1-2019

A New #MeToo Result: Rejecting Notions of Romantic Consent with Executives

Michael Z. Green
Texas A & M University School of Law, mzgreen@law.tamu.edu

A NEW #METOO RESULT: REJECTING NOTIONS OF ROMANTIC CONSENT WITH EXECUTIVES

BY MICHAEL Z. GREEN*

---

* Professor, Texas A&M University School of Law. I would like to thank the Texas A&M research grant program for its support and the following students for providing diligent research to assist me in completing this article: Spencer Mainka, Ryan Grant, Aarika Novelli, and Brianda Curry. I would like to thank Nicole Porter for her many thoughtful comments. I also thank participants in the Law and Society Program Panel "Sexual Harassment and the #MeToo Movement" in Washington, DC, in June 2019; participants in the 4th National People of Color Legal Scholarship Conference Panel "#MeToo and its Impact in the Workplace for People of Color" at the American University Washington College of Law in March 2019; participants in the Colloquium on Scholarship in Employment and Labor Law at the University of South Carolina in September 2018; and participants in the SEALS Labor and Employment Discussion Group on "Sexual Harassment Law: So Much Success, So Much Failure" in Fort Lauderdale in August 2018, for their comments on a prior draft of this paper. Comments from Jeffrey Hirsch have also been truly invaluable.

I. INTRODUCTION: #METOO AND THE GROWING DEBATE ON LEGAL CONSENT

> I recognize . . . there were times decades ago when I may have made some women uncomfortable by making advances. Those were mistakes, and I regret them immensely. But I always understood and respected—and abided by the principle—that "no" means "no," and I . . . never misused my position to harm or hinder anyone's career.[1]
>
> Leslie Roy Moonves

> I certainly understand people who have the viewpoint that any consensual relationship in the workplace is wrong. . . . But there are also other points of view on this. Let me be clear: I own my company. . . In our employee handbook, while we do not encourage office relationships, we do not forbid them, either. And we don't forbid them because I don't know where your heart is going to lead you. I don't know who you're going to hang out with, or date, or fall in love with. (There may be) millions of Americans watching right now who met their spouse at work.[2]
>
> Tavis Smiley

The #MeToo movement[3] has led to public exposure of a tremendous

---

1. Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, NEW YORKER (July 27, 2018), <https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct> [<https://perma.cc/RZL8-YWLJ>] (describing allegations by six women of forced kissing, inappropriate touching, and physical acts of intimidation leading to sexual assault and harassment claims against the CBS chief executive; discussing his acknowledgment that he engaged in advances toward women that might have made them uncomfortable; and referring to his admitted kissing of one of the women charging him with misconduct, he asserted his actions were always consensual).

2. Maeve McDermott, *PBS says "Tavis Smiley Needs to Get his Story Straight" After "GMA" Interview*, USA TODAY (Dec. 18, 2017), <https://www.usatoday.com/story/life/people/2017/12/18/tavis-smiley-hits-back-against-misconduct-allegations-im-not-angry-black-man/960332001/> [<https://perma.cc/ZR32-THGC>] (describing responses by PBS television host Tavis Smiley acknowledging in ABC Good Morning America interview he had sexual relationships with women who reported to him but all were consensual).

3. *See generally Me Too*, METOOMVMT, <https://metoomvmt.org> [https://perma.cc/339K-5SGD] (last visited June 5, 2019); *see also* Christen A. Johnson & KT Hawbaker, *#MeToo: A Timeline of Events*, CHI. TRIB. (June 5, 2019, 9:14 PM), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html> [<https://perma.cc/74LF-Q8Z7>] (cataloguing and updating events from the beginning in 2006, when the phrase "me too" was coined by sexual assault survivor Tarana Burke; to how those words were recast in 2017 as part of an overall groundswell and hashtag movement in response to the public announcement of allegations of sexual assault and misdeeds by movie and entertainment mogul Harvey Weinstein; to the dozens of people in power losing their positions as allegations of sexual misconduct came forward; to the current day activities through May 2019, including allegations regarding singer R. Kelly); *#MeToo Today: How the Movement Has Evolved Since the Initial Weinstein Allegations*, CHI. TRIB. (Dec. 4, 2018),

number of events involving inappropriate sexual and romantic overtures by high-profile and extremely powerful persons in virtually all parts of our society.[4] An ongoing question has started to arise from these events: what does consent to a romantic relationship mean today with evolving notions inspired by the overwhelming avalanche of misdeeds being identified through the #MeToo movement?[5] A recent study of men in Britain demonstrated "alarming views about consent and what constitutes rape and sexual violence" when a third of the men believed that "if a woman has flirted on a date it 'generally wouldn't count as rape' even if she didn't explicitly consent to sex."[6]

Also, several companies have developed an app that they claim can remove the murkiness regarding what represents consent before a sexual encounter.[7] These apps require the parties verify consent through technology before proceeding with any sexual activity.[8] The cold formality of such an arrangement before any sexual activity occurs appears problematic. Further, even taking a selfie as a couple when you digitally sign the app agreement does not address how consent can change at various points along the overall sexual encounter.[9] Unfortunately for those thinking that these apps can provide clarity and protection from assault claims, one developer of a consent app, Michael Lissack, conceded: "Consent must be continuous, and short of a chip that can read someone else's mind, we have no way to use technology other than on a moment-by-moment basis."[10]

As a result of many struggles faced by colleges and universities in

---

<https://www.chicagotribune.com/lifestyles/ct-metoo-20171218-story.html> [<https://perma.cc/3ZGH-L2BX>] (referring to how "#MeToo paved the way for #TimesUp, a legal defense fund and anti-sexual harassment initiative backed by prominent women in the entertainment industry" and how "[t]he second annual Women's March on Jan. 20 [2018] brought out millions of people across the country").

4. *See* Sarah Almukhtar et al., *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html> [<https://perma.cc/6MF8-3SFY>].

5. *See* Nancy Leong, *Them Too*, 96 WASH. U. L. REV. (forthcoming 2019) (manuscript at 5) (on file with author) (describing how the "#MeToo movement has focused on consent").

6. Rachel Thompson, *Even After #MeToo, Research Reveals "Alarming" Attitudes to Consent and Sexual Assault*, MASHABLE (Dec. 6, 2018), <https://mashable.com/article/research-attitudes-what-constitutes-rape/#GD3w5ZGGJqqT> [<https://perma.cc/R8EZ-5W6F>] (citing END VIOLENCE AGAINST WOMEN COALITION, END VIOLENCE AGAINST WOMEN: ATTITUDES TO SEXUAL CONSENT, RESEARCH FOR THE END VIOLENCE AGAINST WOMEN COALITION BY YOUGOV (2018), <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/1-Attitudes-to-sexual-consent-Research-findings-FINAL.pdf> [<https://perma.cc/77Z5-AS3W>]).

7. *See* Edward C. Baig, *Does "Yes" Mean "Yes?" Can You Give Consent to Have Sex to an App?*, USA TODAY (Sept. 26, 2018), <https://www.usatoday.com/story/tech/columnist/baig/2018/09/26/proof-yes-means-yes-sexual-consent-apps-let-users-agree-have-sex/1420208002/> [<https://perma.cc/XJY9-ZS8G>].

8. *Id.*

9. *Id.*

10. *Id.*

addressing sexual misconduct on their campuses,[11] Professor Donna Freitas, author of *Consent on Campus: A Manifesto*, has also attempted to amplify the division among the sexes in understanding the meaning of consent.[12] The Association of American Universities reported in a 2015 study that 23 percent of female and 5 percent of male undergraduates "experience rape or sexual assault through physical force, violence, or incapacitation."[13] Because of these increasing anxieties about sexual assault on campus, "colleges and some states have adopted affirmative consent policies (requiring a clear, unequivocal yes) for sexual conduct," and guaranteeing that new students "are receiving more education about defining consent."[14]

However, some states worried about the problems of consent have pursued legislation seeking to make sure that they teach students what consent means before getting to college by requiring a discussion of the subject in K-12 public school sex education classes.[15] In the midst of

---

11. *See* John Bowden, *Colleges, Universities Seeing Rise in Sexual Assault Claims, Lawsuits,* THE HILL (Sept. 22, 2018), <https://thehill.com/blogs/blog-briefing-room/news/407902-colleges-universities-seeing-rise-in-sexual-assault-claims> [<https://perma.cc/3H53-GYJC>] (describing an increase in sexual assault cases and lawsuits leading a number of universities to outsource investigations and hearings). Several high-profile university cases involving allegations of sexual misconduct and assault of students have arisen in the last few years. *See, e.g.*, Rachel DeSantis, *Students Say Dartmouth Ignored Professors' Sexual Harassment in Lawsuit that Alleges "Hot Tub Parties," Cocaine in Class*, N.Y. DAILY NEWS (Nov. 15, 2018), <https://www.nydailynews.com/news/national/ny-news-dartmouth-sexual-harassment-lawsuit-20181115-story.html> [<https://perma.cc/7H46-TZNT>] (discussion of allegations of sexual harassment and assault of women students over fifteen years by three Dartmouth university professors); Cady Drell, *Inside the USC Sexual Abuse Scandal: Three Women Tell Their Stories*, MARIE CLAIRE (Oct. 26, 2018), <https://www.marieclaire.com/politics/a24226946/usc-sexual-abuse-scandal-accusers-stories/> [<https://perma.cc/K5ME-MBH4>] (describing sexual assault scandal regarding campus gynecologist at University of Southern California); Mac Engel, *Michigan State Is the New Baylor Representing a Broken System*, STAR-TELEGRAM (Jan. 29, 2018), <https://www.star-telegram.com/sports/spt-columns-blogs/mac-engel/article197296864.html> [https://perma.cc/T83C-D8J6] (describing student sexual assault scandals at Michigan State, Baylor, and Penn State universities); Lydia O'Connor & Tyler Kingkade, *If You Don't Get Why Campus Rape is A National Problem, Read This*, HUFFPOST: THE BLOG (June 24, 2016), <https://www.huffingtonpost.com/entry/sexual-assault-explainer_us_5759aa2fe4b0ced23ca74f12> [<https://perma.cc/49BP-MX28>] (discussion of several university student sexual assault cases including those at Stanford, Vanderbilt, and Baylor).

12. *See* Darcel Rockett, *"'Students Don't Even Realize It's Assault': How the Consent Conversation has Changed Post-Kavanaugh,"* CHI. TRIB. (Oct 17, 2018), <https://www.chicagotribune.com/lifestyles/ct-life-consent-on-campus-donna-freitas-20181014-story.html> [<https://perma.cc/WHF4-FLKX>] (describing misunderstandings about consent in sexual encounters with college students in our "hookup culture").

13. *See* Laura Varias, *Saying Yes to Consent Education*, ACSD EDUC. UPDATE NEWSLETTER (Feb. 2017), <http://www.ascd.org/publications/newsletters/education-update/feb17/vol59/num02/Saying-Yes-to-Consent-Education.aspx> [<https://perma.cc/8QBA-GTJ8>].

14. *Id.*

15. *See* Amelia Harper, *#MeToo Influencing Schools to Teach Consent in Sex Ed*, EDUC. DIVE (Oct. 2, 2018), <https://www.educationdive.com/news/metoo-influencing-schools-to-teach-consent-in-sex-ed/538512/> [<https://perma.cc/FY2S-MM25>]; *see also* Precious Fondren, *In the MeToo Era Should Minn. Schools Be Teaching Consent?*, AUSTIN DAILY HERALD (Nov. 14, 2018),

questions being raised during the September 2018 Senate confirmation hearings of United States Supreme Court Justice Brett Kavanaugh about his alleged non-consensual sexual behavior while in high school,[16] the National Public Radio (NPR) *All Things Considered* program debated the issue of the need to teach consent in K-12 sexual education classes.[17] This NPR program also discussed specifically a bill pending in Maryland (ironically Kavanaugh's home state) requiring the teaching of consent in sex education classes for K-12 students.[18] Despite an initial failed attempt when opposing forces claimed that teaching consent in the schools encouraged and endorsed the prospect of very young children engaging in inappropriate sexual behavior, the Maryland bill eventually passed. The new Maryland legislation included a provision requiring sexual education classes teach K-12 students that consent means "the unambiguous and voluntary agreement between all participants in each physical act within the course of interpersonal relationships."[19]

With concerns about defining sexual consent emerging in schools and on campuses, similar fears have also started to surface in workplace sexual harassment matters.[20] A number of the high-profile cases that came to light

---

<https://www.austindailyherald.com/2018/11/in-the-metoo-era-should-minn-schools-be-teaching-consent/> [<https://perma.cc/23ED-PQW8>] (describing a failed attempt in Minnesota to require K-12 schools to teach consent in sexual education classes as a means to address how problems with sexual assault on university campuses suggested that an effort to reach out to students to understand consent should occur before they get to college).

16. *See* Haley Sweetland Edwards, *How Christine Blasey Ford's Testimony Changed America*, TIME (Oct. 4, 2018), <http://time.com/5415027/christine-blasey-ford-testimony/> [<https://perma.cc/DJ8G-QFBT >] (describing allegations by Christine Blasey Ford of her sexual assault by Brett Kavanaugh in 1982 while both were in high school).

17. *See* Anya Kamenetz, *Should We Teach About Consent in K-12? Brett Kavanaugh's Home State Says Yes*, NPR (Sept. 28, 2018), <https://www.npr.org/2018/09/28/652203139/should-we-teach-about-consent-in-k-12-brett-kavanaughs-home-state-says-yes> [<https://perma.cc/8P3W-AVMZ>].

18. *Id.*

19. *See* Harper, *supra* note 15; *see also* Briana Crummy, *How a Teen Girl Got Sexual Consent Taught in Maryland Schools*, NBC (Dec. 8, 2018), <https://www.nbcwashington.com/news/local/How-a-Teen-Girl-Got-Sexual-Consent-Taught-in-Maryland-Schools-501922711.html> [<https://perma.cc/6BND-GJQJ>] (describing various laws being passed to address consent in schools as sex education, including Maryland's new law).

20. Sexual harassment is about sexism, not sexual acts. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. F. 22, 33 (2018). As discussed in Part III, *infra*, workplace sexual harassment law does not focus on consent to sexual advances as in a sexual assault case but whether the advances were "unwelcome" even if voluntary. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986); *see also* Martha Chamallas, *The Elephant in the Room: Sidestepping the Affirmative Consent Debate in the Restatement (Third) of Intentional Torts to Persons*, 10 J. TORT L. 1, 17 (2017) (finding "what is significant is the Court's move away from traditional consent in *Meritor Bank* and its attempt to devise a more protective standard that acknowledges the significance of power disparities between the initiator of sexual conduct and the target. In this respect, unwelcomeness can be looked upon as a more robust version of consent, one which refuses to find consent in instances in which the plaintiff submits or accedes to undesired sex out of concern for retaining her job"). Even this "unwelcome" requirement gets subsumed by the overall requirement that a hostile environment requires both an objective component (that a reasonable person would find it hostile or abusive) and a subjective

as a result of the #MeToo movement involved powerful executives asserting that their romantic overtures and intimate relationships with subordinates had been consensual. The lead offender, movie mogul Harvey Weinstein, continues to claim that his sexual encounters with women in the movie industry were consensual, despite facing criminal rape charges.[21] Two other key examples of executives claiming consent are revealed by the comments at the beginning of this article made by Les Moonves, former Chairman of the Board, President, and Chief Executive Officer of CBS Corporation, and former PBS host and CEO of his own production company, TS Media Inc., Tavis Smiley. There were also many other executives asserting their sexual interactions with subordinates were consensual when those encounters came to light as part of the #MeToo movement.

This article proceeds as follows. Part II discusses the abhorrent nature of the abuse of power by some influential executives identified publicly for their sexual misconduct with subordinates after the #MeToo movement helped to expose them. Part III conveys some of the backlash the #MeToo movement has faced about a rush to judgment against those charged with misconduct, about a lack of appropriate mechanisms to enable the accused to defend against unfair charges, and about seeking to prevent consenting adults from pursuing romantic relationships in the workplace. Part IV highlights the pervasive fears about retaliation that deter subordinates from reporting harassment claims, especially when powerful executives can destroy the careers of those who rejected any romantic or sexual advances. Part V proposes that employers have cause to adopt policies and may also be required by legislation to prohibit executives from asserting consent to justify their romantic or sexual encounters with subordinates. In these proposed policies or statutes, an executive may never defend any act of a sexual or romantic nature being asserted as cause for termination by asserting the subordinate never said "no." Further, when a subordinate did say "no," the executive could not defend the overtures by saying the executive had accepted the "no" without retaliation. The article concludes that employer policies (or potential statutory measures) rejecting executive assertions of consent by subordinates in romantic relationships are

---

component (where employee subjectively perceives environment to be abusive). *See* Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993).

21. *See* Corinne Ramey, *Harvey Weinstein's Lawyers Say Emails Show Consensual Relationship, Not Rape*, WALL STREET J. (Aug. 8, 2018), <https://www.wsj.com/articles/harvey-weinsteins-lawyers-say-emails-show-consensual-relationship-not-rape-1533322331> [<https://perma.cc/9HYG-GMF7>] (describing Weinstein's lawyer arguing that e-mails with accuser suggested a consensual sexual relationship).

warranted as a new #MeToo result.

