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Anonymous Plaintiffs and Sexual Misconduct

Jayne S. Ressler

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"So sue me!" [**]

Scholars continue to propose and write extensively about innovative laws to protect recipients of ever-evolving forms of sexual misconduct. The #MeToo movement makes this scholarship more imperative than ever. The majority of scholars focus their attention on (i) substantive laws to prevent and punish sexual misconduct; and (ii) the failure of traditional privacy laws to address modern assaults on sexual privacy. This Article adds a new perspective to—and fills a gap in—the conversation. It focuses on the inadequacy of the processes by which recipients of sexual misconduct have access to these laws. Given the pervasive reluctance of many sexual misconduct recipients to come forward, this is an essential missing link in the sexual misconduct literature. This Article examines reasons why recipients of sexual misconduct do not bring formal claims against their

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[*] Associate Professor of Law, Brooklyn Law School. J.D., University of Pennsylvania Law School; B.S., Wharton School at the University of Pennsylvania; B.A., University of Pennsylvania. My thanks and gratitude to Anita Bernstein, Dana Brakman-Reiser, Abbe Gluck, and Brian Lee for their suggestions and comments on previous drafts of this Article, and to Sophia Farruggia, Ian Kitts, and Xiaoling Ma for their valuable research assistance. I am particularly indebted to Gavin Goldstein—former student extraordinaire, and best go-to guy around—without whom this Article could not have been completed. I am also grateful to the generous support of this project through the Brooklyn Law School Research Stipend. Finally, all my love to the Rose men—Ken, Nate, and Benny.

[**] *The Breakfast Club* was an exceptionally popular film about high school social dynamics in the mid-1980s. It often appears in compilations of the "Greatest Films of All Time." In one scene, the teenage character played by Judd Nelson huddles under a desk to hide from a teacher. Nelson realizes that from his vantage point, he has a close and direct view under classmate Molly Ringwald's character's skirt—revealed by a camera close-up of Ringwald's white underwear. Nelson takes advantage of his position under the desk to move his head up under Ringwald's skirt, toward her crotch. Ringwald jumps and angrily squeezes his head between her knees. As Nelson emerges from under the desk, Ringwald slaps and curses at him. The "comic" element of the scene is Nelson's response to Ringwald's outrage—"so sue me!" he scoffs. The idea of anyone—let alone a young high school girl—having any legal rights when a "boys-will-be-boys" teen calmly violates her sexual privacy was laughable. Rather, Nelson's actions are portrayed as a "perk" of his decision to hide under the desk. THE BREAKFAST CLUB (Universal Pictures 1985); *see also* Samantha Schmidt, *Molly Ringwald Reckons with 'The Breakfast Club' in the #MeToo Era*, CHI. TRIB. (Apr. 9, 2018), https://www.chicagotribune.com/entertainment/movies/ct-molly-ringwald-the-breakfast-club-metoo-essay-20180409-story.html.

perpetrators, and it proposes procedural reforms to make civil justice for sexual misconduct more attainable. Specifically, I argue that under certain circumstances, sexual misconduct recipients should be permitted to bring anonymous formal civil actions against their perpetrators. While some jurisdictions currently permit such an anonymous process, the current state of the law is ad hoc, inconsistent, and unpredictable. Examining and evaluating the concerns regarding anonymous litigation, this Article proposes a reformed jurisprudence surrounding concealment of a sexual misconduct recipient's identity in formal claims of sexual misconduct. Resolving sexual misconduct claims through an anonymous formal process will aid in testing claims' legitimacy, compensating recipients, deterring wrongdoers, treating the accused fairly, and engendering lasting change.

I. INTRODUCTION

The January 2020 death of basketball star Kobe Bryant brought renewed interest in allegations of sexual misconduct and claimant anonymity[1] – a topic waiting for the next sure-to-come front-page story. While the perpetrators change, these reports continue.[2] In the Bryant case, a nineteen-year-old woman who previously had accused Bryant of rape dropped her criminal complaint against him because the disclosure of her name resulted in death threats and sordid publicity."[3] A criminal defense legal analyst stated "I have no doubt that what happened in the Bryant case dissuaded many women [from seeking justice for sexual misconduct.]"

In August 2019, guards found previously convicted sex-offender and wealthy financier Jeffrey Epstein hanging lifeless in his jail cell.[4] Many saw Epstein's death as another failure in an already broken system that cheated victims out of an opportunity for justice.[5] Less than a year earlier, in November 2018, *Miami Herald* published a story exposing the "extraordinary plea agreement" Epstein entered into with federal prosecutors.[6] The deal ensured that Epstein would not only serve a short prison sentence, but authorities would conceal the full extent of his crimes

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[1] *See, e.g.,* Amanda Holpuch, *How Would Kobe Bryant's 2003 Rape Case Have Fared in the #MeToo Era,* GUARDIAN (Feb. 2, 2020), https://www.theguardian.com/sport/2020/feb/01/kobe-bryant-rape-2003-case-how-much-has-changed.

[2] Indeed, both The New York Times and CNN recently published headline stories regarding women anonymously suing wealthy Canadian fashion designer Peter Nygard for sexual misconduct. *See, e.g.* Kim Barker, Catherine Porter, and Grace Ashford, *How a Neighbors' Feud in Paradise Launched an International Rape Case*, N.Y. TIMES (Feb.. 22, 2020), https://www.nytimes.com/2020/02/22/world/americas/peter-nygard-louis-bacon.html ; Sheena Jones and Madeleine Holcombe, *Class-Action Lawsuit Alleges Canadian Businessman Peter Nygard Sexually Assaulted at Least Ten Women*, CNN (Feb. 19, 2020), https://www.cnn.com/2020/02/19/us/peter-nygard-sexual-assault-accusations/index.html.

[3] *Id.; see also* Steve Henson, *What Happened with Kobe Bryant's Sexual Assault Case*, L.A. TIMES (Jan. 26, 2020), https://www.latimes.com/sports/story/2020-01-26/what-happened-kobe-bryant-sexual-assault-case.

[4] Shimon Prokupecz, Erica Orden & Jason Hanna, *Jeffrey Epstein Has Died by Suicide, Sources Say*, CNN (Aug. 11, 2019), https://www.cnn.com/2019/08/10/us/jeffrey-epstein-death/index.html.

[5] *See, e.g.*, Barbara McQuade, *Jeffrey Epstein's Death Once Again Denies His Victims Justice*, DAILY BEAST (Aug. 12, 2019), https://www.thedailybeast.com/jeffrey-epsteins-death-once-again-denies-his-victims-justice; Matt Taylor, *The Actual Facts Behind Jeffrey Epstein's Death Are Worse than the Conspiracy Theories*, VICE (Aug. 12, 2019), https://www.vice.com/en_us/article/mbmjnn/the-actual-facts-behind-jeffrey-epsteins-death-are-worse-than-the-conspiracy-theories.

[6] Julie K. Brown, *How a Future Trump Cabinet Member Gave a Serial Sex Abuser the Deal of a Lifetime*, MIAMI HERALD (Nov. 28, 2018), https://www.miamiherald.com/news/local/article220097825.html.

and the number of people involved.[7] Although detectives estimate that Epstein molested over eighty girls, fewer than ten initially were willing to speak on the record.[8] Julie K. Brown, the journalist who broke the story, emphasized that Epstein's victims were primarily thirteen- to fifteen-year-old girls who—in addition to the infirmity of their youth—did not have the power to speak up against him.[9] Several stated that they had never told anyone because they were ashamed and they felt that the criminal justice system had already failed them.[10]

A few months before the November 2018 Epstein story broke, a woman contacted *The Washington Post* anonymously through a tip line, claiming that then-D.C. Circuit Court of Appeals Judge Brett Kavanaugh sexually assaulted her when they were both in high school.[11] At the time *The Washington Post* got the tip, Judge Kavanaugh was on the short-list of potential Supreme Court nominees.[12] Soon thereafter the woman sent a letter, via the office of her local congresswoman, to Senator Dianne Feinstein, recounting the allegations she had made to *The Washington Post* and requesting anonymity.[13] Although the woman passed an FBI-administered polygraph test, she opted not to come forward publicly, surmising that to do so would negatively impact her life and likely have no effect on Judge Kavanaugh's nomination: "Why suffer through the annihilation if it's not going to matter?"[14] she questioned.

Eventually Professor Christine Blasey Ford's identity leaked and became known. Many would say that she was figuratively annihilated, and, given Brett Kavanaugh's confirmation to the Supreme Court, that her testimony did not, in fact, matter. Certainly, the consequences to Ford for coming forward were swift and exacting. She received death threats, and

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[7] *Id.*

[8] *Id.*

[9] *Id. See also* Sealed Indictment at 2, U.S. v. Epstein, 19 Crim. 490 (2019), https://int.nyt.com/data/documenthelper/1362-epstein-indictment/01e39b8c091cbeac3797/optimized/full.pdf ("The victims described herein were . . . often particularly vulnerable for exploitation."); Lauren Frias, *Jeffrey Epstein Reportedly Hired Private Investigators to Intimidate and Silence Accusers, Witnesses, and Prosecutors*, YAHOO NEWS (July 13, 2019), https://news.yahoo.com/jeffrey-epstein-reportedly-hired-private-133047974.html.

[10] Julie K. Brown, *Jeffrey Epstein Arrested on Sex Trafficking Charges*, MIAMI HERALD (July 6, 2019, 8:51 PM), https://www.miamiherald.com/news/state/florida/article232374872.html.

[11] Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks out About Her Allegation of Sexual Assault*, WASH. POST (Sept. 16, 2018, 10:28 PM), https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html.

[12] *Id.*

[13] *Id.*

[14] *Id.*

she relocated her family four times out of concern for their safety.[15] False articles and reports were published about Ford, including one that alleged that she had made similar sexual assault allegations against Justice Neil Gorsuch during his Supreme Court confirmation process.[16] President Donald Trump questioned the veracity of Ford's allegations, tweeting "I have no doubt that, if the attack on Dr. Ford was as bad as she says, charges would have been immediately filed with local Law Enforcement Authorities by either her or her loving parents."[17]

In contrast to the President's assertion about Dr. Ford, and consistent with the fear and silence of Bryant's and Epstein's victims, the vast majority of recipients[18] of sexual misconduct[19] do not, in fact, come forward.[20] Rather, they suffer from this abuse in silence, both shamed by what has happened to them and afraid of the real-world consequences—to them and their families—of speaking out. For most sexual misconduct recipients, reporting[21] remains an abstract ideal in which they cannot, and dare not,

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[15] Anna North, *Christine Blasey Ford Has a Security Detail Because She Still Receives Threats*, VOX (Nov. 8, 2018, 5:40 PM), https://www.vox.com/2018/11/8/18076154/christine-blasey-ford-threats-kavanaugh-gofundme.

[16] Alex Kasprak, *Did Christine Blasey Ford Make a Sexual Assault Accusation Against Neil Gorsuch?*, SNOPES (Sept. 24, 2018), https://www.snopes.com/fact-check/christine-blasey-ford-neil-gorsuch/.

[17] Lisa Bonos, *Trump Asks Why Christine Blasey Ford Didn't Report Her Allegation Sooner. Survivors Answer with #WhyIDidntReport*, WASH. POST (Sept. 21, 2018, 11:00 AM), https://www.washingtonpost.com/news/soloish/wp/2018/09/21/trump-asks-why-christine-blasey-ford-didnt-report-her-allegation-sooner-survivors-answer-with-whyididntreport/?utm_term=.c86869a8e4c0.

[18] I use the term "recipient" of sexual misconduct instead of the more commonly used terms "victim" and "survivor" to avoid the stigma, disempowerment, pity, and sense of blame sometimes associated with the latter terms. I believe that using the term "recipient" focuses the responsibility and actions of the wrongdoing solely where it belongs—on the perpetrator. Due to the common practice of using the terms "survivor" and "victim," I include them as well where appropriate. *See, e.g.*, Gwendolyn Wu, *'Survivor' Versus 'Victim': Why Choosing Your Words Carefully Is Important*, HELLOFLO (Mar. 16, 2016), http://helloflo.com/survivor-vs-victim-why-choosing-your-words-carefully-is-important/ ("[T]he way we describe sexual assault has an effect on our perceptions of it. We internalize the messages that we get from media and our interpersonal interactions, and it subconsciously influences how we communicate with others.").

[19] Throughout this paper I use the term "sexual misconduct" to refer to a range of offenses, from sexual harassment at work, gender discrimination, violations of sexual privacy, to rape. Where applicable, I refer to a specific type of sexual misconduct using more precise terminology.

[20] *The Criminal Justice System: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/statistics/criminal-justice-system (last visited Aug. 10, 2019); *Reporting Sexual Assault: Why Survivors Often Don't*, MD. COAL. AGAINST SEXUAL ASSAULT, https://ocrsm.umd.edu/files/Why-Is-Sexual-Assault-Under-Reported.pdf (last visited Jan. 24, 2020); *see* discussion *infra* Part III.

[21] I use the term "reporting" to mean revelation to anyone, whether through a formal legal channel or in a tweet or text to a friend, about being the recipient of sexual misconduct.

partake. This is particularly true for poor women, women of color, and members of marginalized groups (such as the LGBTQ community).[22] It is acutely true for male recipients of sexual misconduct, whose very existence has often been ignored,[23] and, at worst, ridiculed.[24] The hashtag #WhyIDidntReport was born out of President Trump's criticism of Professor Ford's childhood decision not to report her experience.[25] The #WhyIDidntReport movement "comes out of frustration that people still aren't understanding why reporting sexual violence is so tricky and why our . . . justice system is not set up for sexual assault."[26]

Statistics regarding sexual assault[27] paint a grim picture. It is one of the most underreported violent crimes, with approximately three out of four incidents unreported.[28] It is particularly difficult to know how many men are recipients of sexual misconduct. One report states that nine percent of the victims of sexual assault and rape are male,[29] while a more recent study

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[22] Lesley Wexler et al., *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 54–55 (2019) ("[T]rans, nonbinary persons, and women of color . . . are more likely to be abused, less likely to be believed, and less likely to garner media or social attention."). "[T]he majority of raped women who voluntarily reveal their identities are white, middle class, in steady relationships, and most significantly, are raped by strangers." Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 61 FORDHAM L. REV. 1113, 1125 (1993). Those who are particularly vulnerable to sexual misconduct—people of color, poor people, and members of the LGBTQ community—are effectively cut off from even informal mechanisms of disclosure. *See, e.g.*, Kathryn Casteel, Julia Wolfe & Mai Nguyen, *What We Know About Victims of Sexual Assault in America*, FIVETHIRTYEIGHT (Jan. 2, 2018, 10:30 AM), https://projects.fivethirtyeight.com/sexual-assault-victims/; Melissa Chan, *'Our Pain Is Never Prioritized.' #MeToo Founder Tarana Burke Says We Must Listen to 'Untold' Stories of Minority Women*, TIME (Apr. 23, 2019), https://time.com/5574163/tarana-burke-metoo-time-100-summit/. The underrepresentation of minority lawyers participating in the judicial system is an often-overlooked consequence of the absence of sexual misconduct cases brought by marginalized groups. Members of these marginalized groups often choose as representatives members of the legal profession who themselves belong to marginalized groups. Society is further harmed by the absences of these lawyers' voices.

[23] *See, e.g.*, I. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1261–65 (2011); Kiran Mehta, *Male Rape Victims: Breaking the Silence*, 13 PUB. INT. L. REP. 93 (2008).

[24] *See, e.g.*, Amanda Sakuma, *Terry Crews Is Calling out Celebrities for Mocking His Alleged Assault*, VOX (Jan. 27, 2019, 5:07 PM), https://www.vox.com/2019/1/27/18199684/terry-crews-twitter-feud-dl-hughley.

[25] *See* Jacey Fortin, *#WhyIDidntReport: Survivors of Sexual Assault Share Their Stories After Trump Tweet*, N.Y. TIMES (Sept. 23, 2018), https://www.nytimes.com/2018/09/23/us/why-i-didnt-report-assault-stories.html.

[26] Morgan Hunnicutt, *How the #WhyIDidntReport Movement Took Our Political, Social Climate by Storm*, HILLTOP VIEWS (Oct. 1, 2018), https://www.hilltopviewsonline.com/16481/news/how-the-whyididntreport-movement-took-our-political-social-climate-by-storm/.

[27] *See* RAPE, ABUSE & INCEST NAT'L NETWORK, *supra* note 20.

[28] *Id.*

[29] *Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-

shows that "the rates of nonconsensual sexual contact [received by women and men are] basically equalized, with 1.270 million women and 1.267 million men claiming to be victims of sexual violence."[30]

One reason why those who have been sexually assaulted do not disclose what has happened to them is the real—or perceived—repercussions of having their identities made public. According to a National Women's Study, eighty-six percent of women surveyed responded that those who were sexually assaulted "would be 'less likely' to report rapes if those victims believed that the news media would disclose their names."[31] The speed and permanency of the internet, and the proliferation of social media,[32] makes this concern stronger than ever.[33]

Indeed, social media and the speed of the internet fueled the #MeToo movement's meteoric rise into the social consciousness. The movement has provided a safe space for some recipients of sexual misconduct to speak up and add their voices to the crowd. It has done an invaluable job of bringing the issue of sexual misconduct to the forefront of public discourse. But while extrajudicial methods—movements such as #MeToo—of addressing sexual misconduct have an important role in confronting and punishing sexual misconduct, they do not, cannot, and should not occupy the whole sexual misconduct space. The majority of recipients of sexual misconduct for whom #MeToo has had a direct effect are white women.[34] This is

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sexual-violence_0.pdf (last visited Jan. 24, 2020).

