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The Sexual Misconduct of Donald J. Trump: Toward a Misogyny Report

Ruthann Robson
CUNY School of Law

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THE SEXUAL MISCONDUCT OF
DONALD J. TRUMP:
TOWARD A MISOGYNY REPORT

*Ruthann Robson**

ABSTRACT

The numerous allegations of sexual misconduct—unwanted, unwelcome, often aggressive sexual behavior—levied against Donald Trump merit attention and redress. Despite obstacles to civil remedies, there has been some litigation, but it has mostly been unsatisfactory. The many allegations reported in the media have not been amenable to judicial, legislative, executive, or political resolution. Women, including women who allege Trump committed sexual misconduct against them when they were minors, have generally not been afforded the remedies to which they are entitled.

Because litigation and media accounts have proven inadequate to the task of addressing Trump's sexual misconduct, there should be a government inquiry and resulting Report. Such a Report—a Misogyny Report focused on Donald Trump—would assist the nation in assessing and contextualizing the troubling and persistent allegations of his sexual misconduct. An inquiry and Report could provide a forum for considering each individual woman affected and as part of a pattern of Trump's conduct. Further, an inquiry and Report could ameliorate the silencing of women—through isolation, threats, and nondisclosure agreements—and propose remedies to empower these women as well as other women. A Misogyny Report could also suggest specific correctives to obstacles in the path of bringing and completing litigation that could address the alleged sexual misconduct of Trump

* Professor of Law & University Distinguished Professor, City University of New York (CUNY) School of Law.

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and ultimately of others. A government Misogyny Report initiated by Congress or some other governmental body could provide a much-needed reckoning.

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INTRODUCTION

The extent to which we should concern ourselves about the sexual behaviors of politicians including the president is a vexed question. For some, the morality of a politician is important and includes private and public sexual matters such as marriage, divorce, monogamy, and heterosexuality. For others, the morality of a politician should be an issue only when it coincides with criminality, such as in cases of prostitution or sexual assault, including of minors. Additionally, sexual harassment—usually a civil matter unless it includes criminal assault or battery—can play a prominent role in political, including presidential, legal controversies. Moreover, unconventional or even conventional sexual conduct can be a security risk for any politician, assuming that he or she does not want it disclosed. The attempt to evade disclosure can cause a politician to lie, which can be an independent cause for concern, constitute a civil wrongdoing, or even constitute a crime such as perjury. Additionally, while the president is not coextensive with the nation, the president is singularly important; any sexual misconduct sets the tone for our national commitments and conversations about sex and gender equality. The allegations of sexual conduct and misconduct surrounding the 45th President of the United States, Donald J. Trump, have tested the nation's beliefs about how we should consider and evaluate the sexual behavior of our highest office holder.

The inappropriate sexual conduct allegations that plague the President arise from a variety of sources. Trump's sexual behavior surfaces and then recedes in the *Report on the Investigation into Russian Interference in the 2016 Presidential Election*—known as the Mueller Report.¹ Given the Report's focus on investigating links of the Trump campaign to the Russian government and any obstruction of justice in that investigation, the lack of attention to sexual matters is understandable.²

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1. ROBERT S. MUELLER, III, U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019), <https://www.justice.gov/storage/report.pdf> and https://www.justice.gov/storage/report_volume2.pdf [hereinafter MUELLER REPORT]. For a discussion of the sexual allegations in the Mueller Report and their relevancy, see Ruthann Robson, *Sexing the Mueller Report*, 50 STETSON L. REV. (forthcoming 2020) (exploring the sexual matters surfacing in the Mueller Report surrounding the *Access Hollywood* tape, the alleged Moscow sex-tape, and the “hush-money” for silence regarding consensual sexual relationships as relevant to campaign finance violations).
 2. The Mueller Report resulted from the Acting Attorney General's appointment of Robert S. Mueller, III as Special Counsel for the United States Department of Justice to investigate “any links and/or coordination between the Russian government and

Trump's sexual behavior has also been the subject of civil litigation, including complaints that raise the conduct as direct claims of assault,³ and complaints that raise the conduct as an underlying matter as in an action for defamation.⁴ Media accounts—including video and audio of Trump's own statements, reporting of women's various allegations, and women's first-person accounts in essays or in interviews—catalog with varying degrees of detail an array of transgressions. The number of women who have alleged sexual misconduct varies, but ranges from approximately 20⁵ to 67.⁶ The President's sexual conduct and conduct to-

individuals associated with the campaign of President Donald Trump,” and “any matters that arose or may arise directly from the investigation.” Volume I of the Mueller Report addresses Russian interference with the 2016 election and any Trump campaign links in about 200 pages. Volume II of the Mueller Report, slightly longer at an additional 241 pages, focuses on the question of whether the President obstructed justice in connection with the Russia-related investigations, including Presidential actions related to the Special Counsel's investigation itself.

3. See *infra* Section II.B and C for a discussion of claims.
4. See *infra* Section II.A for a discussion of defamation.
5. See, e.g., Andrea Gonzalez-Ramirez, *E. Jean Carroll Is Just One Of 20+ Women Who Have Accused Donald Trump of Sexual Assault & Misconduct*, REFINERY 29 (June 24, 2019), <https://www.refinery29.com/en-us/women-accused-donald-trump-sexual-assault-allegations-list>; Meg Kelly, *President Trump and Accusations of Sexual Misconduct: The Complete List*, WASH. POST (Nov. 22, 2017), <https://www.washingtonpost.com/news/fact-checker/wp/2017/11/22/president-trump-and-accusations-of-sexual-misconduct-the-complete-list/>; Meghan Keneally, *List of Trump's Accusers and Their Allegations of Sexual Misconduct*, ABC NEWS (June 25, 2019), <https://abcnews.go.com/Politics/list-trumps-accusers-allegations-sexual-misconduct/story>; Libby Nelson & Laura McGann, *E. Jean Carroll Joins at Least 21 Other Women in Publicly Accusing Trump of Sexual Assault or Misconduct*, VOX (June 21, 2019), <https://www.vox.com/policy-and-politics/2019/6/21/18701098/trump-accusers-sexual-assault-rape-e-jean-carroll>; Eliza Relman, *The 24 Women Who Have Accused Trump of Sexual Misconduct*, BUS. INSIDER (June 21, 2019), <https://www.businessinsider.com/women-accused-trump-sexual-misconduct-list-2017-12>. Very few people have a Wikipedia entry devoted to the “sexual misconduct allegations” against them, but Donald Trump merits one that runs to almost ten thousand words, noting that he has been accused of “rape, sexual assault, and sexual harassment, including non-consensual kissing or groping, by at least 23 women since the 1980s.” *Donald Trump Sexual Misconduct Allegations*, WIKIPEDIA, https://en.wikipedia.org/wiki/Donald_Trump_sexual_misconduct_allegations (last visited Aug. 1, 2019). The Wikipedia entry does not discuss the allegations by Jane Doe regarding acts committed when she was 13 years old, see *infra* Part IV (“Girls”).
6. BARRY LEVINE & MONIQUE EL-FAIZY, *ALL THE PRESIDENT'S WOMEN: DONALD TRUMP AND THE MAKING OF A PREDATOR 250–75* (2019) (detailing 67 “accusations of inappropriate behavior” with 26 of those cataloged as alleged incidents involving sexual contact, with additional discussions of “disparaging or sexually fueled comments directed at specific women” and “women pursued, fantasized about, or obsessed over”).

ward women is important to the policy, politics, and law of a nation in which more than half of its inhabitants are women, girls, or female-identified. It is arguably just as important as allegations of Russian or other foreign relationships and obstruction of justice that were the central topic of the Mueller Report. What if we recognized this importance with a Report investigating, reaching conclusions, and making recommendations about Trump's sexual misconduct, defined as his unwanted and unwelcome sexual behavior towards other people?

Call it a Misogyny Report on Trump. Misogyny, a label for the beliefs and practices that negate gender and sexual equality, has at its core a subordination of female-identified existence to the sub-human. Under this view, the female is only ever an object, while the male is entitled to be a subject—to be human.⁷ A more generous view is that in “post-patriarchy,” people understand all genders are human, but nevertheless it is only males who are entitled to be neutral beings, while non-males are relegated to “others” who exist in sidelined and supportive roles and exist only in relation to males.⁸

Misogyny is related to—yet distinct from—other types of subordination structures, including the pervasive racism that Trump also exhibits. Trump's misogyny and racism intersect at times: His continued insistence of the guilt of the exonerated “Central Park Five” can be considered a projection;⁹ his insults to established Black Congresswom-

7. Legal scholar Catharine MacKinnon is the best-known proponent of this view. For example, she argues that heterosexual ontology is “the use of things to experience the self,” in which women are the things and men are the self, and famously grounded gender inequality in sexual relations, writing, “Man fucks woman; subject verb object.” CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 123–24 (1989). In a subsequent essay, she argued women have not been considered human. Catharine A. MacKinnon, *Are Women Human?*, in CATHARINE MACKINNON, ARE WOMEN HUMAN AND OTHER INTERNATIONAL DIALOGUES, 41–43 (2006) (discussing the Universal Declaration of Human Rights of 1948 and arguing that “[b]eing a woman is ‘not yet a name for a way of being human’”).

8. See KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY 301 (2018) (writing that the distinction is between a self-recognized human being, e.g., white men who are otherwise privileged in most if not all major respects versus a human giver, a woman who is held to owe many if not most of her human capacities to a suitable man, and is then obligated to offer love, sex, attention, and labor in accordance with social norms).

9. See Jan Ransom, *Trump Will Not Apologize for Calling for Death Penalty Over Central Park Five*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/nyregion/central-park-five-trump.html>; see also Eric Levitz, *Trump Expresses Outrage Over the Exoneration of the Central Park Five*, N.Y. MAG. (Oct. 7, 2016), <http://nymag.com/intelligencer/2016/10/trump-the-central-park-5-are-guilty-despite-dna-evidence.html> (including Trump's statement: “They admitted they were guilty. The police doing the original investigation say they were guilty. The fact that that case

an Maxine Waters;¹⁰ and his attacks on congresswomen “who originally came from countries whose governments are a complete and total catastrophe,” and asking, “[w]hy don’t they go back and help fix the totally broken and crime infested places from which they came,”¹¹ which led to a rare condemnation by the House of Representatives.¹² But with the exception of one campaign worker who brought suit,¹³ the public accounts of Trump’s sexual misconduct involve women who share his white racial identification. Racism, like misogyny, surfaces only briefly in the Mueller Report.¹⁴

The possibility of a Report on Trump’s misogyny—or his racism—might seem far-fetched, but it is not. Indeed, Congresswoman Alexandria Ocasio-Cortez, in an event after Trump had implied she and other Congresswomen should “go back” to their countries, suggested the need for a “9/11 style commission” to investigate child separation of migrants

was settled with so much evidence against them is outrageous. And the woman, so badly injured, will never be the same”).

10. Joe Ruiz, *Trump Again Questions Maxine Waters’ Intelligence, Says She’s ‘Very Low IQ’*, CNN (Mar. 11, 2018), <https://www.cnn.com/2018/03/10/politics/trump-waters-low-iq-individual/index.html>.
11. See Katie Rogers & Nicholas Fandos, *Trump Tells Congresswomen to ‘Go Back’ to the Countries They Came From*, N.Y. TIMES (July 14, 2019), <https://www.nytimes.com/2019/07/14/us/politics/trump-twitter-squad-congress.html>; Matthew Yglesias, *Trump’s Racist Tirades Against “The Squad,” Explained*, VOX (July 18, 2019), <https://www.vox.com/2019/7/15/20694616/donald-trump-racist-tweets-omar-aoc-tlaib-pressley> (including tweets).
12. H.R. Res. 489, 116th Cong. (2019) (enacted). The Resolution was entitled, “Condemning President Trump’s Racist Comments Directed at Members of Congress,” and included a statement that the House of Representatives,

strongly condemns President Donald Trump’s racist comments that have legitimized and increased fear and hatred of new Americans and people of color by saying that our fellow Americans who are immigrants, and those who may look to the President like immigrants, should “go back” to other countries, by referring to immigrants and asylum seekers as “invaders,” and by saying that Members of Congress who are immigrants (or those of our colleagues who are wrongly assumed to be immigrants) do not belong in Congress or in the United States of America.

13. See *infra* Section II.B (Alva Johnson).
14. See MUELLER REPORT, *supra* note 1, Vol. I at 14, 25 (discussing efforts of the Internet Research Agency, a Russian organization which “conducted social media operations targeted at large U.S. audiences with the goal of sowing discord in the U.S. political system,” and discussed accounts the Internet Research Agency operated that were “purported Black social justice groups” with names such as “Black Matters,” “Blacktivist,” and “Don’t Shoot Us.”).

at the border¹⁵ and later tweeted that the United States was “going to need at least 3 major U.S. commissions to study and propose comprehensive, restorative action: 1. U.S. Commission on Hurricane María; 2. U.S. Commission on Child Separation; 3. U.S. Commission on Reparations.”¹⁶ Similarly, there could be a special Commission, modeled on the 9/11 Commission¹⁷ or the Watergate Commission,¹⁸ devoted to the “problem of misogyny” in the United States, focused on the role model set by the President.

While special investigative independent Commissions are relatively rare, Commissions within the Executive Branch are not. As long as Trump is president, it would be unlikely that there would be Executive

15. Miranda Bryant, *Ocasio-Cortez Wants ‘9/11-style Commission’ on Family Separations*, THE GUARDIAN (July 20, 2019), <https://www.theguardian.com/us-news/2019/jul/20/ocasio-cortez-911-style-commission-migrant-family-separations>.

16. Alexandria Ocasio-Cortez (@aoc), TWITTER (July 21, 2019 12:22 PM), <https://twitter.com/AOC/status/1152977199848407040?s=20>.

17. As Mark Fenster explained,

Conceived by Congress when partisan recriminations appeared ready to thwart serious investigation, the National Commission on Terrorist Attacks Upon the United States (popularly known as the “9/11 Commission”) fell within a long tradition of governmental efforts to use an independent advisory commission to study and explain a traumatic, tragic event of national import . . . [Despite impediments to success] the 9/11 Commission produced an unanimous report that forced a strong measure of transparency on an administration committed to information control and executive prerogative and privilege, and offered an array of major legislative and regulatory proposals. The Commission declared and attempted to maintain—and, equally importantly, appeared to maintain— independence from the political, military, intelligence, and regulatory institutions and actors it studied. The news media and public followed the Commission’s operations, and its final report was widely read. Congress and the Executive Branch adopted many of its recommendations. Working within an institutional form replete with commissions that accomplished little despite celebrated beginnings and prominent members, the 9/11 Commission may have had the greatest legislative impact in the form’s history and appears to have provided the authoritative account of the 9/11 attacks.

Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239, 1241, 1243 (2008).

18. The United States Senate’s “Committee on Presidential Campaign Activities,” known as the Watergate Commission, produced a seven-volume, 1,250-page report, *The Final Report of the Select Committee on Presidential Campaign Activities*, S. Rep. No. 93-981, at 96–100 (1974), which led to President Nixon’s resignation, and recommended the creation of the “Office of Public Attorney,” which led to the creation of the Office of the Special Prosecutor. Paul MacMahon, *Soft Adjudication*, 69 ADMIN. L. REV. 529, 551 (2017).

Branch investigations or hearings into Trump's alleged misogyny. But post-Trump, a new administration could report on how the federal government dealt with sexual allegations concerning Trump. One model might be the 2010 United States Commission on Civil Rights Report, *Race Neutral Enforcement of the Law? DOJ and the New Black Panther Party Litigation*, examining the DOJ's legal and policy rationales for dismissing a civil voter intimidation lawsuit against three of four defendants and reducing the relief requested against the fourth, to determine whether the DOJ enforced voting rights in a race-neutral manner when it reversed course in the litigation.¹⁹

Further, there could be another Special Counsel to investigate the President's crimes involving women, including those crimes specifically excluded by the Mueller Report, sexual crimes against women, or false-statement crimes.²⁰ While this can seem unlikely, the investigation of President Bill Clinton's sexual acts seemed similarly improbable.²¹ Even if the Independent Counsel statute under which Ken Starr operated was still in force, emulating the Starr Report is ill-advised given that the excesses of the Starr Report are widely acknowledged and led to the expiration of the Independent Counsel statute and its replacement with the more constrained Special Counsel statute.²²

The most usual venue for hearings and the production of a Report would be Congress or a Congressional committee or subcommittee. The United States Congress holds more than 2,000 hearings a year, some in its oversight capacity and others in aid of legislation; these hearings are broadcast, but also produce transcripts of testimony and written reports.²³ While the more usual focus might be a broad one, for example,

19. U.S. COMM. CIVIL RIGHTS, RACE NEUTRAL ENFORCEMENT OF THE LAW? THE U.S. DEPARTMENT OF JUSTICE AND THE NEW BLACK PANTHER PARTY LITIGATION (2010), https://www.usccr.gov/pubs/NBPH/docs/USCCR_NBPP_report.pdf.

20. 28 CFR § 600.1 provides the grounds for appointing a Special Counsel.

21. See *infra* notes 73–87 and accompanying text.

22. See, e.g., Marjorie Cohn, *The Politics of the Clinton Impeachment and the Death of the Independent Counsel Statute: Toward Depoliticization*, 102 W. VA. L. REV. 59 (1999); Tiffany R. Murphy, *Prosecuting the Executive*, 56 SAN DIEGO L. REV. 105, 107 (2019).

23. See Bruce Moyer, *Book Review*, 58 FED. LAW. 43, 56 (2011) (reviewing WILLIAM N. LAFORGE, TESTIFYING BEFORE CONGRESS: A PRACTICAL GUIDE TO PREPARING AND DELIVERING TESTIMONY BEFORE CONGRESS AND CONGRESSIONAL HEARINGS FOR AGENCIES, ASSOCIATIONS, CORPORATIONS, MILITARY, NGOS, AND STATE AND LOCAL OFFICIALS (2010)) (“Every year, Congress holds about 2,000 hearings on an endless range of topics. At those hearings—in specially designated Senate and House meeting rooms scattered across Capitol Hill—government officials, business executives, nonprofit leaders, and academic experts sit before panels of lawmakers to

equality in athletics, a narrower inquiry is not unusual: in 2019 a Senate Subcommittee investigated the failure to protect athletes from sexual assaults by Larry Nassar, a USA Gymnastics physician, and after four hearings, issued a Report with recommendations.²⁴

This is not to contend that a Report—any Report—would be a panacea, even if it bears imprimatur of government. As the publication of the Mueller Report in April 2019 evinces, an extensive recitation of facts and legal conclusions without more is open to many interpretations,²⁵ and a Report’s very comprehensiveness may lead to its dismissal as “tedious.”²⁶ Additionally, while it may be a call for action, it is not in and of itself action.²⁷ Further, this is not to argue that anyone would be compelled to testify or that the hearings themselves would not be traumatizing for people who participated and even those who did not participate as witnesses. While E. Jean Carroll, who alleged that she was sexually assaulted by Trump, seemingly would welcome hearings regarding the many allegations against Trump for sexual assault,²⁸ this is most likely not a unanimous view.²⁹

achieve a common purpose: To convince Congress to do something or to refrain from doing something”).

