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“Girl Riot, Not Gonna Be Quiet”—Riot Grrrl, #MeToo, and the Possibility of Blowing the Whistle on Sexual Harassment

*Kendra Doty**

Abstract

The 1990s’ Riot Grrrl movement was powerful. Beginning with feminist punk rock bands in Olympia, Washington and spreading throughout the country, girls sparked a revolution. In song lyrics, at group meetings, and in zines, girls formed a community devoted to loudly challenging the constraints society places on women. Part of this project involved flashpoint acts of rebellion—sparks of anger’s flame shooting out as these girls confronted sexual violence and called out perpetrators by name.

Foreshadowing the cascading stories of sexual assault and harassment that erupted in 2017 with #MeToo, the Riot Grrrls warned one another about dangerous people and provided community and support to survivors. In the pre-digital era, there was little risk that these interpersonal conversations and niche songs would expose the accusers to liability. But with the creation of social media and the ease with which #MeToo stories are stitched together with a hashtag, the consequences of blowing the whistle on sexual assault and harassment has become very apparent.

This Article argues that these consequences do not spell the end of the #MeToo movement. Rather, the law of whistleblowing offers a way to conceptualize what #MeToo provides society, and what it risks. From there, this complex body of law provides a framework for resolving the unique challenges presented by #MeToo’s public expression of the anger, frustration, and demand for change that the Riot Grrrls talked, sang, and wrote about.

Many of the [Riot Grrrl] movement’s core values, I’ve come to realize are as necessary now as they were then. The early ‘90s were a difficult time to be a woman, especially a young one, and too little has changed in the intervening decades. Yet nothing else has

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I would like to thank Professor Deborah Tuerkheimer for encouraging me to critically examine the relationship between #MeToo and the law, as well as Professors Wendy Muchman and Mary Foster for patiently guiding me through early drafts. For endlessly inspiring, supporting, and teaching me, I thank my Riot Grrrls: Misty Tippetts Lassiter, Lindsay VanLuvanee, Hillary Chutter-Ames, Anne Hudson, and Christian Ogata. For everything, thank you Andrew Durand and Henry.

emerged since then to confront sexism with a fraction of Riot Grrrl's fire and prophetic drive. The self-righteous absolutism of adolescence eventually softens its edges, as it must. But we never stop needing that idealism and energy, that courage to name things as political if they are political and unacceptable if they are unacceptable, that dedication to crafting our lives and communities on our own terms. Telling stories is just the beginning.

– Sara Marcus¹

I. INTRODUCTION

Allegations of sexual assault are not new. For decades, women have been sharing stories of harassment, unwanted touching, and rape as warnings: Stay away from these people to protect yourself.

But these warnings come with a cost. When the accused finds out that rumors are being spread, they threaten lawsuits,² drag the accuser's name through the mud,³ and do what they can to preserve their societal position.⁴ Accusers experience drastic changes in their life as a result of publicizing their stories—many must move to avoid threats of violence,⁵ the publicity can be overwhelming,⁶ and becoming known as a survivor can take its toll.⁷

1. SARA MARCUS, *GIRLS TO THE FRONT: THE TRUE STORY OF THE RIOT GRRRL REVOLUTION* 10–11 (2010).

2. Joanne Sweeny, *Can You Be Sued for Sharing Your #MeToo Story?*, SALON (Dec. 16, 2017 3:00 PM), [https://perma.cc/UWY4-RP7W] (“[N]aming names carries some risk—more specifically, the risk of being sued for defamation.”); Ruth Brown, *Fairfax Accuser to Speak with Prosecutor After He Threatens to File Criminal Complaint*, N.Y. POST (Feb. 13, 2019), [https://perma.cc/8JQX-E9BJ]; Tyler Kingkade, *As More College Students Say “Me Too,” Accused Men are Suing for Defamation*, BUZZFEED NEWS (Dec. 5, 2017), [https://perma.cc/5XNP-MU42].

3. Emily Birnbaum, *Ellison Accuser: Dems ‘Smearred, Threatened, Isolated’ Me*, THE HILL (Sept. 18, 2018), [https://perma.cc/VY75-6DYF] (“The woman who accused Rep. Keith Ellison (D-Minn.) of emotional and physical abuse is claiming that the Democratic Party ‘smearred, threatened [and] isolated’ her after she went public with the allegations.”).

4. See, e.g., Kaitlin Reilly, *R. Kelly Retaliates by Threatening to “Expose” Accusers on New Website*, REFINERY 29 (Jan. 7, 2019 6:20 PM), [https://perma.cc/P2MD-UC5E] (reporting that R. Kelly was “in the process of creating a website called ‘Surviving Lies’” allegedly designed to “debunk the accounts of [his] accusers”).

5. Tim Mak, *Kavanaugh Accuser Christine Blasey Ford Continues Receiving Threats, Lawyers Say*, NPR: ALL THINGS CONSIDERED (Nov. 8, 2018, 9:00 AM), [https://perma.cc/5825-P8CM] (relaying that Dr. Blasey Ford has had to move four times, pay for a private security detail, and has been unable to return to work as she continues to be harassed); Madeleine Aggeler, *What Happened to the Women Louis C.K. Harassed?*, THE CUT (Aug. 30, 2018), [https://perma.cc/5URU-DQ3W] (“When she finally came forward with her own story, she received death threats.”).

6. See Alanna Vagianos, *Matt Lauer’s First Accuser Lives ‘In Constant Fear’ of Being Identified*, HUFFPOST (Dec. 15, 2017 5:01 PM), [https://perma.cc/YG73-46XP] (“Matt Lauer’s original accuser is “terrified” that her identity will become public. . . . ‘My client is terrified and she does live in constant fear that people are going to track her down and figure out who she is,’ Wilkenfeld said on Friday.”).

7. Ashley May, *Sexual Assault Survivors Risk Lives, Reputations to Stand Up to*

This trade-off—attempting to protect yourself and your loved ones versus the risk of personal, professional, and emotional backlash—has become apparent in the wake of the #MeToo movement, an explosion of stories of sexual harassment, discrimination, and assault.⁸

Many scholars have explored #MeToo’s implications, including changes in law firms’ use of mandatory arbitration clauses,⁹ the legality of nondisclosure agreements,¹⁰ and various burgeoning governmental regulations of sexual misconduct.¹¹ This Article takes a different approach. When the risks of calling someone out for sexual assault can be so drastic, what role can the law play in balancing the benefits of openly identifying perpetrators and discussing sexual harassment against the risks of reputational damage and false allegations? More specifically, can the law of whistleblowing offer insight into how to effectively strike the proper balance in this context?

The seeds for the answer can be found by evaluating how women and girls have navigated social relationships throughout history. Somehow, we’ve survived this long. Through “whisper networks,”¹² individualized support, and unfortunate trial and error, we have learned to know whom to avoid. Before the reign of social media, allegations were slower to spread and alleged perpetrators weren’t always on notice of what was being said about them. This dynamic is clearly illustrated when one looks to feminist punk bands from the early nineties, and the Riot Grrrls¹³ in particular.

Powerful Men, USA TODAY (Sept. 21, 2018), [https://perma.cc/H7WP-G9HL] (“It’s not uncommon for survivors to lose their job, endure verbal and physical harassment and damage to their property and worry about their safety.”).

8. See Fiona Vineberg, *#MeToo is a Movement, Not a Moment*, LAWNOW (Aug. 31, 2018), [https://perma.cc/Y5FC-6SRH] (tracing the legal history of the #MeToo movement from Anita Hill’s testimony in front of the Senate Judiciary Committee to Tarana Burke’s coining of the phrase “Me, too” to the flood gates that opened in the fall of 2017).

9. Karen Sloan, *Kirkland & Ellis Drops Mandatory Arbitration for Associates Amid Law Student Boycott*, LAW.COM (Nov. 21, 2018), [https://perma.cc/Y5FC-6SRH].

10. See David A. Hoffman & Erik Lampmann, *Hushing Contracts*, WASH. U. L. REV. (forthcoming) (U. of Penn. Institution for Law & Econ., Research Paper No. 19-08, Feb. 4, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3328569.

11. Melissa Murray, *Consequential Sex: #MeToo, Masterpeice Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 825 (2019).

12. Deborah Tuerkheimer & Laura Beth Nielsen, *The #MeToo Movement Through a Legal Lens*, LEGAL TALK NETWORK PODCAST (Feb. 21, 2018), recording and transcript available at [https://perma.cc/QSZ8-WEU6] (explaining that women shared a list of “Shitty Media Men” accused of sexual harassment through a “whisper network,” in which “women and media who wanted to keep one another safe, who wanted to share their stories so that the men on the list wouldn’t harm others.”).

13. Riot grrrl itself was created as a ‘zine (a homemade pamphlet frequently distributed at concerts that resembled a magazine). Sara Marcus explains: “[the creators] named the zine *Riot Grrrl*: a blend of Jen’s ‘girl riot’ and the growling ‘grrrl’ spelling that Tobi had recently made up as a jokey variation on all the tortured spellings of ‘womyn/womon/wimmin’ feminists liked to experiment with. . . . A riot grrrl was a revolutionary update of a *Teen* or a *Young Miss* or a *Mademoiselle*: The new zine’s title created its audience of girls by naming them, radicalized them by addressing them as already radical.” MARCUS, *supra* note 1, at 80–81.

Feminist punk rock bands in the 1990s actively targeted gender discrimination in their lyrics, at their shows, and in “zines.”¹⁴ In private and semi-private spaces at concerts, in letters, and in bedrooms,¹⁵ they called out sexual objectification and harassment. They shared stories of sexual abuse and provided space to heal. Through discussion and deliberation, these women and girls created a community of support and protection—a community that challenged sexual assault and the cultural pillars that permit it to continue unabated.

Much of the literature exploring and analyzing the way in which women in these social circles engaged with gender roles, harassment, and violence has come from a sociological perspective.¹⁶ Little work has been done in the legal field to evaluate the way in which these semi-private conversations have erected protective barriers between targets and perpetrators of sexual assault.¹⁷ And even fewer scholars have explored how these conversations

14. Zines are “homemade, hand-lettered, cartoon-filled, photocopied magazine[s]” capturing the do-it-yourself history of punk. LAURINE LEBLANC, *PRETTY IN PUNK: GIRLS' GENDER RESISTANCE IN A BOYS' SUBCULTURE* 35 (1999). The Riot Grrrls used zines to build connections with other girls, to advertise concerts and conferences, and to challenge girls to think through various issues they confronted in their daily lives. MARCUS, *supra* note 1, at 82 (“They had decided to put out one issue per week for the rest of the summer, so they’d have something to pass out at shows, a way to make connections with other girls who lived in DC.”); Anita Harris, *Revisiting Bedroom Culture: New Spaces for Young Women’s Politics*, 27 *HECTATE* 128, 134 (2001) (“[G]rrrlzines also adopted and expanded the punk philosophy of individual responsibility for the creation of social change. They quickly became a place where young women could communicate with one another and plan to come together at conferences, concerts, and in city-based ‘chapters’ or organisations in order to politicise other young women and agitate for change.”). Their zines “discussed, debated and organised around issues affecting young women, such as violence, sexual harassment, self-esteem, unemployment, health, sexuality and the law.” *Id.*; Janice Radway, *Girl Zine Networks, Underground Itineraries, and Riot Grrrl History: Making Sense of the Struggle for New Social Forms in the 1990s and Beyond*, 50 *J. OF AMER. STUDIES* 1, 10 (2016) (“In their zines, they discussed domestic violence, incest, and rape; wrote about sexuality and explored the meaning of identifying as lesbian, queer, straight, or even straight-edge; and laid out their hopes for a more egalitarian, girl-friendly future.”). The zines allowed girls to communicate with one another outside of mainstream’s regulatory grip and allowed the girls to develop a politics for themselves. Harris, *supra*, at 134.

