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Harvey of Hollywood: The Face that Launched a Thousand Stories

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Harvey of Hollywood: The Face that Launched a Thousand Stories

BY SARA KHORASANI*

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* J.D. Candidate, 2019, University of California, Hastings College of the Law; B.A., 2011, University of Southern California. Special thanks to Professor Jennifer Templeton Dunn for helping me tie my past passions into my law school journey. This note is dedicated to my mother and father for their unconditional love and support.

Introduction

In the fall of 2017, the world was shaken by allegations of sexual misconduct against one of Hollywood's high-powered movie moguls. The monster: Harvey Weinstein, Academy Award winning film producer and executive;¹ the victims: what seemed like nearly every female assistant and actress in the entertainment industry. Within a few months, more than eighty women² came forward, accusing Harvey Weinstein of harrowing accounts of sexual misconduct, ranging from sexual harassment to rape.³ As shocking as the allegations were, it was more shocking that they had remained hidden for decades, silenced by Weinstein, his company, and the entertainment industry as a whole.⁴

After the *New York Times* exposé⁵ made the allegations public, the Weinstein Company's business practices also became subject to intense scrutiny. Uncovering years of settlement agreements and non-disclosure agreements, it's not just Harvey, but the management and the board, who may be found liable or guilty.⁶ With these exposures, both Weinstein and his company have become subject to investigations and lawsuits in California and New York, as well as internationally in England and Canada.⁷

The Weinstein revelations have not only brought forth legal issues for Harvey Weinstein and his company, but this scandal has brought to light a major concern plaguing the entertainment industry. Once the sexual misconduct of the film industry's most powerful producer was revealed to

1. Jayme Deerwester & Andrea Mandell, *Harvey Weinstein: Timeline of Hollywood success and hidden abuse*, USA TODAY, <https://www.usatoday.com/pages/interactives/news/harvey-weinstein-timeline> (last visited Mar. 17, 2018) (Harvey Weinstein, with his brother Bob Weinstein, co-founded Miramax Films in 1979. The brothers produced many successful films over several decades, building their reputation as Hollywood royalty. After selling Miramax films to Disney, they founded the Weinstein Company in 2005, continuing their success as producers).

2. Cara Kelly & Sara M. Moniuszko, *Harvey Weinstein scandal: A complete list of the 84 accusers*, USA TODAY, <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/> (last updated Dec. 13, 2017).

3. *Id.*

4. *Id.*

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

6. *Id.*

7. Ryan Faughnder, *New York attorney general sues Weinstein Co. for civil rights 'violations,' throwing sale into question*, L.A. TIMES (Feb. 11, 2018, 8:30 PM), <http://www.latimes.com/business/hollywood/la-fi-ct-weinstein-company-sale-20180211-story.html>.

the world, the proverbial floodgates opened.⁸ Hundreds of women began speaking out about their experiences of sexual harassment and assault against high-powered Hollywood heroes.⁹ With the power of social media and the public hanging on every word, the women of Hollywood helped set fire to the “#MeToo”¹⁰ and “Times Up”¹¹ movements. Such social movements have been instrumental in facilitating a public discussion about sexual harassment in all employment areas, from Hollywood to Capitol Hill,¹² and across the farms and offices of America.¹³

For several decades, federal and state laws have been providing protection against sexual harassment throughout all areas of employment.¹⁴ But Hollywood has somehow managed to evade these protections, as there has historically been a lack of federal oversight into the entertainment industry.¹⁵ To make matters worse, the structure of the entertainment industry breeds acceptance of sexual harassment. Hollywood is a male-dominated industry with gaping power imbalances between executives and employees.¹⁶ Between the social stigmas and fear of retaliation to report incidents, to the secrecy of settlement agreements, there is silence at all stages. With the exposure of Harvey Weinstein and many others, now is the time to break the silence on Hollywood’s worst kept secret.

8. Jim Rutenberg et al., *Harvey Weinstein’s Fall Opens the Floodgates in Hollywood*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/business/media/harvey-weinsteins-fall-opens-the-floodgates-in-hollywood.html>.

9. See Dan Corey, *Since Weinstein, here’s a growing list of men accused of sexual misconduct*, NBC NEWS (Jan. 10, 2018, 4:34 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546>.

10. ME TOO, <https://metoomvmt.org> (last visited May 23, 2018) (social movement and website to support survivors and end sexual violence).

11. TIME’S UP, <https://www.timesupnow.com> (last visited May 23, 2018) (social movement and legal defense fund targeting sexual assault, harassment and inequality in the workplace).

12. Rochelle Dornatt, *Thank You, Harvey Weinstein*, 20 HASTINGS WOMEN’S L.J. 3, 3-5 (2018).

13. See Time’s Up, *supra* note 11.

14. See generally, The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (Title VII providing federal protection for sexual harassment); see also California Fair Employment and Housing Act, Cal Gov Code § 12900 *et seq.* (California law providing protection for sexual harassment).

15. See Rebecca Keegan, *Gender bias in Hollywood? U.S. digs deeper to investigate the industry’s hiring practices*, L.A. TIMES (May 11, 2016, 9:48 AM), <http://www.latimes.com/entertainment/movies/la-et-mn-0512-aclu-women-directors-update-20160509-snap-story.html> (discussing one of the first Hollywood investigations in 2015 by the U.S. Equal Employment Opportunity Commission and American Civil Liberties Union).

16. See Mike Fleming Jr., *How Male-Dominated Hollywood Contributes to Sexual Harassment Culture: Oscar-Winning Producer Cathy Schulman Explains*, DEADLINE HOLLYWOOD (Mar. 2, 2018, 11:18 AM), <http://deadline.com/2018/03/hollywood-male-dominated-cathy-schulman-interview-metoo-times-up-women-in-film-progress-1202308160/>.

This paper seeks to address how to effectively promulgate and create change in an industry that has long bred a systemic culture of sexual harassment and discrimination. Expanding upon the nuances and norms of Hollywood's business practices, this paper will describe the amalgamation of entities and policy changes that must come together to break the silence and promote action.