II. #METOO AND THE VILE USE OF POWER-DIFFERENTIAL BY EXECUTIVE HARASSERS

The current iteration[22] of the #MeToo movement spiraled as a result of an October 2017 report in the *New York Times*[23] and an overall exposé published in the *New Yorker* the same month.[24] Those reports identified a multitude of women who alleged sexual abuse by Weinstein. According to the reports, Weinstein preyed on vulnerable young women seeking to interact with him about employment opportunities with Weinstein's movie studio.[25]

Many of the allegations against Weinstein involved a similar pattern. Women came to meet with Weinstein as a movie studio executive to discuss potential placement in positions within some of his films. These encounters represented "a pattern of professional meetings that were little more than thin pretexts for sexual advances on young actresses and models."[26] Either directly or through his assistants, Weinstein repeatedly steered these women into meeting him in private settings where the women

---

22. *See* Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/GD7A-UC99>] (describing how a black woman, Tarana Burke, had coined the term, "Me Too," out of concern for women who had experienced sexual abuse more than a decade before the hashtag movement under the same term expanded those concerns); Morgan Greene, *#MeToo's Tarana Burke Tells Local Activists Movement "By Us and for Us" Must Include Women of Color*, CHI TRIB. (Oct. 11, 2018), <https://www.chicagotribune.com/news/local/breaking/ct-met-tarana-burke-me-too-20181010-story.html> [<https://perma.cc/SG5S-GES9>] (describing Tarana Burke's involvement in starting the #MeToo movement and referring to the fall of several powerful men for their misconduct while criticizing some aspects of the movement for not focusing on all those being subjected to sexual violence and harassment and not just white females); *see also* Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. F. 105, 106 (2018) (discussing how Burke originated the term, "Me Too," and how many women of color complained immediately when the hashtag movement started because her actions in creating the movement more than a decade earlier had not been acknowledged). Burke has also asserted that the #MeToo movement is not just about vindicating claims of white women but all vulnerable persons regardless of race or sex, including girls and boys who have been subjected to sexual assault or harassment. Patrick Greenfield, *#MeToo Has Been Misrepresented as Plot Against Men, Says Founder*, GUARDIAN (Nov. 30, 2018), <https://www.theguardian.com/world/2018/nov/30/metoo-has-been-misrepresented-as-plot-against-men-says-founder> [<https://perma.cc/473K-WNUF>].

23. *See* Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/5LSZ-3SUC>].

24. *See* Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Story*, 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/HHY8-4Q59>].

25. Farrow, *supra* note 24; Kantor & Twohey, *supra* note 23.

26. Farrow, *supra* note 24.

were left alone with him.[27] After he propositioned the women through aggressive overtures, he then attempted to engage in or did engage in sexual activity with the women or in front of the women. Given the powerful role Weinstein played in the movie industry, these women had little chance to consent to him without a tremendous amount of coercion related to fears about their entire acting careers.[28]

As scores of women in the entertainment industry began making allegations about Weinstein's sexually abusive behavior, actress Alyssa Milano sought to highlight the significance of such inappropriate behavior toward women.[29] In an October 15, 2017 communication made on social media via Twitter, Milano invited other women who had been sexually harassed or assaulted to respond by writing "me too" in corresponding tweets as a method to capture the severity of the problem.[30] There is no doubt at this stage that Milano's tweet prompted the growth of an expansive movement now referred to as #MeToo.[31]

Within six months after the Weinstein allegations, concerns about sexual misdeeds by executives spiked to the point that more than seventy powerful men had been accused of sexual misconduct and lost their powerful places in their industries.[32] The #MeToo movement has inspired throngs of women to come forward from their past silence to expose the loathsome actions of sexual assault and harassment in the workplace by many powerful individuals in addition to Weinstein.[33] A year after the #MeToo movement began, more than 200 powerful men had lost their jobs, and the movement had brought an awareness of sexual mistreatment of women to the forefront of our society.[34] Some stories demonstrate how

---

27. *Id.*

28. *Id.*; *see also* Jane Harris Aiken, *Intimate Violence and the Problem of Consent*, 48 S.C. L. REV. 615, 637 (1997) (discussing how coercion based upon power differentials affects any analysis of meaningful consent).

29. Garcia, *supra* note 22.

30. Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), <https://twitter.com/alyssa_milano/status/919659438700670976> [<https://perma.cc/H8R9-MEEL>]; *see also* Garcia, *supra* note 22 (discussing Milano's tweet leading to a massive social media response).

31. Garcia, *supra* note 22; *see also* Edward Felsenthal, *The Choice:* Time*'s Editor-in-Chief on Why the Silence-Breakers are the Person of the Year*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers-choice/> [<https://perma.cc/4SM4-P5VG>] (identifying the importance of the #MeToo movement and how it has moved concerns about mistreatment of women out into the open with the help of dedicated journalists).

32. *See* Almukhtar et al., *supra* note 4.

33. *See* Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [<https://perma.cc/PX7Z-YMJ7>].

34. *Id.*; *see also 263 celebrities, politicians, CEOs, and others who have been accused of sexual misconduct since April 2017*, VOX (Jan. 9, 2019), <https://www.vox.com/a/sexual-harassment-assault-allegations-list/> [<https://perma.cc/ZK4N-HBXH>] (chronicling sexual harassment misconduct in

powerful men in key executive roles with their companies used their advantageous positions to target vulnerable subordinates who knew their careers were in jeopardy regardless of how they responded. This outing of executives by the #MeToo movement demonstrated a need for greater institutional accountability for the conduct of those at the top of the workplace hierarchy.[35]

For example, Matt Lauer was a highly paid and popular anchor for NBC's network television morning show *Today*.[36] Lauer was terminated after a production assistant stated that she had engaged in a "consensual" relationship with him although she believed that Lauer had used his extreme power differential to overwhelm her.[37] She agreed that the encounter was not a "crime" but it was Lauer taking "advantage of his power" over her.[38] In fact, she said she "felt like a victim because of the power dynamic," as Lauer pursued "the most vulnerable and the least powerful – and those were the production assistants and the interns."[39] According to the production assistant, Lauer "understood that we were going to be so flattered and so enthralled by the idea that the most powerful man at NBC News is taking any interest in us."[40] At the time of his termination, there were also a number of allegations by other women about misconduct by Lauer while at NBC.[41] As one NBC producer explained about Lauer's behavior:

> There were a lot of consensual relationships, but that's still a problem because of the power he held. . . . He couldn't sleep around town with celebrities or on the road with random people, because he's Matt Lauer and he's married. So he'd have to do it within his stable, where he exerted power, and he knew people wouldn't ever complain.[42]

---

categories of arts & entertainment, media, business & tech, politics, and others since Fox News host Bill O'Reilly was forced to resign in April 2017 as that departure set the stage for reports against Weinstein).

35. Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J. F. 85, 87 (2018) (discussing how companies wrongly tolerate harassment by top-level employees while aggressively policing rank-and-file workers).

36. *See* Ramin Setoodeh, *Inside Matt Lauer's Secret Relationship with a 'Today' Production Assistant*, VARIETY (Dec. 14, 2017), <https://variety.com/2017/tv/news/matt-lauer-today-secret-relationship-production-assistant-1202641040/> [<https://perma.cc/2K3P-697Z>].

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *See* Maggie Mallon, *Matt Lauer Once Gave a Female Coworker a Sex Toy as a Gift, According to Bombshell Report*, GLAMOUR (Nov. 29, 2017), <https://www.glamour.com/story/matt-lauer-gave-female-coworker-sex-toy-as-gift-variety-report> [<https://perma.cc/2KMZ-YFPA>].

42. *Id.*

While no one was suggesting that Lauer's interactions with a production assistant represented the criminal activity of sexual assault, it was also pretty clear that Lauer "should not have engaged"[43] in an intimate relationship with a production assistant given the existence of extreme power differentials.[44]

Billionaire casino mogul Steve Wynn represents another key example of an executive whose sexual misconduct was revealed as a result of the #MeToo movement.[45] As its top executive's pattern of sexually harassing employees became clear, Wynn casinos experienced turnover and had difficulty attracting employees despite the high pay relative to other jobs in Las Vegas.[46] Wynn's behavior had led to a culture where there was "acquiescence"[47] without consent until a #MeToo response led to significant financial harm to the company.[48] Wynn Resorts' stock dropped 40 percent of its value after Wynn stepped down as chief executive officer in the midst of multiple allegations of sexual misconduct.[49]

In another example noted above,[50] former CBS Corporation board chairman CEO Les Moonves was charged initially with sexual misconduct by six women in a report published in the *New Yorker* by Ronan Farrow.[51] After six more women came forward shortly after the initial report,

---

43. Setoodeh, *supra* note 36.

44. *See* Emily Strohm & Natalie Stone, *Matt Lauer's "Power Differential" Meant Workplace Affairs Could Not Be Consensual, Expert Says*, PEOPLE (Dec. 15, 2017), <https://people.com/tv/hr-expert-explains-matt-lauer-consent/> [<https://perma.cc/24HN-2JM7>].

45. *See* Alexandra Berzon et al., *Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn*, WALL ST. J. (Jan. 27, 2018, 1:02 AM ET), <https://www.wsj.com/articles/dozens-of-people-recount-pattern-of-sexual-misconduct-by-las-vegas-mogul-steve-wynn-1516985953> [<https://perma.cc/WHZ8-EA7P>].

46. *Id.*; *see also* Kirsten Korosec, *Wynn Resorts Stock Dives After Founder is Accused of Decades-Long Sexual Misconduct*, FORTUNE (Jan. 26, 2018), <http://fortune.com/2018/01/26/wynn-resorts-stock-dives-after-founder-is-accused-of-decades-long-sexual-misconduct/> [<https://perma.cc/3K7K-97QY>] (referring to more than "150 people who recounted abuse by Wynn").

47. *See* Arthur Kane & Rachel Crosby, *Las Vegas Court Filing: Wynn Wanted Sex with Waitress "to See how It Feels" to Be with a Grandmother*, LAS VEGAS REV. J. (Feb. 5, 2018), <https://www.reviewjournal.com/news/las-vegas-court-filing-wynn-wanted-sex-with-waitress-to-see-how-it-feels-to-be-with-a-grandmother/> [<https://perma.cc/KEV2-M65E>] (describing an alleged pattern of Wynn pressuring female employees into having sex, including pursuit of one woman just because he wanted to sleep with a grandmother, and how many of these women agreed to do it to keep their jobs).

48. *See* Steve Friess, *Long vs. Short: Can Wynn Casinos Recover From Steve Wynn's #MeToo Scandal?*, INTELLIGENCER (Jan. 4, 2019), <http://nymag.com/intelligencer/2019/01/can-wynn-casinos-recover-from-steve-wynns-metoo-scandal.html> [<https://perma.cc/Z7EK-7873>].

49. *Id.; see also* Lucinda Shen, *Wynn Resort Loses $3.5 Billion After Sexual harassment Allegations Surface About Steve Wynn*, FORTUNE (Jan. 29, 2018), <http://fortune.com/2018/01/29/steve-wynn-stock-net-worth-sexual-misconduct/> [<https://perma.cc/ML5R-6TRG>] (describing major financial blows endured as a result of Steven Wynn's misconduct being brought forward).

50. Farrow, *supra* note 1.

51. *Id.*

Moonves admitted he "had consensual relations with three of the women [charging him with misconduct] some 25 years ago before [coming] to CBS."[52] Moonves also said that he "always understood and respected – and abided by the principle – that 'no' means 'no.'"[53] However, Moonves also admitted that he "tried to kiss" a female physician during an examination, an example of his various efforts aimed at kissing women without knowing if they consented.[54]

Reports also included that a number of allegations of retaliation against women who rebuffed Moonves had resulted in private financial settlement agreements including non-disclosure clauses preventing the women involved from discussing what happened.[55] A writer, Janet Jones, expressed her fear of retaliation after she rebuffed Moonves' sexual overtures: "The revenge behavior, the 'I'll get you for not kissing me, I'll get you for not doing what the hell I want you to do' – it never quite leaves you."[56]

In an additional example, also noted earlier,[57] former PBS entertainment show host, Tavis Smiley, was charged with "multiple, credible allegations" of sexual relationships with several subordinates.[58]

---

52. *See* William D. Cohan, *Les Moonves Admits to Unwanted Kissing of his Doctor 19 Years Ago*, VANITY FAIR (Sept. 9, 2018), <https://www.vanityfair.com/news/2018/09/les-moonves-admits-to-unwanted-kissing-of-his-doctor-19-years-ago> [<https://perma.cc/552S-N6ZU>] (describing Moonves' acknowledgement of some of the behavior he is charged with—which he asserts was consensual—and his agreement that he "tried to kiss" a female doctor attending to him and had "deep regret" about it, but "[n]othing more happened"); *see also* Ronan Farrow, *As Leslie Moonves Negotiates His Exit From CBS, Six Women Raise New Assault and Harassment Claims*, NEW YORKER (Sep. 9, 2018), <https://www.newyorker.com/news/news-desk/as-leslie-moonves-negotiates-his-exit-from-cbs-women-raise-new-assault-and-harassment-claims> [<https://perma.cc/4TM2-485T>] (describing allegations against the CBS chief executive made by six additional women after the first six women came forward that he forced them to give him oral sex; that he exposed himself to them; that he used physical violence and intimidation to sexually harass them all without their consent; that he retaliated when they rebuffed him; and despite acknowledging his relations and encounters with three of them, he asserts it was all consensual).

53. *See* Farrow, *supra* note 1.

54. Cohan, *supra* note 52 (providing Moonves' statement: "What is true, and what I deeply regret, is that I tried to kiss the doctor. Nothing more happened").

55. Farrow, *supra* note 1; Farrow, *supra* note 52.

56. Farrow, *supra* note 1. Fear of retaliation is a major reason why women don't report harassment. *See* Margaret Gardiner, *Why Women Don't Report Sexual Harassment*, HUFFPOST: THE BLOG (July 22, 2017), <http://www.huffingtonpost.com/Margaret-gardiner/why-women-don't-report-sex_b_11112996.html> [<https://perma.cc/5L9U-6CLH>] (describing the calculation that women are forced to make—to stay silent and not report harassment in a trade that allows them to keep their jobs, or face retaliation, especially when the harasser is a very successful person in a position of high power, whom she may even still need as a reference); *see also* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 36-37 (2005) (describing how the choice to not report harassment involves a cost-benefit assessment looking at the overall culture's ability to deter retaliation).

57. McDermott, *supra* note 2.

58. Daniel Holloway, *PBS Suspends "Tavis Smiley" Following Sexual Misconduct Investigation (Exclusive)*, VARIETY (Dec. 13, 2017), <https://variety.com/2017/tv/news/tavis-smiley-pbs-

Even though Smiley's power differential with these subordinates may have caused them to fear their jobs would be in jeopardy if they did not comply,[59] Smiley argued these past romantic encounters with women subordinates at his company were always consensual: "If having a consensual relationship with a colleague years ago is the stuff that leads to this kind of public humiliation and personal destruction, heaven help us."[60] Further, Smiley asserted that he believed the telling of the truth by women would "lead us to create healthy workspaces" but warned that we must "make sure we don't lose all proportionality in this because if we do, people end up guilty by accusation."[61]

Whether allegedly consensual or not, when extremely powerful executives like Weinstein, Lauer, Wynn, Moonves, and Smiley use their positions of influence to coerce vulnerable female subordinates into sexual encounters, their actions suggest a level of repugnancy that the #MeToo movement has helped to uncover. By shining a light on these abominable executive actions, the #MeToo movement has also demanded a level of corporate responsibility by forcing companies to take immediate action in rejecting this vile form of executive misconduct. As a result, companies now must explore the appropriate responses to this form of misbehavior by executives. These companies will also have to navigate the backlash towards the #MeToo movement which states that much of the behavior complained of consists of harmless flirting or acts that are not illegal or even reprehensible, and that some individual careers could be ruined for merely seeking and engaging in consensual relationships in the workplace.

III. #METOO BACKLASH AND CLAIMS OF UNCERTAINTY ABOUT WORKPLACE CONSENT

A. Increasing "Unwelcome" Sexual Harassment Claims as a Result of #MeToo

In Title VII of the Civil Rights Act of 1964, Congress banned

---

1202639424/> [<https://perma.cc/9VLL-MPW6>].

59. *See* Cynthia Littleton, *Tavis Smiley: "PBS Made a Huge Mistake Here and They Need to Fix It,"* VARIETY (Dec. 18, 2017), <https://variety.com/2017/tv/news/tavis-smiley-pbs-sexual-harassment-allegations-good-morning-america-1202643616/> [<https://perma.cc/8WJY-VYWL>].

60. *See* Meena Jang, *PBS Suspends Tavis Smiley Show Amid Sexual Misconduct Claims*, HOLLYWOOD REP. (Dec. 13, 2017), <https://www.hollywoodreporter.com/news/pbs-suspends-tavis-smiley-show-sexual-misconduct-claims-1067489> [<https://perma.cc/4GAC-Y2N2>].

