

2021

Hiding Sexual Harassment: Myths and Realities

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Recommended Citation

Pat K. Chew, *Hiding Sexual Harassment: Myths and Realities*, 21 Nevada Law Journal 1223 (2021).
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HIDING SEXUAL HARASSMENT: MYTHS AND REALITIES

By Pat K. Chew*

The percent of Americans viewing sexual harassment as a major problem actually decreased between 2017 and 2019, with only 53% of men considering it a major problem in 2019 compared to 66% in 2017.¹

“Each time that I was taking it, again and again, it just felt like more of me diminishing . . . until [I] was just like a shell of a person.”²

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¹ Megan Brennan, *U.S. Men Less Concerned than in 2017 About Sexual Harassment*, GALLUP (Mar. 18, 2019), <https://news.gallup.com/poll/247823/men-less-concerned-2017-sexual-harassment.aspx?version=print> [perma.cc/FYK5-LSAV].

² Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html> [perma.cc/59CB-K69J] (quote by Ms. Wright describing the effect of the constant barrage of sexual insults from her colleagues).

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INTRODUCTION

Sexual harassment and gender disparities in the workplace continue, but we are not paying enough attention.³ The heralded me-too movement and the publicized downfalls of Harvey Weinstein, Bill Cosby, and other former luminaries⁴ might give the impression that the lid is blown off the indignities of harassment in the workplace and that American society's collective disdain and abhorrence of harassment has quickly put an end to these incivilities. But these headline cases are just the tip of the sexual harassment iceberg; they may even give us a false sense of security and optimism.

The truth is that we are not yet in that post-harassment, post-sexist era. By not candidly recognizing that and taking affirmative corrective measures, we are letting harassers and their employers get away with harassment and continue to hurt women in the workplace.

³ I am aware and recognize that “sex discrimination” and “sexual harassment” have been defined in very specific ways under Title VII caselaw. *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786–92 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751–54 (1998). I am using the terms “sex discrimination” and “sexual harassment” in this Article, however, in a more interdisciplinary and plain-language way to encompass women being perceived and treated differently and disadvantageously in the workplace because of their sex and gender. These disparate attitudes and treatment may be revealed in the form of specific employment decisions (as in hiring and promotion) but also may occur in day-to-day experiences. *See, e.g.*, RACHEL THOMAS ET AL., MCKINSEY & CO., *WOMEN IN THE WORKPLACE 2019*, at 11 (2019) [hereinafter MCKINSEY REPORT 2019]. Later in the Article, for instance, I explain how the legal definition of sexual harassment has been too narrow and consequently ineffective in addressing sexual harassment in reality. *See infra* text accompanying notes 189–193.

⁴ *See, e.g.*, Orion Rummel, *Global #MeToo Movement Resulted in 7 Convictions, 5 Charges of Influential Figures*, AXIOS (July 3, 2020), <https://www.axios.com/global-metoo-movement-convictions-charges-382ff226-7ad3-4b26-ac89-451788192578.html> [perma.cc/FM66-YJKV].

This Article explores three related myths on which sexual harassment is built and allowed to continue. These myths perpetuate what we would like to believe about sex discrimination, sexual harassment, and what happens to women who complain about sexual harassment and their alleged harassers. Part I discusses the myth that gender inequality and sex discrimination are no longer prevalent. It continues by exploring the stories we tell ourselves and others to keep that myth alive. Part II discusses the myth that sexual harassment is no longer prevalent. It continues by revealing that sexual harassment very much continues and that it is intrinsically related to sex discrimination. Part III explores the myth that there is a just resolution for the courageous women who are harassed and then report it—that the men and employers responsible are identified and punished. This Article reveals instead that harassed employees are disadvantaged at every stage of the reporting and resolution process, often leading to their frustration and failure.

This Article hopes to inspire conversation on these three myths and their contrary realities. By recognizing these truths, we can begin to take actions toward transforming those idealistic myths into actual realities. The Article ends in the Conclusion with proposals for achieving that future goal.

I. MYTH: SEX DISCRIMINATION IS NO LONGER PREVALENT

Many think gender inequality and sex discrimination in the workplace are no longer prevalent.

The Pew Research Center, for example, reports only 26% of Americans view sexism as a “big problem” with only 35% viewing it as small and 29% as not a problem at all.⁵ Or stated in the inverse, about three-quarters of Americans buy into the myth that women do not face everyday sex discrimination. In another survey, many respondents indicate a similar sentiment. Men in particular believe that the country has done enough or even gone too far on gender equality, with 57% sharing that view.⁶

A. *Sex Discrimination Persists*

The occasional news about a high-profile female chief executive⁷ might suggest that the workplace is now a place of equal opportunity, the glass ceiling

⁵ *In a Politically Polarized Era, Sharp Divides in Both Partisan Coalitions*, PEW RSCH. CTR. (Dec. 17, 2019), <https://www.pewresearch.org/politics/2019/12/17/in-a-politically-polarized-era-sharp-divides-in-both-partisan-coalitions/> [perma.cc/23LF-XQWK].

⁶ John Gramlich, *10 Things We Learned About Gender Issues in the U.S. in 2017*, PEW RSCH. CTR. (Dec. 28, 2017), <https://www.pewresearch.org/fact-tank/2017/12/28/10-things-we-learned-about-gender-issues-in-the-u-s-in-2017/> [perma.cc/WP9E-E8LS]. Even 41% of women agreed. *Id.* 72% of Republicans agreed, in contrast to 30% of Democrats. *Id.* Specific inquiry: When it comes to giving equal rights with men, the country “has gone too far,” “has been about right,” or “hasn’t gone far enough.” *Id.*

⁷ Emma Hinchliffe, *The Number of Female CEOs in the Fortune 500 Hits an All-time Record*, FORTUNE (May 18, 2020, 4:15 AM), <https://fortune.com/2020/05/18/women-ceos->

is no-more, and the pipeline to positions of workplace leadership is as available to women as to men. Wrong. While progress has been made, widespread gender discrepancies in rewards and treatment persist and, in fact, remain pervasive in many places in today's workplace.⁸ The Pew Research Center, for example, found that 42% of women indicate they have experienced gender discrimination at work.⁹ The Equal Employment Opportunity Commission (EEOC) also reports that in 2019, there were 23,532 sex-based discrimination charges.¹⁰

While sex discrimination is manifested in various ways, we briefly note three forms.¹¹ First are pay gaps between women and men, second are disparate career patterns and underrepresentation across many industries and jobs, and third are microaggressions that are disproportionately directed at women.

Earning inequality, as exemplified by pay gaps, is a commonly reported form of discrimination.¹² Twenty-five percent of women say they earn less than

fortune-500-2020 [perma.cc/YV44-LYZR] (but noting that 37 of 500 is only 7.4%); Sharon Terlep, *Clorox, with Its Sales Soaring from the Coronavirus, to Get New CEO*, WALL ST. J. (Aug. 3, 2020, 5:43 PM), <https://www.wsj.com/articles/clorox-posts-higher-sales-as-consumers-stock-up-on-disinfectants-11596454128> [https://perma.cc/8AVQ-86EB] (indicating only 5% of CEO's at 500 largest companies are women).

⁸ See, e.g., MCKINSEY REPORT 2019, *supra* note 3, at 7–8, 10–11; LAUREN PASQUARELLA DALEY, CATALYST, WOMEN AND THE FUTURE OF WORK 2–4 (2019); Stephen Turban et al., *A Study Used Sensors to Show that Men and Women Are Treated Differently at Work*, HARV. BUS. REV. (Oct. 26, 2017), <https://hbr.org/2017/10/a-study-used-sensors-to-show-that-men-and-women-are-treated-differently-at-work> [perma.cc/B2AQ-3494]; Jessica M. Salerno et al., *Closing with Emotion: The Differential Impact of Male Versus Female Attorneys Expressing Anger in Court*, 42 LAW & HUM. BEHAV. 385, 385 (2018); Byrd Pinkerton, *He's Brilliant, She's Lovely: Teaching Computers to Be Less Sexist*, NPR (Aug. 12, 2016, 8:01 AM), <https://www.npr.org/sections/alltechconsidered/2016/08/12/489507182/hes-brilliant-shes-lovely-teaching-computers-to-be-less-sexist> [perma.cc/35Q3-874G]; see also *Sex Discrimination and Sexual Harassment: Quick Take*, CATALYST (Dec. 5, 2019), <https://www.catalyst.org/research/sex-discrimination-and-sexual-harassment/> [perma.cc/V4E8-SVW8]. Research in certain occupations, such as for economists, has been particularly extensive. David Harrison, *Female Economists, in Survey, Cite Gender Discrimination; Results Come as the Profession's Treatment of Women Has Come Under Focus*, WALL ST. J. (Mar. 18, 2019, 2:05 PM), <https://www.wsj.com/articles/female-economists-in-survey-citegender-discrimination-11552923797> [perma.cc/LU6T-KJ9D]; Colleen Flaherty, *Anonymous Comments, Unmasked Bias*, INSIDE HIGHER ED (Aug. 21, 2017), <https://www.insidehighered.com/news/2017/08/21/internet-can-be-brutal-place-women-economics-paper-finds> [perma.cc/7PD9-EZZZ]; Colleen Flaherty, *Belief in Gender Bias and Promotions for Women*, INSIDE HIGHER ED (Aug. 27, 2019, 3:00 AM), <https://www.insidehighered.com/quicktakes/2019/08/27/belief-gender-bias-and-promotions-women> [perma.cc/JVG3-ALGW].

⁹ Gramlich, *supra* note 6 (compared to 20% of men who said the same).

¹⁰ Press Release, U.S. EEOC, EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data (Jan. 24, 2020), <https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data> [perma.cc/WWB4-X77F] (includes both sexual harassment and other sex-based claims such as sex discrimination and retaliation).

¹¹ See discussion in notes 12–42 and accompanying text.

¹² *The State of the Gender Pay Gap in 2020*, PAYSACLE [hereinafter *PayScale Report*] <https://www.payscale.com/data/gender-pay-gap> [perma.cc/HH8Y-GJJJ]; see also Claire

a man doing the same job while just 5% thought they earned less than women doing the same job.¹³ A well-documented actual pay gap between men and women continues. Women make only 81 cents for every dollar men make in 2020.¹⁴ “[T]he gender pay gap is wider for women of color, women in executive level roles, women in certain occupations and industries, and in some . . . states.”¹⁵

The impact of these lost wages on lifetime earnings can be significant with hundreds of thousands of dollars and an improved standard of living at stake.¹⁶ Researchers predict that women in general will lose \$900,000 on average over a lifetime.¹⁷ Furthermore, the researchers conclude that the gender wage gap cannot be fully explained by differences in education, experience, occupation, and personal decisions. “[W]omen are still being paid less than men due to no attributable reason other than gender.”¹⁸

As a PayScale study describes:

Women are paid less relative to men for every occupation . . . [W]omen make up the majority of the workforce in support, service, and wellbeing-related occupations such as community & social services, education, training & library, healthcare practitioners, healthcare support, office and administrative support, and personal care & services.

Although it might stand to reason that the gender wage gap would be smaller in occupations where women dominate, the data showed no such pattern. For example, women dominate in the legal industry, which is 53 percent women and 47 percent men. However, legal had the largest gender wage gap in the study,

Cain Miller, *As Women Take over a Male-Dominated Field, the Pay Drops*, N.Y. TIMES (Mar. 18, 2016), <https://www.nytimes.com/2016/03/20/upshot/as-women-take-over-a-male-dominated-field-the-pay-drops.html> [<https://perma.cc/9W3J-V8JY>]; Jen Hubley Luckwaldt, *When an Occupation Becomes Female-Dominated, Pay Declines*, PAYSCALE (Mar. 21, 2016), <https://www.payscale.com/career-news/2016/03/when-an-occupation-becomes-female-dominated-pay-declines> [perma.cc/6VWL-4JAU]; Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789, 789 (2017) (“[T]he gender pay gap decline[s] much more slowly at the top of the wage distribution than at the middle or [the] bottom . . . [T]raditional explanations [for a gender pay gap] continue to have salience. . . . Gender differences in occupations and industries, as well as differences in gender roles and the gender division of labor remain important, and research based on experimental evidence strongly suggests that discrimination cannot be discounted. Psychological attributes or noncognitive skills comprise one of the newer explanations for gender differences in outcomes. Our effort to assess the quantitative evidence on the importance of these factors suggests that they account for a small to moderate portion of the gender pay gap, considerably smaller than, say, occupation and industry effects, though they appear to modestly contribute to these differences.”).

