

Sexual Harassment and Solidarity

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ABSTRACT

In the waning months of 2017, Americans endured an almost daily barrage of news reports describing sexual harassment by powerful men in entertainment, media, politics, and law. The media focus continued in 2018 as reactions proliferated, ranging from walkouts at Google by workers protesting the company's handling of sexual-misconduct allegations against its male executives, to new initiatives by government agencies and private firms designed to reduce the incidence of sexual harassment and to promptly remediate it when it occurs. Although sexual harassment had been headline news before—most notably, during the 1991 Anita Hill–Clarence Thomas debacle—never had so many victims joined hands and come forward demanding change. The media spotlight presented a tremendous opportunity to reframe sexual harassment from an individual, personal, and idiosyncratic instance of sexual desire to a common abuse of gender and economic power affecting millions of working women and men on a daily basis. Feminist legal scholars have known for years that expectations about appropriate gender roles create an environment where sexual harassment functions to protect male privilege. Nevertheless, the message that sexual harassment is a systemic feature of workplace gender inequality never reached the general public. Instead, the mainstream media's systematic focus on sexual harassment as a twisted manifestation of male sexual desire grabbed headlines and implied that when the harasser is discharged, the story ends. But sexual harassment is about much more than men behaving badly. It is a structural problem linked to unequal pay and occupational segregation by sex.

One might think that labor unions would come forward as advocates for such a large segment of workers suffering economic disadvantage in the workplace. Yet despite the frequent use of the word “solidarity” in media reports about #MeToo, organized labor was conspicuously absent from the dialogue. Although union leaders made public statements denouncing sexual harassment and promised to redouble union efforts to eradicate it, most disclaimed legal responsibility for preventing and addressing sexual harassment in the workplace. Not all the blame for labor's passive stance can be laid at labor's doorstep, however. Unions are hamstrung by a legal structure that creates a fundamental role conflict where they represent a workforce that includes both potential harassers and victims, and National Labor Relations Act protection for worker concerted action for mutual aid has been cabined by courts and the National Labor Relations Board to the point that labor's tradition of solidarity is barely recognizable.

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INTRODUCTION

In the waning months of 2017, Americans endured an almost daily barrage of news reports describing sexual harassment by powerful men in entertainment, media, politics, and law.¹ The stories began in October with allegations against Hollywood movie producer Harvey Weinstein by prominent Hollywood actresses.² Rose McGowan and Ashley Judd accused Weinstein of promising to advance their ca-

¹ NBC News compiled a list of thirty-eight influential men accused of sexual harassment in 2017, including a United States Senator, a former President, Hollywood executives, and influential men in arts and entertainment. See Dan Corey, *Since Weinstein, Here’s a Growing List of Men Accused of Sexual Misconduct*, NBC NEWS (Jan. 10, 2018, 4:50 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546> [<https://perma.cc/MR5X-N664>].

² For a detailed timeline of the allegations against Weinstein, see *Harvey Weinstein Time-*

reers in return for sexual favors.³ Eventually, the number of actresses accusing Weinstein of sexual harassment grew to more than 80.⁴ Ultimately Weinstein was fired by the board of his own company.⁵ The accusations against Weinstein emboldened other women (and men) who had been harassed at work to come forward with their stories in a powerful display of solidarity. In the movie and television industry, multiple men went public with accusations against Academy Award–winning actor Kevin Spacey.⁶ Charges against other iconic entertainment figures followed, including Academy Award–winning actor Dustin Hoffman, who was accused of sexual assault and exposing himself to a minor.⁷

The news media soon found itself implicated in the sexual harassment reporting phenomenon. Perhaps the most notorious allegations involved Matt Lauer of NBC News, anchor of the popular *Today* show.⁸ Lauer was reportedly a “serial harasser . . . , preying on many of the female producers who worked for him.”⁹ The women had complained to NBC management, but previous complaints had been ignored in light of the lucrative advertising surrounding *Today*.¹⁰ In November, CBS News fired veteran talk show host and journalist Charlie Rose after eight women accused him of sexual harassment

line: *How the Scandal Unfolded*, BBC NEWS (May 25, 2018), <https://www.bbc.com/news/entertainment-arts-41594672> [<https://perma.cc/VHL7-KKQW>].

³ See *id.*

⁴ Corey, *supra* note 1.

⁵ See BBC NEWS, *supra* note 2.

⁶ See Maria Puente, *Kevin Spacey Scandal: A Complete List of the 15 Accusers*, USA TODAY (Nov. 16, 2017, 12:04 AM), <https://www.usatoday.com/story/file/2017/11/07/kevin-spacey-scandal-complete-list-15-accusers/835739001> [<https://perma.cc/69L9-FA5G>] (summarizing the allegations of 15 males against Mr. Spacey). The Spacey scandal is a useful reminder that sexual harassment is not “only a women’s issue,” nor is it necessarily about sexual desire; it is about power. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1700, 1748 (1998) (pointing out that sexual harassment “include[s] men teasing other men about sexual potency or interest” as part of the competition for privilege in the workplace).

⁷ See Daniel Holloway, *Dustin Hoffman Accused of Exposing Himself to a Minor, Assaulting Two Women*, VARIETY (Dec. 14, 2017, 2:26 PM) <https://variety.com/2017/biz/news/dustin-hoffman-2-1202641525/> [<https://perma.cc/8UUP-J2TT>]. In addition to these allegations, earlier in 2017 three other women came forward with allegations of sexual harassment against Hoffman, including a production assistant and an actress for a Broadway production of *Death of a Salesman* and a producer for the television network National Geographic. *Id.*

⁸ See Erik Ortis & Corky Siemaszko, *NBC News Fires Matt Lauer After Sexual Misconduct Review*, NBC NEWS (Nov. 30, 2017, 7:39 AM), <https://www.nbcnews.com/storyline/sexual-misconduct/nbc-new-fires-today-anchor-matt-lauer-after-sexual-misconduct-n824831> [<https://perma.cc/E3WS-WH3N>] (reporting six women had come forward with allegations of sexual harassment and sexual assault against Lauer).

⁹ *Id.*

¹⁰ See *id.*

and unwanted advances.¹¹ National Public Radio editor Michael Oreskes resigned after two female journalists accused him of unwanted sexual advances when he worked for the New York Times.¹² In December, New Yorker Magazine dismissed its Washington correspondent, Ryan Lizza, over what the magazine described as “improper sexual conduct.”¹³ And at the NFL Network and ESPN, five former National Football League players, including Hall-of-Famer Marshall Faulk, were suspended “due to allegations in a court filing . . . accusing them of repeated sexual harassment when they were at the NFL Network.”¹⁴

Sexual harassment allegations also rocked the political world. In early December, Senator Al Franken of Minnesota announced his resignation following sexual harassment allegations by seven women.¹⁵ Representative John Conyers, the longest-serving member of Congress, resigned after a number of former aides accused him of unwanted advances.¹⁶ And in a stunning upset victory in the U.S. Senate race in Alabama, Democrat Doug Jones defeated Republican Roy

11 See Daniella Silva & Kalhan Rosenblatt, *Charlie Rose Fired by CBS, PBS and Bloomberg Over Sexual Misconduct Allegations*, NBC NEWS (Nov. 21, 2017, 7:14 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/tv-host-charlie-rose-suspended-apologizes-after-sexual-harassment-accusations-n822691> [<https://perma.cc/2E6F-22RT>] (reporting CBS News had terminated Rose’s employment effective immediately after revelation of “extremely disturbing and intolerable behavior”).

12 See Brian Stelter & Aaron Smith, *Top NPR Editor Resigns Amid Allegations of Harassment*, CNN MONEY (Nov. 1, 2017, 12:36 PM), <https://money.cnn.com/2017/11/01/media/michael-oreskes-npr/index.html> [<https://perma.cc/LP6D-FWHR>] (noting Oreskes, former vice president and senior managing editor at Associated Press, admitted to wrongdoing and apologized).

13 Tom Kludt, *New Yorker Fires Star Political Reporter Over Alleged ‘Improper Sexual Conduct’*, CNN MONEY (Dec. 11, 2017, 7:57 PM), <https://money.cnn.com/2017/12/11/media/ryan-lizza-fired-new-yorker/index.html> [<https://perma.cc/J798-ESP4>] (noting Lizza was also a CNN contributor and an adjunct lecturer at Georgetown University, which reported Lizza would not be teaching any classes the next semester).

14 Chris Isidore, *NFL Network, ESPN Suspend Marshall Faulk, Other Stars After Sexual Harassment Lawsuit*, CNN MONEY (Dec. 13, 2017, 2:44 PM), <https://money.cnn.com/2017/12/12/media/nfl-network-sexual-harassment-marshall-faulk-warren-sapp/index.html> [<https://perma.cc/QAW7-PEY4>] (reporting four other NFL stars were suspended including Ike Taylor, Heath Evans, Donovan McNabb, and Eric Davis).

15 See Elana Schor & Seung Min Kim, *Franken Resigns*, POLITICO (Dec. 7, 2017), <https://www.politico.com/story/2017/12/07/franken-resigns-285957> [<https://perma.cc/LNV6-2ELF>] (reporting that seven women alleged that Senator Franken groped or forcibly tried to kiss them, “capping a stunning fall from grace for one of the Democratic Party’s most popular and high-profile politicians”).

16 See Brian Naylor & Domenico Montanaro, *Conyers Resigns Amid Sexual Harassment Allegations*, NPR (Dec. 5, 2017, 10:49 AM), <https://www.npr.org/2017/12/05/567160325/conyers-resigning-amid-sexual-harassment-charges> [<https://perma.cc/25G7-XHMS>] (reporting that the 88-year-old Congressman had served more than 50 years despite allegations of verbal abuse, inappropriate touching, and groping over a period of decades); *John Conyers: Longest-serving*

Moore following allegations of Moore's sexual misconduct with minors.¹⁷ Sexual harassment even tarnished the reputation of former President George H.W. Bush, whom five women accused of unwanted sexual contact.¹⁸

December had one final shock to deliver. On December 18, 2017, Ninth Circuit Court of Appeals Judge Alex Kozinski, who had served on the federal bench for 35 years, stepped down after accusations of sexual misconduct.¹⁹ The Ninth Circuit subsequently responded to the damage to its reputation by appointing a director of workplace relations—the first position of its kind in the federal judiciary—charged with developing and implementing training to prevent and resolve workplace harassment and discrimination, including sexual harassment.²⁰

Although sexual harassment had been headline news before—most notably, during the 1991 Anita Hill–Clarence Thomas debacle—never had so many victims joined hands and come forward demanding change. The inspiring display of solidarity electrified America. Actress Alyssa Milano used her Twitter account to encourage women who had been sexually harassed or assaulted to tweet the words #MeToo, and a

Congressman Denies Harassment, BBC NEWS (Nov. 21, 2017), <https://www.bbc.com/news/world-us-canada-42070496> [<https://perma.cc/BJ9C-ZPC9>].

¹⁷ The victory by a Democrat in Alabama was one of the most unlikely events in recent American political history. The Democratic Party had not won a statewide election in Alabama in over a decade and did not even field a Senate candidate in 2014. See Scott Lemieux, *Commentary: What Roy Moore's Loss Says About Smart Politics*, REUTERS (Dec. 13, 2017, 12:24 AM), <https://www.reuters.com/article/us-lemieux-moore-commentary/commentary-what-roy-moore-loss-says-about-smart-politics-idUSKBN1E70FV> [<https://perma.cc/DL6R-FFPX>] (also noting that Moore's loss was all the more shocking in that he had the support of the President, Senate Majority Leader Mitch McConnell, and the Republican National Committee, a powerful force against a Democratic Party in Alabama that Lemieux describes as “dysfunctional”).

¹⁸ See Aric Jenkins, *Woman Says George H.W. Bush Groped Her When She Was 16: 'I Was A Child'*, TIME (Nov. 13, 2017), <http://time.com/5019182/george-hw-bush-groping-allegations/> [<https://perma.cc/3SHT-DY4Y>] (reporting that some of the accusers were quite well known, including the daughter of a CIA agent, three actresses, a former Maine Senate candidate, and a journalist).

¹⁹ Maura Dolan, *9th Circuit Judge Alex Kozinski Steps Down After Accusations of Sexual Misconduct*, L.A. TIMES (Dec. 18, 2017, 7:00 PM), <https://www.latimes.com/politics/la-pol-ca-judge-alex-kozinski-20171218-story.html> [<https://perma.cc/2NUK-ACT6>] (reporting that at least 15 women came forward to accuse Judge Kozinski of misconduct that included showing them pornography and improperly touching them). In a lesser known story, the Los Angeles Times article also notes that earlier in the year a California Court of Appeals justice had retired after an investigation found he had mistreated his female staff. See *id.*

²⁰ News Release, Pub. Info. Office, U.S. Courts for the Ninth Circuit, Ninth Circuit Announces Appointment of First Director of Workplace Relations (Nov. 13, 2018), http://cdn.ca9.uscourts.gov/datastore/ce9/2018/11/13/Director_Workplace_Relations_Named.pdf [<https://perma.cc/WU8H-MJPB>].

Twitter phenomenon ensued: within twenty-four hours, the hashtag had been retweeted nearly a half-million times.²¹ Within hours thousands of posts appeared on Facebook from women and men who spoke out about their experiences of harassment and assault, revealing the colossal scale of the problem.²² The #MeToo protests joined other grassroots movements, such as Black Lives Matter and the struggle for lesbian, gay, bisexual, and transgender (“LGBT”) rights, as one of the most powerful demands for social change since the 1960s.²³ Feminist legal scholar Catharine MacKinnon, one of the primary architects of sexual harassment law,²⁴ observed that the #MeToo movement accomplished what law, thus far, had not. The movement eroded the “two biggest barriers to ending sexual harassment in law and in life: the disbelief and trivializing dehumanization of its victims.”²⁵

Moreover, the sustained attention devoted to sexual harassment in the media generated an impetus for reform that had seemed impossible just a few months prior. In addition to the high-profile resignations outlined above, Congress fast-tracked a bipartisan bill to revamp procedures addressing sexual harassment experienced by congressional employees and to require legislators who settle sexual harassment claims to use their own funds rather than taxpayer funds.²⁶ And despite the judicial love affair with workplace predispute arbitration

21 Sophie Gilbert, *The Movement of #MeToo: How a Hashtag Got Its Power*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/> [<https://perma.cc/2YRB-J9TE>] (describing the sudden rise of the #MeToo movement).

22 *See id.*

23 The power of the collective call for justice was reflected in *Time*’s decision to make “The Silence Breakers” about sexual harassment the 2017 “Person of the Year.” Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *TIME Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), <https://time.com/time-person-of-the-year-2017-silence-breakers/> [<https://perma.cc/425G-JEQ7>].

24 *See* CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979) (advocating treating sexual harassment as a form of sex discrimination actionable under Title VII).

25 Catharine A. MacKinnon, *Opinion, #MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html?action> [<https://perma.cc/L3LU-S249>]; *see also* L. Camille Hebert, *Is ‘MeToo’ Only a Social Movement or a Legal Movement Too?*, 22 EMP. RTS. & EMP’T POL’Y J. (forthcoming 2018) (manuscript at 5–15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236309 [<https://perma.cc/7LBG-5YJR>] (suggesting that the cultural shift generated by the #MeToo movement may alter the courts’ treatment of sexual harassment claims by enhancing victims’ credibility).

26 Hassan A. Kanu, *Congress’ MeToo Bill Gets Fast-Track to House Floor for Votes*, 24 Daily Lab. Rep. (BNA) 6 (Feb. 5, 2018).

agreements,²⁷ a bipartisan group of lawmakers introduced legislation banning agreements that require submission of sexual harassment claims to private arbitration, seeking to ensure that they would be heard in public fora.²⁸ Employers in industries rife with gender bias and sensitive to negative publicity about their role in enabling it moved voluntarily to ban such agreements, including Microsoft, Uber, Lyft, and many law firms.²⁹ A walkout by thousands of workers around the world protesting Google's handling of sexual misconduct allegations against three senior executives prompted the company to end mandatory arbitration for employee sexual harassment claims.³⁰ As a further disincentive to the private sheltering of sexual harassment complaints, the Trump administration's tax reform legislation banned companies from writing off settlements related to sexual harassment.³¹

The media spotlight on sexual harassment presented a tremendous opportunity to reframe sexual harassment from an individual, personal, and idiosyncratic instance of sexual desire to a common abuse of gender and economic power affecting millions of working women and men on a daily basis. Legal scholars have known for years

²⁷ See Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018) (detailing the prevalence of mandatory predispute arbitration agreements in employment and explaining how they have functioned as an ex ante waiver of statutory rights).

²⁸ Chris Opfer, *Lawmakers Want Harassment Cases Made Public*, 233 Daily Lab. Rep. (BNA) 5 (Dec. 6, 2017). Further, New York, Maryland, Vermont, and Washington passed legislation banning mandatory arbitration of harassment claims. See Jonathan Hiles, *New York Prohibits Mandatory Arbitration of Sexual Harassment Claims*, SANFORD HEISLER SHARP, LLP (July 20, 2018), <https://sanfordheisler.com/new-york-prohibits-mandatory-arbitration-of-sexual-harassment-claims/> [<https://perma.cc/UE2E-REK6>] (discussing recent laws).

²⁹ Jing Cao, *Microsoft Eliminates Arbitration in Sexual Harassment Cases*, 242 Daily Lab. Rep. (BNA) 10 (Dec. 19, 2017); Meghan Tribe, *Will Law Firms Bow to Pressure to End Mandatory Arbitration*, AM. LAW. (May 24, 2018, 10:52 AM), <https://www.law.com/americanlawyer/2018/05/24/will-law-firms-bow-to-pressure-to-end-mandatory-arbitration/> [<https://perma.cc/W4LQ-7PWR>]; Daisuke Wakabayashi, *Uber Eliminates Forced Arbitration for Sexual Misconduct Claims*, N.Y. TIMES (May 15, 2018), <https://www.nytimes.com/2018/05/15/technology/uber-sex-misconduct.html> [<https://perma.cc/W2LY-K857>].

³⁰ Douglas MacMillan, *Google Changes Harassment Rule*, WALL ST. J., Nov. 9, 2018, at B4. Facebook followed suit shortly thereafter. Jena McGregor, *Google and Facebook Ended Forced Arbitration for Sexual Harassment Claims. Why More Companies Could Follow*, WASH. POST (Nov. 12, 2018), https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/?noredirect=on&utm_term=.578c3f7bbd4e [<https://perma.cc/5R67-AV63>].

³¹ See Tyrone Richardson, *Trump Readies to Sign Tax Overhaul with Job-Related Measures*, 243 Daily Lab. Rep. (BNA) 4 (Dec. 20, 2017); Steven Gutierrez, *Confidential Sexual Harassment Settlements No Longer Tax Deductible*, HOLLAND & HART (Jan. 9, 2018), <https://www.hollandhart.com/confidential-sexual-harassment-settlements-no-longer-tax-deductible> [<https://perma.cc/6ZRK-WARM>].

that structural conditions of sex-segregated work and expectations about appropriate gender roles create a hospitable environment for sexual harassment that functions to protect male privilege in the workplace.³² But the message that sexual harassment is a systemic feature of gender inequality at work never reached the general public. Instead, many media reports simply served to sensationalize sexualized conduct in the workplace, focusing on situations where high-profile relatively powerful women were successful in using their leverage and the power of social media to publicly shame harassers whose reputations were hypersensitive to negative publicity.³³ Lewd stories about sexualized work behavior and “naming and shaming”—although useful in attracting attention to the ubiquitous nature and scope of the problem—only reaffirmed preexisting notions of sexual harassment as an aberration that could be solved by removal of the individual harasser, rather than prompting structural reform targeting the ways in which gender and economic power combine to perpetuate abuse.

Nor was there much public discussion of how workplace sexual harassment damages all who witness it. As a form of workplace bullying,³⁴ sexual harassment visits collateral stress on coworkers and undermines the camaraderie and trust essential to a high-functioning workforce.³⁵ Sexual harassment sends a message to others about wo-

³² See Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 19–21 (1995) (explaining how workplace sexual harassment is a response to women’s entry into traditionally male occupations and operates to defend private turf controlled by men); Schultz, *supra* note 6, at 1784 (explaining that sexual harassment functions as a weapon to force women to perform stereotypically female tasks and to disparage their work competence based on gendered expectations of the types of work women are suited to perform).

³³ There were notable exceptions, including a powerful article in *The New York Times* detailing sexual harassment in the auto industry and a piece in *The Atlantic* focusing on sexual harassment in the restaurant industry. See Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html> [<https://perma.cc/E753-XGAL>]; Alana Semuels, *Low-Wage Workers Aren’t Getting Justice for Sexual Harassment*, ATLANTIC (Dec. 27, 2017), <https://www.theatlantic.com/business/archive/2017/12/low-wage-workers-sexual-harassment/549158/> [<https://perma.cc/E2F4-UYBX>].

