

## NOTES

### THE GOOD, THE BAD, AND THE EVILS OF THE #METOO MOVEMENT'S SEXUAL HARASSMENT ALLEGATIONS IN TODAY'S SOCIETY: A CAUTIONARY TALE REGARDING THE COST OF THESE CLAIMS TO THE VICTIMS, THE ACCUSED, AND BEYOND

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## INTRODUCTION

It was supposed to be a breakfast business meeting, but she got her boss in a bathrobe.<sup>1</sup> He asked her to massage him or watch him shower.<sup>2</sup> He is a powerful man, and she knew that he could help her career.<sup>3</sup> She was not the only one placed under these circumstances; eighty-seven women accused this man of sexual harassment.<sup>4</sup> This scenario is far too familiar for so many women. Over the last twenty years, approximately 18 million women have reported sexual assault in the United States.<sup>5</sup> Keep in mind there is a significant amount of unreported sexual harassment claims. In October 2017, women began breaking their silence, and allegations of sexual harassment began sweeping industries, a nation, and the international community.

The first worldwide #MeToo sexual harassment allegations targeted Harvey Weinstein, a Hollywood producer worth over 250 million dollars.<sup>6</sup> Then, over one hundred high-profile men were publicly accused of sexual harassment.<sup>7</sup> Following these allegations, Weinstein and other men who were similarly accused were given two

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1. 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>.

2. *Id.*

3. *Id.*

4. See Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (June 1, 2018, 4:15 PM), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/>.

5. ME TOO., MeTooMvmt.org (last visited Feb. 26, 2018).

6. There is a growing list of high-profile men accused of sexual harassment with the accusations, results, and responses by the accused. See Sarah Almkhitar, Michael Gold, & Larry Buchanan, *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>.

7. *Id.*

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options: resign or be fired; apologies and admissions were not enough.<sup>8</sup> Weinstein was fired from his own company.<sup>9</sup> In 2016, Weinstein stated his company was worth 500 to 900 million dollars, however after months of sexual harassment accusations against Weinstein, the company failed to sell for 500 million dollars.<sup>10</sup> After initially failing to sell the company, it filed for bankruptcy.<sup>11</sup> However, the Weinstein Company's assets were eventually sold for 310 million dollars—much lower than Weinstein's valuation and the prior bid.<sup>12</sup> The company could not continue doing business after failing to divorce itself from Weinstein's sexual harassment allegations and his tarnished reputation—even after the company fired him.<sup>13</sup>

The Weinstein Company could not separate itself from the scandalous reputation of one of its founders.<sup>14</sup> These sexual harassment claims not only ended a man's career, they nearly ended a multimillion-dollar company. Ending this multimillion-dollar company would have involved terminating 150 employees, harming creditors and other

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8. Sheryl Gay Stolberg, Yamiche Alcindor & Nicholas Fandos, *Al Franken to Resign From Senate Amid Harassment Allegations*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/us/politics/al-franken-senate-sexual-harassment.html>.

9. Almkhtar et al., *supra* note 6.

10. Hoai-Tran Bui, *\$500 Million Deal to Acquire the Weinstein Company Falls Through [Updated]*, SLASH FILM (Mar. 6, 2018), <https://www.slashfilm.com/the-weinstein-company-sold/>.

11. Hoai-Tran Bui, *The Weinstein Company Files for Bankruptcy as Sale Talks Fail*, SLASH FILM (Feb. 26, 2018), <https://www.slashfilm.com/the-weinstein-company-bankruptcy/>.

12. Chris Isidore, *Remains of the Weinstein Company sold to the only real bidder*, CNN (May 2, 2018, 11:32AM), <https://money.cnn.com/2018/05/02/media/weinstein-company-bidder/index.html>.

13. See Brian Stelter & Charles Riley, *Weinstein Company says it will file for bankruptcy*, CNN (Feb. 26, 2018, 5:59PM), <http://money.cnn.com/2018/02/26/media/weinstein-company-bankruptcy/index.html>; see also *Weinstein Co. expected to file bankruptcy after talks fail*, ASSOCIATED PRESS NEWS (Feb. 26, 2018), <https://www.apnews.com/e2548e2fef194edaa0bdae5746924398/Weinstein-Co.-expected-to-file-bankruptcy-after-talks-fail>.

14. See Jessica DiNapoli & Karen Freifeld, *The Weinstein Company says it will file for Bankruptcy*, REUTERS (Feb. 25, 2018, 11:27 PM), <https://www.reuters.com/article/us-people-harvey-weinstein/the-weinstein-company-says-it-will-file-for-bankruptcy-idUSKCN1GA0LH>.

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people who are unrelated to the sexual harassment claims.<sup>15</sup> After nearly six months of allegations, the company reduced its staff to eighty-five full-time employees and twelve independent contractors—staff whose jobs were still at risk from the allegations against Weinstein.<sup>16</sup> Additionally, there is a debate as to whether the women accusing Weinstein for sexual harassment would be drastically less compensated if the company declared bankruptcy.<sup>17</sup>

In Delaware, the court is in the process of determining the best solution to keep the Weinstein Company, a Delaware corporation, operating to protect its employees and creditors.<sup>18</sup> The court is not doing this to protect Harvey Weinstein.<sup>19</sup> The Weinstein Company's attorney assured the court that a bankruptcy process would not "affect anyone's ability to pursue civil or criminal claims against Harvey Weinstein in his individual capacity . . . ."<sup>20</sup>

In 2017, alleged victims of sexual harassment claims are using the media, especially social media, to convey that they were sexually harassed—by naming their accusers. Immediately, society began acting as a judge, eager to sentence the guilty. Society adopted a sentencing mentality, without considering any evidence or listening to any defense. Even if an accused is found not guilty by the legal system, the accused's name has already been tarnished. The accused has to carry the weight of that accusation for the rest of his or her life.

This note attempts to caution society's use of the #MeToo movement as a replacement for the legal system by examining the movement's consequences. The introduction sheds light on the recent stories of sexual harassment victims and the accused who continue to

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15. See Joseph Woelfel, *Warren Buffett, Samsung Galaxy S9 and Weinstein Company – 5 Things You Must Know*, STREET (Feb. 26, 2018, 7:56 AM), <https://www.thestreet.com/story/14494920/1/5-things-you-must-know-before-the-market-opens-monday.html>; see also Brooks Barnes, *Weinstein Co. Will File for Bankruptcy After Deal Talks Collapse*, N.Y. TIMES (Feb. 26, 2018), <https://www.nytimes.com/2018/02/26/business/weinstein-bankruptcy-deal.html>.

16. See Randall Chase, *Judge grants initial motions in Weinstein Co. bankruptcy*, ASSOCIATED PRESS (Mar. 20, 2018), <https://www.apnews.com/a57c0334284c4536bbf3120817551765>.

17. DiNapoli & Freifeld, *supra* note 14.

18. Chase, *supra* note 16.

19. *Id.*

20. *Id.*

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deny these claims. *Part I* defines the #MeToo movement, explains its background and rise in media attention. *Part II* discusses the several consequences to the victims, the accused, and unrelated third parties to the claims. *Part III* aims to demonstrate the advantages for both parties to pursue claims through the legal system—rather than the media—to achieve fair and accurate outcomes. In addition, this section also suggests that the United States should follow in France's footsteps by having law enforcement immediately fine individuals for sexual harassment. This note concludes that the judicial system, the nation, and the international community should be cautioned of the immediate consequences sexual harassment claims can cause all parties, including unrelated third parties.

## I. BACKGROUND

### A. What Is the #MeToo Movement?

“In 2006, Tarana Burke founded The ‘me too’ Movement . . . to ensure survivors [of sexual harassment] know they’re not alone in their journey.”<sup>21</sup> Eleven years later, the #MeToo movement gained worldwide attention when allegations against Harvey Weinstein surfaced.<sup>22</sup> Although Burke intended to specifically help “young women of color from low wealth communities,”<sup>23</sup> the movement helps all survivors of sexual harassment regardless of gender, sex, age, income status, and fame.<sup>24</sup> Together, survivors seek an outlet for their sexual harassment experiences and empower each other by posting on social media to fight against the men who sexually harassed them.<sup>25</sup> The survivors’ power is emboldened as more victims come forward and face their harassers.