24. OFFICES OF SENATORS JERRY MORAN & RICHARD BLUMENTHAL, SENATE OLYMPICS INVESTIGATION, *THE COURAGE OF SURVIVORS: A CALL TO ACTION* (July 30, 2019), https://www.moran.senate.gov/public/_cache/files/c/2/c232725e-b717-4ec8-913e-845ffe0837e6/FCC5DFDE2005A2EACF5A9A25FF76D538.2019.07.30-the-courage-of-survivors—a-call-to-action-olympics-investigation-report-final.pdf.
25. See, e.g., Ben Bradlee, Jr., *How Collusion Confusion Helps Trump*, NEW YORKER (June 12, 2019), <https://www.newyorker.com/news/news-desk/how-collusion-confusion-helps-trump>.
26. See, e.g., Darren Samuelson, ‘What’s the Point?’ Lawmakers Fess Up to Not Fully Reading the Mueller Report, POLITICO (July 9, 2019), <https://www.politico.com/story/2019/07/09/congress-read-mueller-report-1402232> (“‘It’s tedious,’ said Sen. Lisa Murkowski (R-Alaska)”).
27. For a trenchant discussion of the contours of commissions and reports, see Paul MacMahon, *supra* not 18, at 551.
28. See Zach Budryk, *Trump Rape Accuser Responds to Mueller Hearing: ‘I Wish to God’ Accusations Got Congressional Hearings*, THE HILL (July 24, 2019, 4:08 PM), <https://thehill.com/blogs/blog-briefing-room/news/454581-trump-rape-accuser-responds-to-mueller-hearing-i-wish-to-god> (“Mueller! I admire the effort, the brains, the hard work, and the \$40 million spent on this investigation! I just wish to God that the women accusing the President of sexual travesties, got 1/20th of that congressional focus!”).
29. Narratives of those who do not want to produce narratives are by definition inaccessible, but there are many narratives of women who protected their privacy and then participated in public discourse. See, e.g., CHANEL MILLER, *KNOW MY NAME: A MEMOIR* (2019) (discussing her difficult decisions to “tell her story” of sexual assault by Brock Turner); JODI KANTOR & MEGAN TWOHEY, *SHE SAID: BREAKING THE*

Nevertheless, hearings in which the sexual misconduct allegations are explored in public, along with a Report of findings and recommendations for action, could be a springboard for legal and perhaps even political and cultural change. Hearings and a Report could operate to dismantle some of the strategies that silence people's accounts of sexual misconduct and to address some of the obstacles to litigating harms.

This Article ultimately contends that a Report could be a necessary first step in addressing the largely unaddressed allegations of sexual misconduct against the President. Toward that end, Part I first addresses the obstacles to seeking civil remedies for sexual misconduct, including the limitations of claims for relief such as statutes of limitations. It also addresses the special issues when a plaintiff seeks to sue the president of the United States. Section II considers specific instances of litigation involving sexual misconduct and Donald Trump: The ongoing case of Summer Zervos in New York state courts for defamation; the complaint by campaign worker Alva Johnson in federal court; the 1997 pro se complaint by Jill Harth; and finally, the sealed divorce litigation involving Trump's first wife, Ivana Trump. Section III turns to the unlitigated claims of sexual misconduct revealed in media reports with varying detail. Section IV considers the claims, both unlitigated and in filed complaints, involving minors.

Last, in Section V, the Article turns to consideration of the purposes and substance of a Misogyny Report. It first confronts the problems inherent in litigation and media accounts that have obscured incidents of sexual misconduct and the women who experienced them by simultaneously under-individualizing and over-individualizing the women and their experiences. Section V also considers the strategies of silencing women's accounts, including isolation, threats, and nondisclosure agreements, and suggests specific recommendations to address them. Section V additionally suggests countermeasures to obstacles in civil litigation that a Report might recommend. In conclusion, this Article argues that a focus on Trump for a Misogyny Report is both warranted and productive as a means of reckoning with the profusion of allegations of sexual misconduct against the President.

I. THE DIFFICULTIES OF CIVIL LITIGATION FOR SEXUAL MISCONDUCT

Seeking civil remedies against defendants for sexual misconduct is a difficult litigation path. For any plaintiff, the first problem is formulating a claim for relief or cause of action. The second requirement is that the claim be brought to court within a relatively short period of time. An additional possible obstacle occurs when the defendant is the president of the United States.

A. CLAIMS FOR RELIEF AND STATUTES OF LIMITATIONS

Federal civil remedies for sexual assault or sexual misconduct are few and far between. When a defendant acts under federal authority, a cause of action can be difficult,³⁰ although it is easier to sustain if a defendant acts under color of state law.³¹ A claim under a theory of discrimination is possible under Title VII of the Civil Rights Act³² covering some, but certainly not all, employment contexts.³³ Similarly there can

30. Gregory C. Sisk, *The Peculiar Obstacles to Justice Facing Federal Employees Who Survive Sexual Violence*, 2019 U. ILL. L. REV. 269 (2019). As Sisk explains, when any plaintiff brings a tort claim against the United States for intentional harm by a federal employee, the Federal Tort Claims Act (“FTCA”) expressly excludes liability for “[a]ny claim arising out of assault [or] battery.” Federal Tort Claims Act, 28 U.S.C. § 2680(h) (Westlaw through P.L. 109–304). Further, as Sisk explains, there are other more “peculiar” obstacles when the sexual assault arises from an employment relationship treating sexual violence claims in the employment context as exclusively within the Federal Employees Compensation Act, 5 U.S.C. §§ 8101-93 (Westlaw through P.L. 116–91); treating sexual violence claims as subsumed within employment discrimination claims; or in the military context the Feres doctrine, from *Feres v. United States*, 340 U.S. 135 (1950), barring injuries sustained incident to service from tort remedies against the United States. Sisk, at 270–83. Sisk proposes a “Federal Sexual Assault Responsibility Act” to provide remedies.

31. 42 U.S.C. § 1983 (Westlaw through P.L. 116–91).

32. 42 U.S.C. § 2000e (Westlaw through P.L. 116–91). The Court in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), held that sexual harassment that is so severe or pervasive as to alter the conditions of a plaintiff’s employment and create an abusive working environment violates Title VII. In his opinion for the Court, Justice Rehnquist wrote that Vinson testified that her supervisor “fondled her in front of other employees, followed her into the women’s restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions.” *Meritor*, 477 U.S. at 60, 67–68 (1986).

33. To be covered, the employee must be a United States citizen and not be defined as an independent contractor or types of shareholders or partners. 42 U.S.C. § 2000e (2018). The employer must have 15 or more employees, using the restricted definition of employees and sometimes further limiting how part-time employees are

be a discrimination claim under Title IX of the amended Civil Rights Act if the claim arises in a covered educational setting,³⁴ or under the Fair Housing Act if the acts occur in certain housing relationships.³⁵ In 1994, Congress enacted a much more comprehensive law, the Violence Against Women Act (VAWA), which included a civil cause of action against the perpetrator for “crimes of violence motivated by gender,”³⁶ but in *United States v. Morrison*, a closely divided United States Supreme Court concluded the section was unconstitutional.³⁷ The majority opinion in *Morrison*, authored by Chief Justice Rehnquist, found that Congress lacked power under either the Commerce Clause or Section 5 of the Fourteenth Amendment to provide for civil remedies for gender based violence. The petitioner, Christy Brzonkala, had filed a civil complaint alleging that fellow Virginia Polytechnic Institute college student Morrison (and another student) “assaulted and repeatedly raped her,” and in the months following the act, Morrison uttered “boasting, debased remarks about what Morrison would do to women, vulgar remarks that cannot fail to shock and offend,” which the Court did not detail.³⁸ Despite an extensive legislative history, the majority found that recognizing such a civil action was not within the ambit of Congress: “If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But un-

counted. See Merrick Rossein, *The Federal Court Complaint*, 1 EMP. DISCRIMINATION: LAW AND LITIG. §§ 12:8-12.12 (2019).

34. 20 U.S.C. § 1681(a) (Westlaw through P.L. 116–91) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”). The Department of Education has long interpreted the statute as including a right to be free from sexual violence. *Sex-Based Harassment*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T. OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue01.html> (last updated Jan. 16, 2020).
35. See 42 U.S.C. §§ 3601– 3619 (Westlaw through 116–91); 24 C.F.R. § 100.7(a)(iii) (Westlaw through 2020).
36. 34 U.S.C. § 12361(a) (Westlaw through P.L. 103–322). The section specifically did not require a prior criminal complaint, prosecution, or conviction, but did require that the acts would constitute a felony under federal or state law, and that the acts were “committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.” *Id.* at § 12361(d).
37. *United States v. Morrison*, 529 U.S. 598, 627 (2000). For an excellent discussion of the case, see Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109 (2000).
38. *Morrison*, 529 U.S. at 602.

der our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States.”³⁹

Yet as the dissenting opinion in *Morrison* recognized, much of the impetus for the VAWA civil remedy was that “generic state tort causes of action” were “poor tools” for addressing gender-based violence.⁴⁰ Given this inadequacy, some states and localities post-*Morrison* reacted by passing statutes modeled on VAWA providing for civil actions.⁴¹ Additionally, there are private rights of actions in conjunction with state or local bias crime provisions, and a few states provide for a private right of action for interference with state or federal rights, which includes a right to be free from gender-based violence.⁴²

Nevertheless, state tort laws, however inadequate, serve as the default legal regime for addressing sexual misconduct in civil proceedings. As feminist legal scholar Leslie Bender argued decades ago, the civil tort regime is an important one that serves purposes that cannot be met by other means and yet the common law tort requires radical reform.⁴³ Bender later wrote that tort law was the legal means to protect “human dignity” as “fortified by social equality,” providing redress for the harms done by people “who act in ways that reproduce rather than destroy social inequality.”⁴⁴ But as feminist legal scholar Martha Chamallas more recently observed, tort law has failed to appreciate the social or group nature of some claims, such as sexual or racial harassment, and has not understood that the “harms suffered by harassment victims are not simply individual, personal harms, but injuries that serve simultaneously

39. *Morrison*, 529 U.S. at 627.

40. *Morrison*, 529 U.S. at 654 (Souter J., dissenting) (citing S. REP. NO. 101-545, at 45 (1990) (noting difficulty of fitting gender-motivated crimes into common-law categories)). Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, continued: “As the 1993 Senate Report put it, ‘[t]he Violence Against Women Act is intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence. Its goals are both symbolic and practical . . . ’” (quoting S. REP. NO. 103-138, at 38 (1993)) (ellipses in original).

41. Julie Goldscheid & Rene Kathawala, *State Civil Rights Remedies for Gender Violence: A Tool for Accountability*, 87 U. CIN. L. REV. 171, 178-86 (2018) (discussing California, Illinois, and localities in New York, including New York City).

42. *Id.* at 186-98.

43. Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 850 (1990).

44. Leslie Bender, *Tort Law’s Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249, 256 (1998).

to devalue the target and her group and to reinforce the inferior and unequal status of both the target and her group.”⁴⁵

This individualistic orientation of tort law is not the only impediment, especially relating to claims for relief for sexual misconduct. The most obvious claim for relief for unwanted sexual conduct would be a tort such as assault or battery or possibly other torts such as infliction of emotional distress or false imprisonment.⁴⁶ Relatedly, there may be statements or publications about the alleged misconduct that might give rise to claims of defamation, libel, or slander, in which the underlying statement must be proven false.⁴⁷ Considering the #MeToo movement, Professor Chamallas noted that despite accelerated acknowledgement of sexual assault (as well as domestic violence), tort claims against the offender based upon those wrongs have not arisen.⁴⁸ One of the main obstacles to such relief, she wrote, is the application of an “outdated and

45. Martha Chamallas, *Beneath the Surface of Civil Recourse Theory*, 88 IND. L.J. 527, 541 (2013).

46. For example, RESTATEMENT (SECOND) OF TORTS § 18 (AM. LAW INST. 1965) defines “Battery: Offensive Contact” as

1) An actor is subject to liability to another for battery if

(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

(b) an offensive contact with the person of the other directly or indirectly results.

In the next section, “offensive” is defined: “A bodily contact is offensive if it offends a reasonable sense of personal dignity.” RESTATEMENT (SECOND) OF TORTS § 19 (AM. LAW INST. 1965). Infliction of emotional distress requires the conduct be “extreme and outrageous” rather than merely offensive. The Restatement Third includes reckless as well as intentional conduct. *Compare* RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965) (“One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm”) *with* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 46 (AM. LAW INST. 2012) (“An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm”).

47. *See* discussion *infra* Section II.A (discussing defamation).

48. Martha Chamallas, *Will Tort Law Have its #MeToo Moment?*, 11(1) J. TORT L. 39, 45 (2018). Chamallas notes that tort claims against institutional third parties, however, have risen, discussing claims against the Catholic Church and universities. *Id.* at 53–54.

inhospitable doctrine of consent.”⁴⁹ Chamallas also noted that plaintiffs are deterred by short statutes of limitations.⁵⁰

Assuming jurisdiction over the parties, one of the primary obstacles in a tort claim is the statute of limitations. Generally, claims for torts have a relatively short statute of limitations. In New York, the statute of limitations is exceedingly short for intentional torts such as assault, battery, libel, and slander: Only one year from the act.⁵¹ In California, claims for assault and battery must be made within two years, but claims for false imprisonment and libel or slander must be made within one year; however, a 2019 amendment raised the limit to 10 years for sexual assault.⁵² In Florida, the statute of limitations is four years from the time of the act for intentional torts including assault, battery, and false imprisonment, although it is only two years for libel and slander.⁵³ And in Arkansas, the statute of limitations for intentional torts is generally three years, although for assault, battery, false imprisonment, and slander, it is only one year.⁵⁴ There are a number of doctrines that can be invoked to toll a statute of limitations,⁵⁵ and there is a movement toward lengthen-

49. *Id.* at 52. Chamallas explains:

The Restatement (Third) of Intentional Torts continues to endorse a very thin version of consent that finds actual consent whenever an individual acquiesces to the actor’s conduct or invasion, presuming consent when the victim is silent or passive. Additionally, no liability is found in cases of so-called apparent consent, where a person in the position of the defendant reasonably believes that the plaintiff is consenting. These definitions of actual and apparent consent embrace the perpetrator’s perspective and make it very difficult for victims of acquaintance rape to prevail. To top it off, for the first time, the Restatement has also taken the position that it is the plaintiff who shoulders the burden of proof to prove her lack of consent, rather than assigning that burden to the defendant as an affirmative defense.

Id. [footnotes omitted].

50. *Id.* at 48.

51. MCKINNEY’S CONSOLIDATED LAWS OF NEW YORK § 215(3) (CIV. P. LAW AND R. 2019).

52. CAL. STAT. ANN. §§ 335.1, 340, 340.16 (Westlaw through 2003).

53. FLA. STAT. ANN. §§ 95.11(3)(o), 95.11(4)(g) (Westlaw through 2019).

54. ARK. CODE ANN. §§ 16-56-104, 16-56-105 (Westlaw through 2019).

55. For example, tolling doctrines “may afford children additional time to file a cause of action once they reach the age of majority, be lengthened by the discovery doctrine, be tolled by fraudulent concealment of material facts, or be waived by defendants who fails to raise those defenses.” Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 82 (2006) (footnotes omitted).

ing statutes of limitations for certain sexual assaults.⁵⁶ Nevertheless, time currently operates as a substantial obstacle to injured women bringing civil actions.

In addition to bringing a timely claim within the statute of limitations, if the defendant happens to be the president of the United States, the defendant can raise a claim of presidential immunity.

B. *Presidential Immunity*

The notion of presidential immunity derives from the idea of sovereign immunity: The King (or Queen) is immune from suit in the courts because the King can do no wrong.⁵⁷ It persists in the United States in complex doctrines of sovereign immunity and in the Eleventh Amendment pertaining to the immunity of states.⁵⁸ It also persists in the immunity of civil servants, including the president. In *Nixon v. Fitzgerald*, the United States Supreme Court held that former President Nixon was entitled to “absolute immunity from damages liability predicated on his official acts,” as a “functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.”⁵⁹ Writing for the five Justice majority, Justice Powell stated that while generally an “official’s absolute immunity should extend only to acts in performance of particular functions of his office,” in “view of the special nature of the president’s constitutional office and functions, we think it appropriate to recognize absolute presidential immunity from damages liability for acts within the ‘outer perimeter’ of his official responsibility.”⁶⁰ The constitutional rem-

56. See Olabisi Adurasola Alabi, *Sexual Violence Laws Redefined in the “Me Too” Era: Affirmative Consent & Statutes of Limitations*, 25 WIDENER L. REV. 69, 88 (2019).

57. See *Clinton v. Jones*, 520 U.S. 680, 697 n.24 (1997) (citing 1 W. BLACKSTONE, COMMENTARIES *246 (discussing the prerogatives of the monarchs who asserted that “[t]he King can do no wrong” as related to the doctrine of sovereign immunity, although not as extreme as the common-law fiction that “[t]he king . . . is not only incapable of doing wrong, but even of thinking wrong,” which was rejected at the birth of the Republic (citing *Langford v. United States*, 101 U.S. 341, 342–43 (1880)); see also Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign’s Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393 (2005) (“That the king can do no wrong, is a necessary and fundamental principle of the English Constitution.”) (internal citations omitted).

58. U.S. CONST. amend. XI.

59. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

60. *Fitzgerald*, 457 U.S. at 755–56. The Court further stated that this rooting in separation of powers principles means that “a court before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of in-

edy is impeachment, as well as “formal and informal checks on presidential action that do not apply with equal force to other executive officials.”⁶¹

When a president is sued for acts that are not within the perimeter, outer or otherwise, of presidential responsibilities, such as acts before he assumed office, the Court has decided differently.

1. Presidential Immunity in Federal Courts: The Case of Bill Clinton

President Bill Clinton sought to extend the rule of *Nixon v. Fitzgerald* to cover lawsuits based on acts outside of official duties, but only for the pendency of the presidential term.⁶² In short, President Clinton’s argument was a separation-of-powers argument linked to a practical one: If a president had to defend such suits, this would be too distracting from his constitutional duties as president under Article II.⁶³ The United States Supreme Court unanimously rejected the President’s claim for temporary immunity in *Clinton v. Jones*.⁶⁴

trusion on the authority and functions of the Executive Branch.” *Id.* at 754. Further, the Court stated that:

[W]hen judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance . . . or to vindicate the public interest in an ongoing criminal prosecution . . . —the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President’s official acts, we hold it is not.

Id. (internal citations omitted).

61. *Fitzgerald*, 457 U.S. at 757. The Court catalogued these more informal incentives:

The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President’s traditional concern for his historical stature.

Id.