³⁴ A workplace culture replete with bullying is likely to escalate to illegal harassment. See Martin Berman-Gorvine, *Workplace Bullying and the Slippery Slope to Harassment*, 50 Daily Lab. Rep. (BNA) 30 (Mar. 14, 2018). Bullying undermines employee performance and productivity, increases employee turnover, damages the firm’s reputation, and ultimately impacts profitability. See *id.*

³⁵ See Marion Crain, *Sex Discrimination as Collective Harm*, in THE SEX OF CLASS: WOMEN TRANSFORMING AMERICAN LABOR 99, 107 (Dorothy Sue Cobble ed., 2007); see also Dorothy Roberts, *The Collective Injury of Sexual Harassment*, in DIRECTIONS IN SEXUAL

men's proper place and role in society, which may have an impact well beyond a particular workplace.³⁶ Ultimately, it shapes the occupational choices women make, reinforcing occupational sex segregation and associated pay disparities.³⁷

Sorely lacking in the #MeToo anti-sexual harassment mobilization effort was leadership by a social justice group that could coordinate protests, explain and translate the daily news blasts to show how gender and economic power intertwine to create the conditions for sexual harassment, and propose systemic solutions aimed at correcting that power imbalance. Feminist groups found themselves stymied by an intergenerational divide over what constitutes sexual assault and sexual harassment, and how far to push the envelope.³⁸ As 2018 dawned, a collective of more than 300 Hollywood women sought to fill part of the gap with a new initiative called Time's Up.³⁹ Time's Up focuses on supporting legislative lobbying efforts and providing support for a legal-defense arm that will connect sexual harassment victims with legal representation.⁴⁰

Despite the frequent use of the word "solidarity" in dialogue about #MeToo, organized labor was conspicuously absent from the dialogue about how to confront and prevent sexual harassment at work.⁴¹ Why were unions missing in action from a collective protest about working conditions that raised fundamental issues of dignity,

HARASSMENT LAW 365, 366–67 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Naomi Schoenbaum, *Towards a Law of Coworkers*, 68 ALA. L. REV. 605, 629–30 (2017).

³⁶ See Crain, *supra* note 35, at 108.

³⁷ See *id.* at 109–10; see also Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1816–17 (1990) (explaining that women's occupational preferences are not stable but develop in response to structural and cultural features of the workplace).

³⁸ See, e.g., Kate Harding, *The Intergenerational Feminist Divide Over #MeToo is Both Painful and Necessary*, NBC NEWS (Jan. 20, 2018, 5:19 AM), <https://www.nbcnews.com/think/opinion/intergenerational-feminist-divide-over-metoo-both-painful-necessary-ncna838936> [<https://perma.cc/BX35-YTGQ>].

³⁹ See Megan Garber, *Is This the Next Step for the #MeToo Movement?*, ATLANTIC (Jan. 2, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/beyond-metoo-can-times-up-effect-real-change/549482/> [<https://perma.cc/9LTA-PMNT>].

⁴⁰ See *id.*

⁴¹ The Coalition of Labor Union Women ("CLUW"), an affinity group within the AFL-CIO umbrella, stepped forward in support of #TimesUp. A significant part of its efforts, however, seem to be directed at pressuring unions to clean their own houses and to adopt informal resolution mechanisms that members and union staff can use to report harassment quickly. See Mark Gruenberg, *Labor Union Women Commit to Broadening Fight Against Sexual Harassment*, PEOPLE'S WORLD (Jan. 17, 2018), <https://www.peoplesworld.org/article/labor-union-women-commit-to-broadening-fight-against-sexual-harassment/> [<https://perma.cc/B9W9-X7FT>].

economic disadvantage, and voice for workers?⁴² First, unions were busy addressing sexual harassment within their own ranks.⁴³ Service Employees International Union (“SEIU”) discharged two of the key architects of the impactful Fight for \$15 campaign.⁴⁴ Other revelations of widespread sexual harassment within the union soon surfaced, leading to more discharges and resignations.⁴⁵ The American Federation of Labor and Congress of Industrial Organizations’ (“AFL-CIO”) Chief Budget Officer resigned in response to discipline for sexually harassing a secretary.⁴⁶ Mickey Kasparian, President of the United Food and Commercial Workers (“UFCW”) Local 135 in San Diego, resigned from the San Diego County Democratic Central Committee but retains his leadership position in the union and, ironically, his position as President of the San Diego Working Families Council, a coalition of labor unions.⁴⁷ Kasparian and Local 135 were named as defendants by female union members in multiple sexual assault or harassment lawsuits alleging sexualized conduct including groping and masturbation while talking to the victim, and complicity by the union.⁴⁸

Second, although #MeToo prompted union leaders to make public statements denouncing sexual harassment and promising to redou-

⁴² Some within the labor movement have been asking the same question. See, e.g., Jane McAlevey, *What #MeToo Can Teach the Labor Movement*, IN THESE TIMES (Dec. 27, 2017, 9:59 AM), <http://inthesetimes.com/working/entry/20793/me-too-workers-women-unions-sexual-harassment-labor-movement-lessons> [<https://perma.cc/M3GG-MWFP>].

⁴³ For a good overview of recent discharges and resignations of union leaders in the AFL-CIO and the SEIU, see Josh Eidelson, *U.S. Labor Leaders Confront Sexual Harassment in Top Ranks*, BLOOMBERG BUSINESSWEEK (Nov. 7, 2017, 11:33 AM), <https://www.bloomberg.com/news/articles/2017-11-07/u-s-labor-leaders-confront-sexual-harassment-in-their-top-ranks> [<https://perma.cc/R3H7-Q3AB>].

⁴⁴ *Id.*

⁴⁵ See Perry Chiaramonte, *Big Union Embroiled in Own Sexual Harassment Scandal After Allegations Against SEIU Leaders*, FOX NEWS (Nov. 16, 2017), <http://www.foxnews.com/us/2017/11/02/big-union-embroiled-in-own-sexual-harrassment-scandal-after-alligations-against-seiu-leaders.html> [<https://perma.cc/SC2C-TQ6M>]; Marianne Levine, *More SEIU Harassment Allegations*, POLITICO (Nov. 20, 2017, 9:59 AM), <https://www.politico.com/newsletters/morning-shift/2017/11/20/more-seiu-harassment-allegations-028437> [<https://perma.cc/XSV7-XAC8>].

⁴⁶ See Ian Kullgren, *Why Didn't Unions Stop Sexual Harassment?*, POLITICO (Nov. 14, 2017, 10:58 AM), <https://www.politico.com/story/2017/11/14/why-didnt-unions-stop-sexual-harassment-244883> [<https://perma.cc/V6K4-GVM4>].

⁴⁷ See Joshua Stewart, *Kasparian Steps Down from Democratic Committee Amid Sexual Harassment Allegations*, SAN DIEGO UNION-TRIB. (Dec. 20, 2017, 2:20 PM), <http://www.sandiegouniontribune.com/news/politics/sd-me-kasparian-party-20171220-story.html> [<https://perma.cc/PTY6-F4X9>].

⁴⁸ See Jaclyn Diaz, *San Diego Labor Leader Faces Sex Assault Lawsuit*, 242 Daily Lab. Rep. (BNA) 13 (Dec. 19, 2017).

ble union efforts to eradicate it,⁴⁹ union leaders and union lawyers frequently disclaim legal responsibility for preventing and addressing sexual harassment in the workplace. Illustrative is this stance taken in the wake of #MeToo from Thomas Carpenter, general counsel for Actor's Equity, which represents theatrical performers:

It's important for members to understand the difference between the union's role and the employer's It's the employer's duty to create harassment prevention policies and the union's job to ensure that the employer follows through on that duty.

. . . .

The most effective harassment prevention policies are the ones created by the employer, [Carpenter] said.

"It's hard to change the culture of a workplace, but it's the employer's responsibility to do that."⁵⁰

Not all the blame for labor's passive stance can be laid on labor's doorstep. Unions are hamstrung by a legal structure that creates a fundamental conflict for unions that represent a workforce that includes both potential harassers and victims.⁵¹ The National Labor Relations Act ("NLRA") erects an employee representation system founded upon principles of majority rule and exclusivity, in which the union once elected becomes the exclusive representative with a duty to fairly represent all the workers in the bargaining unit.⁵² In this system, the majority union is envisioned as a united front, speaking with a single voice on behalf of all the workers in the bargaining unit on issues affecting their economic futures.⁵³ This united front ideology suppresses conflicts arising along identity lines within the bargaining unit, channeling them instead into a statutory antidiscrimination-law track where the victims must represent themselves or seek assistance

⁴⁹ See, e.g., Richard L. Trumka, President, AFL-CIO, Remarks at a Labor Movement Convening on Sexual Harrassment (Feb. 6, 2018), <https://aflcio.org/speeches/trumka-labor-has-special-responsibility-stop-sexual-harassment> [<https://perma.cc/MXY4-NV9C>] (acknowledging that labor has been "part of the problem" of sexual harassment and urging unions to be "part of the solution").

⁵⁰ Jacquie Lee, *Broadway Confronts Casting Couch*, 232 Daily Lab. Rep. (BNA) 8 (Dec. 5, 2017); see also Crain, *supra* note 32, at 36–45 (analyzing patterns of union argumentation in sexual-harassment-related arbitration cases arising under labor contracts, including "it's a man's world," "the victim assumed the risk" when she entered the workplace, "the victim liked it," "the victim is not credible," and "it could've been worse").

⁵¹ See Marion Crain & Ken Matheny, "*Labor's Divided Ranks*": *Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1543, 1552 (1999).

⁵² See *id.* at 1543.

⁵³ See *id.*

from nonlabor groups, such as the National Organization for Women's Legal Defense Fund.⁵⁴ Meanwhile, if the employer takes disciplinary action based on the victim's complaint, the union is obligated to represent the alleged harasser and enforce the typical collective-bargaining agreement's guarantee of protection against discharge without just cause—with the victim serving as the key witness for the employer.⁵⁵ This combination of legal obligations has deterred unions with scarce resources from taking a proactive approach to sexual harassment.⁵⁶ Unfortunately, this mix of legal obligations and union shirking has the effect of positioning employers as proactive advocates for workplace equality and pushing unions into a fundamentally reactive posture. Labor's voice is silenced in the rooms where anti-sexual harassment policies are created. All workers suffer as a result: unionized workers are deprived of a representative on an issue fundamental to safe and productive workplaces, and nonunion workers learn to see unions as largely irrelevant in the struggle to eradicate discrimination at work—a significant strategic mistake in an increasingly diverse labor force.

Finally, labor's commitment to an ideology of business unionism (pursuing the bread-and-butter needs of its members through work-site-by-worksite representation) has resulted in a troubling and unsustainable divide between economic issues on the one hand, and discrimination and identity-related issues on the other, both in law and union praxis.⁵⁷ This vision of labor's mission systematically separates labor from its historical social justice moorings, undermines its appeal to a wider base, and shapes how it responds to new challenges as they emerge in politics and the media, from President Trump's immigration policies to movements to combat workplace sexual harassment. Although some unions have pressed to broaden labor's scope and recover its social justice mission, their efforts have so far been limited to traditional topics of union activism, albeit on a broader scale. The Fight for \$15, one of labor's most impactful and progressive initiatives in recent years, focused on raising the wage floor, deploying

⁵⁴ See *id.* at 1543, 1552; see also Crain, *supra* note 32 (discussing some of the high-profile cases where this has occurred).

⁵⁵ See Crain, *supra* note 32, at 11–12, 34–35.

⁵⁶ See Ann C. Hodges, *Strategies for Combating Sexual Harassment: The Role of Labor Unions*, 15 TEX. J. WOMEN & L. 183, 202–08 (2006).

⁵⁷ See Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767 (2001); Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211 (2002).

tactics essentially “rewriting organized labor’s playbook.”⁵⁸ The effort is coordinated and supported by the SEIU, and it is credited with having accomplished significant minimum-wage reforms at the state and local levels, but was not directly linked to attracting new members.⁵⁹

Imagine instead a campaign designed to address and prevent workplace sexual harassment coordinated and supported by labor unions and modeled on the Fight for \$15. It could portray unions as the champions of organized and unorganized workers who are victims of sexual harassment and would have potential to energize the public and reform law at federal, state, and local levels. This kind of union campaign would also positively impact some legal battles in which unions are already engaged. For example, the efforts to resist employer rules that purport to enforce confidentiality regarding workplace investigations or prohibit discussions between workers about disciplinary actions,⁶⁰ and to strike down bans on class claims in predispute arbitration agreements⁶¹ would both be strengthened by arguments that such bans tend to silence sexual harassment claims that impact multiple workers. Further, although the Fight for \$15 was at least partially successful in framing itself as a social movement, its appeal to the injustice of income inequality is a hard sell in a country that still holds dear the “American Dream” and remains committed to an ideal of economic attainment as the measure of individual merit.⁶² Appeals to workplace injustice relating to social and cultural identity, on the other hand, are likely to have more moral sway with Americans and offer the opportunity to partner with other social justice groups that emphasize social identities, such as the civil rights movement, femi-

⁵⁸ Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597, 602–03 (2016); see also Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 47–57 (2016).

⁵⁹ See Andrias, *supra* note 58, at 47–57.

⁶⁰ See, e.g., *Banner Health Sys.*, 362 N.L.R.B. 1, 21 (2015) (finding rules requiring employees to maintain confidentiality of workplace investigations invalid), *enforced*, 851 F.3d 35 (D.C. Cir. 2017); *Phx. Transit Sys.*, 337 N.L.R.B. 510, 515 (2002) (finding confidentiality rule prohibiting employees from discussion of sexual harassment complaints invalid). The Board’s General Counsel, appointed by President Trump, has indicated that he plans to revisit these issues. See Hassan A. Kanu, *National Dialogue on Sexual Harassment Spills into Labor Board*, 239 Daily Lab. Rep. (BNA) 5 (Dec. 14, 2017); Memorandum from Peter B. Robb, Gen. Counsel, NLRB, to All Reg’l Dirs., Officers-in-Charge, & Resident Officers (Dec. 1, 2017), <https://apps.nlr.gov/link/document.aspx/09031d458262a31c> [<https://perma.cc/ZU3M-GWMY>]; see also Memorandum from Peter B. Robb, Gen. Counsel, NLRB, to All Reg’l Dirs., Officers-in-Charge, & Resident Officers (June 6, 2018), <https://apps.nlr.gov/link/document.aspx/09031d45827f38f1> [<https://perma.cc/3EPK-4B97>] (noting that regional offices should submit for advice cases involving confidentiality rules applicable to disciplinary or arbitration proceedings).

⁶¹ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

⁶² See generally MARK ROBERT RANK ET AL., *CHASING THE AMERICAN DREAM* (2014).

nists, and immigrant-rights activists. These kinds of appeals have historically ignited passion for change and engaged workers across occupational sectors, resulting in some of labor's greatest gains.⁶³ Public relations campaigns could link unions to a workers' rights issue—sexual harassment—that has since become one of the key issues of this era. Workers have a right—a human right—to a workplace where they are treated with dignity and respect.⁶⁴ Such a claim to dignity is on a par with the right to a safe workplace, long a subject of concern and activism for labor unions. This is a missed opportunity,⁶⁵ but it is not too late.

This Article explores the possibilities for labor unions to play a pivotal role in reframing sexual harassment as a collective harm to workers. Part I describes the historical and popular conception of sexual harassment as an individual problem of unrestrained sexual desire, the typical responses that it engenders in its victims, and the risk that recent media attention will entrench those patterns rather than providing a springboard for structural reform. Part II describes the tradition of mutualism and solidarity in the labor movement that led to improvements in working conditions that benefit all workers, including workplace health and safety measures, higher wages, protection for job security, health care coverage, and retirement security. Part III examines how the labor laws have translated this tradition in ways that make it challenging to frame a workplace free from discrimination, harassment, and retaliation as a collective good. This Part also explains how the law developed to channel discrimination and harassment claims into Title VII of the Civil Rights Act⁶⁶ and parallel state

⁶³ See Marion Crain & Ken Matheny, *The 'New' Labor Regime*, 126 *YALE L.J. F.* 478, 479–80, 482 (2017).

⁶⁴ In recent decades it has become common for scholars to view workers' rights as fundamental human rights. See, e.g., William B. Gould IV, *Fundamental Rights at Work and the Law of Nations: An American Lawyer's Perspective*, 23 *HOFSTRA LAB. & EMP. L.J.* 1, 4 (2005) (noting a growing recognition of workers' rights as human rights).

⁶⁵ An ideal opportunity arose during the #MeToo movement when McDonald's workers, emboldened by the movement, organized an historic multistate strike spanning ten U.S. cities. See Annelise Orleck, *#MeToo and McDonald's*, *JACOBIN* (Sept. 20, 2018), <https://www.jacobinmag.com/2018/09/mcdonalds-strike-metoo-sexual-harassment-organizing> [<https://perma.cc/Q8QC-4GHK>]. The strike organizers had filed sexual harassment complaints with the EEOC and met one another at a corporate shareholders' meeting to tell their stories. The strike sought to publicize the widespread and common nature of sexual harassment in the fast food industry and to pressure McDonald's to strengthen its sexual harassment policy, invest in training, and protect workers from retaliation for reporting. The protesters also seek a union—but union organizers affiliated with an established union such as SEIU, orchestrator of the Fight for \$15 campaign, were not portrayed as connected to the struggle. See *id.*

⁶⁶ 42 U.S.C. §§ 2000e to 2000e-17 (2012).

antidiscrimination statutory schemes that tended to frame them as individual rather than group claims. Part IV discusses an emerging conception of collaborative solidarity that has potential for mobilizing workers around their social identities. It explains how improvisational unionism and social bargaining developed in the context of new mobilization strategies like those developed in the Fight for \$15 could be deployed around sexual harassment, both at the sectoral level and within particular workplaces. This Article concludes with the argument that challenging sexual harassment could re-energize labor unions and offer an opportunity for partnerships with their social-justice allies that would capture hearts and minds.

I. SEXUAL HARASSMENT

Sexual harassment claims at law were initially characterized by a sexual desire/dominance paradigm that linked male sexual desire with women's subordination at work.⁶⁷ Key to this understanding of sexual harassment was that the harassment was *sexual*—i.e., that it involved sexualized conduct and was driven by sexual desire for a particular woman.⁶⁸ Feminist legal scholars have shown how this understanding of the link between workplace sexual harassment and women's economic subordination is underinclusive, failing to capture the gender-privilege-protecting function of sexual harassment in the workplace and its collective impact on both women and men who experience and witness it. Although the law has gradually become more receptive to a more capacious analysis, the sexual desire/dominance paradigm still holds powerful sway in the public mind. Media accounts of sexual harassment typically sensationalize lewd sexual conduct by an individual harasser directed at an individual victim (or a series of victims), thereby reinforcing the paradigm. Worse, sexual harassment law has encoded an unrealistic set of assumptions drawn from rape culture about how a victim should respond to sexual harassment: in order to be credible, she must resist, confront her harasser, and promptly report. Yet research shows that this set of responses is exactly the opposite of what most victims, in fact, do and that when they do report, they are often disbelieved or suffer retaliation and further harassment.⁶⁹ Understanding the reality of the phenomenon is key to craft-

⁶⁷ See Schultz, *supra* note 6, at 1692.

⁶⁸ See *id.* at 1699, 1710.

⁶⁹ See Shaila Dewan, *Why Women Can Take Years to Come Forward with Sexual Assault Allegations*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/18/us/kavanaugh-christine-blasey-ford.html> [<https://perma.cc/FXT8-D9F9>].

ing a legal response and devising mechanisms that will be effective in preventing and addressing harassment where it occurs.

A. *Sexual Harassment: Feminist Theory and Law*

Sexual harassment claims were initially litigated as tort claims for intentional infliction of emotional distress or outrageous conduct.⁷⁰ Sexual interactions—in the workplace or elsewhere—were seen as fundamentally personal and beyond legal purview unless they were so egregious that they could be deemed outrageous and shocking to the conscience.⁷¹ Beginning in the 1970s, feminist lawyers and legal scholars argued that sexual harassment should be understood as a form of sex discrimination actionable under Title VII. Although some theorized harassment broadly as encompassing all uses of sexuality as a mechanism to compete for material resources and to protect privilege in the workplace,⁷² most early feminists saw sexual harassment as driven by a male sexual desire for dominance—top-down, male-female.⁷³ Catharine MacKinnon’s influential writing and advocacy on sexual harassment reinforced this analysis by linking sexual exploitation with gender inequality: she argued that sex inequality is constructed through male-female sexual relations in which gender is defined in terms of conquest for men and acquiescence for women.⁷⁴

The sexual desire-dominance paradigm was also supported by the fact patterns of the earliest cases. The initial cases involved quid pro quo harassment, which occurs when a supervisor with the power to grant job-related rewards or impose discipline conditions the receipt of the reward or threatens discipline contingent on the victim’s willingness to confer sexual favors (e.g., “sleep with me and I’ll promote you” or “sleep with me or I’ll fire you”).