15. See Harris, *supra* note 14, at 134 (“For these young women, underground magazines operate as a site for politics and a place for debating and refiguring young women’s place in a post-industrial world, but they must remain marginal and ‘private.’ They have emerged as a site for youth politics, and young women’s politics in particular, because they operate outside the scrutiny of new regulatory regimes.”).

16. See, e.g., Pauwke Berkers, *Rock Against Gender Roles: Performing Femininities and Doing Feminism Among Women Punk Performers in the Netherlands, 1975–1982*, 24 *J. OF POPULAR MUSIC STUD.* 155 (2012); Anna Ioanes, *Shock and Consent in a Feminist Avant-Garde: Kathleen Hanna Reads Kathy Acker*, 42 *J. OF WOMEN IN CULTURE AND SOC’Y* 175 (2016). For example, sociologists and communications scholars have recently begun analyzing zines. See generally Radway, *supra* note 14; Kristen Schilt, “I’ll Resist with Every Inch and Every Breath” *Girls and Zine Making as a Form of Resistance*, 35 *YOUTH & SOC’Y* 71 (2003).

17. But see Professor Deborah Tuerkheimer’s work on “whisper networks” and forthcoming article prosing a taxonomy to explore these kinds of networks. Deborah

at punk shows in the ‘90s and in zines traveling through the mail laid the groundwork for the explosive, cathartic moment in the fall of 2017 when #MeToo went viral.¹⁸ This piece begins to fill that gap.

The underexplored trajectory from the Riot Grrrls’ insulated, private, and covert allegations of sexual harassment to the very public #MeToo trend beginning in late 2017 provides a unique and informative light by which to evaluate the legal limitations on contemporary attempts to address sexual assault and potential strategies for pushing the movement forward.

One notable consequence of the transition from the allegations spreading slowly in private zines and at niche concerts to the rapid-fire explosion of stories tied together with the #MeToo hashtag has been the immediate appearance of the costs of speaking up in public. In particular, there has been an influx of defamation cases: alleged perpetrators are filing lawsuits against accusers presenting stories on social media, in news outlets, and in other public spaces.¹⁹ By threatening thousands and millions of dollars in damages, these cases quickly reveal the costs of blowing the whistle on sexual assault.²⁰ Lawsuits alleging that a claim of sexual assault is defamatory is a contentious idea in its own right, but the nuances of these suits is not the focus of this Article. The suits simply serve as an example of one potential cost of blowing the whistle by making public accusations of sexual assault and harassment.

The various costs that attach to publicizing one’s experience and naming names, including the risk of potential defamation liability, can chill speech and dissuade women from coming forward.²¹ With the massive reach of #MeToo and its potentially revolutionary wake, the law now faces the question of how to proceed: should the law maintain the current balance between risking severe reputational damage and foreclosing allegations of sexual assault, or should the law seek ways to shift the burdens for making public allegations and accusations so integral to public health and safety?

This is not the first time the law has faced such a conundrum. In whistleblowing law generally, the law has time and again confronted the need to balance a company or the government’s interest in confidentiality and preservation against reputational harm versus the need to let information

Tuerkheimer, *Unofficial Reporting in the #MeToo Era*, U. CHI. L. F. (forthcoming 2019), <https://ssrn.com/abstract=3304717>.

18. To my knowledge, this is the only piece exploring this connection.

19. See Richard Ackland, *#MeToo has Led to an Asphyxiating Vortex of Litigation*, THE GUARDIAN (Apr. 3, 2018, 2:53 PM), [<https://perma.cc/H4XU-8H3E>]. See, e.g., Kaytlyn Leslie, *Author of ‘Thirteen Reasons Why’ Suing for Defamation over #MeToo Accusations*, THE TRIBUNE (Jan. 26, 2019, 4:42 PM), <https://www.sanluisobispo.com/news/local/article/225079030.html> [<https://perma.cc/T9G4-4R9E>] (requesting an undisclosed sum for damages).

20. See Angela Couloumbis & Liz Navratil, *Sen. Daylin Leach Sues Woman Accusing Him of Sexual Assault, and Two #MeToo Activists*, THE INQUIRER (Jan. 28, 2019), [<https://perma.cc/2GAQ-SEBG>] (noting that the plaintiff is seeking \$50,000 in damages).

21. Kingkade, *supra* note 2 (“Sometimes the mere threat of a defamation suit is enough to deter a student from going ahead with a sexual assault claim.”).

of illegal activity come to light.²² This Article argues that lessons can be learned from this classic whistleblowing dilemma and utilized in present debates over how to handle the #MeToo allegations. To put it bluntly, the law should pick the side of exposing allegations and trust that false accusations will be revealed throughout the process. To actualize this shifted balance, the law should adopt whistleblower protections—much like those seen in the public context with the Whistleblower Protection Act—in cases where a person alleges that another has committed sexual assault.

This Article proceeds as follows. Part One introduces the Riot Grrls. It explains their dreams and aspirations as a community devoted to empowering girls and young women to stand up for themselves and support one another. It explores how their communicative and deliberative methods effectuated these goals and allowed the Riot Grrrls to confront sexual assault and harassment head on. Part Two then presents the #MeToo movement's rupture into the public sphere on social media platforms, bringing with it conversations and stories previously kept in hushed tones. In its big reveal of not-so-secret secrets, #MeToo exposed the massive extent of sexual harassment, abuse, and assault in today's society. It sparked a potentially revolutionary fuse, but such revolution can sometimes be messy. This Part also examines the potential negative implications that follow public accusations of sexual assault and begins to contemplate the tension between prioritizing due process and reputation versus protection from sexual violence. Part Three then analyzes the law of whistleblowing to show how it can be used as a guide for striking the proper balance and ensuring that allegations can productively contribute to public dialogue. This Part then argues that, given the purposes underlying whistleblowing law, Congress should take initiative and enact a statute similar to the Whistleblower Protection Act to protect #MeToo whistleblowers and facilitate dialogue challenging sexual harassment and assault. Part Four briefly concludes.

II. PART ONE – RIOT GRRRLS: REVOLUTIONARY SUPPORT

To understand the Riot Grrrls and how they created and maintained a girls-supporting-girls movement that challenged dominant patriarchal societal norms, it is important to know where they came from and how they came together. This Part first maps out how the Riot Grrrls came into being. It then explains how the Riot Grrrls sustained and developed their group through music, zines, and meetings to cultivate a community premised on protecting one another.

A. Revolution Girl Style Now! – The Early Years

Punk has, from its inception, challenged mainstream understandings of acceptable behavior, dress, and music.²³ But punk wasn't perfect. Sexism

22. See *infra* Part III.A.

23. See LEBLANC, *supra* note 14, at 41 (“[Punks] sought to challenge the validity of such rules. Through the use of mockery, irony, and parody, punks protested against the constraints

remained alive and well, despite the subculture’s self-description as feminists striving for equality.²⁴ Punk women suffered through listening to “slimy songs about killing women”²⁵ and risked physical violence.²⁶ Some early punks even threatened women attempting to integrate into the subculture: “Punks are not girls, if it comes to the crunch we’ll have no option but to fight back.”²⁷

Nevertheless, punk girls persisted. They carved out space to make great music and inject feminist thought into the culture.²⁸ In their lyrics, these feminist punk rockers “educate[d] listeners about subjects like independence and rape,”²⁹ drew attention to “the commercialization of love, sexism and rape, and how to fight back against all of it,”³⁰ and powerfully narrated stories describing kidnapping and rape.³¹ According to one scholar, this “punk with a point”³² foreshadowed “one of the best examples of 3rd wave feminism: the riot grrrl movement.”³³

Riot Grrrl, a collection of punk girls active in Olympia, Washington’s music scene in the late 1980s and early 1990s, continued down their predecessors’ path and challenged the traditional sexism they saw in punk culture. These girls refused to play the game and “raise[d] their voices in protest” challenging the popular punk formula: “boy band after boy band,

imposed by conventional norms. They contravened social standards in an effort to challenge the integrity of the culture that produced them.”). *See also id.* 33–48 (detailing the history of punk in the 1960s and 70s in both North America and the U.K.).

24. *Id.* at 6 (“Like me, she felt troubled about the male-dominated gender dynamics in the punk subculture, a subculture that portrays itself as being egalitarian, and even feminist, but is actually far from being either.”).

25. Rebecca Daugherty, *The Spirit of ‘77: Punk and the Girl Revolution*, 6 J. OF GENDER AND CULTURE, 6 (2002) (“No doubt, the climate of the punk community was often unwelcoming for women. Vermilion criticized Johnny Moped for writing ‘slimy songs about killing women.’ Siouxsie Sioux attested, ‘everything felt so abrasive You needed a protest voice to survive within that.’”) (internal citations omitted).

26. *Id.* at 7 (“Viv Albertine, of the Slits, recalled that ‘we got picked on in the street, our lead singer Ari was stabbed.’ Lucy O’Brien of the Catholic Girls remembers a show when ‘a crowd of around 20 of [the audience members] followed us outside and attacked us During gigs there were regular cries of: ‘fuckin’ cows, who do you think you are?’ Many of these attacks seem to have been incited by men’s anger at the woman-oriented political stances of these performers.”) (internal citations omitted).

27. LEBLANC, *supra* note 14, at 47 (citing “Mark P.’s” writing from 1976 in the London zine, *Sniffin’ Glue*). LeBlanc also details other early punk band’s misogyny: “Early punk was not entirely free of misogyny, with bands such as the Stranglers, the Dead Boys, and even Blondie occasionally putting forth unabashedly sexist lyrics and publicity. The Stranglers and Dead Boys were especially objectionable, singing gleefully about beating girlfriends, having sex with groupies, and dominating women. Women and femininity were not always welcome in the punk scene.” *Id.*

28. Michelle Lee, *Oh Bondage: The Early Punk Movement—and the Women Who Made It Rock*, OFF OUR BACKS 42, 42 (November-December 2002).

29. *Id.* at 43 (discussing the Raincoats).

30. *Id.* at 44 (discussing Crass).

31. *Id.*

32. *Id.* at 43.