61. *See* Jessica Vacco-Bolanos, *Tavis Smiley Defends Himself After Show is Suspended: "PBS Made a Huge Mistake,"* US WEEKLY (Dec. 18, 2017), <https://www.usmagazine.com/celebrity-news/news/tavis-smiley-defends-himself-after-sexual-misconduct-allegations/> [<https://perma.cc/9Y3C-9XFT>].

discrimination in the workplace because of sex.[62] The Supreme Court confirmed in 1986 that "sexual harassment" constituted discrimination because of sex under Title VII.[63] With respect to sexual harassment claims, the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing Title VII, explained in November 2018 that "[h]its on . . . [its] harassment webpage doubled since the start of the #MeToo movement one year ago."[64] Heightened awareness about sexual harassment has led to more than a 50 percent increase in the EEOC filing suits charging sexual harassment and a 20 percent increase in finding reasonable cause to believe that discrimination had occurred in 2018 from 2017.[65]

Still, only about one in four women feels comfortable coming forward with a complaint of sexual harassment in the workplace.[66] A significant percentage of the women who faced sexual harassment but had not reported it have derived a huge benefit from the #MeToo movement and its encouragement of them to come forward and no longer suffer in silence.[67] However, because it is important to make employers accountable when they are made aware of workplace harassment and fail to rectify it, the encouragement to report fostered by #MeToo must extend to the filing of

---

62. 42 U.S.C. §§ 2000e-2(a) (2012).

63. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

64. *See* Press Release, Equal Emp't Opportunity Comm'n, EEOC Convenes Public Meeting on Steps to Transform Workplace Culture to Prevent Harassment (Oct. 18, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/10-18-18a.cfm> [<https://perma.cc/TB8F-XKAY>]; *see also* Eric Bachman, *In Response to #MeToo, EEOC Is Filing More Sexual Harassment Lawsuits and Winning*, FORBES (Oct. 5, 2018), <https://www.forbes.com/sites/ericbachman/2018/10/05/how-has-the-eeoc-responded-to-the-metoo-movement/> [<https://perma.cc/G72Q-8VZX>]; Jena McGregor, *The #MeToo Effect: Sexual Harassment Charges with the EEOC Rose for the First Time in Years*, WASH. POST (Oct. 5, 2018), <https://www.washingtonpost.com/business/2018/10/05/metoo-effect-sex-harassment-charges-with-eeoc-rose-first-time-years/> [<https://perma.cc/NU44-LXW4>].

65. See Bachman, *supra* note 64; *see also* Gene Marks, *EEOC Complaints for Sexual Harassment Are Booming Thanks to Harvey Weinstein and Other Factors*, INQUIRER (Nov. 27, 2018), <http://www.philly.com/philly/business/eeoc-sexual-harassment-harvey-weinstein-metoo-20181127.html> [<https://perma.cc/PH4Y-9XSP>]; Kari Paul, *One Year After Weinstein and #MeToo, Sexual Harassment Financial Settlements Have Soared*, MARKETWATCH (Oct. 7, 2018), <https://www.marketwatch.com/story/one-year-after-weinstein-and-metoo-sexual-harassment-financial-settlements-have-soared-2018-10-05> [<https://perma.cc/DX2P-8W8U>].

66. *See* Margaret E. Johnson, CONVERSATION (June 5, 2018), <https://theconversation.com/only-1-in-4-women-who-have-been-sexually-harassed-tell-their-employers-heres-why-theyre-afraid-97436> [<https://perma.cc/U7GX-PGYA>] (citing EEOC Task Force survey of employees); *see also* CHAI R. FELDBLUM & VICTORIA A. LIPNIC, EQUAL EMP'T OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8 n.15 (2016), < https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf > [<https://perma.cc/U7GX-PGYA>] (describing survey of employees that "one in four women (25%)" reported experiencing "sexual harassment" in the workplace and up to "50% of women" when not randomly sampled).

67. Johnson, *supra* note 66 (describing how #MeToo is providing an "effective forum that employees do not believe they have in their workplace" to come forward).

formal complaints rather than only coming forward about it to friends and family or via social media.[68]

However, pursuing a complaint of harassment with an employer constitutes a risky proposition. Approximately 75 percent of those employees who do file formal complaints face some form of retaliation by their employers.[69] In considering the harm from potential retaliatory blackballing, subordinates who choose to respond to executives' overtures in ways that limit the potential for retaliation are not really consenting. Those limited subordinate responses, however, could lead the executive to believe that the subordinate has consented.

What about the subordinate who does capitulate to the executive's advances and engages in sexual encounters? In the landmark 1986 Supreme Court decision *Meritor Savings Bank v. Vinson*,[70] the plaintiff admittedly had multiple sexual encounters with her supervisor, a bank vice president executive. "At first she refused, but out of what she described as a fear of losing her job she eventually agreed."[71] Despite agreeing that she had "intercourse with her boss some 40 or 50 times," Vinson complained of sexual harassment.[72] In its holding that Title VII prohibited sexual harassment, the Court distinguished acts of volition versus unwelcome acts especially given the workplace power imbalance that was at issue.[73] The power differential makes it easier to understand the subordinate's silent acquiescence despite not welcoming the sexual encounter.[74] While

68. *Id.* ("[I]f employees who have been sexually harassed don't file formal complaints with their companies – without suffering retaliation – it is nearly impossible for employers to take action against the harasser or protect the worker.").

69. FELDBLUM & LIPNIC, *supra* note 66, at 16 (citing Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8:4 J. OCCUPATIONAL HEALTH PSYCHOL. 247, 255 (2003)); Tara Golshan, *Study Finds 75 Percent of Workplace Harassment Victims Experienced Retaliation When They Spoke Up*, VOX (Oct. 15, 2017), <https://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts > [<https://perma.cc/6ENU-4DJY>]; *see also* Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J. F. 121, 125 (2018) (describing EEOC report). A recent study of 387 low-wage employees found that 43 percent of workers reported experiencing employer retaliation as a result of their most recent claim about a justiciable workplace problem in the twelve months before the survey. Charlotte Alexander, *#MeToo and the Litigation Funnel*, 23 EMP. RTS. & EM P. POL'Y. J. 17, 23, n. 27 (2019) (citing Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement*, 89 IND. L.J. 1069, 1073 (2014)).

70. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

71. *Id.* at 60.

72. *Id.*

73. "The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Id.* at 68.

74. *See* Kenneth Davis, *Strong Medicine: Fighting the Sexual Harassment Pandemic*, 79 OHIO ST. L.J. 1057, 1086 (2018) (finding that the Supreme Court's approach to banning unwelcome activity even if it is volitional in *Meritor* makes sense because "the power imbalance between the harasser and the victim may account for the victim's silence and acquiescence" to the sexual behavior); *see also* Noa

acknowledging this difference, we still see high-profile and extremely powerful executives such as Moonves while at CBS and Smiley while at PBS asserting that any relationships or overtures with subordinates involved consensual activity.

After *Meritor*, sexual harassment claims involving supervisor misconduct could fall under two categories. In one category, employees attempted to couch their claims involving a supervisor as a "quid pro quo" action in which the employer becomes vicariously liable for a supervisor making sexual and romantic favors a condition of the subordinate's employment.[75] In the other category, "hostile environment," used for acts involving a supervisor that did not actually result in an exchange of sexual or romantic favors, a subordinate has the more difficult burden of showing a pattern of severe or pervasive actions affecting the terms and conditions of employment.[76] As a result, a supervisor could always defend his or her initial overtures that led to a no response as being neither quid pro quo nor hostile environment harassment. There would be no exchange of sexual favors occurring as a condition of employment and the initial romantic overtures would only involve a single incident not sufficiently severe or pervasive.[77]

In 1998, the Supreme Court added futher complications affecting an employee's ability to bring successful hostile work environment sexual harassment claims involving supervisors. In *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton,* the Supreme Court found that employers are vicariously liable for a supervisor's harassment of a subordinate after taking "a tangible employment action . . . such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[78] If

---

Ben-Asher, *How is Sexual Harassment Discriminatory?*, 94 NOTRE DAME L. REV. ONLINE 25, 26 (2018) (referring to how power differentials make the activity unwelcome as it is common for subordinates to say yes to "be accepted, get promoted, or save [their] job").

75. *See* Rebecca Hanner White, *Title VII and the #MeToo Movement*, 68 EMORY J. ONLINE 1, 11-12 (2018) (describing how after *Meritor* "lower courts had divided the universe of sexual harassment claims into two categories" with quid pro quo, where the employer could be held vicariously liable, and hostile environment, where the employer could not be vicariously liable); *see also Meritor*, 477 U.S. at 72 (finding the issue of vicarious liability premature but suggesting that an employer may have no defense to a quid pro quo claim); Ben-Asher, *supra* note 74, at 25 n.5 (referring to both quid pro quo and hostile environment theories).

76. White, *supra* note 75, at 7 n.30 (describing how difficult it is to meet the severe and pervasive requirement but suggesting that #MeToo may change that as it is making it more difficult for employers to tolerate perpetrators).

77. *See* Davis, *supra* note 74, at 1080-84 (discussing cases identifying how courts read a single incident as insufficient to create a hostile environment even if there was an assault unless it possibly rose to the level of rape, being held captive, and hospitalization resulting from the attack).

78. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

no tangible employment action is taken, the employer may assert a two-part affirmative defense: 1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) the alleged victim unreasonably failed to take advantage of preventive or corrective opportunities the employer provided.[79] This so-called *Faragher-Ellerth* affirmative defense focuses on making subordinates report the hostile environment harassment or face losing the claim if the employer establishes the elements. Notably, the defense creates only a short window for the employee to report because even "relatively minor delays in reporting" of even "as short as seven days" may be deemed unreasonable in support of an employer's *Faragher-Ellerth* affirmative defense.[80] However, it is more likely that a subordinate may preempt an employer's use of this defense and have liability imputed directly to the corporation when dealing with an executive harasser who has "'exceptional authority and control' within the organization."[81]

B. Resulting Backlash Based on Consent and Unfair Process

Despite the advances of the #MeToo movement, there has been some backlash involving complaints about hasty decisions and demands for zero-tolerance resignations without allowing the person charged with misconduct a fair process to defend against those allegations even where there may have been consent.[82] In a joint NPR/Ipsos 2018 poll,[83] more than

---

79. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

80. *See* Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1605 (2018).

81. *Id.* at 1603 n.116 (citing Helm v. Kansas, 656 F.3d 1277, 1286 (10th Cir. 2011); *see also Faragher*, 524 U.S. at 789-80 (suggesting an employer's vicarious liability applies and no affirmative defense is available when the alleged harasser is "indisputably within that class of an employer organization's officials who may be treated as the organization's proxy" or has a "sufficiently high position 'in the management hierarchy of the company for his actions to be imputed automatically to the employer'" such as an "owner" or "proprietor, partner or corporate officer") (citations omitted). The nature of an executive's power imbalance and influence over a subordinate distinguishes the vicarious liability finding from a situation where the employer could more reasonably assert lack of corporate knowledge as part of a negligence defense, such as when the alleged harasser is a co-worker or if a lower level supervisor has not taken a tangible employment action to place the employer on notice of the harassment. *See* Vance v. Ball State Univ., 570 U.S. 421, 424 (2013) (describing how employer liability for harassment hinges upon whether the alleged harasser is a co-worker, in which case "the employer is liable only if it was negligent," or if the harasser is a supervisor who has taken a tangible employment action making the employer vicariously liable or a supervisor who has not taken a tangible employment action allowing the employer an affirmative defense).

82. *See* Anne Fisher, *Will #MeToo Spark Backlash Against Women in the Workplace?* FORTUNE (Nov. 1, 2018), <http://fortune.com/2018/11/01/me-too-backlash-women-google/> [<https://perma.cc/QL4A-P4QS>] (describing how many male supervisors are panicking and have backed off on mentoring and exchanges with female subordinates out of fears about #MeToo claims because they believe that firings occur after just a single accusation even though that is rarely true); *see also* Andrew Sullivan, *It's Time to Resist the Excesses of #MeToo,* INTELLIGENCER (Jan. 12, 2018),

40 percent of Americans felt that the #MeToo movement had gone too far.[84] Although "[t]he survey did not define 'too far,' . . . NPR report[ed] that respondents cited worries about a rush to judgment, unproven accusations that could destroy lives, and a bandwagon effect that could encourage people to overstate claims of sexual misconduct."[85]

Harvard Law Professor Elizabeth Bartholet has expressed her fears about overreaching as a result of the #MeToo movement.[86] Specifically, Bartholet has raised "fairness concerns with the #MeToo phenomenon [that] include the ready acceptance in many cases of anonymous complaints, and of claims made by women over conflicting claims by men, to terminate careers without any investigation of the facts."[87] Bartholet also criticized the scope of wrongful conduct falling within the claims being brought pursuant to the #MeToo movement as extending from "requests for dates and hugs on the one hand and to rape and other forced sexual contact on the other."[88] According to Bartholet, responses to behavior under the #MeToo movement have lost track of the legal definition of harassment[89] under Title VII of the Civil Rights Act of 1964 which bans discrimination in the workplace based on sex.[90] Despite her accusations, Bartholet did not refer to any examples where specific overreaching occurred or where an

---

<http://nymag.com/intelligencer/2018/01/andrew-sullivan-time-to-resist-excesses-of-metoo.html> [<https://perma.cc/V38Q-2T2Y>] (criticizing anonymous attacks on men without foundation as an excess of #MeToo and referring to McCarthyism in joining minor offenses such as flirting and multiple employee affairs with rape, violence, and misogyny).

83. *See Ipsos/NPR Examine Views on Sexual Harassment and Assault*, IPSOS (Oct. 31, 2018), <https://www.ipsos.com/en-us/news-polls/NPR-Sexual-Harassment-and-Assault> [<https://perma.cc/UR2W-R2S7>].

84. Megan Keller, *Poll: Over 40 Percent Believe #MeToo Movement Has Gone too Far*, THE HILL (Oct. 31, 2018), <https://thehill.com/homenews/news/414076-poll-over-40-percent-believe-metoo-movement-has-gone-too-far> [<https://perma.cc/TNU9-PPHV >].

85. *Id.*

86. *See* Elizabeth Bartholet, *#MeToo Excesses*, HARVARD CRIMSON (Jan. 16, 2018), <https://www.thecrimson.com/article/2018/1/16/bartholet-metoo-excesses/> [<https://perma.cc/VG24-FGM6>].

87. *Id.*

88. *Id.* However, the effort to cabin the #MeToo Movement as solely about legal claims rather than bringing to light the everyday indignities that women must endure in our culture requires more nuance. *See* Jessica Valenti, *That Kiss, and Other Daily Indignities*, MEDIUM, (Apr. 2, 2019), <https://medium.com/s/jessica-valenti/that-kiss-and-other-daily-indignities-455d2dc29ee3> [<https://perma.cc/GWQ6-DZTY>] (criticizing those who want to limit the #MeToo movement to only "talking about the violations women endure unless they're explicit, violent, or illegal" without discussing the "daily indignities women are expected to put up with" such as "lingering hugs," rubbing of shoulders, inappropriate pats or touches, unwanted or overzealous kisses on the cheek or the mouth, and exuberant hugs, that all involve the "mundane disrespect that chips away at [women's] sense of safety and bodily autonomy" that men do not face even if it is not a violation of the law).

89. *See Harassment*, EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/types/harassment.cfm [<https://perma.cc/P5B3-C5VA >] (last visited June 6, 2019).

90. 42 U.S.C. §§ 2000e-2(a) (2012).

executive's career was ruined without an investigation of the facts.

Backlash towards the #MeToo movement continues to grow.[91] On the other hand, there may soon be more direct evidence to determine the scope of any alleged harm from overreaching punishments made in an unjustified rush to judgment. Many of the men involved in #MeToo allegations are attempting to make a return to their prior work lives.[92] Their successful returns or lack thereof could provide good examples to determine whether the nature of the harm resulting from the punishment meted out fit the misconduct.[93] Ultimately, however, empirical work is needed to determine if the financial impact and other negative results from public outcries seem to outweigh the costs from the underlying misconduct to a degree that suggests that the #MeToo movement needs more limits to address unfair results.

As an anecdotal example of whether the punishment fit the harm created by the misconduct, Smiley argued in his dispute:

> The PBS investigators refused to review any of my personal documentation, refused to provide me the names of any accusers, refused to speak to my current staff, and refused to provide me any semblance of due process to defend myself against allegations from unknown sources. Their mind was made up.[94]

Similar to Smiley's allegations about the harm incurred, many of the backlash claims appear aimed at criticizing lack of process, false allegations, and anonymous reporting as resulting in some form of

---

91. *See* Jia Tolentino, *The Rising Pressure of the #MeToo Backlash*, NEW YORKER (Jan. 24, 2018), <https://www.newyorker.com/culture/culture-desk/the-rising-pressure-of-the-metoobacklash> [<https://perma.cc/S9HW-68SV>] (describing various articles complaining about the scope of misconduct and the consequences for it as a witch hunt while calling for more nuanced analysis in the criticism of #MeToo); Toni Van Pelt, *The Myth of #MeToo Fatigue*, THE HILL (Jan. 3, 2019), <https://thehill.com/opinion/civil-rights/423575-the-myth-of-metoo-fatigue> [<https://perma.cc/GZT6-7HS4>] (describing so-called "fatigue" of the #MeToo movement as a "myth" and referring to comments of movement founder Tarana Burke, in a TEDWomen talk, that "a movement to center survivors of sexual violence is being talked about as a vindictive plot against men").

92. *See* Amanda Arnold, *The Men Who Are Plotting Their Post-#MeToo Comebacks*, THE CUT (Apr. 19, 2018), <https://www.thecut.com/2018/04/comeback-men-sexual-harassment-me-too.html> [<https://perma.cc/KBA6-G274>] (describing comeback efforts of several men who lost their positions as a result of #MeToo movement allegations); *see also* Jennifer Wright, *Men "Brought Down" by the #MeToo Movement Are Back*, HARPER'S BAZAAR (Aug.15, 2018), <https://www.harpersbazaar.com/culture/politics/a22691506/metoo-movement-men-accused-sexual-assault-comebacks/> [<https://perma.cc/Y4HS-85JH>] (lamenting that men who faced losses from #MeToo appear to be recovering in a quick manner and more than the women who experienced the sexual harassment).