62. *Clinton v. Jones*, 520 U.S. 680, 684 (“The President submits that in all but the most exceptional cases the Constitution requires federal courts to defer such litigation until his term ends and that, in any event, respect for the office warrants such a stay.”).

63. U.S. CONST. art. II.

64. Justice Breyer wrote a concurring opinion contending that “once the President sets forth and explains a conflict between judicial proceeding and public duties, the matter changes,” and a court cannot constitutionally interfere with the President’s discharge of his public duties. *Clinton*, 520 U.S. at 710 (Breyer J., concurring).

The case arose from a complaint filed by Paula Corbin Jones in May 1994, just a few days before the statute of limitations expired.⁶⁵ Jones filed the complaint in federal court, primarily based on acts in Arkansas in 1991 when Bill Clinton was governor, alleging that he alone and in conspiracy with other state actors deprived her of equal protection on the basis of gender and due process under the Fourteenth Amendment.⁶⁶ The complaint also included a state tort claim of infliction of emotional distress, and a count of defamation based on statements made by Clinton and the other defendant in 1994, after Clinton became president.⁶⁷

In rejecting Clinton's claim for what would essentially be a stay, the Court's opinion, authored by Justice John Paul Stevens, stressed the unusual nature of a civil suit against the President during his term for actions before becoming president, noting that only three sitting presidents had been in such a position.⁶⁸ The Court found that the historical evidence was conflicting and ultimately unhelpful.⁶⁹ While recognizing the president's "unique office with powers and responsibilities so vast

65. *Clinton*, 520 U.S. at 687 (stating that complaint filed "two days before the three year period of limitations expired").

66. *Clinton*, 520 U.S.

67. *Clinton*, 520 U.S. at 680, 685–86.

68. The Court stated:

Only three sitting Presidents have been defendants in civil litigation involving their actions prior to taking office. Complaints against Theodore Roosevelt and Harry Truman had been dismissed before they took office; the dismissals were affirmed after their respective inaugurations. Two companion cases arising out of an automobile accident were filed against John F. Kennedy in 1960 during the Presidential campaign. After taking office, he unsuccessfully argued that his status as Commander in Chief gave him a right to a stay under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U. S. C. App. §§501-525. The motion for a stay was denied by the District Court, and the matter was settled out of court. Thus, none of those cases sheds any light on the constitutional issue before us.

Clinton v. Jones, 520 U.S. 680, 692 (1997).

69. Justice Stevens wrote that the Court was "unpersuaded by the evidence from the historical record" advanced by Clinton, including a comment by Thomas Jefferson. *Clinton*, 520 U.S. at 695. The Court stated that none of these sources "sheds much light on the question at hand." Moreover, there was "conflicting historical evidence," including in the Constitutional debates that "not a single privilege is annexed to" the character of the President; "far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment." *Id.* at 696, citing 2 JONATHAN ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 480 (2d ed. 1863). In the end, the Court decided the historical sources "largely cancel each other out," *Id.* at 696–97 quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35 (1952) (concurring opinion).

and important that the public interest demands that he devote his undivided time and attention to his public duties,” the Court found that whatever the “outcome of the case,” there “is *no possibility* that the decision will curtail the scope of the official powers of the Executive Branch.”⁷⁰ The Court concluded that the “litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the president poses *no perceptible risk* of misallocation of either judicial power or executive power.”⁷¹ The Court noted that Congress could statutorily protect the president from litigation during his term, but that the Constitution provided no such protection.⁷²

Subsequent events proved the unanimous Court’s opinion to be naïve. In a little less than two years, United States District Judge Susan Weber Wright issued an opinion considering whether Bill Clinton should be sanctioned for civil contempt, but as she described, the contempt sanction was hardly the most dramatic development: “What began as a civil lawsuit against the President of the United States for alleged sexual harassment eventually resulted in an impeachment trial of the President in the United States Senate on two Articles of Impeachment for his actions during the course of this lawsuit and a related criminal investigation being conducted by the Office of the Independent Counsel.”⁷³ The judge described the discovery process in the civil case as “contentious and time-consuming,” with over 50 motions filed, some 30 court orders, and telephone conferences on an almost weekly basis to address various disputes and resolve motions.⁷⁴ She had ruled that plaintiff Jones was “entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame [of May 8, 1986, up to the present] state or federal employees.”⁷⁵ Based on that ruling, the judge overruled objections during the January 17, 1998 deposition of President Clinton that questions concerning Monica Lewinsky were inappropriate areas of inquiry and required that such questions be answered by the President.⁷⁶ During that deposition, Clinton “denied that he had engaged in an ‘extramarital sexual affair,’ in ‘sexual rela-

70. *Clinton*, 520 U.S. at 701 (emphasis added).

71. *Clinton*, 520 U.S. at 701 (emphasis added).

72. *Clinton*, 520 U.S. at 709.

73. *Jones v. Clinton*, 36 F.Supp. 2d 1118, 1120 (E.D. Ark. 1999).

74. *Jones*, 36 F.Supp. 2d at 1121.

75. *Jones*, 36 F.Supp. 2d at 1121.

76. *Jones*, 36 F.Supp. 2d at 1121.

tions,' or in a 'sexual relationship' with Ms. Lewinsky," an answer consistent with her affidavit and with a response to an interrogatory.⁷⁷

The deposition of Clinton was not only part of *Jones v. Clinton*, but became a matter for Kenneth Starr acting as Independent Counsel in the investigation *In re Madison Guaranty Savings & Loan Association*.⁷⁸ Judge Susan Weber Wright wrote she did not know about this occurrence until later.⁷⁹ The original Attorney General Order in *Madison Guaranty Savings & Loan*, more popularly known as "Whitewater," was a charge to "investigate whether any individuals or entities have committed a violation of any federal criminal or civil law relating to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with the Madison Guaranty Savings & Loan Association, the Whitewater Development Corporation, or Capital Management Services, Inc."⁸⁰ After Starr was chosen to replace the previous Independent Counsel,⁸¹ Starr successfully sought to expand the investigation to include whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law, concerning the civil case *Jones v. Clinton*.⁸² Ken Starr filed his Report to Congress, which was a referral for impeachment, containing a brief argument that there was a "complex but direct" link between the original charge and the Clinton and Monica Lewinsky affair, as well as excruciating detail about that affair.⁸³ Indeed, as Richard Posner argued,

77. *Jones*, 36 F.Supp. 2d at 1121–22.

78. *In re Madison Guaranty Sav. & Loan Ass'n*, No. 94-1 (D.C. Cir. Indep. Counsel Div. Jan. 16, 1998) [1998 WL 472444].

79. *Jones v. Clinton*, 36 F.Supp. 2d 1118, 1118, 1122 (E.D. Ark. 1999).

80. The original Attorney General Order provided that the Independent Counsel had authority to "investigate whether any individuals or entities have committed a violation of any federal criminal or civil law relating to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with the Madison Guaranty Savings & Loan Association, the Whitewater Development Corporation, or Capital Management Services, Inc." Attorney General Order No. 1844-94, published at 59 Fed. Reg. 5321 (1994), Friday, Feb. 4, 1994, pages 5313–14, codified at 28 C.F.R. Parts 600–03.

81. For an interesting discussion of the politically fraught replacement of Robert B. Fiske, Jr., the independent counsel chosen by Reno, with Ken Starr, see Peter M. Ryan, *Counsels, Councils and Lunch: Preventing Abuse of the Power to Appoint Independent Counsels*, 144 U. PA. L. REV. 2537 (1996) (describing a lunch between one of the judges on the special division to appoint independent counsels with conservative Senators Lauch Faircloth and Jesse Helms).

82. *Jones*, 36 F.Supp. 2d at 1122, citing *In re Madison Guaranty Savings & Loan Ass'n*, No. 94-1 (D.C. Cir. Indep. Counsel Div. Jan. 16, 1998) [1998 WL 472444].

83. OFFICE OF THE INDEPENDENT COUNSEL, REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES FILED PURSUANT TO 28 U.S.C. § 595(C), H.R. Doc. No. 105-310 (2d Sess. 1998) at 7–8. [hereinafter Starr Report].

the “most compelling criticism of the Starr Report is that there was no need to put that much sex in it,” and by including irrelevant and salacious details, the intent was to “destroy Clinton” by including details that “distract, confound, and embarrass more than they inform or deter.”⁸⁴ Clinton’s statements in the interrogatories and deposition in *Jones v. Clinton* became Article II of the Articles of Impeachment against him,⁸⁵ commenced by the House of Representatives. Clinton was acquitted by the Senate.⁸⁶ As one scholar argues, the unsuccessful Clinton impeachment occurred in a climate of “vituperative partisanship” in which “the Republican campaign against Clinton had gone forth without restraint” without moderating voices arguing that the cost to the country would be too great, resulting in a sullied presidency, the end of the Independent Counsel statute, and perhaps the weakening of the constitutional remedy of impeachment.⁸⁷

2. Immunity in State Court: Donald J. Trump

The Court in *Clinton v. Jones* left open the question of lawsuits against the president in state rather than federal courts. The Court stated that the “important constitutional issue” of whether “a comparable claim” of presidential immunity “might succeed in a state tribunal” was not before the Court.⁸⁸ Nevertheless the Court noted that “instead of advancing a separation-of-powers argument, petitioner would presumably rely on federalism and comity concerns, as well as the interest in protecting federal officials from possible local prejudice that underlies the authority to remove certain cases brought against federal officers from a state to a federal court.”⁸⁹ In its footnote about the federalism concerns, the Court stated that because the Supremacy Clause makes federal law “the supreme Law of the Land,”⁹⁰ any direct control by a state court over the president, who has principal responsibility to ensure

84. RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 80–83 (1999).

85. IMPEACHMENT OF WILLIAM JEFFERSON CLINTON, H.R. Rep. No. 105-830, at 2 (1985), <https://www.congress.gov/105/crpt/hrpt830/CRPT-105hrpt830.pdf>.

86. See Charles Tiefer, *The Senate Impeachment Trial for President Clinton*, 28 HOFSTRA L. REV. 407 (1999).

87. DAVID E. KYVIG, THE AGE OF IMPEACHMENT: AMERICAN CONSTITUTIONAL CULTURE SINCE 1960 352 (2008).

88. *Clinton v. Jones*, 520 U.S. 680, 691 (1997).

89. *Clinton*, 520 U.S. at 691.

90. U.S. CONST. art. VI, cl. 2.

that those laws are “faithfully executed,”⁹¹ may implicate concerns that are quite different from the “interbranch separation-of-powers questions” at issue in the federal case in *Clinton v. Jones*.⁹²

Thus, although lawsuits in federal court with President Trump as the defendant were clearly within the no-presidential-immunity rule of *Clinton v. Jones*, the status of similar lawsuits in state courts was much less clear. In *Zervos v. Trump*, the courts of New York have so far held that the no-presidential-immunity rule of *Clinton v. Jones* extends to state courts, with the appellate division, consisting of five judges, divided three to two on the issue.⁹³

For the majority of the Appellate Division considering *Zervos* in New York, Trump’s argument that the Supremacy Clause “bars a state court from exercising jurisdiction over him” because he is the “ultimate repository of the Executive Branch’s powers and is required by the Constitution to be ‘always in function’” was not supported by the constitutional text or case law.⁹⁴ Instead, the majority found that his interpretation conflicts with the fundamental principle that the United States has a “government of laws and not of men,” a sentiment that the trial judge also expressed.⁹⁵ The majority stated that, in short, “the Supreme Court’s decision in *Clinton v. Jones* clearly and unequivocally demonstrates that the presidency and the president are indeed separable.”⁹⁶ The majority also rejected Trump’s arguments that the possibility of contempt was decisive, finding that contempt is rare and was not the question before the court.⁹⁷ For the dissent, although agreeing that a state court’s “need to order the President of the United States before it so he can answer to contempt charges is hypothetical, the even remote possibility of such an event elevates an arm of the state over the federal government to a degree that the Supremacy Clause cannot abide.”⁹⁸

Thus, the issue of whether the president is amenable to suit in state court is not fully resolved. In January 2020, the Appellate Division granted leave for Trump to appeal the decision to the state’s highest

91. U.S. CONST. art. II, § 3.

92. *Clinton*, 520 U.S. at 680, 692.

93. *Zervos v. Trump*, 94 N.Y.S.3d 75 (N.Y. App. Div. 2019), affirming *Zervos v. Trump*, 74 N.Y.S.3d 442 (N.Y. Sup. Ct. 2018).

94. *Zervos*, 94 N.Y.S.3d at 121.

95. *Zervos*, 94 N.Y.S.3d at 121.

96. *Zervos*, 94 N.Y.S.3d at 124.

97. *Zervos*, 94 N.Y.S.3d at 126–27.

98. *Zervos*, 94 N.Y.S.3d at 135 (Mazzarelli, J., dissenting).

court, the New York Court of Appeals.⁹⁹ However, perhaps even more important than the presidential immunity question before the New York appellate court was the question whether Summer Zervos had stated a claim for defamation connected to a sexual misconduct claim.

II. LITIGATING TRUMP'S SEXUAL MISCONDUCT

Given the various obstacles to bringing cases for sexual misconduct discussed in the last section, it should not be surprising that despite the allegations of sexual misconduct that plague Donald Trump, only a few cases have been filed. This section continues to consider the litigation brought by Summer Zervos focusing on the difficult issue of defamation, then turns to two other filed complaints separated by two decades that directly allege unwanted sexual contact, and finally considers the divorce of Donald Trump and his first wife, Ivana Trump.¹⁰⁰

A. *Summer Zervos and the Problem of Defamation*

Summer Zervos's claim against Donald Trump originated in her claims that he directed unwanted sexual advances to her while she was seeking employment from him in 2007, but rests upon his public denial of the truthfulness of her claims in 2016.¹⁰¹ While any tort claim based on the 2007 allegations would be barred by the statute of limitations, the claim for defamation was timely filed and puts into issue the truthfulness of Zervos's allegations and Trump's denial of the underlying sexual misconduct. The New York Appellate Division majority opinion devoted attention to the underlying claim, beginning by explaining that Zervos was a "former contestant on the 'Apprentice,' a reality show star-

99. *Zervos v. Trump*, LEAGLE, (<https://www.leagle.com/decision/innyco20200107458#>). The order provided:

It is ordered that the motion, to the extent it seeks reargument, is denied. The motion, to the extent it seeks leave to appeal to the Court of Appeals, is granted and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals: Was the order of Supreme Court as affirmed by the this [*sic*] Court, properly made?

100. For complaints involving a minor, *see infra*, Section IV ("Girls").

101. *Zervos v. Trump*, 94 N.Y.S.3d 75, 114–16 (N.Y. App. Div. 2019), affirming *Zervos v. Trump*, 74 N.Y.S.3d 442 (N.Y. Sup. Ct. 2018).

ring defendant Donald Trump.”¹⁰² The court continued that in October 2016, weeks before the presidential election, Zervos “held a press conference to recount two separate incidents in which defendant had made unwanted sexual advances” towards her, supplying details:

The first incident allegedly occurred when she met with defendant at his New York office in 2007, where he kissed her on the lips upon her arrival, and after stating that he would love to have her work for him, kissed her on the lips again as she was about to leave. The kisses made her feel “very nervous and embarrassed” and “upset.”

The second encounter occurred soon thereafter.

Ms. Zervos went to meet defendant for dinner at a restaurant in the Beverly Hills Hotel. Instead, she was escorted to his bungalow, where he kissed her “open mouthed,” “grabbed her shoulder, again kissing her very aggressively, and placed his hand on her breast.” After she pulled back and walked away, defendant took her hand, led her into the bedroom, and when she walked out, turned her around and suggested that they “lay down and watch some telly telly.” He embraced her, and after she pushed him away, he “began to press his genitals against her, trying to kiss her again.” She “attempt[ed] to make it clear that [she] was not interested” and insisted that she had come to have dinner. They had dinner, which ended abruptly when defendant stated that he needed to go to bed.¹⁰³

According to the court’s recitation, Zervos had been “seeking a position in the Trump Organization,” she “was offered a job at half the salary that she had been seeking,” and she called Trump and told him that she “was upset, because it felt like she was being penalized for not sleeping with him.”¹⁰⁴ The court noted that Zervos concluded her press statement with a reference to the recently released *Access Hollywood* tape and Trump’s “denials during the debate,” saying, “I felt that I had to speak

102. *Zervos*, 94 N.Y.S.3d at 114.

103. *Zervos*, 94 N.Y.S.3d at 78–79.

104. *Zervos*, 94 N.Y.S.3d at 79.

out about your behavior. You do not have the right to treat women as sexual objects just because you are a star.”¹⁰⁵

As the court relates, several hours after plaintiff’s press conference, Trump posted on his campaign the following statement: “To be clear, I never met her at a hotel or greeted her inappropriately a decade ago. That is not who I am as a person, and it is not how I’ve conducted my life.”¹⁰⁶ Further, Trump continued to make statements on Twitter, at campaign rallies, and at a presidential debate that the court found to be “in response” to the sexual misconduct allegations of Zervos and other women, including: “These allegations are 100% false . . . They are made up, they never happened . . . It’s not hard to find a small handful of people willing to make false smears for personal fame, who knows maybe for financial reasons, political purposes;” that “[n]othing ever happened with any of these women. Totally made up nonsense to steal the election;” these were “false allegations and outright lies, in an effort to elect Hillary Clinton president . . . False stories, all made-up . . . All big lies;” the reports were “totally false,” he “didn’t know any of these women,” and “didn’t see these women;” and “[e]very woman lied when they came forward to hurt my campaign, total fabrication. The events never happened. Never. All of these liars will be sued after the election is over.”¹⁰⁷ The court noted he also re-tweeted statements by others, including one that had a picture of Zervos and stated, “This is all yet another hoax.”¹⁰⁸

In analyzing whether the claim for defamation by Summer Zervos survived the motion to dismiss, the court discussed Trump’s argument that his statements were mere statements of opinion not subject to being adjudged either false or true, and provided the framework for deciding whether a “reasonable” reader would consider Trump’s denials as “fact or nonactionable opinion,” by holistically considering “three relevant factors”: (1) whether the statements have a “precise meaning” that is “readily understood”; (2) whether the statements can be proven true or false; and (3) whether either the context in which the statements were made or the “broader social context and surrounding circumstances [were] such as to signal . . . readers or listeners that what [was] being

105. *Zervos*, 94 N.Y.S.3d at 79. The opinion continues with a description of the *Access Hollywood* tape, including quoting Trump’s statement, “I don’t even wait. And when you’re a star, they let you do it. You can do anything. Grab them by the pussy. You can do anything.” *Zervos*, 94 N.Y.S.3d at 79.

106. *Zervos*, 94 N.Y.S.3d at 79.

107. *Zervos v. Trump*, 94 N.Y.S.3d 75, 79 (N.Y. App. Div. 2019), *aff’d* *Zervos v. Trump*, 74 N.Y.S.3d 442 (N.Y. Sup. Ct. 2018).