[30] *Id. See also,* Hanna Rosin, *When Men Are Raped*, SLATE (Apr. 29, 2014, 12:54 PM), https://slate.com/human-interest/2014/04/male-rape-in-america-a-new-study-reveals-that-men-are-sexually-assaulted-almost-as-often-as-women.html; *see* Capers, *supra* note 23, at 1272, 1277.

[31] Daniel M. Murdock, *A Compelling State Interest: Constructing a Statutory Framework for Protecting the Identity of Rape Victims*, 58 ALA. L. REV. 1177, 1177 (2007) (citing Denno, *supra* note 22, at 1130–31).

[32] *See* Anita Bernstein, *Real Remedies for Virtual Injuries*, 90 N.C. L. REV. 1458, 1478–81 (2012).

[33] *See* discussion *infra*, Part III.E.

[34] *See* Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105, 107 (2018) (stating "[t]he recent resurgence of the #MeToo movement reflects the longstanding marginalization and exclusion that women of color experience within the larger feminist movement in U.S. society. This marginalization of women of color has occurred within the #MeToo movement despite the fact that a black woman, Mechelle Vinson, was the plaintiff in the first Supreme Court case to recognize a cause of action under Title VII for a hostile work environment created by sexual harassment; despite the fact that #MeToo began with a woman of color; and despite the fact that women of color are more vulnerable to sexual harassment than white women and are less likely to be believed when they report harassment, assault, and rape.") (citations omitted). "#MeToo has the potential to leave the experiences of multipl[e] marginalized groups, such as Black women, trans women, and LGBQ women, out of the shifting collective narrative." Ryan J. Gallagher, Elizabeth Stowell, Andrea G. Parker & Brooke Foucault Welles, *Reclaiming Stigmatized Narrative: The Networked Disclosure Landscape of #MeToo*, SOCARXIV PAPERS 21 (May 24, 2019), https://osf.io/preprints/socarxiv/qsmce; *see also*

particularly unsettling given that its founder is a woman of color,[35] and the total number of recipients of sexual misconduct who are not white women far outweighs the number of white female recipients.[36] As one lawmaker noted, "[t]he MeToo movement . . . can't just be for women who have a Twitter account."[37] Further, most of those "punished" by #MeToo have been high-profile white men, who often feel little impact on their lavish lifestyles notwithstanding their misdeeds.[38] And although #MeToo might be successful in procuring the removal from their jobs of some perpetrators of sexual misconduct, it does not create legal precedent nor provide restitution to the recipients of the misdeeds. As a pair of political scientists put it, "#MeToo exists to prove a point."[39]

Furthermore, a backlash against the #MeToo movement has developed. Some argue that the movement has created an environment of "guilty because accused"[40] or "guilty until proven innocent."[41] *The Economist* reports that the #MeToo movement "has actually made Americans more skeptical about sexual harassment."[42] A *Bloomberg* piece reported that the movement has harmed women's careers because male executives across the country are avoiding contact with them, for fear of being caught up in the sexual misconduct rumor mill.[43] Professor Elizabeth Bartholet expressed

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Wexler et al., *supra* note 22, at 54.

[35] Stephanie Zacharek et al., *Time Person of the Year 2017, the Silence Breakers*, TIME (Dec. 18, 2017), https://time.com/time-person-of-the-year-2017-silence-breakers/ ("The phrase was first used more than a decade ago by social activist Tarana Burke as part of her work building solidarity among young survivors of harassment and assault.").

[36] *See* Onwuachi-Willig, *supra* note 34, at 107; Charissa Jones, *When Will MeToo Become WeToo? Some Say Voices of Black Women, Working Class Left Out*, USA TODAY (Oct. 5, 2018, 8:44 AM), https://www.usatoday.com/story/money/2018/10/05/metoo-movement-lacks-diversity-blacks-working-class-sexual-harassment/1443105002/.

[37] Jones, *supra* note 36 (quoting California Assemblywoman Lorena Gonzalez).

[38] *See, e.g.*, Jessica Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37, 71 (2019) (noting that "public judgments tend to be ephemeral rather than having any lasting career consequences for celebrities.").

[39] Alison Gash & Ryan Harding, *#MeToo? Legal Discourse and Everyday Responses to Sexual Violence*, DEP'T OF POL. SCI., U. OR. 11 (May 21, 2018), https://www.mdpi.com/2075-471X/7/2/21.

[40] Margaret Atwood, *Am I a Bad Feminist?*, GLOBE & MAIL (Jan. 13, 2018), https://www.theglobeandmail.com/opinion/am-i-a-bad-feminist/article37591823/.

[41] Philip Rucker & Robert Costa, *'The Trauma for a Man': Male Fury and Fear Rises in GOP in Defense of Kavanaugh*, WASH. POST (Oct. 1, 2018, 11:16 PM), https://www.washingtonpost.com/politics/the-trauma-for-a-man-male-fury-and-fear-rises-in-gop-in-defense-of-kavanaugh/2018/10/01/f48499a2-c595-11e8-b2b5-79270f9cce17_story.html?utm_term=.03f2cf8dec75.

[42] *Measuring the #MeToo Backlash*, ECONOMIST (Oct. 20, 2018), https://www.economist.com/united-states/2018/10/20/measuring-the-metoo-backlash ("[S]urveys suggest that this year-long storm of allegations, confessions and firings has actually made Americans more skeptical about sexual harassment.").

[43] Gillian Tan & Katia Porzecanski, *Wall Street Rule for the #MeToo Era: Avoid Women*

concern that as a result of #MeToo, "[c]orporate and political leaders . . . dismiss alleged perpetrators overnight, often with no regard for the facts but clearly with significant regard for their corporate reputations and electoral strategies."[44] She notes that "this puts real reform at risk. It undermines the legitimacy of action against serious sexual misconduct and abuse of power."[45] The positive gains achieved via the #MeToo movement have come at a considerable expense.

Scholars have proposed and written extensively about innovative laws to protect recipients of ever-evolving forms of sexual misconduct.[46] The #MeToo movement makes this scholarship more imperative than ever.[47] This Article adds a new perspective to—and fills a gap in—the conversation. The majority of scholars focus their attention on (i) substantive laws to prevent and punish sexual misconduct; and (ii) the failure of traditional privacy laws to address modern assaults on sexual privacy. This Article focuses on the inadequacy of the process by which recipients of sexual misconduct have desirable access to these laws. Given the pervasive reluctance of many sexual misconduct recipients to come forward, this is an essential missing link in the sexual misconduct literature. If we rely on extrajudicial solutions to substitute for the judge, jury, and executioner, we are acknowledging that our legal system is broken, but are refusing to fix it. We are abandoning our commitment to due process and just compensation. And we are telling non-white women—and men—who receive sexual misconduct from non-high-profile perpetrators that they do not count.

It is essential, therefore, to focus on means to create a desirable and attainable formal process to address sexual misconduct.[48] In this Article I suggest and examine reasons why recipients of sexual misconduct do not

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at All Cost, BLOOMBERG (Dec. 3, 2018), https://www.bloomberg.com/news/articles/2018-12-03/a-wall-street-rule-for-the-metoo-era-avoid-women-at-all-cost.

[44] Elizabeth Bartholet, *#MeToo Excesses*, HARV. CRIMSON (Jan. 16, 2018), https://www.thecrimson.com/article/2018/1/16/bartholet-metoo-excesses/.

[45] *Id.*

[46] *See, e.g.*, Wexler et al., *supra* note 22; Vasundhara Prasad, *If Anyone Is Listening, #Metoo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507 (2018); Tyler J. Blake, *In Their Words: Critically Analyzing the Admission of "Me Too" Testimony in Kansas*, 67 KAN. L. REV. 853 (2019).

[47] *See, e.g.*, Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1874 (2019] ("[s]exual privacy sits at the apex of privacy values"); *see also* Kate Bolick, *Fighting Harassers and Stalkers on the Web, in Court, and in Print*, N.Y. TIMES (Aug. 13, 2019), https://www.nytimes.com/2019/08/13/books/review/nobodys-victim-carrie-goldberg-consent-donna-freitas.html ("[S]exual privacy is a right that should be protected by federal law[.]").

[48] I use the term "formal" when referring to a process that follows a prescribed and explicit set of procedural rules. I use the term "informal" to refer to a course of action that does not invoke prescribed procedural regulation.

bring formal claims against their perpetrators, and I explain why bringing civil actions regarding sexual misconduct is desirable. I propose and analyze a procedural means to make a formal system of seeking justice for sexual misconduct more attainable.[49] Specifically, I argue that under certain circumstances, sexual misconduct recipients should be permitted to bring anonymous formal civil actions against their perpetrators. While some jurisdictions currently permit such an anonymous process, the current state of the law is ad hoc, inconsistent, and unpredictable. Examining and evaluating the concerns regarding anonymous litigation, this Article proposes a reformed jurisprudence surrounding concealment of the recipient's identity in formal civil claims of sexual misconduct.

Part II of this Article develops the notion of civil redress for recipients of sexual misconduct. It examines, first, the failure of the criminal justice system in providing justice to these individuals, and second, the growing trend, at both the federal and state levels, to encourage recipients of sexual misconduct to seek justice in the civil system. The discussion illuminates the prodigious barriers sexual misconduct recipients face in the civil system, thus making its benefits largely unavailing.

Part III examines those barriers in detail. It explores the impact of shame, highlighting special concerns for male and marginalized recipients of sexual misconduct; fear of not being believed; concerns regarding repercussions to self, friends and family; and short statutes of limitations. It then examines how the permanency of the internet in the United States stifles the willingness of sexual misconduct recipients to speak up.

Part IV explores concerns regarding concealing the identity of recipients of sexual misconduct, beginning with divergent opinions regarding whether stigmatization is a natural consequence of keeping one's identity a secret. Next, the discussion turns to the American aversion to anonymous plaintiffs. Analyzing the misunderstanding of the ideal of "open courts," this Part reviews the importance of anonymity in American legal history and concludes with a focus on special concerns regarding anonymity in criminal cases.

Part V assesses lessons from the #MeToo movement. Specifically focusing on some pitfalls of relying on extrajudicial methods to address sexual misconduct, it explains why the #MeToo movement illuminates the need for recipients of sexual misconduct to be afforded the option for anonymity when seeking legal redress.

Reviewing both rules and judicial decisions, Part VI summarizes opportunities available under federal and state law for plaintiffs wishing to

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[49] There are, of course, many impediments to access to the civil justice system. In this Article, I focus on but one.

proceed pseudonymously. It includes a brief examination of the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act, which includes two alternative provisions providing for plaintiff anonymity in actions brought under that Act. Part VII concludes with a recommendation that the Federal Rules of Civil Procedure establish standards and procedures for recipients of sexual misconduct to proceed pseudonymously in civil litigation. While I stop short of suggesting that all recipients of sexual misconduct automatically be permitted to sue anonymously, it is imperative that the impediments against coming forward be a central consideration when evaluating whether to permit a recipient of sexual misconduct to litigate pseudonymously.

The recipient's fear-based choice not to pursue the case against Kobe Bryant, and Jeffrey Epstein's death both ensure that secrets about sexual misconduct are forever lost, thereby profoundly diminishing justice. Dr. Christine Blasey Ford's decision to keep her childhood experience with Brett Kavanaugh undisclosed for decades resulted in a lack of knowledge that might have altered the course of history. Permitting sexual misconduct recipients to sue their perpetrators anonymously has a paradoxical effect: its secrecy generates information. Concealment results in more transparency. For this reason, changes to the procedure regarding anonymous sexual misconduct recipients' civil claims are imperative. Resolving sexual misconduct claims through an anonymous formal process will, in the right circumstances, aid in testing claims' legitimacy, compensating recipients, deterring wrongdoers, treating the accused fairly, and engendering lasting change.

II. CIVIL REDRESS FOR RECIPIENTS OF SEXUAL MISCONDUCT

Many recipients of criminal sexual misconduct believe that the criminal judicial system will not provide justice.[50] Indeed, although incidents of sexual assault are among the highest of violent crimes, felony conviction rates for rape are less than one percent.[51] Recipients of criminal sexual misconduct are often uncomfortable with the lack of autonomy and control inherent in being, essentially, a mere witness for the state in a criminal case.[52] Furthermore, it is widely agreed that "[t]he criminal justice system provides

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[50] *See, e.g.*, RAPE, ABUSE & INCEST NAT'L NETWORK, *supra* note 20.

[51] *See* Andrew Van Dam, *Less Than 1% of Rapes Lead to Felony Conviction. At Least 89% of Victims Face Emotional and Physical Consequences*, WASH. POST (Oct. 6, 2018), https://www.washingtonpost.com/business/2018/10/06/less-than-percent-rapes-lead-felony-convictions-least-percent-victims-face-emotional-physical-consequences/?utm_term=.1b54fdad07a6.

[52] Leslie Berkseth, Kelsey Meany & Marie Zisa, *Rape and Sexual Assault*, 18 GEO. J. GENDER & L. 743, 799 (2017).

poor compensation for the severe aftereffects of rape."[53] Making matters worse, the data shows that incarceration can backfire in the long run, leading to increased rates of recidivism, rather than a reduction in future crimes.[54]

A recent rape case in which the criminal judicial system noticeably failed is that of Jacob Walter Anderson. A classmate accused Anderson of drugging and repeatedly raping her at a college fraternity party.[55] Although he was indicted on four counts of sexual assault, the district attorney accepted Anderson's plea deal for the lesser crime of unlawful restraint.[56] If Anderson were to complete three years of probation, undergo drug, alcohol, and psychological treatment, and pay a fine of $400, he would do no jail time and his criminal record would be wiped clean.[57] When asked why she entered into such a lenient plea agreement, the district attorney said "[i]t's my opinion that our jurors aren't ready to blame rapists and not victims when there isn't concrete proof of more than one victim."[58] The district attorney referred to a prior rape case that had resulted in an acquittal. She noted, "[in that case the jury] engaged in a lot of victim blaming—and the behavior of that victim and [this victim] is very similar."[59]

A similar failure of the criminal system occurred in July 2018, when a New Jersey Superior Court judge denied the prosecutors' motion to try a sixteen-year-old as an adult, notwithstanding the fact that he filmed himself "penetrating [a sixteen-year-old girl] from behind, her torso exposed, her

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[53] Patrick J. Hines, Note, *Bracing the Armor: Extending Rape Shield Protections to Civil Proceedings*, 86 NOTRE DAME L. REV. 879, 887 (2011).

[54] *See* David J. Harding, *Do Prisons Make Us Safer?*, SCI. AM. (June 21, 2019), https://www.scientificamerican.com/article/do-prisons-make-us-safer/ ("[T]here are . . . good reasons to believe that prisons might actually increase crime. The harsh prison environment could exacerbate mental health problems, make people more prone to aggression, or make them cynical and distrustful of the legal system. Prisons could isolate prisoners from friends and family who might help them find jobs eventually. Or prisoners may learn from other prisoners how to be better criminals."); *see also* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1159 n.12 (2015) (noting "the growing evidence of the destructive consequences of imprisonment, including vast allocation of public resources to incarceration at the cost of public spending in other areas such as education, diminishing crime-reductive returns associated with increases in incarceration, instability of family and community ties among high prison-sending demographics, depressed labor-market opportunities for persons with criminal convictions and consequent pressures to reoffend").

[55] Katie Mettler et al., *A Former Baylor Frat President Accused of Rape Got No Jail Time—But Now Is Barred from Graduation*, WASH. POST (Dec. 13, 2018, 5:10 PM), https://www.washingtonpost.com/education/2018/12/13/former-baylor-frat-president-accused-rape-got-no-jail-time-now-is-barred-graduation/?utm_term=.1542e3b9c57e.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] Holly Yan & Tina Burnside, *Ex-Baylor Frat President Indicted on 4 Counts of Sex Assault Won't Go to Prison*, CNN (Dec. 11, 2018, 11:52 PM), https://www.cnn.com/2018/12/11/us/baylor-ex-frat-president-rape-allegation/index.html (second alteration in original).

head hanging down"[60] and shared the video with his friends, commenting "[w]hen your first time having sex was rape."[61] The judge questioned if the episode was truly "sexual assault, defining rape as something reserved for an attack at gunpoint by strangers."[62] He emphasized that the perpetrator "came from a good family, attended an excellent school, had terrific grades and was an Eagle scout."[63] The judge admonished prosecutors for failing to explain to the girl and her family that pressing charges would "have a 'devasting effect' on [the boy's] life."[64] Likewise, the Brock Turner case in 2016, in which Turner was convicted of raping an unconscious woman behind a dumpster, yet was sentenced to a mere six months in jail, caused a national outcry.[65]

As a result of the criminal justice system's deficiencies in properly addressing sexual misconduct, and the desire to provide compensation to recipients of this misconduct, there is a growing trend, at both the federal and state levels, to encourage rape survivors to seek justice in the civil system.[66] One scholar has declared that "[t]he act of rape qualifies as a tort in all fifty states."[67] Another noted that "[t]ort suits filed by victims of sexual assault are now litigated throughout the country."[68] Professor Sarah Swan supports a triangulated structure of sexual misconduct civil litigation, whereby recipients of sexual misconduct bring tort suits not only against the perpetrators, but also those who facilitated or failed to prevent the wrongdoing.[69] She suggests that these triangulated "crimtorts" "may ultimately be able to target the social realities underlying sexual assault, and

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[60] Luis Ferre-Sadurni, *Teenager Accused of Rape Deserves Leniency Because He's from a 'Good Family,' Judge Says*, N.Y. TIMES (July 2, 2019), https://www.nytimes.com/2019/07/02/nyregion/judge-james-troiano-rape.html.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] AJ Willingham & Carma Hassan, *A Teen Was Accused of Rape, but a Judge Didn't Want Him Tried as an Adult Because He 'Comes from a Good Family'*, CNN (July 3, 2019, 4:48 PM), https://www.cnn.com/2019/07/03/us/new-jersey-rape-minor-teen-judge-case-trnd/index.html.

