The Legal History and Queerer Future of “Me Too”

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Abstract

This paper traces the legal history of “me too” as a legal pejorative, referring to evidence that courts and defendants sought to exclude from consideration in discrimination cases. The exclusion of this evidence was part of a divide and conquer strategy that covers up the pervasiveness of discrimination, thereby diminishing the claims of those who allege its existence. It then describes how the “#MeToo” social movement uses the term in precisely the opposite way: to bring survivors of coercive sexual behavior together, and to thereby call attention to the pervasiveness of the behavior, which makes the movement’s radical claim to eradicate the abuse even more worthy of urgent attention. Next, it considers the rapid and fierce backlash to the #MeToo movement, in the form of the confirmation of Justice Kavanaugh to the United States Supreme Court, considering how this backlash, like the original exclusion of “me too” evidence, sought to cloak the exercise of power and privilege in legal terms and process. In doing so, the backlash exposed to the public that even the Court—a symbol of law and justice—is corrupted by the political impulse to maintain current allocations of sexual power and entitlement.

I. Introduction

Recent high profile successes of queer activism—from legal recognition of same-sex marriage to the emerging recognition of the rights of transgender persons—have been blamed for a white nationalist backlash in the form of Trumpism that threatens all marginalized persons.¹ This narrative blames a leftist focus on the rights and dignity of a small minority group—queers—for the impending loss of legal security on the part of a vast many: women, people of color, immigrants, persons with disabilities, and poor persons.² But I argue in this essay that one of the most prominent recent queer activist movements—one that has engendered its own incredibly rapid and ferocious backlash—focuses not on a small minority group, but on a majority of people. It is so inclusive, in fact, that we fail to properly recognize it as queer. That movement is the #MeToo movement.

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² Boylan, supra note 1 (referencing and challenging the term “boutique issues” for transgender rights).
In this paper, I take the position that speaking out about sexual violence and harassment is in fact a form of queer activism. The #MeToo movement has exposed that there are very few women who have not been harassed, assaulted, or demeaned through coercive sexual behavior by someone in a relative position of power. The group is large and includes persons of all kinds of identities and backgrounds might make us question its project as potentially “queer.” If virtually all women, and some men, are part of a group, isn’t that group rather “normal”? Moreover, queer approaches to sexuality have been associated with a libertarian stance, rather than one that focuses on the use of sex and sexual power to subordinate. But queer does not necessarily mean uncommon, and it does not necessarily mean unconcerned with sexual abuse or violence. When women speak out, they are indeed making a call for what would be a truly radical change in the distribution of sexual power and status—and what could be more queer than that?

To support our thinking of the #MeToo movement as a queer social movement, I will first explore a less commonly known usage of the phrase “me too” in federal employment discrimination law. This past usage of “me too” was actually employed to undermine claims of discrimination by employees, including those who claimed they had been sexually harassed, through a divide-and-conquer strategy cloaked in the technicalities of evidence law. I will then contrast that usage to the social movement’s employment of the term in virtually the opposite manner—to form a broad and unified coalition that gains strength from its numbers. I will thereby demonstrate how the social movement is a “queer” movement: taking the pervasiveness of sexual abuse and violence and turning that into a strength of the movement to regulate it. I will end by considering how one of the most visible and successful forms of backlash against the movement thus far—the confirmation of Justice Kavanaugh to the Supreme Court—was a fitting backlash, in that it sought, once again, to cloak the refusal to hear a claim of unjust abuse of power in legal technicalities, such as “preponderance of the evidence.” While that backlash was shocking to many in its

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3 See Rhitu Chatterjee, A New Study Finds 81 Percent of Women Have Experienced Sexual Harassment, Feb. 21, 2018, npr.org (https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment) (providing results from a survey, sponsored by Stop Street Harassment, that found 81 percent of women and 43 percent of men had experienced sexual harassment at some time in their lives, or, approximately 62 percent of all men and women).