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21. ME TOO., *supra* note 5; Gillian B. White, *The Glaring Blind Spot of the ‘Me Too’ Movement*, ATLANTIC (Nov. 22, 2017), <https://www.theatlantic.com/entertainment/archive/2017/11/the-glaring-blind-spot-of-the-me-too-movement/546458/>.

22. ME TOO., *supra* note 5.

23. *Id.*

24. *See id.*

25. Drs. Hadar Dancig-Rosenberg & Anat Peleg, *Post and Trauma: The Use of Social Media by Sexual Assault Victims*, BERKELEY SCH. INFO. (Feb. 15, 2017), <https://www.ischool.berkeley.edu/events/2017/post-and-trauma-use-social-media-sexual-assault-victims>.

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Women around the world broke their silence, and the tag “#MeToo” spread in several languages including French, Spanish, Mandarin, and Arabic.<sup>26</sup> In 2017, the “Silence Breakers” were named Time Magazine’s Person of the Year.<sup>27</sup>

*B. Historically, Why It Took #MeToo for People to Listen*

For decades, sexual harassment survivors remained silent about the harassment because of a fear of severe consequences. Survivors of sexual harassment have a long list of reasons for not coming forward with their claims. Some survivors fear retaliation, not being taken seriously, or suffering financial repercussions—such as being drowned in legal fees for a civil claim or losing one’s job.<sup>28</sup> Other sexual harassment survivors refuse to label their encounters as “sexual harassment” because it has a negative connotation suggesting they are victims and therefore weak.<sup>29</sup>

Besides the repercussions stated above, these claims are often difficult to prove. Further, non-disclosure agreements can cause these claims to disappear. A non-disclosure agreement is “a contract between the holder of confidential information and another person to whom that information is disclosed, prohibiting that other person from disclosing the confidential information to any other party.”<sup>30</sup> Generally, an

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26. Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *The Silence Breakers*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/>. The “#MeToo” online hashtag was modified to other languages including French, Spanish, and Arabic, “#BalanceTonPorc, #YoTambien, #Ana\_kaman and many others.”

27. *Id.*

28. Hannah Brenner, *Opinion: DeVos’ New Guidelines on Handling Campus Sexual Assault Raise Risk of Another MSU*, DET. FREE PRESS (Jan. 26, 2018, 12:40 PM), <https://www.freep.com/story/opinion/contributors/2018/01/26/msu-title-9/1065913001/> (discussing some reasons why victims of sexual harassment do not come forward).

29. Kristina Udice, *It’s Not Just Harvey Weinstein: Why Sexual Harassment In The Workplace Goes Unreported*, FAIRYGODBOSS (2018), <https://fairygodboss.com/career-topics/sexual-harassment-in-the-workplace> (last visited Oct. 8, 2018) (explaining five reasons why sexual harassment survivors do not come forward with their claims).

30. *Non-disclosure Agreement*, DUHAIME’S L. DICTIONARY, <http://www.duhaime.org/LegalDictionary/N/NondisclosureAgreement.aspx> (last visited Feb. 8, 2018).

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accused would settle with the accuser (alleged victim) for some amount of money to keep the accuser from discussing the allegations through any form of communication. This means alleged sexual harassment survivors are prohibited from ever sharing their story of sexual harassment and are subject to liability if they do share their story—without penalty for the accused.<sup>31</sup> Preventing sexual harassment survivors from sharing their story harms the public; specifically, other potential victims will not know that the accused may have previously committed sexual harassment. Then, the accused sexually harasses another person, and the story repeats itself because sexual harassers are generally repeat offenders.<sup>32</sup> However, no one ever finds out because the survivor cannot talk about it, unless she breaches the non-disclosure agreement and pays an agreed upon amount.

Non-disclosure agreements are often favored by both the accuser and accused, because it conceals their identities from the public. In the early 2000s, the Catholic Church was under scrutiny for silencing sexual abuse victims by settling and forcing them into non-disclosure agreements.<sup>33</sup> For example, in 1997, “the Roman Catholic Diocese of Albany paid a confidential settlement of nearly one million dollars” to a young boy who was sexually harassed by a priest.<sup>34</sup> Because the settlement was under one million dollars, the Church’s finance council did not need to approve the settlement.<sup>35</sup> Further, the settlement agreement conveyed that “if the confidentiality is broken the victim or his lawyer or family members would be required to return \$400,000 to

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31. Rachel La Corte, *Washington governor signs package of bills sparked by #MeToo*, ASSOCIATED PRESS (Mar. 21, 2018), <https://www.apnews.com/29d9936a0e85461d8318d319f44ed752/Washington-governor-signs-package-of-bills-sparked-by-MeToo>.

32. See Maria LaMagna, *Why sexual harassers keep offending*, MARKETWATCH (Dec. 28, 2017, 10:01 AM), <https://www.marketwatch.com/story/one-major-reason-why-sexual-harassers-can-continue-2017-10-21>.

33. Ryan M. Philp, Comment, *Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 SETON HALL L. REV. 845, 845 (2003).

34. See Laurie Goodstein, *Albany Diocese Settled Abuse Case for Almost \$1 Million*, N.Y. TIMES (June 27, 2002), <https://www.nytimes.com/2002/06/27/nyregion/albany-diocese-settled-abuse-case-for-almost-1-million.html>.

35. *Id.*

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the diocese” as a penalty.<sup>36</sup> The victim in the above case, who wanted to remain anonymous, told his lawyer to ask for a multimillion-dollar settlement, but never filed a lawsuit.<sup>37</sup>

Victims favor these confidential agreements because they remain anonymous. Each victim is forced to live with the highly sensitive and serious crimes inflicted against them for the rest of their lives. The Church also favored these settlements because the sexual harassment allegations would remain hidden from parishioners and the public. However, these settlements allowed church officials who sexually harassed victims to repeat sexual offenses over and over again.<sup>38</sup>

If a church official was caught, he would be sent to a rehabilitation program, and then sent back to his previous duties—“cured” of his sexual misbehavior.<sup>39</sup> Many times the church official would merely be moved to another diocese where he was not recognized for his sexual misconduct. Then, that “cured” church official would repeat his sexual abuse, undeterred by the light repercussions. The media highlighted more and more of the Church’s sexual abuse scandal, and how it continued to do everything in its power to hide the scandal from the public. Finally, the Church decided to enact a policy prohibiting confidential settlements when eighty-six victims accused Father John J. Geoghan of sexual harassment.<sup>40</sup> Catholic parishioners demanded accountability after they became aware of the millions of dollars the Church spent buying sexual harassment victims’ silence.<sup>41</sup>

Like the sexual abuse scandal of the Catholic Church,<sup>42</sup> sexual harassment claims legally disappear because the parties agree to non-disclosure agreements. However, when the media highlights the current deluge of sexual harassment accusations—and much like the Catholic Church scandal—public pays attention.<sup>43</sup> For example, during the Catholic Church scandal, the public demanded accountability, just

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36. *Id.*

37. *Id.*

38. *See id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Philp, *supra* note 33, at 845-46.

43. *Id.*



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as the public today demands accountability for sexual harassment claims as part of the #MeToo movement.<sup>44</sup>

Who could afford to keep paying millions of dollars by settling these sexual harassment claims? Rich and powerful individuals, taxpayers, and parishioners pay these settlements. Surprisingly, when Congressional employees accuse government officials of sexual harassment, and they settle those claims, the “taxpayers are footing the bill.”<sup>45</sup> In 1995, the Congressional Accountability Act created a special fund to pay the “victim.”<sup>46</sup> Over the last twenty years, this special fund paid out 17 million dollars to victims of sexual harassment, discrimination, and other abuses, totaling 268 settlements.<sup>47</sup> The specific amount paid for sexual harassment settlements is hidden within the total 17 million dollars, and does not include those that do not follow through with their claims.<sup>48</sup>

Further, those who agree to settle are often agreeing to maintain their silence. The National Women’s Law Center’s legal director, Sunu Chandy, explains that, for victims of sexual harassment, non-disclosure agreements “can often keep women from connecting with others like them who are victims of the same person or company. ‘It’s swept under the rug, and they can’t find each other.’”<sup>49</sup> Consequently, the repeat offenders “continue on their career path unfettered by their deeds.”<sup>50</sup>

Before the #MeToo movement surfaced, many publicly accused individuals avoided losing their careers due to allegations of sexual misconduct.<sup>51</sup> For example, in 2007, former NBA player Isaiah Thomas kept his position as president of basketball operations after being

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44. *Id.*

45. MJ Lee, Sunlen Serfaty, & Juana Summers, *Congress paid out \$17 million in settlements. Here’s why we know so little about that money*, CNN (Nov. 16, 2017, 8:10 PM), <https://www.cnn.com/2017/11/16/politics/settlements-congress-sexual-harassment/index.html>. See discussion *infra* Section II.C.2.