33. *Id.*

boy 'zine after boy 'zine, boy punk after boy punk after boy."³⁴ But it was more than just the punk scene. These girls were angry with how *society* treated them:

The girls were furious about things like parental-consent abortion laws, bikini-clad women who hawked beer and cigarettes on billboards and TV, and the archaic gender roles that pervaded the cartoon section of the *Washington Post*. They were ready to revolt over things like hallway gropes and sidewalk heckles, leering teachers, homophobic threats, rape, incest, domestic violence, sexual double standards, ubiquitous warnings against walking certain places or dressing certain ways . . . The affronts were never ending. . . . They were mustering for battle against the idea that to be a girl was to be in grave danger that you could never fully escape, only manage by narrowing your life, your range, your wardrobe, your gaze. . . . [T]he girl revolution was just beginning.³⁵

Riot Grrrl provided a space to reflect upon and begin to challenge the expectations society forced on girls,³⁶ to conceptualize and begin to

34. LEBLANC, *supra* note 14, at 132 (quoting a popular zine and explaining that these girls “realiz[ed] that they will ‘never meet the hierarchical BOY standards of talented, or cool, or smart’ [and] argue[d] that if they do meet them ‘we will become tokens.’”). LeBlanc contends that Riot Grrrl evolved into its own faction—a separate and distinct culture. *See id.* at 132–33 (“In challenging the masculinist standards of punk, Riot Grrrls have been marginalized, indeed, have formed their own subculture now quite distinct from punk. Punk girls who want to remain within the subculture restrict their resistance to the masculinism of punk to rhetorical, general comments rather than to confrontation of other punks.”); *Id.* at 64 (“[D]espite the critique of a break-away faction (Riot Grrrl), at the beginning of its third decade of resistance, revolt, and refusal, punk remains a predominantly white, masculine youth subculture. Punk is still a site where girls remain marginalized and silenced. . . . Even within punk, the most rhetorically egalitarian and oppositional of youth sub-cultures, girls are still on the outside.”). *See also* Emily Spiers, ‘Killing Ourselves is Not Subversive’: Riot Grrrl from Zine to Screen and the Commodification of Female Transgression, 26 WOMEN: A CULTURAL REVIEW 1, 2 (2015) (arguing that Riot Grrrl “co-opted punk” as a mechanism “to scream feminist protest and give voice to female desire”).

35. MARCUS, *supra* note 1, at 92–93. *See also id.* at 92 (“Riot Grrrl would later be spoken of as girls challenging sexism within punk. . . . Punk wasn’t really the point, though. The problems with the scene burned the girls up precisely because it echoed the way the world at large treated them.”); Anna Batt, *Bubblegum Girls Need Not Apply: Deviant Women in the Punk Scene*, 2 ON OUR TERMS 52, 57 (2014) (“The Riot Grrrl movement consisted of networks of young women who worked to challenge male hegemony within the punk scene and in society in general.”).

36. *See* Ednie Kaeh Garrison, *U.S. Feminism—Grrrl Style! Youth (Sub)Cultures and the Technologicals of the Third Wave*, 26 FEMINIST STUDIES 141, 142–43 (2000) (“Riot Grrrl is an alternative subculture built around opposition to presuppositions that young (usually white) U.S. girls and women are too preoccupied with themselves and boys to be interested in being political, creative, and loud.”); Marisa Cooke, *Revolution Girl-Style Now!*, CONFLUENCE (Jan. 23, 2017, 11:34 AM), [<https://perma.cc/6P96-XMSF>] (“Riot grrrl was a short-lived but highly influential musical and social movement that addressed the societal expectations and injustices inherent in being a young woman.”).

understand sexual harassment,³⁷ and to share and begin to heal from sexual assault.³⁸ Kathleen Hanna, often considered one of the original founders of Riot Grrrl (and lead singer of popular Riot Grrrl band, Bikini Kill), was especially aware of the benefits of feminism and the potential healing power of communities of girls. Kathleen worked at a domestic violence shelter, provided counseling services, and reached out to high schools to teach about rape and sexual assault.³⁹ She hosted group discussions where girls would work through their traumas with one another and she began to challenge sexual abuse through her music by creating space at her early concerts to listen to girls in the audience “talk about their own abusive fathers, violent boyfriends, and incest flashbacks.”⁴⁰ She supported the girls who shared their stories, assisted them with getting help from other support networks and professionals, and began to see how systemic these issues are.⁴¹ From there, the Riot Grrrls coalesced, forming a tight-knit community held together by empathetic listening and support, passionate politics, and good music.

B. Cool Schmoool – [Com]passionate Politics

Just as Kathleen sat and listened to her friends and fans divulge traumatic stories and offered empathy and a reminder that there is more to the speaker than that one experience, Riot Grrrl consciously created space for girls to be girls—to explore societal expectations, feelings, and experiences in a safe and thoughtful environment.⁴² With this room to grow, the girls learned to

37. See Spiers, *supra* note 34, at 3 (“Drawing on one of the central tenets of second-wave feminist thought, riot grrrls linked the personal with the political, connecting individual lived experience to inequality and injustice perpetuated by dominant power structures.”).

38. See Cooke, *supra* note 36 (“The key to the effectiveness of zine culture was the agency it gave to young women in terms of writing their own narrative. . . . [G]irls wrote about the injustices and abuses they had suffered purely for being female, like rape, molestation, incest, and domestic violence.”); Schilt, *supra* note 16, at 87 (2003) (explaining that zines offered accounts of the healing process, including sharing one’s story).

39. MARCUS, *supra* note 1, at 38. See also Johnny Temple, *Noise From Underground: Punk Rock’s Anarchic Rhythms Spur a New Generation to Political Activism*, THE NATION (Oct. 18, 1999), <https://www.thenation.com/article/noise-underground/> [<https://perma.cc/6X3V-4VE3>] (documenting Hanna’s role in developing “Girl Talk,” a sexual support group targeting teens and her outreach at Maryland high schools where she spoke at assemblies and hosted private sessions with students).

40. MARCUS, *supra* note 1, at 38.

41. *Id.* at 40 (“Kathleen knew that feminism could save people’s lives. How could the girls she met on tour possibly fight against what was being done to them if they lost the ability to name it, to analyze it, to see how it was part of a system?”).

42. Please note that Riot Grrrl wasn’t always perfect. The group was comprised of mostly white girls and had difficulty productively reflecting on and addressing racism. See *id.* at 165–66 (describing a tense debate among girls at the 1992 Riot Grrrl convention’s “Unlearning Racism” workshop—some girls brainstormed how to prevent repeating feminisms’ racist failings while others questioned whether they should attempt change the group’s current composition, and consequently, its social dynamic); Radway, *supra* note 14, at 17–20 (documenting some of Riot Grrrl’s problems with race by tracing one member, Mimi Thi Nguyen’s attempts to callout Riot Grrrl’s race-neutral/racism-ignorant take on sexism). Some have noted similar failings in the maintenance of hegemonic sexuality. See Mimi Schippers, *The Social Organization of Sexuality and Gender in Alternative Hard Rock: An*

identify patterns of oppression and imagine possible alternatives and solutions.⁴³ Their community encouraged the girls “to talk openly about the female sexual experience.”⁴⁴ This in turn allowed Riot Grrrl to operate as a unified front⁴⁵ “to denounce misogyny, violence against women, and call out the jealousies and competitiveness inherent in girl culture” and ultimately “undermine, destabilize, agitate, and challenge women’s marginalization.”⁴⁶

One especially important tool the Riot Grrrls utilized in challenging women’s place in society was calling out and confronting dangerous people. The Riot Grrrls vocalized abuse—they called it out in song lyrics,⁴⁷ processed it in conversations, and described it in zines. By speaking words into the world and shedding light on sexual violence, the Riot Grrrls stopped its normalization and encouraged other girls to similarly identify and call out abusive behaviors.

Connecting the Riot Grrrls to their early feminist punk predecessors, the Riot Grrrl bands drew their audience’s attention to the lived realities many

Analysis of Intersectionality, 14 GENDER & SOC’Y 747, 760 (2000) (noting that rockers replicated heterosexual normative sexual structure and at times expressed overt or subliminal heterosexism: “although alternative hard rockers were relatively successful in creating a social setting with norms that challenged gender hegemony, at the same time, they continuously reproduced hegemonic sexuality”).

43. For example, the Riot Grrrls first zine “decried ‘the general lack of girl power in society as a whole, and in the punk rock underground specifically’” and announced “Clarence Thomas is not your friend.” MARCUS, *supra* note 1, at 82. See also Radway, *supra* note 14, at 29 (“In many ways, paper zines of the 1990s embodied vernacular efforts to understand hegemony, which is to say, how structures of power inhabit the finest textures of the personal and the everyday. Zines also enabled their creators and their readers to explore the question whether such power hierarchies and the forms of subjectivity they produced might be changed, and how. . . . [t]hey functioned as forms of cultural activism, hopeful efforts to produce alternative media capable of ferreting out and addressing other like-minded misfits and dissidents who might together constitute new social forms and new ways of living otherwise.”).

44. *What Happened to All the Ferocious Female Punks?*, NME BLOG (Oct. 21, 2009), [<https://perma.cc/H4EM-UGT5>].

45. See note 42 (explaining some criticisms of Riot Grrrl as unwilling to interrogate the movement’s racism and heteronormativity). See also Radway, *supra* note 14, at 24 (“By leaving out whole chunks of underground history as revealed in those zines, such narratives potentially reinscribe familiar privileges of gender, sexuality, race, and class, and deny the significance of multiple, contentious, changing forms of dissent in the 1990s.”).

46. Tram Nguyen, *From SlutWalks to SuicideGirls: Feminist Resistance in the Third Wave and Postfeminist Era*, 41 WOMEN’S STUD. Q. 157, 167 (2013).

47. Some song lyrics told personal stories about experiencing abuse. See HEAVENS TO BETSY, *My Secret*, on MY SECRET/COOL SCHMOOL (K Records 1992). See also MARCUS, *supra* note 1, at 97–98, 129 (explaining that Heavens to Betsy played at a convention in Olympia and included a song in their set, “the uncompromising ‘My Secret,’ [that] put a sexual abuser on notice” and that the band’s song “Stay Dead” “hinted movingly at childhood sexual abuse and a survivor’s struggles to move on”). Others focused on identifying larger, systematic treatment of women. See BRATMOBILE, *Shut Your Face*, on GIRLS GET BUSY (Lookout! Records 2002) (“When girls are dying / It’s all hype and selling news / When boys are lying / Close your mouth and shut your face / To keep from crying / Ask if it’s a girl thing yeah / Cause girls are dying / Yeah another girl’s gone missing”).

women face by singing about rape and societal expectations.⁴⁸ They used their songs as warnings for perpetrators of sexual assault⁴⁹ and encouragement for other women.⁵⁰ In personal conversations and at meetings,⁵¹ these girls named names.⁵² They told stories about specific members of their community or random people at shows.⁵³

The girls used this information as a caution, a warning to keep an eye out and protect themselves. Sometimes the warnings were as simple as girls identifying people as “assholes” because of how they treated women or how they attempted to “schmooze” girls at bars.⁵⁴ But the girls knew it could be a matter of life or death.⁵⁵

Through creating space to call out sexual assault and harassment in zines, at meetings, and in song lyrics, the Riot Grrrls created opportunities

48. Daugherty, *supra* note 25, at 6 (“In their music, female-driven bands engaged in open discussions of womanhood. Bayton explains that ‘a wide range of new topics entered the musical discourse, ones which spoke of aspects of women’s experience, previously considered inappropriately unsexy or taboo: housework, motherhood, menstruation, contraception, rape, anorexia, female masturbation, cunnilingus, and faking orgasm.’”) (internal citations omitted).