The theory of sexual harassment put forward in the early cases was also shaped by litigators’ need to refute judges’ understanding of sexual harassment as a personal injury, so that sexual harassment would be seen as a form of discrimination “because of sex” actionable under Title VII.⁷⁵ To convince courts that sexual harassment happened to women because they were women, litigators pressed the ar-

⁷⁰ See Schultz, *supra* note 6, at 1692.

⁷¹ See Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 12–18 (1988).

⁷² See Schultz, *supra* note 6, at 1697, 1699–700; see, e.g., CARROLL M. BRODSKY, *THE HARASSED WORKER* 4 (1976).

⁷³ See Schultz, *supra* note 6, at 1699.

⁷⁴ See MACKINNON, *supra* note 24, at 178.

⁷⁵ See 42 U.S.C. § 2000e(k) (2012); Schultz, *supra* note 6, at 1701–02.

gument that (assuming that the supervisors were heterosexual), but for the victims' gender they would not have been propositioned.⁷⁶ Vicki Schultz captured the essence of the sexual desire–dominance paradigm in the following paragraph:

The quintessential case of harassment involves a more powerful, typically older, male supervisor, who uses his superior organizational position to demand sexual favors from a less powerful, typically younger, female subordinate. Sometimes, his motivation is sexual desire: He wants her, and he uses his organizational position to get her. Sometimes, it is a desire to subordinate: He wants to make sure she remains below him in the workplace hierarchy, and he uses sexuality to reinforce his position. Either way, his actions are an abuse of his power and an abuse of her sex. Within this paradigm, heterosexual desire and male dominance are inextricably linked. Men use their dominant positions at work to extract sex from women, and extracting sex from women ensures their dominance.⁷⁷

Confounding this analysis, however, was another sort of fact pattern that came to be known as hostile work environment sexual harassment. In 1980, the Equal Employment Opportunity Commission (“EEOC”) issued guidelines on sex-based harassment that recognized hostile work environment sexual harassment as a form of discrimination in which peers or supervisors create a work climate in which unwelcome sexual conduct “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”⁷⁸ The Supreme Court subsequently accepted both *quid pro quo* and hostile work environment sexual harassment as actionable under Title VII, defining hostile work environment sexual harassment as conduct that is sufficiently severe or pervasive that it alters the conditions of the victim’s employment and creates an abusive work environment.⁷⁹ Sexual harassment claims can be brought against persons of the same sex or of the opposite sex.⁸⁰ Because employers are strictly liable for *quid pro quo* harassment by supervisors with decisionmaking authority and

⁷⁶ See, e.g., *Miller v. Bank of Am.*, 600 F.2d 211, 212 (9th Cir. 1979); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1046–47 (3d Cir. 1977); *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977).

⁷⁷ Schultz, *supra* note 6, at 1692.

⁷⁸ Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended, 45 Fed. Reg. 74,676, 74,677 (Nov. 10, 1980) (codified at 29 C.F.R. § 1604.11(a)).

⁷⁹ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65–69 (1986).

⁸⁰ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

are thus more likely to settle credible quid pro quo claims, the hostile work environment form is more commonly litigated today and has become more widely known.⁸¹

The Supreme Court has considered the question of employer liability for sexual harassment on multiple occasions. In a pair of cases issued in 1998,⁸² the Court established the following regime: employers are vicariously liable for acts of supervisors with apparent authority where a tangible employment action is taken, such as a demotion, termination, denial of a promotion, or a change in salary or benefits.⁸³ However, when a supervisor is the alleged harasser but no tangible employment action is taken, the Court created an affirmative defense for employers who are able to show that they exercised reasonable care to prevent and promptly correct sexual harassment, and that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities offered by the employer.⁸⁴ Failing to file a claim with the employer or delaying in filing a claim will significantly jeopardize the plaintiff's success in a subsequent Title VII claim.⁸⁵ The implicit requirement of prompt reporting is linked to credibility determinations underlying the unwelcomeness requirement: the assumption is that if the victim truly found the conduct unwelcome, she would complain. This assumption, in turn, opens the door to arguments about whether the victim did something to signal that she invited the harassment.⁸⁶ Finally, when coworker harassment is involved, the standard for employer liability is negligence: liability turns on whether the employer "knew or should have known of the harassment and failed to take proper remedial action."⁸⁷

Employers responded to the wave of sexual harassment litigation and to the affirmative defenses erected by the Court by developing

⁸¹ See MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, *WORK LAW* 630–31, 657 (3d ed. 2015).

⁸² See *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

⁸³ See *Burlington Indus.*, 524 U.S. at 760–61.

⁸⁴ See *id.* at 764–65.

⁸⁵ See, e.g., *Debord v. Mercy Health Sys. of Kan., Inc.*, 737 F.3d 642, 655 (10th Cir. 2013) (recognizing affirmative defense and ruling against employee who failed to file because she believed it would be futile); *Crawford v. BNSF Ry. Co.*, 665 F.3d 978, 985 (8th Cir. 2012) (recognizing affirmative defense and ruling against employee who waited eight months to complain because of fear of retaliation).

⁸⁶ Susan Estrich has pointed out how the unwelcomeness requirement in sexual harassment law is the "doctrinal stepchild" of the standards of consent and requirement of resistance in rape law. See Susan Estrich, *Sex at Work*, 43 *STAN. L. REV.* 813, 827 (1991).

⁸⁷ *Green v. Franklin Nat'l Bank*, 459 F.3d 903, 910 (8th Cir. 2006).

aggressive zero-tolerance sexual harassment policies.⁸⁸ Often, these policies focus on sexual conduct in the workplace as a bright-line boundary along which workplace sexual harassment can be policed.⁸⁹ In so doing, however, they overlook the full range of actions that keep women unequal in the workplace, simultaneously exerting even more control over workers.⁹⁰ Vicki Schultz made a compelling case that much gender-based harassment, especially hostile work environment harassment, is not driven by sexual desire and may not even be sexual in content.⁹¹ Instead, it takes the form of undermining women's competence to perform their jobs.⁹² She explained:

The forms of such harassment are wide-ranging. They include characterizing the work as appropriate for men only; denigrating women's performance or ability to master the job; providing patronizing forms of help in performing the job; withholding the training, information, or opportunity to learn to do the job well; engaging in deliberate work sabotage; providing sexist evaluations of women's performance or denying them deserved promotions; isolating women from the social networks that confer a sense of belonging; denying women the perks or privileges that are required for success; assigning women sex-stereotyped service tasks that lie outside their job descriptions (such as cleaning or serving coffee); engaging in taunting, pranks, and other forms of hazing designed to remind women that they are different and out of place; and physically assaulting or threatening to assault the women who dare to fight back.⁹³

Much of this form of sexual harassment is perpetrated by coworkers and is designed to police gender boundaries in the workplace while simultaneously reaffirming the harasser's prestige and the larger social

⁸⁸ See Jonathan Segal, *How the Sexual Harassment 'Awakening' Could Hurt Women if Employers Are Not Thoughtful*, 234 Daily Lab. Rep. (BNA) 21, 22 (Dec. 7, 2017), <https://www.bna.com/sexual-harassment-awakening-n73014472909/> [<https://perma.cc/L6NF-SE67>] (noting that zero-tolerance policies and messaging around them can have perverse effects, including discouraging victims or observers from complaining because they fear that management will respond by discharging the alleged harasser, the equivalent of capital punishment in the workplace).

⁸⁹ See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2065, 2074–75, 2090 (2003).

⁹⁰ See Crain & Matheny, *supra* note 51, at 1583–84; Schultz, *supra* note 89, at 2065–66, 2087–89.

⁹¹ See Schultz, *supra* note 6, at 1687; Schultz, *supra* note 89, at 2173.

⁹² See Schultz, *supra* note 6, at 1687.

⁹³ *Id.*

structure of male dominance.⁹⁴ Sexual harassment is thus “intended to convey the message that women are trespassers, remind women through sexual remarks . . . of their female fragility, and warn them that they venture onto male territory at their own risk.”⁹⁵ It is closely linked to occupational segregation by sex and the preservation of higher-waged jobs and workplace power for men.⁹⁶

B. *Sexual Harassment on the Ground*

Despite these legal developments and the anti-sexual harassment policies that employers have adopted in response, sexual harassment remains depressingly common. In January 2015 the EEOC commissioned a task force to investigate the prevalence of all forms of workplace harassment, including sexual harassment. The task force released its findings in June 2016.⁹⁷ The task force reported that in 2015 the EEOC received approximately 28,000 harassment complaints, most of them alleging sexual harassment.⁹⁸ The number of complaints almost certainly fails to reflect the pervasiveness of workplace sexual harassment because approximately 90% of employees surveyed reported that they never took any formal action, such as filing charges or a complaint.⁹⁹ Using probability samples, the task force found that approximately 60% of women surveyed reported sexual harassment.¹⁰⁰ Depending upon the survey method used, the percentage of women experiencing sexual harassment at work ranged from 25% to 85%.¹⁰¹ Even taking the lowest figure, 25%, the number of women subjected to sexual harassment at work is staggering. The Department of Labor reports that 74.6 million women are employed in

⁹⁴ See Crain, *supra* note 32, at 18–19.

⁹⁵ *Id.* at 21 (footnote omitted).

⁹⁶ See *id.* at 21–22 (arguing that the primary purpose of workplace sexual harassment is “to exclude women workers from high-paying male occupations, ‘private’ turf already controlled by men”); see also Schultz, *supra* note 6, at 1754 (explaining that sexual harassment is primarily a weapon to force women to perform stereotypically female tasks and to disparage their work competence based on gendered expectations of “what types of work are suitable for women to perform”).

⁹⁷ CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016).

⁹⁸ See *id.* at 6.

⁹⁹ *Id.* at 8.

¹⁰⁰ *Id.* at 9–10. A probability sample is a sample of randomly selected individuals who were asked whether they had experienced sexual harassment on the job without defining the term. *Id.* at 8. When women were asked about specific examples of sexual harassment, 40% reported harassment, and when an alternative form of survey was used, 75% of women reported being sexually harassed at work. *Id.* at 8–9.

¹⁰¹ *Id.* at 8.

the civilian workforce.¹⁰² Thus, a minimum of 18,650,000 women are subjected to sexual harassment.

Why is sexual harassment still so ubiquitous? First, although the law requires women to promptly report harassment and confront their harassers through a complaint process, the most common reaction of harassment victims is to do the opposite. The EEOC found that approximately 70% of women who are harassed at work do not discuss the problem with someone in a position to address it—a manager, supervisor, or union representative.¹⁰³ Less than 10% file a formal complaint.¹⁰⁴ Most cite a fear of retaliation—either by management or coworkers.¹⁰⁵ Their fear is reasonable. The EEOC task force notes that 75% of employees who formally complained about harassment suffered retaliation as a result.¹⁰⁶ The fear of retaliation is greatest among low-wage women workers dependent on their paychecks to survive.¹⁰⁷

Instead, most victims respond by adopting less-risky strategies, such as avoidance, defusion, or negotiation.¹⁰⁸ Avoidance, the least risky response, is the most common: 25–81% of victims employ avoidance, either ignoring the harassment or removing themselves from the work environment by quitting, transferring, or shifting occupations.¹⁰⁹ Defusion—going along with the harasser, joking about the harassment, or stalling—is used by up to 34% of victims.¹¹⁰ Negotiation, defined as a conciliatory attempt to shift the focus of the interaction to the victim's needs and feelings as part of a direct appeal to the harasser to stop, is used by 7–41% of victims.¹¹¹ Confrontation is typically used only when less-risky methods have failed.¹¹² Even these less-risky strategies expose victims to serious economic consequences, including high absenteeism rates, job loss or disciplinary action stemming from feelings of demoralization and a lowered sense of competence which translates into poor performance, and psychological and physical manifestations of emotional distress. The majority of victims quit their

102 Mark DeWolf, *12 Stats About Working Women*, U.S. DEP'T LAB. BLOG (Mar. 1, 2017), <https://blog.dol.gov/2017/03/01/12-stats-about-working-women> [<https://perma.cc/GR4J-BS6T>].

103 FELDBLUM & LIPNIC, *supra* note 97, at 16.

104 *Id.*

105 *See id.*

106 *Id.*

107 *See* Semuels, *supra* note 33.

108 Crain, *supra* note 32, at 22–24.

109 *Id.* at 23.

110 *Id.* at 23.

111 *Id.* at 24.

112 *See id.*

jobs, transfer to avoid the harassment, or are discharged or demoted for poor performance or absenteeism.¹¹³

Nor can victims rely on government-funded agencies to protect them in the event of retaliation. Underfunded and understaffed agencies charged with enforcing Title VII and parallel state laws place the burdens of learning their rights and financing any legal challenges directly on the complaining victims, who are simultaneously at risk of losing their jobs and their income streams. Worse, the EEOC will almost certainly be more powerless in the future to address the sexual harassment crisis. Not only does the EEOC have a formidable number of unresolved pending cases, but under the current administration's budget, its funding and staffing will be reduced.¹¹⁴

Although #MeToo has helped high-profile, relatively powerful women use their leverage in social media and elsewhere to publicly shame their equally high-profile harassers, everyday working women with obscure bosses and coworkers lack this kind of leverage. Sexual harassment is widespread in the largely invisible low-wage sectors of the economy, where workers have limited resources to access legal help, have less financial ability to leave their work situations, and fear that their immigration status will be jeopardized if they report.¹¹⁵ The clear-cut gender hierarchies in some industries, like hospitality and agricultural labor, contribute to a workplace culture where sexual harassment is endemic.¹¹⁶ For these women, sexual harassment remains a

¹¹³ See *id.* at 22–29.

¹¹⁴ See Jacquie Lee, *Equal Employment Agency Sees Flat Budget Request*, 29 Daily Lab. Rep. (BNA) 6 (Feb. 12, 2018) (reporting that President Trump reduced funding for the EEOC in his fiscal year 2019 budget request); Heidi M. Przybyla & Eliza Collins, *Harassment Claim Surge Could Run into Federal Budget Squeeze at EEOC*, USA TODAY (Nov. 15, 2017, 7:51 PM), <https://www.usatoday.com/story/news/politics/2017/11/15/garassnebt-claim-surge-could-run-into-federal-budget-squeeze-eeoc/866881001> [<https://perma.cc/R5SD-V22N>] (reporting, among other things, that in 2017, the EEOC had approximately 2,900 employees and a backlog of 32,481 cases, and its 2018 funding request would provide for a staff of under 2,000 employees). In addition, for low-wage workers, even finding legal assistance to bring a charge will prove difficult because many lawyers work on a contingency fee basis. See Semuels, *supra* note 33. But “low-wage workers make so little money, the potential judgment, even if they win, may not be enough to make it worth lawyers’ time.” *Id.* (also noting that employment discrimination laws do not cover independent contractors, a rapidly growing portion of the American labor force, further undermining the efficacy of current laws).

¹¹⁵ See Debra Katz & Hannah Alejandro, *Opinion, Sexual Harassment Stakes Huge for Low-Income Women. Will #MeToo Help Them Too?*, USA TODAY (Dec. 8, 2017, 10:08 AM), <https://www.usatoday.com/story/opinion/2017/12/08/sexual-harassment-stakes-huge-low-income-women-metoo-katz-alejandro-column/928821001> [<https://perma.cc/CR98-DGPZ>] (explaining, from the perspective of two senior plaintiffs’ attorneys, why the #MeToo movement should include low-wage workers).

¹¹⁶ See *id.*

working condition that they are required to endure in order to survive economically. It should not surprise us, then, that the most common response is to hunker down, go along, or quit.

Worse, the media attention to sexual harassment stimulated by #MeToo may exacerbate the situation by reinforcing the sexual desire–dominance paradigm in the public mind. There is still a widespread belief that sexual harassment consists of sexualized conduct by a supervisor or manager with a person who wields power over an individual victim or series of victims in the workplace hierarchy, and the stories by high-profile women showcased in the media have not refuted this. Instead, the mainstream media’s systematic focus on sexual harassment as a twisted manifestation of male sexual desire grabs the headlines, and when the harasser is discharged, the story ends.¹¹⁷ But the problem of sexual harassment is about much more than men behaving badly. It is a structural problem linked to sex inequality in the workplace, including unequal pay and occupational segregation by sex.¹¹⁸

C. *Sexual Harassment and Labor Unions*

As a working condition that affects men’s and women’s economic security, pay, safety, and productivity in the workplace, sexual harassment is a collective injury. One might think that it would be an appropriate subject for labor-union mobilization and collective

¹¹⁷ Not all media accounts during this period were of this ilk. *The New York Times* reported on harassment inside Ford Motor Company’s Chicago plants, capturing the reaction of working-class women there: “What about us?” See Chira & Einhorn, *supra* note 33 (describing decades of harassment of women at Ford Motor Company). Even this powerful account of a pervasive and enduring workplace culture of sexual harassment emphasized the sexualized aspects of the harassment. One paragraph provides a telling summary:

Bosses and fellow laborers treated [the women employees] as property or prey. Men crudely commented on their breasts and buttocks; graffiti of penises was carved into tables, spray-painted onto floors and scribbled onto walls. They groped women, pressed against them, simulated sex acts or masturbated in front of them. Supervisors traded better assignments for sex and punished those who refused.

Id.

¹¹⁸ A group of legal scholars recently expressed concern about the sexualized focus of most of the high-profile allegations, worrying that it obscures the many ways in which sexual harassment infiltrates the workplace and plays upon structural vulnerabilities. See Vicki Schultz et al., *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018), <https://www.stanfordlawreview.org/online/open-statement-on-sexual-harassment-from-employment-discrimination-law-scholars/> [<https://perma.cc/8HFA-7AA3>] (“In the popular imagination, sexual harassment refers to unwanted sexual advances, usually by powerful male bosses or benefactors against less powerful women . . . [but] the bottom line is that harassment is more about upholding gendered status and identity than it is about expressing sexual desire or sexuality.”).

bargaining.¹¹⁹ Further, sexual harassment is particularly prevalent in many of the sectors that labor seeks to organize, including both manufacturing and the service sector. Clearly, a campaign to frame sexual harassment as a structural working condition ripe for reform is sorely needed. Why, then, have unions not jumped into the breach?

First, many unions have been part of the problem, so it is hard to imagine how they could be part of the solution. A powerful backdrop of misogynistic union culture still characterizes even some of the most progressive unions.¹²⁰ The SEIU and its Fight for \$15 campaign, the UFCW and its push to support working families, and the AFL-CIO itself have all been tarnished by sexual harassment allegations.¹²¹ Nor are these isolated instances of the problem. A recent *New York Times* article described decades of sexual harassment at the Ford plants in Chicago—a facility unionized by the United Automobile Workers (“UAW”).¹²² The misogynistic culture at Ford has persisted for over a quarter of a century despite a \$22 million judgment against Ford in the 1990s and a \$10 million settlement in August 2017.¹²³ Some of the predators were union leaders.¹²⁴ Disgusted by a coworker who offered to pay her five dollars in return for oral sex, one woman went to her union representative who urged her not to file a complaint against her harasser and then suggested that she consider the offer to be a “compliment.”¹²⁵ When another female union member went to her union steward to complain about a manager who pressed his groin against her, the steward told her she should be flattered.¹²⁶ Male coworkers retaliated against those who complained, preventing them from working and slashing their car tires in the company parking lot.¹²⁷ The union did nothing, prioritizing its male members’ economic interests over what it saw as its female members’ gender interests.¹²⁸

119 See Crain, *supra* note 35, at 108; Sharon Block, *What Harvey Weinstein Has to Teach Us About the Weakness of Our Laws*, ON LAB. (Nov. 28, 2017), <https://onlabor.org/what-harvey-weinstein-has-to-teach-us-about-the-weakness-of-our-laws/> [<https://perma.cc/L8QJ-GSGX>].

120 See Kullgren, *supra* note 46.

121 See Eidelson, *supra* note 43; Kullgren, *supra* note 46; *supra* notes 41–46 and accompanying text.

122 See Chira & Einhorn, *supra* note 33.

123 *Id.* (discussing settlements resulting from suits brought by workers and the EEOC).

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 We argued years ago that labor unions guided by the atrophied view of solidarity that characterizes business unionism might well be incapable of protecting women workers against sexual harassment. See Crain & Matheny, *supra* note 51, at 1600.