46. *Id.*

47. *Id.*

48. *Id.*

49. Nathan Bomey & Marco della Cava, *Sexual harassment went unchecked for decades as payouts silenced accusers*, USA TODAY (Dec. 1, 2017, 10:17 PM), <https://www.usatoday.com/story/money/business/2017/12/01/sexual-harassment-went-unchecked-decades-payouts-silenced-accusers/881070001/>.

50. *Id.*

51. *Id.*

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publicly accused of sexual harassment and after a jury found that he aided and abetted a hostile workplace.<sup>52</sup> Similarly, Hewlett-Packard CEO Mark Hurd resigned in 2010 after sexual harassment allegations,<sup>53</sup> but was hired to be Oracle's CEO one month later. In both of these instances, the accused men continued their professional careers while facing sexual harassment allegations.

While men before the #MeToo movement usually did not lose their careers, a study shows sexual harassment victims often lose or quit their jobs and start new careers.<sup>54</sup> These victims left their work environments because they felt powerless to change them.<sup>55</sup> Some women started more isolated careers to avoid experiencing more sexual harassment in the workplace.<sup>56</sup> Many victims fear speaking out because of these consequences, including the possibility of losing their jobs and being unable to provide for their families. Other victims have accepted sexual harassment as a reality of our society. Indeed, some victims are unaware what happened to them is defined as sexual harassment because there is no clear definition. Further, we are constantly exposed to sexual harassment as it is heavily intertwined in our daily lives through movies, music, media, video games, books, and more.

Today, it is more difficult to categorize what actions are right and wrong when it comes to socially accepted behaviors that may make another person feel uncomfortable. Consent is the key to whether a behavior is classified as sexual harassment. However, depending on a harasser's position of power over their victim, consent might not be valid because of the power dynamic.

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52. *Id.*

53. *Id.*

54. Lizzie O'Leary & Peter Balonon-Rosen, *How women pay an economic price after sexual harassment*, MARKETPLACE (Nov. 3, 2017, 1:55 PM), <https://www.marketplace.org/2017/11/03/business/how-women-pay-economic-price-after-sexual-harassment>.

55. *Id.*

56. *Id.*

### *C. How the #MeToo Movement Gained Popularity*

The #MeToo movement “accomplish[ed] what sexual harassment law to date has not.”<sup>57</sup> To be taken seriously, more women needed to testify they were sexually harassed in order “to make a dent” in the same man’s denial of the allegations.<sup>58</sup> Thus, a woman’s testimony was significantly unequal to a man’s word.<sup>59</sup> Then, “even when she is believed . . . [h]is value outweighed her sexualized worthiness . . . . It meant she didn’t matter.”<sup>60</sup> The #MeToo movement allowed women who were sexually harassed to feel heard, when the legal system did not listen or allow them such voice. People are beginning to believe sexual harassment victims, and those victims matter.

In the recent case against Lawrence “Larry” Nassar, the court showed it would take sexual harassment victims more seriously.<sup>61</sup> Nassar, the former American gymnastics and Michigan State University medical doctor, molested more than 160 women—as young as six years old. Judge Rosemarie Aquilina, who sentenced Nassar, allowed and supported over 150 victims to make statements against Nassar at his sentencing hearing.<sup>62</sup> The court took this unique approach, and Judge Aquilina even expressed her own personal comments on the case.<sup>63</sup> This case was a powerful example of how the courts’ approach to sexual harassment cases is shifting. Judge Aquilina “acted as both judge and therapist, offering empathy, comfort and advice to each individual.”<sup>64</sup> Judge Aquilina stated,

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57. 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>.

58. *Id.*

59. *Id.*

60. *Id.*

61. *See, e.g.*, Carla Correa, *The #MeToo Moment: For U.S. Gymnasts, Why Did Justice Take So Long?*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/us/the-metoo-moment-for-us-gymnasts-olympics-nassar-justice.html>; *see also* Eric Levenson & Ellie Kaufman, *She’s the judge these Larry Nassar victims needed*, CNN (Jan. 18, 2018, 11:46 AM), <https://www.cnn.com/2018/01/17/us/larry-nassar-judge-sentencing/index.html>.

62. Correa, *supra* note 61.

63. Levenson & Kaufman, *supra* note 61.

64. *Id.*

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Our Constitution does not allow for cruel and unusual punishment . . . . If it did, I have to say, I might allow what he did to all of these beautiful souls—these young women in their childhood—I would allow someone or many people to do to him what he did to others.<sup>65</sup>

Olympian Aly Raisman, a victim of Nassar, was reluctant to speak out against Nassar at his sentencing, yet she spoke out after the #MeToo movement enabled her to have a voice and the power to overcome the trauma Nassar inflicted upon her. Raisman was named the “#MeToo hero that American sports needed.”<sup>66</sup> Another victim and Olympian, McKayla Maroney, signed a confidential non-disclosure agreement with USA Gymnastics, prohibiting her from speaking about her sexual abuse allegations against Nassar.<sup>67</sup> Although USA Gymnastics paid Maroney 1.25 million dollars, this confidential non-disclosure agreement would fine Maroney one hundred thousand dollars if she publicly spoke out about the alleged abuse.<sup>68</sup> After celebrities were outraged about the potential fine Maroney faced if she spoke out, many offered to pay the penalty on her behalf.<sup>69</sup> In response, USA Gymnastics released a statement that it would “not seek any money” from Maroney.<sup>70</sup> Further, USA Gymnastics encouraged all victims to speak out on sexual abuse.<sup>71</sup> Indeed, Maroney’s attorney stated “USA Gymnastics finally acknowledge[d] that the gag order they forced on Ms. Maroney and her attorney was unenforceable.”<sup>72</sup> However, similar to the Catholic Church scandal discussed earlier, USA Gymnastics likely released this statement because of the public outrage against it.

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65. *Id.*

66. Nick Fouriezos, *Aly Raisman is the #MeToo Hero that American Sports Needed*, OZY (Jan. 26, 2018), <https://www.ozy.com/need-to-know/aly-raisman-is-the-metoo-hero-that-american-sports-needed/83485>.

67. Alice Park, *McKayla Maroney Won’t Be Fined for Speaking Out About Sexual Abuse, USA Gymnastics Says*, TIME (Jan. 17, 2018), <http://time.com/5106664/mckayla-maroney-no-fine-usa-gymnastics/>.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

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Overall, organizations and communities continually cover up sexual harassment claims through settlements, confidential non-disclosure agreements, and other tactics to keep their names and crimes out of the media and the public eye. Keeping these claims out of the public eye only leads to repeat behavior, drastically increasing sexual harassment since repeat offenders avoid punishment and continue to hold positions near those they sexually harassed. People tend to question where each victim's parents were, but in Nassar's case, many sexual acts were done in the victims' parents' presence as he used his medical profession to "treat" their daughters.<sup>73</sup> USA Gymnastics shamed Nassar's victims into believing his behavior was normal. The organization made them afraid that their dreams of being an Olympian would end if they spoke out against Nassar. However, because of the #MeToo movement, society—and specifically the courts—are taking sexual harassment claims more seriously, opening the courtroom doors and welcoming victims like Raisman and Maroney to speak.

## II. CONSEQUENCES WITHOUT LIMITS

### A. *The Victims*

Unlike the #MeToo movement utilized on social media, the legal system permits sexual harassment victims to receive non-economic and economic damages for sexual harassment claims.<sup>74</sup> Indeed, those damages are awarded through protected methods. For example, a judge or jury determines damages. Judges and juries are presumed to be reasonable when determining a correct and fair outcome. Although a jury could award 13 million dollars in damages for a sexual harassment claim, there is at least some "reasonable" limiting power.<sup>75</sup> Judges and juries are expected to act reasonably when assessing and awarding damages. In sexual harassment cases, a jury has the power to determine the amount of damages for the victim, and a judge has authority to step in to decrease or increase the damages awarded. As one jury advisor points out, "people who are brain damaged don't get that [amount of

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73. See generally *id.*

74. Nicolas Sonnenburg, *Defending Sex Bias Claims in the #MeToo Era*, L.A. DAILY J., Feb. 21, 2018, at 1.

75. See, e.g., *id.*

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damages].”<sup>76</sup> Therefore, sexual harassment victims are awarded a significant amount of damages through the legal system.