49. See, e.g., HEAVENS TO BETSY, *Stay Away*, on CALCULATED (Kill Rock Stars 1994) (“I saw the way you looked at me / I know the things you want from me / I know the things you take from me / My love, my life, my words, my heart / My innocence is torn apart / I never trust a word you say / You’re just a bad memory / Stay away, stay away”); BRATMOBILE, *Idiot Lover*, on GIRLS GET BUSY (Lookout! Records 2002) (“You can run / But you can’t hide / You were not a nice guy / With words like sugar you’re not so sweet / Don’t bother me / Just say you’re sorry”).

50. See BIKINI KILL, *Double Dare Ya*, on REVOLUTION GIRL STYLE NOW! (self-released 1991) (“Hey girlfriend / I got a proposition goes something like this: / Dare ya to do what you want / Dare ya to be who you will”). See also Ginia Bellafante, *Feminism: It’s All About Me!*, TIME INT’L (June 29, 1998) (“Part of the reason for Riot Grrrl’s impact is that it often focused on the issue of childhood sexual abuse. Not only did the songs relate harrowing personal experiences but the band members started ‘zines and websites through which teenagers who had been molested could communicate with one another.’”).

51. Riot Grrrl began holding meetings early on, intending Riot to create a space for girls to “get together in one room to figure it out.” MARCUS, *supra* note 1, at 88. One girl explained, “It wasn’t until the option was in front of me that I realized how much I needed it.” *Id.* at 89–90 (quoting Ananda La Vita).

52. See MARCUS, *supra* note 1, at 284 (describing two girls naming a guy who claimed that he liked to harass women and posting flyers “that included the guy’s photograph and his name”).

53. See Schippers, *supra* note 42, at 751. See also MARCUS, *supra* note 1, at 283 (“[W]hen she saw other girls talking to him at shows, she’d pull them aside and say, ‘I think you should know that that guy you’re talking to doesn’t treat women very well.’”).

54. Schippers, *supra* note 42, at 751 (“Alternative hard rockers also developed and enforced norms against men actively pursuing women sexually, or against what participants call ‘schmoozing,’ within the confines of the bar. There was a common understanding among participants that the rock show, despite taking place in bars, did not serve as a place to find potential sexual partners. *They defined and maintained this normative structure by chastising men who were perceived to be schmoozing or through storytelling.*”) (emphasis added).

55. For example, about a month after Michael Cartier hassled and heckled Bikini Kill at one of their shows, Kathleen Hanna learned through the grapevine that Cartier murdered his ex-girlfriend, Kristin Lardner, whom he had been stalking since their break up. MARCUS, *supra* note 1, at 153–54.

to speak and be heard.⁵⁶ To listen, to witness, and to heal. To learn that you weren't alone and that your story wasn't over.

The Riot Grrrls recognized how important this was. As Kathleen mentioned once in an interview, "People talking about sexual abuse and getting beat up and emotional abuse in their houses is so important."⁵⁷ She wanted to encourage people "to break their silence" and envisioned "a punk rock movement—an angry girl movement—of sexual abuse survivors . . . I mean, with all of that energy and anger, if we could unify it in some way . . ."⁵⁸ Sara Marcus explains that Kathleen trailed off, noting that "[i]t's easy to imagine her looking down at her hands, overcome with the intensity of her vision."⁵⁹

That anger and energy and passion and outcry, it is powerful. It can halt traffic. It can take a person's breath away. It can shake a silent, angry, fed-up mass awake. It can tether together hundreds and thousands of people with common experiences. It can spark a revolution.⁶⁰

But at this time, in the 1990s when feminist punk teen girls were getting their footing and realizing the importance of communicating and storytelling and standing up for themselves and each other, this anger and yearning for change sat quietly, festering as it waited for the right time to unleash. And as a pot of water begins to boil and the bubbles rise to the cusp, these girls grew into women and more girls began to learn, technology expanded to connect people hours and days apart, conversations at shows and storytelling in bedrooms continued to invigorate and empower.⁶¹

56. These moments were powerful. They made the girls feel like they weren't constantly being "gaslighted" by society. As one girl explains,

Talking to these girls, I began to understand that I didn't have to be miserable . . . I felt powerless not because I was weak but because I lived in a society that drained girls of power. Boys harassed me not because I invited it but because they were taught it was acceptable and saw that no one intervened. These things weren't my fault, and we could fight them all together. For the first time in years, I knew that I was going to be okay.

Id. at 8.

57. MARCUS, *supra* note 1, at 91.

58. *Id.*

59. *Id.*

60. See generally REBECCA TRAISTER, GOOD AND MAD: THE REVOLUTIONARY POWER OF WOMEN'S ANGER (Simon & Schuster eds., 1st ed. 2018) (exploring the history of women's anger and its radical potential for sparking political change).

61. Anita Harris provides helpful insight into why girls and young women choose to engage in political activism in private spaces like bedrooms and bars: "The use of girlhood and young women's experiences as key tropes for post-industrial identity, the saturation of the public imagination with 'the girl' as a symbol of cultural change and anxiety, and the unprecedented scrutiny of young women's lives have resulted in young women retreating to the margins for self-expression." Harris, *supra* note 14, at 132. One of her interviewees said, "We don't always need a movement to express our politics. I think we can all start our own revolutions from our bedrooms with a common goal." *Id.* And further explains that this move to "politic[ize] and re-invigorat[e] the private" has radical potential: "It may not be taken seriously by the dominant culture because it doesn't have a public face to it that is posing a specific threat. But I don't think that that means that it's not there either . . . That revolution

The Riot Grrrls sowed the seeds for revolution.⁶² In their bedrooms and at concerts, in zines and in songs, these girls began formulating politics targeted at challenging sexual violence.

As the digital age came to being and social media gained popularity, girls have taken the work the Riot Grrrls started and begun building community and imagining their future online. In private groups and networks on various platforms, girls have once again found a space to explore their experiences and conceptualize their place in the world.⁶³ Through this private brainstorming and development, girls have been crystallizing their goals and preparing to make their resistance public.⁶⁴

III. PART TWO – #METOO: RISING AND RIPPLING

#MeToo. The hashtag almost immediately removed the thin veil hiding women’s secreted but widely-known experiences with sexual harassment, discrimination, and violence.⁶⁵ In very short order, #MeToo revealed the expansive extent of the problem and challenged society to reevaluate its historic refusal to trust women when they brought forth allegations.⁶⁶

needs to be nurtured in an underground fashion for a long time.” *Id.* (quoting interviewee).

62. See Nguyen, *supra* note 46, at 167 (arguing that through their oppositional nature, the 1990s feminist punk bands worked to reshape feminism and push it in a new direction and specifically explaining that, “these organizations undermine, destabilize, agitate, and challenge women’s marginalization within and beyond the art world. Their work presents a plurality of oppositional consciousness that speaks to women’s anger, creativity, and demands for social and political justice.”).

63. Katrina R. Bodey & Julia T. Wood, *Grrrlpower: What Counts as Voice and Who Does the Counting?*, 74 S. COMM. J. 325, 334–35 (2009); Garrison, *supra* note 36, at 152 (“Democratized technologies become a resource enabling young women to get information to other young women, girls, and boys, a means for developing political consciousness, and a space that can legitimate girls’ issues.”). In the early years of the Internet, Riot Grrrl found space online to continue fostering community. Ellen Riordan, *Commodified Agents and Empowered Girls: Consuming and Producing Feminism*, 25 J. OF COMM. INQUIRY 279, 288 (2001) (“While the circulation of Riot Grrrl music and zines helps define this feminist network, the Internet helps them foster a dynamic movement. Riot Grrrls primarily in the United States but also in Canada and the United Kingdom have connected, shared, and distributed their work via the Internet. Riot Grrrl Web sites are turning into e-zines, and the content is original art, inspiring essays, and engrossing bulletin board discussions. Many of these young women offer help to other girls interested in Web design. The Internet helps to build and maintain a Riot Grrrl community.”).

64. Bodey & Wood, *supra* note 63, at 335 (“Through discussion with others, girls may strengthen their insight into and resistance to normative pressures to be conventionally feminine. As a result, they may go on to enact voice in more definitive and perhaps public ways. Yet, we argue that the steps toward overt, observable voice are not separate from voice itself if voice is conceived as a process rather than an event.”).

65. Kara Fox & Jan Diehm, *#MeToo’s Global Moment: The Anatomy of a Viral Campaign*, CNN (Nov. 9, 2019, 1:35 PM), [<https://perma.cc/U5TY-SDZY>] (data analytics showed “a viral spike immediately after the Weinstein revelations”).

66. Murray, *supra* note 11, at 866. For a succinct and poignant explanation of the societal failings that facilitate sexual harassment and assault to exist unchallenged, see *id.* at 867–68.

Armed with the hashtag and the internet's broad reach, survivors narrated their traumatic experiences and called out perpetrators.⁶⁷ Similar to the type of emotive connections cultivated in Riot Grrrl's meetings and discussions, these narratives brought the allegations front and center in the public sphere. Shifting these stories from the private to the public has encouraged women to once again lean on one another and form compassionate relationships.⁶⁸ This community building was especially poignant during the Senate Judiciary Committee's hearings on now-Justice Brett Kavanaugh's confirmation hearings.⁶⁹

But as Dr. Christine Blasey Ford's experience makes chillingly clear, sharing stories is not without consequences. Accusers confront a variety of hurdles and challenges once they decide to make public their experiences of sexual assault. These can take the form of personal ostracization. For example, many women who have accused prominent men like Matt Lauer have had to remain anonymous to avoid shattering their lives.⁷⁰ Dr. Blasey Ford has moved numerous times and has been continually harassed for coming forward with her allegations against Kavanaugh.⁷¹ This harassment isn't unusual, but a real risk that women

67. See, e.g., Complaint, *Ratner v. Kohler*, No. 17-00542 HG-KSC, 2018 WL 1055528 (D. Haw. Feb. 26, 2018) (quoting accuser's Facebook post calling out film director and producer, Brett Ratner: "Brett Ratner raped me. I'm saying his name, I'm saying it publicly. Now at least I can look at myself in the mirror and not feel like part of me is a coward or a hypocrite. I'm standing up and saying this happened to me and it was not ok.").

68. Vikki Ortiz & Angie Leventis Louros, *Sexual Harassment and the #MeToo Movement: Catalyst for Change or Fleeting Moment?*, CHI. TRIB. (Oct. 28, 2017 9:29 AM), [https://perma.cc/Z6GY-XMUZ] ("It feels like we are at a cultural moment where women are speaking out about sexual harassment and sexual violence and it's reaching a cultural mass," she said. "The connective tissue in Chicago is getting stronger every day. People really care. They are really feeling a lot of emotions right now, I think it's really important that we keep hope at the forefront.") (quoting Emily Dreke, Vice President of Development and Communications at the Chicago Foundation for Women).