¹³ *PayScale Report*, *supra* note 12.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* When taking into account all kinds of variables (controlled group), the lost earnings are less at \$80,000. *Id.* However, given lost investment income from those incremental earnings over forty years, that gap is significant. *Id.*

¹⁸ *Id.*

suggesting that women and men don't have the same jobs levels or titles within the legal profession statistically.¹⁹

The pay gap is greater in some industries, such as finance and insurance.²⁰ And even what sounds like good news in other industries needs to be studied more carefully. When controlling for many factors—for instance in technology and engineering and science—pay equity appears to be achieved.²¹ “However, there is a large difference between the controlled and uncontrolled gender pay gaps in these sectors.”²² “Among other things, this is indicative of women and men not having the same job levels or job titles.”²³

A second example of evidence of sex discrimination is the different career patterns and underrepresentation of women in many settings. While there are select examples of women in all kinds of leadership roles,²⁴ the bigger picture reveals ongoing gender underrepresentation all along the workplace pipeline and patterns of bias. For example, in addition to the issues in pay equity in the technology, engineering, and science industries described above, women make up only 29% of the tech industry and 38% of engineering and science workers.²⁵

A large-scale multi-year research project by McKinsey Consultants (McKinsey Report) illustrates the gender disparities across many settings and across time.²⁶ Their research is based on a survey of hundreds of companies in the private, public, and social sectors.²⁷ Thousands of employees are included.²⁸ Among other findings in their 2018 report are the following:

Based on four years of data from 462 companies employing almost 20 million people, including the 279 companies participating in this year's study, two

¹⁹ *Id.* (“Education, training & library occupations have [a large] uncontrolled pay gap, despite that women make up the vast majority of educators. Women in these jobs earn \$0.72 for every dollar earned by men, even though 74 percent . . . are women. Although women represent a larger portion of this sector's workforce, many teach primary education. Most men . . . teach secondary education, where head coaching and administrative duties are more available than in elementary school settings. Such leadership opportunities [can then lead to] administrative roles with higher salaries. These disparities are compounded when taken with the harmful stereotypes that women are poor leaders or bad with finances, two pejoratives that thicken the glass ceiling.”).

²⁰ *Id.* (“Finance & insurance has the largest uncontrolled wage gap (\$0.76), followed by agencies & consultancies (\$0.81), healthcare (\$0.83), retail & customer service (\$0.83), and transportation & warehousing (\$0.84). Industries with the smallest uncontrolled wage gaps include arts, entertainment & recreation (\$0.93) and real estate & rental/leasing (\$0.92).”).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See CATALYST, WOMEN IN LEADERSHIP AT S&P/TSX COMPANIES 3 (2020).

²⁵ *PayScale Report*, *supra* note 12; see also MCKINSEY REPORT 2019, *supra* note 3, at 46 (noting pay gaps when women enter higher paying occupations).

²⁶ MCKINSEY REPORT 2019, *supra* note 3, at 69 (noting many gender disparities in compensation and other rewards across many industries and professions are documented).

²⁷ *Id.* at 68.

²⁸ *Id.* at 1.

things are clear: [one,] [w]omen remain significantly underrepresented, particularly women of color. [Two,] [c]ompanies need to change the way they hire and promote entry- and manager-level employees to make real progress.

Since 2015, the first year of this study, corporate America has made almost no progress in improving women's representation. Women are underrepresented at every level, and women of color are the most underrepresented group of all, lagging behind white men, men of color, and white women.²⁹

Their evidence further reveals that obstacles to success appear quickly in women's careers. The data shows a "broken rung" in the promotion ladder, where women are not promoted as much as men from entry level to first-level management.³⁰ For every 100 men promoted, only 72 women are promoted.³¹ Not surprising given this broken rung, men hold 62% of all manager-level positions (including more senior levels) and women hold only 38%.³² There is some progress in leadership roles, but still underrepresentation. Only one in five C-suite executives is a woman; only one in twenty-five is a woman of color.³³

The McKinsey Report 2018 study also found that attrition is not the explanation for underrepresentation.³⁴ The same percentage of men and women leave their companies (about 15% annually).³⁵ When they leave their current employer, the same percent of women and men stay in the workforce (81–82%) and only a small percent of women (2%) leave to focus on family.³⁶

A third type of often underreported sex discrimination is microaggressions disproportionately directed at women workers. Microaggressions are everyday slights that may appear small when isolated but indicate patterns of inequality over time.³⁷ As the McKinsey Report indicates, women report that they are more likely than men to be subjected to an array of microaggressions at work.³⁸ They include others questioning their competence, being overlooked, and being disrespected.³⁹ How are these microaggressions manifested and measured? As further delineated below, women's competence is questioned in the following ways: they need to provide more evidence of their competence, or they have their judgment questioned in their areas of expertise.⁴⁰ Women are overlooked

²⁹ RACHEL THOMAS ET AL., MCKINSEY & CO., *WOMEN IN THE WORKPLACE 2018*, at 5–6 (2018) [hereinafter MCKINSEY REPORT 2018].

³⁰ MCKINSEY REPORT 2019, *supra* note 3, at 12–14.

³¹ *Id.* at 10–11.

³² *Id.* at 11; *see also* Vanessa Fuhrmans, *Where Women Fall Behind at Work: The First Step into Management*, WALL ST. J. (Oct. 15, 2019, 12:18 AM), <https://www.wsj.com/articles/where-women-fall-behind-at-work-the-first-step-into-management-11571112361> [perma.cc/DDM3-DKFC].

³³ MCKINSEY REPORT 2019, *supra* note 3, at 9.

³⁴ MCKINSEY REPORT 2018, *supra* note 29, at 7.

³⁵ *Id.*

³⁶ *Id.*

³⁷ MCKINSEY REPORT 2019, *supra* note 3, at 48.

³⁸ *Id.* at 48–49.

³⁹ *Id.*

⁴⁰ *Id.* at 49.

when interrupted, spoken over, or denied credit for their ideas.⁴¹ Women are disrespected by being mistaken for someone at a lower level, by demeaning remarks about them or people like them, by others' surprise at their language skills, or by feeling like they cannot talk about themselves or their lives outside of work.⁴²

HOW WOMEN EXPERIENCE MICROAGGRESSIONS DISPROPORTIONATELY⁴³

Women's Competence Questioned

- More evidence of their competence required (30% of women versus 14% of men)
- Judgment questioned in their area of expertise (38% of women versus 29% of men)

Women Overlooked

- Interrupted or spoken over (50% of women versus 34% of men),
- Not getting credit for their ideas (38% of women versus 27% of men)

Women Disrespected

- Mistaken for someone at a lower level (18% of women versus 9% of men)
 - Demeaning remarks (16% of women versus 11% of men)
 - Surprise at their language skills (14% of women versus 8% of men)
 - Feeling like they cannot talk about themselves (10% of women versus 7% of men)
-

The McKinsey Report also reveals that certain groups of women describe more microaggressions than women in general. Lesbian women, bisexual women, and women with disabilities are more likely to have their competence questioned, be overlooked, or be disrespected.⁴⁴ For example, 46% of bisexual women need to provide more evidence of their competence (in contrast to 14% of men); 64% of bisexual women are interrupted or spoken over (in contrast to 34% of men).⁴⁵ Forty percent of Black women are more likely to have their competence questioned and are disrespected (in contrast to 30% of women in general and 14% of men).⁴⁶ Women who are alone in their workplace also suffer microaggressions disproportionately.⁴⁷ They are more likely than women who are not the only woman in their workplace to have their competence questioned (49% to 51% versus 20 to 30% of women who are not alone), and more likely to be overlooked (52% to 68% versus 29% to 40% of women who are not alone).⁴⁸

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 52.

⁴⁸ *Id.* at 53. Of more than 9,000 respondents in an American Economic Survey, about two-thirds of female economists believe their work is not taken as seriously as the work of male economists. See Harrison, *supra* note 8. Their beliefs are supported by research showing that postings on an anonymous discussion board for economics students describe women's physical characteristics rather than the merits of their work, in contrast to a more predictable dis-

B. Why Do We Believe Otherwise?

Given the clear empirical evidence of sex discrimination—as illustrated above by compensation disparities, underrepresentation and pipeline problems, and disproportionate microaggressions—how are we able to deny these gender disparities? How can the reality of sex discrimination be supplanted with the mistaken belief that sex discrimination is no longer prevalent? We are able to do this in part by telling ourselves “stories” that rationalize what is really happening.⁴⁹

Sociologist Arianne Renan Barzilay proposes that men, and to some extent women, accept gendered treatment because it is consistent with broader societal views.⁵⁰ She posits that we learn these inequities and tolerate them without even thinking about it.⁵¹ I suggest that we capture these societal views in the stories we tell about the way the world functions. I discuss, for instance, two rationalizing stories that allow us to ignore sex discrimination in the workplace. The first is the story that there are natural and appropriate roles for women and men that justify discrimination in the workplace; the second story is that it is just a matter of time for women to achieve parity and that it is largely up to women to do so.

1. Narrative: The Ideal Man, the Ideal Woman, and the Ideal Worker

Could it be that sex discrimination is explained in part by American society’s belief that there are natural and therefore appropriate male and female roles? Furthermore, do these gendered roles result in discrimination in the workplace?

Barzilay proposes that we have idealized versions of gender roles, what I label as the “ideal woman” and the “ideal man”.⁵² At the same time, we also have an idealized version of an “ideal worker” who has characteristics we associate with committed and desirable workers who deserve success and job rewards.⁵³ Society’s image of the “ideal worker” is an employee who is totally devoted to their job and their bosses’ and employers’ business goals.⁵⁴ They do not have distracting family and household duties and obligations.⁵⁵

cussion of the merits of men’s work. *Id.* Another study show that female economists have a harder time than men in placing their work in professional journals. *Id.*

⁴⁹ See, e.g., David Robson, *The Sexist Myths That Won’t Die*, BBC (Sept. 30, 2019), <https://www.bbc.com/future/article/20190930-the-sexist-myths-about-gender-stereotypes-that-wont-die> [perma.cc/GP8K-P6GC].

⁵⁰ Arianne Renan Barzilay, *Discrimination Without Discriminating? Learned Gender Inequality in the Labor Market and Gig Economy*, 28 CORNELL J.L. & PUB. POL’Y 545, 554, 557, 563 (2019).

⁵¹ *Id.* at 554.

⁵² *Id.* at 558–59.

⁵³ *Id.*

⁵⁴ *Id.* at 558.

⁵⁵ *Id.*

Conveniently, this ideal worker is consistent with the description of the ideal man who takes care of himself and his family financially by working very hard for his company, factory, or institution.⁵⁶ Embedded in many ways in American society, an ideal man proves his masculinity through his “macho” image of protecting women and children⁵⁷ and bringing home the essential resources to help his family survive. A man’s workplace, consistent with the natural order of gender roles, is to work outside the home.

In contrast, the ideal woman incorporates the motherhood myth that women are best suited and naturally disposed toward parenting and nurturing the family as a whole. Thus, ideally for society’s sake, a woman should responsibly stay home and take care of raising the children and creating a loving and appropriately supportive home environment.⁵⁸

Motherhood myths include the assumptions that women, by their very nature, are endowed with parenting abilities, that at-home mothers are bonded to their children, providing them with unrivalled nurturing surroundings. Conversely, motherhood myths pathologised alternative mothering models, depicting employed mothers as neglecting their duty of caring, threatening the family relationships and jeopardizing mother-children bondings.⁵⁹

This tension between being an ideal woman and an ideal worker unconsciously disadvantages women in the workplace. Perhaps employers’ and colleagues’ sex discrimination, manifested for instance in their microaggressions and workplace decisions, is an unconscious way for them to lash out at women who they think really should not be working at all or at least not so ambitiously.

Comparative research, for instance, suggests that women and men across many countries use motherhood myths to justify sex discrimination in the workplace.⁶⁰ This research further reveals that countries who adhere most to the motherhood myth area also more likely to have other indices of sex discrimination.⁶¹

2. *Narrative: It’s Just a Matter of Time*

My observations are that those who believe that sex discrimination is not a real problem are also comforted by the mantra “It’s just a matter of time.” They rationalize that a few “things” just have to fall in place, and that they will over time.⁶² Further, they imagine that the amount and timing of gender progress is

⁵⁶ *Id.* at 558–59.

⁵⁷ *See, e.g.*, KRISTIN KOBES DU MEZ, JESUS AND JOHN WAYNE: HOW WHITE EVANGELICALS CORRUPTED A FAITH AND FRACTURED A NATION 76, 84, 91 (2020).