However, when a victim of sexual harassment voices that he or she is a victim through the media, his or her identity is revealed to the public and is subject and vulnerable to the public’s criticism.<sup>77</sup> The public will investigate and scrutinize both the accuser and accused’s life without limit.<sup>78</sup> There is no protection of the accuser’s identity as the legal system ordinarily provides. Overall, the legal system offers more protection for sexual harassment victims than the #MeToo movement.<sup>79</sup>

### B. The Accused

There is a common misconception that men are the only targets of sexual harassment claims. However, women are also accused of sexual harassment.<sup>80</sup> Four men recently accused California Assemblywoman, Cristina Garcia, of sexual harassment by formal complaint. Ironically, Garcia has placed herself at the forefront of the #MeToo movement.<sup>81</sup>

76. Sonnenburg, *supra* note 74, at 4.

77. See, e.g., 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>.

78. See, e.g., *id.*

79. See FED. R. EVID. 412-415. The Federal Rules of Evidence provide special exceptions that protect victims in cases of sexual misconduct. For example, one rule protects victims by preventing certain types of evidence being presented in their case—specifically, evidence that calls the victim’s sexual history or behavior into question. These rules recognize that, in criminal cases, the parties may attempt to turn the attention to the victim. The rules are in place to prevent this from happening, while also ensuring the Constitutional rights of defendants are not violated. For example, Federal Rule of Evidence 412 protects sexual harassment victims by prohibiting “(1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim’s sexual predisposition.”

80. See, e.g., *California Assemblywoman Cristina Garcia denies groping accusations*, CBS NEWS (Feb. 20, 2018, 11:44 AM), <https://www.cbsnews.com/news/cristina-garcia-california-assemblywoman-denies-sexual-misconduct-accusations/>.

81. Melanie Mason, *Assemblywoman at forefront of #MeToo movement accused of sexual misconduct*, L.A. TIMES (Feb. 8, 2018, 4:28 PM), <https://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-female-lawmaker-who-has-been-outspoken-1518133766-htmistory.html>; Phil McCausland, *#MeToo Advocate and California Lawmaker Accused of Sexual Misconduct*, NBC NEWS (Feb. 9, 2018, 12:07 PM),

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Garcia has repeatedly demanded that those accused of sexual harassment to resign, yet she has not resigned nor is she planning to resign.<sup>82</sup> Garcia continues to deny the sexual harassment allegations against her, and is on unpaid leave until the investigation ends.<sup>83</sup> Her case, like that of other public figures accused of sexual harassment, raises the important question: what can and should the accused do when condemned publicly?

The accused could sue for defamation or try to plead his or her case to the public. However, there are serious drawbacks to pursuing a defamation action. First, a defamation suit brought by the accused consumes a significant amount of money and time. Moreover, defamation suits are incredibly difficult to win; the suits generally end in settlement and are swept under the rug. Parties typically sign non-disclosure agreements prohibiting them from discussing the dispute and the existence of the non-disclosure agreement itself. And frequently, the relief from a successful defamation suit may not be satisfactory. Often, the permanent damage has already been inflicted: a reputation can be forever tainted, a company can be irreparably harmed, and employees can lose their livelihoods.

Georgia Tech coach Josh Pastner is another individual accused of sexual harassment that occurred in 2016.<sup>84</sup> In response, Pastner filed a defamation and an attempted extortion lawsuit two years later against his accuser, Jennifer Pendley.<sup>85</sup> One month later, Pendley filed a sexual harassment claim against Pastner.<sup>86</sup> Pastner denied Pendley's claims, characterizing them as "disgusting, bogus [sexual harassment] allegations."<sup>87</sup> Further, Pastner added "[i]t's unfortunate, but I'll deal

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<https://www.nbcnews.com/storyline/sexual-misconduct/metoo-advocate-california-lawmaker-accused-sexual-misconduct-n846421>; *California Assemblywoman Cristina Garcia denies groping accusations*, *supra* note 80.

82. *California Assemblywoman Cristina Garcia Denies Groping Accusations*, *supra* note 80.

83. *Id.*

84. Kyle Boone, *Georgia Tech coach Josh Pastner responds to sexual assault accusations in counter lawsuit*, CBS SPORTS (Feb. 8, 2018), <https://www.cbssports.com/college-basketball/news/georgia-tech-coach-josh-pastner-accused-of-sexual-assault-in-counter-lawsuit/>.

85. *Id.*

86. *Id.*

87. *Id.*

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with it” and describes himself as “an absolute victim in this whole deal.”<sup>88</sup> However, while his public statements may rehabilitate his reputation in the mind of some, his reputation is permanently harmed.

One recent controversial example illustrating the reputational harm that can befall a public figure is the case of comedian Aziz Ansari. In an online article, one woman accused Ansari of sexual misconduct by explaining, in detail, that their date turned into the worst night of her life.<sup>89</sup> Although Ansari won a Golden Globe award just days before the allegations against him surfaced,<sup>90</sup> his reputation will never be the same. The reported sexual misconduct remains on Ansari’s Wikipedia page, and the initial article describing the accuser’s date night remains online.<sup>91</sup> Moreover, Ansari will never be compensated for any future lost profits due to the sexual misconduct allegation, as the amount of damages would be too speculative. At this time, it is unclear whether this sexual misconduct allegation will detrimentally impact his career.

As the #MeToo movement empowers victims of sexual harassment to speak out, it also opens other avenues to quickly destroy the accused’s reputation with a simple allegation posted on the Internet. Former Director of the Federal Bureau of Investigation and current Special Counsel, Robert Mueller, was targeted by a scheme to falsely accuse him of sexual harassment in late 2018.<sup>92</sup> One company<sup>93</sup> used

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88. *Id.*; see Des Bieler, *Georgia Tech coach Josh Pastner vehemently denies sex-abuse allegations*, WASH. POST (Feb. 9, 2018), [https://www.washingtonpost.com/news/early-lead/wp/2018/02/09/georgia-tech-coach-josh-pastner-vehemently-denies-sex-abuse-allegations/?utm\\_term=.25c36478d361](https://www.washingtonpost.com/news/early-lead/wp/2018/02/09/georgia-tech-coach-josh-pastner-vehemently-denies-sex-abuse-allegations/?utm_term=.25c36478d361) (“But unequivocally, zero, zero, zero, zero, zero, zero truth to any of those disgusting, bogus allegations. It’s disgusting,” Pastner added. He repeated “zero” several more times.”).

89. Way, *supra* note 77.

90. Jill Serjeant, *Growing pains for #MeToo as Ansari tale sparks backlash talk*, REUTERS (Jan. 18, 2018, 10:59 AM), <https://www.reuters.com/article/us-usa-misconduct-metoo/growing-pains-for-metoo-as-ansari-tale-sparks-backlash-talk-idUSKBN1F72RA>.

91. See *Aziz Ansari*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Aziz\\_Ansari](https://en.wikipedia.org/wiki/Aziz_Ansari) (last visited Feb. 26, 2018).

92. Markay & Sommer, *Inside the Crazy Cabal Trying to Smear Robert Mueller*, DAILY BEAST (Oct. 30, 2018, 2:57 PM), <https://www.thedailybeast.com/inside-the-crazy-cabal-trying-to-smear-robert-mueller>.

93. The company is called Surefire Intelligence.



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as a façade was hired to contact women who previously worked with Mueller to investigate alleged sexual harassment.<sup>94</sup> The FBI investigated these claims and was able to refute the sexual harassment claims.<sup>95</sup> Fortunately for Mueller, the media did not take the claims seriously.<sup>96</sup>

Similarly, a well-known lobbyist Jack Burkman alleged that he represented a woman accusing a United States congressman of sexual assault; however, he later revealed that the woman refused to come forward and apologized for wasting everyone's time.<sup>97</sup> This accusation drew a lot of attention, especially because of the #MeToo movement.

As this discrediting scheme demonstrates, our society, nation, and international community needs to be prepared for the possibility of these intentionally targeted false allegations. These scenarios serve as a warning that if the media does not properly vet sexual harassment claims, permanent damage can occur.