Part I describes the Harvey Weinstein scandal: what he did, how it was uncovered, and how it affected his company and public perception. Part II will set forth the historical background of sexual harassment in American law, and specifically within the entertainment industry. Part II will also examine the accepted cultural norms of Hollywood, expanding upon how victims of sexual harassment in this industry are silenced at all stages. Part III will analyze the importance of social movements and the elimination of confidential settlement agreements. This note concludes by proposing a complete cultural shift in the entertainment industry, as the Harvey Weinstein scandal has focused the public's attention on sexual harassment. Together, social movements and new legislation can finally break the silence: by encouraging victims to speak out and eliminating the secrecy in settlement agreements.

What Did Harvey Do?

October 5, 2017 marks the infamous "H Day"¹⁷ where the *New York Times* published their exposé on Harvey Weinstein and his decades-long sexual harassment saga.¹⁸ This piece of investigative journalism earned a Pulitzer Prize for Public Service¹⁹ and exposed the world to the sexual misconduct of one of Hollywood's most successful executives. Once known for being the man who has been thanked in more Oscar speeches than God (and second only to Steven Spielberg),²⁰ Harvey Weinstein's name has become synonymous to much more. Weinstein's exposure, and almost immediate downfall, created an unprecedented and unexpected ripple effect within the entertainment industry and beyond.

17. *Id.* ("H Day" coined by award-winning female film producer Cathy Schulman).

18. Kantor & Twohey, *supra* note 5.

19. *Announcement of the 2018 Pulitzer Prize Winners*, THE PULITZER PRIZES (Apr. 15, 2018), <http://www.pulitzer.org/news/announcement-2018-pulitzer-prize-winners> (Pulitzer Prize for Public Service in journalism was awarded to *The New York Times*, for reporting led by Jodi Kantor and Megan Twohey, as well as *The New Yorker*, for reporting by Ronan Farrow).

20. Ronan Farrow, *From aggressive overtures to sexual assault: Harvey Weinstein's accusers tell their stories*, THE NEW YORKER (Oct. 10, 2017, 10:47 AM), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

The Investigation and the Exposé

When the *New York Times* investigation initially began, neither Jodi Kantor nor Megan Twohey were expecting to uncover the magnitude of such deep-seated secrets hidden by Harvey Weinstein and his company.²¹ Their investigation found previously undisclosed allegations of sexual misconduct against Harvey stretching over nearly three decades.²² Interviews with current and former employees and film industry professionals, as well as legal records and internal documents from both Miramax and the Weinstein Company, shed light upon decades of inappropriate business practices.²³

The exposé described the common narrative of Harvey Weinstein's inappropriate and illegal behavior, from the hotel rooms his assistants were forced to set up for his "meetings" with young actresses, to his company's involvement in covering up his indiscretions.²⁴ Descriptions of Harvey's incidents with his employees and victims are far too explicit to be fully described in a piece of investigative journalism, let alone a scholarly law review article. Yet with the *New York Times* piece, Harvey's modus operandi was uncovered.²⁵ If each of his victims accepted his sexual advances, he would boost her career, otherwise she would fear never working in Hollywood again.²⁶ Fear of retaliation and embarrassment silenced victims who were afraid to report the behavior, even though it was no secret to Harvey's inner circle.²⁷ Those who had the courage to report such behavior were immediately silenced with the traditional "hush money," in the form of settlement agreements and nondisclosure agreements.²⁸ The investigation found that from 1990 to 2015, Harvey had reached settlements with at least eight different women, ranging from his assistants, to aspiring actresses and models.²⁹ It is estimated that these women involved in the settlement agreements received between \$80,000 and \$150,000.³⁰

21. Brett Lang, *How New York Times Reporters Broke Hollywood's Biggest Sexual Harassment Story*, VARIETY, <http://variety.com/2017/biz/features/new-york-times-harvey-weinstein-report-megan-twohey-jodi-kantor-1202637948/> (last visited May 23, 2018).

22. Kantor & Twohey, *supra* note 5.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

As hard as Harvey Weinstein and his company tried to shroud his indiscretions in secrecy, he must have known that the truth would eventually be revealed. It is rumored that in the final frantic days before the *New York Times* published its piece, Harvey Weinstein allegedly spent his time deleting sensitive documents and scouring ex-employees' online communications.³¹ He hired a high-powered legal team and former intelligence operatives to identify who leaked his incriminating information to the press.³² One fellow executive expressed that Harvey's concern was "who did him in, not what he had done."³³ Even if Harvey could not understand the gravity of his actions on all those women for all those years, he most definitely would not realize the gravity of this investigation on his career and the entire entertainment industry. His years of silencing his victims had gone on long enough, and his attempts to thwart the publication failed³⁴ as he could no longer silence the press.

Mere minutes after the *New York Times* published their piece on October 5, 2017, the world was abuzz. Within several days, more women came out with allegations against the movie mogul.³⁵ Within a few months, more and more women exposed their past experiences, totaling eighty-four accusations spanning over decades.³⁶ As allegations kept coming out against Harvey, there was a similar outpour of allegations against other high profile men within the entertainment industry, and beyond.³⁷ There seemed to be a seismic shift in society's tolerance for sexual harassment, and Harvey had become the face that launched a thousand stories.

The Effect on Harvey Weinstein and His Company

Within three days after the *New York Times* exposé was published, the Weinstein Company's board fired Harvey Weinstein from the company he co-founded.³⁸ This was not the first of the many eventual firings happening at the Weinstein Company, as one-third of the company's all-male board

31. Dawn C. Chmielewski, *Harvey Weinstein Felt "Anger and Acceptance" Days Before His Downfall*, DEADLINE HOLLYWOOD (Jan. 18, 2018, 9:06 AM), <http://deadline.com/2018/01/harvey-weinstein-final-frantic-days-1202245191/>.