Nor was this sort of harassment unique to Ford. In 1996, the EEOC filed a lawsuit on behalf of approximately 500 women alleging sexual harassment against their employer Mitsubishi Motors.¹²⁹ The allegations in that case were strikingly similar to those at Ford, and the women were also represented by the UAW. The Mitsubishi employees reported numerous instances of misogynist behavior, including physical abuse, inappropriate touching, obscene graffiti, assault, sabotage of women's work, and verbal abuse.¹³⁰ The employer's response was depressingly predictable: it mounted a public relations campaign against the EEOC.¹³¹ The UAW local's leaders at Mitsubishi refused to proceed on formal grievance complaints brought by women who alleged sexual harassment by coworkers and supervisors.¹³² Even though the local's civil rights committee had received sexual harassment complaints from women for years, the local's officers reportedly instructed the committee not to investigate the allegations or pursue them further.¹³³ Instead, the first grievance that the union filed in a hostile work environment harassment case was brought on behalf of an alleged *harasser* whom Mitsubishi had discharged following the filing of EEOC charges.¹³⁴ Women at the Mitsubishi plant who were interviewed by *The Washington Post* described the union local itself as tainted by behavior that denigrated women.¹³⁵ Eventually, the international UAW, sensing a public relations nightmare, announced that it would intensively train local union officials to properly handle allegations of sexual (and racial) discrimination.¹³⁶ However, the union played essentially no role in trying to resolve the sexual harassment problem at the plant.¹³⁷ The consent decree, among other things, established a panel to address future allegations of harassment, but no union official sat on the panel.¹³⁸

¹²⁹ See *id.* at 1546.

¹³⁰ See *id.*

¹³¹ *Id.* at 1547.

¹³² *Id.* at 1549.

¹³³ *Id.*

¹³⁴ *Id.* at 1550; see also Crain, *supra* note 32, at 11–13 (discussing high-profile cases involving egregious examples of sexual harassment in unionized workplaces where the unions either did nothing or actually represented the accused harasser).

¹³⁵ See Crain & Matheny, *supra* note 51, at 1550 (discussing, for example, that the company ordered a union vice president to remove pictures from a *Sports Illustrated* women's swimsuit edition, which he had posted near his workbench, and that women also reported post-shift tailgate parties in the company parking lot with female strippers as the main attraction).

¹³⁶ *Id.* at 1551.

¹³⁷ *Id.*

¹³⁸ *Id.*

Unions are not monolithic, however. If the UAW has learned little, other unions have. The Screen Actors Guild (“SAG-AFTRA”) represents most of the Hollywood actresses involved in the first wave of the #MeToo movement. SAG-AFTRA has set the pace with a new code of conduct aimed at educating its membership about sexual harassment, providing members with practical tools when they confront it, and making it clear that SAG-AFTRA members will refrain from engaging in harassing conduct.¹³⁹ The union understands sexual harassment as a threat to workplace safety, and has warned the production companies with which it contracts that it will direct its members “not to report for work if they cannot work safely.”¹⁴⁰ Under its Code of Conduct, SAG-AFTRA refers performers subject to harassment to legal resources, including the Time’s Up Legal Defense Fund, run by the National Women’s Law Center; if that entity is unable to take the case, SAG-AFTRA will refer the member to plaintiffs’ attorneys or may take the case to the employer itself.¹⁴¹

Further, there is no shortage of good advice from union activists on practices that unions could and should employ to combat sexual harassment in their own ranks and on behalf of their membership, including recognizing sexual harassment as a workers’ rights issue, ensuring that the union’s constitution and its collective bargaining contracts contain anti–sexual harassment provisions, creating informal reporting channels to facilitate reporting, encouraging male union leaders to speak out against sexual harassment, and training union stewards on handling sexual harassment complaints.¹⁴² These practical recommendations echo ideas put forth more than a decade ago by legal scholar Ann Hodges, who offered a thoughtful analysis of the dilemma that faces unions striving to better support members in their efforts to challenge sexual harassment where the harassment occurs

¹³⁹ See Daniel Miller, *SAG-AFTRA Establishes Code of Conduct to Combat Sexual Harassment*, L.A. TIMES (Feb. 12, 2018, 2:45 PM), <http://www.latimes.com/business/hollywood/la-fi-ct-sag-aftra-code-20180210-story.html> [<https://perma.cc/2NUD-QQXC>]; *What Is SAG-AFTRA’s Discrimination and Harassment Policy?*, SAG-AFTRA, <https://www.sagaftra.org/what-sag-aftra-discrimination-harassment-policy> [<https://perma.cc/T4NF-MX4W>]; *Code of Conduct on Sexual Harassment*, SAG-AFTRA, https://www.sagaftra.org/files/sag-aftra_code_of_conduct_f2_2.pdf [<https://perma.cc/LXL8-FSW5>].

¹⁴⁰ Jacquie Lee, *Actors’ Union Says It’s Cracking Down on Sexual Harassment*, 30 Daily Lab. Rep. (BNA) 14 (Feb. 13, 2018).

¹⁴¹ *Id.*

¹⁴² Ana Avendaño & Linda Seabrook, *Top 10 Things Unions Can Do Right Now to Address Sexual Harassment in the Workplace*, ON LAB. (Nov. 10, 2017), <https://onlabor.org/top-10-things-unions-can-do-right-now-to-address-sexual-harassment-in-the-workplace/> [<https://perma.cc/G28R-58CB>].

between members.¹⁴³ Hodges made a compelling case that given the substantial costs of representing bargaining-unit members discharged for sexual harassment, the conflict of interest that arises when both the complainant and the accused harasser are in the bargaining unit, and the union's potential liability for condoning or supporting harassment under Title VII or for breach of its duty of fair representation, unions would be better served investing resources in preventing harassment.¹⁴⁴ She recommended that unions take active steps to support victims of harassment and assist them in making a complaint (regardless of venue), refuse to represent harassers in discipline cases where the union's investigation establishes that harassment occurred and the discipline imposed is proportionate to the harasser's behavior, model behavior that signals that the union does not tolerate sexual harassment, provide training at union conferences and meetings, and facilitate the creation of caucuses within the union.¹⁴⁵

But even as business unionism gives way to a more progressive "mobilizing approach," like that modeled in the Fight for \$15, strategy decisions are still largely in the hands of mostly white-male leaders.¹⁴⁶ It is thus no accident that most unions have taken the position that worker gender is irrelevant to organizing methodology or bargaining goals.¹⁴⁷ For decades, organizers have been urged to focus on bread-and-butter issues (wages, health insurance), while "women's issues" such as sexual harassment, comparable worth, and family leave are viewed as "luxury issues" beyond the scope of their organizing efforts.¹⁴⁸ As one organizer explained: "[Childcare and family issues] help us build credibility and they're fun things to talk about, but they don't . . . win campaigns and I don't think they start campaigns."¹⁴⁹

Misogyny and an implicitly gendered approach to organizing and bargaining are not the only factors influencing union responses to workplace sexual harassment. The law has furthered a vision of solidarity that narrows unions' focus to traditional economic issues, chan-

¹⁴³ See Hodges, *supra* note 56.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* at 211–21; see also Crain, *supra* note 32, at 61 (suggesting that union caucuses could play an important role in addressing sexual harassment in unionized workplaces).

¹⁴⁶ See McAleve, *supra* note 42.

¹⁴⁷ See Marion Crain, *Gender and Union Organizing*, 47 *INDUS. & LAB. REL. REV.* 227, 237, 240, 243 (1994).

¹⁴⁸ *Id.* at 243.

¹⁴⁹ *Id.* (alterations in original). Nevertheless, a few unions—including most notably the SEIU—were beginning to rethink this gender-blind strategy, at least in workforces where women predominated, and to discuss child care, family leave, sexual harassment, and pay equity. See *id.* at 243–45.

neling it away from the eradication of sexual harassment and other forms of discrimination. The next Part explains how the law has cabined the scope of NLRA section 7,¹⁵⁰ which codifies the concept of solidarity in law, in ways that limit the prospects for collective action around social justice issues, particularly workplace discrimination.

II. SOLIDARITY

The labor movement's understanding of solidarity arose from workers' day-to-day experience of exploitation in the workplace and was potentially quite capacious. But labor's notion of communal values and its solidaristic ethos—reflected in the famous maxim, “an injury to one is an injury to all”—was always a difficult fit with a rights rhetoric predicated on individual liberty. Ultimately, the Court and the National Labor Relations Board translated solidarity in ways that condition NLRA protection on self-interested group action aimed at traditional subjects of collective bargaining.

A. *Understanding Labor Solidarity*

What *is* solidarity? Sociologists Charles Heckscher and John McCarthy define solidarity “as a communal sense of obligation to support collective action.”¹⁵¹ The notion of reciprocal obligation is key: individuals can act together because they have common interests or values but not feel the deeper bond of solidarity.¹⁵² As Heckscher and McCarthy explain,

People sometimes act in concert because they see things from the same perspective—based on common interests, empathy or values—without feeling the mutual obligations to each other that characterize solidarity. Actions based in mere common perspectives or interests are unstable and usually brief, vulnerable to fragmenting pressures, and with little leverage for maintaining unity. The advantage of *obligation* for collective action is that it provides a stronger glue, holding people together even when they are not perfectly aligned individually. Solidarity gives movement solidity and flexibility, the ability to call on sacrifices beyond what an individual would do alone.¹⁵³

¹⁵⁰ 29 U.S.C. § 157 (2012).

¹⁵¹ Charles Heckscher & John McCarthy, *Transient Solidarities: Commitment and Collective Action in Post-Industrial Societies*, 52 BRIT. J. INDUS. REL. 627, 629 (2014).

¹⁵² See *id.*

¹⁵³ *Id.*

Common interests, then, do not necessarily produce solidarity; instead, “daily social relations—ties to other people, usually forming a defined group, with emotional connections and reciprocal obligations, in which reputation is very important and shaming an effective sanction,” are the elements from which solidarity arises.¹⁵⁴

For activist and lawyer Staughton Lynd, *labor* solidarity has a distinctive meaning that extends well beyond an implied promise of reciprocal obligation.¹⁵⁵ Lynd articulates three attributes of labor solidarity with implications for law.¹⁵⁶ “First, the well-being of the individual and the well-being of the group are not experienced as antagonistic.”¹⁵⁷ In this tradition, one person’s job security is neither separate from nor does it detract from another’s.¹⁵⁸ Thus, the free development of each individual is consonant with the free development of all—and in fact, depends upon it.¹⁵⁹

Second, the bond between those who work together “is often experienced as a reality in itself.”¹⁶⁰ For Lynd, solidarity is analogous to the experience of family, rather than representing “an updated version of the social contract through which each individual undertakes to assist others for the advancement of his or her own interest.”¹⁶¹ Solidarity is based on the affective bonds between persons:

I do not help my son in order to be able to claim assistance from him when I am old; I do it because he and I are in the world together; we are one flesh. Similarly . . . , persons who work together form families-at-work. When you and I are working together, and the foreman suddenly discharges you, and I find myself putting down my tools or stopping my machine before I have had time to think—why do I do this? Is it not because, as I actually experience the event, your dis-

¹⁵⁴ *Id.* at 629–30.

¹⁵⁵ Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1423 (1984) (explaining that solidarity is “the banding together of individual workers who are alone too weak to protect themselves”).

¹⁵⁶ *Id.* at 1426.

¹⁵⁷ *Id.*

¹⁵⁸ *See id.* at 1423, 1426.

¹⁵⁹ *See id.* at 1422–23.

¹⁶⁰ *Id.* at 1427.

¹⁶¹ *Id.*; *see also* James Gray Pope, *Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB*, 57 BUFF. L. REV. 653, 670 (2009) (observing that “[l]abor’s equivalent to business entrepreneurship is the generation of solidarity” and that “as capital is the key to creating and shaping a business, solidarity is the key to fostering any form of worker ‘self-organization’ or ‘concerted activity for mutual aid or protection’”).

charge does not happen only to you but also happens to us?¹⁶²

Finally, solidarity “can and must be individually exercised.”¹⁶³ A single worker’s assertion of a right is intrinsically an expression of solidarity—the individual activity could not occur without the prior organizing efforts and support of the group, nor could group rights exist absent individual assertions of them. Neither is complete without the other. In short, group well-being and individual self-realization are mutually reinforcing.¹⁶⁴ Thus, under section 7,

there are not two abstract and distinguishable categories of action—individual action for self-interest and collective action for mutual interest—one which Congress chose not to protect and the other which Congress chose to protect, but rather a continuum of individual activity—of individuals choosing to speak and act on their own behalf, singly and in small and large groups. . . . [A]t the core of the freedom of the individual to protest in a group necessarily lies the freedom of the individual to protest at all.¹⁶⁵

The social bonds between workers have been recognized in many other contexts, although they are not always dubbed “solidarity.” In her powerful book, *Nickle and Dimed*, Barbara Ehrenreich describes how she witnessed low-wage workers picking up the slack for one another and forming a “reliable mutual-support group”—all without any discernible instrumental motive:

[I]f one of us is feeling sick or overwhelmed, another one will “bev” [i.e., take and fill beverage orders for] a table or even carry trays for her. If one of us is off sneaking a cigarette or a pee, the others will do their best to conceal her absence from the enforcers of corporate rationality.¹⁶⁶

These insights about coworker altruism confounded economists committed to the rational-actor model, who assumed that workers responded chiefly to individual economic incentives. Then economist and Nobel Laureate George Akerlof offered an explanation.¹⁶⁷ He documented workers foregoing economic rewards out of sentiment

¹⁶² Lynd, *supra* note 155, at 1427.

¹⁶³ *Id.* at 1428.

¹⁶⁴ *See id.* at 1430.

¹⁶⁵ Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of “Concert” Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 344–45 (1982).

¹⁶⁶ BARBARA EHRENREICH, *NICKEL AND DIMED* 60 (2001).

¹⁶⁷ George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. ECON. 543, 550 (1982).

for their coworkers and putting forward more effort to compensate for lower-performing coworkers.¹⁶⁸ He concluded:

[I]f workers have an interest in the welfare of their coworkers, they gain utility if the firm relaxes pressure on the workers who are hard pressed; in return for reducing such pressure, better workers are often willing to work harder.¹⁶⁹

Legal scholar Cynthia Estlund extended this analysis to her exploration of workplace norms, noting that bonds between coworkers drive employees to hold one another and their employers to fairness norms: “Employers’ compliance with those norms meets with trust and reciprocity in the form of zealous job performance; violations may be met with shirking or collective resistance, overt or covert.”¹⁷⁰

Several scholars have argued that work law misses the significance of the bonds between coworkers.¹⁷¹ Michael Fischl penned a particularly persuasive exploration of the concept of mutualism in labor law, noting how legal discourse “takes as given an opposition between self and others in the workplace—an opposition that is belied by the experience of solidarity in the protests at issue and in worklife generally.”¹⁷² Fischl explained that the labor movement’s understanding of mutualism reflected the experience of bonds formed during workplace struggles and embraced the values of community, sympathy, and solidarity.¹⁷³ And it was this working-class experience of solidarity or mutualism that was the genesis of the protection afforded to concerted activities for mutual aid or protection in section 7.¹⁷⁴ Over time, however, the law developed in a way that systematically narrowed protection for worker protests.

¹⁶⁸ *Id.* at 547, 550.

¹⁶⁹ *Id.* at 550.

¹⁷⁰ CYNTHIA ESTLUND, *WORKING TOGETHER* 28 (2003).

¹⁷¹ See Marion Crain, *Arms'-Length Intimacy: Employment as Relationship*, 35 WASH. U. J.L. & POL'Y 163, 164 (2011) (the at-will rule in employment law); Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789 (1989) (labor law); Laura A. Rosenbury, *Working Relationships*, 35 WASH. U. J.L. & POL'Y 117 (2011) (employment discrimination law); Schoenbaum, *supra* note 35, at 608 (labor and employment law); Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63 (2002) (employment discrimination law).

¹⁷² Fischl, *supra* note 171, at 791.

¹⁷³ *Id.* at 793.

¹⁷⁴ See *id.* at 842–53.

B. *Translating Solidarity into Labor Law*

The idea of solidarity is codified in section 7 of the NLRA, which protects employees' rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."¹⁷⁵ The protection of concerted activities for mutual aid or protection traces its origins in federal law to the Norris-LaGuardia Act of 1932,¹⁷⁶ which limited the power of federal courts to issue injunctions in labor disputes. Although the policy driving the Norris-LaGuardia Act emphasized the individual freedom of association and self-organization,¹⁷⁷ the Act itself only regulated the power of federal courts to issue injunctions.¹⁷⁸ The phrase was repeated in the short-lived National Industrial Recovery Act¹⁷⁹ and ultimately adopted in NLRA section 7 and section 8(a)(1) as a positive statement of employee rights and a limit on employer action.¹⁸⁰

The emphasis on solidarity in the original NLRA had potentially radical implications. By explicitly encouraging workers to act in concert with each other, the Act sought to redistribute power to average working Americans.¹⁸¹ Translating solidarity into law, however, presented a challenge to the hyperindividualism that undergirds capi-

¹⁷⁵ National Labor Relations Act, § 7, 29 U.S.C. § 157 (2012). Staughton Lynd and Daniel Gross have remarked on the unique nature of section 7 in American jurisprudence: "It is strange, in our individualistic system of laws, to encounter a right to act together with others. Section 7 of the NLRA nevertheless proclaims [such] a right." STAUGHTON LYND & DANIEL GROSS, *LABOR LAW FOR THE RANK AND FILER* 37 (2008).

¹⁷⁶ Pub L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115 (2012)); see 29 U.S.C. § 102 (2012). For a full history of the concept, see Gorman & Finkin, *supra* note 165, at 331–46.

¹⁷⁷ See Norris-LaGuardia Act, ch. 6, 29 U.S.C. § 102 ("[T]he individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing . . . in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."); Gorman & Finkin, *supra* note 165, at 335.

¹⁷⁸ See Gorman & Finkin, *supra* note 165, at 337.

¹⁷⁹ See *id.* The National Industrial Recovery Act was struck down as unconstitutional by the Supreme Court. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).

¹⁸⁰ See Gorman & Finkin, *supra* note 165, at 338.

¹⁸¹ See Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561, 574 (2014). Unfortunately, the potential for redistributing power was never truly realized because of the hostility of courts to collective action and the implied threat to propertied interests. See, e.g., Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 292–93 (1978) (arguing that the judiciary undermined the radical potential of the NLRA by importing its sense of liberal individualism and its suspicion of class-based collective action).

talism and legal liberalism.¹⁸² The rights rhetoric characteristic of American jurisprudence was at odds with the lived meaning of solidarity: rights are assumed to be individual rights, and even the statutory creation of collective rights was problematic for law. Would the new collective rights be seen as a form of property belonging to groups rather than to individuals?¹⁸³ If so, how could an individual worker assert collective rights? Worse, the idea of one person's exercise of a right enhancing rather than detracting from another's was alien to a legal system that tended to see rights exercise in zero-sum terms.¹⁸⁴ As Staughton Lynd explained,

the language of rights is permeated by the possessive individualism of capitalist society. Rights, in the conventional view, are assumed to be *individual* rights. . . . Moreover, in the conventional view individuals are imagined to *possess* rights in the same way that they possess more tangible kinds of property. . . . Consistent with this analysis of rights as property, the conventional view implicitly assumes that the supply of rights is finite, and thus that "right" is a scarce commodity. In this view the assertion of one person's right is likely to impinge on and diminish the rights of others. Thus, as Karl Klare has suggested . . . , conventional rights rhetoric assumes a "zero-sum" game.¹⁸⁵

Labor solidarity has taken many institutional forms throughout history, ranging from cooperatives to craft associations, trade unions to industrial unions.¹⁸⁶ Public displays of labor solidarity have traditionally occurred in the context of the use of economic weapons such as the strike, the picket line, and the boycott, as well as more spontaneous actions such as walkouts, sitdowns, and various forms of collective action that are less obviously coordinated. Ruling elites, including the federal judiciary, viewed these displays of solidarity—and labor unions in particular—as threatening to the legal order.¹⁸⁷ The judiciary

182 See George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 201, 204 (1994) (observing that when workers act together as a class, they "develop a view that challenges capitalism"); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1420 n.252 (1982) (noting that the liberal legal tradition has not valued communal experience).

183 See Lynd, *supra* note 155, at 1422. Lynd prefers the term "communal rights" to refer to labor law's collective rights, signaling their very different character. See *id.*

184 See *id.*

185 *Id.* at 1418–19.

186 See Heckscher & McCarthy, *supra* note 151, at 630–33 (comparing and contrasting craft solidarity, industrial solidarity, and class solidarity).