To be clear, victims of sexual harassment suffer consequences and endure significant—often lifelong—trauma. However, as demonstrated above, those falsely accused of sexual harassment suffer greatly as well by having their reputation publicly smeared in the media. Even if those falsely accused are formally vindicated, their reputation is permanently stained—the widespread belief they are a perpetrator endures long after the resolved allegations. Further, those falsely accused may lose both their careers because industries distance themselves from individuals with problematic allegations attached to them. One allegation of sexual harassment can cost everything, including losing one's family, friends, career, company, and finances.

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94. Markay & Sommer, *supra* note 92.

95. Natasha Bertrand, *Mueller Wants the FBI to Look at a Scheme to Discredit*, ATLANTIC (Oct. 30, 2018, 5:15 PM), <https://www.theatlantic.com/politics/archive/2018/10/special-counsel-refers-scheme-targeting-mueller-to-fbi/574411/>.

96. Brandy Zadrozny, Ben Collins & Tom Winter, *Mueller refers sex misconduct scheme targeting him to FBI for investigation*, NBC NEWS (Oct. 30, 2018, 11:34 AM), <https://www.nbcnews.com/politics/justice-department/mueller-refers-sex-assault-scheme-targeting-him-fbi-investigation-n926301>.

97. Markay & Sommer, *supra* note 92.

### *C. The Third Parties*

Sexual harassment allegations affect more than just the accused and the accuser. These allegations affect people unrelated to the allegations such as taxpayers, employees, stockholders, students, family members, and friends. Taxpayers pay for sexual harassment settlements of employees of Congress who bring claims against members and the resulting election costs.<sup>98</sup> Employees lose their jobs as large companies declare bankruptcy or let go employees to pay for the costs of the allegations and to repair the company's reputation.

#### *1. Companies*

Today, some companies factor in settlement costs of sexual harassment allegations as a "cost of doing business."<sup>99</sup> This "cost" includes payment of advertising and public relations costs to fix the company's reputation in the wake of such allegations.<sup>100</sup> Companies do this because "a favorable brand name is the most important asset of many successful personalities and businesses. Most importantly, no company can achieve its full economic potential if some employees or potential employees perceive the work environment to be hostile."<sup>101</sup> While it might make business sense for companies to factor in sexual harassment costs as part of doing business, this does nothing to eliminating sexual harassment in the workplace. This behavior will continue unless companies take allegations seriously and are forced to do more to eliminate the problem by creating zero-tolerance policies. But a zero-tolerance policy may be unworkable in certain situations such as competitive workplaces. An employee may try to use a zero-tolerance policy to get rid of another employee to personally advance his or her position in the company. However, this is unlikely because

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98. See generally Scott Shafer, *A Hidden Cost of Sexual Harassment in Sacramento: Expensive Special Elections*, KQED NEWS (Dec. 27, 2017), <https://ww2.kqed.org/news/2017/12/27/a-hidden-cost-of-sexual-harassment-in-sacramento-expensive-special-elections/>.

99. Roger Showley, *Sexual harassment: A hit to business bottomline?*, SAN DIEGO UNION-TRIBUNE (Dec. 1, 2017, 10:55 AM), <http://www.sandiegouniontribune.com/business/growth-development/sd-fi-econometer3dec17-story.html>.

100. *Id.*

101. *Id.*

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an extremely low percentage of people would be willing to lie and risk the consequences of a false report.

## 2. Taxpayers

Most people are unaware that “tens of millions of [taxpayer] dollars . . .”<sup>102</sup> are spent to pay for special elections held to replace politicians accused of sexual harassment. For example, in Los Angeles County, three special elections will take place to replace California lawmakers: Tony Mendoza, Raul Bocanegra, and Matt Dababneh.<sup>103</sup> Each time a public official resigns or is fired as the result of sexual harassment allegations, taxpayer dollars are used to fund unscheduled elections.<sup>104</sup> “Resignations mean more work, and unanticipated costs, for local governments that must hold special elections to fill those vacant seats.”<sup>105</sup> Los Angeles County election chief, Dean Logan, explains it will cost “on average \$1 million to \$1.2 million to hold voting to fill each vacancy.”<sup>106</sup> Because the three men are not part of the same district, each vacancy will require “its own voting procedures, ballots and equipment.”<sup>107</sup>

California is not the only state facing these unplanned and significant additional costs to replace lawmakers accused of sexual harassment.<sup>108</sup> Similarly, Al Franken, a Minnesota Senator, resigned from office, although he maintained that he would have been cleared of

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102. Shafer, *supra* note 98.

103. Kevin Modesti, *Mendoza says sexual harassment findings don't warrant Senate expulsion*, L.A. DAILY NEWS (Feb. 21, 2018, 6:02 PM), <https://www.dailynews.com/2018/02/21/mendoza-says-sexual-harassment-findings-dont-warrant-senate-expulsion/>.

104. Shafer, *supra* note 98.

105. *Id.*

106. *Id.*

107. *Id.*

108. See, e.g., James Anderson & Colleen Slevin, *Colorado lawmaker expelled over sex misconduct claims*, SAN DIEGO UNION-TRIBUNE (Mar. 3, 2018), [http://enewspaper.sandiegouniontribune.com/infinity/article\\_share.aspx?guid=30409377-e2c9-48fa-8c1e-8b022b71a5df](http://enewspaper.sandiegouniontribune.com/infinity/article_share.aspx?guid=30409377-e2c9-48fa-8c1e-8b022b71a5df) (showing that Colorado state House member, Steve Lebsack, was expelled for sexual harassment allegations but continues to deny the allegations).

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any allegations.<sup>109</sup> Overall, taxpayers are affected by sexual harassment allegations as they bear the cost of replacement special elections.

### 3. Stockholders

When a top-ranking business executive is accused of sexual harassment, #MeToo has proven to have unintended consequences on the business's shares and stockholders.

One example of this is the effect on Wynn Resorts. On the day an article was published alleging Steve Wynn, CEO of Wynn Resorts, had sexually harassed female employees,<sup>110</sup> Wynn Resorts' shares lost ten percent in value.<sup>111</sup> Steve Wynn's net worth decreased 450 million dollars.<sup>112</sup> Within five days, Wynn Resorts' stock depreciated from \$200.60 to \$163.22 per share.<sup>113</sup> Although Wynn sold all of his shares and resigned to distance himself from the company, the company emphasized his importance to its success.<sup>114</sup> Without Wynn, Jefferies, a global investment firm, opined that it does "not believe the company can grow at the same trajectory nor can it maintain its cutting-edge position."<sup>115</sup>

When companies lose millions of dollars in one day due to sexual harassment allegations of a high-ranking company official, stockholders and investors suffer the financial consequences.<sup>116</sup> In

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109. Stolberg, Alcindor, & Fandos, *supra* note 8.

110. Brady McCombs, *2 massage therapists accuse Steve Wynn of sexual misconduct*, ASSOCIATED PRESS NEWS (Mar. 1, 2018), <https://www.apnews.com/3b1857e21b914609a759081e0b1e8b64/2-massage-therapists-accuse-Steve-Wynn-of-sexual-misconduct>.

111. Chris Isidore, *Steve Wynn has already lost hundreds of millions of dollars*, CNN (Jan. 29, 2018, 4:09 PM), <http://money.cnn.com/2018/01/29/news/companies/wynn-stock-loss-sexual-misconduct-allegation/index.html>; *see also* Julie Creswell, *Without Steve Wynn, Casino Empire Risks Losing More Than a Name*, N.Y. TIMES (Feb. 7, 2018), <https://www.nytimes.com/2018/02/07/business/steve-wynn-name.html>.

112. Isidore, *supra* note 111.

113. Maggie Astor & Julie Creswell, *Steve Wynn Resigns from Company Amid Sexual Misconduct Allegations*, N.Y. TIMES (Feb. 6, 2018), <https://www.nytimes.com/2018/02/06/business/steve-wynn-resigns.html>.

114. *See* Creswell, *supra* note 111.

115. *Id.*

116. *See* Astor & Creswell, *supra* note 113.

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Wynn's case, not only did the company disconnect from him, but "the University of Pennsylvania revoked his honorary degree, removed his name from a campus plaza and scholarship."<sup>117</sup> Even if the company distances itself from the accused, the company and its shareholders are still likely to suffer.