32. *Id.*

33. *Id.*

34. *Id.*

35. Kelly & Moniuszko, *supra* note 2.

36. *Id.*

37. Corey, *supra* note 9.

38. Megan Twohey, *Harvey Weinstein is Fired After Sexual Harassment Reports*, N.Y. TIMES (Oct. 8, 2017), <https://www.nytimes.com/2017/10/08/business/harvey-weinste-in-fired.html>.

had resigned almost immediately after the allegations were made public.³⁹ After firing the co-founder of the company, the Weinstein Company would eventually undergo investigations of their own, with liability implicated on the board and shareholders.

Other than the inevitable employment law issues arising for the Weinstein Company, the film company's business dealings also went awry thanks to Harvey.⁴⁰ After multiple attempts to save and sell the company, with a failed \$500-million deal among the casualties, the Weinstein Company revealed by February 2018 that it was planning to file for bankruptcy.⁴¹ In a statement to the press, the board recognized their failure to deliver "gold standard human resources policies," along with the increase of company liabilities, ultimately charting a failing financial path.⁴² By late March, the Weinstein Company had filed for Chapter 11 bankruptcy, and with it released anyone "who suffered or witnessed any form of sexual misconduct by Harvey Weinstein" from nondisclosure agreements.⁴³

The *New York Times* exposé spurred Harvey's employment termination, which led to the virtual dissolution of his famed and successful company.⁴⁴ Unfortunately for the once revered and powerful executive, that may be the least of Harvey's problems. Although investigations in London had commenced relatively soon after the exposé's publication in October 2017, it wasn't until February 2018 that Harvey Weinstein was first sued for civil rights violations in federal court.⁴⁵ On behalf of the People of New York, former New York Attorney General Eric Schneiderman sued the Weinstein Company, also naming both founders, Harvey Weinstein and Robert Weinstein, for "egregious violations of New York's human rights and business laws."⁴⁶ The lawsuit, filed in New York County Supreme Court, explicitly listed Harvey's patterns of pervasive sexual harassment, intimidation and discrimination, along with the company's business practices that helped protect their co-founder.⁴⁷ The

39. *Id.*

40. Yohana Desta, *After Catastrophic Downfall, the Weinstein Company Will File for Bankruptcy*, VANITY FAIR (Feb. 26, 2018, 10:19 AM), <https://www.vanityfair.com/hollywood/2018/02/the-weinstein-company-bankruptcy>.

41. *Id.*

42. *Id.*

43. Brook Barnes, *Weinstein Company Files for Bankruptcy and Revokes Nondisclosure Agreements*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/business/weinstein-company-bankruptcy.html>.

44. Desta, *supra* note 40.

45. Faughnder, *supra* note 7.

46. *Id.*

47. *See* THE PEOPLE OF THE STATE OF NEW YORK, by Eric T. Schneiderman, Attorney General of the State of New York, Petitioner, v. The Weinstein Company LLC, The

38 page complaint claimed years-long gender-based hostile work environments, a pattern of quid pro quo sexual harassment, and routine misuse of corporate resources for unlawful ends.⁴⁸ The board of directors and executives were also implicated as being liable because they failed to protect employees or attempt to curb Harvey Weinstein's misconduct, despite the knowledge and numerous complaints to the company's human resources department.⁴⁹ The complaint asserted the many failures of management and corporate oversight, describing how the Weinstein Company's board, including Harvey's brother Robert, acquiesced to Harvey's misconduct, knew about settlement agreements, and did not comply with relevant nondiscrimination laws.⁵⁰

Although this was the first major civil lawsuit for Weinstein, several others have followed.⁵¹ With criminal investigations and proceedings currently underway, the company is also facing a potential class-action suit accusing the studio of enabling Weinstein's alleged predatory behavior.⁵² As allegations and information continue to roll in, there are sure to be more impending lawsuits from Harvey's previously silenced victims.

How these lawsuits inevitably unfold will help shape precedent for how sexual harassment claims are handled in this industry. More information, investigations and research will be necessary to determine exactly what happened in these encounters with Harvey Weinstein. This scandal has (rightfully) destroyed the career of Harvey Weinstein, and with the bankruptcy and inevitability of impending lawsuits, the Weinstein Company is going down in flames alongside its leader.

How Did Harvey Get Away with It?

A proper analysis of the Harvey Weinstein scandal, and its legal implications, necessitates a general overview of sexual harassment protections under American law. Particularly, an examination of Hollywood's history with sexual harassment is necessary to appropriately comprehend how such issues have been able to survive within the industry.

Weinstein Company Holdings LLC, Harvey Weinstein, and Robert Weinstein, Respondents., 2018 WL 845422 (N.Y.Sup.) (verified petition on Westlaw, can also be found at https://ag.ny.gov/sites/default/files/weinstein_company.pdf).

48. *Id.*

49. *Id.*

50. *Id.*

51. Harriet Alexander, *Harvey Weinstein's lawyers in talks to settle series of civil suits alleging sexual misconduct*, THE TELEGRAPH (Oct. 23, 2018, 9:06 PM), <https://www.telegraph.co.uk/news/2018/10/23/harvey-weinsteins-lawyers-talks-settle-series-civil-suits-alleging/>.

52. *Id.*

Looking into the accepted cultural norms of this industry, and expanding upon the nuances of its employment practices, will further explain how victims of sexual harassment are silenced at all stages.

Sexual Harassment in American Law

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964 (“Title VII”).⁵³ Instigated by the Civil Rights Movements of the 1960s,⁵⁴ Title VII sought to prohibit employers from discriminating against individuals for the protected categories of race, color, religion, sex, or national origin.⁵⁵ Although born out of the racial tension of the time, the inclusion of “sex” in the statute spurred an emerging movement of female workers to pursue the opportunity for equality in the courts.⁵⁶ The passage of Title VII brought with it the establishment of the United States Equal Employment Opportunity Commission (“EEOC”) to oversee enforcement in federal law.⁵⁷ Within the first year after Title VII’s enactment, one-third of charges filed with the EEOC were claims of sex discrimination.⁵⁸ It took many years for the EEOC, as well as the public, to get a better understanding of the scope and nature of sexual harassment.⁵⁹

Although sexual harassment can take on many forms, courts have come to recognize two distinct categories of sexual harassment claims: “quid pro quo” sexual harassment and hostile work environment.⁶⁰ “Quid pro quo” sexual harassment occurs when an employee’s submission to

53. 42 U.S.C. §§ 2000e et seq.; *Facts About Sexual Harassment*, EEOC, <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm> (last visited Mar. 11, 2018).