[65] *See generally* Claire Kebodeaux, *Rape Sentencing: We're All Mad About Brock Turner, but Now What?*, 27 KAN. J.L. & PUBLIC POL'Y 30 (2017); Julia Ioffe, *When the Punishment Feels Like a Crime*, HUFFINGTON POST (June 1, 2018), https://highline.huffingtonpost.com/articles/en/brock-turner-michele-dauber.

[66] *See* Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L. J. 1557, 1559–60 (2008) ("Even the U.S. Department of Justice—hardly a shill for the plaintiffs' bar—distributes a publication that 'encourages victim consideration of civil remedies.'").

[67] *Id.* at 1557. *But see* Sarah Swan, *Triangulating Rape*, 37 N.Y.U. REV. L. & SOC. CHANGE 403, 424 (2013) ("[T]here is no tort of rape.").

[68] Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 60 (2006).

[69] Swan, *supra* note 67, at 405.

thus have a transformative effect on the prevalence of sexual assault generally."[70] Professor Swan offers that "[t]he criminal law as it stands neither vindicates the public interest nor the private interests of women who experience sexual harm" because it does not hold responsible those broader systems or individuals who created the context in which the misconduct occurred.[71]

In March of 2019, the House of Representatives reintroduced and passed the 1994 federal Violence Against Women Act.[72] The older version of the Act had included a provision authorizing recipients of criminal sexual violence to bring civil rights claims in federal court against their assailants.[73] Although the Supreme Court struck down that provision, holding that Congress exceeded its Commerce Clause authority to enact such a statute,[74] the need for civil redress of sexual misconduct has only increased. Perpetrators continue to develop new means to violate sexual privacy. These include digital voyeurism, up-skirt photos, non-consensual pornography, deepfake sex videos, and sextortion, to name but a few.[75] Criminal prosecution of these various wrongs often requires vast resources, which many law enforcement agencies do not have.[76] Others are unwilling to expend their resources for these types of matters.[77]

In light of these deficiencies in the criminal system, many have focused on utilization of the civil system to address sexual misconduct. There are several benefits for a recipient of sexual misconduct to file a civil claim against his or her perpetrator.[78] One is the relatively more attainable "preponderance of the evidence" standard inherent in civil cases. Another advantage to pursuing the civil system is the availability of compensatory damages, which can cover damages such as physical injuries, medical

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70 Swan, *supra* note 67, at 406.

71 Swan, *supra* note 67, at 407.

72 H.R. 1585, 116th Cong. (2019).

73 34 U.S.C. § 12361(c) (2018) ("[a] person . . . who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate"); 34 U.S.C.A. § 12361 (West 2019) *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

74 *See Morrison*, 529 U.S. at 616.

75 Danielle Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1879–81 (2019).

76 *Id.*

77 *Id.*

78 *See* Krista M. Anderson, *Twelve Years Post* Morrison*: State Civil Remedies and a Proposed Government Subsidy to Incentivize Claims by Rape Survivors*, 36 HARV. J. L. & GENDER 223, 266 (2013). *But see* Leslie Berkseth, Kelsey Meany & Marie Zisa, *Rape and Sexual Assault*, 18 GEO. J. GENDER & L. 743 799–800 (2017) ("[C]ourts have been less sympathetic to privacy rights" of sexual misconduct recipients in civil suits.). A civil claim can be brought alone, or in conjunction with the pursuit of a criminal case. *See, e.g.*, Lininger, *supra* note 66, at 1567.

expenses, lost wages, and mental distress.[79] Furthermore, unlike criminal prosecutions, civil actions survive the death of the defendant.[80] Additionally, civil actions rarely implicate the constitutional rights of defendants, and in contrast to criminal actions, a sexual misconduct recipient can seek to compel the defendant's testimony in civil court, or draw adverse inferences from the defendant's refusal to provide it.[81]

Professor Swan asserts that seeking civil redress empowers recipients of sexual misconduct.[82] She notes that compensation "constitutes recognition of the violation of the [recipient's] bodily autonomy and dignity."[83] As stated in the Prefatory Note to the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act, "[w]hile criminal law can serve as an important deterrent and expression of social condemnation, civil law is better suited to compensate victims for the harm they have suffered."[84] And of course certain sexual misconduct does not qualify as a crime, which means that only the civil system is available for redress.

The concept of "restorative justice"[85] also incentivizes recipients of sexual misconduct to bring their claims in civil court as well. Lesley Wexler suggests that:

> [F]inancial compensation . . . can be an effective component of making amends. Survivors might desire money damages as concrete compensation for tangible economic losses . . . . These might include lost professional opportunities or assignments, the consequences of career interruption, and expenses for physical and mental health care. Survivors might also see money damages as serving more symbolic purposes. For example, for many,

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[79] *See* Leah M. Slyder, *Rape in the Civil and Administrative Contexts: Proposed Solutions to Problems in Tort Case Brought by Rape Survivors*, 68 CASE W. RES. L. REV. 543, 555 (2017). Furthermore, there can be a more fluid definition of the prohibited harmful conduct, and defendants in the civil realm can be broad, from employers to businesses, schools, nursing homes, foster parents, and others. *Id.*

[80] *See, e.g.*, Matt Stieb, *A Former U.S. Attorney Discusses Where Jeffrey Epstein's Legal Cases Will Go After His Death*, N.Y. MAG. (Aug. 10, 2019), https://nymag.com/intelligencer/2019/08/where-will-jeffrey-epsteins-legal-cases-go-after-his-death.html.

[81] Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 69 (2006).

[82] Swan, *supra* note 67, at 426.

[83] Swan, *supra* note 67, at 428 (internal quotations omitted).

[84] *See* UNIFORM CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURES OF INTIMATE IMAGES ACT 2 (UNIF. LAW COMM'N 2018) (prefatory note), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=45261c0e-bf4f-1e06-d026-efa5a7114201&forceDialog=0.

[85] Restorative justice is a theory of justice in which the perpetrator of a crime attempts to repair the harm to the recipient of the crime caused by the criminal behavior. *See, e.g.*, CENTER FOR JUSTICE AND RECONCILIATION, http://www.restorativejustice.com (last visited Jan. 24, 2020); *see also, e.g.*, John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1 (1999).

> money damages signal that their experience and injuries are acknowledged, serve as evidence that the offender has taken responsibility, or reaffirm their self-worth . . . . Victims deserve to be made whole under the law, and making sexual misconduct expensive for alleged abusers may have a deterrence function. The legal system provides victims of physical assaults with monetary damages for important reasons, and, for many victims, those damages might be just as important as the judicial acknowledgement of wrongdoing by the defendant.[86]

Without, however, addressing the barriers against sexual misconduct recipients coming forward and seeking formal justice, the civil system's benefits are unavailing.

III. IMPEDIMENTS TO BRINGING CIVIL SEXUAL MISCONDUCT CLAIMS.

Notwithstanding the push toward civil litigation of sexual misconduct, many sexual misconduct recipients face various impediments to bringing formal civil action against their perpetrators. In addition to the time and expense of legal proceedings,[87] shame, fear of not being believed or being labeled a gold digger, repercussions to self, friends, and family, short statutes of limitations, and the permanency of the internet are among the obstacles to coming forward. Indeed, the hashtag "#WhyIDidntReport" has been a means by which recipients of sexual misconduct "highlight the difficulties, fear, anger and shame that so often surround sexual harassment and assault" and share their reasons for not reporting their experiences.[88]

A. *Shame*

Despite the many advantages that seeking redress in the civil system can offer, few sexual misconduct recipients choose to pursue that redress. A piece in *Psychology Today* notes:

> One of the primary reasons women don't come forward to report sexual harassment or assault is shame. Shame is at the core of the intense emotional wounding women and men experience when they are sexually violated . . . . When we feel ashamed, we want

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[86] Wexler et al., *supra* note 22 (citations omitted).

[87] Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 461 (2004) (stating "[t]he expense of legal proceedings is not, of course, lost on the public. Over four-fifths of surveyed Americans believe that litigation is too slow and too costly, and about three-quarters believe that it is damaging the country's economy"); *see also* Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 478 (2010) ("[D]espite the centrality of representation in the design of legal processes, the cost of legal services today is such that many people cannot afford to hire a lawyer.").

[88] Fortin, *supra* note 25.

> to hide . . . . Sexual harassment and assault can be a humiliating experience to recount privately, let alone publicly . . . . Depending on how much a woman has already been shamed by previous abuse or by bullying, she may choose to try to forget the entire incident, to put her head in the sand and try to pretend it never happened.[89]

The ease with which one can search online for complaints concerning sexual misconduct makes this shame that much more pronounced. Professor Danielle Citron has noted that a Google search can forever portray even a successful litigant as "the complainer, or the slut who allegedly slept with the boss."[90] Thus the shame in disclosure can feel infinite, as one who comes forward knows that the details of the sexual misconduct will forever be accessible to anyone who looks.[91] Coming forward could create a Streisand effect,[92] whereby the recipient's filing of the complaint results in more interest in—and knowledge about—the events than had the recipient not come forward at all. For some, the cure might be worse than the disease.[93]

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[89] Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCHOL. TODAY (Nov. 16, 2017), https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner.

[90] Jodi Kantor, *Lawsuits' Lurid Details Draw an Online Crowd*, N.Y. TIMES (Feb. 22, 2015), http://www.nytimes.com/2015/02/23/us/lawsuits-lurid-details-draw-an-online-crowd.html?_r=1.

[91] Professors David Ardia and Anne Klinefelter published the results of an empirical study regarding how frequently "sensitive information" appeared in particular public court records. David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807 (2015). One of the categories of their study was information about "sexual activities." *Id.* at 1850. The "sexual activity" category stood out because of its relative absence and infrequent appearance in the court filings they reviewed. *Id.* at 1860. The study showed, however, that when sexual activity was indeed included in the court filings, it was there "with greater frequency than information in all of the other categories excluding [one.]" *Id.* at 1861. This implies that there is an under-filing in court of incidents that involve "sensitive information," which likely includes sexual misconduct.

[92] *See* Kraig J. Marton, Nikki Wilk & Laura Rogal, *Protecting One's Reputation – How to Clear a Name in a World Where Name Calling Is So Easy*, 4 PHX. L. REV. 53, 64 (2010) (stating "this phenomenon—where attempted censorship results in wider publication—the 'Streisand Effect'"); *see also* Robert A. Heverly, *One Piece of the Puzzle: A Private Right to Your Image in the Digital Age*, 7 ISJLP 299, 319–320 (2010) (defining the Streisand Effect as "unintentional escalation of publicity" or "a phenomenon on the Internet where an attempt to censor or remove a piece of information backfires, causing the information to be widely publicized.").

[93] It is possible, for example, to imagine the deep level of shame and sense of loss of privacy one experiences when a video of one engaging in sexual activity is non-consensually distributed on the internet. Assume, arguendo, that one could easily invoke a statute to force the offending material to be immediately removed from the internet—before there is an opportunity for anyone to view it—and damages assessed against the perpetrator. In order, however, to make this guaranteed remedy occur, the recipient must formally file public documents alleging that the sex-tape is out there. There is likely to be an inherent shame in just being the recipient of the release of this sex-tape, even if hypothetically no one is able to see it. In other words, the mere act of publicizing that one has been the recipient of a released

Men are even less likely than women to report receiving sexual misconduct.[94] Sexual misconduct that men receive is often regarded as a source of humor, as in "don't drop your soap [in the shower]" prison jokes, or a rite of passage for sports teams and fraternities.[95] Some even believe that men are incapable of being raped.[96] There is an intensity of shame experienced by male recipients of sexual misconduct, who often imagine that "masculinity 'is achieved by the constant process of warding off threats to it.'"[97]

B. *Fear of Not Being Believed or Being Labeled a "Gold Digger."*

Admitting to having received sexual misconduct runs a strong risk of being labeled a liar. As one expert put it, "[i]t's really the only crime where people doubt the victim immediately . . . . If your car was stolen, they don't say, 'Are you sure it was stolen? Why were you driving such an expensive car?'"[98] When members of U.S.A. Women's Gymnastics complained for years about the abuse they received from national team doctor Larry Nassar, they were disbelieved. Assistant Attorney General on the case Angela Povilaitis stated, "[w]hat does it say about our society that victims of sexual abuse have to hide their pain for years when they did nothing wrong? What does it say about our society when victims do come forward and they are automatically met with skepticism and doubt, treated as liars until proven true?"[99] Members of the LBGTQ community and members of other

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sex-tape might be so shameful in and of itself that the recipient will never come forward. Of course, in the real world the sex-tape would not immediately (if at all) be removed from the web.

[94] *See e.g.*, Capers, *supra* note 23, at 1273–74 (explaining that the taint of homophobia and fears of appearing weak contribute to this underreporting); *see also* Associated Press, *Some Male Sexual Assault Victims Feel Left Behind By #Metoo*, NBC NEWS (Apr. 19, 2018, 7:15 AM), https://www.nbcnews.com/news/us-news/some-male-sexual-assault-victims-feel-left-behind-metoo-n867386 ("[E]xperts say many men, because of social stigma and feelings of shame, are reluctant to speak up about the abuse they experienced or to seek professional help.").

[95] Kiran Mehta, *Male Rape Victims: Breaking the Silence*, 12 PUB. INT. L. REP. 93, 93 (2008).

[96] Phillip N.S. Rumney, *In Defence of Gender Neutrality Within Rape*, 6 SEATTLE J. FOR SOC. JUST. 481, 485 (2007).

[97] Lisa Stemple, *Male Rape and Human Rights*, 60 HASTINGS L.J. 605, 633 (2009) (quoting JEFFREY WEEKS, SEXUALITY AND ITS DISCONTENTS: MEANINGS, MYTHS AND MODERN SEXUALITIES 190 (1985)). *See also* Complaint at ¶ 23, Crews v. Venit, 2017 WL 6033561 (Cal. Super. 2017), in which actor and former professional athlete Terry Crews stated that he "never felt more emasculated and objectified" by the grouping he received at the hands of a talent agency executive.

[98] Fortin, *supra* note 25.

[99] Associated Press, *Read What Prosecutor, Judge Said Before Larry Nassar's Sentencing*, CHI. TRIBUNE (Jan. 24, 2018, 6:45 PM), http://www.chicagotribune.com/sports/international/ct-larry-nassar-judge-prosecutor-statements-20180124-story.html.

marginalized groups, such as low-income individuals, are particularly vulnerable to being disbelieved.[100]

Some sexual misconduct recipients might hesitate to seek financial compensation through a civil suit for fear of being labeled a "gold digger." Gymnast Rachael Denhollander, who was the first to go public about Larry Nassar's sexual misconduct, was "crushed" that skeptics "claimed that those of us who have filed lawsuits were ambulance chasers who were looking for a payday . . . [and] specifically called me out by name and said I'm in it for the money."[101] Similarly, Andrea Constand's use of her settlement money from a civil case against Bill Cosby was criticized. She was described as "settl[ing] right into a ritzy Toronto condo after coming to terms with the comedian" and as getting "enough money from the funnyman to score a posh apartment."[102] When *The Hill* published a story about Janice Dickinson's financial settlement with Cosby, online comments included "I knew from the very beginning that Janice Dickinson was lying . . . she would hold out for as long as possible to get the biggest settlement she could get . . . . This woman will lie in whatever direction gets her money,"[103] and "[a]ll of these women tried to get over and the media gave them a boost."[104]

Professor Lininger has addressed the perceived dichotomy between criminal rape cases, in which the accuser is perceived as fighting for public, altruistic motives, whereas civil plaintiffs are seen as seeking personal gain.[105] He notes that:

Rape victims often initiate criminal proceedings for "selfish"

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[100] Fortin, *supra* note 25 ("If it is hard for privileged women to come forward, we have to acknowledge how much harder it is for women who are marginalized to be believed."); *see generally* Mary Anne Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425 (2017).

[101] *Read Rachael Denhollander's Full Victim Impact Statement About Larry Nassar*, CNN (Jan. 30, 2018), https://www.cnn.com/2018/01/24/us/rachael-denhollander-full-statement/index.html; *see also* Debra Cassens Weiss, *How a Gymnast-Turned-Lawyer Helped Bring Larry Nassar to Justice*, ABA J. (Jan. 29, 2018), http://www.abajournal.com/news/article/how_a_gymnast_turned_lawyer_helped_bring_larry_nassar_to_justice.