69. Haley Sweetland Edwards, *Why Americans Are Still Grappling With Christine Blasey Ford's Legacy*, TIME (Dec. 11, 2018), [https://perma.cc/S2P7-KGTL] ("Ford herself received more than 150,000 personal letters, from teenagers and middle-aged women and octogenarians, all of whom recognized themselves in her pain."). This is reminiscent of the shared empathy noticed at the 1992 Riot Grrrl convention as attendees shared stories of sexual violence among themselves: "One girl's pain was all of theirs; they all felt it." MARCUS, *supra* note 1, at 163.

70. See Vagianos, *supra* note 6; Ramin Setoodeh & Elizabeth Wagmeister, *Matt Lauer Accused of Sexual Harassment by Multiple Women (EXCLUSIVE)*, VARIETY (Nov. 29, 2017 12:34 PM), [https://perma.cc/EL3X-683R] ("Variety has talked to three women who identified themselves as victims of sexual harassment by Lauer, and their stories have been corroborated by friends or colleagues that they told at the time. They have asked for now to remain unnamed, fearing professional repercussions.")

71. Mak, *supra* note 5 (relaying that Dr. Blasey Ford has had to move four times, pay for a private security detail, and has been unable to return to work as she continues to be harassed); Lindsey Bever, *Christine Blasey Ford Says Some Good Came Out of her 'Terrifying' Testimony Against Kavanaugh*, WASH. POST (Nov. 27, 2018), [https://perma.cc/N4BA-TSVC] (stating that Dr. Blasey Ford "had been receiving death threats").

face when publicly sharing their experiences.⁷²

Accusers also face legal liability: some of the accused have taken to filing defamation lawsuits against their accusers to counter allegations of sexual assault or harassment. Court dockets⁷³ and news sources⁷⁴ are full of these types of cases. Fear of these suits is so prevalent that popular media outlets circulated articles sounding in legal advice that explained the potential liability that comes with posting a #MeToo story.⁷⁵ Accusers are even reaching out to social media to crowdsource funding for their legal fees.⁷⁶

The cases are messy. Often, it’s “she said, he said/she said, she said/they said, they said.”⁷⁷ The evidence can be difficult to interpret.⁷⁸ Alcohol can

72. See, e.g., Andy Cush, *After #MeToo: Accusers of R. Kelly, Jesse Lacey, and More on Enduring Fan Harassment*, SPIN (Aug. 14, 2018, 12:54 PM), [<https://perma.cc/UMY7-Z35N>] (documenting story after story of a woman publicly sharing her experience and being immediately harassed by the perpetrator’s fans accusing her of seeking attention or money, one woman receiving messages from a fan writing that the fan “hoped that someone would shoot [the accuser] . . . [a]nd he hoped that someone would rape [her] dead body again,” and fans showing up at one woman’s job and harassing her until she eventually quit).

73. See, e.g., Complaint, *Fitzgibbon v. Radack*, No. 3:18-cv-00247, 2019 WL 470905 (E.D. Va. April 13, 2018); Complaint, *supra* note 67; *Schwern v. Plunkett*, 845 F.3d 1241 (9th Cir. 2017); *Chastain v. Hodgdon*, 202 F. Supp. 3d 1216 (D. Kan. 2016); *Lynch v. Christie*, 815 F. Supp. 2d 341 (D. Me. 2011).

74. Ackland, *supra* note 19 (detailing various defamation suits filed in response to allegations of sexual harassment and assault in different countries and noting that “women who blow the whistle are also in for a torrid time in the witness box”); Couloumbis & Navratil, *supra* note 20 (reporting that a senator sued a woman who “accused him of luring her into performing oral sex when she was a teenager and he was an attorney representing her mother in a criminal case” and who “distributed to the offices of nearly every senator copies of a private criminal complaint that described the alleged sexual assault,” prompting senate democrats to launch an independent investigation into the allegations); Michelle Kaminsky, *The ‘Shitty Media Men’ Defamation Lawsuit is a Danger to Both Free Speech and the #MeToo Movement*, FORBES (Oct. 22, 2018 10:26 AM), [<https://perma.cc/5VQE-4FH7>] (reporting that one person included on the “Shitty Media Men” list sued the creator for defamation and requested “the email address information, Google account, Internet Protocol (“IP”) address assigned to the accounts used by the Jane Doe Defendants by the account holders’ Internet Service Provider (“ISP”), email accounts and/or Google accounts, on the date and time at which the Posts were published and/or information was entered into the List” and concluding that “[i]f a chill ran down your back reading that, you aren’t alone. Indeed, it’s difficult to imagine a more pointed way to both literally and figuratively chill the freedom of speech on the internet.”).

75. See Sweeny, *supra* note 2.

76. Nancy Cárdenas Peña (@ncardenastx), TWITTER (Apr. 3, 2019 3:09 PM), [<https://perma.cc/3EVN-Z5X3>] (sending out a link to a crowdsource fund with the caption, “I have been sued for defamation after going public with the abuse I endured at the hands of an organizer. Want to know why Survivors are hesitant to speak? This is it. Please share and support if you can. Thank you #BelieveSurvivors #MeToo #WeSupportNancy”).

77. In the current civil system, these cases are generally single party suits, but it is possible that conduct involved more than two parties and the genders of the parties varies broadly.

78. See, e.g., *Sanders v. State* [of Nevada], No. 56404, 2011 WL 5846417 slip op. at 1, 3 (Nev. Nov. 18, 2011).

complicate matters.⁷⁹ Further, it can be tough to conceptualize how to evaluate the arguments.⁸⁰ On the one side, allegations of sexual assault are incredibly serious and could irreparably tarnish an accused's reputation. When the stakes are so high, this line of logic goes, the law should take extra care to block false allegations from coming out.⁸¹ Weighing against this theory though is the value of having allegations brought to light.⁸² Exposing violence and naming names warns others and can prevent additional assaults.⁸³ Additionally, when one woman shares her story publicly, it can

79. See *People [of Illinois] v. Collette*, 577 N.E.2d 550, 551 (Ill. App. Ct. 1991) (evaluating whether a defendant could introduce evidence of a victim's prior alcohol use when she already testified that she was an alcoholic and consumed alcohol on the night of the sexual assault); *Arizona v. Causbie*, 384 P.3d 1253, 1256–57 (Ariz. Ct. App. 2016) (considering defendant's objection to a jury instruction explaining how to evaluate whether a victim consented after consuming alcohol).

80. Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements are Women*, N.Y. TIMES (Oct. 29, 2018), [https://perma.cc/RJ9W-URRD] (“And as the Supreme Court confirmation battle over Brett Kavanaugh showed, Americans disagree on how people accused of sexual misconduct should be held accountable and what the standard of evidence should be.”).

81. See Diana Davison, *How the #MeToo Movement Helped Create a Script for False Accusers*, QUILLETTE (Nov. 6, 2018), [https://perma.cc/GSU8-ZN8H] (“The only way to avoid such miscarriages of justice is through the rigorous application of due process, including the presumption of innocence.”); Bari Weiss, *The Limits of ‘Believe All Women’*, N.Y. TIMES (Nov. 28, 2017), [https://perma.cc/BJ5G-APA4] (“What we owe all people, including women, is to listen to them and to respect them and to take them seriously. But we don't owe anyone our unthinking belief. ‘Trust but verify’ may not have the same ring as ‘believe all women.’ But it's a far better policy.”).

82. There is also the long-recognized fundamental tension between defamation liability and free speech principles. As the Supreme Court explained in *New York Times v. Sullivan*, civil defamation suits may invoke such a fear as to “markedly [] inhibit[]” free speech. 376 U.S. 254, 277 (1964). This threat of chilled speech is equally applicable when survivors decide whether to publicly associate with the #MeToo movement and whether to publicly identify their perpetrator. See Sweeny, *supra* note 2 (“[N]aming names carries some risk—more specifically, the risk of being sued for defamation. . . . [E]ven if the victims are likely to win in court, the legal battle can be draining, both emotionally and financially. A threat of a defamation lawsuit is therefore just another barrier to reporting sexual assault, and victims who do disclose, even on social media, are incredibly brave.”).

Some states around the country have passed “Anti-SLAPP” laws to ease the tension and ensure that important information is included in the public discourse by prohibiting frivolous, strategic lawsuits. See *Rusheen v. Cohen*, 128 P.3d 713, 717 (Cal. 2006) (explaining that the California legislature enacted the anti-SLAPP statute “to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights”). However, Anti-SLAPP statutes are of limited assistance in defamation cases arising out of allegations of sexual assault or harassment, see *Lynch v. Christie*, 815 F. Supp. 2d 341, 351 (D. Me 2011) (denying defendant's motion to dismiss per Maine's anti-SLAPP statute), especially in federal diversity cases, *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015) (holding that a federal court sitting in diversity jurisdiction may not apply state anti-SLAPP statute).

83. Cush, *supra* note 72 (noting that R. Kelly's accuser regrets waiting so long to speak up: “The other girls that have been abused, victims of his in the last couple of years, if I had spoken up a little sooner maybe that would never have happened to them”). See also *id.* (“Silence is very, very powerful. When someone [an accused's friends' have] worked with and are promoting to their followers turns out to be an abuser, they have a responsibility to

encourage others to come forward as well—both to strengthen the probability that the perpetrator is held accountable for his behavior⁸⁴ and to facilitate the individual survivors’ healing processes.⁸⁵

But when the law permits the accused to threaten lawsuits, further putting the accuser’s emotional and financial well-being on the line, some survivors decide not to speak up.⁸⁶ This chill is effective and potentially severely damaging, both for the accuser⁸⁷ and for future potential victims.⁸⁸

So how does the movement move forward? Sharing these stories and shedding light on rampant sexual violence is a necessary starting point to reveal the extent of the problem and an important metric by which activists can ensure they are productively and comprehensively targeting violence.⁸⁹

warn the young women who follow them and not stay silent.”) (quoting one anonymous survivor).

84. See Deborah Tuerkheimer, *What if Only One Woman Had Accused Harvey Weinstein?*, THE GUARDIAN (Oct. 22, 2017), [https://perma.cc/SUJ6-6B5L] (“The accounts of multiple women are needed to corroborate one another—that is, to show that an accusation which, on its own, would likely be discredited, can be believed when considered along with a constellation of similar allegations.”). For further reading on the credibility of women who accuse others of rape, see Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 PENN. L. REV. 1 (2017).

85. See Cush, *supra* note 72 (“She had not considered speaking publicly about her ensuing relationship with him until this spring, when she heard from another accuser who was organizing several women to come forward as a group via the Tumblr. She figured that multiple women telling their stories at once would be harder for skeptics to write off, and that the women could act as a support system for each other.”).

86. Kingkade, *supra* note 2 (“Sometimes the mere threat of a defamation suit is enough to deter a student from going ahead with a sexual assault claim.”).