54. See EEOC, *First Principles - Enacting the Civil Rights Act and Using the Courts to Challenge and Remedy Workplace Discrimination* (June 22, 2004), available at <https://www.eeoc.gov/eeoc/history/40th/panel/firstprinciples.html> (providing historical context, from panel presentation at EEOC sponsored event celebrating 40th anniversary of Title VII).

55. 42 U.S.C. § 2000e-2.

56. See EEOC, *Expanding the Reach – Making Title VII Work for Women and National Origin Minorities: Pregnancy, Harassment, and Language Discrimination* (June 23, 2004), available at <https://www.eeoc.gov/eeoc/history/40th/panel/expanding.html> (explaining history of Title VII as it pertains to women, from panel presentation at EEOC sponsored event celebrating 40th anniversary of Title VII).

57. 42 U.S.C. § 2000e-4.

58. EEOC, *supra* note 56.

59. See generally *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); see also EEOC, *Guidelines on Discrimination Because of Sex*, 29 C.F.R. §1604.11(a) (1986).

60. *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983); see also *Henson v. Dundee*, 682 F.2d 897, 908 n.18 (11th Cir. 1982), citing *C. MacKinnon, Sexual Harassment of Working Women* 32-47 (1979).

unwelcome sexual conduct is made a condition of concrete employment benefits.⁶¹ “Quid pro quo” sexual harassment also covers situations where an employer coerces an employee into unwelcome sexual conduct in order to avoid an employment disadvantage or termination.⁶² One single sexual advance linked to an employment action is sufficient to make out a prima facie case of “quid pro quo” sexual harassment prohibited by Title VII, unlike a hostile environment claim.⁶³

There is more of a burden on the victim in a hostile environment claim as courts set the standard for determining whether an environment is hostile by looking at the totality of the circumstances.⁶⁴ Considerations may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.⁶⁵ For a victim of sexual harassment, it can seem quite daunting to try to prove these somewhat subjective elements surrounding such a sensitive subject. Victims can often silence themselves instead of speaking out against their supervisors, employers or even the management of their companies.

Typically under “quid pro quo” sexual harassment, an employer is strictly liable for the conduct of its supervisors.⁶⁶ In the classic “quid pro quo” case, the supervisor relies on his actual or apparent authority to extort sexual consideration from an employee, using the means furnished to him by the employer to accomplish a prohibited purpose.⁶⁷ Unlike employer liability in “quid pro quo” sexual harassment, there is no definitive rule on employer liability in hostile environment cases.⁶⁸ When investigating allegations of sexual harassment, the EEOC looks at all the circumstances, including employer’s prevention practices.⁶⁹ Employer liability can potentially be minimized by providing sexual harassment training to employees, establishing an effective complaint process, and taking immediate and appropriate action if an employee complains.⁷⁰

61. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1413 (10th Cir. 1987).

62. Mariejoy Mendoza, Note, *Making Friends: Sexual Harassment in the Workplace, Free Speech and Lyle v. Warner Bros.*, 40 U.C. DAVIS L. REV 1963, 1973 (2007).

63. Neville v. Taft Broad. Co., No. CIV-82-622C, 1987 U.S. Dist. LEXIS 13461, at *13 (W.D.N.Y. Jan. 16, 1987).

64. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

65. *Id.*

66. Henson v. Dundee, 682 F.2d 897, 910 (11th Cir. 1982).

67. *Id.*

68. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

69. EEOC, FACTS ABOUT SEXUAL HARASSMENT, <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm>.

70. *Id.*

Another obstacle that often silences sexual harassment victims from filing a complaint is exemplified by the retaliation provisions provided by the EEOC. It is unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex, or for filing a discrimination charge, or participating in any way in an investigation, proceeding, or litigation under Title VII.⁷¹ Women, particularly those in low-wage jobs, have an increased risk of harassment and retaliation with little or no legal recourse.⁷²

Scratching the surface of sexual harassment laws helps in understanding the nuances and obstacles in the way for a sexual harassment victim to file, and prove, a claim against her employer. These cases of sexual harassment arise over all employment areas, with some classifications of workers left more vulnerable and ultimately more burdened than others.⁷³ Although there has not been much casework or research done specifically on the entertainment industry, with its elite group of moguls reigning over a multitude of young actors, Hollywood would seemingly classify as an industry needing attention in respect to sexual harassment. Understanding the elements necessary for a sexual harassment victim to bring forth a claim helps facilitate a better understanding of how these victims can be silenced just by the legal process itself. Unfortunately, it is not just the legal process, but the entertainment industry as a whole, that continues to feed into the silencing.

Sexual Harassment in Hollywood

With decades-long federal protections over sexual harassment, and a government agency there to enforce them, it seems strange perhaps that an employer of Harvey Weinstein's stature could be operating inappropriately for so long without legal recourse. Certainly, it is not as if the entertainment industry is free from the law's reach, as Hollywood has had its fair share of big lawsuits throughout its history.⁷⁴ Lawsuits in the entertainment industry span many areas of law, from intellectual property

71. *Id.*

72. Maya Raghu & Joanna Suriani, *#MeTooWhatNext: Strengthening Workplace Sexual Harassment Protections and Accountability*, NAT'L WOMEN'S LAW CTR. REPORT, Dec. 2017, at 2.