93. *See* Wright, *supra* note 92.

94. *See* Jang, *supra* note 60.

vigilantism.[95] However, in the workplace setting, none of the high-profile cases, including Smiley's, have demonstrated the existence of any overreaching by their employers so far.

Further, Smiley did not seem to be too harmed by what transpired after his termination by PBS. He landed a new deal immediately with the Word Network, which claims to be the largest African-American religious network in the world.[96] From all appearances, Smiley is not feeling too much pain from his #MeToo experience despite admitting to what he referred to as consensual behavior with a subordinate. Smiley even conducted a five-city tour throughout several states to lead discussion about what constitutes unacceptable workplace behavior between women and men.[97] By April 2018, less than four months after his PBS termination, Smiley was hosting a special program on the Word Network on the life of Martin Luther King.[98] He also has agreed to host an online series called "The Upside with Tavis Smiley" that will be distributed on key digital platforms such as Roku, Amazon Fire, and Apple TV.[99] As one commentator has even suggested, Smiley may have been merely "collateral damage" in the #MeToo movement who could not be held down for too long given his appeal in the black community.[100] By immediately signing with the Word Network after his PBS termination, Smiley went back to his base, the black church community. That community is populated mostly by black women who, some believe, may not care as much about the #MeToo movement.[101]

Smiley's experience prompts further questions about the intersection of the #MeToo movement and race. To the extent that people of color do

---

95. *See* Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo Era*, 2019 CHI. LEG. F. (forthcoming 2019) (manuscript at 28) (on file with author) (describing backlash to #MeToo arguments and citing Caitlin Flanagan, *The Conversation #MeToo Needs to Have*, ATLANTIC (Jan. 29, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-right-conversation-formetoo/551732> [<https://perma.cc/88A4-BRQB>]).

96. *See* Mary Mitchell, *Tavis Smiley Takes on #MeToo Movement*, CHI. SUN TIMES (Jan. 30, 2018), https://chicago.suntimes.com/columnists/tavis-smiley-takes-on-metoo-movement/, [https://perma.cc/DLU-35L7].

97. *Id.*

98. *See* Ruben Navarrette, Jr., *The Rise and Fall – and Resurrection – of Tavis Smiley*, FRESNO BEE (Apr. 5, 2018), <https://www.fresnobee.com/opinion/opn-columns-blogs/article208032964.html> [<https://perma.cc/JM6W-C5US>].

99. *Id.*

100. *Id.*

101. Mitchell, *supra* note 96; *see also* Maya Salam, *R. Kelly: Why So Many Ignored the Warning Signs*, N.Y. TIMES (Jan. 11, 2019), <https://www.nytimes.com/2019/01/11/arts/surviving-r-kelly-accusations.html> [<https://perma.cc/RNQ7-HXUA>] (relating how #MeToo founder Tarana Burke felt the black community supported singer R. Kelly for a long time in the belief he was innocent of sexual misconduct and how a black man, Chance the Rapper, apparently "didn't value" the charges against Kelly being made by "black women").

not seem to have a strong voice in the #MeToo movement, this represents an issue of fairness worth exploring.[102] At least one commentator, Mary Mitchell, has suggested that the lack of black women's involvement in and support for #MeToo may suggest why a black man like Smiley may not be seeing major repercussions.[103] This disconnect based on race may be changing, though, with the conviction of comedian Bill Cosby, further scrutiny of hip-hop mogul Russell Simmons, whose earning power has diminished after fifteen women charged him with sexual misconduct, and now as rape charges have been pursued against singer R. Kelly.[104] On the other hand, there are some very positive examples of black men, such as actors Terry Crews[105] and Idris Elba,[106] who have become outspoken supporters of the #MeToo movement.

---

102. *See* Greene, *supra* note 22 (describing founder Tarana Burke's complaint that women of color were not being seen by various constituents engaging in the #MeToo movement); Onwuachi-Willig, *supra* note 22 (noting complaints from the very beginning by women of color about #MeToo not recognizing that a black woman had started the movement years before hashtags); *see also* Jamillah Bowman Williams, *Big Data Insights: #MeToo, Law, and Social Change*, 2019 U. CHI. LEGAL F. (forthcoming 2019) (describing limitations based upon race in terms of how #MeToo has developed as a social media tool); *see also* Marion Crain & Ken Matheny, *Sexual Harassment and Solidarity*, 87 GEORGE W. U. L. REV. 56, 64, 112-20 (2019) (referring to how organized labor is suspiciously missing from the #MeToo movement while suggesting how organized labor may still play some role).

103. Mitchell, *supra* note 96.

104. *Id.* (referring to Cosby and Simmons); *see also* Elizabeth A. Harris, *R. Kelly Charged with 10 Counts of Sexual Abuse,* N.Y. TIMES (Feb. 22, 2019), <https://www.nytimes.com/2019/02/22/arts/music/r-kelly-charged-indicted.html> [<https://perma.cc/M87Y-UDSM>] (describing criminal charges going back twenty years recently brought against R. Kelly).

105. *See* Allyson Chiu, *'Are You Implying I Wanted to Be Sexually Assaulted?': Terry Crews Rips D.L. Hughley over #MeToo Comments*, WASH. POST (Jan. 28, 2019), <https://www.washingtonpost.com/nation/2019/01/28/are-you-implying-i-wanted-be-sexually-assaulted-terry-crews-rips-comedian-dl-hughley-over-metoo-comments/> [<https://perma.cc/N7SY-M6JJ>] (referring to Crews' actions in support of the #MeToo movement and his acknowledgment of being a victim of assault while discussing criticism of Crews by other black males and overall discussion of black culture and toxic masculinity). Crews, a former professional football player, also testified before Congress about sexual assault in support of the proposed Sexual Assault Survivors Bill of Rights Act while discussing "toxic masculinity and holding abusers accountable." *See* Helena Andrews-Dyer, *Cause Celeb: Actor Terry Crews Testifies About Sexual Assault Before Congress*, WASH. POST (June 27, 2018), <https://www.washingtonpost.com/news/reliable-source/wp/2018/06/27/cause-celeb-actor-terry-crews-testifies-about-sexual-assault-before-congress/> [https://perma.cc/S3V6-YMTM]. Crews also appears in a Gillette razor short film advertisement, *We Believe: The Best Men Can Be*, YOUTUBE (Jan. 13, 2019), <https://www.youtube.com/watch?time_continue=9&v=koPmuEyP3a0> [<https://perma.cc/AD9H-HTHZ>], that "subverts harmful racial stereotypes" while supporting the #MeToo movement by rejecting "toxic masculinity" and portraying several black males "supporting their black daughters, educating other men about sexist behavior, and protecting women from catcalling." *See* Emily Dreyfuss, *Gillette Ad Proves Definition of a Man Has Changed*, WIRED (Jan. 16, 2019), <https://www.wired.com/story/gillette-we-believe-ad-men-backlash/> [<https://perma.cc/5G5H-FCBA >].

106. *See* Aja Hoggatt, *Idris Elba Proves It's Not Actually That Difficult to Support the #MeToo Movement,* SLATE (Dec. 17, 2018), <https://slate.com/culture/2018/12/idris-elba-metoo-movement-support.html> [<https://perma.cc/4HJ3-JKHH >](referring to positive comments about #MeToo by Elba and how only males with problems should be concerned).

C. Dating at Work Being Unnecessarily Regulated

One aspect of the backlash against #MeToo has focused on claims of unnecessary and overly-parental restrictions on workplace romances. For instance, Smiley has argued that having relationships in the workplace does not create a problem. When asked how many workers he had engaged with in romantic relationships, he even suggested that this question "conflates consensual relationships with sexual assault, sexual harassment and sexual misconduct" and demonstrates how his former employer and other employers addressing misconduct identified by the #MeToo movement have gone too far.[107] Further Smiley asserted: "'There's so many relationships in this country that were started in the workplace . . . Henry Kissinger met his wife in the workplace. Bill Gates met his wife in the workplace. We all know Barack Obama met Michelle Obama in the workplace.'"[108] Smiley's thinking suggests that there are positive gains to be obtained from workplace romances and employers should not rush to judgment when discovering that these consensual relationships exist.

One company that might agree with Smiley's assertions of the benefits of workplace romance is Southwest Airlines.[109] Elizabeth Bryant, a vice president of Southwest Airlines, recently acknowledged the company's encouragement of workplace romances: "If we have an environment where people care for each other and can be themselves coming to work every day, that naturally leads to friendships, relationships, sometimes marriages!"[110] While some companies might adopt policies that just ban employee dating to prevent any liabilities, some experts suggest that "blanket bans on dating colleagues rarely serve any meaningful purpose."[111] A survey by the online job site Vault.com found from its responses that 40 to 55 percent of married employees met their spouses at work.[112] However, 41 percent of both male and female respondents from

---

107. *See CNN Wire, Tavis Smiley: "I am not Harvey Weinstein,"* WGNO NEWS (Dec. 19, 2017), <https://wgno.com/2017/12/19/tavis-smiley-i-am-not-harvey-weinstein/> [https://perma.cc/VUR9-7ECZ].

108. *Id.* (quoting Smiley's interview with CNN's Don Lemon).

109. *See* Marilyn Gardner, *Office Romance? First, Sign a Contract*, CHRISTIAN SCI. MONITOR (Feb. 11, 2008), <https://www.csmonitor.com/Business/2008/0211/p13s01-wmgn.html> [<https://perma.cc/N2T8-B25C>] (referring to how "Southwest Airlines is famous for encouraging and promoting" workplace relationships).

110. *See Office Romance: Love Is Still in the Air*, CBS NEWS SUNDAY MORNING (Feb. 11, 2018), <https://www.cbsnews.com/news/office-romance-love-is-still-in-the-air/> [<https://perma.cc/57R7-48AP >].

111. *See* Justin O. Walker, *Dating in the Workplace: Here's What You Need To Know About Fraternization*, BUSINESS (Jan. 22, 2018), <https://www.business.com/articles/dating-in-the-workplace-fraternization/> [<https://perma.cc/94FZ-V8CR >].

112. *Id.*

that same survey also clearly avoided romantic involvements with work colleagues.[113]

Most employers should have fraternization or dating policies making it clear to employees what the organization expects regarding workplace romances.[114] Although employers may ban dating completely without legal liability, some employers recognize that employee romantic relationships are inevitable.[115] Yet, virtually every employer recognizes there is a concern with having a supervisor involved romantically with a subordinate and, at least, tend to require disclosure to superiors and some consensual relationship acknowledgment if the employer does allow such relationships.[116] Typical consensual relationship agreements are usually required when one of the parties is an executive or high level manager because people in those positions, as opposed to lower-level employees, are privy to confidential information and must make decisions that could raise questions about unfair treatment.[117] Some consultants even suggest that it is "not smart" to allow workplace romances because there are "always issues of trust, confidentiality, and favoritism" and it is "naïve" to think these behaviors can be accommodated rather than banned.[118] Regardless, employers should adopt policies prohibiting managers from dating their subordinates for both legal and pragmatic reasons.[119]

D. Duplicitous Responses Based on Politics

Another criticism of the #MeToo movement has been that its reactions have fallen more within a political divide rather than a moral one.[120] A

---

113. *Id.*

114. *See* Susan M. Heathfield, *The Benefit of a Workplace Fraternization Policy*, BALANCE CAREERS (Nov. 30, 2018), <https://www.thebalancecareers.com/why-you-need-a-fraternization-policy-at-work-3976803> [<https://perma.cc/2BHT-N6Z5>].

115. *See* Gardner, *supra* note 109; *see also* Amy Gallo, *How to Approach an Office Romance (and How Not To)*, HARV. BUS. REV. (Feb. 14, 2019), <https://hbr.org/2019/02/how-to-approach-an-office-romance-and-how-not-to?> [<https://perma.cc/WN3Y-DTLQ >] (recognizing the existence of romantic relationships at work but suggesting to avoid "anyone in your chain of command").

116. Gardner, *supra* note 109.

117. *Id.*

118. *Id.*

119. *Id.* Such policies must not only ban dating between direct reports but should also "prohibit dating relationships between employees who are separated by two levels in the chain of command regardless of the reporting relationship or department." *See* Susan M. Healthfield, *Fraternization Policy Sample*, BALANCE CAREERS (Nov. 5, 2018), <https://www.thebalancecareers.com/fraternization-policy-sample-1918896> [<https://perma.cc/D2LR-Y3RH >].

120. *See* Tovia Smith, *On #MeToo, Americans More Divided by Party Than Gender*, NPR (Oct. 31, 2018), <https://www.npr.org/2018/10/31/662178315/on-metoo-americans-more-divided-by-party-than-gender> [<https://perma.cc/D4H7-JDS7>] (describing significant discrepancies in how people view concerns and allegations raised within the #MeToo movement more so by political party than gender).

recent survey indicates that Republicans tend to believe that #MeToo has gone too far, that the allegations of misconduct are exaggerated or not legitimate, and that the accused, as opposed to the victim, should be given the benefit of the doubt.[121] But even within political parties, reactions can be divided. A classic example of problems resulting in both pragmatic and legal consequences for the entire country occurred a little more than twenty years ago when an executive engaged in a romantic relationship with a subordinate. Democrat William Jefferson Clinton, the 49-year-old President of the United States, began a sexual relationship with a 22-year-old female intern, Monica Lewinsky.[122] That relationship became national news and led to the impeachment of President Clinton in 1998 (he was later acquitted by the Senate).

In 2018, the Clinton-Lewinsky affair became news again after Lewinsky, then 44-years-old, offered a new understanding of what had transpired.[123] Lewinsky had written in 2014 that the affair was consensual.[124] After reflecting on the matter in light of the #MeToo movement, Lewinsky now believes the whole incident was "an abuse of power" by President Clinton.[125] In noting the "power differentials that were so vast between a president and a White House intern," Lewinsky stated that she was "beginning to entertain the notion that in such a circumstance the idea of consent might well be rendered moot."[126] However, Clinton's wife, Hillary Clinton, who was the Democratic presidential candidate in 2016 after having been a United States senator and then secretary of state, stated nothing would have required her husband to resign from the presidency, even based upon what we know now from the #MeToo movement.[127] Hillary Clinton seemed to think that her husband, President

---

121. *Id.*

122. *See* Kate Feldman, *Hillary Clinton: Bill's Affair with Monica Lewinsky Wasn't an Abuse of Power Because "She Was an Adult,"* N.Y. DAILY NEWS (Oct. 14, 2018), <https://www.nydailynews.com/news/politics/ny-news-bill-hillary-clinton-monica-lewinsky-20181014-story.html> [<https://perma.cc/V6DQ-WCMN>].

123. *See* Monica Lewinsky, *Emerging from the 'House of Gaslight' in the Age of #MeToo,* VANITY FAIR (Mar. 2018), <https://www.vanityfair.com/news/2018/02/monica-lewinsky-in-the-age-of-metoo> [<https://perma.cc/WD66-LEVQ >]; *see also* William Cummins, *Monica Lewinsky Rethinks Consent with Bill Clinton in Light of #MeToo Movement*, USA TODAY (Feb. 26, 2018), <https://www.usatoday.com/story/news/politics/onpolitics/2018/02/26/monica-lewinsky-vanity-fair/375452002/> [<https://perma.cc/ZS7H-P9FU >].

124. Lewinsky, *supra* note 123; *see also* Cummins, *supra* note 123.

125. Lewinsky, *supra* note 123; *see also* William Cummins, *Hillary Clinton Denies Bill's Affair with Monica Lewinsky Was "Abuse of Power,"* USA TODAY (Oct. 15, 2018), <https://www.usatoday.com/story/news/politics/onpolitics/2018/10/15/hillary-clinton-lewinsky-affair-not-abuse-power/1649942002/> [<https://perma.cc/6WHY-K9PK >].

126. Lewinsky, *supra* note 123.

127. *Id.*

Clinton, did the correct thing in not resigning when his relationship with Lewinksy became public because Lewinsky was "an adult" at the time and they had both consented.[128] Hillary Clinton did not address the age and power differentials between her husband, the president of the United States, and Lewinsky, a young intern more than twenty years his junior working in her first job out of college.

On the other side of this response, but from a member of the same Democratic Party, was current US senator from New York, Kirsten Gillibrand. Gillibrand asserted that President Clinton should have resigned based upon what we now understand from the #MeToo movement.[129] Some have claimed Gillibrand also "led the charge" in getting the popular Democratic senator from Minnesota, Al Franken, to resign from his position in 2017 after allegations arose that Franken had groped or tried to kiss forcibly more than a half dozen women.[130] Strong Democratic supporters of Franken felt that Gillibrand unfairly forced Franken to step down in light of the #MeToo movement.[131] They criticized Gillibrand for not supporting Franken's right to fight the allegations and stay in his position.[132] This consideration was important to some Democratic supporters, especially when a few Republican figures, including President Trump and his latest appointment to the Supreme Court, Brett Kavanaugh,

---

128. *Id.*

129. Feldman, *supra* note 122.

130. *See* Natasha Korecki & Laura Nahmias, *Franken Scandal Haunts Gillibrand's 2020 Chances*, POLITICO (Nov. 28, 2018, 5:10 AM), <https://www.politico.com/story/2018/11/26/al-franken-kirsten-gillibrand-2020-1014697> [<https://perma.cc/7FDP-YWG3>]. Some of this account about Gillibrand's leadership in calling for Franken's resignation seems to ignore that several other prominent Democratic members of Congress, including Senate minority leader Charles Schumer, had also asked Franken to resign, and that they have not been criticized by Democratic supporters for their actions. *See* Kate Manne, *Gillibrand's Franken-Problem Won't Die*, THE CUT, Jan. 17, 2019, <https://www.thecut.com/amp/2019/01/kirsten-gillibrands-al-franken-problem-wont-die.html> [<https://perma.cc/BYH7-LU29>] (suggesting Gillibrand is being treated unfairly by her own party and via a gendered double standard with respect to Franken's resignation).