87. Anne Godlasky, *Rape Costs Survivors Stress, Trust, Sleep and About \$122,000*, USA TODAY (Apr. 3, 2017), [https://perma.cc/ZPW8-AJYN] (“Anxiety, anger, guilt, nightmares, distrust, hypervigilance and lack of interest in sex are all normal reactions. Feeling numb or practicing avoidance instead? That’s common, too. ‘The memories and triggers are painful, so it’s not uncommon to want to push those away and bury them,’ Gillihan said. ‘I don’t want to give the impression that a person has to go through some sort of lengthy therapy to put it to rest, but at the same time, when we bury these things, often they come back.’ Luckily, these common symptoms diminish over time for many people and one of the best ways of dealing with them is to talk, according to Gillihan.”).

88. *How Saying #MeToo Changed Their Lives*, N.Y. TIMES (June 28, 2018), [https://perma.cc/SU9N-VF3T] (“I didn’t want it to be just about me and my validation and my revenge. I wanted others to have a sense of resolution and relief from the trauma, the harassment, the fear and the blame and the self-shaming. These are vulnerable young women who depend on him for their paycheck.”) (quoting Natalie Saibel, as told to Julia Moskin); *id.* (“It’s not about tearing someone down. Stopping people earlier, cauterizing the problem with people who are chronic or compulsive, that’s important. Hearing people’s experiences so they don’t have to sit with shame, that’s one of the most powerful aftereffects.”) (quoting Abby Schachner, as told to Melena Ryzik).

89. See Ortiz & Lourgos, *supra* note 68 (quoting Professor Deborah Tuerkheimer as characterizing #MeToo as the beginning of a conversation, explaining “What I hope for the future is that one woman’s allegations will be judged fairly, in a way that I don’t think they often are in today’s society. And that it will be judged fairly whether it’s made by a famous actress or it’s made by a poor woman, a woman of color, an undocumented woman, a trans woman—women whose accounts are more likely to be met with skepticism.”). #MeToo has of course not solved every issue of sexual harassment—there is work to be done beyond

Change is occurring, and #MeToo is part of that. Women have taken over prominent roles in industries “jolted by harassment.”⁹⁰ They’re challenging the accused to be accountable for their behavior.⁹¹ They’re trusting themselves and encouraging others to take control.⁹² The numerous and varied #MeToo stories ought to be valued for what they are: courageous acts of personal sacrifice in the name of the greater good.⁹³

Instead of pushing these conversations back into the bedrooms⁹⁴ or bars hosting punk shows,⁹⁵ the law should incentivize making these accusations in the public discourse. To properly align the incentives in this way, whistleblowing law’s struggle with a similar balancing act can provide some guidance and offer potential recommendations for ways to craft legislation encouraging survivors to blow the whistle on their perpetrators.⁹⁶

storytelling. *See* Carlsen et al., *supra* note 80 (“Sexual harassment has hardly been erased in the workplace. Federal law still does not fully protect huge groups of women, including those who work freelance or at companies with fewer than 15 employees. New workplace policies have little effect without deeper cultural change.”).

90. Carlsen et al., *supra* note 80 (recognizing that “[a]ppointing a woman does not guarantee change. . . . Research has repeatedly shown that women tend to lead differently. . . . In news media and entertainment, many women who ascended to jobs vacated by men have changed the tone and substance of what they offer audiences—and in some cases, the fallout from #MeToo has shaped their decisions.”).

91. *Id.* (discussing #MeToo’s founder, Tarana Burke’s reflection on the accused attempting to rise back up in society commenting, “‘Where’s the self-reflection?’ she said. ‘Perhaps if we saw some evidence of that, then we can have a more robust conversation about the road to redemption.’”).

92. *Id.* (“In the meantime, these women say, there are more than enough qualified women ready to take their places in power. ‘A bunch of us who took over these jobs got promoted because we were really good at these jobs,’ said Ms. Vega, the radio host. ‘We have the skills, we have the experience, we have the work ethic and we have the smarts to do it, and it’s time for us to do this job.’”).

93. *See* Kaili Joy Gray (@KailiJoy), TWITTER (Sept. 16, 2018, 11:09 AM), [https://perma.cc/X37L-KXPR] (“A woman is trying to protect us from putting an attempted rapist on the Supreme Court, and she’s going to be destroyed for it, and she knows it, and she’s doing it anyway. That’s patriotism.”); @Susan_Hennessey, TWITTER (Sept. 27, 2018), [https://perma.cc/GK6R-85QR] (“This is among the bravest things I have ever witnessed. [referring to Dr. Christine Blasey Ford’s testimony before the Senate Judiciary Committee]”). Professor Elizabeth Tippet has predicted that the #MeToo movement can fundamentally shift harassment law, at least by communicating to judges deciding harassment cases that sexual harassment and assault can have lasting effects on victims. *See* Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 242 (2018) (“These stories provided context for the severity or pervasiveness of the conduct from the victim’s perspective. Over time, judges may update their application of legal standards for severe or pervasive and objectively hostile behavior accordingly.”).

94. *See* Harris, *supra* note 14, at 134 (“Grrrlzines, as opposed to punk fanzines,” arising in the 1990s and created and consumed by young punk feminist women, “discussed, debated and organised around issues affecting young women, such as violence, sexual harassment, self-esteem, unemployment, health, sexuality and the law. . . . [T]he zines, themselves [referring to the young women] and the culture they grew from remained ‘underground’ since young women feared being scrutinised and co-opted by the mainstream.”).

95. Bellafante, *supra* note 50 (noting that the 1990s feminist punk bands’ songs “relate[d] harrowing personal experiences” about sexual abuse).

96. There is some evidence that California is already moving in this direction. *See*

IV. PART THREE – WHISTLEBLOWING: REVELATORY PROTECTIONS

The #MeToo movement is tackling the tension between protecting the accused and encouraging the dissemination of #MeToo stories, as illustrated by current concerns about defamation liability. But this debate is not new. Whistleblowing law has similarly attempted to strike the proper balance between preventing the dissemination of defamatory or disparaging statements and obtaining insightful information gathered from informants. In some cases, the law has determined that the value of the otherwise unknown or unexposed information outweighs the company or employer’s desire to maintain confidentiality and thus, its reputation.⁹⁷ This history and wisdom provides fruitful ground for #MeToo activists to learn how to approach this debate. The legal protections afforded whistleblowers have dramatic potential to help support the #MeToo movement and push it forward by ensuring that accusers are able to share their stories, foster community, and protect others from going through the same experience.⁹⁸

To illustrate this potential, this Part analyzes the law’s purpose in encouraging whistleblowing by protecting informants and then predicts ways in which the law could extend those protections to #MeToo accusers.

A. Whistleblowing – Goals and Protections

Whistleblowing law protects informants when they “blow the whistle” on illegal or immoral conduct by revealing information to authorities within the company, to the public, or to an external governmental body.⁹⁹

Mariko Yoshihara, *California Leads with #MeToo Reforms*, S.F. CHRON. (Dec. 31, 2018), [https://perma.cc/A3DM-FVW5] (“Lawmakers also made clarifying changes to California’s defamation laws to ensure that perpetrators cannot sue for defamation when someone makes a truthful complaint about sexual harassment.”).

97. See, e.g., the protections afforded by the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)–(9) (1989) (providing protection against retaliation for federal government employees), the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2002) (prohibiting retaliation for private sector whistleblowers), and the Dodd-Frank Act, 15 U.S.C. § 78u-6 (2010) (prohibiting retaliation for private sector whistleblowers that provide novel information to the SEC).

98. Some scholars have already begun to explore the potential support whistleblowing law could provide the #MeToo movement, but have refrained from theorizing exactly how whistleblowing law could extend to protect #MeToo accusers and have not considered its application beyond private sector harassment in the workplace. See Elizabeth C. Tippet, *What #MeToo Teaches Workers: Whistleblowing is More Legit Than Ever*, HUFFPOST (Mar. 8, 2019, 8:07 AM), [https://perma.cc/94DZ-JS87]; Aaron Jordan, *For #MeToo Moment to Last, Strengthen Whistleblower Protections*, BALT. SUN (Jan. 8, 2018 10:25 AM), https://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0109-whistleblower-metoo-20180108-story.html [https://perma.cc/3QR6-CNL8] (explaining that “[e]nhancing and ensuring whistleblower protections are important next steps for the #MeToo movement” and calling on Congress to strengthen the anti-retaliation provisions for those who report workplace harassment).

99. Norma D. Bishara, Elletta Sangrey Callahan & Terry Morehead Dworkin, *The Mouth of Truth*, 10 NYU J.L. & BUS. 37, 43 (2013) (“We espouse the following widely-used definition: ‘whistle-blowers are organization members (including former members and job

Whistleblowers are an integral part of a democratic government¹⁰⁰ and operate to expose fraud and corruption within private businesses.¹⁰¹ Laws protecting and incentivizing whistleblowing have been crafted out of a recognition that making information public is important, but that there can be risks associated with speaking up.¹⁰² This fundamental goal of whistleblowing law neatly illustrates the problems with making public accusations of sexual harassment; but to fully theorize how whistleblowing law can contribute to the #MeToo movement, it is important to understand the purpose of the body of law and to see the current makeup of the legal landscape in this area.

1. Whistleblowing Law's Purpose

Whistleblowing offers a way to learn about information critical to exposing illegal or immoral activity. Often, whistleblowing brings information to light that would "otherwise be nearly impossible to obtain."¹⁰³ As the Securities and Exchange Commission (SEC) explains, "whistleblowers can help the Commission identify possible fraud and other violations much earlier than might otherwise have been possible," thus allowing the SEC to better protect investors and hold fraudsters accountable.¹⁰⁴ Consequently, this information is critical to rooting out

applicants) who disclose illegal, immoral, or illegitimate practices (including omissions) under the control of their employers, to persons or organizations who may be able to effect action."').

100. Terry Morehead Dworkin & Elletta Sangrey Callahan, *Employee Disclosure to the Media: When is a "Source" a "Sourcerer"?*, 15 HASTINGS COMM/ENT L.J. 357, 388–89 (1993) (explaining that "[b]y definition, whistleblowing involves the disclosure of information about acts harmful to the public good" and that at its core, whistleblowing is a "method of exposing and reducing wrongdoing").

101. Leora F. Eisenstadt & Jennifer M. Parcella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L.J. 665, 673 (2018) ("Noting that ignoring and retaliating against whistleblowers through 'corporate code[s] of silence' both 'hampers investigations, [and] also creates a climate where ongoing wrongdoing can occur with virtual impunity,' legislators created the SOX whistleblower program with the intention of remedying these problems generally to 'serve the public good.'" (quoting S. REP. NO. 107-146, at 5, 19 (2002))).

102. See Miriam A. Cherry, *Virtual Whistleblowing*, 54 S. TEX. L. REV. 9, 11 (2012) ("By taking his allegations directly to YouTube, he was able to use the Internet to call attention to his claims. And in making those claims public, he was able to establish that the problems he was calling attention to were critical and could not be ignored."); Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237, 237–38 (2009) ("[Citizen Employees] question or resist instructions to commit or assist wrongful activity. When they discover wrongful conduct of fellow employees or managers, they blow the whistle to other responsible managers or outside law enforcement authorities. They serve the public as jurors, witnesses, military reservists, and volunteer emergency responders, despite the competing demands of their employment.").