187 See Crain & Matheny, *supra* note 181, at 566–79 (noting that judicial hostility to class-

soon narrowed the protection of collective action, defining section 7 rights in ways more consistent with liberal concepts of individualism and with deference to property rights than with the historical experience of worker organizing and collective action.¹⁸⁸

In a series of decisions, the Supreme Court severely curtailed the use of group action by workers to leverage the power that was apparently given to them by the NLRA.¹⁸⁹ One of labor's most effective weapons, the sitdown strike, was deemed unprotected.¹⁹⁰ A "right" for employers to "permanently replace" economic strikers was created out of deference to managerial discretion and business owners' property rights at common law.¹⁹¹ The Labor Board found slowdown work actions to be unprotected.¹⁹² Partial or intermittent strikes were also held unprotected.¹⁹³ In addition to the narrowing of section 7 protection by the courts, Congress enacted the Taft-Hartley amendments in 1947 that, among other things, outlawed most forms of secondary boycotts with the result that "[a]ctivities that were based on class or worker solidarity or that existed outside the contractual regime were

based collective action dates back to the earliest years of the American republic); see also Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. 1791, 1812–19 (describing forms that judicial hostility assumed).

¹⁸⁸ Feldman, *supra* note 182, at 201; see also JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 44 (1983); Fischl, *supra* note 171, at 795–96.

¹⁸⁹ For a discussion of these cases, see Crain & Matheny, *supra* note 181, at 575–79 (discussing landmark cases that narrowed the protection of section 7 and narrowed the concept of solidarity to economic self-interest).

¹⁹⁰ See *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252 (1939) (holding with little analysis that the sitdown strike is not protected by the Act). For a discussion of this case and sitdown strikes, see ATLESON, *supra* note 188, at 45–50.

¹⁹¹ See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938) (stating that an employer who is not guilty of an unfair labor practice can permanently replace strikers). For a penetrating critique of this decision, see ATLESON, *supra* note 188, at 19–34. The creation of a right to permanently replace economic strikers "reflects a historical continuity of values . . . in judicial opinions. The traditional judicial deference given to productivity, hierarchical control, and continued production has thus remained significant after, as well as before, the NLRA. *Mackay* can be viewed as the almost automatic responses of judges raised in an era of acknowledged managerial freedom." *Id.* at 33.

¹⁹² See *Elk Lumber Co.*, 91 N.L.R.B. 333, 335–39 (1950) (upholding the discharge of workers involved in a slowdown action). A slowdown is essentially workers' determining for themselves what constitutes a fair day's work for the pay they receive and to regulate the pace of work. See ATLESON, *supra* note 188, at 50–52; see also Pope, *supra* note 161, at 679–80 (describing a slowdown as workers' joining together to regulate their pace of work and "enacting their own norms concerning a fair day's work").

¹⁹³ See *NLRB v. Kohler Co.*, 220 F.2d 3, 11 (7th Cir. 1955) (enforcing the NLRB's order finding that a partial strike by workers was not protected by the NLRA and upholding the discharge of the workers involved).

often defined as outside the protective ambit of the law.”¹⁹⁴ Picketing was viewed with suspicion and considered synonymous with confrontation and violence, and so categorized as a form of conduct enjoying only minimal First Amendment protection.¹⁹⁵ The courts missed the significance of picketing as an expression of solidarity, “a public demonstration of loyalty to the union or sympathy with the union’s goals.”¹⁹⁶ Another blow came in 1981 when the Supreme Court significantly narrowed the range of issues that workers could bargain about and in so doing weakened union power, limiting workers’ influence over employer decisions relating to the future scope and direction of the business.¹⁹⁷

The Court and the Labor Board eventually established a three-part test for determining which activities are shielded from employer retaliation under section 7 of the NLRA: the activity must be (1) “concerted,” (2) for collective bargaining or “other mutual aid or protection,” and (3) “protected,” meaning that an otherwise protected activity may lose protection if it is unlawful, violent, in breach of contract, or otherwise inconsistent with traditional notions of the master-servant relation.

1. Concerted Activity

To be concerted, activity must involve conduct by more than one employee, by one employee acting on behalf of others, or by one employee seeking to initiate, induce, or prepare for group action or to bring truly group complaints to the attention of management.¹⁹⁸ Al-

¹⁹⁴ ATLESON, *supra* note 188, at 47.

¹⁹⁵ See James G. Pope, *The Three Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 219–21 (1984); see also Dianne Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894–1921*, 37 BUFF. L. REV. 1, 32, 89 (1989) (discussing the Supreme Court’s view of workers as violent and irrational, and picketing as fundamentally a form of intimidation).

¹⁹⁶ Avery, *supra* note 195, at 89; see also Crain & Matheny, *supra* note 181, at 599 (observing that picketing is an expression of solidarity, a physical demonstration “of workers’ willingness to stand up against oppressive employment practices even when doing so places their jobs at risk”).

¹⁹⁷ See *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 676–86 (1981) (holding that an employer’s decision to shut down part of its business for economic reasons is not a mandatory subject of bargaining under the Act).

¹⁹⁸ See *Meyers Indus. (“Meyers I”)*, 268 N.L.R.B. 493, 497 (1984), *remanded sub nom* Prill v. NLRB, 755 F.2d 941, 948 (D.C. Cir. 1985), *supplemented by* *Meyers Indus. (“Meyers II”)*, 281 N.L.R.B. 882, 887 (1986), *aff’d sub nom* Prill v. NLRB, 835 F.2d 1481, 1484 (D.C. Cir. 1987); see also *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984) (explaining concept of constructive concerted activity protecting action by individual employee to enforce a right guaranteed by a collective-bargaining agreement).

though this element is analytically separate from the other two requirements for protection under section 7,¹⁹⁹ there also exists overlap with the mutual aid or protection element, particularly in the case of a single worker acting alone, where the benefit to coworkers as a group may not be immediately apparent. One of the most challenging questions has been under what conditions a single person's actions could be deemed concerted where the worker is not authorized by others to act and others are not persuaded to act collectively. Ultimately, the Court and the Board distinguished between situations arising in non-union workforces and those arising in unionized workforces. Although informal group activity in a nonunion workplace has been accorded section 7 protection,²⁰⁰ the efforts of a single employee acting alone to challenge working conditions or assert statutory rights impacting other workers have generally been deemed not to be concerted.²⁰¹ By contrast, a single employee acting alone to assert rights protected under the labor contract is considered to be acting concertedly.²⁰²

Despite evidence that solidarity stems from social networks and informal social interactions rather than from the formality of union presence,²⁰³ the Court and the Labor Board have considered the link to a formal union representative critical in finding activity concerted. In *NLRB v. J. Weingarten, Inc.*,²⁰⁴ the Court found concerted an employee's request for a union representative when faced with an interview likely to lead to disciplinary action.²⁰⁵ Even though the disciplinary action would directly impact only one employee, the request for representation was concerted (and for mutual aid) because

¹⁹⁹ See *Summit Reg'l Med. Ctr.*, 357 N.L.R.B. 1614, 1616 (2011) (explaining that despite close relationship between them, elements of section 7 protection are analytically distinct).

²⁰⁰ See *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14–15 (1962) (holding that walkout by seven employees protesting extremely cold temperatures in their workplace was protected); see also *Cent. Valley Meat Co.*, 346 N.L.R.B. 1078, 1092 (2006) (holding that employees who walked off the job to protest a coworker's termination were protected); *Ohio Oil Co.*, 92 N.L.R.B. 1597, 1619 (1951) (holding that informal protest against elimination of overtime work was protected). More recently, protection has been extended to conversations about working conditions that occur between nonunion workers on social media. See, e.g., *Design Tech. Grp.*, 359 N.L.R.B. 777 (2013) (holding that employees who criticized manager on social media and were discharged for insubordination were protected); *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. 368 (2012) (holding that employees who criticized a coworker's performance on social media and were discharged for harassment and bullying were protected).

²⁰¹ See *Meyers I*, 268 N.L.R.B. at 496.

²⁰² See *City Disposal Sys., Inc.*, 465 U.S. 822, 835–36 (1984).

²⁰³ Schoenbaum, *supra* note 35, at 616 (“[S]olidarity . . . [is] more a product of informal coworker social attachments than of labor unions or their organizing efforts.”).

²⁰⁴ 420 U.S. 251 (1975).

²⁰⁵ See *id.* at 260.

the union representative would safeguard the interests of all unit employees against unjust disciplinary procedures and his presence would signal to other employees that the union would be available for assistance should they face a similar threat.²⁰⁶ Although the Board initially extended *Weingarten* rights to the nonunion context,²⁰⁷ it later retreated from this position.²⁰⁸ In the nonunion setting, the Board saw no guarantee that the interests of the group would be safeguarded by the presence of a coworker (as opposed to a union steward obligated to represent the interests of the group); in addition, the absence of a reciprocal implied promise of benefit made it difficult for the Board to find either concerted activity or mutuality.²⁰⁹ In the Board's view, coworkers were not a significant force in rebalancing the power between the employer and the individual employee because all they could provide was "moral and emotional support," rather than being able to leverage the power of the group as a union representative could.²¹⁰

More difficult was the question whether a single employee acting alone to enforce contract rights in lieu of a union representative could be deemed concerted. In *NLRB v. City Disposal Systems, Inc.*,²¹¹ the Court had before it the question whether a unionized worker who refused to drive a truck because he believed it to be unsafe was engaged in concerted activity.²¹² James Brown's refusal was covered by a contract provision that allowed a worker to refuse to operate an unsafe vehicle, but Brown acted alone in exercising the right and made no reference to the relevant contract provision.²¹³ In a 5–4 decision, the Court ruled that Brown's refusal was protected concerted activity under section 7.²¹⁴ The Court constructed the element of concert by tracing the contract right to its historical roots in group activity: by invoking a right guaranteed by the collective-bargaining agreement, Brown was reminding his employer that the employees as a group had extracted a promise from the employer and that they would collec-

²⁰⁶ *Id.* at 260–61.

²⁰⁷ See *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982); see also *Epilepsy Found. of Ne. Ohio*, 331 N.L.R.B. 676 (2000) (returning to *Materials Research* rule), enforced, 268 F.3d 1095 (D.C. Cir. 2001).

²⁰⁸ See *E.I. Dupont de Nemours*, 289 N.L.R.B. 627, 630 (1988); *Sears, Roebuck & Co.*, 274 N.L.R.B. 230, 231 (1985); see also *IBM Corp.*, 341 N.L.R.B. 1288, 1289–90 (2004) (overturning *Epilepsy Foundation* and returning to *Sears* rule).

²⁰⁹ See *E.I. Dupont de Nemours*, 289 N.L.R.B. at 629–30.

²¹⁰ *IBM Corp.*, 341 N.L.R.B. at 1292.

²¹¹ 465 U.S. 822 (1984).

²¹² *Id.* at 825.

²¹³ *Id.* at 826–27.

²¹⁴ See *id.* at 824–826.

tively enforce the promise.²¹⁵ Blessing the Labor Board's *Interboro* doctrine,²¹⁶ the Court found that assertion of such a right is an extension of the concerted activity that produced the agreement, and affects the interests of all employees in the unit.²¹⁷ In a famous passage, the Court explained:

[W]hen an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees. When, for instance, James Brown refused to drive a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks. He was also reminding his employer that if it persisted in ordering him to drive an unsafe truck, he could reharass the power of that group to ensure the enforcement of that promise. It was just as though James Brown was reassembling his fellow union members to reenact their decision not to drive unsafe trucks. A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.²¹⁸

Justice O'Connor, joined by Chief Justice Powell and Justice Rehnquist, dissented, unable to see concerted activity in the actions of a single worker.²¹⁹ To O'Connor, James Brown was simply asserting a "self-interested" and therefore "personal concern"—his own contractual rights.²²⁰ Ultimately, this drove her to conclude that "the concepts of individual action for personal gain and 'concerted activity' are intuitively incompatible."²²¹ O'Connor's analysis reflected dichotomous thinking about individual rights and group rights: group rights (pro-

²¹⁵ See *id.* at 831–32.

²¹⁶ *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1298 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967). The Board had reasoned that a single employee's assertion of a right contained in a labor contract was an extension of the concerted activity that produced the contract and that assertion of such a right impacts the rights of all employees covered by the contract, even where the employee may have his own interests immediately in mind. See *id.* at 1298.

²¹⁷ See *City Disposal Sys., Inc.*, 465 U.S. at 840–41 (stating that an "honest and reasonable invocation of a collectively bargained right constitutes concerted activity" and analogizing the employee's action to filing a grievance).

²¹⁸ *Id.* at 832.

²¹⁹ *Id.* at 845 (O'Connor, J., dissenting).

²²⁰ *Id.* ("[W]hen an employee acts alone in expressing a personal concern, contractual or otherwise, his action is not 'concerted' . . .").

²²¹ *Id.* at 842.

tected under the NLRA) could be exercised only by multiple employees acting together or by authorizing one to act on their behalf.

Thus, the Court was able to recognize concerted activity in the actions of a single employee in a unionized workforce who seeks to enforce rights created in a labor contract either by looking backward in time to the group action that produced the contract (*City Disposal*) or forward in time to the benefits that contract enforcement will yield for others (*Weingarten*). Neither rationale had applicability to a single worker's action in a nonunion workplace, however. Nevertheless, the Board initially extended its *Interboro* doctrine to the nonunion setting, finding that an employee who filed a safety complaint under a state statute was protected even where his coworkers did not support his efforts, reasoning that consent of the coworkers to a benefit traditionally addressed in collective bargaining could be implied.²²² The Board eventually retreated from that position, however, and concluded that employees who act alone to enforce statutory rights in a nonunion context are not engaged in concerted activity since the actions that led to enactment of a statute conferring individual rights are not necessarily congruent with the group action that led to ratification of a labor contract.²²³ Only where the facts suggest that the employee's action is linked to prior conversations with coworkers or a history of complaints by coworkers that raise common issues has the Board been willing to find concerted activity where express authorization from others is lacking.²²⁴ And even this doctrine is threatened by the Court's recent observations about the limited nature of protected concerted activity relating to the collective enforcement of statutory rights in *Epic Systems Corp. v. Lewis*.²²⁵

Finally, when a single employee's actions shade too much toward attaining an individual benefit or personal "gripping," the Board finds the conduct unprotected, reasoning either that it is not concerted or

²²² See *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000-01 (1975).

²²³ See *Meyers Indus. ("Meyers I")*, 268 N.L.R.B. 493, 497 (1984), *remanded sub nom* *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *supplemented by* *Meyers Indus. ("Meyers II")*, 281 N.L.R.B. 882, 887 (1986), *aff'd sub nom* *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

²²⁴ See, e.g., *Every Woman's Place, Inc.*, 282 N.L.R.B. 413, 413 (1986), *enforced*, 833 F.2d 1012 (6th Cir. 1987) (employee who called Department of Labor to inquire about holiday-pay requirements was engaged in protected concerted activity where employee and two coworkers had repeatedly complained about overtime compensation to the employer without a response).

²²⁵ 138 S. Ct. 1612, 1624-25 (2018) (citation omitted) (finding scope of section 7 coverage for concerted activities limited to those listed in the statute or those that employees "just do" for themselves in the course of exercising their right to free association in the workplace," and excluding "the highly regulated, courtroom-bound 'activities'" of class arbitration and collective litigation to enforce statutory rights).

that it is not sufficiently oriented toward mutual aid or protection.²²⁶ These scenarios are more likely in a nonunion setting because of the absence of the labor contract as a source of rights.

2. *For Mutual Aid or Protection*

The mutual aid or protection requirement focuses on the *goal* of the concerted activity, asking whether the employees were “seek[ing] to improve terms and conditions of employment or otherwise improve their lot as employees.”²²⁷ The Labor Board has made clear that the goal of the activity is distinct from the motive of the worker pursuing it:

[T]he analysis focuses on whether there is a link between the activity and matters concerning the workplace or employees’ interests as employees. As one court has explained:

The motive of the actor in a labor dispute must be distinguished from the purpose for his activity. The motives of the participants are irrelevant in terms of determining the scope of section 7 protections; what is crucial is that the purpose of the conduct relate to collective bargaining, working conditions and hours, or other matters of “mutual aid or protection” of employees.²²⁸

A troubling question is whether other employees must share the goal or benefit from its attainment in order for the mutual aid or protection element to be satisfied. In an early case, Judge Learned Hand of the Second Circuit articulated an influential and capacious description of the mutualism that section 7 was designed to protect:

When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a “concerted activity” for “mutual aid or protection,” although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is “mutual aid” in the most lit-

²²⁶ See *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 751–52 (4th Cir. 1949) (finding petition for removal of supervisor not protected where worker was nursing personal grudge against that supervisor); *Capitol Ornamental Concrete Specialties, Inc.*, 248 N.L.R.B. 851, 851 (1980) (finding employee discharged for personal “gripping” was not protected under section 7).

²²⁷ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

²²⁸ *Fresh & Easy Neighborhood Mkt., Inc.*, 361 N.L.R.B. 151, 153 (2014) (quoting *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328 n. 10 (7th Cir. 1976)).

eral sense, as nobody doubts. So too of those engaging in a “sympathetic strike,” or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased.²²⁹

Judge Learned Hand’s description of labor solidarity has been frequently quoted with approval by both the Court and the Labor Board, but its application has been uneven. A number of scholars have observed that although it has been understood as resting upon an implied promise of reciprocal benefit running to issues of traditional concern to collective bargaining—the so-called “self-interest” requirement for section 7 protection—it is actually far more capacious.²³⁰ Meanwhile, however, the Board and courts have reinterpreted what were essentially selfless actions by workers as self-interested in order to gain protection under the Act.²³¹

In *Eastex, Inc. v. NLRB*,²³² the Court further limited the range of section 7 protection for “mutual aid” to matters of direct interest to employees qua employees.²³³ At issue was whether section 7 protected an effort by unionized employees to distribute at their workplace a newsletter that, among other things, addressed a presidential veto of an increase in the minimum wage and encouraged employees to write their legislators to oppose a right-to-work amendment to the state constitution.²³⁴ The question was whether these supposed “political” issues were sufficiently self-interested—that is, pertained to the economic interests of employees—to be protected by section 7.²³⁵ The Court assumed without discussion that for the distribution of the newsletter to be protected concerted activity, the minimum wage and right-to-work issues had to be self-interested, not altruistic. Even though the activities also supported employees of employers other than their own and the channel utilized to pursue group action was outside the immediate employer-employee relationship, the Court had little difficulty finding that both issues were related to employees’ own interests. The right-to-work issue was protected despite its “political” nature because of employees’ self-interest in enhancing their bar-

²²⁹ *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505–06 (2d Cir. 1942).

²³⁰ *See, e.g.*, Fischl, *supra* note 171, at 854–58.

²³¹ *See id.* at 791 & n.8, 800.

²³² 437 U.S. 556 (1978).

²³³ *See id.* at 564.

²³⁴ *See id.* at 559.

²³⁵ *See id.* at 558.

gaining power.²³⁶ As for the minimum wage issue, the Court found that this issue was sufficiently self-serving to be protected because the minimum wage sets a threshold level for wages that can be achieved through collective bargaining—even though the employees in *Eastex* earned well above the minimum wage.²³⁷ In his influential analysis of this decision and its implications, Michael Fischl observed:

It may well be the case that the employees in *Eastex* were as craftily self-interested as the Court's reasoning suggests. The fascinating thing about the case, however, is that the newsletter on its face suggested that the only motive behind the distribution at issue was the employees' concern not for themselves, but for *other* workers

Labor law thus puts a curious twist on the Golden Rule. Workers may do unto others as they would have others do unto them, but—to receive legal protection against employer interference with their protest—they must do so in a manner that will permit the Labor Board and the courts to pretend plausibly that what they are “really” up to is doing for themselves.²³⁸

3. *Protected Conduct*

Even when activity is both concerted and for collective bargaining or other mutual aid or protection, its form may cause it to lose section 7 protection.²³⁹ The limitations on protection stem either from external law, contract, or implied obligations inherent in the employment relation at common law, such as the duty of loyalty to the common enterprise.²⁴⁰ Picket-line conduct that is violent or reasonably tends to coerce or intimidate other employees in the exercise of section 7–protected rights (e.g., the right not to strike) thus loses protec-

²³⁶ See *id.* at 569.

²³⁷ See *id.*

²³⁸ Fischl, *supra* note 171, at 797–98.

²³⁹ See *S. S. Co. v. NLRB*, 316 U.S. 31, 46 (1942) (strike by seamen unprotected because unlawful mutiny); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 255 (1939) (sitdown strike unprotected because unlawful trespass); *Elk Lumber Co.*, 91 N.L.R.B. 333, 336 (1950) (slowdown not protected).