108. *Zervos*, 94 N.Y.S.3d at 79.

read or heard [was] likely to be opinion, not fact.”¹⁰⁹ The court then applied the factors, stating that the denial of the allegations of sexual misconduct were susceptible of being proven true or false, since he either did or did not engage in the alleged behavior, and that further, although a denial “does not always provide a basis for a defamation claim, even though it implicitly claims that the alleging party is not telling the truth,” here it is “coupled with the claim that the accuser is or will be proven a liar,” so that it “impugns a person’s character as dishonest or immoral and typically crosses the line from nonactionable general denial to a specific factual statement about another that is reasonably susceptible of defamatory meaning.”¹¹⁰ Moreover, the court found that it was not mere “rhetorical hyperbole” because Trump “used the term in connection with his specific denial of factual allegations against him” and his statement that plaintiff was motivated by financial gain “could be viewed by a reasonable reader as containing the implication that defendant knows certain facts, unknown to his audience, concerning organized political efforts to destroy his campaign, which supports his opinion.”¹¹¹ The court likewise rejected Trump’s claim that his statements were “protected political speech” because they were made in the “context of a heated political campaign,” noting that claims for defamation can arise out of “acrimonious political battles.”¹¹² Finally, the court discredited Trump’s argument that the statements were not clearly referring to Zervos, finding that even though he did not refer to her by name and even though there were other accusations of sexual misconduct, nevertheless “the ‘allegations’ that defendant’s statements attack as false and politically motivated and the ‘events’ the statements claim ‘never happened’ are easily understood as relating to plaintiff’s accusations, as well as the accusations by other women who had come forward by that time.”¹¹³

The court distinguished another defamation case in New York filed against Trump and Trump’s former campaign manager, Corey Lewandowski, and the campaign organization by Cheryl Jacobus, in which the

109. *Zervos*, 94 N.Y.S.3d at 88 (quoting *Davis v. Boehm*, 22 N.E.3d 999 (2014)). The New York appellate court found that the laws of California and New York had no discernible differences regarding the tort, so there was no need to make a “choice of law” finding.

110. *Zervos*, 94 N.Y.S.3d at 88–89.

111. *Zervos*, 94 N.Y.S.3d at 89.

112. *Zervos*, 94 N.Y.S.3d at 89 (citing *Silsdorf v. Levine*, 449 N.E.2d 716, *cert. denied* 464 U.S. 831 (1983)).

113. *Zervos v. Trump*, 94 N.Y.S.3d 75, 89 (N.Y. App. Div. 2019), *aff’d* *Zervos v. Trump*, 74 N.Y.S.3d 442 (N.Y. Sup. Ct. 2018).

appellate court found the statements did not constitute defamation.¹¹⁴ *Jacobus* did not arise from sexual misconduct by Trump although as the trial judge explained, *Jacobus* alleged as part of the harm caused by Trump's tweeted statements was that "Trump's numerous Twitter followers responded to his tweets by attacking plaintiff with demeaning, sometimes sexually charged, comments and graphics, including insults aimed at her professional conduct, experience, qualifications, and her purported rejection by Trump," as well as "an image of plaintiff with a grossly disfigured face, and a depiction of her in a gas chamber with Trump standing nearby ready to push a button marked 'Gas.'"¹¹⁵ Instead, the underlying incident arose from the appearance of Cheryl *Jacobus*, a "frequent commentator on television news channels" offering "political opinion and analysis from the Republican perspective," on a CNN cable television show to "discuss Trump's threat to boycott one of the Republican presidential primary debates unless FOX removed Megyn Kelly as a moderator."¹¹⁶ As the trial judge related, Trump posted the following on Twitter: "Great job on @donlemon tonight @kayleighmcenany @cherijacobus begged us for a job. We said no and she went hostile. A real dummy! @CNN."¹¹⁷ A few days later, Trump followed up with another tweet: "Really dumb @CherJJacobus. Begged my people for a job. Turned her down twice and she went hostile. Major loser, zero credibility!"¹¹⁸

Applying the factors for distinguishing statements from opinion, the trial judge found that the characterization of *Jacobus* as having "begged" for a job was reasonably viewed as a "loose, figurative, and hyperbolic reference" rather than a statement "susceptible of objective verification."¹¹⁹ But importantly, the trial judge seemed somewhat troubled that Trump's use of Twitter to "belittle and demean" *Jacobus* must be considered in the context of Trump's similar statements about others, so that the frequency of Trump's insults could mean that the public will consider them hyperbolic opinion rather than fact.¹²⁰ Nevertheless, she

114. *See Zervos*, 94 N.Y.S.3d at 89 (citing *Jacobus v. Trump*, 64 N.Y.S.3d 889, *appeal denied*, 102 N.E.3d 431 (2018)).

115. *Jacobus v. Trump*, 51 N.Y.S.3d 330, 334–35, *aff'd* 64 N.Y.S.3d 889 (2017).

116. *Jacobus*, 51 N.Y.S.3d at 334.

117. *Jacobus*, 51 N.Y.S.3d at 334.

118. *Jacobus*, 51 N.Y.S.3d at 334.

119. *Jacobus*, 51 N.Y.S.3d at 342.

120. *Jacobus*, 51 N.Y.S.3d at 342–43. The judge's discussion and citations regarding the problem are worth noting:

[T]he immediate context of defendants statements is the familiar back and forth between a political commentator and the subject of her criti-

ruled that in “the spirit of the First Amendment, and considering the statements as a whole (imprecise and hyperbolic political dispute *cum* schoolyard squabble),” a reasonable reader “would recognize defendants’ statements as opinion, even if some of the statements, viewed in isolation, could be found to convey facts,” and even if some readers might “infer a defamatory meaning from the statements.”¹²¹ In this way,

cism, and the larger context is the Republican presidential primary and Trump’s regular use of Twitter to circulate his positions and skewer his opponents and others who criticize him, including journalists and media organizations whose coverage he finds objectionable. (See e.g. Jasmine C. Lee & Kevin Quealy, *The 289 People Places and Things Donald Trump Has Insulted on Twitter: A Complete List, The Upshot*, N.Y. TIMES (Dec. 6, 2016), <http://www.nytimes.com/interactive/2016/01/28/upshot/donald-trump-twitter-insults.html>). His tweets about his critics, necessarily restricted to 140 characters or less, are rife with vague and simplistic insults such as “loser” or “total loser” or “totally biased loser,” “dummy” or “dope” or “dumb,” “zero/no credibility,” “crazy” or “wacko,” and “disaster,” all deflecting serious consideration.

And yet, the context of a national presidential primary and a candidate’s strategic and almost exclusive use of Twitter to advance his views arguably distinguish this case from those where heated rhetoric, with or without the use of social media, was held to constitute communications that cannot be taken seriously. (See, e.g. Gerald F. Seib, *The Method in Donald Trump’s Maddening Communications Habits*, WALL ST. J. (Jan. 2, 2017), <http://www.wsj.com/articles/the-method-in-donaldtrumps-maddeningcommunications-habits-1483377825> (there “seem to be specific objectives behind many of Mr. Trump’s seemingly scattershot missives and comments,” and that while there is “danger” in leaving the world unsure which messages to take literally, it is “also likely Mr. Trump knows exactly what he is doing”); David Danford, *Why Donald Trump’s Constant Twitter Battle with the Media is a Brilliant Strategy*, THE FEDERALIST (Dec. 7, 2016), <http://thefederalist.com/2016/12/07/donald-trumpsconstant-twitterbattle-mediabrilliant-strategy/> (“Trump’s seemingly off-the-cuff and thoughtless tweets are no small part of this fascinating display of political skill”). These circumstances raise some concern that some may avoid liability by conveying positions in small Twitter parcels, as opposed to by doing so in a more formal and presumably actionable manner, bringing to mind the acknowledgment of the Court of Appeals that “[t]he publisher of a libel may not, of course, escape liability by veiling a calumny under artful or ambiguous phrases” (*Nichols v. Item Pubs., Inc.*, 132 N.E.2d 860 (1956)).

Indeed, to some, truth itself has been lost in the cacophony of online and Twitter verbiage to such a degree that it seems to roll off the national consciousness like water off a duck’s back. See, e.g., Farhad Manjoo, *How the Internet is Loosening Our Grip on the Truth*, N.Y. TIMES (Dec. 2, 2016), <http://www.nytimes.com/2016/11/03/technology/how-the-internet-is-loosening-our-grip-on-the-truth.html> (because there is more media from which to choose, people tend to focus on information that fits their personal opinions or narrative whether or not factually accurate).

121. *Jacobus v. Trump*, 51 N.Y.S.3d 330, 343, *aff’d* 64 N.Y.S.3d 889 (2017).

Trump's habit of belittling people, including women, works to his advantage in the construction of what a "reasonable reader" would believe.

Similarly, a judge dismissed Stormy Daniels' claim for defamation against Donald Trump.¹²² Daniels, whose given name is Stephanie Clifford, but whose preferred name is Stormy Daniels, has stated she engaged in one consensual sexual encounter with Trump and other social encounters with him, and is the subject of "hush-money" allegations that surface in the Mueller Report.¹²³ Her claim in *Clifford v. Trump* arises indirectly from her alleged sexual encounters with Trump. It flows from her statements about being threatened should she come forward with her allegations about her sexual encounters with Trump, specifically being threatened by a man who approached her in Las Vegas in 2011 and told her, "Leave Trump alone. Forget the story."¹²⁴ Like the *Zervos* lawsuit, Daniels' claim for defamation is based upon Trump's denial of her credibility. As the district judge in *Clifford v. Trump* explained, Daniels "worked with a sketch artist to render a sketch of the person who had purportedly threatened her in 2011," and the sketch was released "publicly on April 17, 2018."¹²⁵ As the judge explained:

The next day, on April 18, 2018, Mr. Trump, from his personal Twitter account (@RealDonaldTrump), posted a purportedly false statement regarding Ms. Clifford, the sketch, and Ms. Clifford's account of the threatening incident that took place in 2011. Mr. Trump's tweet read as follows: "A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!" Mr. Trump posted this tweet in response to another tweet posted by an account named DeplorablyScottish (@ShennaFoxMusic), which showed side-by-side images of the sketch released by Ms. Clifford and a picture of Ms. Clifford and her husband.¹²⁶

As the judge described the contention of Daniels, the tweets "meant to convey that Ms. Clifford is a liar, someone who should not be trusted"

122. *Clifford v. Trump*, 339 F. Supp. 3d 915, 929 (C.D. Cal. 2018).

123. See generally Robson, *supra* note 1, at 22–29.

124. *Clifford*, 339 F. Supp. 3d at 919. Stormy Daniels also discusses the incident in her book, *STORMY DANIELS, FULL DISCLOSURE 200–01* (2018).

125. *Clifford*, 339 F. Supp. 3d at 919.

126. *Clifford*, 339 F. Supp. 3d at 919 (internal citations omitted); see also Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 18, 2018, 6:08 AM), <https://twitter.com/realDonaldTrump/status/986547093610299392>.

and that not only were her claims about the threatening encounter false, but by falsely accusing the individual depicted in the sketch of committing a crime, she had herself committed a serious crime.¹²⁷ The judge quickly concluded that Trump's tweet was opinion rather than a factual statement: It was "rhetorical hyperbole" that is "normally associated with politics and public discourse in the United States" and protected by the First Amendment.¹²⁸ Moreover, the tweet involved a matter of public concern, "including purported acts committed by the now president of the United States," so that Trump's tweet "served as a public rejoinder" to her allegations.¹²⁹ The trial judge thereafter assessed costs, attorney's fees, and sanctions against Stormy Daniels in the amount of almost 300,000 dollars.¹³⁰

Thus, Trump has been able to prevail on the merits in at least two of the complaints filed by women against him for defamation. Yet as the New York trial judge alluded to in her opinion in *Jacobus*, Trump has not prevailed under these same standards when he has been a plaintiff suing for defamation.¹³¹ Indeed, Trump has argued that defamation laws need to be altered so that it is *easier for plaintiffs* to prevail. For example, in a February 2016 campaign rally, he stated:

I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We're going to open up those libel laws. So when the *New York Times* writes a hit piece which is a total disgrace or when the *Washington Post*, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected.¹³²

This stance is understandable given Trump's lack of success as a plaintiff in defamation cases.¹³³ Yet perhaps coincidentally, United States Su-

127. *Clifford*, 339 F. Supp. 3d at 919–920.

128. *Clifford v. Trump*, 339 F. Supp. 3d 915, 925 (C.D. Cal. 2018).

129. *Clifford*, 339 F. Supp. 3d at 926–27.

130. The amount was \$293,052.33. *Clifford v. Trump*, No. CV 18-06893-SJO (FFMx), 2018 WL 6519029, at *5 (C.D. Cal. Dec. 11, 2018).

131. *Jacobus v. Trump*, 51 N.Y.S.3d 330, 341, *aff'd* 64 N.Y.S.3d 889 (2017) (citing *Trump v. Chicago Tribune Co.*, 616 F. Supp. 1434, 1436–37 (S.D.N.Y. 1985)).

132. Hadas Gold, *Donald Trump: We're Going to 'Open Up' Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), <http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>.

133. Trump was reportedly a "libel bully," who was (with his companies) "involved in a mind-boggling 4,000 lawsuits over the last 30 years," and who "sent countless threat-

preme Court Justice Clarence Thomas advanced a similar argument in a concurring opinion from a denial of certiorari in a case involving a defamation lawsuit predicated on the sexual misconduct of entertainer Bill Cosby.¹³⁴ Thomas's rather unique opinion might be attributable to his close relationship to Trump,¹³⁵ although it could be arguably connected with Thomas's own experiences having been accused of sexual misconduct.¹³⁶

ening cease-and-desist letters to journalists and critics," although he and his companies "have never won a single speech-related case filed in a public court." Susan Seager, *Donald J. Trump is a Libel Bully but also a Libel Loser*, 32 COMM. LAW. 1, 1 (2016). Seager's article, which caused a bit of controversy itself when there were reported efforts by the ABA to temper the contents, discussed seven cases, including the lawsuit cited by the trial judge in *Jacobus* against an architecture critic who called Trump's planned tower "aesthetically lousy," an author whose book argued Trump was not a billionaire, a former Trump University student who posted on internet message boards and wrote to the Better Business Bureau that the university engaged in fraudulent business practices, a contestant in the Miss USA pageant who posted on Facebook that she had learned the contest was predetermined, and the programming chief of Univision Networks, who posted on Instagram a photo of Trump side-by-side with a photo of Dylann Roof (the white supremacist since convicted of the AEME church shooting in Charleston, South Carolina) with the caption "Sin commentaries/No Comments." *Id.* at 1, 5–10.

134. *See* *McKee v. Cosby*, 139 S.Ct. 675, 675 (2019) (Thomas, J., concurring). Plaintiff, Katharine McKee, sued actor and comedian Bill Cosby for defamation based on publication of a letter impugning her truthfulness after she had publicly accused him of raping her decades earlier. The First Circuit held that the plaintiff's allegations did not meet the *New York Times v. Sullivan*, 376 U.S. 254 (1964) standard of malice applicable because the matter was one of public concern. *McKee v. Cosby*, 874 F.3d 54, 62–65 (1st Cir. 2017). Justice Thomas argued that *New York Times v. Sullivan* and the Court's decisions extending it were "policy-driven decisions masquerading as constitutional law," not consistent with the "First Amendment as it was understood by the people who ratified it," *McKee*, 139 S.Ct. at 676.

135. *See, e.g.*, Maggie Haberman & Annie Karni, *Trump Meets with Hard-Right Group Led by Ginni Thomas*, N.Y. TIMES (Jan. 26, 2019) (reporting that "after the Thomases had dinner with the president and the first lady, Melania Trump," President Trump took an "unusual" meeting with a hard-right group led by Ginni Thomas).

136. As one journalist wrote:

Suppose I were to speculate that Thomas has a specific interest in protecting the private lives of public figures because of his own very public debacle in 1991, when he was accused of sexual harassment by a former employee, Anita Hill. In the era of #metoo, many people have sought to revisit these claims or even mount efforts to impeach Justice Thomas himself. I don't know whether this highly personal motivation is behind Thomas's opinion. But it's a valid question to ask, since it is germane to the reasoning of a Supreme Court justice in a high-profile case. Yet if *Times v. Sullivan* were overturned, such speculation could be impossible. Which maybe is what Thomas really wants. If I'm still allowed to say that.

For whatever reason, Trump has often threatened to sue for defamation without doing so. During his 2016 election campaign, Trump vowed to sue all of the women—at least 10, including Summer Zervos—who had come forward accusing him of inappropriate touching: “Every woman lied when they came forward to hurt my campaign,” continuing that it was “Total fabrication. The events never happened. Never. All of these liars will be sued after the election is over.”¹³⁷ Of course, it was Trump’s statement that formed the basis of Zervos’s own suit for defamation against him.

Thus, as a means of addressing sexual misconduct, defamation based on denials of sexual misconduct allegations is unsatisfactory. While it can re-start the dispute and therefore circumvent the statute of limitations barring litigation of the original misconduct, it is a difficult tort to sustain, as the dismissals in the Stormy Daniels and *Jacobus* cases demonstrate. This difficulty may be exacerbated when the defendant is a political candidate or president, given the heightened relevancy of the First Amendment. Further, when the defendant is Donald Trump or someone with a similar reputation for “falsehoods” or “hyperbole,” the claim may be even more difficult to seriously allege.¹³⁸ Finally, defamation is undoubtedly a double-edged sword: Just as women alleging sexual misconduct can bring a claim for defamation if the person accused

Jay Michaelson, *If You Don't Value New York Times v. Sullivan, You'd Better Start, Because Clarence Thomas Is Gunning for It*, DAILY BEAST (Feb. 19, 2019, 6:28 PM), <https://www.thedailybeast.com/if-you-dont-value-times-v-sullivan-you-d-better-start-because-clarence-thomas-is-gunning-for-it>.

137. Jeremy Diamond & Eugene Scott, *Trump Says He'll Sue Sexual Misconduct Accusers*, CNN POLITICS (Oct. 22, 2016, 10:31 PM), <https://www.cnn.com/2016/10/22/politics/trump-says-hell-sue-sexual-misconduct-accusers/index.html>.

138. See generally Chris Cillizza, *People Don't Think Donald Trump is Honest or Trustworthy. And They Never Really Have*, CNN (Sep. 11, 2018, 8:21 AM), <https://www.cnn.com/2018/09/11/politics/trump-honest-and-trustworthy/index.html> (“[L]ess than one in three people in the new CNN-SSRS poll believe that President Donald Trump is honest and trustworthy”); Glenn Kessler et al., *President Trump Has Made 10,796 False or Misleading Claims Over 869 Days*, WASH. POST: FACT CHECKER (June 10, 2019, 3:00 AM), <https://www.washingtonpost.com/politics/2019/06/10/president-trump-has-made-false-or-misleading-claims-over-days/>; Julia Manchester, *Poll: Just 13 Percent of Americans Consider Trump Honest and Trustworthy*, THE HILL (May 17, 2018, 8:47 AM), <https://thehill.com/homenews/administration/388107-poll-just-13-percent-of-americans-consider-trump-honest-and>. In *Jacobus*, the trial judge distinguished situations in which the defendant’s statements “cannot be taken seriously,” implying that a defendant should not be able to insulate himself from liability, and yet found a “reasonable reading” of the tweets did not sustain the cause of action for defamation. *Jacobus v. Trump*, 51 N.Y.S.3d 330, 343–44. In *Clifford v. Trump*, the court easily accepted defendant Trump’s claim that his tweet was “hyperbole.” *Clifford*, 339 F. Supp. 3d at 925.

issues suitable vituperative denials, so too can the accused bring a claim for defamation based on the accusations themselves.