103. Eisenstadt & Parcella, *supra* note 101, at 671. ("[S]uch tips have proven to be far more effective than external audits or investigations.").

104. U.S. SECURITIES AND EXCHANGE COMMISSION, OFFICE OF THE WHISTLEBLOWER: Welcome, <https://www.sec.gov/whistleblower> [<https://perma.cc/5D7J-WVTG>].

corruption,¹⁰⁵ abating fraud,¹⁰⁶ and identifying failures in the democratic process.¹⁰⁷

For whistleblowers, making their allegations public calls attention to the identified problem in a way that ensures they cannot be ignored.¹⁰⁸ In this position, whistleblowers play a unique role. They learn of the wrongful or immoral conduct, interpret the conduct and map it onto their personal understanding of the law and morality, and then the whistleblower unilaterally decides whether to report and, if so, to whom.¹⁰⁹ The law and associated regulations help mediate this process by providing incentives (as the SEC does with money for original, fruitful reports¹¹⁰) or legal protections from retaliation,¹¹¹ but also limiting the circumstances to which these protections apply.¹¹² Fundamentally, whistleblowing law “seek[s] to encourage disclosure of [] misconduct as a matter of public policy.”¹¹³ However, the law isn’t entirely consistent or comprehensive. Rather, it “remains fractured: a patchwork of statutes and caselaw.”¹¹⁴

105. See Claire Tilton, Note, *Women and Whistleblowing: Exploring Gender Effects in Policy Design*, 35 COLUM. J. GENDER & L. 338, 348 (2018).

106. Whistleblowing’s ability to bring otherwise unknown information to light has also been recognized in fraud on the government cases, where the False Claims Act protects and incentivizes whistleblowing. See Evan J. Ballan, Note, *Protecting Whistleblowing (And Not Just Whistleblowers)*, 116 MICH. L. REV. 475, 475 (2017) (explaining the history of the False Claims Act).

107. Dworkin & Callahan, *supra* note 100, at 360 (“Permitting such disclosures, on the other hand, promotes the exposure and reduction of wrongdoing and furthers democratic values that depend on maximizing the information available to the public through the media.”).

108. Cherry, *supra* note 102, at 11 (“By taking his allegations directly to YouTube, he was able to use the Internet to call attention to his claims. And in making those claims public, he was able to establish that the problems he was calling attention to were critical and could not be ignored.”).

109. Carlson, *supra* note 102, at 237–38 (“[Citizen Employees] question or resist instructions to commit or assist wrongful activity. When they discover wrongful conduct of fellow employees or managers, they blow the whistle to other responsible managers or outside law enforcement authorities. They serve the public as jurors, witnesses, military reservists, and volunteer emergency responders, despite the competing demands of their employment.”).

110. See U.S. SECURITIES AND EXCHANGE COMMISSION, *supra* note 104.

111. See Tilton, *supra* note 105, at 340 (“Whether an individual makes an internal or an external report, regulation and law affect the calculation that leads the whistleblower to reach out and report conduct. Laws can provide protection from retaliation, assurances of confidentiality, or monetary incentives.”).

112. See, e.g., 15 U.S.C. § 78u-6 (2010) (limiting the Dodd-Frank Act’s protections and incentive structure to whistleblowers who report information to the SEC).

113. Bishara, Callahan & Dworkin, *supra* note 99, at 83.

114. *Id.* at 43. See also Carlson, *supra* note 102, at 243 (“[T]hese laws form an incomplete, inconsistent, and unreliable patchwork. There is no master anti-retaliation law of the order of Title VII to fill the gaps, either at the federal level or in any but a few states. A citizen employee’s protection against retaliation and interference depends as much on the luck of geography, occupation, and the law the employer violated as on the merits of the employee’s conduct or the value of his action to the community.”). Perhaps consequently, it isn’t always clear to whistleblowers how to report or to whom they should provide information. See Robert J. McCarthy, *Blowing in the Wind: Answers for Federal*

2. Existing Protections

Congress has enacted various provisions protecting and incentivizing whistleblowing. Initially, the protections were incorporated into remedial statutes like the National Labor Relations Act and the Federal Mine Safety and Health Act.¹¹⁵ Though these statutes were designed to achieve specific goals like ensuring safe drinking water,¹¹⁶ the whistleblowing protections embedded in the statutory scheme prohibited employers and others from retaliating against whistleblowers for disclosing important information.¹¹⁷

Eventually, federal law expanded beyond these baked-in anti-retaliation provisions to offer a variety of protections for whistleblowers. For example, the Securities and Exchange Commission incentivizes employees to report fraud by awarding to the whistleblower a percentage of the money recovered from sanctions imposed.¹¹⁸ Federal law also rewards companies that establish procedures to facilitate whistleblowing by permitting such programs to mitigate against harsh punishments imposed against the company.¹¹⁹ The False Claims Act permits individuals to blow the whistle and pursue fraud claims on behalf of the government in *qui tam* actions in

Whistleblowers, 3 WM. & MARY POL'Y REV. 184, 195–201 (2012) (explaining the intricate process a whistleblower must go through to seek protection from retaliation under the Whistleblower Protection Act). The complexity of this area of the law provides different statutes of limitations, different administrative exhaustion requirements, and different prerequisites necessary to *be* a whistleblower. *See, e.g.*, the differences between the Dodd-Frank Act, 15 U.S.C. § 78u-6 (2010), and the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2002), briefly summarized in Bishara, Callahan & Dworkin, *supra* note 99, at 47–49.

115. Bishara, Callahan & Dworkin, *supra* note 99, at 46. These types of protections were frequently limited: “[T]hose who disclose wrongful activity are covered only if their employment, disclosure, or both are related to the activities regulated by the statute.” *Id.*

116. Dworkin & Callahan, *supra* note 100, at 365 n.40 (noting that “[t]he statutes were designed to promote goals other than whistleblowing, and the protection afforded whistleblowers was incidental to those objectives” and citing such statutes as the Toxic Substances Control Act, the Age Discrimination in Employment Act, and the Occupational Safety and Health Act.).

117. These kinds of provisions are incredibly important and serve to encourage others to blow the whistle and report. *See* Ballan, *supra* note 106, at 477 (“[Antiretaliation] provisions increase the likelihood that insiders will report wrongdoing, thus protecting the government and taxpayers at large from fraud and abuse. They also protect employees from suffering personal harm for serving the public interest in combating fraud.”). However, do note that there are disagreements over whether the empirical evidence supports the intuition that antiretaliation provisions prompts further disclosure. *See* Bishara, Callahan & Dworkin, *supra* note 99, at 56–59 (summarizing empirical studies analyzing various statutes’ effect on the rate of whistleblowing).

118. Eisenstadt & Parcella, *supra* note 101, at 672 (“Dodd-Frank grants whistleblowers a direct private right of action in federal court to seek redress for retaliation; a lengthy six-year statute of limitations; remedies including reinstatement of employment, compensation for litigation costs, and double back pay; and a novel bounty program that incentivizes whistleblowers to come forward through the payment of cash rewards.”).

119. Bishara, Callahan & Dworkin, *supra* note 99, at 51 (“Federal law also rewards employers who establish organizational whistleblowing procedures. The Corporate Sentencing Guidelines encourage “rightdoing” by mitigating sanctions, including fines, for corporate criminal defendants that have an effective compliance program.”).

exchange for a cut of the award if the litigation is successful.¹²⁰ Finally, the Whistleblower Protection Act and its expansive amendments provide “general anti-retaliation protection to federal government employees”¹²¹ who blow the whistle on fraud and misconduct in government.¹²²

In addition to these various federal protections, states have also enacted whistleblowing protection statutes; however, “the statutes vary greatly, particularly with respect to the report recipients designated, characteristics of protected whistleblowers, and protected disclosures.”¹²³ But many states have adopted a general policy of protecting whistleblowing by extending tort law’s traditional public policy exception to the general rule of at-will employment when a person is fired for blowing the whistle on improper or illegal conduct.¹²⁴

Other non-statutory protections have been forwarded as well. Some have contended that the First Amendment should protect whistleblowing activity.¹²⁵ In the case of public employees, courts have held that they enjoy First Amendment protections, but the threshold for deserving such protection is very high.¹²⁶ Many conversations also have sprouted about courts’ ability to invalidate nondisclosure agreements and contractual confidentiality agreements to facilitate whistleblowing, especially when it pertains to sexual harassment and violence.¹²⁷

Whistleblowing is generally theorized from a business or governmental perspective. An employee witnesses fraud and decides to report up and out. A governmental agent learns of illegal spying and a cover up scheme and decides to leak information to the press. However, whistleblowing is not limited to these paradigmatic realms. Many have conceptualized #MeToo

120. Bishara, Callahan & Dworkin, *supra* note 99, at 50.

121. *Id.* at 49–50.

122. 5 U.S.C. § 2302(b)(8)–(9) (1978).

123. Bishara, Callahan & Dworkin, *supra* note 99, at 52 (comparing numerous state statutes) (footnotes omitted).

124. *Id.* at 55 (“[N]early half of the states apply the public policy exception to whistleblowers, despite the courts’ tendencies to take a conservative approach in this context.”) (footnotes omitted). *See also* Eisenstadt & Parcella, *supra* note 101, at 673 (“The understanding that whistleblowing furthers public policy has long been supported by common law, which provides a tort claim of retaliatory discharge for aggrieved employees who are terminated for engaging in actions protected by public policy such as whistleblowing.”).

125. *See* Hoffman & Lampmann, *supra* note 10, at 38 (noting that such arguments are “rarely, if ever, successful”).

126. *See* Cherry, *supra* note 102, at 22–23 (surveying caselaw and explaining that the general circumstances of a public employee blowing the whistle on a blog foreclose a person’s ability to receive First Amendment protections); Dworkin & Callahan, *supra* note 100, at 371.

127. Tippet, *supra* note 93, at 255 (“Since the MeToo movement, several states, including Pennsylvania, New York, and California, are considering or have passed prohibitions on certain types of non-disclosure agreements.”); Hoffman & Lampmann, *supra* note 10, at 40. *See also* Bishara, Callahan & Dworkin, *supra* note 99, at 83 (“There is a manifest conflict between whistleblower protection laws, which seek to encourage disclosure of organizational misconduct as a matter of public policy, and the legal theories and contractual terms available to an employer to shield against such potentially damaging disclosures.”).

as a form of whistleblowing, or even “mass whistleblowing.”¹²⁸ This is unsurprising as a large number of the #MeToo stories concerned allegations of sexual harassment and assault in the workplace. So, what tools does the law of whistleblowing offer #MeToo activists to cultivate the revolutionary moves the hashtag has spurred?