131. Korecki & Nahmias, *supra* note130.

132. *Id.* Some of the public criticism of Franken's resignation focused on the nature of the conduct at issue in the initial complaint against him even though there were more expansive complaints of repeated misconduct alleged against him by the time he resigned. *See* Meghan Keneally, *Sen. Al Franken's Accusers and their Allegations Against Him*, ABC NEWS, (Dec. 6, 2017), <https://abcnews.go.com/US/sen-al-frankens-accusers-accusations-made/story?id=51406862> [<https://perma.cc/U43R-Q5ZE>](describing the initial allegation of groping against Franken by the first woman to come forward, Leeann Tweeden, but also providing additional groping accounts by seven other women); *see also* Laura McGann, *The Still-Raging Controversy Over Al Franken's Resignation, Explained*, VOX, (May 21, 2018), <https://www.vox.com/2018/5/21/17352230/al-franken-accusations-resignation-democrats-leann-tweeden-kirsten-gillibrand> [<https://perma.cc/BQS6-GHWP>] (describing a theory that the initial complaint against Franken was made by a Republican supporter of President Trump as part of an orchestrated effort to take Franken down even though Franken admitted and apologized for his behavior, and noting that there were similar claims by seven other women).

were charged with much more egregious sexual misconduct, and they did not withdraw in light of the allegations.[133] Prominent Democratic donors and supporters also viewed Gillibrand's position on Franken as opportunistic—that she was seeking merely to pursue her political goals by not even giving a fair hearing to a male colleague who had promoted many favorable women's initiatives.[134] Some instances referred to by critics of #MeToo have focused on the limited nature of the initial complaint compared to the final action taken against the alleged wrongdoer. Yet the ultimate terminations, including Franken's resignation, ended up being for much more expansive misconduct.[135]

E. The Aziz Ansari Experience

Another instance of the #MeToo movement backlash arose from a 2018 story on the blog *Babe* that involved comedian Aziz Ansari. In that *Babe* story,[136] a woman who met Ansari and eventually went on a date with him described her encounter as a sexual assault.[137] She asserted that Ansari seemed to be focused on having sexual relations with her on their first date and immediately after their first kiss.[138] She said she sent every message to

---

133. Korecki & Nahmias, *supra* note 130 (referring to how "wounds over Franken's ouster were reopened" when President Trump nominated Kavanaugh, who "faced sexual misconduct allegations but was still seated on the Supreme Court").

134. *Id.*; *see also* McGann, *supra* note 132 (describing how some Democrats felt "hustled" by Gillibrand, who seemed to be setting up her run for the presidency in 2020 at the expense of fairness for Franken).

135. *See* Jane Meyer, *The Case of Al Franken*, NEW YORKER (July 22, 2019), (conducting a comprehensive review of the allegations against Franken, the witnesses to the alleged incidents, and Franken's responses and defenders) <https://www.newyorker.com/magazine/2019/07/29/the-case-of-al-franken> [https://perma.cc/NAR8-E89G]; *see also* Keneally, *supra* note 132 (describing all the allegations against Franken, not just the initial allegations). The termination of folksy media host and humorist Garrison Keillor by Minnesota Public Radio is another example of initial complaints about a rush to judgment before more misconduct was disclosed. *See* Associated Press, *Garrison Keillor: Radio Station Reveals Broader Claims of Sexual Harassment*, GUARDIAN (Jan. 24, 2018), <https://www.theguardian.com/world/2018/jan/24/garrison-keillor-sexual-harassment-allegations> [<https://perma.cc/G4FZ-XH83>]. Keillor claimed that his termination was based on a single incident of an alleged inappropriate touching of a female subordinate that Keillor maintained was inadvertent. This led to a public backlash. *Id.* The station provided later information that another woman had accused Keillor of dozens of sexually inappropriate incidents over several years including requests for sexual contact and explicit sexual communications. *Id.* The employer asserted that it had used this information as part of an overall investigation that began before the touching incident in its decision to terminate Keillor and had done so after he refused to provide access to his computer or text messages as part of the investigation. *Id.* The company explained that it had not disclosed in detail all the allegations against Keillor because it was still trying to resolve the matter while involved in mediation with Keillor and other parties. *Id.*

136. *See* Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of my Life*, BABE (Jan. 13, 2018), <https://babe.net/2018/01/13/aziz-ansari-28355> [<https://perma.cc/X8SS-M5Z3>].

137. *Id.*

138. *Id.*

him through what she called "non-verbal cues to indicate how uncomfortable and distressed she was" about his aggressive acts of a sexual nature through "pulling away and mumbling" as a response.[139] He continued to pursue sexual activity with her several times and she told him that she did not want to feel "forced" and "hate" him, which led Ansari to say "let's just chill."[140] However, she admitted that she then engaged in oral sex as she "just felt really pressured."[141] As he attempted another sexual encounter and began more aggressive kissing, she stood up and said "no, I don't think I'm ready to do this, I really don't think I'm going to do this."[142] They got dressed and "chilled" on the couch.[143]

Then she said: "It really hit me that I was violated. I felt really emotional all at once when we sat down there. That that whole experience was actually horrible."[144] After more attempts at "aggressive" kisses, she pulled away and asked Ansari to call her a ride home.[145] The next day when Ansari texted her saying it was "fun meeting you" she responded by saying it "might've been fun for you, but it wasn't for me."[146] According to her, Ansari "ignored clear non-verbal cues" and "kept going with advances."[147] Ansari responded by saying he was "so sad to hear this" and acknowledged that he had "clearly . . . misread things in the moment and [was] truly sorry."[148]

According to the *Babe* story, the woman "compare[d] Ansari's sexual mannerisms to those of a horny, rough, entitled 18-year-old." However, journalist Katie Way wrote, "He's a 34-year-old actor and comedian of global renown who's probably done more thinking about the nuances of dating and sex in the digital age than practically anyone else."[149] Ansari's response[150] to the story was that they "went out to dinner, and afterwards . . . ended up engaging in sexual activity, which by all indications was completely consensual."[151] Further, Ansari claimed, "It was

---

139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *See* Meg Swertlow, *Aziz Ansari Releases Statement After Being Accused of Sexual Misconduct*, ENEWS (Jan. 15, 2018), <https://www.eonline.com/news/906326/aziz-ansari-releases-statement-after-being-accused-of-sexual-misconduct> [<https://perma.cc/PF2J-HDS5>].
151. *Id.*

true that everything did seem okay to me, so when I heard that it was not the case for her, I was surprised and concerned. I took her words to heart and responded privately after taking the time to process what she had said."[152] Nevertheless, the woman involved stated: "It took a really long time for me to validate this as sexual assault" as she "was debating if this was an awkward sexual experience or sexual assault."[153]

The Ansari situation created a huge debate and generated backlash against the #MeToo movement. A number of responses on social media responded negatively to Ansari based on the *Babe* story's description of his behavior and the alleged lack of consent.[154] The allegations against Ansari did not involve a person in power over someone's career possibilities attempting sexual advances that might affect future employment opportunities. The two people involved had gone on a mutually-agreed date and engaged in sexual activity in Ansari's apartment after that date. However, the story opened the door to some criticisms of #MeToo as being heavy-handed in its identification of scenarios allegedly involving lack of consent between men in women engaged in sexual activity.

Headline News journalist Ashleigh Banfield responded very negatively to the story in *Babe* about Ansari.[155] Banfield believed the story was "reckless" in describing what appeared to be a "bad date" as a form of sexual assault and having "potentially destroyed this man's career over it."[156] Banfield stated that she chose to air her concerns about the *Babe* story because she feared that this woman's account about Ansari could have "chiseled away" the impact of the #MeToo movement's efforts to combat sexual misconduct.[157]

The author of the *Babe* story, Katie Way, rejected an offer to appear on Banfield's program to respond to the criticism and belittled Banfield's age, hair highlights, and lipstick in an e-mail.[158] Banfield reacted directly

---

152. *Id; see also* Emily Stewart, *Aziz Ansari Responds to Sexual Misconduct Allegations Against Him*, VOX (Jan. 15, 2018), <https://www.vox.com/identities/2018/1/15/16893468/aziz-ansari-allegations> [<https://perma.cc/8BWU-B74P >].

153. *See* Way, *supra* note 136.

154. *See* Caroline Framke, *The Controversy Around Babe.net's Aziz Ansari Story, Explained*, VOX (Jan. 18, 2018), <https://www.vox.com/culture/2018/1/17/16897440/aziz-ansari-allegations-babe-me-too> [<https://perma.cc/9FRT-G3J9>].

155. *See* Ron Dicker, *Ashleigh Banfield Blasts Aziz Ansari Accuser For "Reckless" Sexual Assault Claim*, HUFFPOST: THE BLOG (Jan. 16, 2018), <https://www.huffingtonpost.com/entry/ashleigh-banfield-blasts-aziz-ansari-accuser_us_5a5e0b59e4b0fcbc3a1393da> [<https://perma.cc/3MK6-2NHQ >].

156. *Id.*

157. *Id.*

158. *See* Doha Madani, *Ashleigh Banfield Responds on Air to Insulting Email from Aziz Ansari Story Reporter*, HUFFPOST: THE BLOG (Jan. 18, 2018), <https://www.huffingtonpost.com/entry/ashleigh-banfield-katie-way-email_us_5a5fadc1e4b0ccf9f121033a> [<https://perma.cc/6FPG-

and harshly to Way's message, writing, "if you truly believe in the #MeToo movement, if you truly believe in women's rights, if you truly believe in feminism, the last thing you should do is attack someone in an ad hominem way for her age."[159] Banfield also stated that she thought the story was "sloppy" because even if what the anonymous woman said was true, it did not amount to any type of legally actionable behavior.[160] Finally, Banfield clarified that she did not approve of Ansari's behavior, which she categorized as "disgusting but not actionable" as it was not a rape or sexual assault in her opinion.[161]

Others tended to agree with Banfield. Journalist Caitlin Flanagan criticized the *Babe* story as "revenge porn" aimed at damaging Ansari rather than validating the story.[162] To Flanagan, it represented a situation where "the revolution . . . is starting to sweep up all sorts of people into its conflagration: the monstrous, the cruel, and the simply unlucky" in an effort to" destroy a man who did not deserve it."[163] An op-ed in the *New York Times* by Bari Weiss criticized the woman involved for suggesting that Ansari had committed sexual assault because he failed to understand her non-verbal cues when she could have said goodbye and left.[164] Weiss noted that the story about Ansari had translated into "digital hosannas by young feminists who insisted that consent is only consent if it is affirmative, active, continuous and – and this is the word most used – enthusiastic."[165] Although some social media responses suggested a power differential existed given Ansari's wealth, Weiss observed, "Ansari had no power over the woman – professionally or otherwise."[166] To Weiss, this "trivializes what #MeToo first stood for."[167]

The Ansari story brings to light concerns "with a specific instance of sexual intimidation that exists in the contentious sexual gray area between

---

L55P >].

159. *Id.*

160. *See* Greg Evans, *Ashleigh Banfield Doubles Down on Aziz Ansari Accusations: "Sloppy & Reckless,"* DEADLINE (Jan. 19, 2018), <https://deadline.com/2018/01/ashleigh-banfield-megyn-kelly-aziz-ansari-accuser-sloppy-reckless-1202262914/> [<https://perma.cc/GH5F-V7WP >].

161. *Id.*

162. *See* Caitlin Flanagan, *The Humiliation of Aziz Ansari*, ATLANTIC (Jan. 14, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/55054/> [<https://perma.cc/26SE-79UW >].

163. *Id.*

164. *See* Bari Weiss, *Aziz Ansari Is Guilty. Of Not Being a Mind Reader*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html> [<https://perma.cc/N2GC-6FCF >].

165. *Id.*

166. *Id.*

167. *Id.*

enthusiastic consent and resigned acceptance."[168] However, one commentator has asserted that "[t]he story was politicized and polemicized and, in the process, turned into a parable; an interaction between two people, presented as an embodiment of questions that linger, still, around the rhetoric of sexual consent."[169]

As a result, the Ansari story has helped foster a further backlash towards #MeToo, with critics asserting that members of this movement are engaging in "vigilantism" rather than pursuing justice.[170] The theory of this backlash is that in these #MeToo times, it is men who need more protection from being charged with crimes and inappropriate behavior where they were merely flirting or expressing sexual interest, and not attempting to force themselves on women without consent.[171] However, critics of the *Babe* story and its treatment of Ansari may themselves have rushed to judgment about what the impact was, as there are no clear indications that Ansari's career has been destroyed or even significantly harmed.[172] In fact, Ansari "embarked on a comeback tour a mere 10 months after his career was allegedly destroyed."[173] The upshot of the Ansari controversy may be that our society is starting to reflect on what consent means and moving toward a standard of "empathy" where "both parties" must be "having fun" for their actions to be consensual.[174]

---

168. Framke, *supra* note 154 (describing numerous stories critical of the *Babe* story about Ansari and how its framing of the consent issues may create problems and backlash for the #MeToo movement).

169. *See* Megan Garber, *Aziz Ansari and the Paradox of "No,"* ATLANTIC (Jan. 16, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/aziz-ansari-and-the-paradox-of-no/550556/> [<https://perma.cc/QGR7-LLRB >].

170. *Id.*

171. *Id.*

172. *See* Russ Espinoza, *Aziz Ansari to Resurface After Sexual Assault Accusation with Big 2019 Tour*, FORBES (Nov. 28, 2018), <https://www.forbes.com/sites/russespinoza/2018/11/28/aziz-ansari-to-resurface-after-sexual-assault-accusation-with-big-2019-tour/#3676d86d77fd> [<https://perma.cc/79MJ-NJT4>] (discussing how Ansari is embarking on his first comedy tour since the sexual assault story in *Babe* with new 28-show tour for 2019 called "Road to Nowhere" that will "canvass North America" starting in February 2019 with stops in Canada and "the go-to American metropolises" as well as several "traditionally underserved locales like Salt Lake City, Buffalo, N.Y. and Reno, Nev."); Katie Kilkenny, *Aziz Ansari Sets New Tour Dates After Sexual Misconduct Claim*, HOLLYWOOD REP. (Nov. 27, 2018), <https://www.hollywoodreporter.com/news/aziz-ansari-sets-new-tour-dates-sexual-misconduct-claim-1164394> [<https://perma.cc/F7BM-63BY >] (describing new tour dates for Ansari after *Babe* story suggesting his career has not been destroyed); Osita Nwanevu, *There is No Rampaging #MeToo Mob*, SLATE (Jan. 16, 2018), <https://slate.com/culture/2018/01/the-reaction-to-the-aziz-ansari-allegations-shows-metoo-is-more-measured-than-its-critics-claim.html> [<https://perma.cc/Q9YA-F4CC >] (suggesting that critics of the *Babe* story about Ansari "don't bother offering explanations as to why they're so certain that Ansari is finished").

173. *See* Joel Rubinoff, *Aziz Ansari's Back and so Is the #MeToo Backlash*, THE STAR (Nov. 24, 2018), <https://www.thestar.com/entertainment/opinion/2018/11/24/aziz-ansaris-back-and-so-is-the-metoo-backlash.html> [<https://perma.cc/2548-JAQ3>].

174. Garber, *supra* note 169. At least one commentator believes that the Ansari incident suggests that whatever you think about the sexual consent issue, the #MeToo movement also highlights how you

F. Women as the Violators

The dynamics of these discussions are not limited to men's actions toward women. The popular singer Katy Perry, while serving as one of the judges on the television show *American Idol*, kissed a young male contestant, Benjamin Glaze, without his consent.[175] Perry kissed Glaze after he admitted that he had never kissed a girl.[176] Glaze had specifically stated he did not want to kiss a woman until he was in a romantic relationship.[177] But Perry kissed the young man anyway.[178] People on Twitter erupted in criticism, saying that her kiss was inappropriate.[179] Perry's actions provide stark reminders of the impact of power differentials, as Glaze was seeking to start his music career through the *American Idol* show and Perry was in the powerful position of deciding whether he would continue in that process. Indeed, Glaze seemed so flummoxed by Perry's unwanted kiss that he did not perform well during the audition and his performance was cut short by Perry, who told him that he would not be selected for the show.[180]

Asia Argento, an actress and one of Weinstein's key accusers, faced her own allegations of sexual assault charges brought by a younger male actor, Jimmy Bennett.[181] Bennett alleged that Argento sexually assaulted him in 2013 when he was 17-years-old and Argento was 37-years-old.[182] They allegedly engaged in sexual relations when they met at a hotel room

---

don't have to be a "jerk" in dealing with the opposite sex. Rubinoff, *supra* note 173.