²⁴⁰ See *NLRB v. Int'l Bhd. of Elec. Workers Local 1229 (“Jefferson Standard”)*, 346 U.S. 464, 472, 476–77 (1953) (finding the circulation of handbills disparaging the employer's product not protected by section 7 where there was no reference to a labor controversy because “[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer”). For an analysis of the duty of loyalty and its origins in common law, see Ken Matheny & Marion Crain, *Disloyal Workers and the “Un-American” Labor Law*, 82 N.C. L. REV. 1705 (2004); see also ATLESON, *supra* note 188.

tion under the Act.²⁴¹ Strikes in violation of a no-strike clause in a labor contract are unprotected.²⁴² Worker activities that disparage the employer's products or services are likely to be unprotected, particularly if they are not closely connected with a labor dispute.²⁴³ Even if they are so connected, activities may lose protection if they are likely to leave a lingering impression in the consumer's mind that will have deleterious business impacts after the labor dispute has ended.²⁴⁴ In addition, the Seventh Circuit Court of Appeals held that concerted worker activity must meet a "reasonableness" requirement that it called an "inherent proportionality requirement."²⁴⁵ Finally, workers who use profanity while exercising section 7 rights may forfeit protection if they undermine employer authority in ways that the Board finds incompatible with common-law understandings of the employment relation.²⁴⁶

III. SEXUAL HARASSMENT AND SECTION 7

The boundaries of protected section 7 concerted activity are not static, as the National Labor Relations Board decisions discussed above illustrate. The uncertainty is exacerbated because the Board's membership is determined by the political party that occupies the White House.²⁴⁷ To put it plainly, the NLRB's decisions under a Republican administration will differ from those under a Democratic administration, and the reason for the different outcomes is often

²⁴¹ See *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044, 1045 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985).

²⁴² See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956).

²⁴³ See *Jefferson Standard*, 346 U.S. at 472; *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061 (D.C. Cir. 1992) (holding that employee who participated in rally advocating consumer boycott of employer's products when no labor dispute existed could be discharged for disloyalty).

²⁴⁴ See, e.g., *Miklin Enterprises, Inc. v. NLRB*, 861 F.3d 812, 825 (8th Cir. 2017) (en banc) (finding that Jimmy John's franchise was justified in firing workers who were pressing for paid sick days by posting fliers that pictured sandwiches side by side and implying that those made by workers who came to work while sick would pass disease because fliers represented a calculated attack on employer's products that would likely outlive the labor dispute).

²⁴⁵ *Bob Evans Farms, Inc. v. NLRB*, 163 F.3d 1012, 1023–24 (7th Cir. 1998) (finding that a walkout by restaurant employees protesting the discharge of a supervisor was unprotected because the walkout was a "disproportionately disruptive" response to the discharge of a supervisor).

²⁴⁶ See *Atl. Steel Co.*, 245 N.L.R.B. 814, 819 (1979) (outlining test that Board uses to determine when the use of profanity crosses the line into insubordination and loses protection).

²⁴⁷ See William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501, 1506 (2015) (noting the power of the President to influence the NLRB's decisions through the appointment process).

traceable to the ideological leanings of Board members.²⁴⁸ Few areas illustrate this pattern more clearly than the treatment accorded to claims of sexual harassment in the workplace when they are advanced as a form of section 7-protected activity.

A. *Sexual Harassment Complaints: Concerted and for Mutual Aid or Protection?*

In *Holling Press, Inc.*,²⁴⁹ Catherine Fabozzi filed a complaint with the New York State Division of Human Rights after her union determined that her sexual harassment complaint was unfounded.²⁵⁰ When the agency asked for specific information to prepare a complaint on her behalf, Fabozzi sought assistance from Susan Garcia, a female co-worker who had made statements implying to Fabozzi that the alleged harasser had also engaged in sexualized conduct directed at her.²⁵¹ When Garcia hesitated, Fabozzi threatened her, telling Garcia that she could be required by subpoena to testify, and using language that Garcia found intimidating.²⁵² The employer responded by suspending and later terminating Fabozzi for attempting to coerce Garcia into corroborating Fabozzi's sexual harassment charge.²⁵³ Although Fabozzi complained to her union representative, the union found the complaint unfounded and did not pursue it in arbitration.²⁵⁴ Fabozzi filed a section 8(a)(1) charge with the Board, asserting that her section 7 rights were violated by her termination.²⁵⁵

The Bush Labor Board found that although Fabozzi's actions were concerted, they were not undertaken for purposes of mutual aid or protection because they were not made to accomplish a collective goal, but were instead "purely individual" efforts to advance her "personal claim before a State agency."²⁵⁶ The Board reasoned that there was no evidence that other employees had suffered similar problems in the workplace, nor had Fabozzi offered to help others as a quid pro quo for their support of her claim.²⁵⁷ The Board distinguished *Eastex*,

²⁴⁸ See William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23, 27 (2006).

²⁴⁹ 343 N.L.R.B. 301 (2004).

²⁵⁰ *Id.* at 301.

²⁵¹ See *id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* The administrative law judge criticized the union's investigation of Fabozzi's complaint. *Id.* at 301 n.5.

²⁵⁵ See *id.* at 301 n.9.

²⁵⁶ *Id.* at 302.

²⁵⁷ *Id.*

stating that “[o]bviously, ‘right to work’ vs. union security is an issue that is an important one for all union supporters within the unit” and “[e]qually obvious, minimum wage laws are not personal to any particular employee.”²⁵⁸ The *Eastex* employees thus had a “common interest in the subject matter,” something that the Board found lacking in a “purely individual” sexual harassment complaint.²⁵⁹ Although the Board majority did acknowledge that workplace sexual harassment is not merely an individual concern, it required more than one employee-victim’s complaint to rise to a level of *common* concern.²⁶⁰ Said the Board, “The bare possibility that the second employee may one day suffer similar treatment, and may herself seek help, is far too speculative a basis on which to rest a finding of mutual aid or protection.”²⁶¹ The Board went on to distinguish cases in which a single employee requests assistance from others when facing an investigatory interview that could result in disciplinary action, observing that employees have a common interest in a disciplinary regimen because “discipline and the threat thereof are commonplace occurrences” creating a “real possibility” that others would suffer the same fate and seek assistance.²⁶² By contrast, the Board characterized claims to remedy alleged sexual harassment as “not a common everyday occurrence” raising only “a theoretical possibility that the solicited person may herself file a claim or suit some day and ask for assistance at that time,” one that is “far too remote and tenuous to support a conclusion that the request is for mutual aid or protection.”²⁶³

Board Member Wilma Liebman penned a powerful dissent, noting that the fact that Fabozzi’s was the only complaint related only to the element of concertedness—which (as the majority acknowledged) was satisfied by her solicitation of assistance from coworkers.²⁶⁴ Liebman went on to explain that the solidarity principle embodied in section 7 renders protected “‘making common cause with a fellow work[er] over his separate grievance’ . . . even if only the one worker ‘has any immediate stake in the outcome.’”²⁶⁵ Further, she argued, the

²⁵⁸ *Id.* at 302–03.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 303.

²⁶¹ *Id.* at 303–04.

²⁶² *Id.* at 304.

²⁶³ *Id.*

²⁶⁴ *Id.* at 304 (Liebman, Member, dissenting).

²⁶⁵ *Id.* at 305 (first alteration in original) (quoting *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505 (2d Cir. 1942) (providing Judge Learned Hand’s description of mutualism)).

Act's protections do not distinguish between different types of workplace grievances; all that is necessary is that they bear on terms and conditions of employment, which an effort to eradicate sexual harassment and discrimination in the workplace clearly does.²⁶⁶ Moreover, the Act's protections, reflecting the solidarity principle, do not depend upon coworkers sharing identical grievances, because one worker may support another in her grievance, expecting future support from her in his very different grievance.²⁶⁷ Finally, Liebman pointed out the error of the majority's assumption that sexual harassment is rare, quoting EEOC statistics showing more than 13,000 sexual harassment charges filed in 2003 and citing studies concluding that underreporting of sexual harassment suggests that work-related sexual harassment impacts one of every two women.²⁶⁸ Liebman concluded,

It may be true that Fabozzi cared more about herself than she did about her coworkers. And Fabozzi may well have aggressively pursued her own interests. But Section 7 requires neither altruism, nor unequivocal solidarity, on the part of an individual employee who seeks help from coworkers with respect to working conditions. My colleagues, I fear, have let their understandable lack of sympathy for some of Fabozzi's behavior lead them to make bad law for all workers. Whatever the reason, the majority's decision today places an arbitrary roadblock in front of employees who join together to resist unlawful discrimination. At bottom, it encourages victims of sexual harassment to remain silent.²⁶⁹

The *Holling Press* ruling stood for a decade. Ten years later, the Obama Board overturned the ruling in a case arising outside the union context, *Fresh & Easy Neighborhood Market, Inc.*²⁷⁰ Margaret Elias told her supervisor that she was going to file a sexual harassment complaint because of a sexually explicit slur about her posted on a whiteboard in the employee breakroom.²⁷¹ Because the employer had a rule prohibiting cameras in the workplace,²⁷² Elias made a handwritten copy of the offensive posting and asked three female coworkers to sign the paper attesting to its accuracy.²⁷³ When questioned by the

²⁶⁶ *Id.* at 305.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 305–06.

²⁶⁹ *Id.* at 306 (footnote omitted).

²⁷⁰ 361 N.L.R.B. 151, 151 (2014).

²⁷¹ *Id.*

²⁷² *Id.* at 151 n.3.

²⁷³ *Id.* at 151.

store manager, the three witnesses did not dispute the accuracy of the document to which they had attested, but did state that they were not interested in joining her complaint.²⁷⁴ One witness felt that Elias had pressured them into signing the document, and she filed a complaint against Elias with the employer for bullying her into signing the document.²⁷⁵ The store's employee relations manager ordered Elias not to obtain any more formal statements from her coworkers regarding the incident, and Elias then filed an unfair labor practice complaint with the NLRB alleging that this instruction violated section 8(a)(1) by infringing on her section 7-protected rights.²⁷⁶ Relying on *Holling Press*, the administrative law judge found that the employer's actions did not violate the NLRA because, in part, "[Elias's] goal in raising the issue to management was a purely individual one."²⁷⁷

The Board majority disagreed, finding Elias' solicitation of her coworkers to be both concerted and for mutual aid or protection, regardless of the lack of a shared objective or the fact that Elias might be the only immediate beneficiary of the solicitation.²⁷⁸ The Board explained that solicited employees do not have to agree with the soliciting employee or join cause with her in order for activity to be concerted.²⁷⁹ On the question whether Elias' activity was for mutual aid or protection, the Board analogized to *Weingarten*, noting that a single employee's appeal for help during an interview when facing the threat of discipline is still for mutual aid or protection, even though discipline is highly individualized and the employee is clearly motivated by personal concerns.²⁸⁰ Citing and discussing cases where protection had been accorded to individual employees who were motivated by personal benefit and had an immediate stake in the outcome, but the change sought impacted all employees, the Board explained:

Although arising in widely varying circumstances, all of those cases are grounded in the "solidarity" principle. In enacting Section 7, Congress created a framework for employees to "band together" in solidarity to address their terms and conditions of employment with their employer. "[M]ak[ing] common cause with a fellow workman over his

²⁷⁴ *Id.* at 152.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *See id.* at 153–55.

²⁷⁹ *Id.* at 154.

²⁸⁰ *Id.* at 155 (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975)).

separate grievance” is a hallmark of such solidarity, even if “only one of them . . . has any immediate stake in the outcome.” By soliciting assistance from coworkers to raise his issues to management, an employee is requesting that his coworkers exercise vigilance against the employer’s perceived unjust practices. The solicited employees have an interest in helping the aggrieved individual—even if the individual alone has an immediate stake in the outcome—because “next time it could be one of them that is the victim.” “An injury to one is an injury to all” is one of the oldest maxims in the American labor lexicon.²⁸¹

Because “*Holling Press* effectively nullif[ied] the solidarity principle” and had “create[d] a special exception for sexual harassment,” the Board then proceeded to overrule *Holling Press*.²⁸² Relying heavily on Liebman’s dissent, the Board noted that the claim that sexual harassment claims are rare was “simply indefensible,” that the reciprocity contemplated by the mutual aid or protection doctrine does not require that the types of workplace grievances be the same, and that the implicit promise of future reciprocal action is itself sufficient: “the ‘mutual aid or protection’ element is satisfied by the implicit promise of future reciprocation, when one employee answers another’s call for assistance, even if that promise is rarely (or never) called upon.”²⁸³ The Board issued a sweeping ruling: “We hold that an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is acting for the purpose of mutual aid or protection” and applied the principle equally where an employee raises the complaint directly to her employer or to an outside agency.²⁸⁴

Member Philip Miscimarra filed a strong dissent, disagreeing with the majority’s conclusion that Elias had engaged in protected concerted activity, with its conclusion that the activity was for mutual aid or protection, and with its decision to overrule *Holling Press*.²⁸⁵ Miscimarra charged the majority with effectively eliminating the statute’s mutual aid or protection requirement by creating section 7 protection for complaints implicating individual non-NLRA rights as long as the individual worker seeks to involve any of her coworkers.²⁸⁶ He argued

281 *Id.* at 155–56 (alterations in original) (citations omitted) (footnotes omitted).

282 *Id.* at 156–57.

283 *Id.*

284 *Id.* at 157.

285 *Id.* at 161 (Miscimarra, Member, concurring in part and dissenting in part).

286 *Id.* at 169–70.

that the majority's decision revived a version of the discredited *Alleluia Cushion*²⁸⁷ standard that a single worker's conduct is inherently concerted if it involves an effort to invoke non-NLRA statutory protections.²⁸⁸ He also worried that affording section 7 process protections would have the unintended consequence of undermining non-NLRA statutes like Title VII by making fact-gathering difficult for employers confronted with a sexual harassment complaint, impeding the accomplishment of the statutory objective of a workplace free from discrimination and harassment.²⁸⁹

Both Miscimarra's dissent and the earlier majority opinion in *Holling Press* invoked the notion of a two-track system of rights, in which the NLRA protects workers' rights to economic justice and Title VII and parallel state laws protect their civil rights to gender and racial equality.²⁹⁰ In this system, unions see themselves as the watchdogs for workers' economic rights, while individual employees must take it upon themselves to initiate proceedings before agencies or in court to enforce their civil rights to be free from discriminatory harassment at work, with assistance from private attorneys, the EEOC, civil rights groups, feminist groups, and other nonlabor groups. The two-track system has induced unions to ignore or even reinforce hostile work environments in many workplaces, either by declining to process sexual harassment complaints through arbitration under the labor contract, representing male workers accused of sexual harassment and leaving the victims to pursue remedies under Title VII with their own resources, or (in the most egregious cases) by union officials who use their power within the union hierarchy to harass women bargaining-unit members.²⁹¹

The two-track system does not reflect reality on the ground, where sex and race discrimination often intertwine with economic in-

²⁸⁷ 221 N.L.R.B. 999 (1975).

²⁸⁸ *Fresh & Easy Neighborhood Mkt., Inc.*, 361 N.L.R.B. at 163–64 (Miscimarra, Member, concurring in part and dissenting in part); see *Alleluia Cushion*, 221 N.L.R.B. at 1000 (finding that a single employee's invocation of health and safety rights guaranteed under the Occupational Safety and Health Act was concerted activity in the absence of evidence that fellow employees disavowed representation), *overruled by Meyers Indus.*, 268 N.L.R.B. 493, 496 (1984).

²⁸⁹ *Fresh & Easy Neighborhood Mkt., Inc.*, 361 N.L.R.B. at 170–71 (Miscimarra, Member, concurring in part and dissenting in part) (discussing the risk of unfair-labor-practice charges posed by unlawful interrogation or surveillance of employees engaged in protected concerted activity).

²⁹⁰ See Crain & Matheny, *supra* note 51, at 1543; Crain & Matheny, *supra* note 57, at 1781.

²⁹¹ See Crain, *supra* note 32, at 29–45.

justice.²⁹² Many issues that might be categorized as legally actionable under Title VII also have obvious economic levers, including unequal wages, job channeling into segregated workforces associated with differential rates of pay, and sexual harassment designed to police pay and gender boundaries. Finally, the two-track regime tends to entrench unions' deplorable history of sexism and racism, making ever more difficult unions' struggle to reinvent themselves to attract those workers who hold the key to labor's future—women, people of color, and idealistic youth.²⁹³ Taken to its extreme, it isolates the labor movement from other progressive movements, relinquishing the moral high ground of the social justice agenda to civil rights and feminist groups that seek vindication of antidiscrimination rights. In the next Section, we discuss how the two-track regime influences the third element necessary for protection under section 7.

B. When Do Concerted Activities Lose Section 7 Protection Because They Violate Antidiscrimination Norms?

Another area where the solidarity principle intersects with sexual harassment is the third requirement under section 7 that the concerted activity be “protected”—i.e., not too disloyal or otherwise inconsistent with the common law master-servant relation, or in conflict with external law. Consider the case of *Cooper Tire & Rubber Co. v. NLRB*.²⁹⁴ The employer had locked out its unionized workers during a dispute with the union over a new contract, and the union responded by organizing a picket line.²⁹⁵ When a van arrived filled with replacement workers who were predominantly African Americans, one of the locked-out workers, Runion, shouted “‘Hey, did you bring enough KFC for everybody?’ and ‘Hey anybody smell that? I smell fried chicken and watermelon.’”²⁹⁶ Although the union subsequently settled its contract dispute and the locked-out employees were returned to their jobs, the employer discharged Runion for racial harassment.²⁹⁷ The union challenged the discharge under the arbitration machinery in the labor contract, and the arbitrator found in favor of the em-

²⁹² Cf. Crain, *supra* note 57, at 224–29 (describing how civil rights unionism mobilizes workers around their intersecting class, racial, and ethnic identities).

²⁹³ See Michelle Chen, *Millennials Are Keeping Unions Alive*, NATION (Feb. 5, 2018), <https://www.thenation.com/article/millennials-are-keeping-unions-alive/> [<https://perma.cc/53HN-5SJB>].

²⁹⁴ 866 F.3d 885 (8th Cir. 2017).

²⁹⁵ *Id.* at 889.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

ployer.²⁹⁸ The union also filed unfair-labor-practice charges with the Board, arguing that the discharge contravened Runion's right to engage in the protected concerted activity of picketing.²⁹⁹

The Obama Board (in a decision subsequently enforced by the Court of Appeals) refused to defer to the arbitrator's decision and found an unfair labor practice, ordering Runion reinstated on the basis that the NLRA's section 7 protections necessitate a tolerance for emotional outbursts on the picket line unless they have the effect of coercing or intimidating other employees exercising section 7 rights (such as the right not to strike).³⁰⁰ The employer argued that it was obligated under Title VII to protect its workforce from racial harassment by discharging Runion and could not reinstate him.³⁰¹ Although the union's picket line rules prohibited racist epithets, the union nevertheless intervened on behalf of Runion in the proceeding before the Eighth Circuit, arguing that Runion's "unfortunate remarks" had no effect on the replacement workers.³⁰² The court agreed with the union, finding Runion's epithets not sufficiently severe or pervasive to amount to actionable harassment, and observing that discipline less than discharge might have been a more appropriate response.³⁰³ The dissenting judge, appalled by the Board's "cavalier and enabling approach" to sexual and racially demeaning conduct on picket lines, chastised the Board for giving refuge under section 7 to illegal conduct "designed to humiliate and intimid[id]ate another individual because of and in terms of that person's gender or race."³⁰⁴

The *Cooper Tire* ruling drew new attention to the tension between labor rights and the antidiscrimination laws.³⁰⁵ Once again, the employer was cast in the role of protector and enforcer of antidiscrimination rights in a unionized workplace, while the union defended the section 7 rights of the harasser. At one level, the union's advocacy

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 891.

³⁰¹ *Id.* at 892.

³⁰² Brief of Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union at 6, 9, *Cooper Tire*, 866 F.3d 885 (Nos. 16-2721, 16-2944).

³⁰³ *Cooper Tire*, 866 F.3d at 891-92.

³⁰⁴ *Id.* at 894, 896 (Beam, J., dissenting) (emphasis omitted) (quoting *Consolidated Commc'ns, Inc. v. NLRB*, 837 F.3d 1, 20-24 (D.C. Cir. 2016) (Millett, J., concurring)).