73. *Id.*

74. *See Crazy Cases! 18 of Hollywood's Outrageous Entertainment Lawsuits*, HOLLYWOOD REP. (Dec. 6, 2011, 9:20 AM), <https://www.hollywoodreporter.com/gallery/hollywood-craziest-lawsuits-court-cases-267628/15-knowing-not-fiction-after-all>; *see also* Eriq Gardner *Hollywood's Top 10 Nearly Incredible Lawsuits from 2016*, HOLLYWOOD REP. (Dec. 22, 2016, 7:15 AM), <https://www.hollywoodreporter.com/thr-esq/hollywoods-top-10-incredible-lawsuits-2016-958248>.

issues to First Amendment infringements, breaches of contract to labor and employment disputes.⁷⁵

As the government agency created to enforce Title VII and protect employees from sexual harassment,⁷⁶ the EEOC has seemingly steered clear from Hollywood lawsuits. It was only recently, after the ACLU called the EEOC's attention to gender discrimination issues against women directors, that the agency explicitly focused on Hollywood.⁷⁷ Before 2015, the EEOC had never looked into Hollywood employment practices specifically, though they still included the arts and entertainment while compiling data across many industries.⁷⁸ According to the EEOC, from 2005-2015, there were 667 sexual harassment complaints filed with them by workers employed in the arts, entertainment and recreation industries.⁷⁹ Although strict confidentiality provisions limit the EEOC from commenting on these complaints, it is likely that only a small number of these cases have actually been litigated.⁸⁰

The cloak of confidentiality is a major key to how Hollywood has managed to keep itself from being subject to more scrutiny over sexual harassment guidelines. Not only does the EEOC have strict confidentiality guidelines for sexual harassment claims,⁸¹ but confidentiality clauses and non-disclosure agreements make many settlement agreements from sexual harassment claims virtually impossible to research. Between victims suppressing their secrets, human resources hiding employee complaints, or settlement and nondisclosure agreements legally binding silence, there may be more sexual harassment cases than imaginable.

Throughout the history of Hollywood, only a handful of entertainment industry-related cases have made it to the court system or out into the public eye. Research on legal websites⁸² and the public domain provides very limited information on such cases. With more public attention on sexual harassment issues in the 1990s, a few entertainment-related cases were able to make their way into the courts. In 1992, a film intern in

75. *Id.*

76. 42 U.S.C. § 2000e-4.

77. Michael J. Zimmer et al., *Taking on an Industry: Women and Directing in Hollywood*, 20 EMPL. RTS. & EMPLOY. POL'Y J. 229, 230 (2016); see also Letter from ACLU to EEOC (May 12, 2015) available at <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/05/EEOC-FINAL-LETTER-05-11-2015.pdf>.

78. *Id.*

79. David Robb, *EEOC Has Litigated Few of Hundreds of Sexual Harassment Complaints Filed Since 2005*, DEADLINE HOLLYWOOD (Nov. 28, 2017, 11:10 AM), <http://deadline.com/2017/11/eec-has-litigated-few-of-the-industrys-hundreds-of-sexual-harassment-complaints-filed-since-2005-1202215709/>.

80. *Id.* (quoting EEOC spokesman Joseph Olivares).

81. *Id.*

82. LexisNexis and Westlaw.

Florida was sexually harassed by the head of a production company.⁸³ After establishing her claim for hostile environment and quid pro quo sexual harassment, the plaintiff received over one million dollars for back pay, tort claims and punitive damages.⁸⁴

In 1996, one of the biggest entertainment companies, the American Broadcasting Company, Inc. (“ABC”) was involved in a sexual harassment case that made its way to the Court of Appeal of California.⁸⁵ An aspiring actor alleged sexual harassment, retaliation and negligent hiring, claiming that an ABC casting director drugged and sexually assaulted him.⁸⁶ Although the actor did not win on all his claims, one important distinction was made in this case.⁸⁷ Even though the alleged sexual assault occurred away from the workplace and not during working hours, the court still decided it was sufficiently work-related to hold ABC liable.⁸⁸ The court’s opinion highlighted the different dynamics of the relationship between a casting executive who acts as a “gatekeeper for the glamorous world of entertainment” and the aspiring actor who attends various events to meet entertainment executives “for the purpose of enhancing employment opportunities.”⁸⁹ The court here recognized the lack of structure and professionalism in some of the entertainment industry’s common “work-related” practices.⁹⁰

Perhaps the most high-profile of all entertainment industry sexual harassment cases made available to the public is the case of *Lyle v. Warner Brothers Television Productions*.⁹¹ In 2006, a female writers’ assistant sued defendant comedy writers on the popular television show “Friends” for sexual harassment.⁹² Although she had been warned of the writers’ creative sessions that would include sexually mature themes, the assistant felt the constant barrage of jokes were so sexual and vulgar, it constituted harassment.⁹³ The Supreme Court of California concluded that the writers’ lewd talk and gestures did not involve and was not aimed at the assistant or other women in the workplace, therefore it was not sufficiently severe or pervasive to create a hostile work environment for the assistant.⁹⁴ The

83. *Stockett v. Tolin*, 791 F. Supp. 1536, 1540 (S.D. Fla. 1992).

84. *Id.* at 1561.

85. *Doe v. Capital Cities*, 50 Cal. App. 4th 1038, 1042 (1996).

86. *Id.*

87. *Id.* at 1054.

88. *Id.* at 1050.

89. *Id.*

90. *Id.* (“It is not farfetched that plaintiff believed his attendance had something to do with advancing his ambition to obtain employment as an actor”).

91. *Lyle v. Warner Bros*, 38 Cal. 4th 264, 271 (2006).

92. *Id.*

93. *Id.*

94. *Id.* at 291.

court recognized that there was no dispute in the sexually coarse and vulgar language that was used regularly on-set,⁹⁵ which further provides information on how much of a norm this behavior is within the film and television industry. The court also acknowledged the validity of the “creative necessity” argument for the defendant’s Free Speech defense,⁹⁶ which is yet another way that entertainment employers can limit their liability in sexual harassment cases.

With all the confidentiality surrounding the entertainment industry, these few publicly available cases nonetheless shed light on some industry-specific issues that can cause, and even promote, sexual harassment in the workplace. Unfortunately, with the confidential safeguards legally protecting sexual harassment claims, further research may not be able to provide any more case law or examples of sexual harassment in the entertainment industry. Without many big public cases drawing attention to the need for change within Hollywood in the past, it is important to view the entertainment industry as a whole, and how it has historically and systematically bred a culture of sexual harassment and inequality.