B. *Alva Johnson and the Dismissive Judge*

Alva Johnson, a former Donald Trump campaign worker, filed a complaint in the Middle District of Florida in February 2019, alleging battery based on sexual assault: During a meet-and-greet event prior to a campaign rally in Tampa, Florida in August 2016, “Trump forcibly kissed Ms. Johnson in the presence of several of her colleagues and others. The forced and unwanted kiss was deeply offensive to Ms. Johnson.”¹³⁹ In support of the alleged battery, the complaint included allegations made by other women of forcible kissing and unwanted sexual contact.¹⁴⁰ The defendants, Donald Trump and the Campaign, moved to dismiss and to strike the allegations concerning other sexual misconduct, both of which the district judge granted, scolding Alva Johnson that if she “wishes to make a political statement or bring a claim for political purposes, this is not the forum.”¹⁴¹

The judge described Johnson’s allegations of battery, then stated that although “this simple battery appears to have lasted perhaps 10–15 seconds, Plaintiff has spent 29 pages and 115 paragraphs in the Complaint setting it forth,” including “19 unrelated incidents involving women upon whom Defendant Trump allegedly committed nonconsensual acts, over the past four decades with differing circumstances.”¹⁴² In striking the allegations pertaining to other incidents, the judge re-

139. Complaint at ¶ 129, *Johnson v. Trump for President, Inc.*, No. 8:19-cv-00475, 2019 WL 2492122 (M.D. Fla. June 14, 2019).

140. *Id.* at 19–27, ¶¶ 97–107.

141. *Johnson v. Trump for President, Inc.*, No. 8:19-cv-00475-T-02SPF, 2019 WL 2492122, at *1 (M.D. Fla. June 14, 2019).

142. *Johnson*, No. 8:19-cv-00475-T-02SPF, 2019 WL 2492122, at *1. The judge continued,

Most of the incidents do not resemble the present allegation; some do. For example, Plaintiff hopes to prove and introduce at trial evidence that Defendant Trump “was like an octopus” when groping one woman on a commercial flight in the early 1980s, or that 15 years before the instant claim he entered a dressing room where beauty contestants were unclothed. These allegations, salacious and in florid language, appear to come from media reports. Indeed, in attempting to set forth a cause of action for simple battery, the Complaint cites approximately 40 different media reports or newspaper articles.

Johnson, No. 8:19-cv-00475-T-02SPF, 2019 WL 2492122, at *2.

ferred to a court's "broad discretion" to strike from a pleading "any redundant, immaterial, impertinent, or scandalous matter."¹⁴³ He then reasoned that even if the allegations do not constitute a "scandalous matter," they are nonetheless "immaterial and impertinent" to Johnson's simple battery claim and further that other incidents would not be admissible at trial.¹⁴⁴ On the admissibility issue, the judge distinguished inadmissible character evidence from admissible habit evidence, noting that although they are "close akin," a "habit is a behavior repeated so often as to become a reflex" under the Federal Rules of Evidence,¹⁴⁵ but did not consider Federal Rule of Evidence 415 which allows admission of similar acts in civil cases involving sexual assaults.¹⁴⁶ Moreover, the judge reasoned that "only one of the 19 prior incidents happened during the presidential campaign," and that the allegations did not support a claim for punitive damages.¹⁴⁷

The judge allowed Alva Johnson to file an amended complaint in which she "should allege a simple battery in 10 or fewer pages, including relevant factual allegations," and "should omit all reference to other incidents beyond her own alleged battery and omit any quotes from the press or media reports in her complaint."¹⁴⁸ Presumably, had the case gone forward on an amended complaint, the judge would limit discovery about any other incidents of sexual misconduct, unlike the judge in *Jones v. Clinton*.¹⁴⁹ Instead, Alva Johnson declined to pursue the case,

143. *Johnson*, No. 8:19-cv-00475-T-02SPF, 2019 WL 2492122, at *2 (citing FED. R. CIV. P. 12(f)).

144. *Johnson*, No. 8:19-cv-00475-T-02SPF, 2019 WL 2492122, at *2. The judge quoted Federal Rule of Evidence 404(b) that evidence "of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." The judge rejected the plaintiff's argument that the evidentiary issue was more suitable for summary judgment or a motion in limine rather than at the complaint stage.

145. *Johnson*, No. 8:19-cv-00475-T-02SPF, 2019 WL 2492122, at *3. The judge wrote that while habit under Rule 406 of the Federal Rules of Evidence may be "close akin," nevertheless habit is distinct. *Id.*

146. FED. R. EVID. 415 ("In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation.").

147. *Johnson v. Trump for President, Inc.*, No. 8:19-cv-00475-T-02SPF, 2019 WL 2492122, at *3 (M.D. Fla. June 14, 2019).

148. *Johnson*, 2019 WL 2492122, at *6. On the other claims, the judge directed that the "employment discrimination claims in Counts II and III, including relevant factual allegations, may not exceed fifteen pages in total," although on those claims the judge's dismissal was predicated on findings that the allegations were not sufficiently specific. *Id.*

149. *See supra* notes 73–77 and accompanying text.

given the odds of success: “I’m fighting against a person with unlimited resources, and repeatedly the judicial system has failed to find fault in his behavior.”¹⁵⁰

C. *The Expansive Complaint by Jill Harth (Houraney)*

One of the few other complaints known to allege sexual misconduct was filed by Jill Harth Houraney in the Southern District of New York in 1997 against Donald Trump and two men who were officers in Trump’s casino interests in Atlantic City.¹⁵¹ Jill Harth, as she is usually known, alleged that beginning in 1992, she was an employee with “American Dream Festival,” owned by George Houraney. The festival was entering into a partnership with Trump for a 1993 festival event which included a “Calendar Girl” competition. Jill Harth’s complaint, filed pro se but evincing legal expertise, contains detailed allegations over the course of several years, consisting in large part of threats of various types and instances of forced “intimate touching.”¹⁵² Harth’s complaint also contains allegations of the type of sexual “banter” that could rise to sexual harassment had there been a covered employment relationship: “Defendant Trump engaged in conversations with plaintiff, expressed his ‘boredom’ with Marla Maples and said he didn’t want to marry her, stating that he wasn’t ‘even sure that kid was mine,’ and that Maples had lost her ‘tits’ and was no longer appealing to him as a ‘sex object,’” but that plaintiff was appealing.¹⁵³

Interestingly, the complaint contains allegations objecting to Trump’s treatment of other women including those who were underage: Going into the bedroom of an American Dream participant to sexually

150. Olivia Messer, *Alva Johnson Drops Lawsuit Against President Trump: ‘I’m Fighting Against a Person With Unlimited Resources’*, DAILY BEAST (Sept. 5, 2019, 9:04 PM), <https://www.thedailybeast.com/alva-johnson-drops-lawsuit-against-president-trump-im-fighting-against-a-person-with-unlimited-resources-6>.

151. Complaint, *Houraney v. Trump*, No. 1:97-CV-03135 (S.D.N.Y. Apr. 30, 1997), <https://assets.documentcloud.org/documents/3010800/Jill-Harth-v-Donald-Trump.pdf>.

152. *See, e.g.*, Complaint, *Houraney*, at ¶ 21(c) (alleging “threats against plaintiff by defendant to ‘keep her mouth shut or else’” over telephone); at ¶ 9 (alleging that “the defendant Trump repeatedly put his hands on plaintiff’s thighs and violated plaintiff’s ‘physical and mental integrity’ by attempting to touch plaintiff’s intimate private parts”); at ¶ 14(b)(i) (alleging that defendant Trump “forcibly prevented plaintiff from leaving and forcibly removed plaintiff to a bedroom, whereupon defendant subjected plaintiff to defendant’s unwanted sexual advances, which included touching of plaintiff’s private parts in an act constituting attempted ‘rape’”).

153. *Houraney* Complaint at ¶ 21(d).

accost her while she was sleeping,¹⁵⁴ seeking “access” to underage contestants,¹⁵⁵ attempting to trap “female targets” in “daughter Ivanka’s room” alone with Trump,¹⁵⁶ and preventing Black women contestants from advancing in the pageant.¹⁵⁷ The complaint’s counts sound in constitutional and civil rights violations as well as the state law torts of defamation and intentional infliction of emotional distress and sought money damages as well as an injunction preventing Donald Trump’s involvement with beauty pageants.¹⁵⁸ The complaint was voluntarily dismissed, reportedly in settlement with another lawsuit that Jill Harth had filed relating to their business relations.¹⁵⁹

In a 2016 interview, Harth reiterated her allegations and also discussed the attempts to have her recant her story.¹⁶⁰ While she stated she was originally willing to “let bygones be bygones,” she was motivated to come forward about the previous lawsuit when she heard Trump deride her previous lawsuit and its allegations as meritless.¹⁶¹ Harth may have considered filing a defamation suit given the denials by Trump as well as the denials by his daughter, Ivanka Trump, who would have been 10 years old at the time of the alleged incidents.¹⁶²

D. *Ivana Trump’s Divorce*

The records in the divorce litigation between Trump and his first wife, Ivana Trump—like most divorce cases—are sealed. A 2016 attempt by newspapers to disclose them was unsuccessful; a New York trial judge ruled that despite the newspapers’ “extremely important role in keeping the public informed in matters as crucial as presidential elections,” it was not the court’s role to “inject itself into the political pro-

154. *Houraney* Complaint at ¶ 40(e)(i).

155. *Houraney* Complaint at ¶ 18.

156. *Houraney* Complaint at ¶ 40(c).

157. Complaint, *Houraney v. Trump*, No. 1:97-CV-03135, ¶ 40(e)(ii). (S.D.N.Y. Apr. 30, 1997), <https://assets.documentcloud.org/documents/3010800/Jill-Harth-v-Donald-Trump.pdf>.

158. *Houraney* Complaint at ¶¶ 39–59.

159. Margaret Hartman, *What Happened to the 20 Women Who Accused Trump of Sexual Misconduct*, INTELLIGENCER (Feb. 26, 2019), <http://nymag.com/intelligencer/2017/12/what-happened-to-trumps-16-sexual-misconduct-accusers.html>.

160. Lucia Graves, *Jill Harth Speaks Out About Alleged Groping by Donald Trump*, GUARDIAN (July 20, 2016), <https://www.theguardian.com/us-news/2016/jul/20/donald-trump-sexual-assault-allegations-jill-harth-interview>.

161. *Id.*

162. *Id.*

cess by making the value judgment of what information is useful in determining” fitness for office.¹⁶³ Of interest in any discussion of sexual misconduct that might be revealed in those records is less Trump’s adultery with Marla Maples, but more a reported allegation by Ivana Trump during a deposition that Trump had violently sexually and physically assaulted her in 1989, which appeared in the book *Lost Tycoon*.¹⁶⁴

The book’s account, written in the present tense, but without any sources in the notes, described Trump entering the master bedroom at Trump Tower after painful scalp reduction surgery for which he blamed Ivana, ripping out Ivana’s hair, then “rip[ping] off her clothes and unzip[ping] his pants” and then “jam[ming] his penis inside her.”¹⁶⁵ The book has a pasted “Notice to the Reader” on its frontispiece with a “Statement of Ivana Trump.” The Notice states that after the book had been printed, Trump and his lawyers furnished the Ivana Trump statement; the Statement provides that during a deposition she had used the word “rape,” but that word should not be interpreted in a “literal or criminal” sense.¹⁶⁶ Early in Trump’s presidential campaign, she gave an even stronger denial to reporters, which was supplemented by statements from Trump’s personal attorney Michael Cohen wrongly claiming that “marital rape” was not a crime in New York at the time.¹⁶⁷

Ivana Trump did publish a novel, *For Love Alone*,¹⁶⁸ which was presumably the subject of post-divorce litigation between the parties involving the legal status of a nondisclosure clause in their post-nuptial agreement.¹⁶⁹ The trial judge had “without notice to the parties or ex-

163. Trump v. Trump, No. 72319/90 (N.Y. Sup. Ct. Sept. 22, 2016), <http://www.politico.com/f/?id=00000157-544c-db5f-a7d7-75ec9cd40000>.

164. HARRY HURT III, *LOST TYCOON: THE MANY LIVES OF DONALD J. TRUMP* (1993).

165. *Id.* at 55.

166. *Id.* at i. For a discussion of Trump’s attorneys, see David Graham, *Donald Trump’s Long History of Paying for Silence*, ATLANTIC (Jan. 29, 2017), <https://www.theatlantic.com/politics/archive/2018/01/donald-trumps-long-history-with-hush-money/550745/>.

167. Brandy Zadronzy & Tim Mak, *Ex-Wife: Donald Trump Made Me Feel ‘Violated’ During Sex*, DAILY BEAST (July 27, 2015, 8:35 PM), <https://www.thedailybeast.com/ex-wife-donald-trump-made-me-feel-violated-during-sex> (quoting Ivana Trump as saying, “I have recently read some comments attributed to me from nearly 30 years ago at a time of very high tension during my divorce from Donald. The story is totally without merit,” and including Michael Cohen’s statements on marital rape as well as his related threats regarding publication).

168. IVANA TRUMP, *FOR LOVE ALONE* (1992). For a good discussion of the book, see Kelly Faircloth, *I Read Ivana Trump’s 1992 Romance Novel So You Don’t Have To*, JEZEBEL (Feb. 11, 2016, 1:05 PM), <https://pictorial.jezebel.com/i-read-ivana-trumps-1992-romance-novel-so-you-dont-have-1758483428>.

169. *See* Trump v. Trump, 582 N.Y.S.2d 1008 (N.Y. App. Div. 1992).

planation, excluded the confidentiality provision from incorporation into the supplemental judgment,” but the Appellate Division reinstated it, rejecting Ivana Trump’s argument that it was a prior restraint abridging her First Amendment rights and reasoning that “parties to a civil dispute have the right to chart their own litigation course,” including stipulating away their constitutional rights.¹⁷⁰ In any event, Ivana Trump’s novel, while it does have sex scenes, does not have any portrayals of marital rape or violence.¹⁷¹

Ivana Trump’s allegations demonstrate, as do the allegations of Jill Harth, Alva Johnson, and Summer Zervos, that the litigation is imbricated with media and other nonjudicial practices. The next section considers the numerous allegations against Donald Trump that did not result in known litigation.

III. UNLITIGATED AND UNLITIGABLE: ALLEGATIONS AND MORE ALLEGATIONS

To read reports of additional allegations by adult women concerning sexual misconduct by Donald Trump is to read variations of stories of sexual aggression. By most counts, there are about 20 women who have not filed lawsuits but have made their allegations public.¹⁷² These allegations have come to light in press conferences, in reported stories, and, in a few instances, in published first-person narratives. Denials by Trump, or by people speaking on his behalf, such as Hope Hicks or Michael Cohen, followed almost all the accounts.

There are women who say they did not know Trump before the alleged incident. There is Jessica Leeds, who described Trump as an “octopus.” She made her acquaintance with Trump when she sat next to him in an airplane and he began grabbing her breasts and trying to put his hand up her skirt.¹⁷³ There is Rachel Crooks, a receptionist who met

170. *Trump*, 582 N.Y.S.2d at 1009–10.

171. The confidentiality clause required the husband’s “written consent in advance” for any accounts, whether “fictionalized or not,” on penalty of cessation of payments from Donald Trump, which included a ten million lump sum, and \$350,000 per year maintenance. *Trump*, 582 N.Y.S.2d at 1009. For her part, Ivana Trump seemed to insist that the husband character in her book was not based on Donald Trump. See Irene Lacher, *Ivana’s New Trump Card: The Donald’s History, but His Ex Is Conquering Other Worlds, Including Price Club*, L.A. TIMES (Apr. 26, 1992), <https://www.latimes.com/archives/la-xpm-1992-04-26-vw-1119-story.html>.