³⁰⁵ The case drew media attention, prompting the NLRB and the EEOC to promise joint guidance for employers on how to harmonize the NLRA and Title VII. Hassan A. Kanu, *Labor Board and EEOC to Clarify Overlap in Anti-Bias, Labor Laws*, 217 Daily Lab. Rep. (BNA) 4 (Nov. 13, 2017).

on behalf of Runion is understandable because it furthered a more capacious interpretation of section 7 in order to protect the rights of picketing workers. But the union had an antiharassment policy applicable to conduct on the picket line that it could have enforced against Runion.³⁰⁶ Further, the union could have refused to file a grievance on Runion's behalf challenging his discharge. Even if the union considered the penalty disproportionate to Runion's offense, its defense of Runion in arbitration under the labor contract clearly satisfied its duty of fair representation. The union's decision to carry the case to the Board represented an affirmative choice to protect the job security of a harasser over the interests of all workers to a harassment-free workplace. What message did African-American and white workers who weren't strikebreakers receive from the union's stance?

Adding to the media frenzy around the issue was a contemporaneous high-profile case where unions were not involved, but the scope of section 7 protection again clashed with antidiscrimination norms. James Damore was a Google software engineer fired in August 2017, just one day prior to the release of the *Cooper Tire* opinion.³⁰⁷ Damore authored a ten-page "manifesto" criticizing Google's diversity policies and "politically correct monoculture," arguing that women are underrepresented in tech occupations because biological differences render them less suited to the work.³⁰⁸ Google, struggling to recruit female STEM majors to its workforce and simultaneously defending itself against a class action by women software engineers asserting violations of the Equal Pay Act and a federal administrative complaint based on a Department of Labor contract compliance review that found systemic compensation disparities against women,³⁰⁹ terminated Damore.³¹⁰

Damore filed an unfair-labor-practice claim with the Labor Board, arguing that circulating a memo critiquing the employer's diversity and inclusion programs through an internal email discussion group was concerted activity for mutual aid, protected under section

³⁰⁶ See *Cooper Tire*, 866 F.3d at 897 (Beam, J., dissenting).

³⁰⁷ Josh Eidelson et al., *Fired Google Engineer Faces Headwinds Seeking Legal Recourse*, 151 Daily Lab. Rep. (BNA) 9 (Aug. 8, 2017).

³⁰⁸ See *id.* The biological differences to which Damore alluded included women's supposed heightened neuroticism and men's prevalence at the top of the IQ distribution.

³⁰⁹ Erik Larson, *Google Sued by Women Workers Claiming Gender Discrimination*, 177 Daily Lab. Rep. (BNA) 9 (Sept. 14, 2017); Chris Opfer & Jay-Anne B. Casuga, *Google May Be Pressed to Turn Over More Pay Data in Bias Probe*, 164 Daily Lab. Rep. (BNA) 3 (Aug. 25, 2017); Claire Suddath, *Tech Companies Recruiting Female STEM Majors at Awkward Time*, 178 Daily Lab. Rep. (BNA) 17 (Sept. 15, 2017).

³¹⁰ Eidelson et al., *supra* note 307.

7.³¹¹ Labor's position in *Cooper Tire* came home to roost, as some speculated that *Cooper Tire* would be used to support Damore's claim for protection: after all, if hurling racist epithets on a picket line is protected under section 7, why not gender stereotypes in a "rambling manifesto"?³¹² The Trump Board's Region 32 Associate General Counsel issued an advice memorandum finding Damore's claim unfounded because Google had terminated Damore for advancing harmful stereotypes about women in violation of its harassment and antidiscrimination policies and not for his concerted activity, and because the gender stereotypes he advanced had the potential to create a hostile work environment which the employer was obligated to address.³¹³ Assuming that his activity was concerted and for mutual aid or protection,³¹⁴ Damore's activity nevertheless lost protection because his assertions about gender stereotypes clashed with Google's duty to comply with antidiscrimination laws and undermined its strong interest in promoting diversity in its workforce.³¹⁵ The memorandum noted that employers' good-faith efforts to enforce lawful antidiscrimination or antiharassment policies would be afforded "particular deference" and concluded that "employers must be permitted to 'nip in the bud' the kinds of employee conduct that could lead to a 'hostile workplace,' rather than waiting until an actionable hostile workplace has been created."³¹⁶

³¹¹ Hassan A. Kanu, *Google Worker Saga Features Clash of Labor, Anti-Bias Laws*, 153 Daily Lab. Rep. (BNA) 3 (Aug. 10, 2017). Damore subsequently filed a reverse discrimination claim under the California Labor Code. Class Action Complaint, *Damore v. Google, LLC*, No. 18CV321529 (Cal. Super. Ct. Jan. 8, 2018); see also Eve Wagner, *Google Bias Suit Presents Critical Juncture in Labor Law*, LAW360 (Feb. 9, 2018, 10:44 AM), <http://www.law360.com/employment/articles/1009500/google-bias-suit-presents-critical-juncture-in-labor-law> [<https://perma.cc/66P8-Q8R6>].

³¹² Kanu, *supra* note 311.

³¹³ Memorandum from Jayme L. Sophir, Assoc. Gen. Counsel, Div. of Advice, NLRB Office of the Gen. Counsel to Valerie Hardy-Maloney, Regional Dir., Region 32, NLRB (Jan. 16, 2018), <http://apps.nlr.gov/link/document.aspx/09031d45826e6391> [<https://perma.cc/MEN9-FF6L>].

³¹⁴ Legal experts and former Board members believed Damore might be on firm ground in satisfying those elements because he had emailed the memo to others soliciting feedback and support for his position and the arguments had potential implications for diversity policies that impact wages, benefits, and working conditions. See Kanu, *supra* note 311; see also Matthew Bodie, *Analyzing James Damore's Employment-Related Claims Against Google: Part One*, ON LAB. (Aug. 18, 2017), <http://onlabor.org/analyzing-james-damores-employment-related-claims-against-google-part-one/> [<https://perma.cc/MN6Z-U8VK>].

³¹⁵ See Bodie, *supra* note 314.

³¹⁶ Memorandum from Jayme L. Sophir, *supra* note 313, at 4. Google was able to demonstrate that female employees were complaining that the memorandum was offensive and made them feel unsafe at work, and that two female engineering-job candidates withdrew from consid-

The Damore case pitted an employer seeking to diversify its workforce, root out sexism, and combat a potentially hostile work environment created by Damore's memo against an unsympathetic public figure and an argument for a broad interpretation of protected activity under section 7. At a time when the public's attention was focused on sexual harassment through the #MeToo movement, this resolution was predictable. Labor law—and section 7 rights in particular—emerged the villain.

C. *Employer Rules that Interfere with Rights Consciousness*

In the background of the pitched battles between the NLRB and Title VII's antidiscrimination mandate is another body of Board law that influences the development of rights consciousness by invalidating employer policies that potentially chill the formation of group action. Board doctrine prohibits employer confidentiality policies that limit employees' rights to discuss wages³¹⁷ and terms of employment (including sexual harassment)³¹⁸ because such conversations are often precursors to group activity and union organizing.³¹⁹ Accordingly, the Labor Board has historically examined company policies limiting employee speech to determine whether employees would reasonably interpret them as limiting the exercise of section 7 rights by chilling speech that might lead to union formation or other concerted activity.³²⁰

The Obama Board was particularly active in protecting such pre-union consciousness-raising activity. In *Lutheran Heritage Village-Livonia*,³²¹ the Board established a two-step inquiry applicable to em-

eration and pointed to Damore's memo as the reason for their decisions. Thus, Damore's actions were already causing harm and disruption in the workforce. Kanu, *supra* note 311.

³¹⁷ See, e.g., *Cintas Corp. v. NLRB*, 482 F.3d 463, 468–69 (D.C. Cir. 2007) (pay confidentiality rule); *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1254 (10th Cir. 2005) (same). For a comprehensive analysis of pay-secrecy rules, see Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. PA. J. LAB. & EMP. L. 121 (2003).

³¹⁸ See *Phx. Transit Sys.*, 337 N.L.R.B. 510, 510 (2002) (confidentiality rule prohibiting employees from discussing complaints concerning sexual harassment).

³¹⁹ Not all confidentiality rules were invalidated by this analysis, however. Where an employer can demonstrate a legitimate business interest justifying its rule such as preventing disclosure of trade secrets or private customer information, the rule may be upheld. See, e.g., *Macy's Inc.*, 365 N.L.R.B. No. 116 (Aug. 14, 2017) (finding confidentiality rule prohibiting employees from releasing customer social security or credit card numbers was valid because the employer had the right to protect the confidentiality of sensitive customer information).

³²⁰ See *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), *enforced sub nom.* *Leisure Ctrs., Inc. v. NLRB*, 203 F.3d 52 (D.C. Cir. 2000).

³²¹ 343 N.L.R.B. 646 (2004).

ployer work rules, asking first whether the rule explicitly restricts section 7-protected activities (in which case it violates section 8(a)(1), which prohibits interference with restraint or coercion of employees in the exercise of section 7 rights), and second, if the rule does not explicitly restrict section 7-protected activity, whether (1) employees would reasonably construe the language of the rule to prohibit section 7 activity, (2) whether the rule was promulgated in response to union activity, or (3) whether the rule has been applied to restrict the exercise of section 7 rights.³²² Under the *Lutheran Heritage Village-Livonia* framework, a number of common workplace policies were invalidated, including policies banning discussion of workplace complaints currently under investigation,³²³ policies restricting employees from communicating with media representatives and law enforcement officials,³²⁴ no-gossip policies, and policies banning class arbitration of grievances.³²⁵

As 2017 drew to a close, the Trump Board shifted the landscape on workplace policies dramatically. In *Boeing Co., Inc.*,³²⁶ the Board overruled *Lutheran Heritage Village-Livonia* and established a new test applicable to facially neutral employer work rules that may, reasonably interpreted, potentially interfere with section 7 rights.³²⁷ The new test gives more weight to business needs than the prior test. Under this test, when a facially neutral rule potentially interferes with section 7 rights, the Board will consider (1) the nature and extent of the potential impact on NLRA rights from the employees' perspective and (2) legitimate business justifications associated with the rule's re-

³²² *Id.* at 646–47.

³²³ See *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393, 400 (6th Cir. 2017), *abrogated on other grounds by Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Banner Health Sys. v. NLRB*, 851 F.3d 35, 43 (D.C. Cir. 2017); *see also NLRB v. Long Island Ass'n for AIDS Care, Inc.*, 870 F.3d 82, 88 (2d Cir. 2017) (holding that the prohibition on disclosing any nonpublic information intended for internal purposes, including salaries and contract terms, was unlawful).

³²⁴ See *DirecTV U.S. DirecTV Holdings, LLC*, 359 N.L.R.B. 545, 545–46 (2013).

³²⁵ *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2277 (2012), *enforcement denied*, 737 F.3d 344 (5th Cir. 2013). A circuit split developed over the Board's view and the Supreme Court ultimately granted certiorari. In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the Court ruled that section 7 does not encompass a right to collective litigation, and thus class waivers in arbitration agreements are enforceable. *See id.* at 1624–26. For a good analysis of the issues involved in harmonizing mandatory arbitration agreements with NLRA rights, see Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013 (2013); *see also Ann C. Hodges, Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 217–18 (2003).

³²⁶ 365 N.L.R.B. 1 (2017).

³²⁷ *See id.* at 5, 14.

quirements, and strike the proper balance between them.³²⁸ Applying this test, the Board upheld the employer's "no-camera" rule banning workers from using devices to take photos or videos on job sites without permission.³²⁹ The Board went on to explain that in future cases it would endeavor to provide greater clarity by establishing three categories of employment policies, rules, and handbook provisions.³³⁰ Category 1 includes rules that the Board designates as lawful, such as general civility policies requiring workplace harmony, because the policies would have minimal impact on workers' rights to engage in protected activity.³³¹ Category 2 includes rules that warrant individualized scrutiny and balancing by the Board.³³² Category 3 includes rules that the Board designates as unlawful, such as a rule that prohibits employees from discussing wages or benefits.³³³

Many of the Obama Board's rulings designed to broaden section 7 protection and enhance organizing opportunities are now targets for the Trump Board. NLRB General Counsel Robb has suggested that he intends to pursue an alternative analysis to the Obama Board's approach in contexts with significant potential to impact the scope of concerted activity for mutual aid or protection in cases involving sexual harassment complaints,³³⁴ including employer rules requiring that confidentiality be maintained in workplace investigations,³³⁵ the scope of protection for racist comments made on picket lines,³³⁶ and employee social-media postings where employer liability under antidiscrimination statutes may be implicated.³³⁷ Seeking information from other employees about past employer disciplinary practices in parallel cases is obviously a vital form of rights consciousness-raising in the workplace.³³⁸ The silencing of coworkers as a source of information

³²⁸ *Id.* at 14.

³²⁹ *Id.* at 19.

³³⁰ *Id.* at 15.

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ See Robert Iafolla, *New NLRB General Counsel Unveils Broad Agenda to Undo Obama-Era Decisions*, REUTERS (Dec. 4, 2017, 8:44 PM), <https://www.reuters.com/article/us-employment-nlrp/new-nlrp-general-counsel-unveils-broad-agenda-to-undo-obama-era-decisions-idUSL1N1O503U> [<https://perma.cc/8YFD-6GLD>].

³³⁵ *Banner Health Sys.*, 362 N.L.R.B. 1, 3 (2015) (finding that rules requiring employees to maintain confidentiality of workplace investigations were unlawful), *enforced*, 851 F.3d 35 (D.C. Cir. 2017).

³³⁶ *Cooper Tire & Rubber Co.*, 363 N.L.R.B. 1, 12 (2016), *enforced*, 866 F.3d 885 (8th Cir. 2017).

³³⁷ *Pier Sixty, LLC*, 362 N.L.R.B. 1, 3 (2015).

³³⁸ See Schoenbaum, *supra* note 35, at 636.

(and potentially support) would significantly impact the advancement of antidiscrimination norms in the workplace, making it less likely that sexual harassment victims or bystanders would bring forward complaints about harassment.

IV. PROSPECTS FOR ENGAGING UNIONS TO CHALLENGE WORKPLACE SEXUAL HARASSMENT

At first blush, it seems obvious that workers have an interest in a workplace free from discrimination, harassment, and retaliation and that unions should champion these rights. After all, workplace safety and job-security protections ensuring that promotion and disciplinary decisions will not be arbitrary or biased have long been hallmarks of collective bargaining. As discussed above, sexual harassment impacts all workers: victims suffer demoralization, have more difficulty performing their jobs, and endure physical and psychological harms that ultimately threaten their health as well as their job security; a workplace culture tolerant of sexual harassment makes it likely that multiple workers will experience harassment on the job; bystanders suffer similar health and psychological responses to victims and receive a powerful message about women's proper role in society and the consequences likely to befall those who transgress gender boundaries; and all are subject to the speech- and privacy-invading impact of employer-designed prophylactic measures designed to address sexual harassment.³³⁹

Nevertheless, unions' reluctance to see sexual harassment as a working condition squarely within their bailiwick has been longstanding and persistent. What, then, are the prospects for engaging unions in combating workplace sexual harassment? And how, exactly, could this new role be realized within the existing legal structure? The answer is both deceptively simple and complex: unions must take sexual harassment seriously. This means not only cleaning labor's house, but dedicating resources to efforts in partnership with feminist, civil rights, and "alt-labor"³⁴⁰ groups in a coordinated campaign to challenge sexual harassment at the worksite and sectoral levels. A new, more collaborative understanding of solidarity will be essential. Further, it means dedicating unions' legal expertise to press for an understanding of mutualism under section 7 that includes eradicating sexual harassment for the benefit of all workers, including representing victims and

³³⁹ See Crain, *supra* note 35; Roberts, *supra* note 35, at 366–68; Schoenbaum, *supra* note 35, at 628–29.

³⁴⁰ See *infra* notes 367–69 and accompanying text.

filing charges under section 8(a)(1) or intervening where necessary. Finally, if ensuring voice for victims of sexual harassment were at the front of union consciousness, unions might invoke that goal as a lever to challenge employer rules that tend to silence victims or undermine claims assertion, such as rules banning class actions (*Epic Systems v. Lewis*)³⁴¹ and rules prohibiting discussion of workplace investigations (*Banner Estrella Medical Systems*).³⁴²

A. Collaborative Solidarity and Social Bargaining

Sociologists Charles Heckscher and John McCarthy suggest that a new form of collaborative labor solidarity is evolving that will impact workforce mobilization in important ways.³⁴³ Older-style solidarity tended to mobilize workers through shop-floor relationships and through picket lines and strikes in the craft and industrial contexts, drawing on the stable communal identity of an oppressed group with strong geographical connections and family ties and mobilizing workers against a common oppressor.³⁴⁴ Unions thus developed top-down militaristic leadership traditions and bureaucratic structures that emphasized command and control, allowing them more effectively to mobilize the strike, picket, and boycott as weapons for bargaining leverage.³⁴⁵ As stable social relations and community have declined,³⁴⁶ however, more diffuse and fluid expressive friendship networks have proliferated via social media, crossing international, racial, and ethnic boundaries.³⁴⁷ Although many have been skeptical of the potential for these diffuse or “weak” ties to ground solidarity, emerging research suggests that social-media engagement can be harnessed to supplement personal relations (rather than undermining them), and that social-media engagement can also increase links across groups and thus afford opportunities to build coalitions.³⁴⁸

The #MeToo movement offers a compelling illustration of the power of collaborative solidarity. Women and men who had been victims of sexual harassment broke their silence in wave after wave of revelations, crossing class and occupational lines and connecting their

³⁴¹ 138 S. Ct. 1612 (2018).

³⁴² See *supra* notes 60–61 and accompanying text.

³⁴³ See Heckscher & McCarthy, *supra* note 151, at 628.

³⁴⁴ See RICK FANTASIA, *CULTURES OF SOLIDARITY* 39 (1988); Heckscher & McCarthy, *supra* note 151, at 637.

³⁴⁵ See Heckscher & McCarthy, *supra* note 151, at 642–45.

³⁴⁶ See ROBERT D. PUTNAM, *BOWLING ALONE* 16 (2000).

³⁴⁷ See Heckscher & McCarthy, *supra* note 151, at 634–35.

³⁴⁸ *Id.* at 637, 639.

experience to those who had come before them without any expectation of reciprocal benefit.³⁴⁹ #MeToo also exemplifies a strategic mobilization tactic that Heckscher and McCarthy call “swarming”—collective action that involves many different groups operating independently, but organizing around a broad common purpose.³⁵⁰ Originating in the military context, swarming was developed as a nimble form of engagement capable of adapting rapidly to shifting contexts:

“Swarming—a seemingly amorphous, but deliberately structured, coordinated, and strategic way to strike from all directions, by means of a sustainable pulsing of force and/or fire, close-in as well as from stand-off positions—will work best, and perhaps will only work, if it is designed mainly around the deployment of myriad, small, dispersed, networked maneuver units.”³⁵¹

Most recently, the power of swarming augmented by social media was convincingly demonstrated by the statewide teachers’ strike in West Virginia.³⁵² A powerful strike including both unionized and nonunionized teachers grew out of grassroots mobilization over a period of months through conversations on a 24,000-member Facebook group that connected and coordinated workers across the isolating West Virginia geography.³⁵³ The protests culminated in local gatherings at malls and event halls, smaller walkouts, and live-streamed pickets at the West Virginia State Capitol.³⁵⁴

³⁴⁹ For example, the #TimesUp initiative was reportedly inspired by a letter from the Alianza Nacional de Campesinas, an organization representing 700,000 farmworkers, in which the workers asserted a common experience of exploitation at work and expressed solidarity with their sisters in the entertainment industry. Garber, *supra* note 39.

³⁵⁰ Heckscher & McCarthy, *supra* note 151, at 642.

³⁵¹ *Id.* (quoting JOHN ARQUILLA & DAVID RONFELDT, SWARMING AND THE FUTURE OF CONFLICT 45 (2000)).

³⁵² See Caroline O’Donovan, *Facebook Played a Pivotal Role in the West Virginia Teacher Strike*, BUZZFEED (Mar. 7, 2018, 7:47 PM), https://www.buzzfeed.com/carolineodonovan/facebook-group-west-virginia-teachers-strike?utm_term=.kiPwNGZvK#.tbrAVZmR6 [<https://perma.cc/Y6RT-U4V2>].

³⁵³ See *id.*

³⁵⁴ See *id.*; Jess Bidgood & Campbell Robertson, *West Virginia Walkouts a Lesson in the Power of a Crowd-Sourced Strike*, N.Y. TIMES (Mar. 8, 2018), <https://www.nytimes.com/2018/03/08/us/west-virginia-teachers-strike.html?smid=tw-nytimes&smtyp=cur> [<https://perma.cc/Q5Z9-E7N5>]. For a more detailed treatment of the West Virginia teachers’ strike and its implications for the future of the labor movement, see Marion Crain & Ken Matheny, *Labor Unions, Solidarity, and Money*, 22 EMP. RTS. & EMP. POL’Y J. (forthcoming 2018) (manuscript at 30–33), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3150001 [<https://perma.cc/FG6G-89QN>].