Accepted Industry Norms and Silence at All Stages

The public’s perception of the entertainment industry has always been one of glitz and glamour: where an elite group of power players dominate an industry so elusive that only nepotism (or “favors”) can lead aspiring artists to Hollywood’s promise of fame and fortune. Those lucky enough to be in gatekeeper positions have the ability to show an outsider some courtesy⁹⁷ and give them their “big break.” But it seems that often in this male-dominated industry, those in the gatekeeper positions exploit the ambitions of incoming youth as leverage to impose their own perversions.⁹⁸

The term “casting couch” is a familiar concept in popular culture, not just within the entertainment industry. Academy Award winning actor and producer Tom Hanks has been quoted in interviews, responding without shock at some of these newfound allegations with, “there has always been the concept of the casting couch.”⁹⁹ The “casting couch” as a phenomenon

95. *Id.* at 273.

96. Mendoza, *supra* note 62, at 1985.

97. Mike Fleming Jr., *How Male-Dominated Hollywood Contributes to Sexual Harassment Culture: Oscar-Winning Producer Cathy Schulman Explains*, DEADLINE HOLLYWOOD (Mar. 2, 2018, 11:18 AM), <http://deadline.com/2018/03/hollywood-male-dominated-cathy-schulman-interview-metoo-times-up-women-in-film-progress-1202308160/>.

98. *Id.*

99. Sharon Stern Gerstman, *#METOO*, NEW YORK STATE BAR ASSOCIATION, <http://www.nysba.org/metoo/> (last visited Mar. 29, 2018).

can even be found in academic works, as well as law review articles and some case law. This proverbial couch has been described in one law journal article as a place in which “vulnerable young men and women, seeking their fame and fortune in Hollywood, are exploited by unscrupulous people who demand sexual favors in exchange for movie and TV roles.”¹⁰⁰ The Ninth Circuit has explained how this “casting couch” has evolved throughout the history of Hollywood.¹⁰¹ As time goes by and harassers learn that they can no longer victimize their prey so overtly, Hollywood has taught them to employ more subtle techniques, but the results remain the same.¹⁰² The significance of the “casting couch,” in addition to some of its nuances, has clearly been so entrenched in the entertainment industry that it has become a common term used by the public, academics and even judges.

The accepted culture of sexual harassment, discrimination and misconduct places the burden on the young person entering the industry, not on the structure of the industry itself.¹⁰³ Working alongside Equal Rights Advocates, Academy Award winning actress (and one of Harvey Weinstein’s victims) Mira Sorvino has become a major activist, describing the industry in detail.¹⁰⁴ She explains that “the entire system always put it on the young person entering it. . . to navigate the shoals of sexual harassment alone.”¹⁰⁵ Sorvino further describes how Hollywood works to silence victims who are basically told, “this is your problem, you need to deal with it. Don’t make too much noise, just deal with it. This is how it’s always been and this is how it’s always going to be.”¹⁰⁶

In the situation with Harvey Weinstein, it was the same tale as old as time, and “no secret to the inner circle.”¹⁰⁷ Many of the victims did not report the harassing behavior because there were no witnesses, or they feared retaliation.¹⁰⁸ As Jodi Kantor and Meghan Twohey discovered, “speaking up could have been costly [for a victim]. A job with Mr.

100. Norma Jean Almodovar, *For Their Own Good: The Results of the Prostitution Laws as Enforced by Cops, Politicians and Judges*, 10 HASTINGS WOMEN’S L.J. 119, 125 (1999) (describing the casting couch in the entertainment industry in reference to the similar exploitation of prostitutes).

101. *Nichols v. Frank*, 42 F.3d 503, 512 (9th Cir. 1994).

102. *Id.*

103. Mary Elizabeth Williams, *Mira Sorvino: “Women have less protection under the Constitution than gun owners”*, SALON.COM (Mar. 16, 2018, 11:00 PM), <https://www.salon.com/2018/03/16/mira-sorvino-women-have-less-protection-under-the-constitution-than-gun-owners/>.

104. *Id.*

105. *Id.*

106. *Id.*

107. Kantor & Twohey, *supra* note 5.

108. *Id.*

Weinstein was a privileged perch at the nexus of money, fame and art.”¹⁰⁹ The fear of reprisal, and the fear of never again working in the entertainment industry was enough for many women to suppress and silence themselves.

The few victims who had the courage to report Harvey to human resources, or even the police, were instead silenced in the form of settlement agreements and non-disclosure agreements.¹¹⁰ The Italian model who reported her incident with Harvey to the New York Police Department was silenced with a settlement, conditioned on anonymity with the addition of a nondisclosure agreement.¹¹¹ The assistant who posted a staff memo on Harvey’s inappropriate behavior withdrew her complaint only six days later after being offered a secret settlement agreement.¹¹² Along with her resignation, she even wrote a letter to Harvey “thanking him for the opportunity to learn about the entertainment industry,” almost as if to erase the traces of his sexual harassment.¹¹³

Unfortunately, Harvey Weinstein and his company were not the only ones in the entertainment industry creating and enforcing these confidential settlement agreements.¹¹⁴ Once-powerful men like Bill Cosby and Bill O’Reilly, amongst many others, had managed to buy their victims’ silence for decades with settlements and nondisclosure agreements.¹¹⁵ Such secrecy in these agreements is detrimental to the whole system, as it prevents a survivor from telling her story and warning others.¹¹⁶ These agreements and clauses are prevalent in many low-wage industries where companies exploit economically vulnerable women to stay silent about their abuses.¹¹⁷ Hollywood is another industry ripe with these situations and agreements, with the vast power imbalances between the powerful gatekeepers and those trying desperately to make it in such an elusive industry.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Jessica Levinson, *Non-disclosure agreements can enable abusers. Should we get rid of NDAs for sexual harassment?* NBC NEWS (Jan. 24, 2018, 1:19 AM) <https://www.nbcnews.com/think/opinion/non-disclosure-agreements-can-enable-abusers-should-we-get-rid-ncna840371>.