4 E.g., Marc Spindelman, Discriminating Pleasures, in Directions in Sexual Harassment Law (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (making this point, particularly in response to Janet Halley’s chapter, “Sexuality Harassment,” which warned about the potential use of sexual harassment law to police gay sex, in the same book).

5 Cf. Robyn Weigman & Elizabeth A. Wilson, Introduction, Antinormativity’s Queer Conventions, 26 Differences 1, 18 (2015) (arguing that queer theory’s commitment to antinormativity is a canonical belief, but that this “antinormativity generates and protects the very propriety it claims to despise,” and hoping to “channel the energies of queer inquiry otherwise.”).

6 Cf. Eve Kosofsky Sedgwick, Introduction, in Epistemology of the Closet 1 (1990) (describing minoritizing and universalizing approaches to understanding sexual oppression, in which the minoritizing view treats certain persons, such as gay men, as having a fixed and minority sexual identity that is discriminated against, while the universalizing view treats sexual power and status as distributed in ways that impact us all).
fury, and in the lasting impact it will necessarily have, it did expose to the public that even revered and solemn institutions of law are corrupted by the unjust and gendered distribution of power and entitlement.

II. The Legal History of “Me Too” as Pejorative

To highlight how radical this movement is, or how queer it has the potential to be, I demonstrate how the phrase “me too” was not always recognized as an effective exposé against sexual abuse as it is today. Indeed, the phrase “me too” was once a legal pejorative. The term began to be used in federal employment discrimination cases in the late 1990s by defendant employers. When a plaintiff bringing a lawsuit sought to present evidence that the employer had discriminated not just against her, but also against other employees, these defendants would call that evidence “me too” evidence. The plaintiffs pointed to this evidence to buttress the claim of discrimination in their own case, but the defendants, and judges, used to use the term to indicate that the evidence was of low probative value. The defendants argued that it should not be admitted at all. As a backup argument, when that failed, the defendants tried to use Federal Rule of Evidence 403, which states that a “court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” For instance, a plaintiff might allege her supervisor failed to give her a promotion because she is African American. She might seek to call a fellow Asian American worker to testify that this same supervisor once called him by a racial epithet. The defendant might concede that there is no rule specifically prohibiting the plaintiff from bringing up this evidence of racial animus. But the defendant would still seek to argue that a racial epithet is so inflammatory, it would be highly “prejudicial” to the employer’s case, and that, at the same time, since the epithet shows racial animus against Asian American persons, it is not very “probative” of whether the supervisor harbors racial animus against an African American worker.

Of course, the pejorative use of “me too” was not careless. It was a well thought out attempt by attorneys, skilled in the use of rhetoric, to achieve a specific goal. The goal

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7 See, e.g., Reid v. Nat'l Linen Serv., 182 F.3d 918 (6th Cir. 1999) (explaining that “[t]rial courts regularly prohibit ‘me too’ evidence from or about other employees who claim discriminatory treatment because it is highly prejudicial, but only slightly relevant,” and describing the defendant’s argument that “the jury’s verdict was tainted by improper ‘me too’ evidence”); Goldsmith v. Bagby Elevator Co., 513 F.3d 1261 (11th Cir. 2008) (describing the plaintiff’s “me too” evidence, the defendant’s attempts to have the evidence excluded, and holding that while the evidence was not admissible under Fed. R. Evid. 406, as evidence of “habit,” it was permissible for the district court to admit it under other Rules).

8 See Sprint/United Mgmt. Co. v. Mendelsohn, Petition for a Writ of Certiorari, 2007 WL 738928 (2007) (arguing that the Supreme Court should grant certiorari in a case in which the Tenth Circuit had reversed a district court’s exclusion of “me too” evidence in an age discrimination lawsuit, in part because granting certiorari would resolve a split of authority amongst the federal appellate courts, four of which “ha[d] held ‘me, too’ evidence wholly irrelevant,” and five of which “ha[d] held that such evidence, even if perhaps peripherally relevant, may be excluded under Federal Rule of Evidence 403”).