[102] Wexler et al., *supra* note 22 (citing Lisa Massarella & Danika Fears, *Cosby Accuser Used Settlement to Buy Ritzy Toronto Condo*, PAGE SIX (Jan. 1, 2016), https://pagesix.com/2016/01/01/cosby-accuser-used-settlement-to-buy-ritzy-to-ronto-condo/). "Mr. Cosby's lawyers have said they intend to show that Mr. Cosby was the victim of someone who hatched a plot to siphon money from a rich entertainer." Grahan Bowley & Jon Hurdle, *Bill Cosby Jury to Hear Account That His Accuser Was Scheming*, N.Y. TIMES (Apr. 3, 2018), https://www.nytimes.com/2018/04/03/arts/television/bill-cosby-jury-to-hear-account-that-his-accuser-was-scheming.html.

[103] KillerKoala, Comment to *Janice Dickinson Reaches Settlement with Bill Cosby Insurer*, HILL (Jul. 25, 2019), https://thehill.com/blogs/in-the-know/in-the-know/454754-janice-dickinson-reaches-settlement-with-bill-cosby-insurer.

[104] Rick Manigault, Comment to *Janice Dickinson Reaches Settlement with Bill Cosby Insurer*, HILL (Jul. 25, 2019), https://thehill.com/blogs/in-the-know/in-the/know/454754-janice-dickinson-reaches-settlement-with-bill-cosby-insurer.

[105] Lininger, *supra* note 66.

> reasons: a desire for personal protection, an interest in vindication or retribution, or even a desire for compensation through restitution from defendants or payments from state victim compensation funds. Thus the interests that lead rape survivors into the criminal and civil justice systems are actually quite similar—perhaps even duplicative.[106]

Indeed, in some other cultures payment to the recipient from the perpetrator of a crime is common, expected, and considered a moral responsibility.[107]

C. *Repercussions to Reputation, Career, Friends, and Family*

One of the biggest impediments to reporting sexual misconduct in the workplace is the concern that the effect of doing so will have on the recipient's career. A recent CareerBuilder survey shows that the majority of workplace sexual misconduct recipients do not report the misconduct, for fear of losing their jobs.[108] As such, the number of *anonymous* workplace harassment suits has been rapidly increasing.[109] Being permitted to anonymously sue their employers is "an important dimension of the #MeToo movement. The same things that have prevented people from coming forward to raise allegations makes them afraid to publicly attach their name [to workplace sexual misconduct litigation.]"[110] Employees desire to hold their employers accountable for sexual misconduct, but they fear the very real consequences of using their names to do so.

Indeed, the members of U.S.A. Women's Gymnastics were told that there would be grave damages brought against their teammates and women's gymnastics as a whole if they spoke up.[111] Many employers search the web

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106 Lininger, *supra* note 66, at 1601–02.

107 *See, e.g.*, Melanie Reid, *Crime and Punishment, a Global Concern: Who Does It Best and Does Isolation Really Work?*, 103 KY. L.J. 45, 52–54 (2014) (discussing restitution in Saudi Arabia and Germany); Melissa Clack, *Caught Between Hope and Despair: An Analysis of the Japanese Criminal Justice System*, 31 DENV. J. INT'L L. & POL'Y 525, 531 (2003) ("The police [in Japan] also persuade the suspect to make an apology or partake in some other type of restitution."); David A. Suess, Note, *Paternalism Versus Pugnacity: The Right to Counsel in Japan and the United States*, 72 IND. L.J. 291, 316 (1996) ("Japanese society expects a suspect to confess, repent, and make restitution.").

108 *New CareerBuilder Survey Finds 72 Percent of Workers Who Experience Sexual Harassment at Work Do Not Report It*, CAREERBUILDER (Jan. 19, 2018), http://press.careerbuilder.com/2018-01-19-New-CareerBuilder-Survey-Finds-72-Percent-of-Workers-Who-Experience-Sexual-Harassment-at-Work-Do-Not-Report-it. Over fifty percent of those surveyed said that they did not report the sexual misconduct because they did not want to be labeled a trouble-maker or were afraid of losing their jobs. *Id.*

109 Erin Mulvaney & Hassan Kanu, *Anonymous Workplace Harassment Suits Double in the #MeToo Era*, BLOOMBERG L. (July 29, 2019), https://news.bloomberglaw.com/daily-labor-report/anonymous-workplace-harassment-suits-double-in-metoo-era.

110 *Id.*

111 Hadley Freeman, *How Was Larry Nassar Able to Abuse So Many Gymnasts for So*

when evaluating potential job candidates.[112] According to a Microsoft study, nearly eighty percent of employers use search results to make decisions about candidates, and in about seventy percent of cases, those results have a negative impact on job applicants.[113] A social media firm estimates that ninety percent of employers conduct online searches for prospective hires.[114] It is less risky to hire those unencumbered by damaged online reputations.[115]

These reputational concerns, however, are not limited to workplace sexual misconduct. For example, when a fourteen-year-old girl went public with rape allegations against a seventeen-year-old star football player in their small Missouri town, her family was nearly destroyed by the backlash. The girl's mother was fired from her job in a veterinary clinic, the girl attempted suicide, and their house was mysteriously burned down.[116] The family was forced to relocate to another city.[117]

D. *Short Civil Statutes of Limitations*

The majority of states do not designate a "sexual assault" cause of action.[118] Thus, recipients of sexual misconduct seeking civil redress often must claim civil assault, battery and/or intentional infliction of emotional distress as a cause of action.[119] The state statutes of limitations for these actions are most commonly two or three years from the date of the incident, with some as short as one year and others as long as five years.[120] These

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Long?, GUARDIAN (Jan. 26, 2018, 8:47 AM), https://www.theguardian.com/sport/2018/jan/26/larry-nassar-abuse-gymnasts-scandal-culture.

[112] *Number of Employers Using Social Media to Screen Candidates at All-Time High, Finds Latest CareerBuilder Study*, CAREERBUILDER (June 15, 2017), http://press.careerbuilder.com/2017-06-15-Number-of-Employers-Using-Social-Media-to-Screen-Candidates-at-All-Time-High-Finds-Latest-CareerBuilder-Study; *see also* Erica Swallow, *How Recruiters Use Social Networks to Screen Candidates*, MASHABLE (Oct. 23, 2011), https://mashable.com/2011/10/23/how-recruiters-use-social-networks-to-screen-candidates-infographic/#p.RPip3oYaqI.

[113] DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 8 (2014); *see also* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 352 (2014).

[114] CITRON, *supra* note 113, at 8.

[115] CITRON, *supra* note 113, at 7.

[116] Dugan Arnett, *Nightmare in Maryville: Teens' Sexual Encounter Ignites a Firestorm Against Family*, KAN. CITY STAR (Oct. 12, 2013, 9:10 PM), https://www.kansascity.com/news/special-reports/maryville/article329412.html.

[117] *Id.*

[118] *See, e.g.* Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies,* 59 SMU L. REV. 55, 70 (2006).

[119] *Id.* at 71.

[120] *See, e.g.*, *Sexual Assault Civil Statutes of Limitations by State*, FINDLAW, https://injury.findlaw.com/torts-and-personal-injuries/sexual-assault-civil-statutes-of-limitations-by-state.html (last visited Jan. 31, 2020).

brief limitations periods require swift action on the part of the would-be plaintiffs. Given the shame and other impediments to coming forward, many sexual misconduct recipients are unlikely to be inclined to file a public complaint in such a short time span. Providing the option to do so anonymously can help ensure that these recipients of sexual misconduct preserve their rights to timely seek civil redress, while permitting them to decide at a later date whether to continue to pursue the action.

E. Permanency of the Internet in the United States

Recipients of sexual misconduct often fear that if they reveal themselves publicly they will forever be tarnished by their past, instead of seen for who they are in the present and the potential that they have for the future.[121] They worry that they will be passed over—romantically, socially, and professionally—as "damaged goods."[122] The permanency and easy accessibility of the internet makes this concern even more profound. Recognizing the tremendous damaging power of the internet, the European Commission has proposed a regulation to give all European citizens the "right to be forgotten online."[123] The basic premise of the law is that it "will give all European Union citizens a right . . . for the individual user to have his or her personal online data removed from the web."[124] The United States does not have such a law, so what is available online remains so indefinitely. Many recipients of sexual misconduct consider this too high a price to pay for speaking out.

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[121] *See e.g.*, Prarthana Mitra, *All You Need to Know About the #WhyIDidntReport Movement,* QRIUS (Sept. 25, 2018), https://qrius.com/all-you-need-to-know-about-the-whyididntreport-movement/ ("Women . . . do not want this accusation to stick to their lives and career, and be defined by a single experience which is actually someone else's criminal act.").

[122] Geneva Overholser, *Why Hide Rapes?*, N.Y. TIMES (July 11, 1989), https://www.nytimes.com/1989/07/11/opinion/why-hide-rapes.html.

[123] *See* EUROPEAN COMMISSION, FACTSHEET ON THE "RIGHT TO BE FORGOTTEN RULING" (C-131/12) (2014); *see also* Press Release, An Internet Search Engine Operator Is Responsible for the Processing That It Carries out of Personal Data Which Appear on Web Pages Published by Third Parties (May 13, 2014), https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf; Jake Swearingen, *Europe's 'Right to Be Forgotten' Will Be Staying in Europe*, INTELLIGENCER (Jan. 10, 2019), http://nymag.com/intelligencer/2019/01/europes-right-to-be-forgotten-will-be-staying-in-europe.html; *see generally* Patricia Sánchez Abril & Jacqueline D. Lipton, *The Right to Be Forgotten: Who Decides What the World Forgets?*, 103 KY. L.J. 363 (2014); Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. 88 (2012); Michael L. Rustad & Sanna Kulevska, *Reconceptualizing the Right to Be Forgotten to Enable Transatlantic Data Flow*, 28 HARV. J.L. & TECH. 349, 352 (2015).

[124] Rustad & Kulevska, *supra* note 123, at 353 (citing Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (May 13, 2013), http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=E).

IV. CONCERNS REGARDING CONCEALING THE IDENTITY OF RECIPIENTS OF SEXUAL MISCONDUCT

A. *Stigmatization*

There is an ongoing debate regarding the social impact of withholding from the public the identity of recipients of sexual misconduct. Professor Deborah Denno notes "[w]hile proponents of disclosure [of a sexual assault victim's name] insist that withholding the victims' names increases the stigma[125] attached to rape, opponents claim that this very stigma justifies why rape and its victims should be treated differently."[126]

Some opponents of providing anonymity for sexual assault recipients theorize that the practice does more harm than good. They speculate that "[i]f . . . victims show they have nothing to be ashamed of . . . then rape will lose its stigma."[127] Others suggest that naming recipients affords them credibility.[128] Professor Alan Dershowitz argues that naming the accused but not the accuser is a violation of the accused's presumption of innocence until proven guilty.[129] Journalist Geneva Overholser believes that "anonymity, rather than being part of an effective solution to an unacceptable reality, contributes to its prolongation."[130] Overholser suggests that recipient anonymity (i) keeps the dimensions of sexual assault hidden; (ii) is unfair to those accused, which "feeds the fires of those disinclined to hear victims' truths," and (iii) prevents the public from fully engaging with the problem.[131] She contends that "nothing affects public opinion like real stories with real faces and names attached. Attribution brings accountability, a climate within

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[125] Professor Alena Allen has referred to stigma as "'an enduring condition, status, or attribute that is negatively valued by a society and whose possession consequently discredits and disadvantages an individual.'" Alena Allen, *Rape Messaging*, 87 FORDHAM L. REV. 1033, 1053 (2018) (quoting Gregory M. Herek, *Thinking About AIDS and Stigma: A Psychologist's Perspective*, 30 J.L. MED & ETHICS, 594, 596 (2002)).

[126] Denno, *supra* note 22, at 1116.

[127] *See* HELEN BENEDICT, VIRGIN OR VAMP: HOW THE PRESS COVERS SEX CRIMES 252 (Oxford Univ. Press 1993).

[128] *Id.* at 253.

[129] Roger Cohen, *Should the Media Name the Accuser When the Crime Being Charged Is Rape?*, N.Y. TIMES (Apr. 21, 1991), https://www.nytimes.com/1991/04/21/weekinreview/nation-should-media-name-accuser-when-crime-being-charged-rape.html ("'In this country there is no such thing and should not be such a thing as anonymous accusation. If your name is in court it is a logical extension that it should be printed in the media. How can you publish the name of the presumptively innocent accused but not the name of the accuser?' [said Alan M. Dershowitz].").

[130] Geneva Overholser, *Rape and Anonymity: A Fateful Pairing*, GENEVA OVERHOLSER (Dec. 11, 2014), http://genevaoverholser.com/2014/12/11/rape-and-anonymity-a-fateful-pairing/.

[131] *Id.*

which both empathy and credibility flourish."[132] *Newsweek* writer David Kaplan notes that "[t]he paternalism of not naming names reinforces the idea that rape is anything more than a terrible act of violence, that women should be shamed . . . . In a perfect world, . . . rape would be just another crime and society wouldn't be so cruel to its victims."[133] Feminist author Naomi Wolf believes that withholding identities of sexual misconduct recipients "lets rape myths flourish. When accusers are identified, it becomes clear that rape can happen to anyone. Stereotypes about how 'real' rape victims look and act fall away, and myths about false reporting of rape . . . can be challenged."[134] Journalist Irene Nolan says simply "we ought to name rape victims and treat them the same as victims of other crimes."[135]

> On the other hand, Professor Helen Benedict declared:
>
> [a]s long as people have any sense of privacy about sexual acts and the human body, rape will . . . carry a stigma—. . . a stigma that links [a victim's] name irrevocably with an act of intimate humiliation. To name a rape victim is to guarantee that whenever somebody hears her name, that somebody will picture her in the act of being sexually tortured.[136]

Professor Benedict wrote these words in 1992, before the advent of even the beginnings of social media.[137] Today, with the addition of the verb "google" to the Merriam-Webster dictionary in 2006, Benedict's quote would read "to name a rape victim is to guarantee that whenever somebody googles his or her name, that somebody will picture him or her in the act of being sexually tortured. And that somebody can tweet and post about it—reaching thousands of people—in a matter of seconds."

Scott Berkowitz, the founder and president of RAINN[138] stated simply, with regard to revealing their identities, "[s]urvivors need to make a decision about what's best for themselves."[139] The National Alliance to End Sexual

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[132] *Id.*

[133] David A. Kaplan, *Remove That Blue Dot*, NEWSWEEK (Dec. 15 1991, 7:00 AM), https://www.newsweek.com/remove-blue-dot-200840.

[134] Naomi Wolf, *Julian Assange's Sex-Crime Accusers Deserve to Be Named*, GUARDIAN (Jan. 5, 2011, 2:29 PM), https://www.theguardian.com/commentisfree/2011/jan/05/julian-assange-sex-crimes-anonymity.

[135] Alex S. Jones, *Editors Debate Naming Rape Victims*, N.Y. TIMES (Apr. 13, 1991), https://www.nytimes.com/1991/04/13/us/editors-debate-naming-rape-victims.html; *see also* Helen Boyle, *Rape and the Media: Victim's Rights to Anonymity and Effects of Technology on the Standard of Rape Coverage*, EUROPEAN J.L. & TECH. (2012), http://ejlt.org/article/view/172.

[136] *See* BENEDICT, *supra* note 127, at 254.

[137] *See* Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 214 (2008) ("[T]he first recognizable social network site launched in 1997.").

[138] RAPE, ABUSE & INCEST NAT'L NETWORK, *supra* note 20.

[139] Jessica Testa, *Why the "Rape Girls" Are Speaking Out*, BUZZFEED NEWS (Dec. 3,

Violence says:

> [v]ictims remain silent because they fear being subjected to the intense public scrutiny and blame that often follow being named in the media. Our culture continues to condemn the victim for rape and, as a result, an extraordinary amount of shame and silence follow the crime. Publicizing the name of a rape complainant under these conditions only deters more victims from coming forward.[140]

Further, opponents of publication of recipients' names argue that it is not the recipients' responsibility to educate the public about sexual assault, and "change must come from the individuals in society who hold stereotypical views about rape, not from the victims themselves."[141] Some say that exposure to public scrutiny is comparable to being assaulted a second time.[142] One blogger noted "[a]nonymity protects us in the face of judicial systems which, even after subjecting us to the so-called 'correct way to report violence,' do not believe our evidence, the arguments we present, or our own stories."[143]

In an ideal world, there would be no stigma to being a recipient of sexual misconduct.[144] Coming forward publicly would be met with compassion, concern, and support, not the myriad of negative consequences many sexual misconduct recipients currently experience.[145] Nonetheless, no matter how progressive our society becomes in our reaction to sexual misconduct, it should always be the sexual misconduct recipient's choice of whether he or she wants to reveal his or her experiences publicly. Recipients of sexual misconduct should not be required to choose between seeking restitution or exposing to the world details about their intimate life.

The notion of respecting control over one's sexual privacy, and the contours of what that privacy consists of, continues to grow and expand.[146]

2013, 1:31 PM), https://www.buzzfeednews.com/article/jtes/why-the-rape-girls-are-speaking-out.

[140] *Naming Victims in the Media*, NAT'L ALL. TO END SEXUAL VIOLENCE, https://www.endsexualviolence.org/where_we_stand/naming-victims-in-the-media/ (last visited Jan. 31, 2020).