115. *Id.*

116. Noreen Farrell, *It’s the System, Stupid: Why Weinstein Isn’t Just About Weinstein*, MEDIUM.COM (Oct. 17, 2017) <https://medium.com/equal-rights-advocates/its-the-system-stupid-why-weinstein-isn-t-just-about-weinstein-19c708195c74>.

117. *Id.*

Solutuion: Breaking the Silence

Even as the worst kept secret of Hollywood, the sexual harassment of the entertainment industry had managed to continue on throughout history for far too long. After decades of suppressing secrets, once allegations of sexual misconduct against Harvey Weinstein were exposed, the floodgates of Hollywood opened during what has been called a “watershed moment.”¹¹⁸ Power spread to the people as prominent female figures in Hollywood helped spearhead social media campaigns against harassment.¹¹⁹ The reaction to the Harvey Weinstein scandal has been instrumental in promoting a change in the public’s perception of sexual harassment, as scandals like this often do in history. As seen this past year, the social movements are the first step in breaking the silence by inspiring victims to speak out, instigating the public’s provocation and promoting new legislation. In addition to these social movements (and perhaps with their help), the entertainment industry must also rid itself of all confidential settlement agreements surrounding sexual harassment cases. Now is the time for both of these solutions to help ensure that the silence remains broken.

Social Movements Spurring Speech

As explained in Part II, sexual harassment is no new phenomenon, and legal protections have been in place (and strengthening) for several decades. However, the entertainment industry has managed to almost blatantly evade some of these protections throughout its history. After the Harvey Weinstein scandal, many victims, scholars, and advocates have spoken up about sexual harassment. The groundbreaking social movements such as “#MeToo”¹²⁰ and “Times Up”¹²¹ created a public conversation about sexual harassment, assault, and women’s empowerment.¹²²

Prominent scholar, Catharine MacKinnon, is widely credited with bringing both public and judicial attention to the problem of workplace

118. Rutenberg et al., *supra* note 8.

119. *Id.*

120. Me Too, *supra* note 10.

121. Time’s Up, *supra* note 11.

122. Alix Langone, *#MeToo and Time’s Up Founders Explain the Difference Between the 2 Movements – And How They’re Alike*, TIME, <http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/> (last updated Mar. 22, 2018, 5:21 PM).

harassment.¹²³ From her 1979 publication “*Sexual Harassment of Working Women: A Case of Sex Discrimination*,” to her newest *New York Times* articles addressing a post-Harvey Weinstein world,¹²⁴ MacKinnon has been an advocate for women and sexual harassment protections. MacKinnon stresses the importance of social movements such as #MeToo stating that “sexual harassment law prepared the ground, but its today’s movement that is shifting gender hierarchy’s tectonic plates.”¹²⁵ Such widespread public revulsion against harassing behavior can change workplaces and schools by restraining and shunning predators.¹²⁶ MacKinnon believes that taking #MeToo’s changing norms into the law will predictably transform the law as well.¹²⁷

Although sexual harassment laws came about in the 1960s, it wasn’t until the 1990s that social movements helped promote the furtherance of sexual harassment policies. The first time that sexual harassment was a national conversation was in 1991 after Anita Hill alleged that Supreme Court Justice nominee Clarence Thomas had sexually harassed her at work.¹²⁸ That year, the EEOC reported an uptick in harassment claims by as much as forty percent.¹²⁹ With the eyes of the American public following Anita Hill’s case, the exposure promoted more knowledge and hope for further sexual harassment protections.

Much like the Anita Hill case caused a public conversation about sexual harassment, such has been the case following the Harvey Weinstein scandal. Social movements such as #MeToo and Time’s Up have continued to stimulate other social movements and grow to become more than just avenues for people to share their stories. In January, the Time’s Up movement called for Hollywood stars to wear all black on the Golden Globes’ red carpet, in solidarity for victims of sexual harassment.¹³⁰ This seemingly simple gesture made a huge impact on the entire award show season, with well-known celebrities (both male and female) speaking freely about these issues on a public platform.¹³¹

Not only did Time’s Up spur conversation with its red carpet movement and celebrity involvement, but it took the movement one step

123. Ann C. Hodges, *Strategies for Combatting Sexual Harassment: The Role of Labor Unions*, 15 TEX. J. WOMEN & L. 183, 184 (2006).

124. Catherine MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>.

125. *Id.*

126. *Id.*

127. *Id.*

128. 23 No. 6 W. Va. Emp. L. Letter 1.

129. *Id.*

130. Cindy Lang, *How Will #MeToo Show Up on the Oscars Red Carpet?* TIME (Mar. 2, 2018), <http://time.com/5180877/oscars-2018-times-up-red-carpet/>.

131. *Id.*

further by creating the “Time’s Up Legal Defense Fund.”¹³² Administered by the National Women’s Law Center, the fund helps defray legal and public relations costs in cases of sexual harassment or related retaliation in the workplace.¹³³ It is important for Time’s Up, along with other social movements and advocacy groups to follow suit, creating access to prompt and comprehensive legal communications for those suppressed by the realities of sexual harassment.

In addition to the public conversation and legal defense funds these social movements have incited, they have even helped guide policymakers into some proposed legislation.¹³⁴ This past year has brought with it an unprecedented amount of legislation targeting sexual harassment.¹³⁵ According to the National Conference of State Legislatures, 32 states have introduced over 125 pieces of such legislation.¹³⁶ In Hollywood’s home state of California, there were more than twenty pending bills created by legislators addressing necessary sexual harassment changes.¹³⁷

Adopting the social movement’s ideals and name, the Connecticut State Democrats proposed legislation in February with their “Times Up Act: Combating Sexual Harassment and Sexual Assault.”¹³⁸ Intending the “largest overhaul in modern Connecticut history of sexual harassment laws,” this bill did not pass, unfortunately.¹³⁹ However, California’s House Representative Jackie Speier introduced the aptly named “ME TOO Congress Act” to update the system for filing and settling harassment claims within congress.¹⁴⁰ Although targeting Capitol Hill and not the Hollywood Hills, even from its name, this bill shows the expansive reach and influence of these social movements on new laws.