175. *See* Carly Ledbetter, *Man Katy Perry Kissed on "American Idol" Says He Didn't Like It*, HUFFPOST: THE BLOG (Mar. 15, 2018), <https://www.huffingtonpost.com/entry/katy-perry-kiss-american-idol_us_5aa93314e4b018e2f1c3a73f> [<https://perma.cc/D7QC-UDGA >].

176. *See* Melanie Hamlett, *Katy Perry's "American Idol" Kiss Sparks Consent Debate*, GLAMOUR (Mar. 15, 2018), <https://www.glamour.com/story/katy-perry-american-idol-kiss-raises-consent-debate> [<https://perma.cc/MA9Q-54PV >].

177. *Id.*

178. Tracy E. Gilchrist, *Katy Perry and American Idol Play Up Sexual Harassment During Era of #MeToo* ADVOCATE (Mar. 15, 2018), <https://www.advocate.com/arts-entertainment/2018/3/15/katy-perry-and-american-idol-play-sexual-harassment-during-era-metoo> [<https://perma.cc/MA9Q-54PV >]; Ledbetter, *supra* note 175.

179. *See* Ledbetter, *supra* note 175.

180. Gilchrist, *supra* note 178.

181. *See* Kim Severson, *Asia Argento, a #MeToo Leader, Made a Deal With Her Own Accuser*, N.Y. TIMES (Aug. 19, 2018), <https://www.nytimes.com/2018/19/us/asia-argento-assault-jimmy-bennett.html> [<https://perma.cc/2UG8-A339>]; *see also* Brett Michael Dykes, *Report: Weinstein Accuser Asia Argento Paid $380K to a Sexual Assault Accuser of her Own*, UPROXX (August 19, 2018), <https://uproxx.com/movies/asia-argento-james-bennett/> [<https://perma.cc/RE2E-5DKW >] (describing how Argento had initially agreed to pay Bennett $380,000 to prevent him from pursuing a sexual assault claim against her and other details of legal documents obtained by the *New York Times* describing the details of the assault and allegedly with three pictures of Argento and Bennett in bed and "their unclothed torsos exposed").

182. *See* Severson, *supra* note 181.

in Marina Del Rey, California.[183] Rose McGowan, another of Weinstein's principal accusers, noted that "it's good" that Bennett had come forward because "it's furthered the conversation that boys and men get hurt too."[184] One difference about the allegations against Argento as compared to many of the other #MeToo incidents is that, if true, Argento could not assert consent as a response because Bennett was not old enough to consent at the time of their sexual encounter.[185] The age of consent is 18 years of age in the state of California where the alleged sexual assault occurred.[186] The twenty-year age difference and ongoing relationship between Argento and Bennett indicated her "tools of power" over him, as she referred to him as her "son" and her "love."[187] This use of "rhetorical reminders of [Argento's] position of authority in [Bennett's] life" also demonstrated the "notable imbalance" of power between them.[188] Bennett's allegations against Argento and Perry's treatment of Glaze demonstrate how vulnerable boys and men may easily become victims needing #MeToo protection.

G. Much More Ado Than Should Be Due in the Workplace

Ansari's treatment in the *Babe* article and Franken's treatment by those who called for his resignation may indicate some legitimate process concerns. Fairness of the process used and the ability of those in power to get a fair shake should be an objective. Because there is "little evidence" to support any claim that there is a groundswell of false allegations being made against powerful executives and influential persons in our society for their treatment of subordinates in the workplace, employers should focus on greater advancement of employees through positive mentoring interactions.[189]

---

183. *Id.*

184. *See* Ariel Sobel, *Rose McGowan Thinks Asia Argento Controversy Is Good for #MeToo*, ADVOCATE (Sept. 25, 2018), <https://www.advocate.com/women/2018/9/25/rose-mcgowan-thinks-asia-argento-controversy-good-metoo> [<https://perma.cc/NGG8-66AV >].

185. *See* Hannah Giorgis, *Asia Argento, #MeToo, and the Complicated Question of Power*, ATLANTIC (Aug. 21, 2018), <https://www.theatlantic.com/entertainment/archive/2018/08/asia-argento-allegations/568018/> [<https://perma.cc/GU95-54NX >].

186. Dykes, *supra* note 181; Giorgis, *supra* note 185; Severson, *supra* note 181.

187. *See* Giorgis, *supra* note 185.

188. *Id.*

189. *See* Erin Mulvaney, *Men Are Worried, but EEOC Panel Finds Little Evidence to Support #MeToo Backlash Fears*, LAW.COM (Oct. 31, 2018), <https://www.law.com/2018/10/31/men-are-worried-but-eeoc-panel-finds-little-evidence-to-support-metoo-backlash-fears/> [<https://perma.cc/6TAW-PET3>] (referring to how "little evidence exists to prove a push against sexual harassment in the workforce hurts men, experts and federal regulators say"). Most of the backlash against the #MeToo movement in the workplace appears to be hurting women, who are no longer receiving mentoring and social opportunities for advancement out of unfounded fears by

Overall, there should be some concern to make sure the processes for assessing #MeToo-inspired allegations in the workplace do not devolve into some unsubstantiated and "incipient panic over mobs of angry, lying women eviscerating innocent men."[190] But at this stage, the evidence does not suggest that powerful corporate executives are being unfairly treated in the workplace. While the Ansari, Franken, and Clinton-Lewinsky stories engender strong feelings, they do not involve an assessment by a corporate employer of a powerful person's actions that warranted their departures from their powerful positions. Moonves, Smiley, Wynn, Lauer, and Weinstein had sexual encounters with subordinates that arguably created an inappropriate culture that lowered the value of their companies while also generating potential corporate liability via harassment, retaliation, and shareholder mismanagement suits.

In fact, the #MeToo movement brought to light a large number of instances where women suffered in silence for many years while powerful executives misused their positions to coerce them into romantic and sexual encounters. Exposing these misdeeds by corporate executives should be applauded. So far the backlash has not established that any executive has been wrongfully deposed as a result of the #MeToo movement. Instead, rather than worrying about purported vigilantism and revenge, the next step should be to focus on what more can be done in the workplace to protect vulnerable subordinates from powerful executives with career-threatening powers.

IV. #METOO AND THE BACKBONE TO COME FORWARD DESPITE EXECUTIVE RETALIATION

One could argue that a subordinate would still have the protection of a

executives. *See id.*; Hemel & Lund, *supra* note 80 (referring to male executives' refusal to mentor or even hire attractive females as a potential "backfire" of the #MeToo movement and referring to this behavior as the "Mike Pence effect," due to the "Vice President's reported refusal to dine alone with any woman other than his wife"); *see also* Vivia Chen, *The #MeToo Backlash Is Building*, AM. LAWYER (Oct. 26, 2018), <https://www.law.com/americanlawyer/2018/10/26/the-metoo-backlash-is-building/> [<https://perma.cc/8N8D-2WJW>] (discussing hesitance of male lawyers to interact with female lawyers as part of the "Pence effect" response to #MeToo while also referring to "hypersensitivity among young women attorneys to behavior which, while not necessarily great, does not rise to the level of sexual harassment"); Jena McGregor, *#MeToo Backlash: More Male Managers Avoid Mentoring Women or Meeting Alone With Them*, WASH. POST (May 17, 2019), <https://www.washingtonpost.com/business/2019/05/17/metoo-backlash-more-male-managers-avoid-mentoring-women-or-meeting-alone-with-them/> [<https://perma.cc/3HAZ-JP7L>] (describing survey finding that "60 percent of male managers say they are uncomfortable doing common workplace activities with women such as mentoring, socializing or having one-on-one meetings" and "senior-level male managers were nine times more likely to say they hesitated to take work trips with junior women than they were with junior men").

190. Tuerkheimer, *supra* note 95 (manuscript at 30).

retaliation action if a powerful industry executive, unhappy at being rejected by the subordinate, decides to limit the subordinate's career advancement. The EEOC has reported consistent increases in retaliation charges from 1997 to 2017.[191] As of 2017, retaliation claims were 48.8 percent of the EEOC's overall total charges, whereas sex-related claims amounted to only 30.4 percent of the agency's overall total charges.[192] In general, as Nicole Porter has recently explained, retaliation represents a key obstacle to those pursuing successful results from the #MeToo movement.[193] Reports of workplace sexual harassment are very low as one study revealed that 44 percent of those who experienced harassment at work did nothing, compared to the 12 percent of respondents who reported.[194] Rather than face the prospect of outing their harasser, victims tend to ignore the harassment or take costly steps to avoid the harasser on the job.[195]

A compelling reason why those being harassed choose not to report is not only that they tend to be retaliated against but the retaliation claim often fails, too.[196] Hence, #MeToo cannot effectuate change until retaliation claims can be better vindicated. When the alleged harasser is a top-level executive, companies try to keep the victim quiet or retaliate against the victim because the company becomes more concerned about losing their star and how that loss will affect the company's prospects.[197] But corporations need to recognize that sexual harassers do incredible harm to their companies. Even a top-performing executive who harasses subordinates is not worth the harm to the employer's bottom line.[198]

Catharine MacKinnon, the Michigan law professor who played a key role in the development of sexual harassment as a recognized claim under Title VII, has suggested that one of the great benefits of the #MeToo movement is that it "is accomplishing what sexual harassment law has [been unable to do]."[199] Specifically, according to MacKinnon, the #MeToo

---

191. *See Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2017*, EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [<https://perma.cc/TXC9-T3XD>] (last visited June 6, 2019).

192. *Id.*

193. *See* Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 51 (2018).

194. *Id.*

195. *Id.*; *see also* Gardner, *supra* note 109.

196. Porter, *supra* note 193, at 52.

197. *See* Bryce Covert, *The Real Cost of Keeping Les Moonves*, N.Y. TIMES (Aug. 3, 2018), <https://www.nytimes.com/2018/08/03/opinion/les-moonves-cbs-sexual-harassment.html> [<https://perma.cc/4VLG-NFYH>].

198. *Id.*

199. *See* Linda L. Berger, Kathryn M. Stanchi & Bridget J. Crawford, *Rewriting Judicial Opinions*

movement has been successful in getting those in power to take sexual harassment claims seriously by believing women and no longer "devaluing . . . accusers."[200] However, with the greater inspiration provided by #MeToo for victims to come forward with their harassment claims, comes a greater need for protection from retaliation.[201] Ronan Farrow, whose exposé on Weinstein in the *New Yorker* galvanized #MeToo, stated "[v]irtually all of the people [he] spoke with told [him] that they were frightened of retaliation."[202]

A major obstacle to providing greater protection from retaliation is the law itself. In particular, courts have narrowly interpreted the scope of anti-retaliation protections in the sexual harassment context. For instance, a line of jurisprudence has incorporated into the retaliation analysis the sexual harassment requirement that the conduct complained of must be severe or pervasive or at least reasonably believed to have been severe or pervasive.[203] In *Clark County v. Breeden,*[204] the Supreme Court held that the employee failed to establish a retaliation claim because "[n]o reasonable person could have believed that the single incident . . . violated Title VII's standard."[205] Following *Breeden*, many lower courts have held that a single sexual or romantic incident or overture cannot be a reasonable basis for asserting a retaliation claim, thereby putting any accuser who complains about improper—albeit not so widespread as to be "severe or pervasive"—harassment to be subjected to retaliation without any legal protection.[206] This approach narrows the scope of actionable retaliation

---

and the Feminist Scholarly Project, 94 NOTRE DAME L. REV. ONLINE 1, 4-5 (2018) (describing MacKinnon's role in the development of banning sexual harassment in the workplace); *see also* Alexander, *supra* note 69, at 22 (describing MacKinnon's crafting of the theory that sexual harassment was a form of sex discrimination).

200. *See* Catharine A. MacKinnon, *"#MeToo Has Done What the Law Could Not,"* N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> [<https://perma.cc/JK2Y-79FB >].

201. *See* Vicki Schultz et al., *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN L. REV. ONLINE. 17, 38 (2018) (discussing certain principles for reform of sexual harassment law developed by several employment discrimination law scholars, including Principle 8: protection against retaliation for victims of harassment and people who stand up for them must be strengthened).

202. *See* Farrow, *supra* note 24.

203. *See* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80-81 (1998) (requiring that harassment claims not be a civility code and does not cover stray remarks, only offensive conduct that is severe and pervasive).

204. 532 U.S. 268 (2001) (per curiam).

205. *Id.* at 271.

206. *See* Craig Robert Senn, *Redefining Protected Opposition Activity in Employment Retaliation Cases*, 37 CARDOZO L. REV. 2035, 2050-59 (2016) (describing how lower courts have applied *Breeden* to reject retaliation claims based upon a single incident). *But see* Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 285 (4th Cir. 2015) (en banc) (finding that "an employee is protected from retaliation for opposing an isolated incident of harassment when she reasonably believes that a hostile environment is

claims for a sexual harassment hostile environment complaint to only those instances where the acts complained of were very close to or actually severe or pervasive conduct.

With this limited approach to retaliation claims, although an employee who fails to report harassment out of fear may overcome the employer's *Faragher-Ellerth* affirmative defense[207] because of the broad authority of the executive,[208] the law does not address the dilemma the subordinate still faces when dealing with an executive with the power to end the subordinate's career. Even if the *Faragher-Ellerth* affirmative defense is not available to the employer when the complaint involves a powerful executive, the subordinate must still wait for the executive's behavior to become so severe and pervasive to constitute harassment and at least very close to severe and pervasive to provide protection against retaliation. This high standard not only deters employees from filing sexual harassment complaints against powerful bosses, it also makes obtaining protection from retaliation a daunting proposition.

Unfortunately, because of the overall power of the executive to affect a subordinate's career, it is also difficult for a subordinate to prove that the executive took any retaliatory actions at all or at least until quite a while down the road. The Weinstein situation provides an astounding example of how retaliation might occur without the subordinate being aware of it. Specifically, after the allegations made against him, Weinstein issued a statement saying:

> Any allegations of non-consensual sex are unequivocally denied by Mr. Weinstein. Mr. Weinstein has further confirmed that there were never any acts of retaliation against any women for refusing his advances. Mr. Weinstein obviously can't speak to anonymous allegations, but with respect to any women who have made allegations on the record, Mr. Weinstein believes that all of these relationships were consensual.[209]

The Weinstein matter provides a stark example of how such a powerful person can say openly that no retaliatory acts were taken when it does not take much to be in a position where retaliation can occur. Actress Mira Sorvino, who had privately refused Weinstein's romantic overtures and even complained about his behavior to a Weinstein employee, thought

---

in progress, with no requirement of additional evidence that a plan is in motion to create such an environment or that such an environment is likely to occur").

207. *See supra* notes 78-81 and accompanying text.

208. Hemel & Lund, *supra* note 80, at 1603 n.116 (citing Helm v. Kansas, 656 F.3d 1277, 1286 (10th Cir. 2011)).

209. Farrow, *supra* note 24.

that her rebuff of Weinstein and reporting on his behavior had led to her not receiving further acting roles.[210] But Sorvino could only suspect that Weinstein had prevented her from obtaining future roles; she could not prove it. When the #MeToo movement exploded and Weinstein's behavior towards several actresses, including Sorvino, became more public, at least one director and producer, Peter Jackson, acknowledged that he had considered Sorvino and another actress who had rebuffed Weinstein, Ashley Judd, for roles in his *Lord of the Rings* movies but decided not to employ either actress after negative input from Weinstein.[211] There was really no way for Sorvino or Judd to know what Weinstein had done (giving negative input to Jackson), and Jackson could not have known that the actresses had rebuffed Weinstein's sexual advances until the #MeToo movement made those actions public. Also, actress Rosanna Arquette feared that Weinstein had retaliated against her after she refused his sexual overtures, but she could not prove any retaliation either without knowing the behind-the-scenes actions and Weinstein's influence on her career advancement.[212]

While formal complaints of sexual harassment are increasing, protection from retaliation must also be addressed. Although there is strength in numbers as evidenced by the #MeToo movement, subordinates must have a solid opportunity to challenge executive abuse of power and workplace harassment. The legal analysis must be expanded to cover more people than are presently covered by the high standard of harassment sufficiently severe and pervasive or close to it.[213]

Interpretations of *Breeden* or the holding itself must be changed to make it clear that reporting a single incident of harassment is sufficient for retaliation protection. This change requires establishing a fix to the

---

210. *Id.*

211. *See* Ashley Boucher, *Miro Sorvino, Ashley Judd on Weinstein "Smear Campaign": "I Remember This Well,"* THE WRAP (Dec. 15, 2017), <https://www.thewrap.com/ashley-judd-responds-to-peter-jacksons-claims-on-harvey-weinstein-blacklist/> [<https://perma.cc/6EQ9-64MM>] (describing comments by Peter Jackson, the director of the *Lord of the Rings* trilogy, who asserted that Weinstein had told him that actresses Ashley Judd and Mira Sorvino were "a nightmare to work with" and that this resulted in them not being called to audition for the movies).