9 Id.
of those attorneys, as well as the judges who went along with their suggestions, was to divide, isolate, and thereby diminish the strength of victims of discrimination, including sexual abuse and violence, so that they would not be believed. For instance, in *Wyvill v. United Companies Life Insurance*,\(^\text{10}\) two employees that were fired sued the employer, alleging they had been terminated because of their age. The defendant argued that they had been fired for improper behavior, such as disruptive phone calls. A jury found in the plaintiffs’ favor, and they were awarded backpay and punitive damages. The Fifth Circuit overturned the award, however, on the ground that the district judge should not have let the plaintiffs “introduce[] anecdotal testimony from and about former employees in an effort to show that United Companies, a company of 2700 employees, had a ‘pattern or practice’ of discriminating against older workers.” The court reasoned that a “‘pattern or practice’ of discrimination does not consist of ‘isolated or sporadic discriminatory acts by the employer.’”\(^\text{11}\) The court explained, among other things, that the other alleged victims of discrimination had different supervisors from the plaintiffs who were suing, they were fired at different times, and the reasons those employees were given for being terminated were different from the reason the plaintiffs suing were given. For instance, “[t]he stated reasons for Davis’s termination—a ‘lack of chemistry’ and a failure to meet production quotas—were different from the explanation behind Waldrop’s discharge—rude and abusive conduct toward staff and customers.”\(^\text{12}\) The subtle implication of copying or mimicking someone else’s claim—“me too”—feels almost cruel, from today’s vantage point: that others had suffered the same or similar discrimination was not only deemed irrelevant, or at least unimportant, it subtly undermined the claimant’s own veracity.

Defendants successfully limited the use of so-called “me too” evidence in many regions of the United States. A common rule is that “me too” evidence would need to have some “nexus” to the individual plaintiff’s claim; for example, that the supervisor who allegedly discriminated in the “me too” instance is the same supervisor who allegedly discriminated against the plaintiff, or that the discrimination against the other employees occurred at a similar time to the discrimination against the one suing.\(^\text{13}\) This is why, in the *Wyvill* case, the court criticized the use of the “me too” evidence as coming from employees who had been fired by different supervisors.\(^\text{14}\) Courts requiring a “nexus” to admit “me too” evidence implicitly reject the idea that numerous incidents of discrimination by supervisors at a company is evidence of a culture of discrimination, or an institutionalized version of turning a blind eye—a “pattern or practice” of discrimination. Instead, the model

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\(^\text{10}\) 212 F.3d 296 (5th Cir. 2000) [Wyvill].

\(^\text{11}\) Id. at 302.

\(^\text{12}\) Id. at 302-03.

\(^\text{13}\) E.g., Goldsmith, 513 F.3d at 1261; Griffin v. Finkbeiner, 689 F.3d 584 (6th Cir. 2012) [Griffin] (applying Sprint/United to require an individualized analysis of relevance for the “evidence related to each ‘me too’ employee”).

\(^\text{14}\) Wyvill, supra note 10 at 302.
of discrimination being followed is that of a rogue, biased supervisor.

Eventually, the Supreme Court held that a “per se” rule excluding “me too” evidence about different supervisors or regions would be improper. At the same time, trial judges were afforded broad discretion to exclude “me too” evidence, as long as they engaged in a fact- and circumstance-specific inquiry that takes other factors into account, such as whether supervisors knew of each others’ decisions, and temporal or geographic proximity.\(^\text{15}\) Thus, if someone alleges she has been sexually harassed by her supervisor, and she seeks to admit evidence of other harassment victims at her company, in order to show that harassment is common and tolerated at her company, thereby making her accusations more plausible, she may still be unable to do so. It would depend on how the trial judge phrases his or her reasons for excluding her evidence of other victims. The judge could no longer say, “This evidence is excluded because only evidence of harassment by the same supervisor can be admitted.” But the judge could say, “This evidence is excluded because it is evidence of harassment by a different supervisor, and there is no proof that the person who allegedly harassed the plaintiff knew about the other harasser’s behavior. If he didn’t know about that specific harasser, then the incidents would not have contributed to his beliefs on whether harassment is acceptable at the company or not.”