172. See articles cited *supra* note 5.

173. Megan Twohey & Michael Barbaro, *Two Women Say Donald Trump Touched Them Inappropriately*, N.Y. TIMES (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/>

Trump outside an elevator at Trump Tower, she introduced herself, and he kissed her first on the cheeks and then directly on the mouth.¹⁷⁴ There is Kristin Anderson, who met Trump when he groped her under her skirt at a Manhattan nightclub.¹⁷⁵ There is Karena Virginia, who was waiting for a ride after the U.S. Open when Trump approached her with other men, started commenting on her legs, and then touched her breast, asking her if she knew who he was.¹⁷⁶

There are women who were working around Trump. In addition to the women who sued—Alva Johnson, the campaign worker, and Jill Harth, the business partner—there are other women who made similar allegations. There is Mindy McGillivray, who was working as a photographer’s assistant at Trump’s residence at Mar-a-Lago when he groped her.¹⁷⁷ There is Juliet Huddy, a *Fox & Friends* host, whom Trump kissed

us/politics/donald-trump-women.html. Leeds, then 74, contacted the *New York Times* by email after she heard Trump “lying” in the presidential debate in which Trump denied ever sexually assaulting women and was then interviewed by reporters about the event that occurred when she was 38. *Id.*

174. *Id.* Crooks, age 22, was working at her first job when the incident occurred in 2005 and reached out to the *New York Times* after reading about the allegations by Temple Taggart.
175. Karen Tumulty, *Woman Says Trump Reached Under Her Skirt and Groped Her in Early 1990s*, WASH. POST (Oct. 14, 2016), https://www.washingtonpost.com/politics/woman-says-trump-reached-under-her-skirt-and-groped-her-in-early-1990s/2016/10/14/67e8ff5e-917d-11e6-a6a3-d50061aa9fae_story.html. Anderson had told people about the event which occurred when she was in her early 20s, and a “reporter contacted her after hearing her story from a person who knew of it, and she spent several days trying to decide whether to go public,” but decided to do so after the *New York Times* story about Leeds and Crooks. See also *supra* notes 170–71, *infra* note 176.
176. Elizabeth Chuck, *Karena Virginia Becomes 10th Woman to Accuse Trump of Sexual Misconduct*, NBC NEWS (Oct. 20, 2016, 12:26 PM), <https://www.nbcnews.com/news/us-news/karena-virginia-becomes-tenth-woman-accuse-trump-sexual-misconduct-n670146>. Karena Virginia described the 1998 encounter in a press conference with attorney Gloria Allred. Molly Redden, *Tenth Woman Accuses Donald Trump of Sexual Misconduct*, THE GUARDIAN (Oct. 20, 2016, 11:43 AM), <https://www.theguardian.com/us-news/2016/oct/20/donald-trump-sexual-misconduct-tenth-woman-accuser>. A profile of Karena Virginia in 2018 described her motivation in contacting Gloria Allred, including watching “Trump call all of the other women liars.” Jia Tolentino, *Karena Virginia Told Her Story in 2016. It’s Been a Long Two Years*, NEW YORKER (Nov. 5, 2018), <https://www.newyorker.com/news/dispatch/karena-virginia-told-her-story-about-trump-in-2016-its-been-a-long-two-years>.
177. Joe Capozzi, *Local Woman Says Trump Groped Her*, PALM BEACH POST (Oct. 12, 2016, 12:01 AM), <https://www.palmbeachpost.com/news/national-govt—politics/palm-beach-post-exclusive-local-woman-says-trump-groped-her/aLcLWjmxbmudQM7TXuxiK/>. Mindy McGillivray reached out to her local newspaper, the *Palm Beach Post*, about the 2003 incident which occurred when she was 23 years old, after Trump stated in the debate that he had never groped a woman.

on the lips in an elevator.¹⁷⁸ There is Natasha Stoyoff, a journalist assigned to do a profile of Trump and his third wife Melania, interviewing them at Mar-a-Lago when he pushed her against a wall and forced his tongue in her mouth; he later kept telling her they would have an affair.¹⁷⁹

There is a woman who stated she was introduced to Trump by her mother-in-law at a Mother's Day brunch at Mar-a-Lago, her husband and three children nearby, when Trump took her hand, grabbed her, and "went for the lips" as she leaned backwards to avoid him, although he was strong and seemed to feel entitled to kiss her; her name is Cathy Heller.¹⁸⁰

There are the models and actresses and beauty contestants who say that Trump grabbed, groped, kissed, or harassed them. Like Summer Zervos seeking a job after a stint on Trump's reality show, *The Apprentice*,¹⁸¹ there is Jennifer Murphy, whom Trump kissed on the lips at her post-*Apprentice* job interview.¹⁸² There is Lisa Boyne, who described having dinner with Trump, a modeling agent, and other models, when Trump made the models walk across a table and then looked up their skirts and reported whether they were wearing underwear.¹⁸³ There is

178. Avery Anapol, *Former Fox News Employee: Trump Tried to Kiss Me on the Lips*, HILL (Dec. 8, 2017, 7:33 PM), <https://thehill.com/homenews/administration/364056-former-fox-news-anchor-trump-tried-to-kiss-me-on-the-lips>; Emily Smith, *Ex-Fox News Anchor Claims Trump Tried to Kiss Her*, PAGE SIX (Dec. 8, 2017, 6:39 PM), <https://pagesix.com/2017/12/08/ex-fox-news-anchor-claims-trump-tried-to-kiss-her/>.

179. Natasha Stoyoff, *Physically Attacked by Donald Trump—A People Writer's Own Harrowing Story*, PEOPLE MAG. (Oct. 12, 2016, 10:31 PM), <https://people.com/politics/donald-trump-attacked-people-writer/>. Stoyoff wrote of the 2005 incident, "I'd been interviewing A-list celebrities for over 20 years, but what he'd done was a first," and that afterwards "I asked to be taken off the Trump beat, and I never interviewed him again."

180. Molly Redden, *Donald Trump 'Grabbed Me and Went for the Lips,' Says New Accuser*, THE GUARDIAN (Oct. 16, 2016, 7:56 AM), <https://www.theguardian.com/us-news/2016/oct/15/donald-trump-sexual-misconduct-allegations-cathy-heller>. Heller believes the year was 1997 and stated that what ultimately swayed her to tell her story publicly were Trump's own denials of such conduct, including at a debate. *Id.*

181. See *supra* notes 93–114 and accompanying text (discussing Summer Zervos).

182. Erin Burnett, *'Apprentice' Star: Trump Kissed Me, I Wasn't Offended*, CNN OUT FRONT (Oct. 15, 2016), <https://www.cnn.com/videos/politics/2016/10/15/jennifer-murphy-former-apprentice-contestant-comments-erin-intv.cnn>. Murphy describes the 2005 kiss as not offensive and welcomed opportunity to be on television to share her affection for Trump.

183. Mollie Reilly & Sam Stein, *Trump Faces Another Accusation - This Time, He Looked Up Models' Skirts*, HUFFINGTON POST (Oct. 13, 2016, 3:52 PM), https://www.huffpost.com/entry/donald-trump-models-skirts-underwear_n_57ffd172e4b0162c043ac07f. Boyne related the incident because "she

Jessica Drake, an actress, who chronicled a meeting with Trump at the Lake Tahoe celebrity golf event the same weekend in 2016 Trump met with Karen McDougal and Stormy Daniels, when he grabbed Drake tightly and kissed her.¹⁸⁴ There is Temple Taggart McDowell, “Miss Utah,” who reported unwanted kisses and embraces.¹⁸⁵ There is Cassandra Searles, Miss Washington, who revealed Trump groped her on the buttocks and asked her to go to a hotel room.¹⁸⁶ There is Ninni Laaksonen, Miss Finland 2006, who recounted appearing on the *Late Show with David Letterman* when Trump grabbed her by the buttocks.¹⁸⁷

And there are other women, some anonymous and some not, included in the October 2019 book, *ALL THE PRESIDENT’S WOMEN*:

experienced a ‘flashback’” to that 1996 dinner when she saw a *New York Times* story in May detailing a number of disturbing stories of how Trump has interacted with women in private, and when the *Access Hollywood* tape surfaced, she “felt compelled to share her story.”

184. Reena Flores, *Another Donald Trump Accuser Comes Out with Charge of Sexual Misconduct*, CBS NEWS (Oct. 22, 2016, 8:22 PM), <https://www.cbsnews.com/news/another-donald-trump-accuser-comes-out-with-charge-of-sexual-misconduct/>. Drake, an adult film actor, detailed the 2016 Trump meeting at a press conference with Gloria Allred, who exhibited a photograph of Trump and Drake together. *Id.* Drake alleged that he later asked her to dinner and offered her \$10,000 which she declined.
185. Hallie Jackson & Alex Johnson, *Miss USA Contestant Details Unwanted Encounters With Trump*, NBC NEWS (Oct. 13, 2016, 2:47 AM), <https://www.nbcnews.com/politics/2016-election/miss-usa-contestant-details-encounters-trump-n665521>. Temple Taggart McDowell, who at 21 years old represented Utah in the 1997 Miss USA pageant, stated Trump embraced her and kissed her on the lips during the pageant and later at Trump Tower did the same as she pursued modeling contracts, making one of the chaperones so “uncomfortable” that the chaperone advised her never to be in a room with Trump alone, was prompted to come forward by the *Access Hollywood* tape.
186. Tessa Stuart, *A Timeline of Donald Trump’s Creepiness While He Owned Miss Universe*, ROLLING STONE (Oct. 12, 2016, 8:26 PM), <https://www.rollingstone.com/politics/politics-features/a-timeline-of-donald-trumps-creepiness-while-he-owned-miss-universe-191860/>. The news reports regarding Cassandra Searles allegations about Trump’s conduct in the 2013 Miss USA pageant cited her June 2016 Facebook postings, tagging others from the pageant. Lauren Tuck, *Donald Trump Reportedly Treated Miss USA Contestants Like ‘Property’*, YAHOO NEWS (June 17, 2016), <https://www.yahoo.com/lifestyle/donald-trump-reportedly-treated-miss-000000927.html>.
187. Scott Bixby, *Former Miss Finland Is 12th Woman to Accuse Donald Trump of Sexual Assault*, GUARDIAN (Oct. 28, 2016, 8:58 AM), <https://www.theguardian.com/us-news/2016/oct/27/trump-twelfth-woman-sexual-assault-accusation-ninni-laaksonen>. Laaksonen related the 2006 incident after being contacted by a local Finnish newspaper. Harriet Alexander, *Former Miss Finland Becomes 12th Woman to Accuse Trump of Sexual Assault*, TELEGRAPH (U.K.) (Oct. 27, 2016, 4:37 PM), <https://www.telegraph.co.uk/news/2016/10/27/former-miss-finland-becomes-12th-woman-to-accuse-trump-of-sexual/>.

DONALD TRUMP AND THE MAKING OF A PREDATOR, by Barry Levine and Monique El-Faizy.¹⁸⁸ In their book, they add to the known incidents with new accusations revealed in interviews. By their count, there are “at least sixty-seven separate accusations of inappropriate behavior, including twenty-six instances of unwanted sexual contact.”¹⁸⁹

There is also E. Jean Carroll, the popular advice columnist and writer. In June 2019, *New York Magazine* published an excerpt from Carroll’s book, *WHAT DO WE NEED MEN FOR? A MODEST PROPOSAL*, detailing a sexual assault by Donald Trump in 1995 or 1996.¹⁹⁰ Carroll described how she came to be in a dressing room of the high-end department store, Bergdorff Goodman, with Trump, when he “unzip[ed] his pants, and, forcing his fingers around my private area, thrust[ed] his penis halfway—or completely, I’m not certain—inside me.”¹⁹¹ She struggled, pushed him off, and escaped the dressing room and the store.¹⁹² But the allegation was hardly front-page news¹⁹³—it attracted little attention—and then the fact that it received so little attention merited some attention; the editor of the *New York Times* later stated that the newspaper had underplayed the allegations.¹⁹⁴ Even though Carroll’s allegations were more violent than others, feminist writer Moira Donegan observed that Carroll’s “revelation had the quality of déjà vu, not shocking but familiar.”¹⁹⁵ Donegan asked, “[w]hat does it mean for the

188. LEVINE & EL-FAIZY, *supra* note 6.

189. *Id.* at 2.

190. E. JEAN CARROLL, *WHAT DO WE NEED MEN FOR?: A MODEST PROPOSAL* (2019), as reprinted in E. Jean Carroll, *Hideous Men: Donald Trump Assaulted Me in a Bergdorf Goodman Dressing Room 23 Years Ago. But He’s Not Alone on the List of Awful Men in My Life*, N.Y. MAG. (June 21, 2019), <https://www.thecut.com/2019/06/donald-trump-assault-e-jean-carroll-other-hideous-men.html>.

191. *Id.*

192. *Id.*

193. Katie Sullivan, *Major Newspapers Largely Leave New Report of Sexual Assault by Trump Off Their Front Pages*, MEDIA MATTERS FOR AM. (June 22, 2019, 11:57 AM), <https://www.mediamatters.org/blog/2019/06/22/major-newspapers-largely-leave-new-report-sexual-assault-trump-their-front-pages/224009>.

194. Lara Takenaga, *Our Top Editor Revisits How We Handled E. Jean Carroll’s Allegations Against Trump*, N.Y. TIMES (June 24, 2019), <https://www.nytimes.com/2019/06/24/reader-center/e-jean-carroll-trump-allegations.html> (“In retrospect,’ Mr. Baquet said, ‘a key consideration was that this was not a case where we were surfacing our own investigation—the allegations were already being discussed by the public. The fact that a well-known person was making a very public allegation against a sitting president should’ve compelled us to play it bigger”).

195. Moria Donegan, *E. Jean Carroll and the ‘Hideosity Bar’*, ATLANTIC (July 6, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/what-e-jean-carroll-aftermath-means/593299/>.

office of the presidency that no one is at all surprised that the man who occupies it has been accused of rape?”¹⁹⁶

Yet there was press coverage, and it was accelerated by Trump’s reactions. In a written statement distributed to the press the same day Carroll’s excerpt was published online, Trump claimed he had never met Carroll, claimed her “fiction” was motivated by wanting to sell a book, included a statement that “[f]alse accusations diminish the severity of real sexual assault,” and asked anyone having information that she was working with the Democratic Party to come forward.¹⁹⁷ The next day, asked by a reporter about his statement that he never met Carroll when there was a photograph of them together, he repeated his statement that he had no idea who she was, that she had made accusations against other men, and that she was similar to other women who had been paid money to say bad things about him.¹⁹⁸ And two days later, in an interview, Trump stated, “I’ll say it with great respect: Number one, she’s not my type. Number two, it never happened. It never happened, OK?”¹⁹⁹ All three of these interviews would form the basis of a complaint for one count of defamation that E. Jean Carroll filed in New York State Court in November 2019, following the path blazed by Summer Zervos.²⁰⁰

Given all these alleged incidents, it can seem that there are so many sexual misconduct allegations that there is nothing that would be surprising, although perhaps sexual misconduct involving girls rather than women retains the capacity to outrage.

196. *Id.*

197. Laura Litvan (@LauraLitvan), TWITTER (June 21, 2019, 5:17 PM), <https://twitter.com/LauraLitvan/status/1142179819075121154>. The statement was quickly published in whole or part at various news outlets.

198. *Remarks by President Trump Before Marine One Departure*, WHITE HOUSE (June 22, 2019, 10:18 AM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-49/>.

199. Jordan Fabian & Saagar Enjeti, *Trump Vehemently Denies E. Jean Carroll Allegation, Says ‘She’s Not My Type’*, THE HILL (June 24, 2019, 6:43 PM), <https://thehill.com/homenews/administration/450116-trump-vehemently-denies-e-jean-carroll-allegation-shes-not-my-type>.

200. Complaint, *E. Jean Carroll v. Donald Trump*, No. 160694/2019, ¶¶ 81–105 (N.Y. Sup. Ct. Nov. 04, 2019) [hereinafter *E. Jean Carroll Complaint*].

IV. GIRLS

In addition to the allegations of Jill Harth's 1997 complaint involving very young women,²⁰¹ there are other allegations of Trump's sexual attitudes towards minors, including in his own statements. The allegations of Trump's misconduct at pageants included Trump's forays into dressing rooms. He discussed this practice on a radio show in 2005, saying that as owner of the pageant he was "inspecting it" and "they're standing there with no clothes," but "I sort of get away with things like that."²⁰² Various women contestants reported his unusual practice of entering their dressing rooms.²⁰³ The practice seemed to extend to teen-aged girls, at least at the 1997 contest, Teen USA, featuring contestants ranging from 14 to 19 years of age, according to five of the teenagers.²⁰⁴ As one of the teenagers said, "[w]e were all very young, but even at the time, it caught us funny." Now, "as an adult and as a mother," she said she finds it "absolutely inappropriate."²⁰⁵ When another of the teenagers told Ivanka Trump, herself 15 at the time and co-host of the pageant, she reportedly replied, "[y]eah, he does that."²⁰⁶

In addition to the voyeuristic behavior at pageants are the allegations of sexual assault including rape leveled against Trump in connection with convicted sex offender Jeffrey Epstein. The complaint filed by Jane Doe—or actually more than one complaint—in *Doe v. Trump and Epstein* in the Southern District of New York recounts harrowing incidents of sexual abuse of a 13-year-old girl. The first complaint was filed June 20, 2016, and voluntarily dismissed on September 16, 2016.²⁰⁷ The second complaint, with the same allegations, was filed two weeks

201. E. Jean Carroll Complaint.

202. Caitlin Yilek, *Trump Told Stern He Walked Backstage When Beauty Queens Were Naked*, THE HILL (Oct. 09, 2016 12:12 PM), <https://thehill.com/blogs/ballot-box/presidential-races/300093-trump-confirms-he-walked-backstage-when-beauty-queens>.

203. Kendal Taggart et al., *Teen Beauty Queens Say Trump Walked in on Them Changing*, BUZZFEED (Oct. 12, 2016, 5:44 AM), <https://www.buzzfeednews.com/article/kendalltaggart/teen-beauty-queens-say-trump-walked-in-on-them-changing>.

204. *Id.*

205. *Id.*

206. *Id.*

207. Complaint, *Jane Doe v. Donald Trump and Jeffrey Epstein*, Case 1:16-cv-04642 (S.D.N.Y. June 20, 2016), available at <https://www.documentcloud.org/documents/2996704-Doe-v-Trump-Complaint.html> [hereinafter *Jane Doe Complaint 1*]. See also Notice of Voluntary Dismissal, *Jane Doe v. Donald Trump and Jeffrey Epstein*, Case 1:16-cv-04642 (S.D.N.Y. Sept. 16, 2016), available at <https://www.courtlistener.com/recap/gov.uscourts.nysd.459083.9.0.pdf>.

later, on September 30, 2016, and voluntarily dismissed on November 4, 2016, a few days before the 2016 election.²⁰⁸ These complaints echo a previous pro se complaint filed in federal court in the Central District of California in April of 2016, *Johnson v. Trump and Epstein*.²⁰⁹

The complaints filed in New York federal court allege that in 1994, the plaintiff, 13 years old, was “enticed by promises of money and a modeling career to attend a series of parties” at the New York City residence of Jeffrey Epstein.²¹⁰ It avers that Trump forcibly raped her, including violently striking her, and threatened her if she revealed the incident.²¹¹ It also avers that Epstein thereafter brutally raped her, “attempted to strike Plaintiff about the head with his closed fists while he angrily screamed at Plaintiff that he, Defendant Epstein, rather than Defendant Trump, should have been the one who took Plaintiff’s virginity,” and threatened her and her family should she “reveal any of the details of his sexual and physical abuse of her.”²¹² The complaints seek a tolling of the statute of limitations based on the continuing threats.²¹³

The New York complaints also include a count for defamation, based on Trump’s statements reacting to the pro se California April 2016 complaint.²¹⁴ The New York complaints aver that Trump provided a statement that read “[t]he allegations are not only categorically false, but disgusting at the highest level and clearly framed to solicit media attention or, perhaps, are simply politically motivated. There is absolutely no merit to these allegations. Period.” The statement was published in the media, including American Media, Inc. (A.M.I.) and its subsidiary, *Radar Online*.²¹⁵

208. Complaint, *Jane Doe v. Donald Trump and Jeffrey Epstein*, Case 1:16-cv-07637 (S.D.N.Y. Sept. 30, 2016) [hereinafter *Jane Doe Complaint 2*], available at <https://www.politico.com/f/?id=00000158-26b6-dda3-afd8-b6fe46f40000>. The notice of voluntary dismissal provides no reason. See Notice of Voluntary Dismissal, *Jane Doe v. Donald J. Trump and Jeffrey Epstein*, Case 1:16-cv-07673 (S.D.N.Y. Nov. 4, 2016), available at <https://www.courtlistener.com/recap/gov.uscourts.nysd.463432.15.0.pdf>.

209. Complaint, *Katie Johnson v. Donald Trump and Jeffrey Epstein* (C.D. Cal. Apr. 26, 2016) (5:16-cv-00797-DMG-KS) [hereinafter *Katie Johnson Complaint*].

210. *Jane Doe Complaint 1*, *supra* note 207, at 3; *Jane Doe Complaint 2*, *supra* note 208, at 4.

211. *Jane Doe Complaint 1*, *supra* note 207; *Jane Doe Complaint 2*, *supra* note 208.

212. *Jane Doe Complaint 1*, *supra* note 207, at 4; *Jane Doe Complaint 2*, *supra* note 208, at 5.