[141] Denno, *supra* note 22, at 1126 (citing Paul Marcus & Tara L. McMahon, *Limiting Disclosure on Rape Victim's Identities*, 64 S.C. L. REV. 1020, 1030–36 (1991)).

[142] Kimberley Kelley Blackburn, *Identity Protection for Sexual Assault Victims: Exploring Alternatives to the Publication of Private Facts Torts,* 55 S.C. L. REV. 619, 621 (2004).

[143] Florencia Goldsman, *Dilemma Facing #MeToo: Anonymity Is Necessary*, TAKE BACK TECH BLOG, https://www.takebackthetech.net/blog/dilemmas-facing-metoo-anonymity-necessary (last visited Feb. 8, 2020).

[144] Lessening this stigma is why I choose to refer to sexual misconduct "recipients" in lieu of "victims."

[145] *See* discussion *supra* Part II.

[146] Citron, *supra* note 113, at 1879–81.

As such, giving a recipient of sexual misconduct the choice whether to disclose his or her identity in the pursuit of justice furthers the growing social emphasis on control of information. We can empower recipients of sexual misconduct to seek redress by giving them the option, but not the obligation, to remain anonymous. Indeed, Professor Citron asserts:

> [Even i]n a sex-positive, bigotry-free world . . . we would still need sexual privacy. Regardless of whether anyone judges us, we should be able to manage the boundaries of our intimate lives . . . . [W]e need . . . the ability to manage how much of our intimate lives is shared with others.[147]

If we increase the desirability to report sexual misconduct, we will have a better understanding of the data. We can encourage reporting by permitting recipients to bring civil litigation anonymously. Although anonymous litigation might create a concern about false allegations,[148] societal bias already assumes that women are lying about sexual misconduct—including women who readily come forward publicly.[149] Reporting via a formal litigation process will uphold our commitment to due process, while leading to more transparency, more accountability, more truth-finding, more deterrence, and more compensation. It might also compel courts to revisit their practices and procedures when adjudicating the sensitive and intimate aspects of sexual misconduct.[150]

One of the more recent forms of sexual privacy violation is video voyeurism, which occurs, inter alia, when a recording device is installed in a place where "one may reasonably expect to be safe from . . . intrusion or surveillance."[151] Professor Citron states that video voyeurism hijacks a recipient's ability to control access that others have to their intimate environments.[152] Requiring a plaintiff to publicly provide—without the safety of anonymity—intimate details of sexual misconduct in order to get legal relief is akin to a government-imposed form of voyeurism. This is particularly true given the media's practice of routinely scanning court filings in search of "juicy cases" to report to the public. "There [is a] saying[]

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147 Citron, *supra* note 113, at 1897.

148 *See generally* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017) (discussing that recipients of sexual assault are unlikely to seek police assistance because they are often not believed).

149 *Id.*

150 *See, e.g.*, Negar Katirai, *Retraumatization in Family Courts* 4 (Arizona Legal Studies, Discussion Paper No. 19-10, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3389573 (noting that there is a risk of retraumatization that recipients of intimate partner violence face when participating in court proceedings under current procedures).

151 *Voyeurism Law and Legal Definition,* USLEGAL, https://definitions.uslegal.com/v/voyeurism/ (last visited Feb. 9, 2020).

152 Citron, *supra* note 113, at 1909.

that [is] familiar in every news room across the country [] 'sex sells.'"[153]

Just as some choose to reveal their sexual orientation, others choose to keep this information private. Just as some choose to divulge childhood traumas, physical and mental health challenges, and myriad other issues, so too should sexual misconduct be a choice to disclose by the recipient. He or she should not have to decide whether to reveal his or her identity or remain remediless in the face of sexual misconduct. Seeking redress via participation in #MeToo is not an option for most, since most daily instances of sexual misconduct are not news stories. It is true that "[e]very year, more women make the decision . . . [to choose] openness over shame, telling their families, their neighbors, and anyone who searches for them on Google that they've been the victims of sexual assault."[154] Imbedded in this sentence, but overlooked in it, is the fact that it is the sexual misconduct recipients' *choice* to identify themselves. Sexual misconduct does not have one-size-fits-all effects, and we should not offer a one-size-fits-all process to seek justice for it.

B. *An Aversion to Anonymous Plaintiffs*

1. A Misplaced Emphasis on Open Judicial Proceedings

Opponents of plaintiff anonymity argue that the practice contravenes the importance of open judicial proceedings.[155] The presumption is that anonymous plaintiffs and open judicial proceedings are by definition mutually exclusive.[156] There is also an implicit assumption that open judicial proceedings are a per se good, without exception or qualification.[157] Most courts have accepted, without investigation, the notion that open judicial proceedings refers to a prohibition against secrecy in the judicial process.[158] The United States Supreme Court has noted that "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public

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[153] BRENDAN BRUCE, ON THE ORIGIN OF SPIN 209 (CreateSpace Independent Publishing Platform, 4th ed. 2013).

[154] Testa, *supra* note 139.

[155] *See generally* Jayne S. Ressler, *#WorstPlaintiffEver: Popular Public Shaming and Pseudonymous Plaintiffs*, 84 TENN. L. REV. 779, 819–22 (2017); Tom Isler, *White Paper: Anonymous Civil Litigants*, REP. COMM. FOR FREEDOM PRESS, https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2015/white-paper-anonymous-civil-l#_ftn10 (last visited Feb. 8, 2020).

[156] Tom Isler, *White Paper: Anonymous Civil Litigants*, REP. COMM. FOR FREEDOM PRESS, https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2015/white-paper-anonymous-civil-l#_ftn10 (last visited Feb. 8, 2020); Ressler, *supra* note 155, at 819.

[157] *Id.* at 819–20.

[158] *See generally*, Tom Isler, *White Paper: Anonymous Civil Litigants*, REP. COMM. FOR FREEDOM PRESS, https://www.rcfp.org/journals/news-media-and-law-fall-2015/white-paper-anonymous-civil-l/ (last visited Feb. 8, 2020).

concern."[159] The Court explained that open court proceedings assure the public that proceedings are conducted fairly and discourage perjury, misconduct by participants, and biased decision-making.[160] The Court proclaimed that openness promotes public understanding, confidence, and acceptance of judicial processes and results, while secrecy encourages misunderstanding, distrust, and disrespect for the courts.[161]

Nevertheless, there appears to be no agreement on specifically what constitutes open judicial proceedings.[162] Although many state constitutions include a provision that "all courts shall be open,"[163] research on this provision indicates that it is tied to the concept of "a right to a remedy," not public access to courtrooms.[164] Furthermore, "courts have never undertaken the task of discovering from where the provision came, or attempted to discern its original intent."[165] Some scholars go so far as to assert that this language was added as a carryover from language contained in the Magna Carta, without any real intent and purpose.[166] One scholar has surmised that the provision was designed to guarantee the judiciary's freedom "from corrupt influence and improper meddling."[167] Another scholar concluded that:

> [T]he early purpose of the open courts provision was to ensure that all persons would have access to justice through the courts .... [T]he various states' interpretations of the provision are inconsistent and ... the jurisprudential significance of the

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159 Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 839 (1978).

160 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980).

161 *See id.* at 569–70.

162 "[With respect to] the open courts clause[,] [t]he courts are in total disarray over how to interpret it." Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1282 (1995); *see generally* Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309 (2003).

163 *See* ALA. CONST. art. I, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; KY. CONST. § 14; LA. CONST. art. 1, § 22; MISS. CONST. art. III, § 24; NEB. CONST. art. I, § 13; OHIO CONST. art. I, § 16; PA. CONST. art. I, 11; S.C. CONST. art. I, § 9; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. i, art. 4; WYO. CONST. art. 1, § 8.

164 *See, e.g.*, Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause,* 32 RUTGERS L. J. 1005, 1006 n.5 (2001) (citing SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: A COMMENTARY UPON LITTLETON 55–56 (1642)); William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 419 (1997); David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 41–42 (1986).

165 Hoffman, *supra* note 162, at 1282.

166 *See* Hoffman, *supra* note 162, at 1284–85; Schuman, *supra* note 164, at 38–39.

167 Hoffman, *supra* note 162, at 1288, 1318.

> provision varies dramatically from state to state. In some states, it is second only to the due process clause in importance; while in other states, it is little more than an interesting historical relic.[168]

Thus, a fair interpretation of the clause is that it does not refer to third parties' rights to enter the courtroom.[169] For example, although article I, § 13 of the Texas Constitution states that "[a]ll courts shall be open,"[170] the Supreme Court of Texas has noted that that section "includes at least three separate constitutional guarantees: (1) courts must actually be operating and available; (2) the Legislature cannot impede access to the courts through unreasonable financial barriers; and (3) meaningful remedies must be afforded . . . ."[171] Another theory is that the clause is one that refers to the right to a remedy.[172] Many recipients of sexual misconduct are denied that right to a remedy when they are compelled to publicly seek redress. And

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[168] Koch, Jr., *supra* note 164, at 341.

[169] *See e.g.*, State v. Porter Superior Court, 412 N.E.2d 748, 751 (Ind. 1980) ("[T]he requirement of Art. I, § 12, that the courts be open may refer to being open to the injured for legal redress, and not to openness in the sense of being open to observation by the public and press." (citation omitted) (first citing Gallup v. Schmidt, 56 N.E. 443 (Ind. 1900); then Dodd v. Reese, 24 N.E.2d 995 (Ind. 1940)); Goodrum v. Asplundth Tree Expert Co., 824 S.W.2d 6, 9 (Mo. 1992) ("'Art. I §14 does not create rights, but is meant to protect the enforcement of rights already acknowledged by law. The right of access 'means simply the right to pursue in the courts the causes of action substantive law recognizes.'") (quoting Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503, 510 (Mo. 1991)); Meech v. Hillhaven W., Inc., 776 P.2d 488, 491 (Mont. 1989) ("[Article of Constitution governing access to court and guaranteeing remedy] guarantees only a right of access to courts to seek a remedy for wrongs recognized by common-law or statutory authority . . . ."); Mehdipour v. Wise, 65 P.3d 271, 275 (Okla. 2003) ("It is always important to recognize that the right to reasonable access to the courts is not the same thing as having a right to appear personally in court to participate in a lawsuit which has been filed there."); Kyllo v. Panzer, 535 N.W.2d 896, 901 (S.D. 2012) ("[We have] interpreted the open courts provision as a guarantee that for such wrongs as are recognized by the laws of the land the courts shall be open and afford a remedy.") (quoting Simons v. Kidd, 38 N.W.2d 883, 886 (S.D. 1949)) (internal quotations omitted); Puttuck v. Gendron, 199 P.3d 971, 978 (Utah Ct. App. 2008) ("[T]he open courts provision was intended to place 'a limitation upon the [l]egislature to prevent that branch of the state government from closing the doors of the courts against any person who has a legal right which is enforceable in accordance with some *known* remedy.'") (alteration in original) (quoting Brown v. Wightman, 151 P. 366, 366–67 (Utah 1915)); *see also* LOUIS F. HUBENER, *Rights of Privacy in Open Courts: Do They Exist?, in* 2 EMERGING ISSUES OF STATE CONSTITUTIONAL LAW 189, 192 (1989) ("These provisions originated, however, as guarantees of legal remedies, not to ensure that courts would be open for spectators."). *But see* KFGO Radio Inc., v. Rothe, 298 N.W.2d. 505, 511 (N.D. 1980) ("[T]he provision in Article I, §22 of the Constitution of North Dakota which states that 'all courts shall be open' stands for the proposition that officers of the courts, along with jurors, witnesses, litigants, and the general public have the right of admission to court proceedings."). *See generally* Ressler, *supra* note 155, at 822.

[170] TEX. CONST. art. I, § 13.

[171] Trinity River Auth. v. URS Consultants, 889 S.W.2d 259, 261 (Tex. 1994) (citing Tex. Ass'n of Business v. Tex. Air Control Bd., 852 S.W.2d 440, 448 (Tex. 1993)).

[172] *See* Schuman, *supra* note 164, at 35–36.

regardless of the meaning of the "open courts" ideal, the public can keep a watchful eye on the workings and integrity of the judiciary without knowing the plaintiff's name.

2. Ignorance of the Importance of Anonymity in American Legal History

Anonymity has been of instrumental importance in United States legal history. As the celebrated Broadway musical *Hamilton* reminds us, the evolution of the United States came about in no small part from the interchange of anonymously disseminated ideas.[173] "Between 1789 and 1809, six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published anonymous political writings or used pen names."[174] The Federalist Papers and their rebuttal were authored under a pseudonym.[175] One journalist has gone so far as to suggest that "it is highly probable that the United States would not even exist without anonymous speech. Sadly, we have forgotten this lesson somewhere in the intervening years. Today, anonymous speech is too often demonized, derided as 'dark,' or otherwise dismissed for its lack of 'transparency.'"[176]

In 1995, the Supreme Court recognized that "[a]nonymity is a shield from the tyranny of the majority . . . . It thus exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation . . . at the hand of an intolerant society."[177] Indeed, the Supreme Court has held that anonymous speech is afforded the same constitutional First Amendment rights as speech of which the author is known.[178]

In September 2018, *The New York Times* published an anonymous op-ed credited to a senior official in the Trump administration.[179] While many, including the president's opponents, criticized the anonymous aspect of the piece, historians were more forgiving. One wrote in *The Washington Post*

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[173] Bradley Smith, *What Hamilton Teaches Us About the Importance of Anonymous Speech*, WASH. POST (Nov. 26, 2018), https://www.washingtonpost.com/opinions/what-hamilton-teaches-us-about-the-importance-of-anonymous-speech/2016/11/08/dd17ae3c-a53d-11e6-8fc0-7be8f848c492_story.html?utm_term=.95bcd4fdaabc.

[174] DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET, 139–40 (2007).

[175] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 343 n.6 (1995); *Primary Documents in American History: The Federalist Papers*, WEB GUIDES, https://www.loc.gov/rr/program/bib/ourdocs/federalist.html (last visited Aug. 1, 2019).

[176] Smith, *supra* note 173.

[177] *McIntyre*, 514 U.S. at 357.

[178] *See id.*

[179] *See* Anonymous, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html.

that "anonymous publication has been an essential feature of American democracy since its beginning. It has long allowed vulnerable voices to . . . speak truth to power."[180] Anonymity was employed in part to permit readers to focus on the substance, rather than the author of the work, and to "embody the broader public."[181] Even as early as the mid-1700s "authors feared what might happen to them if they used their real names."[182] Today, "[w]hen power is aligned against truth, truth must have a safe harbor from power."[183]

Permitting plaintiffs to sue their perpetrators of sexual misconduct in civil court is a means by which to speak truth to power. Indeed, the name and identifying information of recipients of sexual misconduct is not important public information. It is the underlying facts of the claim to which the public must have access.[184] In other words, in the overwhelming number of cases it is not who the plaintiff is that is relevant to the public, but rather the specifics of the cause of action. Indeed, the public does not know the identities of the underlying plaintiffs in most class action litigation, yet these types of actions often do the most to both illuminate the public regarding various legal issues and vindicate public interests. In most cases it is simply immaterial to the public if the plaintiff is John, Bob, Mary, or Jane. "Case law indicates that any risk . . . of allowing a plaintiff to proceed anonymously is minimized when the 'issues raised are purely legal and do not depend on identifying the specific parties.'"[185] The public has little legitimate interest in knowing the identity of a party suing if that party's identity has little or no bearing on the case itself.[186] One court noted that "[i]f a plaintiff is granted leave to proceed using a fictitious name, the public is not denied its right to attend the proceedings or inspect the orders or opinions of the court on the

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[180] Jordan E. Taylor, *Anonymous Criticism Helped Make America Great,* WASH. POST (Sept. 8, 2018, 3:45 PM), https://www.washingtonpost.com/outlook/2018/09/08/anonymous-criticism-helped-make-america-great/?utm_term=.ecc758771677.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] The plaintiff's identity, however, is usually essential information for the defendant. I propose a solution for this dichotomy of concerns in my recommendations, *infra* Part VIII.

[185] Doe v. Merten, 219 F.R.D. 387, 394 n.22 (E.D. Va. 2004) (citing Doe v. Alaska, No. 96-35873, 1997 WL 547941, at *1 (9th Cir. Sept. 2, 1997)). *See also* Doe v. Pittsylvania Cty., Va., 844 F. Supp. 2d 724, 731 (W.D. Va. 2012). *But see* 4 Exotic Dancers v. Spearmint Rhino, No. CV 08-4038 ABC, 2009 WL 250054, at *3 (C.D. Cal. Jan. 29, 2009) ("[i]dentifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts." (citing United States v. Stoterau, 524 F.3d 988, 1013 (9th Cir. 2008) (quoting Doe v. Blue Cross & Blue Shield United of Wis., 112 F.3d 869, 872 (7th Cir. 1997) (alteration in original omitted)).