Many readers will find the legal requirement of a special “nexus” odd in light of the recent #MeToo social movement. If an employee is seeking to prove discrimination, isn’t the rampant existence of it relevant? Indeed, part of the contemporary movement is about exposing the pervasiveness of sexual violence, harassment, and abuse, which then makes claims that individual instances really happened more plausible. When the #MeToo social movement initially exploded, the fact that sexual abuse in the entertainment industry is so common—by different directors, producers, and crew members, at different production companies and locations, across large expanses of time—is part of what caused many to believe the individual claims of abuse in that industry. How could pervasiveness be a point against the significance of the evidence that others have been harassed?

\section*{III. The Legal History of “Me Too” as Pejorative}

But to note that conflict between the two uses of the term is to begin to recognize how radical the premise of the #MeToo movement is. At the same time as employers and courts were employing the term to pejoratively dismiss evidence in the late nineties, Tarana Burke was struggling to find the words to help a child victim of sexual abuse. She reports she could not bring herself to say “me too” in solidarity with the child, and was haunted by her

\(^{15}\) Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 386-87 (2008) (noting that “had the District Court applied a per se rule excluding the evidence, the Court of Appeals would have been correct to conclude that it had abused its discretion” but that “[t]he question whether evidence of discrimination by other supervisors is relevant . . . is fact based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case”); see also Griffin, 689 F.3d at 584.
She eventually founded Me Too in 2007 to help survivors of sexual abuse. Her belief was that the two words and the movement it inaugurated would create bonds between survivors and dissipate survivors’ sense of shame. She was right. When her use of the term was finally popularized, it helped many survivors overcome shame to speak out. The #MeToo movement utterly rejects the premise of the legal pejorative: that exercises of power to diminish, harm and exploit those weaker are individual acts of misbehavior having little to do with each other or with broader sex inequality. Rather, these many instances of individual harm are manifestations of systemic injustice.

While the movement’s focus on sexual power and its abuse is fundamentally “queer,” the systemic nature of the problem of sexual abuse means that many, perhaps even most, of its survivors are not sexual minorities. #MeToo does not seem to be primarily about LGBT experiences of sexual abuse. Nor is it primarily about sexual abuse of women in poverty or people of color. Many survivors seem to identify as very “normal” when it comes to sex and gender. But that does not make their challenge to systemic abuse and gender hierarchy any less queer. Survivors are challenging deeply held norms governing whose sexual pleasure and consent is privileged over whose. The antinormative concerns of queer theory need not take attention away from problems that are, essentially, “normal.” Indeed, the normal-ness of the problem of sexual abuse should arguably recommend it as a subject of queer concern, from a universalizing perspective on sex and gender injustice. Otherwise, the norms surrounding who is entitled to sexual pleasure are ironically reinstated and given more power because it is being left unchecked, becoming the “rule.” In prior work, I have promoted the idea that we should privilege and protect against monopolistic control those activities that contribute to “cultural velocity,” in essence, the rate of meaningful cultural exchange and evolution. That includes sexual activity, because “[w]ho one has sex with often signifies something important about one’s social identity. It communicates what one finds desirable, who one is desirable to, even sometimes what one thinks about gender, domestic labor, and children. . . . [O]ne’s sexual decisions carry a great deal of cultural meaning, both positive and negative.” To redistribute control and influence over those decisions is, in essence, to queer them.

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18 Id.

19 Id.; see also Barbara Palmer, Ten Years Later, Anita Hill revisits the Clarence Thomas Controversy, Stanford Rep., Apr. 3, 2002 (https://news.stanford.edu/news/2002/april3/anitahill-43.html) (quoting Anita Hill: “If you think about the way the hearings were structured, the hearings were really about Thomas’ race and my gender,” who pointed out that “[i]n reality, her race and Thomas’ gender were more relevant.”).