212. Farrow, *supra* note 24.

213. *See* Senn, *supra* note 206, at 2049-59. *But see* Schultz et. al., *supra* note 201, at 38 (asserting that protection against retaliation for victims of harassment who stand up to their harassers should be broadly defined to include any adverse action an employee believes in good faith); Michael Z. Green, *Rewritten Opinion in* Clark County v. Breeden, *in* FEMINIST JUDGMENTS: EMPLOYMENT DISCRIMINATION REWRITTEN (Ann C. McGinley and Nicole Porter eds. forthcoming 2019) (suggesting analysis under retaliation must be broader to protect underlying claims involving just a single incident in order to support the defenses employers have when employees fail to report claims and reversing the Goldilocks problem of reporting too soon and losing out on retaliation claim and reporting too late or not at all and losing out on both harassment and retaliation claim due to causation analysis).

"Goldilocks problem" created by *Faragher-Ellerth* and *Breeden*. If an employee reports the behavior too soon, she could lose the retaliation claim under an interpretation of *Breeden* that no reasonable person could have believed a single incident was a violation of Title VII. But if she waits for a completely severe and pervasive environment to arise, she may be reporting too late and will lose the harassment claim because of the *Faragher-Ellerth* affirmative defense. Such a result would leave an employee with only one realistic and very narrow option: report harassing conduct at just the perfect time when it has reached a sufficiently hostile or abusive level to be actionable or very close to being actionable, but not past the point where the plaintiff would be deemed unreasonable in not reporting earlier.[214]

This article joins with those employment discrimination professors that have already called for a change in how retaliation analysis operates so that employees should be able to bring a winnable retaliation claim for any adverse action taken when an employee believes in good faith that harassment has occurred.[215] This new single incident analysis could follow the approach of the United States Court of Appeals for the Fourth Circuit by finding that as long as the employee reasonably believed the single incident was part of an overall hostile environment in progress, then that would be all the protected activity needed to prevail.[216] The EEOC also follows this approach in dealing with retaliation claims based upon responses to a single-incident harassment complaint.[217]

---

214. *See* Senn, *supra* note at 206, at 2077-78 (describing Goldilocks timeliness problem for harassment versus retaliation claim); *see also* EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES, *Example 2* & n. 62 (2016) <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#_ftnref62> [<https://perma.cc/75D9-XG99>] ("If an employee's internal complaint were not protected, therefore, an employee would be in a catch-22: either complain to the employer about offensive conduct experienced or witnessed before it becomes severe or pervasive (taking the risk that the employer would be permitted to fire her for complaining), or wait to complain until the harassment is so severe or pervasive that she is certain she will be protected from retaliation (taking the risk of further harm, and that her failure to complain sooner will relieve the employer of liability even if a court later finds there was a hostile work environment). Under Faragher and Ellerth, 'the victim is commanded to 'report the misconduct, not investigate, gather evidence, and then approach company officials.'").

215. Schultz et al., *supra* note 201, at 38.

216. *See* Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 786 F.3d 264, 285 (4th Cir. 2015) (en banc).

217. *See* EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES, *supra* note 214, at *Example 2* & nn.63-64 <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#_ftnref64> [<https://perma.cc/HLT3-FHU4>] (asserting that the report of "an isolated single incident of harassment is protected opposition if the employee 'reasonably believes that a hostile work environment is in progress, with no requirement for additional evidence that a plan is in motion to create such an environment or that such an environment is likely to occur' . . . or if repeated often enough, would result in an actionable hostile environment claim") (citations omitted).

V. #METOO DEMANDS HARSH EMPLOYER RESPONSES TO EXECUTIVE CLAIMS OF CONSENT

When the #MeToo movement gained momentum in 2017, one question that repeatedly arose was whether it would change anything in the workplace.[218] Before #MeToo, employers tended to "settle sexual harassment complaints against high-powered miscreants and tried to limit the damage through non-disclosure agreements."[219] Now employers realize that quiet settlements with large payouts after egregious executive behavior will more likely result in immediate firings without severance pay because of board duties and potential liability.[220] In early 2019, we can see that #MeToo has changed other aspects of corporate behavior.[221] Many high-profile companies such as Google and Facebook, as well as a number of key law firms,[222] have eliminated policies that seem to hide corporate executives' sexual misdeeds and prevent the public resolution of these matters provided by the courts.[223] Some companies are also revising their dating policies in response to the #MeToo movement.[224] Google and Facebook have implemented policies limiting their co-workers to a single romantic overture, and if the co-worker turns down the request or even responds ambiguously, no further requests can be made.[225]

---

218. *See* Joan C. Williams & Suzanne Lebsock, *Now What?*, HARV. BUS. REV. (Jan. 2018), <https://hbr.org/cover-story/2018/01/now-what> [<https://perma.cc/7YBW-QDK7>] (discussing the implications for the workplace in light of #MeToo).

219. *Id.*

220. *Id.*

221. *See, e.g.*, Matthew Weaver et al., *Google Walkout: Global Protests After Sexual Misconduct Allegations*, GUARDIAN (Nov. 1, 2018), <https://www.theguardian.com/technology/2018/nov/01/google-walkout-global-protests-employees-sexual-harassment-scandals> [<https://perma.cc/AE58-JJER >] (describing job walkouts inspired by #MeToo at Google over the company's arbitration and harassment policies and Google's response to the employee protests).

222. *See* Chris Villani, *After Kirkland, Sidley Arbitration Flip, Group Eyes DLA Piper*, LAW 360 (Nov. 28, 2018), <https://www.law360.com/articles/1105619> [<https://perma.cc/X7H7-9EJ3>]. Many of these firms have also removed arbitration provisions with staff. *See* Karen Sloan, *Kirkland & Ellis Backs off Mandatory Arbitration for Staffers*, AM. LAWYER (Dec. 7, 2018), <https://www.law.com/americanlawyer/2018/12/07/kirkland-ellis-backs-off-mandatory-arbitration-for-staffers/> [<https://perma.cc/V7YZ-RRG4>].

223. *See* Braden Campbell, *Employers May Follow Tech Titans' Lead on Arbitration*, LAW 360 (Nov. 16, 2018), <https://www.law360.com/employment/articles/1102846/ > [<https://perma.cc/MX7T-XKZZ>].

224. *See* Gallo, *supra* note 115 (referring to worker dating policy changes due to #MeToo); Williams & Lebsock, *supra* note 218 (describing how some companies have "no-dating" policies because "work relationships should be about work"); *see also Office Romance, supra* note 110 (recognizing that companies may be changing policies as a result of #MeToo but that Southwest Airlines would continue its policy of nearly forty-five years of embracing romantic workplace relationships).

225. *See* Shana Lebowitz, *Google and Facebook Have Similar Rules on Asking Out Coworkers: You Only Get One Chance*, BUS. INSIDER, (Feb. 8, 2018), <https://www.businessinsider.com/google-facebook-policies-dating-coworkers-2018-2> [<https://perma.cc/YV3Q-XMSE>](referring to Google

While these policies seem like a good step, employers must do even more in this time of #MeToo to hold executives accountable before having to take immediate termination actions. It is now clear that corporate damage is occurring from executives' sexual misbehavior.[226] As a result, employers can no longer have policies that fail to deter executives' misdeeds. When news of an executive's misdeeds emerges and the company's stock price plummets, many investors are now suing companies for letting their corporate executives run rampant.[227] The state of Oregon even sued Wynn Resorts' board of directors for failing to fulfill their fiduciary responsibilities by not addressing sexual harassment misconduct by Steve Wynn.[228] Likewise, CBS stock dropped significantly when the acts of executive Les Moonves became public.[229]

According to Elizabeth Tippett, when sexual harassment involves supervisors, employers should treat those actions in a more serious manner warranting removal, possibly as a breach of a duty of trust that taints the supervisor in subsequent supervisory actions.[230] In another approach, PBS asserted that Smiley "violated the morals clause in his contract and sought to reclaim nearly $2 million it had paid him."[231] These are all examples of the first steps that companies have pursued to place more financial burden on an executive when a romantic encounter goes awry or was always unwanted and the executive attempts to justify the behavior as consensual and not cause for termination while seeking a large severance buyout.

---

and Facebook policies of only one chance to ask co-workers on a date).

226. *See* Hemel & Lund, *supra* note 80, at 1585-90, 1613-28 (describing how corporate law in state fiduciary breaches and shareholder federal suits is being used to respond to the sexual harassment scandals by executives uncovered throughout the #MeToo movement and as a response to resulting stock price declines while cataloguing various companies and related lawsuits).

227. *See* Erin Morrissey, *Comment, #MeToo Spells Trouble for Them Too: Sexual Harassment Scandals and the Corporate Board*, 93 TUL. L. REV. 177, 180-94 (2018) (describing problems for corporate directors as a result of #MeToo at Weinstein, Guess, Wynn, 21st Century Fox, and Amazon); *see also* Peter J. Biging & Heather M. Zimmer, *Corporate D&O Liability and Sexual Harassment in the Workplace*, BRIEF, Fall 2018, at n.7 <https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2018/november-2018/corporate-d-o-liability-sexual-harassment-workplace/> [<https://perma.cc/TX3C-KJMX >] (describing challenges to corporate directors as a response to #MeToo and how stock prices and company value has gone down and led to the filing of lawsuits against Guess, Papa John's, Wynn Resorts, 21st Century Fox, CBS, Nike, National Beverage, Dartmouth, and Weinstein Company as they all lost money related to alleged executive misconduct).

228. *See* Associated Press, *Oregon Sues Steve Wynn, Board of Directors for Failing to Stop Sexual Misconduct*, HOLLYWOOD REPORTER (Mar. 7, 2018), https://www.hollywoodreporter.com/news/oregon-sues-steve-wynn-board-directors-failing-stop-sexual-misconduct-1092801 [<https://perma.cc/SQ5C-E86N>].

229. Covert, *supra* note 197.

230. Elizabeth C. Tippett, *The Legal Implications of the #MeToo Movement*, 103 MINN. L. REV. 229, 287-88 (2018).

231. *See* Ashley Cullins, *Tavis Smiley Stumbling in Lawsuit Against PBS*, HOLLYWOOD REPORTER (Aug. 24, 2018), <https://www.hollywoodreporter.com/thr-esq/tavis-smiley-stumbling-pbs-lawsuit-1137134> [<https://perma.cc/3RSA-6DLF>].

But as Rachel Arnow-Richman has explained, few executive agreements even ban sexual harassment.[232] Further, certain terms prevalent in executive agreements or employer policies have prevented executives from being held responsible for their sexual harassment behavior including: justified dismissal being only for outrageous or criminal acts; arbitration clauses requiring private dispute resolution instead of the courts; and non-disclosure agreements in settlements.[233] These policies and provisions have also historically made it difficult for subordinates to become aware of the nature of executive acts of sexual harassment in their organization when companies resolve those matters privately and prevent any public disclosure.

Too many scandals have occurred due to the misconduct of executives while the public sees them receive huge payouts as they exit silently with little punishment.[234] As executives assert consent or a refusal by the subordinate to say no as an explanation for their offensive behavior, employers need to remove this executive argument from the analysis. Employer policies and statutory changes should preclude an executive (and his or her employer) from asserting consent by a subordinate as a defense to a sexual harassment claim. This rule, borrowing from state laws on statutory rape that prohibit a minor's consent to sexual relations as a matter of public policy, analogizes the power imbalance inherent in age differentials to the imbalance where subordinates are subject to executive influence in the workplace. This article proposes the following two options

---

232. *See* Arnow-Richman, *supra* note 35, at 92-93 (describing how most executive contracts protect the executives from terminations by having cause provisions that limit justifiable terminations to only those actions involving egregious behavior and only a few agreements even list sexual harassment as a cause for termination).

233. *See* Elizabeth C. Tippett, *Non-Disclosure Agreements and the #MeToo Movement: What Do We Do Now?*, 25 DISP. RESOL. MAG., Winter 2019, at 12; *see also* L. Camille Hébert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?*, 22 EMPLOY. RTS. & EMP. POL'Y J. 321, 333-36 (2018) (describing some of the legal changes being made as a response to #MeToo including laws regarding non-disclosure agreements, both at the state and federal level, as well as attempts to address arbitration through proposed legislation); *see also* Tippett, *supra* note 230, at 249-58 (discussing legislative activity aimed at prohibiting non-disclosure agreements from being used to settle sexual harassment matters)]. For a comprehensive discussion of the concerns about arbitration in light of the #MeToo movement, *see* Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Toward Justice in Employment Law: Where To, #Me Too?*, 54 HARV. CIV. RTS.-CIV. LIB. L. REV. 155, 193-205 (2019).

234. *See* Dana Liebelson, *Powerful Men Who Lose Their Jobs Over Harassment Can Still Get Big Payouts*, HUFFPOST (Feb. 22, 2018), <https://www.huffpost.com/entry/powerful-men-who-lose-their-jobs-over-harassment-can-still-get-big-payouts_n_5a9035abe4b03b55731b9c6d> [<https://perma.cc/A6FH-ELFT>] (describing how many executives charged with harassment in high-profile cases received large severance payouts); *see also* Daisuke Wakabayashi & Kate Conger, *Google Workers Fume Over Executives' Payouts After Sexual Harassment Claims*, N.Y. TIMES (Oct. 26, 2018), <https://www.nytimes.com/2018/10/26/technology/sexual-harassment-google.html> [<https://perma.cc/VDS4-X849>] (discussing alleged large payouts to Google executives charged with misdeeds and fallout as Google employees protested these actions).

to help prohibit executive assertions of consent from their subordinates: 1) direct changes to company policies and executive agreement provisions and 2) legal revisions that create statutory prohibitions.

A. Corporate Change to Prohibit Consent to Executives via Workplace Harassment

An employer may benefit from voluntarily adopting changes to its disciplinary practices to conform to what may now be expected regarding harassment claims after #MeToo.[235] Some companies have already started looking at for-cause and claw-back provisions in executive compensation agreements as a form of restraining executive behavior.[236] Some states are starting to pass legislation banning non-disclosure clauses in sexual harassment cases.[237] Just the specter of potential legislation may inspire employers to make changes before they are required to do so as a matter of law. Specifically, as Tippett has suggested, employers may end up adopting changes such as eliminating secrecy requirements regarding sexual harassment matters previously contained in confidentiality and social media policies.[238] These changes will also likely apply to overall settlement agreements as well by removing any secrecy provisions.[239]

Tippett has also noted that companies have started to terminate executives for sexual harassment even if the company may have to pay out a large sum of money because the executive's agreement does not identify harassment misconduct as constituting cause for termination.[240] While

---

235. Tippett, *supra* note 230, at 272-74.

236. *See* Jena McGregor, *How #MeToo Is Reshaping Employment Contracts for Executives*, LA TIMES (Nov. 2, 2018), < https://www.latimes.com/business/la-fi-metoo-executive-contracts-20181102-story.html> [<https://perma.cc/877A-4W6N>] (describing efforts to provide executives with more training and to "button up" for cause language in executive agreements to reduce severance payouts and to create incentives to avoid sexual misconduct); John L. Utz, *#MeToo: Sexual Harassment and Executive Compensation*, PRAC. LAW., Feb. 2019, at 31 (describing adding sexual harassment as cause for termination and using a claw-back to provide for return of already paid compensation if an event involving sexual harassment by the executive is discovered); John L. Utz, *Addressing Workplace Misconduct with Exec Compensation*, LAW 360 (Nov. 5, 2018), <https://www.law360.com/employment/articles/1096712/> [<https://perma.cc/43PB-XSBK >]. Federal law may place some constraints on employers deciding to alter an executive's financial portfolio upon termination for cause by prohibiting changes to vested employee benefits even if the change is based upon the executive's misconduct. *Id.* (discussing vesting and protected employee benefits under federal law).

237. Tippett, *supra* note 230, at 249-58.

238. *Id.* at 259-62.

239. *Id.* at 262-69.

240. *Id.* at 278-79, 284-86 (discussing potential changes to employer policies and providing suggested changes that employers may want to adopt because of legal and other changes in dealing with workplace sexual harassment as a result of the #MeToo movement while also describing how "the ability to fire even an executive at a moment's notice" is possible but it may involve a payout of millions of dollars in severance and benefits if the termination is without just cause pursuant to the executive's agreement).

pursuing immediate termination does help to deal with executive misuse of power differentials, even if the executive may still receive a huge payout,[241] Tippett recommends further employer policy changes to affect executive behavior, including providing warnings that disciplinary decisions may be disclosed and establishing broader definitions for cause in executive contracts, such as making harassment and drops in stock price and company value resulting from an executive's harassment scandal termination offenses.[242]

Several merger agreements have also started to include a so-called Weinstein clause, protecting wary buyers from sexual harassment liability by requiring "disclosure of any 'allegations of sexual harassment' against officers, directors or employees who supervise at least eight other employees if it would result in a 'material adverse event.'"[243] The term "material adverse event" means "so bad that it would noticeably affect our profits."[244] As Tippett notes, "[t]he arrival of the Weinstein clause signals how important #MeToo has become – not just as a social movement but as a business risk."[245]

In this environment, where employers are already making policy changes to respond to #MeToo, this article proposes that employers protect themselves further by writing clauses into executive agreements that provide expressly that termination for cause includes romantic or sexual encounters with subordinates.[246] Employers should also add provisions that consent cannot be raised as a defense to a for-cause termination for sexual harassment. Any severance or golden parachute arrangements that typically pay off executives despite their misconduct would become null and void. The executive who pursues a romantic encounter with a subordinate operates at a risk that any complaint of sexual harassment based upon actual overtures will result in termination regardless of whether there was consent. This supports the general understanding that executives who pursue romantic encounters with subordinates send a broader negative message to the entire workplace that they wield power for their own personal gain and to the detriment of the businesses and industries they

241. *Id.* at 278-79

242. *Id*, at 279-87.