B. “My [Not-So-Secret] Secret”¹²⁹ – Protect the Girls

As the Riot Grrrls decided when and to whom to share their experiences, and as the people sharing their #MeToo stories weighed the costs and benefits of public disclosure, so too do whistleblowers make a choice: Whether to come forward and blow the whistle, keep their head down and avoid the problem, or simply leave the environment and remove themselves from the group committing illegal, immoral, or problematic acts.¹³⁰ Having statutory protections insulating a whistleblower from some of the associated costs provides a necessary sense of security for individuals contemplating blowing the whistle and encourages them to take the leap and make the information public.¹³¹ Given the personal and public benefit that can be served when a survivor makes public an allegation of sexual assault,¹³² the law should incentivize having those conversations in the public sphere rather than in zines and interpersonal, word-of-mouth exchanges. To accomplish this goal, Congress should enact statutory reforms to whistleblowing law to protect survivors sharing their stories.

Given the restrictive applicability of many statutes and common law

128. Tippett, *supra* note 98.

129. See HEAVENS TO BETSY, *My Secret*, on MY SECRET/COOL SCHMOOL (K Records 1992) (disclosing the artist's experience with sexual abuse as a child: “My secret is coming out . . . It happened to my best friend / I'll tell it again and again / What you did to us, we were only ten”).

130. Tilton, *supra* note 105, at 340 (explaining that whistleblowers face retaliation risks from the public and their employers and that these risks and other potential costs weigh into whistleblower's decisions about whether and to whom to report). Tilton further elaborates on the types of costs a whistleblower may face, including job loss, familial insecurity, and psychological problems like alcohol abuse and depression. *Id.* at 343.

131. Carlson, *supra* note 102, at 256 (“First, it increases the possibility that at least one employee will oppose an employer's misconduct, and one employee might be just enough to deter or reveal the misconduct. Second, awareness of the remedy makes an employer more cautious, particularly in complying with the law and the public interest. Third, a demonstration of the remedy, even by a “disgruntled” employee discharged for legitimate reasons, can shock actual or potential wrongdoers, and it can be an antidote for a culture of wrongdoing.”). Some have challenged the empirical basis for the conclusion that antiretaliation statutes incentivize additional whistleblowing. See Bishara, Callahan & Dworkin, *supra* note 99, at 57 (“There is no evidence, however, that state anti-retaliation statutes have increased disclosures or reduced reprisals.”).

132. See Tippett, *supra* note 93, at 298 (“[D]isruption can be fruitful. Ultimately, the MeToo movement injects democracy into the workplace, by pushing employers toward transparency and accountability. Without secrecy for cover, employers must finally show their work, and figure out what it means in practice to provide everyone with an equal opportunity to succeed.”).

rules,¹³³ the whistleblowing law that has the most potential for pushing the #MeToo movement forward is the Whistleblower Protection Act (WPA),¹³⁴ despite the Act’s limited application to only governmental employees.¹³⁵ By providing explicit protection for workers who disclose what they reasonably believe to be illegal activities or gross mismanagement, and explicitly identifying different entities to which workers may (but are not required to) report, the WPA and its associated amendments have created a network through which fraudulent or corrupt governmental conduct can be exposed and abated.¹³⁶

Congress should look to the WPA and craft a new statute designed to protect individuals who publicly disclose, either to their employer’s internal corporate HR department, their college or university’s Title IX office, or to the public, that they have experienced sexual violence. The statute should prohibit employers, universities, and other bodies to which a survivor may report, from retaliating against the accuser. This means that a survivor could not be demoted, formally shunned, or punished for sharing their story. The statute should also explicitly provide a mechanism that accusers could use to terminate defamation suits filed against them by the accused. This would likely take the form of providing an affirmative defense, much like a First

133. Most statutes are strictly limited to private sector, employment related whistleblowing. Eisenstadt & Parcella, *supra* note 101, at 675 (“The statutory language in SOX, Dodd-Frank, and the FCA requires a formal employment relationship for retaliation protection eligibility.”).

134. 5 U.S.C. § 2302(b)(8) (1978). The Act provides: “Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences--

(i) any violation (other than a violation of this section) of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety”.

135. The WPA has additional important limitations: it “does not cover employees of the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, and the National Security Agency, among other national security related government workers, and it does not protect disclosures of classified national security information.” Margaret B. Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV. 1387, 1439 (2015).

136. Keep in mind that the WPA is far from perfect. Some have argued that the way the Office of Special Counsel has previously addressed whistleblowers’ requests for protection indicates that the statute does little to adequately prevent and punish retaliation. See McCarthy, *supra* note 114, at 188.

Amendment defense to defamation or an anti-SLAPP statute.¹³⁷

There are a few scholars exploring various ways to protect #MeToo whistleblowers in the employment context, specifically,¹³⁸ ones which could be supplemented by this proposed statute. Some existing statutes regulating sexual harassment provide antiretaliation protections to whistleblowers exposing illegal conduct in very narrow circumstances.¹³⁹ But whistleblowing protections with limited application can only be so effective.¹⁴⁰ Given the importance of providing a public space to disclose allegations of sexual harassment and assault, broader reform is required.

Some states have already enacted or considered enacting statutory protections for #MeToo whistleblowers.¹⁴¹ However, national protection is necessary. Whistleblowing law is confusing already, and many whistleblowers do not understand the protections available to them.¹⁴² It is important that protections for #MeToo whistleblowers exist nationally and apply uniformly regardless of where the whistleblower is, where the accused perpetrator lives, or where consumers read, hear, or discover the allegations. Otherwise, there's a very real risk that the protections will be inadequately enforced, and more survivors will choose not to speak up from fear of retaliation.¹⁴³

There is a risk that some allegations brought to light as part of the #MeToo movement will be false.¹⁴⁴ However, it is likely that false

137. See *infra* note 82 for a description of Anti-SLAPP statutes and the limitations in how they are currently constructed.

138. See Tippett, *supra* note 93.

139. See Carlson, *supra* note 102, at 241 (“Narrow coverage is typical of anti-retaliation laws for citizen employees. Many anti-retaliation laws grant protection only for certain conduct in support of a particular law, policy, or regulatory scheme. The implied anti-retaliation rule identified in *Jackson*, for example, relates only to an employee’s opposition to a violation of Title IX’s prescription against discrimination in education.”).

140. See *id.* at 240.

141. Yoshihara, *supra* note 96 (documenting recently enacted California law attempting to address the implications of the #MeToo movement, including “changes to California’s defamation laws to ensure that perpetrators cannot sue for defamation when someone makes a truthful complaint about sexual harassment”); James S. Azadian, 2019: *In With the New!*, ORANGE COUNTY LAWYER, Mar. 2019, at 37–38 (describing California’s new law); Tippett, *supra* note 93, at 257–28 (noting that New York’s proposed law effectively incorporates common law whistleblowing protections by prohibiting contracts that conceal information that advances the public interest, including allegations of sexual assault and harassment).

142. McCarthy, *supra* note 114, at 195–201. See also Cherry, *supra* note 102, at 30–33 (explaining that virtual whistleblowing is an especially underdeveloped area of the law such that the legal ramifications of blowing the whistle on a blog is up for debate).

143. See Cherry, *supra* note 102, at 33–34 (“[T]he more nuanced and complicated the laws are—and the more they vary by jurisdiction—the more difficult it will be to secure enforcement of those rights.”).

144. Sandra Newman, *What Kind of Person Makes False Rape Accusations?*, QUARTZ (May 11, 2017), [<https://perma.cc/B89Z-CU67>] (“[I]n the most detailed study ever conducted of sexual assault reports to police, undertaken for the British Home Office in the early 2000s, out of 216 complaints that were classified as false, only 126 had even gotten to the stage where the accuser lodged a formal complaint. Only 39 complainants named a suspect. Only six cases led to an arrest, and only two led to charges being brought before they were ultimately

accusations will be exposed through various means, like accurate investigative reporting,¹⁴⁵ and could be specifically accounted for in the proposed legislation. Regardless, this minimal risk is outweighed by the magnitude of harm that might be prevented by allowing survivors to come forward. For example, eighty-seven women accused Harvey Weinstein of sexual assault or harassment.¹⁴⁶ Sixty women said Bill Cosby raped them.¹⁴⁷ If one woman had been able to come forward publicly to accuse one of these men of sexual assault, others may have been saved.¹⁴⁸

V. CONCLUSION

Society has an interest in protecting disclosures of sexual harassment and assault because such behavior threatens the health and safety of the public.¹⁴⁹ Each accusation challenges people to recognize the reality of sexual assault—that anyone can commit it, and that anyone can have it happen to them.¹⁵⁰ Having the conversation in public ensures these accusations aren't brushed under the rug, left to collect dust while perpetrators continue on with their rampages.¹⁵¹ To ensure the #MeToo movement has lasting effect, whistleblowing law should be extended to facilitate the dialogue the hashtag sparked in late 2017. Congress should take initiative and enact a statute similar to the Whistleblower Protection Act to ensure that #MeToo

deemed false. (Here, as elsewhere, it has to be assumed that some unknown percentage of the cases classified as false actually involved real rapes; what they don't involve is countless innocent men's lives being ruined.). *See also id.* (explaining that calls to treat rape allegations with more skepticism “help[s] real rapists escape justice, while perversely making it more likely that we will miss the signs of false reports”).

145. See Sady Doyle, *Despite What You May Have Heard, “Believe Women” Has Never Meant “Ignore Facts”*, ELLE (Nov. 29, 2017), [<https://perma.cc/8MAU-EWTB>] (explaining that when the media works the way it's supposed to, and has, by checking its facts, false allegations will be revealed).

146. Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017; updated June 1, 2018), [<https://perma.cc/KRC2-8XQP>].

147. Carly Mallenbaum, Patrick Ryan & Maria Puente, *A Complete List of the 60 Bill Cosby Accusers and Their Reactions to his Prison Sentence*, USA TODAY (Sept. 26, 2018), [<https://perma.cc/UZ5Q-QFNY>].

148. See Tuerkheimer, *supra* note 84.

149. See Bishara, Callahan & Dworkin, *supra* note 99, at 87 (“[S]ocietal interests are served when impending or continuing health and safety threats are revealed.”).

150. Alia E. Dastagir, *Analysis: George H.W. Bush and the Problem with Thinking ‘Good Guys’ Don’t Cross the Line*, USA TODAY (Nov. 3, 2017), [<https://perma.cc/U5G6-NMQS>] (“Each new #MeToo revelation insists the country not look away. Each implores us to believe not only the individual, but also the mounting evidence that shows the impunity of powerful men has heavy costs. Sociologists and psychologists say people must recognize sexual assault can happen to anyone—and be perpetrated by anyone. ‘We want to think of it as this rare and extreme form of deviance,’ Hamby said. ‘And that’s just not an accurate perception of offending at all.’”).

151. See Joan C. Williams & Suzanne Lebsack, *Now What?*, in *MANAGING #METOO* (pt. 1), HARV. BUS. REV. (Jan. 2018), available at [<https://perma.cc/25PV-ZJBH>] (“The internet enables women to go public with accusations, bypassing the gatekeepers who traditionally buried their stories.”).

whistleblowers can finish the work that the Riot Grrrls worked so hard to encourage: girls supporting girls to stop sexual assault.