⁵⁸ Catherine Verniers & Jorge Vala, *Justifying Gender Discrimination in the Workplace: The Mediating Role of Motherhood Myths*, 13 PLOS ONE, Jan. 2018, at 3, 14, 16, 18.

⁵⁹ *Id.* at 3 (internal citations omitted).

⁶⁰ *Id.* at 14.

⁶¹ *Id.* at 14, 16.

⁶² *Id.* at 2.

largely under the control of women.⁶³ Hence, to the extent there are any gender differences in the workplace, they are attributable to women's efforts and choices.⁶⁴

Thus, when faced with the reality of women's pay gap or their lags in advancement, a common story is that women simply lack the necessary job skills and conduct. Men, the reasoning goes, have mastered the necessary job skills and conduct that lead to their success. Specifically, men have mentors, have contact with company leaders, and are active in their communications and social networks.⁶⁵ Women, on the other hand, lack mentoring relationships and the necessary networking skills.⁶⁶ Once women behave appropriately (e.g., have mentors and network), they too will be successful. "It's just a matter of time."

Stephen Turban and his colleagues deconstruct this story and its assumptions.⁶⁷ They conducted an extensive case study of a large American company where women are not getting promoted.⁶⁸ They researched whether men and women do in fact have different skills and behave differently.⁶⁹ Their extensive case study is of a large multinational firm where women were 35–40% of the entry-level employees but only 20% of those in upper management.⁷⁰ Women were not advancing.⁷¹

Turban's research methodology was to use sophisticated monitoring devices to track email communications and meetings, and also to meticulously track employees in-person behavior throughout their workday.⁷² Using sociometric sensors that measure speech patterns and employees' movement, they were able to determine who talks with whom, where and when people communicate, and who dominates conversations.⁷³

⁶³ See MCKINSEY REPORT 2019, *supra* note 3, at 8, 13, 17 (evidencing the many ways that gender progress is not under the control of women).

⁶⁴ See, e.g., MCKINSEY REPORT 2018, *supra* note 29, at 4, 7, 9, 32–34, 58, 60. Sex discrimination is not attributable to women's choices in the McKinsey Report. *Id.* at 4, 7, 34. Contrary to a common belief that that women do not have the same salaries because they simply do not ask for better pay, the evidence here is that they do ask for better salaries. *Id.* In addition, the report indicates that women do not leave jobs for family reasons any more than men do. *Id.* The MCKINSEY REPORT 2018 also discusses at length the many external workplace barriers to gender progress. Pages 10–15 offer a summary, for instance, of the way that women get less support than men from managers in providing necessary resources, help with navigating organizational politics, etc. *Id.* at 10–15.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Turban, *supra* note 8.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

The researchers found no perceptible differences in men and women's conduct regarding mentors, networking, and communication patterns.⁷⁴ Both groups had the same number of contacts and time with senior leadership.⁷⁵ Men and women even had the same performance evaluations.⁷⁶ Turban and his colleagues' explanation for their findings is straightforward: the gender inequality that shows up in women's lack of promotion is attributable to management bias, not to differences in women's behavior.⁷⁷ Women are perceived and treated differently; the same behavior and performance do not reap the same rewards as for men.

Jessica Salerno and her colleagues research on lawyers⁷⁸ also is contrary to the story that "it's just a matter of time." The accompanying narratives are that women are still comparatively new to their jobs and careers, they still have insufficient skills and have not learned the conduct necessary for success, and that this skills-building are things that women can fix if they want.⁷⁹

In Salerno's study, participants view videos of a male or a female attorney giving the same closing statement in a murder case, either in a calm tone or in an angry one.⁸⁰ While attorneys are ordinarily expected to be calm and rational, trial attorneys are trained to be emotional in the courtroom when telling their "narrative" to the jurors. Prosecuting attorneys, for instance, "delivering a closing statement in a case involving a mother who was murdered in heinous manner in front of her infant child" are expected and trained to be emotional.⁸¹ Their anger is professionally appropriate, anticipated, and endorsed as a way to convince jurors of the defendant's brutal and outrageous act.

Asked to evaluate the attorney's effectiveness, the participants' assessment of male and female attorneys differ.⁸² Male lawyers' anger is more likely to be described as commanding, powerful, and competent; and participants are more likely to hire them for their effectiveness.⁸³ Female lawyers' anger, in contrast, are more likely described as shrill, hysterical, and grating; and participants are more likely to consider them ineffective and not hire them.⁸⁴ In other words, angry male litigators who were exhibiting professionally appropriate behavior and skills under the circumstances are perceived positively. Angry female litigators, also exhibiting professionally appropriate behavior and skills were per-

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Salerno, *supra* note 8, at 388.

⁷⁹ See, e.g., MCKINSEY REPORT 2018, *supra* note 29, at 11 (illustrating lack of management support for women's success), 29 (noting that women do ask for higher salaries and promotions).

⁸⁰ Salerno, *supra* note 8 at 388.

⁸¹ *Id.*

⁸² *Id.* at 390.

⁸³ *Id.*

⁸⁴ *Id.* at 394.

ceived negatively.⁸⁵ Also striking, both male and female participants evaluated the attorneys in these gender-biased ways.⁸⁶

In other words, the Salerno study results document that women lawyers are still discriminated against even though they demonstrate the appropriate professional skills. Others' negative assessment of them is not attributable to women lawyers' building the necessary skills and adapting the appropriate professional conduct. It is not just a matter of their time.

In summary, despite the societal myth that sex discrimination is no longer prevalent, the empirical evidence confirms otherwise. One way we perpetuate this myth is the underlying stories we tell—such as the ones about the disconnect between the ideal woman and the ideal worker, and the false narratives that progress is inevitable and any lack of progress is attributable to women themselves. Further, as we discuss below, the ongoing prevalence of sex discrimination is related to sexual harassment.

II. MYTH: SEXUAL HARASSMENT IS NO LONGER PREVALENT

A. *Sexual Harassment and Sex Discrimination*

As with sex discrimination, many do not believe that sexual harassment continues to be widespread. According to a Gallup poll, the percentage of Americans viewing sexual harassment as a major problem actually decreased between 2017 and 2019, with only 53% of men considering it a major problem in 2019 compared to 66% in 2017.⁸⁷

Empirical research, however, indicates a different reality about the prevalence of sexual harassment. A large-scale government study (Feldblum Report)⁸⁸ reveals a staggering 60% of female workers in all kinds of settings report some form of gender harassment.⁸⁹ The Equal Employment Opportunity Commission (EEOC) statistics also are telling. Last year, 12,739 employee charges of sex-based harassment were filed with the EEOC.⁹⁰ Further, the McKinsey Report based on a survey of organizational settings, finds that two in five women in their careers have experienced sexual harassment—including being touched in inappropriately sexual ways, receiving unwanted attempts to

⁸⁵ *Id.* at 394.

⁸⁶ *Id.* at 397.

⁸⁷ Brennan, *supra* note 1 (increasing concerns for accused men and backlash from me-too).

⁸⁸ CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace> [perma.cc/FN98-TVZR] (definition of gender harassment; sampling techniques); *see also Sex Discrimination and Sexual Harassment: Quick Take, supra* note 8.

⁸⁹ FELDBLUM & LIPNIC, *supra* note 88.

⁹⁰ *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 - FY 2019*, U.S. EEOC, <https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2019> [perma.cc/LU58-LQ5R].

have an intimate relationship, and hearing sexist jokes.⁹¹ Some groups are particularly likely to report harassment: lesbian women, bisexual women, women with disabilities, and women in technical roles.⁹² More detailed research in certain professional areas, such as one on the legal profession,⁹³ offer a detailed expose of sexual harassment in a particular setting. And considering that an estimated 90% of those who are harassed do not publicly complain, all these statistics grossly underestimate actual sexual harassment.⁹⁴

As the McKinsey Report illustrates, sexual harassment includes many forms of conduct.⁹⁵ At one extreme, it includes unwanted sexual advances, sexual assault, and rape. But it also includes “hostile behavior, physical assault, patronizing treatment, personal ridicule, social ostracism, exclusion or marginalization, denial of information, and work sabotage.”⁹⁶ What all these forms of conduct have in common are that women are being targeted in these disadvantaged and unwanted ways because of their sex or sexual orientation. The result is a work culture that is hostile to women because they are women.

Not realizing that sexual harassment continues to be prevalent is not the only thing we do not acknowledge. We also view sex discrimination and sexual harassment as very different phenomena. We believe that sexual harassment is driven specifically by sexual attraction and desire while sex discrimination is a much broader phenomenon predicated on fundamental beliefs such as those described in Part I.⁹⁷ But sex discrimination and sexual harassment actually have a common basis.

⁹¹ MCKINSEY REPORT 2019, *supra* note 3, at 50.

⁹² *Id.* (table: 53% of lesbian women, 62% of bisexual women, 51% of women with disabilities, 48% of women in technical roles, and senior level women 59%).

⁹³ An extensive empirical study of the legal profession found the following:

[1.] The [e]xtent and [b]readth of [m]isconduct/[h]arassment [a]re [i]nsidious and [a]larming[. . . 2.] Reporting [s]ystems [i]ntended to [d]iscourage and [c]apture [h]arassing [i]ncidents [a]re [m]ostly [n]ot [w]orking[. . . 3.] Most [h]arassers [f]ace [f]ew or [n]o [a]dverse [c]onsequences[. . . 4.] The “[p]rice” [t]hat [w]omen, in [p]articular, [p]ay and the [c]ost to [o]rganizations and the [p]rofession [a]re [c]onsiderable[. . . 5.] People at [e]very [l]evel— [i]ncluding [w]omen in [p]owerful [p]ositions—[a]re [b]eing [h]arassed[. . . 6.] Age, [r]ace/[e]thnicity and [g]lender [i]dentity [a]re [p]erceived as [c]ompounding [d]imensions.

WOMEN LAWYERS ON GUARD INC., STILL BROKEN: SEXUAL HARASSMENT AND MISCONDUCT IN THE LEGAL PROFESSION 6, 8, 19–22 (2020).

⁹⁴ FELDBLUM & LIPNIC, *supra* note 88 (EEOC statistics would predict over 190,000 workers who feel harassed). Sexual harassment is not limited to workplaces. For instance, there is increased recognition of sexual harassment and assault on college campuses. *See, e.g.*, Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1969 (2016); Jonathan Broder, *Title IX and Campus Sexual Assault*, 29 CQ RESEARCHER 1, 4–5, 15 (2020).

⁹⁵ MCKINSEY REPORT 2019, *supra* note 3, at 48, 50.

⁹⁶ Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. F. 22, 27 (2018) [hereinafter Schultz 2018].

⁹⁷ *See supra* notes 49–61.

As Vicki Shultz proposes in her pioneering work,⁹⁸ sexual domination and exploitation may not be the only or even the primary motivation for sexual harassment. Men instead sexually harass women because of their “drive to maintain the most highly rewarded forms of works as domains of masculine competence.”⁹⁹ Harassment’s purpose is to denigrate women’s competence so they are seen as inferior and less capable workers, and therefore prevented from male-dominated jobs.¹⁰⁰

Shultz bluntly states: “Sexual harassment has always been more about sexism than it is about sex.”¹⁰¹ It bolsters an idealized masculine work identity and status,¹⁰² and is consistent with a broader workplace culture of viewing and treating women in professionally demeaning and devaluing ways:¹⁰³

Motivated by both material considerations and equally powerful psychological ones, harassment provides a means for men to mark their jobs as male territory and to discourage any women who seek to enter. By keeping women in their place in the workplace, men secure superior status in the home, in the polity, and in the larger culture as well.¹⁰⁴

Furthermore, it takes only a few men, particularly if the supervisor acquiesces, to create a hostile environment for any women daring to upset the “natural order” of gender segregation.¹⁰⁵ For women who hold nontraditional jobs, harassment exaggerates gender differences to remind them they are out of place for a man’s world. As Barzilay reminds us, the “ideal man” is traditionally viewed as the breadwinner with mastery of uniquely masculine competencies.¹⁰⁶ When the presence of women threatens their status, men use harassment as a means to reinforce gender differences and protect their masculine-

⁹⁸ Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1755 (1998) [hereinafter Schultz 1998]; Schultz 2018, *supra* note 96, at 27 (2018).

⁹⁹ Schultz 1998, *supra* note 98, at 1755. Schultz also describes a “competence-centered” paradigm. *Id.* Harassment is used “as a means [for men] to reclaim favored lines of work and work competence as masculine-identified turf—in the face of a threat posed by the presence of women (or lesser men) who seek to claim these prerogatives as their own.” *Id.* She notes all kinds of ways that women are denigrated and demeaned. *Id.* at 1763–66.