[186] *See, e.g.*, Freedom from Religion Found., Inc. v. New Kensington-Arnold Sch. Dist., No. 2:12-cv-1319, 2012 U.S. Dist. LEXIS 179531, at *9 (W.D. Pa. Dec. 19, 2012) (stating in a case in which the plaintiffs sought a declaration that a monument of the Ten Commandments at the local high school was unconstitutional that "the issue in this case does not turn on the identity of the Plaintiff[s].").

underlying constitutional issue."[187] Recently the Southern District of New York stated that "because the matter does not involve government actions but only private actions, there is a weak public interest in revealing Plaintiff's name."[188] Emily Doe, the sexual misconduct recipient in the Brock Turner case, noted in 2016 that she would remain anonymous because "[f]or now, I am every woman."[189] She has since *chosen* to come forward publicly, and has written a book about her ordeal using her real name.[190]

Several other countries specifically address the right of recipients of sexual misconduct to remain unknown. Under UK law, recipients of sexual assault are automatically given lifelong anonymity, under the Sexual Offences (Amendment) Act 1992.[191] That Act states in part:

> Anonymity of victims of certain offences. (1) Where an allegation has been made that an offence to which this Act applies has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed.[192]

This includes those who have made an allegation of rape which is being investigated by police, in the trial process, or has not resulted in a conviction.[193] Identifying victims and complainants also includes publishing details which may allow the public to work out who the victim is.[194] This can include publishing details of family members or photographs—even if they are blurred or pixelated—which can lead to their identification.[195]

In Ontario, Canada, Rule 14.06(1) of the Rules of Civil Procedure requires that "[e]very originating process shall contain a title of the proceeding setting out the names of all the parties and the capacity in which they are made parties, if other than their personal capacity."[196] Courts in

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[187] Doe v. Pittsylvania Cty., 844 F. Supp. 2d 724, 728 (citing Doe v. Barrow Co., 219 F.R.D. 189, 193 (N.D. Ga. 2003)).

[188] Order at 2, Doe v. Landry's Inc., Case 1:18-cv-11501-LAP (S.D.N.Y. 2019), http://src.bna.com/Kb1.

[189] Jaime Gordon, *'I Am Every Woman': Stanford Victim on Why She's Staying Anonymous (For Now)*, USA TODAY (June 9, 2016, 1:00 PM), https://www.usatoday.com/story/college/2016/06/09/i-am-every-woman-stanford-victim-on-why-shes-staying-anonymous-for-now/37418335/.

[190] *See* CHANEL MILLER, KNOW MY NAME (Viking Press 2019).

[191] *See* DAVID BANKS & MARK HANNA, MCNAE'S ESSENTIAL LAW FOR JOURNALISTS 113–27 (20th ed. 2009).

[192] Sexual Offences (Amendment) Act 1992, c. 34, § 1 (Eng.).

[193] BANKS & HANNA, *supra* note 191, at 114.

[194] BANKS & HANNA, *supra* note 191, at 115.

[195] *See id.*

[196] Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 14.06 (1) (Can.),

Ontario, however, have "the authority . . . to dispense with strict compliance of [Rule 14.06(1)].[197] Indeed, an Ontario court applied a three-part test to determine whether a plaintiff could proceed under a pseudonym: (i) whether there is a serious issue to be tried; (ii) whether there is a likelihood of irreparable harm if the court denies permission for the plaintiff to proceed under anonymously; and (iii) does the balance of convenience favor the plaintiff's anonymity.[198] Ontario courts are predisposed to permit sexual misconduct recipients to proceed under a pseudonym, since "[i]n civil sexual assault cases, public interest weighs in favour of anonymity, as protecting the identity of sexual assault victims contributes to the likelihood that the assault will be reported and has been shown to increase victims' co-operation with authorities."[199] Other Canadian provinces hold similarly.[200]

India's Penal Code was amended in 1983 to criminalize publication of the identity of victims of certain sexual offenses.[201] The anonymity is automatic, although there are exceptions when the victim waives anonymity or when the police investigating the case deem publication to be in the public interest.[202] Anyone who violates the law can be sentenced to up to two years in jail.[203] The statute does not forbid courts from using the victim's name, but the Indian Supreme Court held that courts should also refrain from using victims' names.[204] India also passed a law in 2013 to combat workplace

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https://www.ontario.ca/laws/regulation/900194. *See also* Commencement of Proceedings, Rule 14, Originating Process (Can.), https://www.courts.pe.ca/sites/www.courts.pe.ca/files/Forms%20and%20Rules/A-14.pdf.

197 Doe v. O'Connor, [2010] ONSC 1830 20100511 Docket: CV-09-00378309 (citing RJR-MacDonald, Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311).

198 *Id.*

199 Anna Matas, *The Use of Pseudonyms in Civil Cases*, CANADIAN LAWYER (Dec. 7, 2015), https://www.canadianlawyermag.com/article/the-use-of-pseudonyms-in-civil-cases-3108/.

200 *See, e.g.*, Court of Queen's Bench Rules, Reg. 553/88, C.C.S.M., c. C280 (Can.), https://web2.gov.mb.ca/laws/rules/qbr1e.php#r14.

201 Indian Evidence Act, §114(A) 1972; YKA Youth Ki Awaaz, *The Evolution of Anti-Rape Laws in India Since 1860*, WTD NEWS, (Aug. 9, 2018), https://www.youthkiawaaz.com/2018/08/indias-anti-rape-laws-the-evolution/ ("Also, it was this amendment that banned the publication of victims' identity and prohibited the 'character assassination' of rape victims in court. It's thanks to this amendment that rape victims now have pseudonyms like 'Nirbhaya.'"); *Access to Justice for Women, India's Response to Sexual Violence in Conflict and Social Upheaval*, U. CAL., BERKELEY 6 (October 2015), https://www.law.berkeley.edu/wp-content/uploads/2015/04/AccesstoJustice.pdf ("Indian law prohibits the disclosure of identifying information about victims of sexual violence," citing India PEN. CODE § 228A ("Whoever prints or publishes the name or any matter which may make known the identity of any person against whom [a sexual offense] is alleged or found to have been committed shall be punished.")).

202 India PEN. CODE § 228A.

203 *Id.*

204 Himachal Pradesh v. Shree Kant Shekari, AIR 2004 SC 4404 (India), https://indiankanoon.org/doc/722945/.

sexual harassment, which includes a provision that complainants must have the option of remaining anonymous.[205] Several other countries have similarly afforded recipients of sexual misconduct various forms of anonymity protection when pursuing formal redress.[206]

C. *Criminal Cases*

The vast number of recipients of sexual misconduct suffer emotional and physical consequences—a higher number than robbery or assault victims—and much of it severe.[207] Sexual assault, however, is one of the most underreported violent crimes, with about three out of four incidents

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[205] *See* The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, § 16, Acts of Parliament, 2013 (India).

[206] *See, e.g.*, Bermuda Criminal Code Act 1907, §329(C)(1) (Berm.), http://www.bermudalaws.bm/laws/Consolidated%20Laws/Criminal%20Code%20Act%201907.pdf ("After a person has been arrested and charged with a sexual offence, no matter likely to lead members of the public to identify a person as the complainant in relation to that charge shall be published in a written publication available to the public, or be broadcast, except as authorized by a direction given under this section."); Guyana Criminal Law (Offences) Act, Title 7, §78(1), Anonymity of Complainant in Rape Cases (Guy.), https://www.oas.org/juridico/spanish/mesicic2_guy_criminal_law_act.pdf ("After a person is accused of a rape offence, no matter likely to lead members of the public to identify a person as the complainant in relation to that accusation shall either be published in Guyana in a written publication available to the public or be broadcast in Guyana except as authorized by a direction given in pursuance of this section."); Criminal Law (Rape) Act, 1981, (Act No. 10/1981) §§7–8 (Ir.), http://www.irishstatutebook.ie/eli/1981/act/10/enacted/en/print#sec6 (protecting the identities of the complainant and accused), The Sexual Offences Act, (2009) Cap. 253 § 7 (7) (Kenya), https://www.ilo.org/wcmsp5/groups/public/—-ed_protect/—-protrav/—-ilo_aids/documents/legaldocument/wcms_127528.pdf ("In the exercise of the powers provided for under section 39 (13) of the Act, regard shall be had to the need to protect the names and identity of the complainant, victims and other witnesses, especially where such persons have been declared vulnerable by a court of law during criminal proceedings."); Criminal Procedure Act, 2011, s 203, (N.Z.), http://www.legislation.govt.nz/act/public/2011/0081/147.0/DLM3360350.html; An Act Providing Assistance and Protection for Rape Victims, Establishing for the Purpose a Rape Crisis Center in Every Province and City, Authorizing the Appropriation of Funds Therefor, and for Other Purposes, Rep. Act No. 8505, §5, (Feb 13, 1998) (Phil.), https://www.lawphil.net/statutes/repacts/ra1998/ra_8505_1998.html ("At any stage of the investigation, prosecution and trial of a complaint for rape, the police officer, the prosecutor, the court and its officers, as well as the parties to the complaint shall recognize the right to privacy of the offended party and the accused. Towards this end, the police officer, prosecutor, or the court to whom the complaint has been referred may, whenever necessary to ensure fair and impartial proceedings, and after considering all circumstances for the best interest of the parties, order a closed-door investigation, prosecution or trial and that the name and personal circumstances of the offended party and/or the accused, or any other information tending to establish their identities, and such circumstances or information on the complaint shall not be disclosed to the public.").

[207] Franks, *supra* note 100, at 447 ("The psychological after-effects of sexual assault can be lifelong and crippling, hindering victims' ability to feel in control of their bodies and of their most intimate decisions.").

incidents unreported.[208] This means that recipients have no redress for the wrongs done to them, and perpetrators remain free to assault again. Many recipients of sexual assault choose not to report because of feelings of shame and blameworthiness.[209] Often this shame comes in the form of "victim blaming."[210]

As a result of many of these concerns, and to encourage recipients of sexual assault to come forward, some states enacted laws to prohibit the media from disclosing the names of alleged rape victims. Indeed, as early as the beginning of the 1900s, some states passed laws making it an offense to publish the names of recipients of sexual assault. South Carolina passed one such statute in 1909. The statute, entitled "Misdemeanor to Publish Name of Person Raped," stated:

> [W]hoever publishes, or causes to be published, the name of any woman, maid, or woman-child, upon whom the crime of rape or an assault with intent to ravish has been committed or alleged to have been committed, in this State in any newspaper, magazine or other publication shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars or imprisonment of not more than three years.[211]

Additional states, such as Georgia, Florida, and Wisconsin, followed with similar laws.[212] Many of these statutes were updated decades later, with

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208 RAPE, ABUSE & INCEST NAT'L NETWORK, *supra* note 20.

209 *See* discussion *supra* Part II.

210 "Victim-blaming" can involve the media's portrayal of rape myths that perpetuate a culture that shifts the blame from the sexual predators to the victims. John Slack, *Twitter Wars: How the Kentucky General Assembly and Courts Should Strike Back Against Virtual Victim-Blaming in Sexual Assault Cases*, 56 U. LOUISVILLE L. REV. 411, 412 (2019) ("While attempts have been made over the years to prevent victim-blaming in sexual assault cases, especially with the introduction of rape shield laws in the 1970s, many of these implementations are becoming outdated with the increasing advancement and use of technology in the world."). *See also* Courtney Fraser, *From "Ladies First" to "Asking for It": Benevolent Sexism in the Maintenance of Rape Culture*, 103 CALIF. L. REV. 141, 158–59 (2015) (discussing how women who fail to conform to normative and traditional femininity are often described as "asking for it" when they report sexual assault).

211 Act of Mar. 1, 1909, no. 129, 1909 S.C. Acts 208 (codified as amended at S.C. CODE ANN. § 16-3-730 (2019)). This statute remains law today.

212 Name of Assaulted Female, Publication of Prohibited, no. 278, 1911 Ga. Laws 179–80 (codified as amended at GA. CODE ANN. § 16-6-23, *invalidated by* Dye v. Wallace, 553 S.E.2d 561, 561 (Ga. 2001) ("[I]t shall be unlawful for any newspaper publisher, or any other person to print and publish, or cause to be printed . . . in the State of Georgia the name or identity of any female who may have been raped, or upon whom an assault with intent to commit rape may have been made."); Act of May 23, 1911, ch. 6226, 1911 Fla. Laws 195 (codified as amended at FLA. STAT. § 794.03 (2018) ("It is hereby made unlawful for any person . . . to print and publish . . . in any newspaper, magazine, periodical or any other publication in the State of Florida the name or identity of any female raped or upon whom an assault with intent to commit rape has been committed or may be committed."); Act of May

only slight stylistic revisions made.[213] Other jurisdictions permitted a sexual assault recipient to bring a common law invasion of privacy tort action against one who disseminated her identity.[214]

Laws prohibiting the media from disclosing the names of alleged rape recipients were met with mixed reaction from the courts. While some upheld the validity of the statutes,[215] most, including the Supreme Court, ruled that the media's First Amendment right to publish the identity of a sexual assault recipient renders these statutes unconstitutional.[216] As a result, various states enacted penal codes entitling recipients of criminal sexual misconduct to be identified in court proceedings and documents using pseudonyms.[217] In other words, if the media legally cannot be prohibited from reporting on and disclosing the contents of public records, states will ensure that those records, compiled by the government, would not contain recipient-identifying information. There is no impact on the First Amendment, since the media can freely report on whatever is contained in the court files. As the Sixth Circuit noted, "[The] interest in protecting the victims of sexual violence from humiliation . . . has prompted states . . . to advocate against the publication [by government actors] of rape victims' names."[218]

27, 1925, ch. 201, 1925 Wis. Sess. Laws 276–77 (codified as amended at WIS. STAT. § 942.02 (1955) (repealed 1975) ("Any person who shall publish . . . in any newspaper, magazine, periodical or circular . . . the identity of a female who may have been raped or subjected to any similar criminal assault, shall be punished by imprisonment . . . or by fine . . . or by both such fine and imprisonment.").

213 *See, e.g.*, Act of Mar. 27, 1979, no. 23, 1979 S.C. Acts 23 (amending text of South Carolina law to read "criminal sexual conduct" instead of "rape").

214 Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 U. KAN. L. REV. 963, 980 n.101 (2016) ("In addition to battery, common causes of action for sexual assault include intentional infliction of emotional distress, assault, outrage, false imprisonment, and invasion of privacy." (citing Ellen Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 75–84 (2006)).

215 Dorman v. Aiken Commc'ns, Inc., 398 S.E.2d 687, 689 (S.C. 1990); State v. Evjue, 33 N.W.2d 305, 162 (Wis. 1948).

216 *See* Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) ("We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) (holding that a state may not impose sanctions on the press for publication of a rape victim's name obtained from judicial records that are maintained in connection with a public prosecution and that themselves are open to public inspection).

217 *See* Daniel M. Murdock, *A Compelling State Interest: Constructing a Statutory Framework for Protecting the Identity of Rape Victims*, 58 ALA. L. REV. 1177, 1187 (2007) (citing, *inter alia*, ALASKA STAT. § 12.61.140 (LexisNexis 2019); CAL. PENAL CODE § 293 (West 2019); CONN. GEN. STAT. § 54-86e (2019); FLA. STAT. § 794.024 (2018); MASS. GEN. LAWS ch. 265, § 24C (2017); NEV. REV. STAT. § 200.3771(1) (2017); N.Y. CIV. RIGHTS LAW § 50-b (McKinney 2019); OHIO REV. CODE ANN. § 2907.11 (West 2019); S.D. CODIFIED LAWS § 23A-6-22 (West 2019); TEX. CODE CRIM. PROC. ANN. art. 57.02(b) (West 2019)).

218 Bloch v. Ribar, 156 F.3d 673, 685 (6th Cir. 1998); *see generally* Donald Dripps et al.,

> For example, California's Penal Code provides:
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> (a) [T]he court, at the request of the alleged victim, may order the identity of the alleged victim in all records and during all proceedings to be either Jane Doe or John Doe, if the court finds that such an order is reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or the defense.
>
> (b) If the court orders the alleged victim to be identified as Jane Doe or John Doe pursuant to subdivision (a) and if there is a jury trial, the court shall instruct the jury, at the beginning and at the end of the trial, that the alleged victim is being so identified only for the purpose of protecting his or her privacy pursuant to this section.[219]

In *People v. Ramirez*, the defendant was convicted of assault with intent to commit rape, attempted rape, sexual battery, and failing to register as a sex offender.[220] Ramirez challenged section 293.5 of the California Penal Code as unconstitutional.[221] The California Court of Appeals upheld the constitutionality of the statute, stating "[t]here can be little dispute that the state's interest in protecting the privacy of sex offense victims is extremely strong and fully justified."[222]

In another California Court of Appeals case, the court upheld the trial court's order, pursuant to California Penal Code section 293.5, to withhold the victim's name from the case and the jury.[223] The Court of Appeals noted, "we conclude the confrontation clause did not require the trial court to allow the jury to hear the victim's name in this case . . . . [I]t was reasonable for the trial court to conclude the victim's privacy interest outweighed defendants' interest in communicating her name to the jury."[224]

Connecticut has also enacted a statute protecting the identity of victims, which states:

> The name and address of the victim of a sexual assault . . . and such other identifying information pertaining to such victim as determined by the court, shall be confidential and shall be

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Panel Discussion, *Men, Women and Rape*, 63 FORDHAM L. REV. 125 (1994) (discussing "why rape is different" and outlining some of the legal reforms in place and those still needed to be implemented); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991) (discussing rape prosecution reforms, including rape shield laws).