20 See Weigman & Wilson, supra note 5.

21 Gowri Ramachandran, Against the Right to Bodily Integrity: Of Cyborgs and Human Rights, 87 Denv. Univ. L. Rev. 1, 30-31 (2009); Gowri Ramachandran, Delineating the Heinous: Rape, Sex, and Self-Possession,
Importantly, this focus on a problem that most “normal” women experience need not, and does not, exclude those who are less normal. For the #MeToo social movement, any abuse of sexual power is a problem, and all are manifestations of that systemic injustice. While the public’s attention has focused mainly on some wealthy, white, and relatively privileged survivors of that injustice, those who do not fit that mold have been given airtime too. For instance, Terry Crews and Anthony Rapp are widely considered persons who spoke out as part of the #MeToo movement. The fact that all survivors’ experiences matter is part of what gives the movement its force in terms of numbers. The problem of sexual abuse may be normal, but one need not be normal to have been harmed by it, and to now resist it.

IV. Backlash: What’s Next for “Me Too”; What’s Next for Law?

With all that said, the #MeToo movement’s challenge to received norms of sexual entitlement and power has not come without a backlash. Perhaps given the history of “me too” as a legal term, it is fitting that the most visible and stunning backlash against the #MeToo movement has appeared, once again, as power cloaked in liberal law. The earlier use of the term “me too” as a pejorative was an attempt to divide and isolate, in response to someone resisting power by calling attention to a pattern of its abuse. Citations to technical aspects of law—The Federal Rules of Evidence, to be precise—functioned to cover up what was actually a simple desire to ignore a complaint of abuse of power, in order to maintain the status quo. Of course, cloaking a desire to maintain one’s own power in legal rules is the job of a defense attorney in an employment discrimination case: the employees attempt to disrupt the power employers have over workers by pointing out that the power is being abused; it is being used to discriminate. In turn, the employer cannot say “abuse of power is permitted,” or “you have no right to point out the abuse” or “I like the status quo.” That is because the law says the discrimination is not in fact permitted, and that employees further have a right to complain and be compensated if they have been discriminated against. So the defense attorney must hope that the complaint is not believed, or else find some other law providing a reason for why the complaint can or must


22 See, e.g., Chloe Melas, Terry Crews Responds to Those Who Question His #MeToo Story, June 28, 2018, cnn.com (https://www.cnn.com/2018/06/29/entertainment/terry-crews-MeToo-assault-response/index.html); Mahita Gajanan, There is Strength in Numbers: Anthony Rapp Shares Why He Opened Up About Kevin Spacey, Jan. 4, 2018, Time Magazine (“[H]e was inspired by the many women who have opened up over the last few months in the wake of the allegations of sexual harassment and assault against Harvey Weinstein.”) (http://time.com/5088481/anthony-rapp-kevin-spacey-sexual-misconduct/).

23 See sources cited supra notes 8-15.

be ignored. For employment defense attorneys, that law was the Federal Rules of Evidence, and they have had mixed success on that front, as described above.

This is how an adversarial legal system works, of course, but it is indeed fitting that, when the social movement #MeToo had huge success, seemingly overnight, in the social and political realm, the most visible backlash to that success attempted to employ the cloak of legality, once again. The backlash has gone well beyond saying, “No, I don’t want to listen,” or, “I want to maintain the status quo, with respect to what wealthy, privileged teenage boys are permitted to do.” Instead, Senators who voted to confirm Justice Kavanaugh did not in fact claim to be unpersuaded by Christine Blasey Ford’s gripping testimony, nor admit to not wanting to listen to it. Nor did they address that now-Justice Kavanaugh’s claims of innocence were utterly lacking in credibility, as they were replete with lies as to matters small and large. Instead, they argued that the law in some way compelled them not to listen to Dr. Blasey Ford, and to treat Justice Kavanaugh as innocent even if he wasn’t. They argued that they were applying, and indeed must apply, a “presumption of innocence.”

Of course, the Senators were not actually applying or developing a legal principle, as numerous commentators have pointed out. Just as the defense attorneys of the 1990s attempted to mold the Federal Rules of Evidence into an excuse to ignore another set of laws (federal employment discrimination statutes) Senators voting to confirm Kavanaugh attempted to bend terms describing burdens of proof in litigation, such as “presumption of innocence” and “more likely than not,” into an excuse to ignore a whole host of other laws. They used the terms to ignore a standard jury instruction: that small lies permit the inference of big lies.