¹⁰⁰ *Id.* at 1762.

¹⁰¹ Schultz 2018, *supra* note 96, at 22.

¹⁰² *Id.* at 24.

¹⁰³ Schultz 1998, *supra* note 98, at 1762–63.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1759 (internal quotations omitted).

¹⁰⁶ Barzilay, *supra* note 50, at 558, 563; see also THE ASSISTANT (Bleecker Street Media 2020) (a film depicting how harassment can become an unspoken part of workplace culture); Justin Chang, ‘The Assistant’ Helps Explain How Predatory Behavior Stays Hidden, NPR (Jan. 28, 2020, 1:49 PM), <https://www.npr.org/2020/01/28/800408643/the-assistant-helps-explain-how-predatory-behavior-stays-hidden> [perma.cc/3S4X-9798]. Surveys of economists illustrate, for instance, an interactive relationship: female economists face professional denigration in various ways and report being victims of attempted or actual sexual assaults or touched in ways that make them feel uncomfortable. See Blau & Kahn, *supra* note 12, at 836–37; Harrison, *supra* note 8.

identified turf. Sexual harassment is about control and power rather than sexual desire.¹⁰⁷

Moreover, studies show that sexual harassment is more likely in settings that evidence gender disparities more generally. For example, women are particularly susceptible to harassment in workplaces that are homogeneously male; and where men are significantly over-represented relative to women.¹⁰⁸ Men dominate in technology related industries and energy related industries, with significant female underrepresentation throughout the pipeline from the entry level on.¹⁰⁹ A worker who is the only woman in a group, such as a team, department, or location also is more susceptible. Those in the minority or alone can feel isolated and vulnerable; and those who are in the majority might feel threatened or uncomfortable around those not like them.¹¹⁰

Sexual harassment is also more probable in settings with power disparities, such as when workers hold positions with less status, authority, and compensation.¹¹¹ Examples are employees holding positions subject to others' direction, such as administrative support staff, nurses and other allied health professionals, maintenance personnel, and entry level positions. When men have the decision-making power, they may feel emboldened to exploit low-ranking employees who may feel they have no choice and also do not understand their rights.¹¹²

Shultz relates these two risk factors of homogenous workplaces and power disparities in her discussion of "sex segregation," that is, workplaces where men have jobs with the most power and status while women hold lower-status positions:¹¹³

This state of affairs fosters sex stereotypes—for example, a sense that men are leaders or geniuses while women are followers, . . . prompting the dominant group to perceive any minorities who enter their jobs as "different" and out of place, and to close ranks against them to defend . . . their superior workplace positions and associated masculinities . . ."¹¹⁴

The situation is worse still if supervisors' decision-making authority is subjective and unconstrained. Without the power and safety of more women at all levels, harassed women "cannot effectively censor or counter stereotypes and

¹⁰⁷ Zeba Blay, *Sexual Harassment Isn't About Sex, It's About Power*, HUFFPOST (Mar. 23, 2017, 5:12 PM), https://www.huffpost.com/entry/sexual-harassment-isnt-about-sex-its-about-power_n_58d13b9fe4b00705db52c340 [<https://perma.cc/3AJ2-4JU3>].

¹⁰⁸ Schultz 1998, *supra* note 98, at 1759.

¹⁰⁹ Technology related industries include, for *e.g.*, hardware, information technology services and telecom; and energy related industries include, for *e.g.*, utilities and basic materials, oil and gas. *See* MCKINSEY REPORT 2019, *supra* note 3, at 66–67 (for data on these and other industries, including along the pipeline).

¹¹⁰ FELDBLUM & LIPNIC, *supra* note 88, at 14.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Schultz 2018, *supra* note 96, at 49–50.

¹¹⁴ *Id.* at 49.

cannot effectively deter, resist, or report harassment.”¹¹⁵ At the same time, they are not in positions that can meaningfully reshape the organization’s culture so that it becomes a more inclusive environment.

Research also suggests that certain types of employees are more vulnerable, for example, young workers, workers with cultural and language differences, and employees with sexual orientation differences.¹¹⁶ More established and older employees may target newer and younger employees where the power imbalance is great, and who they expect will be less likely to resist their advances.¹¹⁷ Workers with cultural and language differences may fear for their jobs if they do not conform to others’ social pressures.¹¹⁸ And workers with sexual orientation differences may be targeted as particularly threatening to those with more traditional views of male and female roles.¹¹⁹

B. Franchina v. City of Providence

*Franchina v. City of Providence*¹²⁰ illustrates a case where sex discrimination and sexual harassment are interconnected, and where sexual desire does not appear to be a motive for the harassment.¹²¹ It also illustrates how the risk factors described above fuel Lori Franchina’s “hostile work environment.”

¹¹⁵ *Id.*

¹¹⁶ FELDBLUM & LIPNIC, *supra* note 88, at 8, 14.

¹¹⁷ *See, e.g.*, THE ASSISTANT, *supra* note 106.

¹¹⁸ *Chart of Risk Factors for Harassment and Responsive Strategies*, U.S. EEOC, <https://www.eeoc.gov/chart-risk-factors-harassment-and-responsive-strategies> [<https://perma.cc/6AQZ-GWY3>].

¹¹⁹ MCKINSEY REPORT 2018, *supra* note 29, at 18, 20.

¹²⁰ *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018).

¹²¹ Judge Thompson offers a detailed description of the facts, noting that though the City of Providence “trivializes” the plaintiff Lori Franchina’s negative work experiences while working with the Fire Department, the court “decline[s] to be as pithy in reciting Franchina’s plight” in order to provide the proper context in which this case occurs. *Id.* at 38.

Another detailed accounting of sexual harassment, albeit in a very different setting, is given in Chira & Einhorn, *supra* note 2. It is the story of a decades long, recurrent history of sexual and racial harassment normalized by persistent and resilient cultural norms in two Ford manufacturing plants in Chicago. *Id.* Chicago Assembly Plant manufactured cars and its workforce is predominantly Black; Chicago Stamping Plant provided automobile parts and its workforce is majority White. *Id.* In 2017, there were 5700 workers at both plants and one-third were women *Id.* Both settings are unionized. *Id.* Their jobs are considered “golden tickets”—coveted positions, with good pay, benefits, and relative security. *Id.*

However, beginning in the 1970s when women first worked permanently at the plants and on the line, incidents of sexual harassment became numerous and insidious. *Id.* In the 1990s, Ford and the EEOC agreed to pay \$22 million prompted by lawsuits and Ford’s commitment to remedy the situation. *Id.* And while federal monitoring continued, the workplace apparently did improve. *Id.* But as federal monitoring ended, a culture of sexual harassment returned. *Id.* In 2017, Ford and the EEOC again reached a settlement of \$10 million for sexual and racial harassment, with five years of federal monitoring. *Id.* Numerous lawsuits are also still pending. *Id.*

The following case illustrates the intolerable working environment for women. *Id.* Ms. Suzette Wright happily accepted a job as a data entry clerk at Ford, feeling fortunate to land

Lori Franchina had no problems during the first four years of being a firefighter.¹²² To the contrary, after graduating tenth in her 80-person class at the Providence Firefighter Academy, the Fire Department repeatedly recognized her for her high performance and promoted her to Lieutenant.¹²³ Her problems began when she was assigned to work a shift with Andre Ferro, with Franchina as the shift supervisor and Ferro as her driver.¹²⁴ Ferro was a misogynist firefighter with a history of sexual harassment in the Department.¹²⁵ He quickly lived up to his reputation:

After arriving at the station for her shift and while pouring herself a cup of coffee, Franchina was immediately approached by Ferro who, without missing a beat, asked if she was a lesbian. . . . After Franchina retorted that it was none of his business, Ferro followed up with the statement, “I don’t normally like to work with women; but, you know, we like the same thing, so I think we’re going to get along.” Franchina testified she was appalled by his comments and as his supervisor, instructed him not to say such things.¹²⁶

a job at the big company that offered job security. *Id.* She quickly learned the downsides of the environment for her and other women. *Id.*

As Ms. Wright settled in, she asked a co-worker to explain something: Why were men calling out “peanut butter legs” when she arrived in the morning? He demurred, but she insisted. “He said: ‘Well peanut butter,’” Ms. Wright recalled. “‘Not only is it the color of your legs, but it’s the kind of legs you like to spread.’”

Like many of the females who eventually sued Ford, Ms. Wright is African-American; those accused of harassment include black, white and Latino men. Some of the women felt doubly victimized—propositioned and denounced as sluts while also being called “black bitches” and other racial slurs. . . . As the affronts continued—lewd comments, repeated come-ons, men grabbing their crotches and moaning every time she bent over—Ms. Wright tried to ignore them. Veteran female employees warned that reporting the behavior brought only more trouble. The smallest infraction, routinely overlooked, suddenly merited a write-up. The very nature of factory work—the pressure to keep the production line going—gave bosses power to inflict petty humiliations, such as denying bathroom breaks.

But after a man Ms. Wright had trusted as a mentor made a crack about paying her \$5 for oral sex, she asked her union representative for help. He began what she calls a “don’t-file-a-claim-against-Bill” campaign: Her co-worker would lose his job, his benefits, his pension, she was told. Rumors spread, questioning their relationship. Then a union official delivered the final insult: “Suzette, you’re a pretty woman—take it as a compliment.”

Id.

Instead, Ms. Wright felt that: “Each time that I was taking it, again and again, it just felt like more of me diminishing . . . until [I] was just like a shell of a person.” *Id.*

Ford thus exemplifies a stratified workplace with large power disparities; a workplace considered a male turf with an engrained culture of sexually abusive that resurfaces when external supervision is removed. Women, typically minority women, are vulnerable because they fear losing their jobs and so are hesitant to complain or resist. The union is also inconsistent in their position, especially when both the accused and the accusers are union members.

¹²² See *Franchina*, 881 F.3d at 38.

¹²³ *Id.*

¹²⁴ *Id.* at 38–39.

¹²⁵ *Id.* at 38.

¹²⁶ *Id.* at 39.

Soon after, an emergency call came in and [they] were . . . dispatched. During the emergency run [together,] Ferro continued with [his] inappropriate [sexual comments]. He asked, for example, if Franchina wanted to have children and quickly followed up with, “could help you with that,” implying that he wanted to impregnate her. So incessant was the unprofessional chatter that Franchina was forced to tell Ferro on multiple occasions to stop talking because she was having difficulty hearing the dispatcher’s instructions.¹²⁷

During the same shift, Franchina and Ferro were sent to the Rhode Island Hospital.¹²⁸ During the shift, Ferro approached a group of six firefighters including Franchina who were chatting together.¹²⁹

Ferro approached the group and began rubbing his nipples in a circular fashion, leapt up in the air, and screamed at Franchina, “My lesbian lover! How are you doing?” Nurses, doctors, patients, and patients’ families were all present . . . Franchina . . . was horrified and felt belittled. . . Others . . . were similarly appalled.¹³⁰

Back at the station at the end of the shift, Franchina went to her personal quarters to change out of her uniform.¹³¹ Without knocking and against protocol, Ferro intruded on Franchina, dressed only in his underwear.¹³² Franchina, dressed only in her undergarments, quickly grabbed a sheet to cover herself.¹³³ She asked Ferro to leave, but only after telling him to “get the fuck out” of the room did Ferro leave.¹³⁴

Franchina did not initially report Ferro’s “repulsive” behavior.¹³⁵ But Chief Curt Varone heard about it and filed a written complaint against Ferro with the possibility of him being terminated.¹³⁶ However, both her supervisors and any collegial support for Franchina quickly crumbled when word spread about Ferro’s disciplinary proceeding.¹³⁷ Firefighters at her station began to treat her with “contempt and disdain.”¹³⁸ Among other incidents, Andy McDougal, a firefighter subordinate to her and the station cook, publicly yelled at her “What are you trying to get him fucking fired?”¹³⁹ Although the top supervisor at her station was present, he did not report or reprimand McDougal.¹⁴⁰

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 39–40.