#### *D. Local Effects: San Diego, California*

The #MeToo movement can have even farther-reaching consequences when protesters deny the accused of any recognition for important social or scientific achievements. After Woody Allen's stepdaughter accused him of sexual harassment, more than 15,000 students at the University of California of San Diego ("UCSD") protested and petitioned the university to cancel a class titled "The Films of Woody Allen," which has been taught for over twenty years.<sup>118</sup> Essentially, students protested to remove the acclaimed works from the history books.

However, the university has not cancelled the class.<sup>119</sup> In a speech at UCSD addressing the protest on Woody Allen's works, constitutional law expert, Erwin Chemerinsky, asked the audience, "does it also mean you should not teach a course about the writings of Adolf Hitler?"<sup>120</sup> This question raises a valid concern. Although it is understandable that students would want to erase any honor and praise given to someone they believe to be a sexual harasser, doing so also ignores valuable

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117. *Id.*

118. Gary Robbins, *UC San Diego students pressing the school to drop class devoted to the films of Woody Allen*, SAN DIEGO UNION-TRIBUNE (Feb. 7, 2018, 3:45 PM), <http://www.sandiegouniontribune.com/news/education/sd-me-woodyallen-ucsd-20180207-story.html>; Gary Robbins, *UC San Diego petition demands end of Woody Allen film appreciation class*, L.A. TIMES (Feb. 8, 2018, 7:25 AM), <http://www.latimes.com/local/lanow/la-me-woody-allen-film-class-20180208-story.html>.

119. Abigail Staggmeier, *UCSD to Continue Offering Controversial Woody Allen Film Class*, U. OF CAL., SAN DIEGO GUARDIAN (Feb. 25, 2018), <http://ucsdguardian.org/2018/02/25/ucsd-to-continue-offering-controversial-woody-allen-film-class/>.

120. Gary Robbins, *Woody Allen at center of free speech fight at UC San Diego*, SAN DIEGO UNION-TRIBUNE (Feb. 13, 2018, 2:05 PM), <http://www.sandiegouniontribune.com/news/education/sd-me-woodyallen-ucsdclass-20180213-story.html>.

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societal contributions of the accused. History includes both good and bad people; simply erasing evil people from history robs society of valuable lessons.

Usually, damages affect the parties to the suit, not unrelated third parties. As mentioned above, sexual harassment allegations have a profound impact on third parties. When a survivor of sexual harassment posts on social media or through news media—rather than proceeding through the legal system—we should be aware of the social cost of allowing an allegation to be an unappealable final verdict.

In the wake of #MeToo, the public does not wait for the legal system to investigate the truth of allegations. It immediately sentences the accused to limitless damages without due process—and in the court of public opinion, there is no right to appeal. For example, one Connecticut Superior Court Judge questioned whether “secrecy at all cost was a wise or effective policy” when weighed against legitimate public interest.<sup>121</sup>

### *E. International Effects*

The United States is not alone in facing #MeToo. More than eighty-five countries around the world are forced to face #MeToo and its repercussions.<sup>122</sup> Each country is dealing with sexual harassment differently as the movement brings down powerful individuals in their governments and corporations.

#### *1. France*

Historically, France has been more lenient in accepting sexual misconduct, as sexual behavior is an accepted part of French culture.<sup>123</sup> Former cultural history professor, Joan Scott, explains “there is a longstanding commitment to the notion that the French do gender relations differently—especially from prudish Americans—and that

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121. Philp, *supra* note 33, at 847.

122. Dina Berliner, ‘#MeToo’ Movement Struggles To Resonate In Arab Countries, THE MEDIA LINE (Feb. 17, 2018), <http://www.themedialine.org/student-journalists/metoo-movement-struggles-resonate-arab-countries/>.

123. See generally Alissa J. Rubin, ‘Revolt’ in France Against Sexual Harassment Hits Cultural Resistance, N.Y. TIMES (Nov. 19, 2017), <https://www.nytimes.com/2017/11/19/world/europe/france-sexual-harassment.html>.

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has to do with the French understanding of seduction . . . . Seduction is the alternative to thinking about it as sexual harassment.”<sup>124</sup> The French believe that Americans are too concerned about sexual matters.

France has repeatedly rejected several requests to extradite Roman Polanski, a famous movie director, despite his admission to statutorily raping a thirteen-year-old girl in the United States about forty years ago.<sup>125</sup> Polanski fled from the United States to France knowing he was safe from being extradited.<sup>126</sup> The French are now speaking out against Polanski by protesting at The Cinematheque in Paris where Polanski's work would be admired, and his latest 2017 film would premiere.<sup>127</sup> Like UCSD continuing to teach the class on Woody Allen's films, the organization stated it would continue to honor Polanski's work.<sup>128</sup> Furthermore, the French Culture Minister, Francoise Nyssen, echoed Chemerinsky's sentiments, stating: “this is about his life's work, not about the man.”<sup>129</sup>

However, after #MeToo brought down Hollywood giant Weinstein, many French individuals followed in the movement to fight sexual harassment. France broke out with “#BalanceTonPorc,” which means, “rat out your pig.”<sup>130</sup> One French actress, Isabelle Adjani said, “[l]et these harassing men know that actresses, like workers, farmers or nurses, shopkeepers or teachers, mothers or whores, are all free to fuck, free to abort. And free to speak out!”<sup>131</sup> In France in 2016, thirty-three

124. *Id.*

125. Jill Serjeant, *Judge rejects bid by Polanski's 1977 rape victim to end case*, REUTERS (Aug. 18, 2017, 3:38 PM), <https://www.reuters.com/article/us-people-polanski/judge-rejects-bid-by-polanskis-1977-rape-victim-to-end-case-idUSKCN1AY2IW>.

126. *See id.*

127. Lucien Libert, *Protesters disrupt Polanski retrospective after new rape allegations*, REUTERS (Oct. 30, 2017), <https://www.reuters.com/article/us-france-polanski/protesters-disrupt-polanski-retrospective-after-new-rape-allegations-idUSKBN1CZ2QR>.

128. *See id.*

129. *Id.*

130. Rubin, *supra* note 123.

131. Rachel Donadio, *#BalanceTonPorc Is France's #MeToo*, ATLANTIC (Oct. 18, 2017), <https://www.theatlantic.com/international/archive/2017/10/the-weinstein-scandal-seen-from-france/543315/>.

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women a day reported rapes, and more than two hundred thousand sexual harassment claims were filed that year.<sup>132</sup>

Prominent leaders in the French government were placed under the microscope as several were accused of sexual harassment sparked by #BalanceTonPorc.<sup>133</sup> For example, popular French Environment Minister, Nicolas Hulot, in the French President's cabinet, was accused of sexual harassment.<sup>134</sup> Hulot stated, "[i]t hurts, when it's wrongful and unfounded. Yesterday, my children were in tears."<sup>135</sup> Further, Hulot "describ[ed] the [sexual harassment claims] as 'a nightmare' and the rumors as 'shameful.'"<sup>136</sup> Hulot continued to deny the sexual harassment allegations.<sup>137</sup> Additionally, in 2008, the sexual harassment claims filed against Hulot were dismissed.<sup>138</sup>

## 2. China

In opposition to the #MeToo movement, the Chinese government censored the hashtag #MeToo and related words and phrases, after one week of the hashtag going viral.<sup>139</sup> The #WoYeShi (我也是) or

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132. *Id.*

133. See, e.g., *The second woman who lodged a complaint against Gérald Darmanin said that she felt "obliged" to have sex with him*, FRANCEINFO (Feb. 25, 2018, 8:36 PM), [https://www.francetvinfo.fr/politique/gerald-darmanin/la-seconde-femme-qui-a-porte-plainte-contre-gerald-darmanin-dit-s-etre-sentie-obligee-d-avoir-un-rapport-sexuel-avec-lui\\_2628802.html](https://www.francetvinfo.fr/politique/gerald-darmanin/la-seconde-femme-qui-a-porte-plainte-contre-gerald-darmanin-dit-s-etre-sentie-obligee-d-avoir-un-rapport-sexuel-avec-lui_2628802.html); *France: Rape inquiry into Gérald Darmanin dropped*, BBC (Feb. 16, 2018), <http://www.bbc.com/news/world-europe-43093032>; *French minister Nicolas Hulot denies harassment allegations*, BBC (Feb. 8, 2018), <http://www.bbc.com/news/world-europe-42993712>.