213. *Jane Doe Complaint 1*, *supra* note 207, at 6–7; *Jane Doe Complaint 2*, *supra* note 208, at 6–8.

214. *Katie Johnson Complaint*, *supra* note 206.

215. *Jane Doe Complaint 1*, *supra* note 207, at 7–8; *Jane Doe Complaint 2*, *supra* note 208, at 8 (citing *Trump Sued by Teen ‘Sex Slave’ For Alleged ‘Rape’ - Donald Blasts*

The first New York complaint included a declaration by Jane Doe in support of her request for a protective order and a declaration by another anonymous declarant, Tiffany Doe. Doe stated that she was a “party planner” for Epstein from 1991–2000, was hired to recruit “adolescent women” to attend parties, and persuaded Jane Doe to “attend a series of parties” in the summer of 1994. Doe stated that she personally witnessed sexual and physical abuse of the 13-year-old Jane Doe, providing details including some involving another girl, “Maria.”²¹⁶ The second complaint adds a third and very simple declaration by Joan Doe stating that during the 1994 to 1995 school year, Jane Doe told her she was “subject to sexual contact by Defendants at parties in New York City during the summer of 1994.”²¹⁷

The scheduled appearance of Jane Doe, who was presumed to be the Katie Johnson of the California complaint, at a press conference in November 2016 did not occur, with one of her lawyers, the “high-profile civil rights attorney and TV commentator” Lisa Bloom, announcing that “Johnson was afraid to show her face after receiving multiple death threats, and that they would have to reschedule.”²¹⁸ Bloom thereafter tweeted that “Jane Doe instructed us to dismiss her lawsuit against Trump and Epstein today. Tough week for her. We wish her well” and linked to a copy of the dismissal.²¹⁹

The “Katie Johnson” allegations resurfaced in conjunction with the 2019 criminal indictment of the other defendant in her civil suit, the controversial Jeffrey Epstein, who was charged with sex acts with underage girls.²²⁰ Epstein had been previously charged with similar crimes, but

‘Disgusting’ Suit (Apr. 28, 2016 4:34 PM), <https://radaronline.com/exclusives/2016/04/donald-trump-sued-sexual-abuse-jeffrey-epstein-claims/>).

216. Declaration in Support of Plaintiff’s Request for Protective Order, *Jane Doe v. Donald Trump and Jeffrey Epstein* (S.D.N.Y. June 20, 2016) (1:16-cv-04642). The Tiffany Doe Declaration includes a statement that “I personally witnessed four sexual encounters that the Plaintiff was forced to have with Mr. Trump” including “the fourth of these encounters where Mr. Trump forcibly raped her despite her pleas to stop,” and “witnessed the one occasion where Mr. Trump forced the Plaintiff and a 12-year-old female named Maria perform oral sex on Mr. Trump and witnessed his physical abuse of both minors when they finished the act.”
217. Declaration by Joan Doe, *Jane Doe v. Donald Trump and Jeffrey Epstein* (S.D.N.Y. Sept. 30, 2016) (1:16-cv-07673).
218. Emily Crockett, *The Lawsuit Accusing Trump of Raping a 13-year-old Girl, Explained*, VOX (Nov. 3, 2016 2:40 PM), <https://www.vox.com/policy-and-politics/2016/11/3/13501364/trump-rape-13-year-old-lawsuit-katie-johnson-allegation>.
219. Lisa Bloom (@LisaBloom), TWITTER (Nov. 4, 2016 8:30 PM), <https://twitter.com/LisaBloom/status/794698295775993856>.
220. On July 5, 2019, Jeffrey Epstein was arrested returning to the country. The indictment accused him of sex trafficking conspiracy and sex trafficking related to sexual

the then-United States Attorney for the Southern District of Florida, Alexander Acosta, oversaw a very lenient plea deal.²²¹ Acosta was named the Secretary of Labor in the Trump Administration, but the revelations about Acosta's involvement in the Epstein plea deal led to Acosta's resignation from the cabinet post.²²² There remains continued uncertainty regarding the extent to which Trump, or other political and powerful figures, may have been involved with Epstein's crimes.²²³

Relatedly, there is a defamation suit by Virginia Roberts Giuffre, who as a 16-year-old was working at Mar-a-Lago, against Ghislaine Maxwell, an associate of Epstein's, alleged to be someone who recruited or facilitated the recruitment of young females for sexual activity with Jeffrey Epstein.²²⁴ The case, filed in 2015, was settled in 2017 on undis-

interactions with minor girls at his "mansion in New York" and his "estate in Palm Beach, Florida." The indictment references Minor Victim one, two, and three and Employee one, two, and three, but does not specifically identify other people. Indictment, United States of America v. Jeffrey Epstein (S.D.N.Y. July 25, 2019) (19 Crim 490), <https://int.nyt.com/data/documenthelper/1362-epstein-indictment/01e39b8c091cbeac3797/optimized/full.pdf>.

221. See Julie K. Brown, *Cops Worked to Put Serial Sex Abuser in Prison. Prosecutors Worked to Cut Him a Break*, MIAMI HERALD (Nov. 28, 2018), <https://www.miamiherald.com/news/local/article214210674.html> ("In 2007, despite ample physical evidence and multiple witnesses corroborating the girls' stories, federal prosecutors and Epstein's lawyers quietly put together a remarkable deal for Epstein, then 54. He agreed to plead guilty to two felony prostitution charges in state court, and in exchange, he and his accomplices received immunity from federal sex-trafficking charges that could have sent him to prison for life. He served 13 months in a private wing of the Palm Beach County stockade. His alleged co-conspirators, who helped schedule his sex sessions, were never prosecuted. The deal, called a federal non-prosecution agreement, was sealed so that no one—not even his victims—could know the full scope of Epstein's crimes and who else was involved. The U.S. attorney in Miami, Alexander Acosta, was personally involved in the negotiations, records, letters and emails show").
222. See, e.g., Annie Karni et al., *Acosta to Resign as Labor Secretary Over Jeffrey Epstein Plea Deal*, N.Y. TIMES (Jul. 12, 2019), <https://www.nytimes.com/2019/07/12/us/politics/acosta-resigns-trump.html> ("President Trump's embattled labor secretary, R. Alexander Acosta, announced his resignation on Friday amid continuing questions about his handling of a sex crimes case involving the financier Jeffrey Epstein when Mr. Acosta was a federal prosecutor in Florida.").
223. See, e.g., Kat Tenbarge, *How One Epstein Victim Was Said To Be Recruited From Mar-a-Lago, and All the Other Connections Between the Accused Sex Trafficker and Trump's Palm Beach Resort*, BUS. INSIDER (Sept. 23, 2019), <https://www.businessinsider.com/jeffrey-epstein-and-trump-mar-a-lago-resort-connections>; Madison Feller, *How Exactly Is Alleged Sex Trafficker Jeffrey Epstein Connected to President Trump?*, ELLE (Aug. 13, 2019), <https://www.elle.com/culture/career-politics/a28320376/jeffrey-epstein-president-trump-connection/>.
224. See *Giuffre v. Maxwell*, 325 F. Supp. 3d 428, 433-34 (S.D.N.Y. 2018), vacated and remanded *sub nom.* *Brown v. Maxwell*, 929 F.3d 41 (2d Cir. 2019).

closed terms after a tumultuous discovery process including protective orders sealing the case material.²²⁵ There is much speculation regarding whether any of that material mentioned Trump or other important figures. Journalists, most notably Julie Brown of the *Miami Herald*, intervened to have the material unsealed; the trial judge denied the motion, but the Second Circuit reversed.²²⁶ The Second Circuit held that with respect to documents submitted to the court for its consideration in a summary judgment motion, it is well-settled that such materials “are—as a matter of law—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment.”²²⁷ After reviewing the materials found that “there is no countervailing privacy interest sufficient to justify their continued sealing,” and they should be unsealed.²²⁸ As to the other materials submitted to the court, which are discovery materials related to motions to compel testimony, to quash trial subpoenas, and to exclude certain deposition testimony, the court held that these also bear a presumption of disclosure, although under a somewhat lower presumption than that applied to summary judgment materials, and which the trial judge should conduct a review of the thousands of pages at issue.²²⁹ The Second Circuit concluded with a “note of caution to the public regarding the reliability of court filings such as those unsealed today,” given the nature of the documents and that there was little consequence for falsehoods, implying its own skepticism about their truthfulness.²³⁰ The day after the previously sealed materials began to be disclosed, Jeffrey Epstein was found dead in

225. *Brown*, 929 F.3d at 46.

226. *Brown*, 929 F.3d at 46.

227. *Brown*, 929 F.3d at 46–48.

228. *Brown*, 929 F.3d at 46–48.

229. *Brown v. Maxwell*, 929 F.3d 41, 49–52 (2d Cir. 2019).

230. *Brown*, 929 F.3d at 52–53. The court noted that although “affidavits and depositions are offered ‘under penalty of perjury,’ it is in fact exceedingly rare for anyone to be prosecuted for perjury in a civil proceeding.” The court continued, “Similarly, pleadings, complaints, and briefs—while supposedly based on underlying evidentiary material—can be misleading. Such documents sometimes draw dubious inferences from already questionable material or present ambiguous material as definitive.” *Id.* at 52. The court added that court filings could be “particularly susceptible to fraud,” because under the applicable New York law of defamation, there is “absolute immunity from liability” for oral or written statements made “in connection with a proceeding before a court.” Thus, the court urged “the media to exercise restraint in covering potentially defamatory allegations” and cautioned “the public to read such accounts with discernment.” *Id.* at 53.

his prison cell.²³¹ As of January 2020, the materials are still being unsealed.

V. TOWARD A MISOGYNY REPORT

Neither litigation nor media reports including first-person accounts have been adequate to allow a grasp of the allegations, never mind the accuracy of those allegations, regarding Donald Trump's sexual misconduct. The Articles of Impeachment adopted by the House of Representatives in December 2019 did not address Trump's sexual behaviors.²³² But hearings in Congress or elsewhere could begin to assess and address these matters. As E. Jean Carroll, who has accused Trump of raping her, tweeted after Special Counsel Robert Mueller testified before Congress: "Mueller! I admire the effort, the brains, the hard work, and the \$40 million spent on this investigation! I just wish to God that the women accusing the President of sexual travesties, got 1/20th of that congressional focus!"²³³ Again, this is not to argue that all those who have been subject to Trump's "sexual travesties" would embrace testifying in the public hearings that E. Jean Carroll advocates. Indeed, E. Jean Carroll's own experience of not making public her own allegations until June 2019—many years after the incident and almost three years after Trump's campaign²³⁴—support multiple perspectives on sharing trauma.

231. William K. Rashburn et al., *Jeffrey Epstein Dead in Suicide at Jail, Spurring Inquiries*, N.Y. TIMES (Aug. 10, 2019), <https://www.nytimes.com/2019/08/10/nyregion/jeffrey-epstein-suicide.html>.

232. See Articles of Impeachment Against Donald John Trump, H.R. 755, 116th Cong. (2019). Both of the two articles addressed Trump's alleged conduct regarding Ukraine; the first was Abuse of Power, and the second was Obstruction of Congress. Without taking evidence or testimony, the United States Senate voted to acquit the President on both counts. See H.R. 755, 116th Cong., 2d Sess. Senate Roll Call Vote 33 (Feb. 5, 2020), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00033 (voting not to convict on Article I of Articles of Impeachment Against President Donald John Trump, Abuse of Power, 52-48); H.R. 775, 116th Cong., 2d Sess. Senate Roll Call Vote 34 (Feb. 5, 2020), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00034 (voting not to convict on Article II of Articles of Impeachment Against President Donald John Trump, Obstruction of Congress, 53-47). The "yea" votes of guilt, 48 on Count I and 47 on Count II, fell far short of the two-thirds required for the Senate to convict and remove under Const. Art. I, §3.

233. E. Jean Carroll (@ejeancarroll), TWITTER (Jul. 24, 2019 3:22 PM), <https://twitter.com/ejeancarroll/status/1154109517468184576>.

234. See CARROLL, *supra* note 190.

Similar to other governmental interventions,²³⁵ a Misogyny Report following hearings could address some of the inadequacies of the current media landscape and provide pathways for remedies in three ways. First, a Misogyny Report with hearings could provide a proper assessment and contextualization of the allegations by individualizing the women who have made complaints, addressing the current situation of both under-individualization and over-individualization. Second, a Misogyny Report could explore the ways in which women who have accused Trump have been silenced—through isolation, threats, and NDAs—and could propose remedies to prevent these women as well as other women from being silenced. Third and finally, a Misogyny Report could propose specific correctives to obstacles in the path of bringing and completing litigation.

A. *From Object to Subject: Respecting Women's Humanity*

In the litigation, reported stories, and Mueller Report, women's individuality is obscured. Any investigation and resulting Misogyny Report on Trump should center the women involved. This is neither to suggest that simply telling women's stories is sufficient²³⁶ nor required,²³⁷ and it is not simply to accept liberalism's preoccupation with individuality. But it is to combat the obfuscation of women that occurs through

235. See MacMahon, *supra* note 18 (discussing the usefulness of hearings and Reports).

236. See Ruthann Robson, *Beginning From (My) Experience: The Paradoxes of Lesbian/Queer Narratives*, 48 HASTINGS L.J. 1387 (1997).

237. Certainly at times it can seem as if recounting trauma is posited as its ultimate remedy. For example, in her essay *Trauma Abounds: A Case for Trauma-Informed Lawyering*, 26 UCLA WOMEN'S L.J. 7, 16 (2019), Professor Claudia Peña ends by quoting a passage from writer Aurora Levins Morales:

The only way to bear the overwhelming pain of oppression is by telling, in all its detail, in the presence of witnesses and in a context of resistance, how unbearable it is. If we attempt to craft resistance without understanding this task, we are collectively vulnerable to all the errors of judgment that unresolved trauma generates in individuals. It is part of our task as revolutionary people, people who want deep-rooted, radical change, to be as whole as it is possible for us to be. This can only be done if we face the reality of what oppression really means in our lives, not as abstract systems subject to analysis, but as an avalanche of traumas leaving a wake of devastation in the lives of real people who nevertheless remain human, unquenchable, complex and full of possibility.

(citing AURORA LEVINS MORALES, *MEDICINE STORIES: HISTORY, CULTURE AND THE POLITICS OF INTEGRITY* (1999)).

the mirror-image problems of under-individualizing women and over-individualizing them.

1. Under-Individualization

One reason women are not accorded full individual status in the current understandings of the sexual misconduct allegations against Trump is because their narratives about the sexual misconduct too often remain in the background or are completely omitted. For example, consider Nancy O'Dell, the woman to whom Trump is referring in the *Access Hollywood* tape when he says he “moved on her,” “did try to fuck her,” “took her out furniture shopping,” and now she has “the big phony tits and everything.”²³⁸ O'Dell was an *Entertainment Tonight* show host at the time of the tape, and after the *Access Hollywood* tape was published, O'Dell issued a dignified statement that it was “disappointing to hear such objectification of women,” and situating herself as a “woman who has tried very hard to establish her career” and as a mother.²³⁹ But assuming O'Dell decided to “tell her story,”²⁴⁰ her testimony in front of a commission might be much more expansive; she might speak about being the subject who was “moved on” “very heavily” and “like a bitch.” Media reports do not list her among the women who have been subjects of Trump's sexual assault or misconduct,²⁴¹ but perhaps her narration might alter that. Further, she might discuss how the underlying event,

238. See David Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 7, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html.

239. ET Online Staff, *Nancy O'Dell Reacts to Donald Trump Recording*, ET ONLINE (Oct. 8, 2016), https://www.etonline.com/news/199881_exclusive_nancy_o_dell_reacts_to_donald_trump_recording (“Politics aside, I’m saddened that these comments still exist in our society at all. When I heard the comments yesterday, it was disappointing to hear such objectification of women. The conversation needs to change because no female, no person, should be the subject of such crass comments, whether or not cameras are rolling. Everyone deserves respect no matter the setting or gender. As a woman who has worked very hard to establish her career, and as a mom, I feel I must speak out with the hope that as a society we will always strive to be better.”).

240. Again, this is not to argue that O'Dell must or should testify. See Sisk, *supra* note 30 (discussing CHANEL MILLER, *KNOW MY NAME: A MEMOIR* (2019) (memoir of dealing with sexual violence, trauma, and the decision to publish her memoir)); JODI KANTOR & MEGAN TWOHEY, *SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT* (2019) (discussing women who made the difficult decision to become public with accusations against Harvey Weinstein).

241. See *supra* note 5 (listing sources discussing the 20–67 women who have made accusations).

Trump's statements in the *Access Hollywood* tape, and the revelation of those statements affected her career and her family life. She might also be able to provide a counter-narrative to Trump's easily mocked statement, "I even took her out furniture shopping,"²⁴² by discussing her career not only as a host of *Access Hollywood*, but also as a businesswoman who started her own line of furniture.²⁴³

Providing counter-narratives would be an important aspect of any Misogyny Report. While there have been numerous articles in the media, television interviews, analysis, first person journalism, and even books, as well as some litigation about Trump's sexual misconduct, his perspective continues to be the dominant one. He has denied making statements that he has tweeted, and he not only denies all sexual misconduct, but denies knowing about allegations or knowing the woman making the claim.²⁴⁴ Women's counter-narratives are buried. Even when one party is not the president of the United States, unequal gender relations can make the recommended remedy of "counter speech" to combat falsehoods, insults, or denials more illusory than real when it is women who seek to enter the public discourse.²⁴⁵ In the case of the President, with his "bully-pulpit," or "bully-twitter," the stories of women have been buried. A Misogyny Report could help uncover these stories.

A Misogyny Report could also preserve each woman's individuality. Although there are numerous overlapping and intersecting aspects to

242. See, e.g., Renee Fisher, *Furniture Shopping With Donald Trump*, HUFFINGTON POST (Oct. 15, 2016), https://www.huffpost.com/entry/furniture-shopping-with-donald-trump_b_12400554; Faux Reel Studios, *Furniture Shopping (With Donald Trump)*, YOUTUBE (Oct. 19, 2016), <https://www.youtube.com/watch?v=nOilx3vwBMs>.

243. Joe Bargman, *Nancy O'Dell to Start Line of Outdoor Furniture*, PEOPLE (Jan. 15, 2010), <https://people.com/celebrity/nancy-odell-to-start-line-of-outdoor-furniture/>.

244. See, e.g., Flores, *supra* note 184 ("'This story is totally false and ridiculous,' the campaign said in a statement Saturday. 'The picture is one of thousands taken out of respect for people asking to have their picture taken with Mr. Trump. Mr. Trump does not know this person, does not remember this person and would have no interest in ever knowing her. This is just another attempt by the Clinton campaign to defame a candidate who just today is number one in three different polls'").