¹³³ *Id.* at 40.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

Over the next two years, Franchina was subject to a repeated and persistent barrage of insults, insubordination, and sabotage—frequently called “bitch, cunt or Franchina.”¹⁴¹ On one occasion, McDougal exclaimed loudly in her presence “affirmative action’s killing this fucking job.”¹⁴² At another time, he intentionally shoved Franchina into the wall.¹⁴³ Again, although she complained, nothing was done.¹⁴⁴

At one point, the men at her station used a white board in a common area to taunt her.¹⁴⁵

Twenty-one total insults were written on the board including: . . . “you get what you get, bitch,” and “Frangina leads Team Lesbo to victory.” [She] testified that she personally heard Captain Peter Spedutii, a thirty-year veteran of the Department, point at the white board and say, “I’ll show her[,]” . . . [and] him brag[ging about the derogatory comments that were] written on the board. Although Franchina complained to [Superior] Chief Michael Crawford, . . . the perpetrators were not reprimanded . . . and [the insulting remarks] remained up over 14 hours.¹⁴⁶

Thus, Franchina is the story of a highly qualified performer, relatively early in her career, who experiences much bullying because of her gender and perceived sexual orientation. She has no work problems until the homogeneous and male-dominated culture is threatened. Egregious and vulgar harassment by one misogynist firefighter and concerns about his welfare quickly inspire others to also harass her.¹⁴⁷ As a way to defend their culture and masculine solidarity, her male colleagues collectively turn on her. Their insults and abusive actions are demeaning, gendered and sexually-insulting. Her sexual orientation makes her more vulnerable to their tactics.

Even after Franchina repeatedly complains, her all-male supervisors and the institutional structure fail her. She is alone, with no way to address the power disparity that female firefighters face. Her male supervisors exercise their power and discretion in ways that minimize or ignore her harassment in the interest of traditional male cohesiveness.

In summary, while many continue to believe the myth that sexual harassment is no longer prevalent, overwhelming evidence indicates otherwise. Furthermore, a related faulty belief is that sex discrimination and sexual harassment are really two different phenomena.¹⁴⁸ However, as work by Shultz and others reveal, and cases such as the Franchina case graphically illustrate, sex

¹⁴¹ *Id.* at 40–41.

¹⁴² *Id.* at 41.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 40–41.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See discussion in *supra* Section II.A.

discrimination and sexual harassment have a common motivation of demeaning and dominating women.¹⁴⁹

III. MYTH: SEXUAL HARASSERS ARE STOPPED AND PUNISHED

We would like to think that even if sexual harassment does occur from time to time, it is quickly and appropriately dealt with: Harassers are identified, employers and the harasser are held responsible, and the harasser is stopped and punished. The unfortunate reality is different. The formal processes for resolving these disputes all too often do not result in alleged harassers being publicly identified, in employers being held accountable, or in harassers being punished.

As we discuss below, the dispute resolution process is problematic from the beginning: Faced with a system stacked against them, victims are often silent about the harassment. And even those who decide to formally complain face either a litigation process that is ineffective at addressing harassment or an unwanted arbitration process in which they are systematically disadvantaged. Not surprising then, in both litigation and arbitration, the outcomes greatly favor the employer and often the alleged harasser is not stopped or punished.

A. *Victims Do Not Report Harassment*

In recent years, the media has reported numerous women's public complaints about workplace sexual harassment and assault.¹⁵⁰ Launching a much-publicized me-too movement, these victims broke a barrier of silence.¹⁵¹ But these women and their public revelations are the exception rather than the rule.

Large-scale studies show that employees who believe they have been sexually harassed rarely report what has happened to them.¹⁵² Estimates are that 87–94% do not formally complain.¹⁵³ It turns out that workplace culture and practices deter rather than encourage women from complaining. Due to this high number of unreported incidents, statistics on the prevalence of sexual harassment are gross underestimates.¹⁵⁴

¹⁴⁹ See discussion in *supra* Section II.A.

¹⁵⁰ See, e.g., Amanda Becker, *Inside the Lincoln Project's 'Toxic' Workplace: Accusations of Sexual Harassment and a Culture of Infighting*, USA TODAY (Feb. 15, 2021), <https://www.usatoday.com/story/news/politics/2021/02/15/inside-lincoln-project-claims-harassment-sexi-sm-toxic-workplace/4483922001/> [perma.cc/S4A5-9MBH].

¹⁵¹ Jessica Bennett, *The #MeToo Moment*, N.Y. TIMES, <https://www.nytimes.com/series/met-oo-moment> [perma.cc/2PRM-L87D] (a database the New York Times continuously updates with #MeToo stories).

¹⁵² See FELDBLUM & LIPNIC, *supra* note 88, at 3; MCKINSEY REPORT 2018, *supra* note 29, at 22; Deborah L. Brake, *Coworker Retaliation in the #MeToo Era*, 49 U. BALT. L. REV. 1, 50 (2019) [hereinafter Brake, *Coworkers*]; Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 25 (2005) [hereinafter Brake, *Retaliation*].

¹⁵³ See FELDBLUM & LIPNIC, *supra* note 88, at 7; Brake, *Coworkers*, *supra* note 152, at 50.

¹⁵⁴ See FELDBLUM & LIPNIC, *supra* note 88, at 7.

Why does this happen? Research indicates that employee silence is prompted by the following.¹⁵⁵ First, there are victims' personal and social costs.¹⁵⁶ An essential step toward reporting harassment is victim's acknowledgement that it has happened.¹⁵⁷ But often victims rationalize what occurs, resulting in their denial of the harassment: "Perhaps it was a misunderstanding." "He wouldn't do that." "I can trust his intentions."¹⁵⁸ Those who have been harassed do not want to see themselves as "victims" of sexual harassment.¹⁵⁹ Doing so forces them to acknowledge their vulnerability and loss of control. It also threatens their beliefs in a just and meritocratic society which they formally believed. Employees also hesitate to complain to others because they fear being socially ostracized.¹⁶⁰ They worry about what coworkers and bosses will think of them.¹⁶¹

Second, victims have concerns about their employers' reactions.¹⁶² Workers fear employers' retaliation if they complain.¹⁶³ They are concerned that employers will either blame them for what has occurred, or consider their complaint so disruptive to the workplace that they want the complaining employee removed.¹⁶⁴ In addition, victims fear that the employer will do nothing, perhaps not even further investigate.¹⁶⁵ Given this, asking employees to formally complain is asking them to take risks with a high likelihood of no meaningful improvement in their situation. Knowing that victims are unlikely to report incidents, harassers may well continue harassment, knowing that there are no negative consequences.¹⁶⁶ Employers' inaction effectively normalizes the harassers' misconduct.

Finally, victims question their legal protection.¹⁶⁷ They hesitate to report harassment because they do not know if they can successfully sue the harasser and employer, and whether there is adequate legal protection against employer retaliation.¹⁶⁸ They may have heard that sexual harassment laws are not particularly effective, and of course, the costs and distress of litigation are daunting.¹⁶⁹

¹⁵⁵ *Id.* at 3; Brake, *Coworkers*, *supra* note 152, at 50–51.

¹⁵⁶ FELDBLUM & LIPNIC, *supra* note 88, at 3; Brake, *Coworkers*, *supra* note 152, at 50–51.

¹⁵⁷ Brake, *Retaliation*, *supra* note 152, at 26.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 26.

¹⁶⁰ *Id.* at 28, 32, 34.

¹⁶¹ *Id.* at 32, 34.

¹⁶² *Id.* at 36–37; FELDBLUM & LIPNIC, *supra* note 88, at 3.

¹⁶³ FELDBLUM & LIPNIC, *supra* note 88, at 3.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 17.

¹⁶⁷ Brake, *Coworkers*, *supra* note 152, at 33, 53.

¹⁶⁸ *Id.* at 33, 37, 53.

¹⁶⁹ *Id.* at 53.

Unfortunately, it turns out that these employee hesitations and fears are well-founded.¹⁷⁰ Co-workers, particularly men, tend to blame those who claim to be victims of discrimination.¹⁷¹ They are labeled as whiners and criticized for disrupting the perceived workplace harmony.¹⁷² And as indicated by many lawsuits, employers do sometimes retaliate.¹⁷³ Particularly if the alleged harasser is a star performer, employers may do nothing to ameliorate the situation.¹⁷⁴ Or they may even shift the burden to the harassed employee by removing them involuntarily, either by changing their job or by finding an excuse for firing them.¹⁷⁵ And as discussed later, the victims' concern about the lack of legal protection is also justified.¹⁷⁶ The law does not provide a reliable safety net, either for sexual harassment or for retaliation. Plaintiffs in sexual harassment litigation have a very poor success rate.¹⁷⁷

Plus, the well-established at-will employment doctrine confirms that employers are in control of an employee's job security.¹⁷⁸ As a strong presumptive general rule, employers can fire an employee at its will, without notice and for any reason.¹⁷⁹ Except for narrowly defined public policy and statutory and contractual exceptions, the "at-will doctrine" prioritizes employers' autonomy and discretion over employers' right to their jobs.¹⁸⁰

Bystanders of harassment are similarly silent. The McKinsey Report found that one in four employees "sometimes or very often saw biased behavior toward women."¹⁸¹ But of this group of bystanders, only a third objected.¹⁸² By-

¹⁷⁰ FELDBLUM & LIPNIC, *supra* note 88, at 10; Brake, *Coworkers*, *supra* note 152, at 1–2, 10 (describing three doctrines that pose difficulties for Title VII protections against coworker retaliation); Brake, *Retaliation*, *supra* note 152, at 32–41.

¹⁷¹ See generally Renata Bongiorno et al., *Why Women Are Blamed for Being Sexually Harassed: The Effects of Empathy for Female Victims and Male Perpetrators*, 44 PSYCH. WOMEN Q. 11 (2020).

¹⁷² Brake, *Coworkers*, *supra* note 152, at 2–3 (noting common tendency to blame persons who identify themselves as victims of discrimination even when there is contrary evidence, a tendency that is enhanced by the belief in a just and meritocratic society); Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1309 (2012).

¹⁷³ FELDBLUM & LIPNIC, *supra* note 88, at 10; Brake, *Retaliation*, *supra* note 152, at 32.

¹⁷⁴ FELDBLUM & LIPNIC, *supra* note 88, at 13.

¹⁷⁵ See *id.*

¹⁷⁶ See *infra* text accompanying notes 188–97.

¹⁷⁷ See *infra* text accompanying notes 188–97.

¹⁷⁸ The well-established at-will employment doctrine also substantiates employees' lack of control and choices. The doctrine provides employers the presumptive right to terminate any employee for any reason. See RESTATEMENT OF EMPLOYMENT LAW § 2.01 (AM L. INST. 2015). Ironically, employment discrimination laws are one of a select few exceptions to this general rule. *E.g.*, 42 U.S.C. § 2000e–2(a) (1964).

¹⁷⁹ Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 224–25 (2017).

¹⁸⁰ *Id.*

¹⁸¹ MCKINSEY REPORT 2019, *supra* note 3, at 44.

¹⁸² *Id.*

standers fear the risks of hurting their careers and their social standing in the workplace.¹⁸³ At the same time, they also question whether their calling out the harassment will make a difference.¹⁸⁴ This lack of confidence in employers' responsiveness is born out, given that half of the employees who objected say nothing happened as a result.¹⁸⁵ Their fear of hurting their careers is also a legitimate concern, given the limited protection under employment law for "whistle-blowers" and under retaliation claims.¹⁸⁶

B. *Litigation and the Victims' Dismal Prospects*

Even if aggrieved employees take the very difficult step of formally complaining, there is little assurance that the harassment will be recognized and that the perpetrator is stopped and punished. The employee's complaint is predictably met with the employer's and alleged harasser's denials, so the parties' dispute must be resolved. The employee's alternative formal paths are litigation or arbitration. As shown in the following illustration and subsequently discussed, both paths offer plaintiffs' dismal outcomes.¹⁸⁷

ILLUSTRATION. FEW HARASSERS AND EMPLOYERS ARE IDENTIFIED AND PUNISHED
THROUGH LITIGATION AND ARBITRATION

Out of 100 alleged harassments, only 15 victims formally complain—

-> If these 15 go to litigation, in only 4 cases do plaintiffs succeed, which is only 4% of 100 alleged harassments

-> If these 15 go to arbitration, in only 2 cases do complainants succeed, which is only 2% of 100 alleged harassments

On one hand, litigation offers the opportunity to resolve this particular dispute, but it also serves collateral purposes. Litigation is a public process, so the alleged harasser and an employer's inadequate response are made known. And public identification could potentially prevent others from harm from particular harasser, especially if the court holds for the plaintiff. Other potential harassers will also be more hesitant to harass given the plight of the harasser in this case.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Brake, *Retaliation*, *supra* note 152, at 36–37.