219 CAL. PENAL CODE § 293.5 (West 2019).

220 People v. Ramirez, 64 Cal. Rptr. 2d 9 (Cal. Ct. App. 1997).

221 *Id.* at 7.

222 *Id.* at 12–13.

223 People v. Alaniz, No. F072954, 2018 WL 2277483, at *5 (Cal. Ct. App. May 18, 2018).

224 *Id.*

> disclosed only upon order of the Superior Court, except that (1) such information shall be available to the accused in the same manner and time as such information is available to persons accused of other criminal offenses, and (2) if a protective order is issued in a prosecution under any of said sections, the name and address of the victim, in addition to the information contained in and concerning the issuance of such order, shall be entered in the registry of protective orders . . . .[225]

Applying that Connecticut statute, the Connecticut Court of Appeals noted:

> [T]he court's use of pseudonyms to refer to the victim was proper and a well-established method for courts to comport with § 54–86e, which provides for the confidentiality of the name and address of a victim of sexual assault. The court's subsequent action in striking references to the victim's full name from the record was little more than an effort to maintain compliance with the statutory requirements and was not improper."[226]

Similarly, the Florida Crime Victims Protection Act provides "[t]he state may use a pseudonym instead of the victim's name to designate the victim of a crime,"[227] while Ohio "does not require that a victim be named in an indictment when the identity of the victim is not an essential element of the crime."[228]

V. LESSONS FROM #METOO

The World Justice Project has observed that informal justice can develop when "legal institutions fail to provide effective remedies . . . ."[229] Such is what occurred on October 15, 2017, when Alyssa Milano tweeted: "[i]f you've been sexually harassed or assaulted, write 'me too' as a reply to this tweet."[230] By the next morning, Milano's tweet was trending as number one on Twitter's ranking system.[231] The #MeToo hashtag was tweeted

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225 CONN. GEN. STAT. § 54-86e (2019); *see also* State v. Molnar, 829 A.2d 439, 443 n.1 (Conn. App. Ct. 2003) ("Pursuant to General Statutes § 54-86e, we will refer to the victim only as 'S'"), *aff'd sub nom*, State v. Eric M., 858 A.2d 767 (Conn. 2004).

226 *Molnar*, 829 A.2d at 446.

227 FLA. STAT. ANN. § 92.56(3) (2018).

228 State v. Jones, 110 N.E.3d 1049, 1058 (Ohio Ct. App. 2018) (quoting State v. Cicerchi, 915 N.E.2d 350, 358 n.7 (Ohio Ct. App. 2009)).

229 *Factors of the Rule of Law*, WORLD JUSTICE PROJECT, https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019/factors-rule-law (last visited July 30, 2019); *see generally* VICTOR A. UKMAR, SENTENCED BY THE COURT OF SOCIAL MEDIA (2018), http://muep.mau.se/bitstream/handle/2043/25796/Thesis%20II_Victor%20A.%20Ukmar_June%202018_FINAL%20%20copy.pdf?sequence=1&isAllowed=y.

230 L. Camille Hebert, *Is "Metoo" Only a Social Movement or a Legal Movement Too?*, 22 EMPL. RTS. & EMPLOY. POL'Y J. 321, 321–22 (2018).

231 N. Sayej, *Alyssa Milano on the #MeToo Movement: "We're Not Going to Stand for It*

almost a million times within forty-eight hours, and Facebook had "more than 12 million posts, comments, and reactions in less than 24 hours."[232] While some recipients of sexual misconduct posted specific details about their experiences, many chose not to disclose anything other than to simply say "#MeToo."[233] Milano's tweet brought the prevalence of sexual misconduct into the forefront of public discourse, and the "digital tsunami" that followed led some high-profile offenders to receive informal justice.[234] Famed author Margaret Atwood said simply, "[t]he #MeToo moment is a symptom of a broken legal system."[235]

One might propose that, given the inadequacies in our formal legal systems, extrajudicial methods (such as the #MeToo movement) be the vehicles by which sexual misconduct is addressed, notwithstanding their lack of formal procedural norms. After all, many famous perpetrators' misdeeds were known for years, but it was #MeToo that finally exposed them and extracted retribution.[236] Professor Jessica Clarke writes largely in support of the movement's extrajudicial procedures, at least in limited circumstances.[237] She suggests that as long as journalists investigate and report sexual misconduct accusations according to professional journalistic norms, #MeToo has procedural legitimacy.[238] Professor Lesley Wexler likewise states that, in the #MeToo context, journalism that follows the Society of Professional Journalists' Code of Ethics "accord[s] with Americans' basic notion of fairness."[239] Further, these scholars emphasize that journalists vet allegations according to multiple sources, thereby ensuring the allegations' accuracy. Specifically, Professor Clarke argues

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Any More.", GUARDIAN (Dec. 1, 2017), https://www.theguardian.com/culture/2017/dec/01/alyssa-milano-mee-too-sexual-harassment-abuse.

[232] *More Than 12M "Me Too" Facebook Posts, Comments, Reactions in 24 Hours,* CBS NEWS (Oct. 17, 2017), https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/.

[233] *See generally* Hosterman, Johnson, Stouffer, & Herring, *Twitter, Social Support Messages and the #MeToo Movement,* 7 J. SOC. MEDIA SOC'Y 69 (2018). Social scientists have emphasized #MeToo's role in providing essential messages of social support. *Id.*

[234] Ukmar, *supra* note 229, at 7. *See also* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement,* 103 MINN. L. REV. 230, 231–32 (2018) (discussing the aftermath of the Milano tweet and its influence on accusations against television hosts Charlie Rose, Matt Lauer, Tavis Smiley, and several high-ranking hosts at National Public Radio; Disney producer John Lasseter, actor Kevin Spacey, comedian Louis CK, chefs Mario Batali and John Besh, and photographers Mario Testino and Bruce Weber).

[235] Margaret Atwood, *Am I a Bad Feminist?* GLOBE & MAIL (Jan. 13, 2018), https://www.theglobeandmail.com/opinion/am-i-a-bad-feminist/article37591823.

[236] *Id.*

[237] *See generally* Clarke, *supra* note 38.

[238] Clarke, *supra* note 38, at 53.

[239] Lesley Wexler, *2018 Symposium Lecture: #Metoo and Procedural Justice,* 22 RICH. PUB. INT. L. REV. 181, 186 (2019).

that because journalists reporting on #MeToo stories do so primarily when they uncover accusations from multiple sexual misconduct recipients, and not that of a lone recipient, their reports should be deemed trustworthy.[240] Most notably, in further support of the reliability of #MeToo's extrajudicial procedures, Professor Clarke emphasizes that "[i]n the #MeToo context, reporters are wary of coming forward with stories in which accusers refuse to be named publicly."[241]

Following sound journalistic norms is not equivalent to adhering to legal procedural rules which have been developed and tested over time. Extrajudicial methods to address sexual misconduct have an uncertain end game—is their objective to contain or to rehabilitate or to punish? Formal legal complaints permit the recipient of sexual misconduct to tell his or her own story, while journalists have the power and incentive to "find a story," and edit the information they receive. And, of course, journalists are not immune to "getting the story wrong"—faulty journalism is likely to blame for ruined lives on a much greater scale than are false legal allegations.[242] It is a slippery slope to make journalists our investigators, fact-finders, and decision-makers, and public shaming our enforcement mechanism of those decisions. Indeed, it is the very power of public shaming that discourages many sexual misconduct recipients to come forward publicly, for they fear that they too will be met with the same fate. Our legal system already has a system in place for being judged by one's peers—the jury.

Furthermore, requiring allegations from multiple sexual misconduct recipients gives an accused perpetrator, in essence, "a free bite of the apple." If the accused perpetrator engages in sexual misconduct once—let alone multiple times—with one recipient, Ciarke and others imply that the perpetrator is outside of the orbit of #MeToo. This is but one example of #MeToo's under-inclusivity. It is akin to creating a condition precedent where the law requires none. Moreover, it discourages recipients from coming forward, and sends the message to each individual recipient that her experience alone is insignificant and unworthy of attention. It harkens back to a time when corroboration was a de facto normative predicate for proving

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240 Clarke, *supra* note 38, at 60–61. "[I]n #MeToo discussions . . . in the very least, an accusation must be supported by more evidence than a single victim's statements." Notwithstanding this assertion, however, Clarke states that "by [her] count," 50 of the 202 #MeToo cases listed by *The New York Times* involved a single accuser. Clarke, *supra* note 38, at 61.

241 Clarke, *supra* note 38, at 76.

242 *See, e.g*, Hunter Paulie, *Why I Quit: Local Newspapers Can Needlessly Ruin Lives for Empty Clicks,* GUARDIAN (Aug. 8, 2017), https://www.theguardian.com/media/2017/aug/08/local-news-crime-reporting-quitting-journalism ("[Journalists] blow small crimes out of proportion and ruin people's lives for pennies.").

sexual misconduct.[243]

Most importantly, the Society of Professional Journalists states that "[a]nonymous sources are sometimes the only key to unlocking that big story, throwing back the curtain on corruption, [and] fulfilling the journalistic mission[] of . . . [being the] informant to the citizens."[244] NPR's Ethics Handbook states "[w]e use information from anonymous sources to tell important stories that otherwise would go unreported."[245] It is not the case that permitting a claimant to be anonymous increases the likelihood of receiving false information. Doing so simply increases the likelihood of receiving the information. A *New York Times* report noted that "[s]ome readers suggest that sources are more likely to be honest if their names are published, and more likely to lie if granted anonymity. But reporters in many areas know that the opposite can be true. On the record, people in sensitive positions will often simply mouth the official line; they will be candid only if they know their name won't be used."[246] Indeed, Professor Deborah Tuerkheimer asserts that "networks featuring anonymous accusers are proliferating in the age of #MeToo. With the help of technology, women are increasingly able to share accounts of sexual violation without divulging their identities."[247]

Although extrajudicial methods such as #MeToo might provide just deserts to some perpetrators of sexual misconduct, it is courts that provide justice. With the limitations of using market solutions to address sexual misconduct, it is essential for recipients to have the option to formally seek civil redress for this behavior—anonymously if they so choose. Professor Tuerkheimer suggests that:

> there are risks . . . if official mechanisms for processing allegations of abuse do not simultaneously evolve so as to become . . . the primary repositories for these allegations. A meaningful societal response to sexual misconduct must entail a commitment to activating formal mechanisms of accountability.[248]

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[243] *See* Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Sexual Assault*, 84 B.U. L. REV. 945, 955–59 (2004).

[244] Michael Farrell, *Anonymous Sources*, SOCIETY OF PROFESSIONAL JOURNALISTS, https://www.spj.org/ethics-papers-anonymity.asp (last visited July 31, 2019).

[245] *NPR Ethics Handbook, Transparency*, NPR, https://www.npr.org/about-npr/688413859/transparency#anonymoussources (last visited July 31, 2019).

[246] Philip B. Corbett, *How the Times Uses Anonymous Sources*, N.Y. TIMES (June 14, 2018), https://www.nytimes.com/2018/06/14/reader-center/how-the-times-uses-anonymous-sources.html.

[247] Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo Era,* 2019 U. CHI. L. F. 273, 281 (2019).

[248] *Id.* at 297–98.

Given that informal anonymous allegations are increasing, an essential element of that evolution should include procedural progress regarding formal claimant anonymity.[249]

VI. CURRENT LAWS PERMITTING RECIPIENTS OF SEXUAL MISCONDUCT TO PROCEED ANONYMOUSLY

A. *Federal Statutes and Cases*

The Federal Rules of Civil Procedure on their face prohibit plaintiffs from bringing claims anonymously. Rule 10(a) of the Federal Rules of Civil Procedure requires that "[t]he title of the complaint must name all the parties."[250] Notwithstanding this directive, several federal courts have authorized the plaintiff to proceed using a pseudonym.[251] Indeed, the United States Supreme Court has implicitly condoned the practice of permitting pseudonymous plaintiffs in several cases—most famously in Roe v. Wade, and most recently in 2013—yet none of these cases involved sexual misconduct.[252]

The majority of federal courts examine five basic factors in order to determine which plaintiffs to permit to proceed pseudonymously:

1. whether the plaintiff would risk suffering injury if publicly identified;
2. whether the plaintiff is challenging governmental activity;
3. whether the plaintiff would be compelled to admit her intention to engage in illegal conduct, thereby risking criminal prosecution;
4. whether the plaintiff would be required to disclose information of the utmost intimacy; and
5. whether the party defending against a suit brought under

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[249] Recipients of sexual misconduct should be free to disclose their experiences in whichever manner they chose. That is to say, I am not suggesting that extrajudicial processes should not be available for anyone who wishes to utilize them. I am, however, urging that formal channels of seeking redress become more accessible.

[250] FED. R. CIV. P. 10(a); *see also* FED. R. CIV. P. 17(a)(1) ("An action must be prosecuted in the name of the real party in interest").

[251] *See* Ressler, *supra* note 155, at 811–12.

[252] *See, e.g.*, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013); Doe v. Reed, 561 U.S. 186 (2010); City of San Diego v. Roe, 543 U.S. 77 (2004) (pseudonymous police officer's challenge to termination of employment); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (pseudonymous students' challenge to public high school's "football prayer policy"); Honig v. Doe, 484 U.S. 305 (1988) (pseudonymous student's challenge to district's policy of excluding disabled children from classroom for dangerous or disruptive conduct); Plyler v. Doe, 457 U.S. 202 (1982) (pseudonymous children's challenge to exclusion of illegal aliens from public schools); Roe v. Wade, 410 U.S. 113 (1973) (pseudonymous woman's challenge to criminal abortion statute).

a pseudonym would be prejudiced.[253]

While there should be little doubt that disclosure of being a recipient of sexual misconduct would be revelation of information of the utmost intimacy, not all federal courts have used this factor to protect recipients of sexual misconduct from revealing their identities in order to proceed. For example, a case in the Central District of California involved a civil lawsuit brought by a woman claiming that basketball star Derrick Rose raped her.[254] The judge in that case denied that plaintiff's motion to proceed anonymously, stating that allowing her to do so "would communicate 'a subliminal comment on the harm the alleged encounter with the defendant has caused the plaintiff.'"[255] In 2017, the United States District Court for the District of Kansas stated, "plaintiff has cited no authority for the proposition that an adult plaintiff asserting claims relating to an alleged sexual assault is automatically entitled to the use of a pseudonym. The weight of authority holds to the contrary."[256]

Similarly, in denying the plaintiff's motion to proceed under a pseudonym, the United States District Court for the District of Nevada declared that "this is a civil suit for damages, where plaintiff is seeking to vindicate primarily her own interests. This is not a criminal case where rape shield laws might provide some anonymity to encourage victims to testify to vindicate the public's interest in enforcement of our laws . . . . Indeed, the public's interest in bringing defendants to justice for breaking the law—assuming that they did—is being vindicated in the criminal proceedings."[257]

In contrast, the United States District Court for the Northern District of Indiana permitted a male student who was expelled from Purdue University for alleged sexual misconduct to sue the University under a pseudonym, asserting that "if Plaintiff is successful in proving that the charges of sexual misconduct against him were unfounded and that Defendants' procedures violated his due process rights, the revelation of Plaintiff's identity 'would

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[253] *See, e.g.* Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 190 (2d Cir. 2008) (internal quotations and citations omitted); *see also Filing Pseudonymously: Federal*, WITHOUT MY CONSENT, http://withoutmyconsent.org/50state/filing-pseudonymously/federal (last visited Feb. 2, 2020).

[254] *See generally* Order, Jane Doe v. Derrick Rose, Case 2:15-cv-07503-MWF-JC (Cent. D. Cal., 2016) (Document 264); *see also* Joel Rubin, *A Rape Lawsuit Against NBA Star Derrick Rose Raises Key Question: Should an Accuser Be Allowed to Stay Anonymous?*, L.A. TIMES (Oct. 3, 2016), http://www.latimes.com/local/california/la-me-rose-rape-lawsuit-anonymous-20161003-snap-story.html.

[255] *See generally* Order at 4, Jane Doe v. Derrick Rose, Case 2:15-cv-07503-MWF-JC (Cent. D. Cal., 2016) (Document 264) (quoting Doe v. Cabrera, 307 F.R.D. 1, 10 (D.D.C. 2014) (internal citation omitted).

[256] Doe v. Haskell Indian Nations U., 266 F. Supp. 3d 1277, 1289 n.5 (D. Kan. 2017).

[257] Doe v. JBF RAK LLC, No. 2:14–cv–00979–RFB–GWF, 2014 WL 5286512, at *7 (D. Nev. Oct. 15, 2014).

further exacerbate the emotional and reputational injuries he alleges.'"[258] The United States District Court for the Southern District of New York recently emphasized, in a sexual harassment suit, "permitting Plaintiff to proceed anonymously should not prejudice Defendants. They will be able to defend the action equally as well if Plaintiff proceeded under his real name."[259]

Some current media-reported federal cases in which the plaintiffs are proceeding anonymously include, inter alia, (i) a woman alleging that the rapper Nelly sexually assaulted her;[260] (ii) six former female associates suing Jones Day for gender discrimination, pregnancy discrimination, and comments and conduct that derogates women;[261] (iii) a class action lawsuit accusing Dartmouth College of failing to promptly address sexual misconduct allegations against three former professors;[262] (iv) three former associates suing Morrison & Foerster for pregnancy discrimination;[263] (v) a former Baylor University student suing the school for its "shaming, embarrassing, and hostile manner" in its investigation of her rape allegations against Baylor football players;[264] (vi) a man suing Landry's, Inc., in a suit where his superior sexually assaulted him and gave him a sexually transmitted disease;[265] and (vii) a woman alleging that the former Southern Baptist Convention president shamed and ignored her after she informed him that she had been stalked and raped at gunpoint by a male seminary student

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[258] Doe v. Purdue U., 321 F.R.D. 339, 342 (N.D. Ind. 2017) (quoting Doe v. Colgate U., 5:15-cv-1069 (LEK/DEP), 2016 WL 1448829, at *3 (N.D.N.Y. Apr. 12, 2016)).