Using celebrity appeal to attract more followers, these social movements keep the conversation about sexual harassment alive, not only

132. Time’s Up, *supra* note 11.

133. *Id.*

134. Susan Davis, *Me Too Legislation Aims To Combat Sexual Harassment In Congress*, NPR (Nov. 15, 2017, 5:25 PM), <https://www.npr.org/2017/11/15/564405871/me-too-legislation-aims-to-combat-sexual-harassment-in-congress>.

135. NAT’L CONF. OF STATE LEG., *2018 Legislation on Sexual Harassment in the Legislature* (June 6, 2018), <http://www.ncsl.org/research/about-state-legislatures/2018-legislative-sexual-harassment-legislation.aspx>.

136. *Id.*

137. *Don’t Stand So Close to Me: Ten California Sexual Harassment Bills to Watch*, JDSUPRA, (May 18, 2018), <https://www.jdsupra.com/legalnews/don-t-stand-so-close-to-me-ten-34086/>.

138. CONNECTICUT STATE DEMOCRATS, *Time’s Up Act: Combatting Sexual Harassment and Sexual Assault*, <http://www.senatedems.ct.gov/docshr/pdf/TimesUp-handout.pdf> (last visited Nov. 11, 2018).

139. *Id.*

140. ME TOO Congress Act, H.R. 4396, 115th Cong. (2017) available at <https://www.congress.gov/bill/115th-congress/house-bill/4396/text?format=txt>.

with the public but with lawmakers as well. It is imperative that these social movements continue to help fund and advocate for new sexual harassment laws, as they have been doing this past year since the Harvey Weinstein scandal.

Eliminating the Secrecy in Settlement Agreements

In line with the idea of social movements bringing sexual harassment to the attention of the public, eliminating the confidentiality of settlement agreements will also break the silence surrounding sexual harassment. The public uncovering of the Weinstein settlement agreements (along with O'Reilly, Cosby and many others) proved that harassment can be suppressed for decades.¹⁴¹ Unfortunately, many companies like the Weinstein Company are helping their perpetrators by creating and facilitating such agreements. According to some employment attorneys, settlement agreements containing non-disclosure provision are “the rule, and not the exception.”¹⁴²

Non-disclosure agreements allow predators to cover up their actions without public consequences, which ultimately allows them to continue with the behavior.¹⁴³ Although some settlement agreements can contain mutual beneficial confidentiality clauses in some business dealings, there is no place for them in cases involving sexual misconduct or harassment.¹⁴⁴ In the wake of the Harvey Weinstein scandal, several states have proposed and passed new legislation that would limit the use of nondisclosure agreements in situations involving sexual misconduct.

In California, the Stand Together Against Non-Disclosures (“STAND”) Act, was introduced in early 2017 to ban “secret settlements in cases of sexual assault, sexual harassment and sex discrimination.¹⁴⁵ Co-sponsored by the Consumer Attorneys of California and the California Women’s Law Center, this legislation was intended to apply to both private and public employers in California.¹⁴⁶ Originally introduced by Senator Connie M. Leyva of Chico, the motive of the bill was to end the unjust practice of secret settlements that keeps aggressors unaccountable and able

141. Levinson, *supra*, note 114.

142. Evan Gibbs, *Non-Disclosure Agreement In The #MeToo Era*, ABOVE THE LAW, (Feb. 20, 2018, 10:51 AM) <https://abovethelaw.com/2018/02/non-disclosure-agreements-in-the-metoo-era/?rf=1>.

143. *Id.*

144. *Id.*

145. *Senator Leyva Introduces STAND (Stand Together Against Non-Disclosures) Act*, (Jan. 3, 2018) <http://sd20.senate.ca.gov/news/2018-01-03-senator-leyva-introduces-stand-together-against-non-disclosures-act>.

146. *Id.*

to prey on other victims.¹⁴⁷ With much support, the STAND Act passed through California legislature, and was approved by the Governor on September 30, 2018.¹⁴⁸

Naturally, this step in the right direction does have a few concerns that come with it. Many confidential settlement agreements force victims to make a difficult choice after they have been sexually harassed or abused: either sign a nondisclosure agreement and receive monetary compensation for the suffering, or engage in the uncertainty of litigation.¹⁴⁹ Although it may sound appealing to some advocates, it would be too unrealistic to completely ban all settlement agreements in general, which is why the focus is limited to eliminating the confidentiality clauses.¹⁵⁰

Those opposed to the proposed anti-secrecy laws claim that many victims of sexual harassment would want their cases kept confidential, as it was part of their reasoning for not pursuing litigation.¹⁵¹ Even if this may be true, it is not much of a problem since many of the new laws contain provisions allowing victims the option as to whether or not their settlement agreement contains a non-disclosure provision or not.¹⁵² This would be the middle ground where both parties would still be incentivized to settle, but the victims could choose whether they want to retain the ability to speak out about their experience.¹⁵³ Giving victims such an option gives them more power to break the cycle, even if not completely breaking the silence. As such, it would be beneficial for both the victim, and society as a whole, to eliminate these confidentiality clauses once and for all, breaking the silence one settlement agreement at a time.

Conclusion

The Harvey Weinstein scandal was the catalyst for starting a sexual harassment revolution, bringing the conversation to the forefront of American popular culture. Light has been shed on how this problem persists so dramatically within the entertainment industry, where sexual harassment victims are silenced at every stage of the process. Between the accepted cultural norms of the industry perpetuating power imbalances, to the fear of reprisal in such an exclusive industry, to the confidential

147. *Id.*

148. *Senate Bill 820 (Levy) – Stand Together Against Non-Disclosures (STAND) Act*, CA WOMEN’S LAW CENTER, <https://www.cwlc.org/2018/04/s0820-senate-bill-820-leyva-stand-together-against-non-disclosures-stand-act/> (last visited Nov. 11, 2018).

149. Gibbs, *supra*, note 142.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

settlement agreements. . . the silence has been deafening. With the help of social movements spurring conversation and new legislation, as well as an elimination of secrecy in settlements, the time is finally up on the silence surrounding sexual harassment.