¹⁸⁷ Settlement and informal internal grievance procedures (such as counseling, ombudsperson, etc.) are also possible. Data on these procedures, however, are very difficult to ascertain and not systematically reported, as far as the author is aware. Our discussion here, therefore, focuses on the formal procedures of litigation and arbitration. The illustration is based on data provided in FELDBLUM & LIPNIC, *supra* note 88 (indicating an estimated 85% of those harassed do not formally complain), and Pat K. Chew, *Comparing the Effects of Judges' Gender and Arbitrators' Gender in Sex Discrimination Cases and Why It Matters*, 32 OHIO ST. J. ON DISP. RESOL. 195, 207 (2017) (using data on complainants' success rate in litigation and arbitration, indicating that 27% (plaintiff success rate) of 15 = 4.05 and 14% (complainants' success rate) of 15 = 2.1).

Even if the plaintiff is not successful, the public revelation of her allegations may provide a cautionary tale of potential employer and harasser liabilities. The litigation system also has due process safeguards that help plaintiffs access information they need to build their case.

On the other hand, those employees that bring sexual harassment lawsuits face an uphill battle. Ultimately, they will most likely lose. Empirical evidence indicates that plaintiffs in federal courts are successful in only about 25% of the cases.¹⁸⁸ Why these dismal prospects for holding employers and harassers responsible? There are at least two explanations: first is that the law is ineffective in stopping sexual harassment; and second is that judges as a whole find it difficult to identify and therefore fully understand the victim's workplace predicament.

Scholars and practitioners have extensively critiqued the law, explaining why it has been so ineffective in stopping sexual harassment.¹⁸⁹ While the Supreme Court case of *Harris v. Forklift* heralded the landmark extension of Title VII sex discrimination protection to sexual harassment in 1993,¹⁹⁰ sexual harassment jurisprudence has since evolved in ways that narrow rather than expand possible protections against sexual harassment. The legal standards for proving sexual harassment, for instance, that the harassment must be "pervasive or severe" and that the harassment must be attributed to the plaintiff's sex, have been interpreted as so demanding that fact patterns satisfying those standards tend to be very limited.¹⁹¹ For instance, while many courts recognize explicit forms of harassment, the more common and pervasive subtle forms of harassment confirmed by social scientists¹⁹² are not acknowledged. At the same time, the law provides employers with a convenient affirmative defense of providing a "reasonable" grievance procedure—without appreciating the psychological and practical difficulties for an employee to actually use those procedures.¹⁹³ In short, the legal net for catching sexual harassment is too small to effectively address all the sexual harassment that actually occurs in the workplace.

In addition, the gender composition of judges also affects the outcomes of sexual harassment cases. Research consistently shows that male judges are less likely than female judges to hold for plaintiffs, who are typically female, in sex discrimination and sexual harassment cases (called the "gender effect").¹⁹⁴ Jen-

¹⁸⁸ See Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1768 (2005).

¹⁸⁹ See, e.g., Brake, *Coworkers*, *supra* note 152, at 5–6 (me too movement is a critique of law); Tristin Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J.F. 152 (2018).

¹⁹⁰ *Harris v. Forklift*, 510 U.S. 17, 21 (1993).

¹⁹¹ See cases cited *supra* note 3.

¹⁹² Chew, *supra* note 187, at 200–01; Pat K. Chew, *Judges' Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions*, 14 J. GENDER RACE & JUST. 359, 366–67 (2011).

¹⁹³ See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

¹⁹⁴ Chew, *supra* note 187, at 197–99.

nifer Peresie, for instance, found that male judges hold for the plaintiffs only 24% of the time; female judges hold for the plaintiffs 39% of the time.¹⁹⁵ Presumably, female judges are better able to understand the nuances of sexual harassment in the workplace such as more subtle forms of harassment.¹⁹⁶ At the same time, 87.8% of federal judges are male and only 12.2% are female.¹⁹⁷ Given this dominance of men as judges, plus the very high standards for establishing sexual harassment under the law, it is no wonder that harassed women cannot rely on litigation to punish their harassers and their employers.

C. Arbitration and Victims' Even More Dismal Outcomes

As discussed above, employees' prospects for a favorable resolution in litigation are not promising. But the litigation process at least allows the public discourse on the alleged harasser, the actions on which the plaintiff bases her or his complaint, and the employer's actions or lack of actions.¹⁹⁸ The litigation process also has the procedural protections of due process guaranteed by the Federal Rules of Civil Procedure (FRCP) and the right to an appellate review on the merits. And in approximately a quarter of cases, the employer and alleged harasser are held accountable to some extent.¹⁹⁹

In contrast, mandatory employment arbitration characteristically does not have any of these attributes.²⁰⁰ The arbitration process is private and confidential, so the allegations are not public.²⁰¹ FRCP are not mandated, and there is no judicial review on the merits. Instead of judges selected through a public vetting process, arbitrators privately selected by the parties determine the outcome. Not surprisingly, while plaintiffs face dismal odds in litigation, preliminary research indicates that the prospects for success in arbitration are even worse—in only 14% of the cases are the employer and alleged harasser held accountable.²⁰²

Yet employers increasingly use mandatory employment arbitration to resolve harassment claims. As Jean Sternlight observes, once the Supreme Court gave the green light to employment arbitration in *Gilmer v. Interstate/Johnson*

¹⁹⁵ Peresie, *supra* note 188, at 1769; *see also* Christina Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010).

¹⁹⁶ Chew, *supra* note 187, at 199–203.

¹⁹⁷ *Biographical Directory of Article III Federal Judges, 1789–present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> [perma.cc/BX8F-CAJ4] (finding out of 3801 federal judges, 3338 are male and 463 are female).

¹⁹⁸ *See* Jean Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1662–64 (2005); *cf.* Maureen A. Weston, *Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era*, 2021 U. ILL. L. REV. 507, 510–14 (2021).

¹⁹⁹ Peresie, *supra* note 188, at 1769.

²⁰⁰ Sternlight, *supra* note 198, at 1664.

²⁰¹ Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 KAN. L. REV. 1255, 1256 (2006).

²⁰² Chew, *supra* note 187, at 208.

Lane Corp.,²⁰³ companies quickly gravitated toward it.²⁰⁴ In many work settings today, mandatory employment arbitration is typically part of the employment agreement between employers and its workers.²⁰⁵ This excerpt from a typical provision in an employment agreement illustrates:

In consideration of my employment with this company and its promise to arbitrate all disputes, I agree that . . . any and all past, present, or future controversies, claims, or disputes between the company . . . and me, including but not limited to any disputes arising from my employment or termination of my employment (“Disputes”) will be subject to binding arbitration under the Federal Arbitration Act.

Disputes include, but are not limited to, any federal or state statutory claim, including but not limited to Title VII of the Civil Rights Act of 1964 and all other civil rights statutes, claims of retaliation, harassment, discrimination, or wrongful termination, and any other contractual, tort, or statutory claims to the extent allowed by law.

I understand that, except as provided below, the company and I waive any right to a judge or jury trial on any Dispute.²⁰⁶

Particularly pertinent for our discussion, the contract language requires employers to use arbitration instead of litigation for their sexual harassment complaints. In addition, all kinds of other disputes are covered, extending to all kinds of employee complaints about discrimination, privacy, loyalty, and competition. From the employer’s point of view, the broader the scope the better. And as discussed below, it exemplifies employers’ advantage over employees at every stage of the arbitration process—from the design of the process itself to the selection of the arbitrators.

1. *Employer-Drafted Terms*

Employment arbitration is attractive to employers for many reasons, including their higher likelihood of success and their assumption that arbitration has lower costs and is a speedier process than litigation.²⁰⁷ Another primary attraction is that it is a confidential and private way to deal with employees’ complaints of harassment, thus helping employers keep these disputes and any possible negative reputational harm under wraps.²⁰⁸ The employee’s complaint

²⁰³ *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20, 35 (1991).

²⁰⁴ Sternlight, *supra* note 198, at 1637–40.

²⁰⁵ ALEXANDER J.S. COLVIN, *ECON. POL’Y INST., THE GROWING USE OF MANDATORY ARBITRATION* 1–2 (2018).

²⁰⁶ This provision is illustrative, based on a composite of the provisions currently used by two technology companies in California. *See infra* Appendix.

²⁰⁷ KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, *THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS* 18–19 (2015) [hereinafter *THE ARBITRATION EPIDEMIC*].

²⁰⁸ Reputational concerns can be both internal (e.g., harm to workplace morale and company loyalty; providing incentives for other employees to complain) and external (e.g., harm to customers and suppliers’ views of the employer’s reputation as a fair and progressive employer).

and the arbitrator's decision is not known to any external third parties, including customers, competitors, and journalists. The arbitrations, including the employees' arguments and employers' defenses are behind closed doors. Thus, companies can keep discrete employees' detailed complaints of a supervisor's inappropriate conduct and possible management cover-up from other employees internally as well as third parties externally.²⁰⁹

Courts allow the employer to treat employment arbitration agreements as an enforceable privately negotiated contract.²¹⁰ As with any contracts, which are not inherently unfair, contracts providing for arbitration are not inherently unfair.²¹¹ The typical contract providing for employment arbitration, however, tends to have terms more advantageous to employers since they are drafted by employers' lawyers and with the employer's interest in mind. Employers' lawyers intentionally and understandably draft them in their clients' own interest to assure maximum confidentiality and maximum management control.²¹²

Employees, while theoretically able to negotiate terms more protective of their interests, are in reality offered these completed agreements as a condition of employment. It is the rare case where prospective employees take the risks or have the leverage to push back on the terms of the standardized provisions typically embedded in the general employment agreement. Instead, new employees feel that the general employment agreement including the terms on arbitration are "take it or leave it", with the "leave it" option tantamount to turning down the employment opportunity.²¹³ In this way, these arbitration agreements are a condition of employment.

Increasingly, employers are using these arbitration agreements and agreements obligating the parties to keep confidential the dispute and its resolution in non-disclosure agreements (NDAs) in combination to doubly assure that allegations of sexual harassment and the resolution of claims stay secret.²¹⁴ As Maureen Weston points out, this means that sexual harassers go unreported and possibly unpunished, resulting in ongoing public safety risks.²¹⁵ Even if arbitrators conclude harassment has occurred, their companies may still allow harassers to continue their jobs because, for instance, they are outstanding revenue producers for their companies—thus allowing the perpetrators to harass again

²⁰⁹ See, e.g., Collen Flaherty, *A Culture of Sexual Harassment*, INSIDE HIGHER ED (Aug. 27, 2019), <https://www.insidehighered.com/news/2019/08/27/star-scholar-minority-serving-institutions-was-accused-fostering-hypersexualized-and> [perma.cc/2EJQ-THBD] (describing NDA required at University of Pennsylvania research lab).

²¹⁰ Weston, *supra* note 198, at 522.

²¹¹ THE ARBITRATION EPIDEMIC, *supra* note 207 at 3.

²¹² See *id.* at 24 (showing state variations), 30.

²¹³ See Sternlight, *supra* note 198, at 1648–49.

²¹⁴ Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Sexual Assault*, ATLANTIC (Oct. 18, 2017), <https://www.theatlantic.com/business/archive/2017/10/legal-agreements-sexual-assault-ndas/543252/> [https://perma.cc/97KZ-R78H].

²¹⁵ Weston, *supra* note 198, at 522–23.

within the company.²¹⁶ Even if the harassers are fired from one job for their misconduct, they can go on to other jobs in other places and continue their harassment in the new setting—protected by the secrecy of the arbitration proceedings as required in the arbitration agreement and an NDA.²¹⁷

2. *Arbitration Procedures Favor Employers*

As drafters of the arbitration agreement, employers understandably design an arbitration process with procedures that are as efficient, inexpensive, and convenient for them as possible. Unlike litigation, the FRCP or comparable state due process rules are not required in arbitration. While the arbitration agreement may refer to or incorporate the rules of a private arbitral administrators, such as the American Arbitration Association (AAA) or JAMS Mediation, Arbitration and ADR Services, these rules are much less comprehensive than the FRCP.²¹⁸

The differences between the procedural rules that employers draft and the FRCP are understandable given that the FRCP priority is to assure the fullest fairest process for resolving disputes,²¹⁹ while employers prioritize their efficiency goals over comprehensive due process. Thus, arbitration procedures in the arbitration agreement are predictably less protective of an employee's due process than the protection afforded under the FRCP.