[259] Doe v. Landry's Inc., 1:18-cv-11501-LAP (S.D.N.Y. 2019) (Document 21), http://src.bna.com/Kb1.

[260] Associated Press, *Rapper Nelly Seeks Dismissal of Lawsuit Alleging Sexual Assault*, USA TODAY (Jan. 25, 2019, 3:09 PM), https://www.usatoday.com/story/life/2019/01/25/rapper-nelly-seeks-dismissal-lawsuit-alleging-sexual-assault/2679779002/.

[261] Tiffany Hsu, *Jones Day Law Firm Is Sued for Pregnancy and Gender Discrimination by 6 Women*, N.Y. TIMES (April 3, 2019, 11:38 PM), https://www.nytimes.com/2019/04/03/business/jones-day-pregnancy-discrimination.html.

[262] CNN Wire, *Dartmouth Says Letting Women Use Pseudonyms in Sexual Misconduct Lawsuit Is Burdensome and Confusing*, WTVR (May 15, 2019, 8:29 PM), https://wtvr.com/2019/05/15/dartmouth-says-letting-women-use-pseudonyms-in-sexual-misconduct-lawsuit-is-burdensome-and-confusing/.

[263] Stephanie Russell-Kraft, *Morrison & Foerster Sued for Pregnancy Bias*, BLOOMBERG L. (Apr. 30, 2018, 3:56 PM), https://news.bloomberglaw.com/us-law-week/morrison-foerster-sued-for-pregnancy-bias.

[264] Phillip Ericksen, *New Title IX Lawsuit Accuses Baylor of Botching Rape Case Involving Football Players*, WACO TRIBUNE (Mar. 28, 2019), https://www.wacotrib.com/news/courts_and_trials/new-title-ix-lawsuit-accuses-baylor-of-botching-rape-case/article_5a4df2fa-6877-5aef-a658-4fe11adf1672.html.

[265] Doe v. Landry's Inc., 1:18-cv-11501-LAP (S.D.N.Y. 2019) (Document 21), http://src.bna.com/Kb1; https://www.courtlistener.com/docket/8382212/doe-v-br-guest-holdings-llc/.

over the course of two years.[266]

B. *State Statutes and Cases*

In contrast to the Federal Rules, some state civil procedural statutes contain explicit authorization of anonymous plaintiffs—often in cases involving sexual abuse of minors.[267] Forms referring to anonymous plaintiffs are included in a few states' civil procedure codes, noting that anonymous filing is permitted where appropriate.[268] State case law concerning pseudonymous plaintiffs in civil cases is wide-ranging. Many state courts defer for guidance on this matter to federal courts.[269] But state courts often rule on this issue in an inconsistent and ad hoc manner. For example, the Connecticut Superior Court recently permitted plaintiffs to proceed anonymously in two cases involving sexual abuse,[270] while in another similar sexual abuse case, the same court denied the plaintiff's request to use a pseudonym.[271] The Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act, which addresses the disclosure of private, sexually explicit images without consent, includes two alternative provisions providing for plaintiff anonymity in actions brought under that Act:

> SECTION 5. PLAINTIFF'S PRIVACY.
>
> Alternative A In an action under this [act] a plaintiff may proceed using a pseudonym in place of the true name of the plaintiff under [applicable state law or procedural rule].

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[266] Robert Downen & Sarah Smith, *New Lawsuit: Patterson, Former Southern Baptist Leader, Humiliated Woman Who Reported Rape*, HOUS. CHRON. (June 21, 2019), https://www.houstonchronicle.com/news/houston-texas/houston/article/New-lawsuit-Patterson-former-Southern-Baptist-14028012.php.

[267] *See Filing Pseudonymously: State,* WITHOUT MY CONSENT, https://withoutmyconsent.org/50state/filing-pseudonymously/by-state/ (last visited Mar. 1, 2020).

[268] *See, e.g.*, 1 WEST'S PA. FORMS, CIVIL PROCEDURE § 8:19 (Pennsylvania); 1A VERNON'S OKLA. FORMS 2D, CIV. PROC. § 1.24 (2d ed.) (Oklahoma).

[269] *See, e.g.*, Doe v. Weiss, No. 09-1071, 2010 Ark. LEXIS 176, *3–5 (Ark. 2010); Unwitting Victim v. C.S., 47 P.3d 392, 400–01 (Kan. 2002); Doe v. Burkland, 808 A.2d 1090, 1096–97 (R.I. 2002); Doe v. Bruner, No. CA2011-07-013, 2012 WL 626202 (Ohio Ct. App. 2012); Doe v. Town of Plainfield, 860 N.E.2d 1204, 1208–09 (Ind. Ct. App. 2007); Doe v. Heitler, 26 P.3d 539, 541–42 (Colo. App. 2001); Doe v. Shady Grove Adventist Hosp., 598 A.2d 507, 513–14 (Md. Ct. Spec. App. 1991); Doe v. Bodwin, 326 N.W.2d 473, 475 (Mich. Ct. App. 1982); Roe v. Gen. Hosp. Corp., No. CIV.A. 11-991-BLS1, 2011 WL 2342737, at *1 (Mass. Super. 2011).

[270] *See* Doe v. Firn, No. CV065001087S, 2006 WL 2847885, at *1 (Conn. Super. Ct. 2006); Doe v. Curtis, 2010 WL 936781, at *1 (Conn. Super. Ct. 2010).

[271] Doe v. St. John, No. CV055000443S, 2006 WL 1149224 (Conn. Super. Ct. 2006). Also compare Doe v. Martin, No. CV044001231, 2004 WL 2669274, at *1 (Conn. Super. Ct. 2004) (denying adult victim of sexual abuse the right to sue pseudonymously); Doe v. McNamara, No. CV095022796S, 2009 WL 1334992, at *1 (Conn. Super. Ct. 2009) (permitting adult victim of sexual abuse the right to sue pseudonymously).

> Alternative B In an action under this [act]: (1) the court may exclude or redact from all pleadings and documents filed in the action other identifying characteristics of the plaintiff under [applicable state law or procedural rule]; (2) a plaintiff to whom paragraph (1) applies shall file with the court and serve on the defendant a confidential information form that includes the excluded or redacted plaintiff's name and other identifying characteristics; and (3) the court may make further orders as necessary to protect the identity and privacy of a plaintiff].
>
> *Legislative Note: If a state's rules of civil procedure do not provide for the possibility of a plaintiff to use a pseudonym in a civil action, use Alternative B.*
>
> Comment The fear of further notoriety or abuse deters many victims from pursuing legal remedies. This fear can be mitigated by clear procedures allowing victims to use pseudonyms. Recognizing that some procedures already exist and vary widely among states, this section leaves the particulars of the process to other applicable state law.[272]

There are several pseudonymous plaintiff media-reported sexual misconduct cases currently pending in state civil courts, including, inter alia, (i) a former talent agent at the Agency for the Performance Arts alleging that her former employer maintained a "toxic, pervasive, and sexually abusive environment";[273] (ii) a cancer patient alleging that a gynecologist sexually assaulted her;[274] (iii) a truck driving student seeking compensation from a trucking company that employed an instructor who raped her;[275] and (iv) a woman alleging her former boss and owner of popular local restaurants raped her in his hotel room.[276]

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[272] UNIF. CIV. REMEDIES FOR UNAUTHORIZED DISCLOSURES OF INTIMATE IMAGES ACT (UNIF. LAW COMM'N 2018), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=45261c0e-bf4f-1e06-d026-efa5a7114201&forceDialog=0.

[273] Hailey Konnath, *Ex-Agent Says APA Fosters 'Sexually Abusive Environment'*, LAW360 (June 19, 2019), https://www.law360.com/articles/1171096/ex-agent-says-apa-fosters-sexually-abusive-environment.

[274] Richard Winton, *Cancer Patient Says UCLA Gynecologist Sexually Assaulted Her, Faults University Inaction,* L.A. TIMES, (June 18, 2019), https://www.latimes.com/local/lanow/la-me-ucla-gynecologist-sued-molester-sexually-battery-heaps-20190618-story.html.

[275] Cristina Flores, *Truck Driving Student Sues Company After She Was Raped*, KUTV (June 17, 2019), https://kutv.com/news/local/truck-driving-student-sues-company-after-she-was-sexually-assaulted.

[276] Amy McCarthy, *Houston Restaurant Manager Named in $1 Million Sexual Assault Lawsuit Resigns Post*, EATERY HOUS. (June 21, 2019), https://houston.eater.com/2019/6/21/18700903/joshua-martinez-sexual-assault-lawsuit-houston.

VII. RECOMMENDATIONS AND CONCLUSION

The United States should follow the lead of the United Kingdom and enact a federal law similar to the Sexual Offence (Amendment) 1992 law, addressed not to the media, but to government officials. Specifically, lawmakers should promulgate federal rules of civil procedure establishing standards and procedures for recipients of sexual misconduct to proceed pseudonymously in civil litigation. While I stop short of suggesting that all recipients of sexual misconduct automatically be permitted to sue anonymously, it is imperative that the impediments against coming forward be a central consideration when evaluating whether to permit a recipient of sexual misconduct to litigate pseudonymously.[277] While the fine details of these procedures are beyond the scope of this paper, under my proposal, a sexual misconduct recipient would file an action in civil court with a pseudonym such as "Jane Doe." The plaintiff would then move the court to proceed under the pseudonym, which motion the court would presumptively grant. The burden would be on the defendant to show how granting this motion would be prejudicial to the defense of the case. The plaintiff's anonymity would extend only to court filings and any other documents that would be released to the public.[278] In other words, the defendant would have the same information about the plaintiff had the plaintiff filed the case under his or her own name.

The court would be free to modify this ruling at any point in the proceeding should the circumstances change. The defendant would be permitted to file motions stating objections to the plaintiff's use of a pseudonym as the case progresses, and the court could even review the issue sua sponte. But the criteria for re-evaluation would be limited to whether the public's lack of knowledge of the plaintiff's identity impairs (i) the defendant's ability to defend the case, or (ii) the public's ability to understand the legal issues in the case. Protections against the defendant's release of the plaintiff's identity should be contained in a court order against disclosure. This order would, in essence, be no different than the sorts of protective orders that courts routinely issue during the course of litigation.

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[277] I urge the Judicial Conference to propose uniform rules for the Supreme Court to adopt regarding standards for proceeding pseudonymously. The particulars, however, are beyond the scope of this paper.

[278] Documents that could become public could be redacted to remove reference to the specific identity of the plaintiff without losing the nature of their content. Such a provision is already contained in the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act. *See generally* UNIF. CIV. REMEDIES FOR UNAUTHORIZED DISCLOSURES OF INTIMATE IMAGES ACT (UNIF. LAW COMM'N 2018), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=45261c0e-bf4f-1e06-d026-efa5a7114201&forceDialog=0.

A proposed order could be fashioned as follows:

ORDER

Upon consideration of plaintiff's Motion for Permission to Proceed in Pseudonym and for Protective Order, and defendant's response thereto, it is hereby **ORDERED** that said Motion is **GRANTED. IT IS FURTHER ORDERED** that:

1. Plaintiff is allowed to proceed in pseudonym and the docket shall continue to reflect plaintiff's name as Jane Doe.
2. Plaintiff will be referred to as Jane Doe in all depositions, pleadings and other documents related to this litigation, and the plaintiff shall be allowed to endorse documents related to this litigation using the pseudonym, Jane Doe.
3. The identity of Jane Doe and her address shall be available to the attorneys of record and in-house counsel for defendant, who shall not disclose or permit disclosure thereof, except to the following persons:
    a) Their law partners, associates and persons employed in the law offices of such attorneys, and other in-house counsel;
    b) The employees of defendant who have knowledge of the facts alleged in the Amended Complaint;
    c) Bona fide outside experts and their employees, not on the staff of any party, consulted by such attorneys in the prosecution or defense of the claims herein;
    d) A person whose deposition is to be taken in this action, but only to the extent necessary for the deposition; and
    e) Any person who potentially possesses information that is relevant to plaintiff's claims or defendant's defense.
4. Each person to whom the identity of Jane Doe is to be disclosed pursuant to this Order, shall agree in advance:
    a) That he or she will not disclose the identity of Jane Doe to any person not entitled to know her identity under this Order; and
    b) That he or she will not use the identity of Jane Doe except in connection with the prosecution or defense of the claims herein.
5. In the event defendant believes it is necessary in the defense of the claims herein for defendant to disclose the identity of Jane Doe to persons other than those specified in this Order, defendant shall communicate with plaintiff's counsel and if agreement cannot be reached in writing, the matter shall be determined by the Court.
6. Attendance at any part of any deposition of which the identity of

Jane Doe is disclosed shall be limited to those to whom disclosure of such information can be made pursuant to this Order, and only after they have complied with the terms of this Order.

7. In all proceedings held before this Court, including trial, all counsel, witnesses and court personnel present shall refer to plaintiff by her pseudonym, Jane Doe.
8. In all proceedings held before this Court, including trial, plaintiff's photograph shall not be taken by members of the media and plaintiff's picture shall not be drawn by the courtroom artists.
9. The terms of this Order shall remain in effect until further Order of this Court.

AND IT IS SO ORDERED[279]

My proposal is not without its flaws. As discussed earlier, keeping sexual misconduct recipients' identities a secret can perpetuate the aura of shame. There would also be added expenses to the plaintiff, related to the motion seeking to proceed under the "Jane Doe" pseudonym. A jury would be free to consider the plaintiff's desire to shield his or her identity when evaluating credibility. This could limit the effectiveness of proceeding under a pseudonym. From the courts' perspective, the process of assessing a request for plaintiff anonymity would increase the courts' workload, and it could create further inefficiencies in the already-overburdened judicial system. For example, it could be difficult for a court to determine situations in which a defendant's ability to present a defense would be affected by the plaintiff's anonymity. And even after making such a determination, fashioning a suitable protective order in a particular case might be exceptionally challenging. Many cases dealing with anonymous plaintiffs are not appealed, so there likely will not be much precedent to offer guidance. And, while it might be simple to redact the plaintiff's name from relevant documents, redacting identifying information contained therein could be anything but straightforward.

Furthermore, there is a risk that permitting recipients of sexual misconduct to proceed anonymously will make their claims even less likely to be believed than when they identify themselves. Societal confidence in the judicial system could be eroded if the public believes that anonymity influenced the outcome of the case.[280] Additionally, bringing a civil complaint opens a plaintiff up to counterclaim for defamation, the defense

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[279] *See* Ressler, *supra* note 155 (citing Doe v. Provident Life & Acc. Ins. Co., 176 F.R.D. 464, 470–71 (E.D. Pa. 1997)).

[280] See discussion, *supra*, Part III.B.

of which can be lengthy, expensive, and demoralizing.[281] Nonetheless, in the right circumstances, permitting recipients of sexual misconduct to bring anonymous civil actions will aid in testing claims' legitimacy, inspiring others to bring similar actions, compensating recipients, deterring wrongdoers, treating the accused fairly, and engendering lasting change.

The criminal justice system is replete with shortcomings in confronting sexual misconduct and providing proper redress to its recipients. Extrajudicial movements such as #MeToo are insufficient to properly address the problem. Many have suggested that the civil system is the best venue to oppose and remedy sexual misconduct. But many sexual misconduct recipients are reluctant to come forward publicly. One means to encourage them to do so is to permit, under certain circumstances, recipients of sexual misconduct to anonymously sue their perpetrators. Permitting sexual misconduct recipients to sue their perpetrators anonymously has a paradoxical effect: its secrecy generates information. Resolving sexual misconduct claims through an anonymous formal process will aid in testing claims' legitimacy, compensating recipients, deterring wrongdoers, treating the accused fairly, and engendering lasting change.

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[281] But note that disclosing sexual misconduct via social media or other informal means does not insulate the accuser from being sued for defamation. He or she might even be compelled in such a suit to publicly reveal his or her identity and the intimate facts sought to be kept private. *See, e.g.*, Megan Graham, *An Anonymous Instagram Account That Aimed to Take down the Advertising World's Sexual Harassers May Soon Be Unmasked*, CNBC (Apr. 14, 2019), https://www.cnbc.com/2019/04/14/anonymous-diet-madison-avenue-instagram-account-could-soon-be-unmasked.html; Brittany Martin, *A Lawsuit Against the Creator of the "Shitty Media Men List" Raises Interesting Questions*, L.A. MAG (Jan. 15, 2019), https://www.lamag.com/citythinkblog/shitty-media-men-list/ ("Elliot's complaint . . . includes . . . unnamed defendants "officially referred to as 'Jane Does (1-30)'. . . . His counsel intends to use the discovery process . . . to get their identities.").