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25 Id.
27 Collins, supra note 26; Flake, supra note 26. Both Senators’ statements make no mention of the many misleading and false statements in Justice Kavanaugh’s testimony that commentators had pointed out.
28 Collins, supra note 26; Flake, supra note 26. Both Senators’ statements use the phrase “presumption of innocence.”
29 Benjamin Wittes, I Know Brett Kavanaugh, But I Wouldn’t Confirm Him, The Atlantic, Oct. 2, 2018 (quoting former FBI Director James Comey in saying, “Small lies matter, even about yearbooks. From the standard jury instruction: ‘If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust such witness’ other testimony and you may reject all the testimony of that witness.”) (https://www.theatlantic.com/ideas/archive/2018/10/why-i-wouldnt-confirm-brett-kavanaugh/571936/).
attorneys. And, they used the terms to ignore the federal criminal law forbidding perjury. Had they sincerely sought to apply a “more likely than not” burden of proof standard to Dr. Blasey Ford’s allegation of sexual assault, as some claimed, many more would have voted no, given the weight of the evidence.

The Senators were using the cloak of law, but were in fact engaged in a politic act; they did not demand a new, conservative, but more uncontroversially qualified nominee because voting for Justice Kavanaugh energized a core group of voters who appreciated Justice Kavanaugh’s partisan fury and indignation, as well as his defense of male entitlement and power. Thus, the vote was all about preserving power—the Senators’ own political power, the political power of their colleagues in the House of Representatives, and the power generally of men to abuse women sexually. And in fact, it resulted in the installation of one who wielded political power and rhetoric to secure himself a position in the institution that, until now, was understood as the ultimate embodiment in the United States of legal power, as distinguished from political power.

The rule of law is often understood as a force meant to tame abuse of raw power. And it can be so, at times. But in both the older employment discrimination cases and in the confirmation hearings, legalese was used as cover for the maintenance of the status quo with respect to power and inequality. Victims are saying, “I have been abused and many others have, too,” and those with the power to abuse have not only refused to listen, they have turned to law, or a facsimile of law, as the excuse for that refusal.

As many have lamented, Justice Kavanaugh was confirmed, but the attempt to cover an exercise of power with talk of law was a failure. The image of impartial, dispassionate, and fact-based decision making by the nation’s highest Court has been fatally

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31 Nathan J. Robinson, How We Know Kavanaugh Is Lying, Current Affairs, Sept. 29, 2018 (https://www.currentaffairs.org/2018/09/how-we-know-kavanaugh-is-lying) (arguing that Judge Kavanaugh committed perjury before the Senate Judiciary Committee and detailing numerous lies, omissions, and misleading statements). While a few of Robinson’s examples may not be considered “lies” by all reasonable people, and while perjury may be a difficult crime to prove, his comprehensive catalog of dishonesty, and others like it, certainly raised a concern that perjury might have been committed, yet the Senators did not engage with much less attempt to refute this concern.

32 Collins, supra note 26.


34 Id.

35 Thomas Hobbes, Leviathan (1651).

36 E.g., Post, supra note 33.
disrupted. The #MeToo movement’s queering of sexual power structures will continue in the cultural and social realm, and we will have to wait to see what successes may or may not be had in the legal realm. But with respect to the United States Supreme Court, the movement, and the backlash it engendered, has had the unintended consequence of diminishing the legitimacy of the institution, a symbol of the rule of law. The curtain has been peeled back, and while that is a tragedy, perhaps it can be a tragedy that comes from acknowledging, rather than accepting, the corruption of law by power. We can’t escape the reminder that the will to preserve the current allocations of sexual power and entitlement is so strong, it corrupts even constitutionally sanctioned repositories of legal power, intended to tame us. But perhaps that reminder will serve to propel an even greater willingness to engage in the project of queering the status quo.

37 Id.