What is the consequence? A consideration of the FRCP rules on discovery illustrate. While FRCP rules have many purposes, one important goal is procedures that help assure relevant, reliable, and fair disclosure.²²⁰ According to the FRCP, “[t]hrough discovery, the parties find out what the other side’s claims or defenses are *really* all about and what facts they are based upon.”²²¹ Each party can use five discovery tools: depositions, interrogatories, requests for production, medical examinations if the court grants a party’s motion, and requests for admissions.²²² And there are required disclosures between the parties: identifying each person “likely to have discoverable information . . . the . . . party may use to support its claims or defenses, [identifying all documents or objects in control of each party]”²²³ that she may use to support her claims or defenses, plaintiff’s assessment and proof of damages, and defendant’s insurance agreements. With a “watchful eye,” the court oversees compliance with discovery

²¹⁶ FELDBLUM & LIPNIC, *supra* note 88, at 13.

²¹⁷ Weston, *supra* note 198, at 512–13; 523–25 (including examples).

²¹⁸ *Id.* at 9 (commenting on institutional rules).

²¹⁹ RICHARD D. FREER, CIVIL PROCEDURE 7–11 (3d ed. 2017). For discussions of full and fair dispute resolution processes, see Sternlight, *supra* note 198, at 1635, 1667.

²²⁰ See FED. R. CIV. P. 26 (providing a set of rules allowing the parties to request and exchange relevant information).

²²¹ FREER, *supra* note 219, at 386; see FED. R. CIV. P. 26.

²²² See FED. R. CIV. P. 30–36.

²²³ *Id.* 26(a)(1)(A)(i).

rules. Unless the court orders otherwise, parties may discover “any nonprivileged matter that is relevant to any party’s claim or defense.”²²⁴

These discovery rules, however, are not required or are much more limited than discovery procedures in litigation.²²⁵ In an employment case, the employer’s actions and records may contain critical information for supporting the employee’s claims that would be very difficult for the aggrieved employee to obtain in the absence of mandated discovery rules. Thus, the scope of an employee’s rights to discovery can make a critical difference in the employee’s success or failure.²²⁶

In addition to diminished or nonexistent discovery procedures, employers also often draft arbitration agreements that do not have other due process rules required in litigation. For example, courts are automatically obligated to follow legal principles and legal precedents, but arbitrators are not.²²⁷ The arbitration agreement provides the basis of the arbitrator’s decision-making. While the agreement can specify legal principles and precedents, it is not unusual for it to provide for an alternative basis—such as industry standards, fairness, or strict compliance with any “contract” terms. In the absence of any specified basis for decision-making, the arbitrators are presumptively left to use their own discretion.

Another example is the appeals process built into the litigation system. In the interest of efficiency, arbitration agreements routinely provide that the arbitrator’s decision is not subject to any judicial review or appeal.²²⁸ Consistent with the typical terms of the arbitration agreement, the arbitrator’s decision is “final and binding.”²²⁹ There is no further review on the merits; the employees’ “day in arbitration” is over and there is no “day in court.”

3. Arbitrators Inclined Toward Employer Perspective

Employees are further disadvantaged in arbitration because of the arbitrators themselves. There is increasing evidence that arbitrators in employment cases are inclined toward the employers’ perspective. This occurs primarily because of the employers’ advantage as “repeat players” in selecting arbitrators

²²⁴ *Id.* 26(b)(1).

²²⁵ See, e.g., Sternlight, *supra* note 198, at 1641 n.51 (noting limited discovery in arbitration); see also *infra* Appendix (providing a sample arbitration agreement which shows no specific provisions for discovery). The agreement may designate arbitral institution’s rules, as indicated in Provision 5, but these rules typically provide only very general discovery rules. *Id.*

²²⁶ See Sternlight, *supra* note 198, at 1641 n.51.

²²⁷ Agreements to arbitrate are considered contractual agreements subject to the agreed-upon terms. As illustrated in Appendix, *infra*, if it does not specify that legal precedents will govern the dispute’s resolution, then the arbitrators are not required to follow legal precedents.

²²⁸ *Id.*

²²⁹ *Id.*

from a pool of eager arbitrators.²³⁰ In addition, arbitrators are disproportionately males and are thus less likely to intuitively identify with the plaintiffs' predicaments given that plaintiffs are most often female.²³¹

In theory, both employers and employees select the arbitrator. But in practice, employers have advantages in selecting the arbitrator. As repeat players, they have more experience with the arbitration process and are more knowledgeable about prospective arbitrators and their reputations. Employers understandably select arbitrators that are receptive to the management perspective.²³²

Andrea Cann Chandrasekhar and David Horton confirm this employer's advantage in consumer arbitration.²³³ They note that "even controlling for other factors, companies that arbitrate more than once boast higher win rates than one-shot firms."²³⁴ Similarly, Alexander Colvin and Mark Gough investigated 2,802 employment arbitration cases administered over an 11-year period by the American Arbitration Association (AAA), looking for predictors of employee wins and damage amounts in an award.²³⁵ They found that larger-scale employers who are involved in more arbitration cases tend to have higher win rates and have lower damage awards made against them.²³⁶ Their study also provides evidence of a significant repeat employer-arbitrator pair effect: employers that use the same arbitrator on multiple occasions win more often and have lower damages awarded against them than do employers appearing before an arbitrator for the first time.²³⁷

In addition, arbitrators as a professional group are already attuned to the employers' perspective. Judges are the decisionmakers in litigation, and arbitrators are the decisionmakers in arbitration. However, unlike judges, arbitrators

²³⁰ Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 ILR REV. 1019, 1035–40 (2015); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 21 (2011).

²³¹ See *supra* text accompanying notes 194–97 (drawing from research on judges' gender).

²³² See Chew, *supra* note 187, at 210 (describing how parties select arbitrators).

²³³ See Andrea Cann Chandrasekhar & David Horton, *Empirically Investigating the Source of the Repeat Player Effect in Consumer Arbitration 1* (Oct. 22, 2019) (unpublished manuscript), https://law-economic-studies.law.columbia.edu/sites/default/files/content/docs/Chandrasekhar_Arbitration_10_22_19.pdf [perma.cc/43EY-2VC8]. These researchers further explore whether this "repeat player effect is a product of experience within the arbitral forum (the 'experience' hypothesis)," as suggested here, or "characteristics of the repeat playing companies themselves (the 'defendant-specific' hypothesis)." *Id.* "Using a unique regression specification that includes *both* discrete and continuous random variables . . . [to study] 4,570 consumer arbitration awards from the American Arbitration Association, . . . they find that the repeat player effect is more consistent with the defendant-specific hypothesis than it is with the experience hypothesis." *Id.*; see also Sternlight, *supra* note 198, at 1649–50.

²³⁴ Chandrasekhar & Horton, *supra* note 233.

²³⁵ Colvin & Gough, *supra* note 230, at 1019.

²³⁶ *Id.* ("The authors find that self-represented employees tend to settle cases less often, win cases that proceed to a hearing less often, and receive lower damage awards.")

²³⁷ *Id.*; Chew, *supra* note 187, at 207.

have to compete for business.²³⁸ Arbitrators, recognizing employers as repeat players, understand that they are an important target market. They need employers to find them acceptable as arbitrators, and therefore want a reputation as being receptive to the employer's perspective. These market pressures shape the pool of arbitrators, so that only the ones acceptable to employers stay in business. These market dynamics tend to favor employers.

As suggested above, arbitrators as a group are already inclined toward employer perspectives. In addition, arbitrators are also a homogenous group, most likely to be white males.²³⁹ Employees in harassment disputes are from diverse gender and racial backgrounds. They are more likely to be women in sexual harassment and sex discrimination claims. Minority employees, particularly Blacks, are the most frequent plaintiffs in racial harassment and discrimination claims.²⁴⁰ Drawing from the research on the effect of judges' gender in sexual harassment litigation,²⁴¹ it would predict that male arbitrators in sexual harassment arbitration cases are less likely to hold for employees than female arbitrators.²⁴² This supposedly occurs because female arbitrators are better able to understand female employees' situation, while male arbitrators would find it more difficult to identify with female worker's experiences of sexual harassment.²⁴³

CONCLUSION

IV. MYTHS AND REALITIES

Three interconnected myths help us rationalize and minimize sexual harassment in the workplace: (1) sex discrimination is no longer prevalent; (2) sexual harassment is no longer pervasive; and (3) in the unlikely event there is sexual harassment, the harassment is stopped and the harasser is punished. As this Article explains, the unfortunate reality is often the opposite.

Sex discrimination is still prevalent in many work settings as evidenced by documented pay gaps, underrepresentation that is perpetuated by barriers to advancement, and disproportionate microaggressions. Ongoing sex discrimination is explained in part by entrenched and sometimes unconscious cultural beliefs

²³⁸ See Chew, *supra* note 187, at 210.

²³⁹ See *id.* at 211, 216.

²⁴⁰ Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1143 (2009).

²⁴¹ Chew, *supra* note 187, at 197–203.

²⁴² *But see* Colvin & Gough, *supra* note 230, at 1019, 1023 (“Female arbitrators and experienced professional labor arbitrators render awards in favor of employees less often than do male arbitrators and other arbitrators.”).

²⁴³ The author's research, however, suggests that this gender effect in arbitration is more tentative and complicated by the market dynamics described above. Research findings suggest that the pro-employer inclinations, prompted by the market forces described above, trump over the general tendency for female decision-makers to more intuitively understand sexual harassment and be more disposed toward female complainants. Chew, *supra* note 187, at 202–03, 211.

about the ideal roles of men and women in relationship to the workplace. In addition, we rationalize problems by the mistaken beliefs that progress is “just a matter of time” and that progress is actually in women’s control.

Contrary to the second myth that sexual harassment is no longer a problem, sexual harassment in its many forms is pervasive in many settings. This reality is not surprising given that sex discrimination and sexual harassment have a common basis: protection of men’s dominance in certain industries and jobs by controlling, demeaning, and insulting women who threaten male turf. As Vicki Schultz and other scholars observe, sexual harassment is more about sexism than sexual desire.²⁴⁴

The third myth is that when sexual harassment occurs, the harassers and their employers are stopped and punished. All too often, this does not happen. The processes for formally resolving these sexual harassment disputes are often fraught with frustrations and failure for victims of sexual harassment. First of all, the workplace culture discourages victims from reporting. Plaintiffs who move ahead with litigation confront laws and precedents that create exceedingly high evidentiary burdens and judges who do not intuitively appreciate their perspectives. Pursuant to their employment agreements, many employees do not even have the option of suing. Thus, many victims are forced into employment arbitration where the odds are even more stacked against them. Employers have numerous advantages in arbitration, including their design of the arbitration process and other substantiated “repeat player” benefits. Arbitrators also have market pressures to be receptive to employers’ and alleged harassers’ argument. As Jean Sternlight and Maureen Weston observe: mandatory employment arbitration and nondisclosure agreements result in too many harassers getting away with harassment.²⁴⁵

V. PROPOSALS

A comprehensive plan to dismantle these myths and provide solutions to sex discrimination, sexual harassment, and employment arbitration goes well beyond the purpose of this Article.²⁴⁶ However, a few curated proposals on sex discrimination, sexual harassment, and employment arbitration are offered to get us thinking about what we can do.

A. *Proposal for Sex Discrimination: Fixing the Broken Rung*

In our discussion of ongoing sex discrimination, the problem of the “broken rung” in the promotion ladder is highlighted. As the McKinsey Report reveals in their study, for every 100 men promoted, only 72 women are promot-

²⁴⁴ Schultz 1998, *supra* note 98, at 1755.

²⁴⁵ See Sternlight, *supra* note 198, at 1664; Weston, *supra* note 198, at 522–23.

²⁴⁶ See FELDBLUM & LIPNIC, *supra* note 88, at 66–71 (offering more comprehensive plan for addressing sexual harassment).

ed.²⁴⁷ This gender disparity obviously affects the specific women who are not promoted, but this broken rung also has longer term broader future effects. Reducing the number of women who enter that initial step in the management ladder decreases the pool in every subsequent stage (e.g., senior manager/director, vice-president, senior vice-president, and C-suite leaders) of the pipeline thereafter. “[U]nless we close the disparities in hiring and promotions that make up the broken rung, we are many decades away from reaching parity, if we reach it at all.”²⁴⁸

FIVE STEPS FOR FIXING THE BROKEN RUNG:²⁴⁹

--Set goals.

Rather than aspiring in general terms, employers can set specific and bold targets for representation of women at the first-level of management. By publicizing these goals, employers would be held accountable and garner support for these goals.

--Require diverse slates for hiring and promotions.

Increasing the number of diverse candidates for hiring and promotions can notably increase the probability of a woman getting the position. Sincere and committed efforts to find well-qualified candidates is important.

--Evaluators should have unconscious bias training.

Employers are becoming increasingly aware of the effects of unconscious bias in employment decisions—triggering unfair and gendered assumptions about the future potential of certain candidates. Training in unconscious bias appears to make a positive difference in companies making progress.