243. *See* Elizabeth C. Tippett, *#MeToo Movement Finds an Unlikely Champion in Wall Street with the New "Weinstein Clause,"* CONVERSATION (Aug. 3, 2018), <https://theconversation.com/metoo-movement-finds-an-unlikely-champion-in-wall-street-with-the-new-weinstein-clause-100938> [<https://perma.cc/75M3-6DKB>].

244. *Id.*

245. *Id.*

246. *See* McGregor, *supra* note 236 (describing employer actions to expand meaning of just cause for executive agreements in light of #MeToo).

play such a key role in running.

An executive with the power to negotiate non-disclosure, private arbitration, and just-cause agreements with an employer, should not be able to exit quietly with a major severance package or golden parachute in hand after being charged with sexual harassment.[247] Rather, this article recommends that someone at the executive level may never assert consent or a lack of an affirmative no by a subordinate as a defense when challenging a for-cause termination related to sexual harassment allegations.

What is the drawback of a policy prohibiting executive consent with a subordinate? Maybe the company is perceived as being a bit parental. The company could also be criticized for denying employees the opportunity to form healthy and prosperous relationships that do arise inevitably in the workplace along with the productivity allegedly gained. But any such drawbacks become overwhelmed by the concerns presented when executives are involved in those relationships. The biggest concerns become not only liability for the executive's acts of sexual harassment and retaliation but also the impact on the company's bottom line from the executive's misconduct.

Any concerns about being overly parental by not allowing romantic relationships with an executive tend to diminish when companies see the fallout from such behavior. The #MeToo movement has caused employers to think proactively about the impact of an executive's sexually-harassing misdeeds on the company's overall performance. Further, as Arnow-Richman highlighted recently, when the power differential is so substantial between the harasser and the person being harassed, the drawback is that liability becomes a question of not just whether a single act is harassment but whether the entire climate created by such an act establishes overall hostile-environment liability for an employer.[248]

Weinstein, Lauer, Smiley, Wynn, and many of the other men who have seen their fortunes dim in the light of the #MeToo movement, have asserted that their actions were always consensual. One of the most recent, and likely one of the most powerful, assertions of consent as a defense to allegations of misconduct came from former CBS CEO Les Moonves. An executive such as Moonves, who believes he can make overtures to vulnerable women subordinates in his industry and justify his behavior by

247. Tippett, *supra* note 230, at 285 (describing how Hewlett Packard former CEO Mark Hurd was terminated because of a harassment scandal and he received a severance package valued at $34.5 million dollars).

248. Arnow-Richman, *supra* note 35, at 90-91 (discussing allegations involving former federal judge Alex Kozinski).

claiming consent shows a lack of judgment in not realizing the consequences presented by such power differentials.

Even worse, this behavior sends a message to everyone in that industry that subordinates are fair game for powerful executives. Even if the subordinates reject these overtures, the executive predator has created an overall toxic environment by placing them in a defenseless position.[249] When someone has obtained enough power and gravitas in a particular industry or field to reach the executive level, approaching a subordinate about a romantic relationship has to be viewed as the exact kind of action that jeopardizes that company's financial standing. As the Moonves incident demonstrated, companies will suffer financially if their executives commit sexual misconduct.[250]

It is only right, at this time of heightened scrutiny, for companies to shift the financial hardships onto executives by precluding them from asserting a subordinate's consent as a defense in a disciplinary action resulting from an allegation of sexual misconduct. Although an executive's actions may not be criminal, a progressive company can justify its requirements by analogizing the power differentials to statutory rape where the underage individual can never consent as a matter of policy and law. By imposing a similar requirement on executives, that is, by rejecting the notion that a subordinate could ever consent with an executive, companies can send a stronger message to executives that they should pursue romantic and sexual relationships with any of the millions of individuals in our society who do not work in their own industry. This is the only change that will help executives see that their claimed benign and consensual overtures do have consequences.

This change is suggested only for those who have reached the executive level. This article is not suggesting prudish behavior toward all romantic relationships in the workplace. This does not advocate regulating the general activities of businesses such as Southwest Airlines, a company that encourages workplace romances, or seeking a general ban on any form of consensual relationships in the workplace.

Prohibiting defenses of subordinate consent merely adds to some of the pragmatic policies that companies such as Google and Facebook have

---

249. *See* Leong, *supra* note 5 (describing how others are negatively affected by a subordinate's relationship with the boss).

250. Covert, *supra* note 197; *see also* Biging & Zimmer, *supra* note 227 at 11 (describing challenges to corporate directors as a response to #MeToo and how stock prices and company value has gone down and lawsuits have been filed against Guess, Papa John's, Wynn Resorts, 21st Century Fox, CBS, Nike, National Beverage, Dartmouth, and Weinstein Company as they all lost money related to alleged executive misconduct).

already adopted to deal with the complexities of workplace romance in light of #MeToo.[251] This article goes a step further by insisting that companies tell their executives that even if there was an ambiguous (did not say "no") or positive response to a romantic overture, the executive may not assert the subordinate's consent to justify the executive's behavior. This prohibition on asserting a subordinate's consent would only become necessary when complaints about the executive's behavior create problems for the company warranting a termination of the executive for cause. Any positive and productive romantic relationships would never end up having to deal with the prohibition on asserting subordinate consent when there is never any complaint against the executive's behavior.

When one of the parties interested in engaging in a workplace romance is at the executive level of a corporate hierarchy suggesting overall power within an industry and the other party is not even remotely close to that level of responsibility, the power differentials are too insurmountable. In light of the power differentials and the public exposure via #MeToo, it is only prudent for employers to establish policies that encourage an executive to refuse to even take the risk of making an overture to see if there can be a consensual relationship with a subordinate. Despite the insurmountable power differentials, it is not impossible for a positive and productive relationship of the nature espoused by Southwest Airlines' policies to develop between a subordinate and an executive. Prohibiting consent does not stop such relationships from arising; rather, this action just highlights to the executive that he or she is engaging in risky activity without the aid of a consent defense if the encounters go badly. The executive who takes this action risks not only sending a message to the entire organization of the predatory acts that the executive has initiated, but the executive's behavior also helps to establish a link in the chain of acts developing major potential liability for the company and a resulting loss in stock value. Businesses now have a duty inspired by #MeToo to stop these executive actions before they happen. By prohibiting an executive from asserting that the subordinate consented as a key policy to address sexual harassment, employers can terminate executives immediately for cause without facing further public scrutiny and liability.

---

251. *See* Lebowitz, *supra* note 225 (describing Google and Facebook policies that limit employees to only one request for a date with a co-worker even after an ambiguous response).

B. Legal Change to Prohibit Consent With Executives in Workplace Harassment

Some might expect that the law would already address the problems presented in this #MeToo era posed by executive misconduct.[252] However, despite some recent legislative efforts sparked by the #MeToo movement, current laws do not provide strong protections from retaliation, as already discussed, and do not offer sufficient punishment when retaliation occurs.[253] As a result, there is little legal incentive to deter a top executive from retaliating against a subordinate who has rejected an executive's sexual advance. Employees faced with a romantic overture from an executive should not be placed in such a lose-lose situation. Rather, the employer and the executive should bear the harm for such actions. If retaliation analysis starts to change, employers will certainly have to deal with that form of liability because it is natural to want to retaliate and supervisors sometimes do not realize how broadly the scope of behavior protected from retaliatory actions may be.[254]

Tippett has recently explored a number of the potential legal changes arising as a result of the #MeToo movement with respect to an employer's scope and enforcement of its sexual harassment policies.[255] Some states are starting to pass legislation to ban non-disclosure clauses from being used in sexual harassment cases as another result from #MeToo.[256] Congress has also passed some limited legislation as a response to the #MeToo movement. In December 2018, President Trump signed a new tax bill into law creating a new Internal Revenue Code provision, Section 162(q), sometimes referred to as the "Harvey Weinstein" provision.[257] Section 162(q) prevents an employer from making a tax deduction for settlement or payment of sexual harassment or abuse claims and attorney's fees related thereto if the agreement to settle contains a confidentiality and non-

---

252. *See* Davis, *supra* note 74, at 1061 (acknowledging that the law is limited in dealing with sexual harassment but still asserting that it has a key role to play).

253. *See* Johnson, *supra* note 66 (but referring to some legislative attempts in response to #MeToo that have received some bipartisan support including a bill supported by Democratic senator Kirsten Gillibrand and Republican senator Lindsey Graham that would prohibit private arbitration of sexual harassment claims and allow sexual harassment claimants to file their claims in courts).

254. *See* Sara Jodka, *In the #MeToo Era, Why Retaliation is the Scariest Word for Employers*, (ALL THINGS HR) (Oct. 15, 2018), <http://hr.dickinson-wright.com/2018/10/15/in-the-metoo-era-why-retaliation-is-the-scariest-word-for-employers/>.

255. *See* Tippett, *supra* note 230, at 287-91.

256. *Id.* at 249-58.

257. *New Tax Law Prohibits Sexual Harassment Deductions*, BUSCA LAW FIRM ARTICLES (Jan. 2018), <http://mjbuscalaw.com/new-tax-law-prohibits-sexual-harassment-deductions/> [https://perma.cc/2FBH-T3AY>]

disclosure provision.[258]

But Congress and state legislatures have not passed any real significant legislation to address key issues of sexual harassment in the workplace by executives even though current law is disappointing.[259] There are no real indications that the #MeToo movement will lead to productive legislation aimed more directly at addressing sexual harassment and retaliation misconduct in the workplace when committed by executives asserting the subordinate's consent. The more likely option for seeking change will have to come from companies believing their bottom lines require this response, as discussed in the prior section. Taking the actual step of creating a statutory ban on subordinate consent with an executive in a sexual harassment matter is an even more unlikely legislative change with the current Congress. It is also unlikely that the current President would sign any legislation making it more difficult or an outright statutory prohibition for an executive to assert the subordinate's consent in response to a sexual harassment claim.

Nevertheless, it is useful to consider possible statutory changes. The law of employment discrimination harassment under Title VII should be changed to make it clear that an employer may not assert the *Faragher-Ellerth* affirmative defense to executive misconduct and to allow single-incident harassment opposition as a viable retaliation claim. Changes should also prohibit the assertion of consent or lack of saying no as an executive's defense to a subordinate's claim. Essentially, what was referred to as unwelcome behavior under the *Meritor* decision would include any overture made by an executive to a subordinate as a matter of law. While doubtful that the current Congress will amend Title VII to prohibit consent between an executive and a subordinate, this proposal could be considered by a future session of Congress especially if the #MeToo movement continues to expose recalcitrant employers as unable to rein in their top level executives.

The legislation would be modeled after statutory rape laws and their approach to consent. Prohibiting consent from being asserted by an executive as a viable explanation to engage in a romantic relationship with a subordinate does have some similarity with how statutory rape laws make the assertion of consent impossible when having sexual relations with someone at a designated age or younger. In some aspects, statutory rape

---

258. *Id.*

259. *See* Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J. F. 152, 153 (2018) (arguing that the law involving sexual harassment "constrains permissible narratives on both sides").

laws recognize that there is a tremendous imbalance of power.[260] Statutory rape consent laws have developed as part of two interrelated policy goals: "(1) to prevent underage girls from consenting to sex in an uninformed manner, thereby exposing themselves to physical and emotional harm; and (2) to deter men from preying on young females and coercing them into sexual relationships."[261] In comparing statutory rape consent law with the law concerning harassment as it would apply to adolescents in the workplace, Jennifer Drobac argued that the legal analysis should not tolerate consent as a defense in that situation.[262] Drobac recognized that prohibition of consent in sexual activity in dealing with all adolescents in the workplace as a standard presumed the overall "undesirability of consensual adolescent sexual conduct in the workplace."[263] However, Drobac also asserted that such a result seemed reasonable in preventing predators from thinking it was okay to have sexual relationships with adolescents through the working environment.

In advocating a similar approach by not recognizing assertions of consensual sexual behavior with a subordinate by an executive, this article likewise presumes the undesirability of sexual conduct (at least from an employer's perspective as a matter of policy) between a subordinate and an executive that has the power disparity to destroy the subordinate's career. And that result also seems reasonable to prevent executive predators from using their power to prey upon vulnerable subordinates. Moreover, given how co-workers may also be harmed by even consensual workplace relationships between an executive and a subordinate,[264] it is imperative that the law address these workplace romance dynamics in our #MeToo era. Precluding the consent defense as a matter of workplace law recognizes the strong policy need to prevent subordinates from exposing themselves to physical or emotional harm as well as deterring top level executives from preying on vulnerable subordinates and creating an overall toxic environment for all employees.

---

260. *See* Jennifer Ann Drobac, *Sex and the Workplace: "Consenting" Adolescents and Conflict of Laws*, 79 WASH. L. REV. 471, 499 (2004) (suggesting that "coercion and power disparities in sexual relationships involving minors" is a major reason why statutory rape laws exist).

261. Britton Guerrina, Comment, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1259-60 (1998).

262. Drobac, *supra* note 260, at 504.

263. *Id.* at 505.

264. *See* Leong, *supra* note 5 (discussing how third parties are harmed by relationships with subordinates and bosses); *see also* John A. Pearce II & Ilya A. Lipin, *Mitigating the Employer's Exposure to Third Party Claims of a Hostile Work Environment*, 26 HASTINGS WOMEN'S L.J. 319, 332-44 (2015) (describing either a paramour favoritism or third-party harassment theory as justification for claims by co-workers when a supervisor has a romantic relationship with another worker).

VI. CONCLUSION: #METOO AND A CLARIFYING SOLUTION OF EXECUTIVE NON-CONSENT

Concerns about power differentials suggest that subordinates face a dreadful choice when an executive makes romantic overtures. The subordinate must recognize that rejecting an advance can affect his or her livelihood in the entire industry. In the Weinstein matter, many of the women talked about fears of being blackballed given Weinstein's power to affect careers in his industry. In cases like Weinstein's, the executive has placed the subordinate in a helpless position that affects the terms and conditions of employment through an action, a romantic or sexual overture, that has absolutely nothing to do with performance of work duties. While it may be that a response of "no means no" in terms of the romantic or sexual encounter, the subordinate can never be certain that a no does not also mean tremendously adverse career consequences.

Unfortunately, as other incidents involving Moonves, Smiley, Lauer, Wynn, and others demonstrate, a subordinate who wants to reject any romantic or sexual overture from an executive with the power to affect that subordinate's career will have no realistic positive option. She could choose to acquiesce and have a romantic relationship with the executive. Maybe the subordinate would be open to or even welcome the relationship with the executive. As Smiley argued, many successful and positive relationships have developed through those individuals meeting in the workplace. Southwest Airlines' policy of valuing workplace romances and encouraging employees to develop relationships has resulted in a number of successful marriages. Those Southwest Airlines relationships do not appear to have suffered from the type of power differentials that can affect romantic or workplace relationships.[265]

In contrast to the experience at Southwest, when the romance is between a subordinate and an executive with the power to affect that subordinate's lifelong career, there is a certain stigma that comes with that relationship. Other employees and co-workers may not feel that the subordinate has gained success through performance or merit, but rather through a relationship with the executive.[266] Co-workers in these environments can also feel uncomfortable and limited in their interactions with the subordinate as the effect or appearance can be that it also involves interacting with the executive who has the power to affect the co-worker's

---

265. *See* Office Romance, *supra* note 110 (describing a CBS news story noting that in its encouragement of workplace romances, Southwest Airlines does have a "ban on supervisors dating subordinates"); Pearce & Lipin, *supra* note 264, at 337-43.

266. *See* Gallo, *supra* note 115.

terms and conditions of employment.[267] An employee can choose to weigh the risks and the rewards and still accept the overture with the executive as a benefit outweighing the risks. But as an overall corporate consequence, this does not appear to be the greatest way to develop human resources.

Human resource expert Chris Edmonds explained, in reference to the case of Matt Lauer, "[W]orkplace affairs are always a liability, especially so when they occur between a person of power and a subordinate."[268] Because of the catch-22 a subordinate faces when having to respond to an executive's romantic overtures, employers should consider such overtures as warranting immediate cause for termination. While this may suggest a harsh result, the reality is that this situation is created by the executive's own behavior and the need to protect corporate value and prevent liability. Instead of legal changes, a real benefit of the #MeToo movement is that it has resulted in some systematic changes without the need for legislation to put major pressure on employers. Thus, this article calls for corporate as well as legal change aimed at rejecting notions of romantic consent when used by powerful executives to prey upon their subordinates.

But as discussed throughout, the best approach for employers is to require by contract that an executive may not assert consent from the subordinate as a defense to a for-cause termination. As the saying goes, with great power comes great responsibility.[269] Executives should be able to lead their organizations without seeking romantic encounters with their subordinates. By removing the possibility of consent as a defense against for cause termination as a policy and contractual matter, corporate employers will have achieved another positive result from the #MeToo movement. If the law also changes to adopt this approach of not allowing an executive to justify behavior by asserting a subordinate's consent, the #MeToo result will have an even greater impact.

---

267. *Id.*

268. Strohm & Stone, *supra* note 44.

269. *See e.g.*, Withrow v. Williams, 507 U.S. 680, 716 (1993); Stan Lee, David Koepp, SPIDER-MAN (2002); Stan Lee (writer), Steve Ditko (artist), AMAZING FANTASY NO. 15 (Aug. 1962); SPIDER-MAN (Columbia Pictures 2002).