134. *French minister Nicolas Hulot denies harassment allegations*, *supra* note 133.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Christian Shepard, *China's #MeToo movement in colleges initially encouraged by authorities, then frustrated*, REUTERS (Jan. 30, 2018, 3:13 PM), <https://www.reuters.com/article/us-china-harassment-insight/chinas-metoo-movement-in-colleges-initially-encouraged-by-authorities-then-frustrated-idUSKBN1FJ33W>; Shannon Liao, *China's Feminist Movement Braves a Government Crackdown on #MeToo*, THE VERGE (Feb. 9, 2018, 4:37 PM), <https://www.theverge.com/2018/2/9/16897048/metoo-china-feminism-activism> ("Social media posts about #MeToo in China have been continuously deleted by



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#MeToo在中国 riled up students at universities who wanted to speak out against sexual harassment.<sup>140</sup> When the movement first began, the universities and government seemed to be supportive and showed promise that they would implement change to address sexual harassment.<sup>141</sup> For example, China's education ministry stripped Professor Chen Xiaowu of his academic title after he was accused of sexual harassment.<sup>142</sup> But shortly after, universities told their students not to attend organized marches regarding sexual harassment.<sup>143</sup>

According to the China Family Planning Association in 2016, “[one] third of Chinese college students say they have suffered sexual violence or sexual assault.”<sup>144</sup> The students’ most common sexual harassment allegations include the use of sexual language, forced kisses, or inappropriate touching.<sup>145</sup> The Chinese Government says it is doing something about sexual harassment, but it has only acted on one viral post regarding the professor.<sup>146</sup> Moreover, Chinese universities have not implemented any rules or regulations preventing sexual harassment because “they have not yet had instructions from above, that there is no relevant law and regulation, that there is no precedent to follow.”<sup>147</sup>

### 3. United Kingdom

In response to the #MeToo movement, the United Kingdom terminated the Kevin Spacey Foundation because of the sexual

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government censors, which have blocked not only the hashtag itself but related phrases like ‘anti-sexual harassment.’ #MeToo in China is translated as #WoYeShi (我也是), or #MeToo 在中国 though activists are now using multiple hashtags to try and circumvent the censors. The latest one, #RiceBunny, uses the emoji for rice (mǐ) and bunny (tù) as a clever transliteration of #MeToo.”).

140. See Shepard, *supra* note 139.

141. See *id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

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harassment allegations against Kevin Spacey.<sup>148</sup> The foundation, founded in 2008, recognized and supported young artists in the United States, United Kingdom, and Canada by “provid[ing]. . . training and resources . . . .”<sup>149</sup> The grant winner was awarded ten thousand dollars and a mentorship.<sup>150</sup> The foundation in the United States declared one million dollars in assets at the end of 2015.<sup>151</sup>

Countries are attempting to create laws and regulations that address sexual harassment. However, many people fear that some countries will do nothing to address the issue. Sexual harassment is not new; this behavior likely reaches far back in human history. Yet it took #MeToo, or some version of it, to force governments to listen and attempt to seriously treat sexual harassment as an immoral and unacceptable behavior.

## III. SOLUTION

## A. France

Recently, as a response to the uproar of the #MeToo movement, France has implemented several methods that address sexual violence.<sup>152</sup> First, France implemented “on-the-spot fines for sexual

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148. See *Kevin Spacey Foundation in UK ‘no longer viable,’ shuts down*, ASSOCIATED PRESS NEWS (Feb. 27, 2018), <https://www.apnews.com/9a78ea6a37f940e29dbd91b41a06dbe3/Kevin-Spacey-Foundation-in-UK-'no-longer-viable,'-shuts-down>.

149. *Id.*; see also Ilana Kaplan, *Kevin Spacey foundation to immediately shut down amid sexual assault allegations*, INDEPENDENT (Feb. 27, 2018, 4:55 PM), <http://www.independent.co.uk/arts-entertainment/films/news/kevin-spacey-foundation-shut-down-sexual-assault-allegations-uk-a8231251.html>; Liz Nord, *You Have No Excuse Not to Apply for a Kevin Spacey Foundation Grant this Week*, NO FILM SCHOOL (Feb. 26, 2018), <https://nofilmschool.com/2016/02/kevin-spacey-foundation-artists-of-choice-award-grant-deadline>.

150. Nord, *supra* note 149.

151. Stewart Clarke, *Kevin Spacey Foundation to Shut Down in U.K.*, VARIETY (Feb. 27, 2018, 8:24 AM), <http://variety.com/2018/film/news/kevin-spacey-foundation-close-down-uk-britain-1202711565/>.

152. See Ingrid Melander & Marine Pennetier, *France targets sexual harassment with on-the-spot fines*, REUTERS (Mar. 20, 2018, 5:04 PM), <https://www.reuters.com/article/us-france-politics-harassment/france-targets-sexual-harassment-with-on-the-spot-fines-idUSKBN1GX009>.

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harassment on the street.”<sup>153</sup> Specifically, street harassment offenders would be fined on the spot and those fines “range from 90 euros to 750 euros (\$110 to \$920), [but] [the fines] could reach 1,500 euros in the case of aggravating circumstances and 3,000 euros for repeat offenders.”<sup>154</sup> Second, France extended deadlines for filing rape claims.<sup>155</sup> Finally, France’s parliament attempted to set the age of consent at fifteen years but was unsuccessful—it still does not have an age of consent.<sup>156</sup>

The country made these changes because the legal system was failing those victims of sexual harassment, including victims young as eleven years of age.<sup>157</sup> For example, in one case involving an eleven-year-old girl, the defendant was acquitted of raping her, as the prosecution’s burden was very high.<sup>158</sup> The prosecution had to prove “violence, coercion, threat or surprise” during sexual intercourse with the minor.<sup>159</sup> If the prosecution did not prove this burden, the defendant could not be convicted of a crime, but would receive a mere infraction of “atteinte sexuelle,” which means “sexual abuse.”<sup>160</sup> The recent and similar cases “shocked the country,” which encouraged a change in addressing sexual harassment claims.<sup>161</sup>

Some French citizens criticize the changes toward sexual harassment as “kill[ing] the culture of the ‘French lover’ if we punish street harassment.”<sup>162</sup> However, France’s Gender Equality Minister, Marlene Schiappa, defended the changes as “preserv[ing] seduction, chivalry and ‘l’amour à la française’ by saying what is key is consent.

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153. *Id.*

154. *Id.*

155. *Id.*

156. Scott Neuman, *France Moves To Make 15 Legal Age Of Consent For Sex*, NPR (Mar. 6, 2018, 2:39 PM), <https://www.npr.org/sections/thetwo-way/2018/03/06/591212333/france-to-make-15-legal-age-of-consent-for-sex>; Chloe Farand, *France votes against setting minimum age of sexual consent amid backlash*, INDEPENDENT (May 17, 2018), <https://www.independent.co.uk/news/world/europe/france-sex-age-consent-minimum-national-assembly-vote-15-rape-a8355516.html>.

157. *See* Neuman, *supra* note 156.

158. *Id.*

159. *Id.*

160. *Id.*

161. *See id.*

162. Melander & Penetier, *supra* note 152.

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Between consenting adults everything is allowed, we can seduce, talk, but if someone says ‘no’, it’s ‘no’ and it’s final.”<sup>163</sup> Further, Schiappa explained that punishable sexual harassment would include street harassment “such as asking a woman for her phone number a dozen times when she has made clear she is not interested.”<sup>164</sup> In addition, the changes will include “tougher sanctions for group harassment online by making clear that every single person that is taking part will have to answer for it, even if they just sent a few tweets.”<sup>165</sup>

*B. United States**1. Legal Safeguard in Place: Defamation*

The Supreme Court ruled “the First Amendment requires that we protect some falsehood in order to protect speech that matters.”<sup>166</sup> States decide the legal standard for liability under defamation.<sup>167</sup> In California, defamation is “(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.”<sup>168</sup> “The defendant [in a defamation claim] has the initial burden of showing the allegedly defamatory statement was made on a privileged occasion, whereupon the burden shifts to the plaintiff to show the defendant made the statement with malice.”<sup>169</sup>

However, public figures suing for defamation must “prove[] that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>170</sup> Although “public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private

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163. *Id.*

164. *Id.*

165. *Id.*

166. *Gertz v. Welch*, 418 U.S. 323, 341 (1974).

167. *Id.* at 347 (holding that “states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual”).

168. *Taus v. Loftus*, 40 Cal. 4th 683, 720 (2007).

169. *Kashian v. Harriman*, 98 Cal. App. 4th 892, 915 (2002).

170. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

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individuals normally enjoy,”<sup>171</sup> few overcome the #MeToo movement allegations. As discussed above, most public figures accused of sexual harassment suffer immediate and significant consequences.

Historically, damages for sexual harassment claims were inadequate to overcome the stigma and reputational damage caused by the claims, and after the 1990s, remedies and damages were amended.<sup>172</sup> For example, the right to a jury trial for sexual harassment cases was added. In addition, under Title VII, legal damages are limited; Congress “capped the maximum amount allowed per claimant, depending upon the size of the defendant employer.”<sup>173</sup>

## *2. The Problem with Defamation as the Only Solution*

Defamation is not a perfect solution. Even if one is successful in a defamation tort lawsuit, damages are too speculative and the reputation of the accused is damaged beyond repair. As the Supreme Court held,

(1) reputation alone, apart from some more tangible interests such as employment, was neither “liberty” nor “property” by itself sufficient to invoke the procedural protection of the due process clause, (2) thus the plaintiff’s claim . . . based solely on the charge of defamation,

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171. *Gertz*, 418 U.S. at 344.

172. STEPHANIE SCHAEFFER, *SEXUAL HARASSMENT DAMAGES AND REMEDIES* 73 AM. JUR. TRIALS § 2 (1999).

173. Limitations on sexual harassment claims. 42 U.S.C.A. § 1981a(b)(3) (2017). “The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party— (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000; (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000; and (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.”

was insufficient to sustain the action under 42 USCS 1983 and the Fourteenth Amendment.<sup>174</sup>

A reputation is a non-monetizable intangible possession that cannot be replaced with money. Therefore, when suing for damages incurred from a ruined reputation, there is no adequate compensation.

### *3. How States Are Addressing Sexual Harassment*

Recently, Washington Governor Jay Inslee signed several bills addressing sexual harassment in the workplace—highlighting the effect of the #MeToo movement.<sup>175</sup> Washington is the first state to directly address confidential non-disclosure agreements concerning sexual harassment.<sup>176</sup> One bill bars non-disclosure agreements that prohibit employees from speaking out on sexual harassment.<sup>177</sup> Another Washington bill instructs the Human Rights Commission to focus on making policies designed to eliminate sexual harassment in the workplace.<sup>178</sup> A third bill makes any employment contract unenforceable if the contract does not have terms protecting an employee's rights to file a sexual harassment claim.<sup>179</sup>

Although other states, including “California, Maine, and Oregon . . . passed sexual harassment training in the workplace, and . . . California passed legislation in 2016 banning the use of a confidentiality clause that would prevent the disclosure of ‘factual information’ in a civil settlement in regards to a sexual offense, it did not specify sexual harassment.”<sup>180</sup>

Overall, states are just beginning to create laws in an attempt to eliminate sexual harassment. States have begun tackling sexual harassment in the workplace through educational trainings, but more

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174. Paul v. Davis, 424 U.S. 693, 712 (1976).

175. See Rachel La Corte, *Washington governor signs package of bills sparked by #MeToo*, ASSOCIATED PRESS (Mar. 21, 2018), <https://www.apnews.com/29d9936a0e85461d8318d319f44ed752/Washington-governor-signs-package-of-bills-sparked-by-MeToo>.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

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needs to be done to make a cultural change particularly in educating children and young people the severity of sexual harassment.<sup>181</sup> Just as a child quickly learns that a police officer will pull over a speeding car, he or she should know sexual harassment could result in punishment, as France will implement.<sup>182</sup> We should want children to be able to quickly identify behaviors of sexual harassment—raising a generation that does not share our current struggles with determining what sexual behavior is right or wrong.

If children are instilled with values that sexual harassment is not acceptable—and the public is not willing to turn a blind eye to it—then we, as a society, will see a sharp decline in sexual harassment. Even if citations of three thousand dollars for repeat sexual harassment offenders are not enough to stop rich and powerful offenders, the crime can become increasingly more severe per offense. Although many incidents of sexual harassment occur behind closed doors, the citations will also allow police officers to confront the issue immediately as they see it in daily life. Nevertheless, implementing citations for sexual harassment is only the first step, and influencing children to detest this kind of behavior will create lasting cultural change.

In addition, all states should follow Washington's example of prohibiting enforcement of confidential non-disclosure agreements that bar the sexual harassment victim from speaking out. However, if these confidential non-disclosure agreements are unenforceable when a victim speaks out—the agreements become worthless. Those accused of sexual harassment are unlikely to acquiesce to such agreements. Yet, hiding these sexual harassment claims from the public only minimizes the crime of sexual harassment, contributing to societal acceptance of the behavior. Eliminating confidential non-disclosure agreements will

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181. Meaning, a girl's first "sexually flattering" experience is generally a form of sexual harassment, including: a boy in school touching a girl's rear-end, a kindergarten boy kissing a girl without her permission, or a boy "pantsing" a girl in Physical Education class. All of these acts are treated as harmless. Even from the young girl's perspective, the act is flattering and a welcomed form of attention. However, allowing that behavior sends a message to boys that this type of behavior is not only okay but welcome. As for girls, those messages contribute to their self-esteem. Those messages can also be perceived as indications of their beauty and thus, a boost to their self-confidence. A cultural change is one of the first and best ways to address these issues before they become so commonplace in work environments.

182. See discussion *supra* Section II.E.1.

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benefit the public in the long run as the public becomes more aware of how frequently sexual harassment occurs.

## CONCLUSION

The #MeToo movement sparked a much needed global debate and empowered women to feel comfortable speaking against those who have sexually harassed them. Still, it is important for society to prepare itself for the unintended, but immediate consequences of accusing individuals in the public sphere. We must listen to sexual harassment survivors and implement a better legal system to accommodate their needs, while introducing preventative measures to avoid future victims. Just as Judge Aquilina supported and comforted over 160 women in her courtroom as they expressed their impact statements, more courts must take sexual harassment survivors seriously and open their doors. Further, we need to follow France's lead in citing sexual harassment in public. Then, we need to teach our children right from wrong and discourage sexual harassment by eliminating it from our movies, music, and our daily choice of words.

We need to arm our children with a voice, just as the #MeToo movement has given sexual harassment survivors the space and support to speak out when no one is listening. We need to educate children and our communities on sexual harassment and the lifetime consequences of sexual harassment. As today's children will sit on the juries of tomorrow, they will approach sexual harassment claims seriously and with more understanding for each victim that comes forward. We must stop calling each victim who comes forward a lying, promiscuous, gold-digger, and ensure sexual harassment does not continue to be accepted in society. We must stop any entity or person, regardless of gender, from continuing and promoting this behavior. When people begin taking sexual harassment claims seriously—and understand there are serious consequences—sexual harassment will decline.

#MeToo shifted the fear from sexual harassment victims to those who sexually harass, which was the first step needed. Now, to hold the right people accountable, society and the legal system have a responsibility to provide a platform for sexual harassment victims to speak out. #MeToo has had far reaching effects, even for parties unrelated to the sexual harassment allegations such as taxpayers,



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employees, companies, and stockholders. Finally, as we treat sexual harassment more seriously, we do not want to falsely accuse people of sexual harassment because it will permanently harm that person, his or her reputation, and the legitimacy of other sexual harassment claims. Therefore, to achieve a fair and just outcome for all parties involved, we must remain cautious of holding people accountable for sexual harassment outside the legal system.

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\* J.D. Candidate, California Western School of Law, 2019; B.A., University of San Diego, 2014. First and foremost, I would like to thank Professor Paul J. Gudel, Professor Roberta K. Thyfault, and Dean Donald J. Smythe for their unwavering support in me throughout my research and writing process. Second, I would like to thank the staff of *California Western International Law Journal* for their keen eye and commitment to excellence. Finally, and most importantly, I would like to thank my family and friends for their constant support and motivation. Particularly, I wish to express my deepest thanks to my mother, Areeg Akel, for not only filling a mother's role but also a father's, raising me to be the person I am today, encouraging me to be an even better person than I thought I could be, and being the most selfless role model a daughter could ever ask for. I am grateful to my grandparents, Othman and Fadila Akel, for giving my family members a better chance to achieve their dreams by moving to a peaceful country, leaving behind their families, friends, and professions. I am indebted to Jonathan D. Hoff for his endless guidance, positivity, and confidence in me. I would not be where I am today without my family, friends, and professors.