--Establish clear evaluation criteria.

Employers should have in place the evaluation criteria before the review process begins. Evaluation tools should be based on objective and measurable input reflective of the evaluation criteria. Candidates should have a safe way to disclose their impressions of potential bias.

--Put more women in line.

Employers should be sure women have access to opportunities that put them in line for management. This includes leadership training, sponsorship, and high-profile assignments.

B. Proposal for Sexual Harassment: Bystander Intervention

In our discussion of ongoing sexual harassment, we note the possible role of others in intervening in harassment or supporting those who do complain. Workplace leaders and colleagues at all levels can identify and help stop harassment—thus helping to change the norms for what is acceptable and respectful conduct. But as we discussed, bystander intervention is currently the exception rather than the rule.²⁵⁰ How do we change that?

²⁴⁷ MCKINSEY REPORT 2019, *supra* note 3, at 11.

²⁴⁸ *Id.* at 12.

²⁴⁹ *Id.* at 16–17.

²⁵⁰ *Supra* Part IV.

There is encouraging evidence that training programs in bystander intervention can be successful. In a macro-review of research on the topic, Gabriel Mujal and his co-researchers found that training programs used in university and college settings have been effective in changing bystanders' attitudes and conduct.²⁵¹ Through a series of steps, participants become more aware of the problems and learn how to take responsibility to solve them.²⁵² Two particular training programs, "Bringing in the Bystander" and the "The Men's Program," have the most consistent effectiveness.²⁵³

While more widely used in university and college settings for sexual assaults, the promotion and training for bystander intervention in sexual harassment is slowly being utilized in the workplace.²⁵⁴ Two states, New York and Connecticut, have recently incorporated bystander training into their sexual harassment laws for employers.²⁵⁵ Lauren Daley and her coauthors for Catalyst (a gender-equity in the workplace organization) describe bystander intervention training of employees.²⁵⁶ It should include the following training and practice: recognizing when they may feel reluctant to intervene (barriers), when to intervene, what behaviors to intervene on (defining sexual harassment), and how to

²⁵¹ Gabriela Mujal et al., *A Systematic Review of Bystander Interventions for the Prevention of Sexual Violence*, 22 TRAUMA, VIOLENCE & ABUSE 381, 392–93 (2019).

²⁵² *Id.* at 387.

²⁵³ *Id.* at 381–82; see also *Bystander Intervention Tips and Strategies*, NAT'L SEXUAL VIOLENCE RES. CTR. (2018), https://www.nsvrc.org/sites/default/files/2018-02/publications_nsvrc_tip-sheet_bystander-intervention-tips-and-strategies_1.pdf [perma.cc/2XX8-MTSQ].

²⁵⁴ See, e.g., Brigid Schulte, *To Combat Harassment, More Companies Should Try Bystander Training*, HARV. BUS. REV. (Oct. 31, 2018), <https://hbr.org/2018/10/to-combat-harassment-more-companies-should-try-bystander-training> [perma.cc/3PGW-CGTF].

²⁵⁵ Connecticut's Governor's Bill 5043 ("An Act Promoting a Fair, Civil and Harassment-free Workplace") goes into effect October 1, 2019 and new training requirements include a section on "Bystander Intervention" and similarly, beginning April 1, 2019, New York City employers with 15 or more employees must provide anti-sexual harassment training to all of their New York City employees on an annual basis (Stop Sexual Harassment in NYC Act). This includes information regarding Bystander Intervention, including resources that explain how to engage in Bystander Intervention. See H.B. 5043, 2018 Gen. Assemb., Feb. Sess. (Conn. 2018); Stop Sexual Harassment in NYC Act, Local Law 96 § 8-107 (2018). Some laws, such as Good Samaritan Laws, are intended to protect bystanders from liability for any harm that may be caused by their intervention. For instance, these laws seem less applicable to intervention to sexual harassment in the workplace, where harms caused by a bystander's intervention are hard to imagine. Other laws encourage or even impose a duty to intervene in certain misconduct, and thereby impose liability on you if you do not intervene. These laws however typically target bystander intervention in sexual assault and rape and not in the more typical kinds of non-violent sexual harassment misconduct in the workplace. See, e.g., R.I. GEN. LAWS ANN. § 11-1-5.1 (West, Westlaw through 2020 Regul. Sess.); FLA. STAT. ANN. § 794.027 (West, Westlaw through 2020 2d Reg. Sess.). See generally Zachary D. Kaufman, *Protectors of Predators of Prey: Bystanders and Upstanders Amid Sexual Crimes*, 92 S. CAL. L. REV. 1317, 1325 (2019).

²⁵⁶ LAUREN P. DALEY ET AL., CATALYST, SEXUAL HARASSMENT IN THE WORKPLACE: HOW COMPANIES CAN PREPARE, PREVENT, RESPOND AND TRANSFORM THEIR CULTURE 8–9 (2018), https://www.catalyst.org/wp-content/uploads/2019/01/sexual_harassment_in_the_workplace_report.pdf [perma.cc/E89U-6K6C].

intervene.²⁵⁷ Steps in “how to intervene” (sometimes called the 4 Ds +) include how to directly confront the situation (direct), how to create a distraction (distract), how to get help (delegate), how to touch base with the target later (delay), and how to report.²⁵⁸

Effective training of course has to be part of a broader workplace culture where management clearly endorses and is committed to a workplace of civility and mutual respect among all employees, regardless of their gender. Management should create “a culture of accountability free from retaliation” for those who complain about and intervene in sexual harassment.²⁵⁹

C. *Proposal for Employment Arbitrations: Recalibrating the Power*

Finally, we recall our discussion of the frustrating and ineffective alternatives for those who have been harassed and want to do something to stop and punish the harasser. Among other topics, we explored the lop-sided advantages of employers over complaining employees in the arbitration process. How can we recalibrate the parties’ relative positions so that there is a fairer playing field? By doing so, we improve the efficacy of identifying and stopping harassment in the workplace, instead of harassers slipping through without any repercussions.

One way to fundamentally change the current situation is to no longer make arbitration mandatory, but instead to return the presumptive power of employees’ choice of litigation or arbitration to employees. At the very least, this would encourage employers to offer arbitration provisions that would be more attractive to employees. For instance, the proposed provision could assure more discovery of relevant materials. Employees could also be assured of more of a voice in the selection of arbitrators and more gender-diverse arbitrators from which to select.

However, there are currently few examples of recalibrating the employers’ power to require mandatory employment arbitration. One example was prompted by the unusual leverage of a group of very desirable job applicants; the second was instituted by state law. In the first example, it was brought to the attention of Harvard Law students interviewing at a well-known West Coast law firm for summer associate positions, that the firm would require them to sign a mandatory arbitration agreement.²⁶⁰ This agreement would require them to go

²⁵⁷ *Id.* at 9; *see also* Schulte, *supra* note 254.

²⁵⁸ DALEY ET AL., *supra* note 256, at 9.

²⁵⁹ *Id.* at 8.

²⁶⁰ This event occurred while I was teaching at Harvard Law School in the spring semester 2018, and involved students discussed with me what was happening. *See* Stephanie Francis Ward, *A Group of Harvard Law Students Is Trying to Get Rid of Mandatory Arbitration Clauses*, ABA J. (Sept. 1, 2019, 1:20 AM), <https://www.abajournal.com/magazine/article/parity-to-the-people> [perma.cc/4X2L-299L]; Sejal Singh & Andre Manuel, *Harvard Law Students Are Taking on Forced Arbitration*, NATION (Apr. 15, 2019), <https://www.thenation.com/article/archive/harvard-law-students-are-taking-on-forced-arbitration/> [perma.cc/9HQG-C

to arbitration for an array of employee claims, including sexual harassment claims. Unlike many other law students, Harvard Law students enjoy the privilege of firms competing over them.²⁶¹ Exercising their very real competitive leverage, they made public their objection to this firm's mandatory arbitration requirement and prompted attention to other firms' similar practice.²⁶² This West Coast law firm consequently changed their policy so that their employees (including their summer associates) would not be forced into arbitration to resolve their sexual harassment complaints.²⁶³

The second example is not dependent on the leverage of highly-desirable job applicants, but instead more inclusively protects all job applicants and employees in California.²⁶⁴ Under a new state law, an employer cannot require any applicant for employment or any employee to "waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (FEHA) or other specific statutes governing employment as a condition of employment. . . . This bill would additionally make violations of the prohibitions described above, relating to the waiver of rights, forums, or procedures, unlawful employment practices under FEHA."²⁶⁵ In other words, employers cannot require job applicants or employees to resolve state-based discrimination and labor code claims in arbitration. This would include sexual harassment claims made under state law. Furthermore, employers face legal consequences for threatening, retaliating, or discriminating against any worker who refuses to waive their rights to litigation.

In conclusion, the challenges in transforming our workplace into a productive environment free of gender disparities and sexual harassment are daunting. The challenges to assuring that litigation and arbitration are effective ways to stop sexual harassment are difficult. Hiding from our current predicament is no help. Recognizing and understanding these challenges are essential to continuing progress.

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²⁶¹ See Ward, *supra* note 260.

²⁶² *Id.*

²⁶³ See *id.*; Aidan F. Ryan, *Harvard Law Students Push Major Firm to Drop Controversial Contract Provisions*, THE HARV. CRIMSON (Nov. 26, 2018), <https://www.thecrimson.com/article/2018/11/26/kirkland-ellis-boycott/> [<https://perma.cc/JA8U-ESTV>].

²⁶⁴ Assemb. B. 51, 2019 Assemb., Reg. Sess. (Cal. 2019) (excluding any mandatory arbitration agreements agreed to prior to Jan. 1, 2020). The law's viability, however, is being tested. In particular, there are questions about whether the law will be preempted by the Federal Arbitration Act (FAA) which expressly endorses arbitration agreements. See Robert Carrol et al., *AB 51 Update: Federal Court Preliminarily Enjoins California Law Restricting Employment Arbitration Agreements*, JD SUPRA (Feb. 21, 2020), <https://www.jdsupra.com/legal-news/ab-51-update-federal-court-96466/> [perma.cc/7R3G-CCQ5]; Lisa Nagele-Piazza, *New California Law Bans Mandatory Arbitration for Most Workplace Claims*, SHRM (Oct. 17, 2019) <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/new-california-law-bans-mandatory-arbitration.aspx> [perma.cc/SVZ8-5DGJ]; see also Weston, *supra* note 198, at 533–34.

²⁶⁵ Assemb. B. 51, 2019 Assemb., Reg. Sess. (Cal. 2019).

APPENDIX: SAMPLE ARBITRATION AGREEMENT PROVISIONS (COMPOSITE FROM VARIOUS AGREEMENTS)

In consideration of my employment with this company and its promise to arbitrate all disputes, I agree that, except as provided below, any and all past, present, or future controversies, claims, or disputes between the company (or any director, officer, agent, shareholder, employee) and me, including but not limited to any disputes arising from my employment or termination of my employment (“Disputes”) will be subject to binding arbitration under the Federal Arbitration Act.

Disputes include, but are not limited to, any federal or state statutory claim, including but not limited to Title VII of the Civil Rights Act of 1964 and all other civil rights statutes, claims of retaliation, harassment, discrimination, or wrongful termination, and any other contractual, tort, or statutory claims to the extent allowed by law.

I understand that, except as provided below, the company and I waive any right to a judge or jury trial on any Dispute.

The arbitrator, and not any government court or agency, shall have exclusive authority to resolve any Dispute relating to the interpretation, applicability, enforceability, voidability, or formation of this arbitration provision;

Arbitration Procedure. The Company and I agree that any arbitration will be administered by [an arbitral institution such as the American Arbitration Association] pursuant to its employee arbitration rules and procedures.

The arbitrator will have the power to decide motions prior to any arbitration hearing, the power to award any individual remedies available under applicable law including injunctive relief.

The arbitrator will apply the substantive law of the state in which the claim arose, or federal law, or both, as applicable. The federal rules of evidence will apply. The arbitrator will not have the authority to disregard or refuse to enforce any lawful company policy, nor will require the company to adopt a policy not otherwise required by law.

The parties will each bear their own costs and fees, except that the arbitrator can apply cost and fee-shifting to the benefit of the prevailing party.

The arbitrator’s decision will be in writing and contain findings of fact and conclusions of law. The arbitrator’s award may be entered as a final and binding judgment in any court having jurisdiction thereof.

Except as provided by law, the rules of the arbitral institution, or this arbitration provision, arbitration will be the sole, exclusive, and final remedy for any dispute between me and the company.