Collaborative solidarity is a difficult fit with the command-and-control structure of most unions because it relies upon a more diffuse, participatory and decentralized structure. In the past, unions expressed frustration with diffuse, less hierarchically structured movements, such as Occupy.³⁵⁵ But certainly something between a top-down command-and-control structure and the deliberate anarchy that typified Occupy is possible. Indeed, unions' historical partnership with civil rights groups³⁵⁶ and the initial success of the Fight for \$15, with its broad-ranging alliances,³⁵⁷ suggest that unions have the capability to work with nonlabor groups and serve as orchestrators and coordinators of mobilizing efforts rather than limiting their role to top-down leadership. In our increasingly digital age, a more diffuse and collaborative solidarity may require the investment of union resources in development of member platforms, campaigns, and coordination as unions become orchestrators of campaigns rather than top-down leaders.³⁵⁸ Unions have experimented with platforms that offer members the ability to use the organizational architecture for their own purposes, such as the scaffolding they have offered for identity caucuses within the AFL-CIO.³⁵⁹ Unions could develop a platform that supports the broadly shared goal of eradicating workplace sexual harassment while allowing diverse and innovative activities that nonetheless press forward in a coherent direction. An effective platform would allow members to define their own priorities and be mutualistic while working in tandem with peers to achieve agreed-upon goals.³⁶⁰ This means embracing different voices that focus on aspects of the affront to dignity that sexual harassment represents as well as different solutions, rather than boiling the effort down to a singular focus on a reform package.

A valuable set of tools in this effort will be what Michael Oswalt dubbed the "improvisational unionism" characteristic of the Fight for \$15 and OUR Walmart: spontaneous but coordinated decentralized worker actions that amount to "organizing by unions, but [not] union organizing."³⁶¹ As Oswalt observes, the use of social media was a criti-

³⁵⁵ Heckscher & McCarthy, *supra* note 151, at 644.

³⁵⁶ See Crain & Matheny, *supra* note 63, at 479–80; Crain & Matheny, *supra* note 57, at 1771–73.

³⁵⁷ See Andrias, *supra* note 58, at 8; Crain & Inazu, *supra* note 187, at 1843–44; Oswalt, *supra* note 58, at 600.

³⁵⁸ See Heckscher & McCarthy, *supra* note 151, at 643–47.

³⁵⁹ See Crain, *supra* note 32, at 70–71.

³⁶⁰ Heckscher & McCarthy, *supra* note 151, at 647.

³⁶¹ Oswalt, *supra* note 58, at 602, 604 (emphasis omitted).

cal tool for building solidarity, as the SEIU and local workers' rights groups deployed social networks already present there.³⁶² Improvisational tactics like one-day strikes, planned (or unplanned) short-term walkouts, pickets, and boycotts designed to highlight workplace injustices may also garner First Amendment–assembly protection against government interference through enforcement of the NLRA's restrictions on picketing or secondary boycotts.³⁶³ In addition, the right to assembly can provide constitutional protection where employers seek to use labor laws to shut down protests mounted on social media.³⁶⁴

A significant question is how to fund these new coordinated solidarities. Traditional unionism, with its bargain of exclusive and work-site-specific representation in exchange for the imposition of fiduciary functions, still offers the most stable source of funding through dues. But that revenue source is under attack,³⁶⁵ and new funding mechanisms are beginning to emerge. For example, New York City enacted a Fast Food Empowerment Bill that creates an optional program for fast-food employees to automatically contribute funds to nonprofit organizations that advocate on behalf of fast-food workers and register with the city's Department of Consumer Affairs.³⁶⁶ These nonprofit organizations are not labor unions, but instead are described as “alt-labor” groups—workers' centers and advocacy groups that organize and work to empower workers but do not seek a conventional collective agreement.³⁶⁷ Unions able to work with these groups at the local or state level to enact ordinances or statutes requiring employers to deduct fees from workers' pay checks and direct these tax-deductible

³⁶² *E.g., id.* at 619–20 (discussing OUR Walmart and UFCW's use of the internet and social media in the workers' struggle against Walmart).

³⁶³ *See* Crain & Inazu, *supra* note 187, at 1793–96.

³⁶⁴ *See id.* at 1830; *see also* John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093, 1121 (2013) (arguing that the right of assembly provides strong protection for the right of online groups to assemble).

³⁶⁵ *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2460 (2018) (striking down agency fee arrangements in the public sector, which provided a major source of public-sector unions' funding); *see also* Crain & Matheny, *supra* note 354 (discussing implications of *Janus* for union coffers).

³⁶⁶ N.Y.C. ADMIN. CODE §§ 7-701 to 7-715, 20-130 to 20-1310 (2017); *see also* Cora Lewis, *Fast-Food Worker Groups Could Get a Big Financial Boost in NYC*, BUZZFEED NEWS (Dec. 5, 2016, 5:34 PM), <http://www.buzzfeed.com/coralewis/fast-food-worker-groups-could-get-a-big-financial-boost> [<https://perma.cc/93MW-W5HG>] (describing the original bill); Michael Saltsman, *New York City Wants to Supersize the 'Fight for \$15,'* WALL ST. J. (May 19, 2017, 7:10 PM), <https://www.wsj.com/articles/new-york-city-wants-to-supersize-the-fight-for-15-1495235426> [<https://perma.cc/FE2A-XSJS>].

³⁶⁷ *See* Josh Eidelson, *Alt-Labor*, AM. PROSPECT (Jan. 29, 2013), <http://prospect.org/article/alt-labor> [<https://perma.cc/TXX5-W4SR>] (coining the term “alt-labor”).

payments to alt-labor organizations chosen by workers could also partner with them to advocate for political change and workers' rights reforms through organizing and lobbying, while collective bargaining remains the province of unions.³⁶⁸ This would offer a more stable resource base for groups that focus primarily on issues of concern to certain sectors of the workforce, allowing them to join hands with traditional unions to mount campaigns that mobilize workers across a broad spectrum on issues with powerful resonance.³⁶⁹

Nor is this strategy completely novel. In the 1990s, SEIU formed a partnership between its Local 925 in Cleveland and 9to5, the National Association of Working Women.³⁷⁰ 9to5 educated women about their legal rights in the workplace using hotlines, workshops, and lobbying efforts to catalyze self-help, working to build a collective-rights consciousness that is essential for union organizing.³⁷¹ SEIU 925 was then well positioned to identify workplaces rife with abuse of power that were ripe for organizing. Such partnerships could be very effec-

³⁶⁸ There are, of course, significant risks to the strategy of a sustained partnership between labor unions and alt-labor, not the least of which is the likelihood that such a partnership will add fuel to the fire of the effort to categorize alt-labor groups as "labor organizations" under the Landrum-Griffin Act or the NLRA for purposes of imposing reporting obligations and secondary boycott liability. See Michael C. Duff, *ALT-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837 (2014); David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469 (2006). The concerns are serious: the Labor Department has initiated an investigation into whether a Minneapolis worker center should be considered a "labor organization" subject to the reporting and disclosure requirements of the Labor Management Reporting and Disclosure Act. There are over 260 worker centers in the U.S., and worker centers have been able to accomplish many things that traditional unions once did, including filing unpaid-wage claims, organizing strikes, and educating workers on their legal rights. Ben Penn & Jacquie Lee, 'Worker Center or Union' Probe May be Sign of Things to Come, BLOOMBERG L. (Mar. 15, 2018), <https://www.bna.com/worker-center-union-n57982089900/> [<https://perma.cc/6AWW-ZZV5>].

³⁶⁹ See, e.g., Jonathan Timm, *A Labor Movement That's More About Women*, ATLANTIC (Aug. 25, 2016), <https://www.theatlantic.com/business/archive/2016/08/the-womens-labor-movement/497294/> [<https://perma.cc/3AFT-6JPJ>] (describing how alt-labor groups like Restaurant Opportunities United and the National Domestic Workers United can work in partnership with traditional unions to achieve gains for working women).

³⁷⁰ See Crain, *supra* note 32, at 71–72.

³⁷¹ See Cindia Cameron, *Noon at 9 to 5: Reflections on a Decade of Organizing*, 8 LAB. RES. REV. 103, 108 (1986); see also Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1961 n.269 (1994); Crain, *supra* note 32, at 71–72 (describing how 9to5 seeks to enhance women office workers' rights consciousness and win discrete legal victories to inspire women to see the possibilities for change and to organize).

tive in challenging sexual harassment on a regional or sectoral level while simultaneously organizing workers in a particular workforce.³⁷²

Sexual harassment is also a prime target for “social bargaining.” Kate Andrias argues that a “new” labor regime is emerging that moves beyond the traditional worksite-specific model of employee representation and collective bargaining to politicized social bargaining.³⁷³ In this regime, unions mobilize workers across sectors and harness state power through legislation or other vehicles to strengthen workers’ economic leverage. Pointing to recent union-backed mobilization efforts like the Fight for \$15, Andrias details how the movement caught fire and attracted media attention and important nonlabor partners (such as Black Lives Matter), achieving legislative wage increases at state and local levels and pressuring large and influential private employers like Walmart and McDonald’s to raise wages, as well as advancing initiatives for paid sick leave and reform of just-in-time and on-call scheduling practices.³⁷⁴ Success is measured not solely by the addition of new union members, but through the attainment of new standards of employment at the sectoral level. The legislative efforts and social bargaining are integrated with ongoing worksite-based organizing campaigns, reflecting a sustained commitment to worker voice and collective action on a local level.³⁷⁵ Finally, social bargaining is easily linked to new forms of worker representation, including minority or members-only worker organizations.³⁷⁶

The prevalence of sexual harassment in the food service industry suggests that a campaign against sexual harassment would have as much potential as the Fight for \$15 to serve the interests of workers in that industry. Indeed, it is striking that the initial relatively broad-ranging campaign to mobilize fast food workers, Fast Food Forward, quickly narrowed its focus to just two goals: a living wage (later defined as \$15 an hour by the architects of the Fight for \$15 campaign), and the right to organize a union without retaliation.³⁷⁷ Food service and hospitality workers are predominantly female and suffer some of

³⁷² See Hodges, *supra* note 56, at 226 n.265 (identifying 9to5 as a potential nonlabor partner for unions seeking to challenge sexual harassment).

³⁷³ See Andrias, *supra* note 58, at 80; see also Crain & Matheny, *supra* note 63, at 487 (questioning whether social bargaining is really a new phenomenon and tracing the roots of ideological and social justice unionism).

³⁷⁴ See Andrias, *supra* note 58.

³⁷⁵ See *id.* at 64, 69.

³⁷⁶ See *id.* at 97–99.

³⁷⁷ See Crain & Matheny, *supra* note 181, at 563–64 n.13.

the highest documented rates of sexual harassment,³⁷⁸ yet the issue did not emerge as a core focus of Fast Food Forward. In 2014, an alt-labor group known as the Restaurant Opportunities Center (“ROC”) released a report regarding sexual harassment of women and men who work in food service.³⁷⁹ ROC found that women restaurant workers are especially at risk for sexual harassment because they comprise two-thirds of those who rely on tips to bring their earning from the subminimum tipped wage of \$2.13 per hour up to minimum wage levels, “creating an environment in which a majority female workforce must please and curry favor with customers to earn a living.”³⁸⁰ Fully one-third of women restaurant workers and one-quarter of male restaurant workers reported experiencing sexual harassment from customers on *at least* a weekly basis, including inappropriate touching.³⁸¹ Harassment by owners, managers, supervisors, and coworkers was even more widespread than customer harassment: two-thirds of women and one-half of men experienced some form of sexual harassment from a restaurant owner, manager, or supervisor.³⁸² Finally, nearly 80% of women and 70% of men experienced some form of sexual harassment from coworkers.³⁸³

Although the Fight for \$15 was at least partially successful in framing itself as a social movement, imagine the boost it might have received from a focus on the sexual harassment epidemic in the restaurant industry. Partnering with other social justice groups that emphasize social identities, such as the civil rights movement, feminists, and immigrant-rights activists has historically engaged workers across occupational sectors, resulting in some of labor’s greatest gains.³⁸⁴ Public relations campaigns could have linked unions to a workers’ rights issue—sexual harassment—that has since become one of the key issues of this era. To see and exploit this opportunity, labor would

³⁷⁸ See David Kiley, *Now, Ford Must Grapple with Sexual Harassment*, FORBES (Dec. 21, 2017, 4:49 PM), <https://www.forbes.com/sites/davidkiley5/2017/12/21/now-ford-must-grapple-with-sexual-harassment/#5367d965b438> [<https://perma.cc/HU78-A6YJ>] (reporting that largest number of sexual harassment claims received by the EEOC are from the restaurant industry).

³⁷⁹ See THE REST. OPPORTUNITIES CTR. UNITED, *THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY 2* (2014), http://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf [<https://perma.cc/2MYZ-TWDQ>] (reporting on survey of 688 current and former restaurant workers across 39 states).

³⁸⁰ *Id.* at 1.

³⁸¹ *Id.* at 13.

³⁸² *Id.* at 19.

³⁸³ *Id.* at 13.

³⁸⁴ See Crain & Matheny, *supra* note 63.

need to have the goal of eradicating workplace discrimination in all its forms at the front of mind: in other words, to take sexual harassment seriously.

B. *Reforming Labor Law to Support Collaborative Solidarity*

Union determination to combat sexual harassment is necessary, but not sufficient. Labor law reform is also essential. In particular, preserving the Obama Board's legacy in *Fresh & Easy Neighborhood Market*³⁸⁵ and pressing for a more capacious understanding of mutualism under section 7 that aligns unions and labor law with the goal of eradicating discrimination and sexual harassment is critical. The ideological differences between the Board majority and the dissents in *Holling Press* and *Fresh & Easy Neighborhood Market* will have real consequences as the Trump Board approaches the issue of sexual harassment complaints in the NLRA context. In December 2017, the Board's newly appointed General Counsel, Peter Robb, issued a memo signaling that he might present an "alternative analysis" to the Board in cases where "only one employee ha[s] an immediate stake in the outcome," such as sexual harassment cases, citing *Fresh & Easy Neighborhood Market*.³⁸⁶ This suggests that the Board will revisit its doctrinal approach on concerted activity for mutual aid or protection, and the narrow conception of solidarity in *Holling Press* may be revived. Seeing this risk, Democratic senators on the U.S. Senate Committee on Health, Education, Labor, and Pensions immediately posed a series of questions about the reason for revisiting the issue and seeking the General Counsel's views on workplace sexual harassment and the solidarity principle in the NLRA more generally.³⁸⁷ The Obama Board's overreliance on the existence of an implied reciprocal obligation is troubling because it understates the solidarity principle; what mischief might it cause in the hands of the Trump Board?

It is vital, then, for unions to represent workers like Catherine Fabozzi and Margaret Elias when they are retaliated against by the

³⁸⁵ See *supra* notes 270–84 and accompanying text.

³⁸⁶ Hassan A. Kanu, *National Dialogue on Sexual Harassment Spills into Labor Board*, 239 *Daily Lab. Rep. (BNA)* 5 (Dec. 14, 2017); Memorandum from Peter B. Robb (June 6, 2018), *supra* note 60, at 1–2.

³⁸⁷ See Kanu, *supra* note 386; Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, Murray and Warren Demand Answers from National Labor Relations Board General Counsel Peter Robb on Sweeping Memo Changing Board Policies, Warn of a "Significant Shift in the Board's Efforts to Protect Workers' Rights" (Dec. 12, 2017), <https://www.help.senate.gov/ranking/newsroom/press/murray-and-warren-demand-answers-from-national-labor-relations-board-general-counsel-peter-robb-on-sweeping-memo-changing-board-policies-warn-of-a-significant-shift-in-the-boards-efforts-to-protect-workers-rights> [https://perma.cc/J7JY-X2SB].

employer for asserting sexual harassment claims. Because there is no standing requirement to file a charge before the Board, a union could serve as the charging party even where an unrepresented (i.e., nonunion) worker engaging in concerted activity for mutual aid is the real party in interest. Union participation in shaping the argument before the Board is especially important before a Republican Board, and the rising significance of section 7 rights for the nonunion workforce suggests that it may also be smart advertising for unions. Even where the complaining worker has obtained her own counsel or filed charges herself, unions could seek to intervene and impact the theory of the case, insuring that arguments favoring protection feature a capacious understanding of solidarity consistent with the labor movement's experience of communal values.³⁸⁸

Second, unions have traditionally participated in significant cases affecting collective rights under the NLRA (and other statutes) when the cases move to the circuit court or Supreme Court level, filing amicus briefs, partnering with social justice organizations, and consulting with lawyers who represent the parties.³⁸⁹ Unions should take these opportunities to consider how their arguments would be strengthened by reference to the silencing effect of a narrow understanding of section 7 on victims of sexual harassment. In *Epic Systems Corp.*,³⁹⁰ for example, unions could have argued that predispute arbitration policies that require workers to waive their rights to pursue class claims tend to silence sexual harassment claims.

Finally, fighting to retain the Obama Board's doctrine on employer rules that potentially inhibit conversations about working conditions that could lead to group action is also critical, particularly in low-wage workforces.³⁹¹ Cynthia Estlund described the barriers posed by the structure of low-wage work to the formation of solidarity—or even the social bonds that precede a solidaristic moment—this way:

[I]n seeking to maximize the output of unskilled workers and to squelch any whisper of unionization or dissent, . . . em-

³⁸⁸ 29 C.F.R. § 102.29 (2018) (authorizing Regional Director or administrative law judge to permit intervention “upon such terms as may be deemed proper”); see also *Camay Drilling Co.*, 239 N.L.R.B. 997, 998 (1978) (finding that section 10(b) of the NLRA also authorizes the Board to permit intervention in its proceedings by interested parties).

³⁸⁹ See generally Charlotte Garden, *Union Made: Labor's Litigation for Social Change*, 88 TUL. L. REV. 193 (2013) (describing union involvement in litigation as social change strategy).

³⁹⁰ 138 S. Ct. 1612 (2018).

³⁹¹ See Michael M. Oswald, *The Right to Improvise in Low-Wage Work*, 38 CARDOZO L. REV. 959, 1009–11 (2017) (describing aspects of low-wage work that make formation of relationships difficult).

ployers suppress all kinds of productive human interaction. Employers aggressively suppress communication among workers about their oppressive working conditions and poor wages, and particularly about the possibility of organized opposition, by close oversight and the ever-present threat of discharge. Intense supervision and monitoring and the pervasive threat of discharge supplant and suppress the voluntary cooperation that is otherwise commonplace at work. Workers are also left little time and space for informal sociability. Sociability itself is not especially threatening, but it is an incidental casualty of both the intensely driven and intensely monitored pace of production and the aggressive suppression of dissident union talk.³⁹²

Thus, targeting confidentiality and nondisclosure policies that tend to silence victims and prevent them from discussing with coworkers the harassment they suffer in the workplace, or its circumstances with government agencies, would be imperative.³⁹³ Unions could and should intervene in these cases to advance the interests of workers generally and those subjected to sexual harassment in particular.

CONCLUSION

The media spotlight on sexual harassment presents a rare opportunity for America's beleaguered labor unions—a chance to redeem themselves, play a key role in a major battle for a more just society, and win hearts and minds in the struggle for public support. The opportunity to connect sexual harassment to the larger structural inequities that drive gendered pay disparities is unprecedented. If labor is truly interested in rebranding itself as a movement that serves the interests of all workers as an advocate for workplace equality, it should seize this moment to showcase its role in promoting human dignity at work.

But if unions are to be an effective force in this regard, they must take sexual harassment seriously and live the values of solidarity and mutualism. At a minimum, this means rooting out sexual harassment within union ranks, prioritizing sexual harassment as an organizing and bargaining issue, and partnering on a coordinated effort at a

³⁹² ESTLUND, *supra* note 170, at 56–57.

³⁹³ Although there may be interests in maintaining confidentiality on both sides of such a settlement—the victim's as well as the employer's—the larger public-policy and collective-employee interests in maintaining a harassment-free workplace may cut against purchasing compelled silence. See Hassan A. Kanu, *Labor Board Could Loosen Curbs on Nondisclosure Agreements*, 2 Daily Lab. Rep. (BNA) 7 (Jan. 3, 2018).

sectoral level with nonlabor groups that aim to combat sexual harassment as a core part of their missions. It also means deploying union legal expertise to fight for the most capacious understanding of section 7 protection possible while still respecting the interests of a diverse workforce. We call on unions to educate the public, judges, and the Labor Board that sexual harassment is a collective harm furthered by structural inequality, not an individual problem. If unions don't advance the labor movement's capacious understanding of mutualism, history suggests that no one will.