245. See Lynne Tirrell, *Toxic Misogyny and the Limits of Counterspeech*, 87 FORDHAM L. REV. 2433, 2450 (2019) (arguing that misogyny lives in every step of language game theory: "First, women's entry to speech situations is limited, often quite dramatically. Once in a practice or game, we often face derogatory networks of inferences, assumptions, and presuppositions that deprive our speech of authority. In such cases, we think we are making the same moves as our male counterparts, and yet our speech is deprived of its legitimate force. That sometimes results from entering the speech situation with truncated game-assigned powers and sometimes from the accumulation of toxic inferences within the speech situation in the language game. Finally, we often are deprived of the power to make the exit moves we think we are making, such as explicitly withholding sexual consent").

their individual stories, each story is unique from their perspective. The number of accusations and stories of sexual misconduct and encounters that have surfaced contributes to an understandable blurring of incidents. Even for those who have followed the reports of the sexual scandals, they are difficult to differentiate. Stormy Daniels? Isn't that the adult film star who had a consensual affair and wrote a book? Or is that Karen McDougal? Who was the woman who says she was attacked by an octopus-Trump on a plane? And isn't there a Miss Universe or something?

The inability to distinguish and the number of incidents leads to fatigue and an erosion of outrage. There has been a shift, feminist writer Moira Donegan argues, from the time when “the possibility that a powerful or respected man had committed sexual assault created cognitive dissonance” to a present acceptance that although society might pretend to hold elites including the President to a “high standard” and pretend to value women’s dignity, we do not.²⁴⁶ Even E. Jean Carroll’s first person account of rape was greeted as more of the same.²⁴⁷ Yet hearings and a Misogyny Report could counteract this corrosion by providing a forum in which the allegations are treated as serious and worth attention.

2. Over-Individualization

The problem of over-individualization is the mirror-image of under-individualization, but it equally shapes public understandings of individual wrongs in our political and legal discourse. As in civil tort cases, the “harms suffered by harassment victims are not simply individual, personal harms, but injuries that serve simultaneously to devalue the target and her group and to reinforce the inferior and unequal status of both the target and her group.”²⁴⁸ Yet as in civil tort cases, the resolution of the claim fails to take into account the broader social landscape or, perhaps more accurately, resolves the claim with reference to the unarticulated biases that inhabit the landscape.

246. Donegan, *supra* note 195.

247. See Sullivan, *supra* note 193; see also Takenaga, *supra* note 194 (“In retrospect, Mr. Baquet said, a key consideration was that this was not a case where we were surfacing our own investigation—the allegations were already being discussed by the public. The fact that a well-known person was making a very public allegation against a sitting president ‘should’ve compelled us to play it bigger’”).

248. Chamallas, *supra* note 45, at 540 and accompanying text.

For example, consider Jessica Drake.²⁴⁹ Her allegation of sexual misconduct occurred at a celebrity golf tournament at Lake Tahoe.²⁵⁰ Questions about her particular claim would include how she met Trump and what acts the sexual misconduct included. In answer, she stated that she met him while she was working at her company's booth at the tournament, he invited her to his room, and she went, taking two other women with her.²⁵¹ While her account does not describe how she and her friends were dressed, it does mention that Trump was wearing pajamas. He reportedly "grabbed each of us tightly in a hug and kissed each one of us without asking permission." The women reportedly stayed in his room for about 30 to 45 minutes, Trump asking them questions about their jobs, in what Drake said "felt like an interview." Later, when she returned to her room, she said he called her, inviting her for dinner at his suite or to a party, which she declined, and after that, he offered her \$10,000 and he would allow her the use of his private jet, presumably to fly back to Los Angeles, if only she accepted his invitation. The knowledge that Jessica Drake is an actress for "an adult film company," which was the booth she was working at when she and Trump met, and that the conversation about work in the hotel room was about making adult films,²⁵² shifts many people's perspective of the events. Drake's own self-identification as a "sex education advocate whose work has focused on consent and communication," should lend further credibility to her claim that the actions of Trump were unacceptable, as should her explicit statement that "I am not looking for monetary compensation. I do not need additional fame . . . I understand that I may be called a liar or an opportunist."²⁵³

A Misogyny Report would have the potential to counter this over-individualization focused on the complainant by refocusing on the individual who is Donald Trump. It would delve into his denial issued by his campaign: "Mr. Trump does not know this person, does not remember this person, and would have no interest in ever knowing her."²⁵⁴ It could explore not only the possible falsity of the statement, but also what it might mean if he is being subjectively truthful that he does not even recall her, and what it might mean that he can so conde-

249. Reena Flores, *Another Donald Trump Accuser Comes Out with Charge of Sexual Misconduct*, CBS NEWS (Oct. 22, 2016), <https://www.cbsnews.com/news/another-donald-trump-accuser-comes-out-with-charge-of-sexual-misconduct/>.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

scendingly dismiss his interest in ever knowing her, and thereby seemingly dismiss her very humanity. It would also situate her allegations in his experience of contemporaneous events. At the same celebrity golf tournament at which Trump invited Drake to his room and greeted her in pajamas, Trump invited Stormy Daniels—who worked at the same company as Drake—to his room and also greeted her in pajamas, which she described as being black silk.²⁵⁵ Stormy Daniels stated this encounter was the first and only time in which she had sex with Trump.²⁵⁶ Additionally, Karen McDougal, who did not work at that company, related she had sex with Trump at that same celebrity golf tournament, an episode in their continuing affair.²⁵⁷ A focus on Trump would also highlight that Trump’s third wife, Melania Trump, had given birth to their son a few months before, and illuminate Trump’s general motives and character, as well as his possible rationale for denying the allegations.²⁵⁸

A Misogyny Report could also reveal women’s own struggles with over-individualization. In her press conference, Jessica Drake explicitly disputed her own over-individualization, by stating that she risked being called “a liar or an opportunist” in order to “stand in solidarity with women who share similar accounts.”²⁵⁹ At the time of Drake’s statement in October 2016, she was the “latest woman to step forward with her story, following the unwanted kissing and groping accusations of 10 others.”²⁶⁰ Yet less public was the relationship between Jessica Drake and Stormy Daniels, former coworkers, former friends, and sometimes rivals; Drake had already suggested Stormy Daniels come forward, and after Trump’s spokespeople denied he knew Drake, Daniels “wondered what they would say about me.”²⁶¹ Thus, a refusal to over-individualize one’s own situation does not necessarily mean speaking out in solidarity;

255. DANIELS, *supra* note 124, at 118.

256. *Id.*

257. Ronan Farrow, *Donald Trump, the Playboy Model Karen McDougal, and a System for Concealing Infidelity*, NEW YORKER (Feb. 16, 2018), <https://www.newyorker.com/news/news-desk/donald-trump-a-playboy-model-and-a-system-for-concealing-infidelity-national-enquirer-karen-mcdougal>.

258. Karen McDougal, who engaged in an extensive affair with Trump, apparently believed she could be his “next wife.” Moreover, Trump’s motivation for paying “hush money” to Karen McDougal might have been motivated by his desire to keep the affair secret from his wife, an intent which might be a defense to the charge that the “hush money” constituted a campaign finance violation. See Robson, *supra* note 1.

259. Flores, *supra* note 249.

260. *Id.*

261. DANIELS, note 124, at 210–12.

when Daniels was approached after Drake's press conference with the nondisclosure agreement, she decided to enter into the agreement.²⁶²

Yet for other women, realizing they were not in a unique situation vis-à-vis Trump prompted them to speak out. Karena Virginia, alleging that Trump groped her as she was waiting for a car service to pick her up after the U.S. Open tennis tournament in Queens, New York, said that she believed for years that "she was to blame for the incident because she was wearing a short dress and high heels at the time," and was motivated to come forward after hearing Trump call all the other women liars.²⁶³ Rachel Crooks, alleging Trump kissed her on the mouth at her first job as a receptionist, came forward after hearing other allegations against Trump and his denials, saying, "I was upset that it had happened to other people, but also took some comfort in knowing I wasn't the only one he had done it to."²⁶⁴

By producing a number of narratives, a Misogyny Report has the potential to contest the type of over-individualization that makes each story of sexual misconduct unique and perhaps explicable when focused on the characteristics of the accuser and particular circumstances. It has the capacity to enable a broader view, even as it refocuses on Trump and his actions, making dismissal of claims less likely and expanding remedies and solutions. It can also empower individual women by providing formal recognition of the harms they have suffered and combat strategies of silencing women.

B. *Dismantling the Strategies of Silencing*

A Misogyny Report should also investigate the strategies of silencing women, which again, often overlap and are mutually reinforcing. While silence can certainly be exercised from a "place of resistance and power" and "breaking silence" should not be fetishized,²⁶⁵ it is neverthe-

262. *Id.* at 213–15.

263. See Chuck, *supra* note 176.

264. Megan Twohey & Michael Barbaro, *Two Women Say Donald Trump Touched Them Inappropriately*, N.Y. TIMES (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/us/politics/donald-trump-women.html>.

265. See, e.g., Wendy Brown, *In the 'Folds of Our Own Discourse' the Pleasures and Freedoms of Silence*, 3 U. CHI. L. SCH. ROUNDTABLE 185, 186 (1996) (arguing it is also possible to make a fetish of breaking silence, and to have this ostensible tool of emancipation deploy its own techniques of subjugation); Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REFORM 263, 266 (2000) (discussing interplay between the subordinating aspects of being silenced and the liberatory aspects of si-

less vital that women's autonomy be central. Thus, the strategies Trump and his agents used to silence women need attention from any Misogyny Report inquiry. These strategies include isolation, threats, and non-disclosure agreements and are discussed in turn.

1. Isolation

An important contributor to the silencing of women's complaints about sexual misconduct is the cultural message that women are to blame and are unworthy of regard. While self-blame is an aspect of over-individualization, unworthiness is connected to the pervasive sense of isolation.²⁶⁶ In this cultural construction, isolation means that one cannot command the empathy or sympathy of the world at large; one would be lucky if one had a few trusted friends.

Narratives of individual women who become isolated targets of violence permeate our culture; the fear of being a victim shapes women's lives.²⁶⁷ Writing about the infamous 1964 Kitty Genovese murder, feminist historian Marcia Gallo explains that the story of neighbors who did not want to "get involved" and thus did not help a young woman attacked on the street, became a parable of urban apathy that was far from the facts.²⁶⁸ Despite its falsity, the apathy parable was amplified by media providing a powerful narrative that echoed "preconceptions and anxieties."²⁶⁹ The apathy parable extends not only to stranger-attacks in supposedly dangerous urban settings, but extends to situations in which the woman feels herself alone against powerful and shadowy forces. One of the most affecting passages in Stormy Daniels' memoir relates her fear that she will be the victim of a "single-car accident" or an accidental

lence, its expressive and performative aspects that are part of our linguistic and racial repertoires).

266. See *e.g.*, *supra* notes 263–64 and accompanying text (Karena Virginia, alleging that Trump groped her as she was waiting for a car service to pick her up after the U.S. Open tennis tournament in Queens, New York, said that she believed for years that "she was to blame for the incident because she was wearing a short dress and high heels at the time," and was motivated to come forward after hearing Trump call all the other women liars. Rachel Crooks, alleging Trump kissed her on the mouth at her first job as a receptionist, came forward after hearing other allegations against Trump and his denials, saying, "I was upset that it had happened to other people, but also took some comfort in knowing I wasn't the only one he had done it to").

267. See ESTHER MADRIZ, NOTHING BAD HAPPENS TO GOOD GIRLS: THE FEAR OF CRIME IN WOMEN'S LIVES 2 (1997).

268. MARCIA GALLO, "NO ONE HELPED": KITTY GENOVESE, NEW YORK CITY, AND THE MYTH OF URBAN APATHY (2015).

269. *Id.* at 178.

drug overdose or a natural gas leak in her home: She “started down a Google rabbit hole of political conspiracies, starting with Marilyn Monroe. If there’s a mistress who died suspiciously, I read about it, and each one, no matter how far-fetched, fed my fears.”²⁷⁰

A Misogyny Report and the publicity it could generate might provide a counter-narrative to the isolationist one. It could show women that society is paying attention. It could demonstrate that women do have the ability to speak up without being in danger, even though it could not guarantee that by becoming public they would not be subject to additional harassment. To be sure, these benefits of a Misogyny Report would be more political than legal, but given the prevailing narratives that echo our present “preconceptions and anxieties,” this would be potentially powerful. Moreover, this cultural phenomenon is linked to two very specific problems that surfaced in Trump’s sexual misconduct cases—threats and nondisclosure agreements—each of which is amenable to more concrete legal solutions as the next subsections suggest.

2. Threats

Threats are endemic to the sexual misconduct allegations surrounding Trump. Before Stormy Daniels indulged in the spiral down the “Google rabbit hole of political conspiracies,” she relates that she had actually been threatened.²⁷¹ As previously discussed, she made a claim about the threat publicly, Trump mocked that claim, she sued him for defamation, and the court not only dismissed her claim but assessed attorneys’ fees against her.²⁷² Trump himself threatened to sue all the women who had publicly accused him of sexual misconduct, saying “All of these liars will be sued after the election is over.”²⁷³ In her complaint, Jill Harth stated that Trump made threats against her “to keep her mouth shut or else.”²⁷⁴ The complaint by Jane Doe and subsequent press conference announcing the withdrawal of the complaint aver there were multiple threats to her and her family, some including bodily injury.²⁷⁵

270. DANIELS, *supra* note 124, at 200–01.

271. *Id.*

272. *See supra* notes 122–30 and accompanying text.

273. *See supra* note 137 and accompanying text.

274. *See supra* note 152 and accompanying text.

275. *See supra* note 218 and accompanying text.

The role of the attorney—or “fixer”—in using threats merits considerable investigation in any Misogyny Report focused on Trump. While representing Trump, Michael Cohen threatened a reporter who was writing about Ivana Trump’s allegations of rape: “You write a story that has Mr. Trump’s name in it, with the word ‘rape,’ and I’m going to mess your life up . . . for as long as you’re on this frickin’ planet.”²⁷⁶ In rather dramatic testimony before Congress, Congresswoman Jackie Speier asked Cohen, “How many times did Mr. Trump ask you to threaten an individual or entity on his behalf?”²⁷⁷ Cohen initially answered that he had quite a few times, but Speier pressed him on a number, asking 50 times, to which Cohen responded more, and only at the query “500 times” did Cohen say, “Probably, over the 10 years” that he had worked for Trump.²⁷⁸ What we do not know is how many of those 500 times involved women who had accused Trump of sexual misconduct, including women who have not come forward. At least one account names another one of Trump’s attorneys and fixers, Marc Kasowitz, as “taking care” of Trump’s “jams” with hundreds of women during the campaign;²⁷⁹ but although Kasowitz apparently threatened a

276. See Brandy Zadronzy & Tim Mak, *Ex-Wife: Donald Trump Made Me Feel ‘Violated’ During Sex*, DAILY BEAST (Jul. 27, 2015), <https://www.thedailybeast.com/ex-wife-donald-trump-made-me-feel-violated-during-sex>. Cohen seems to be threatening litigation rather than bodily harm:

I will make sure that you and I meet one day while we’re in the courthouse. And I will take you for every penny you still don’t have. And I will come after your *Daily Beast* and everybody else that you possibly know,” Cohen said. “So I’m warning you, tread very fucking lightly, because what I’m going to do to you is going to be fucking disgusting. You understand me?” “You write a story that has Mr. Trump’s name in it, with the word ‘rape,’ and I’m going to mess your life up . . . for as long as you’re on this frickin’ planet . . . you’re going to have judgments against you, so much money, you’ll never know how to get out from underneath it,” he added.

Id. A recording of that phone call is available on NPR. Tim Mak, *How Michael Cohen Protects Trump By Making Legal Threats*, NPR (May 31, 2018, 3:37 PM), <https://www.npr.org/2018/05/31/615843930/listen-how-michael-cohen-protects-trump-by-making-legal-threats>.

277. Meg Warren et al., *Michael Cohen Testifies Before Congress*, CNN (Feb. 27, 2019), https://www.cnn.com/politics/live-news/michael-cohen-testimony/h_91b862d3bd6c9cab7c1e4f0652ea57b2 (including transcript and video).

278. *Id.*

279. Rex Santus, *Trump Lawyer Who “Took Care” of Women During the Campaign is Back*, VICE NEWS (Apr. 12, 2018, 11:11 AM), https://news.vice.com/en_ca/article/kzxxpa/trump-lawyer-who-took-care-of-women-during-the-campaign-is-back.

man by email,²⁸⁰ his conduct is not as well-known as Cohen's. Any Misogyny Report investigation should further interrogate Trump's attorneys to uncover any threatening or intimidating conduct toward women who had claims against Trump, especially if those women were not represented by counsel.

Threats of bodily injury or kidnapping are generally a crime under federal and state laws, but the meaning of what constitutes a threat is subject to First Amendment constraints.²⁸¹ However, attorneys should be held to a higher standard than merely avoiding criminal conduct. Attorneys are not ethically prohibited from threatening civil lawsuits, subject to considerations involving threats that are baseless in fact or in law, intended to harass, or prejudicial to the administration of justice.²⁸² The National Association of Legal Investigators has a code of ethics,²⁸³ and licensed private investigators are regulated by statute.²⁸⁴ These pre-existing mechanisms might provide the basis for a Misogyny Report inquiry into relevant violations.

A Misogyny Report could recommend the adoption of further legal recourse. Attorneys dealing with unrepresented persons might be held to a higher standard. Attorneys making threats directed at the media might also be held to a higher standard. These standards might also be heightened when there is an election campaign and there may be special standards when so-called "hush money" is involved.

280. Kasowitz later apologized. See Sharon LaFraniere, *Trump Lawyer Marc Kasowitz Will Apologize After Sending Email Threats*, N.Y. TIMES (July 13, 2017), <https://www.nytimes.com/2017/07/13/us/marc-kasowitz-email-trump-lawyer.html>.

281. See, e.g., *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) (holding that to be constitutional, federal threat statute required either knowledge of threatening nature, or specific intent to threaten); *Virginia v. Black*, 538 U.S. 343, 362–63, 367 (2003) (finding that defendant's cross-burning was done without "intent to intimidate" and thus was protected by the First Amendment because it was not a "true threat"); *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (holding "true threats" are not protected by the First Amendment).

282. THE ASS'N OF THE B. OF THE CITY OF N.Y. COMM. ON PROF'L ETHICS., FORMAL OP. 2017-3: ETHICAL LIMITATIONS ON SEEKING AN ADVANTAGE FOR A CLIENT IN A CIVIL DISPUTE BY THREATENING ANCILLARY NON-CRIMINAL PROCEEDINGS AGAINST AN ADVERSE PARTY 5–9 (2017), http://documents.nycbar.org/files/2017159-2017-3_Formal_Opinion_Negotiation_Threats.pdf.

283. NAT'L ASS'N OF LEGAL INVESTIGATORS, *Code of Ethics*, <https://nalionline.org/become-a-member/code-of-ethics/>.

284. See, e.g., N.Y. GEN. BUS. LAW § 70 (McKinney 2019) (licensing private investigators, bail enforcement agents, and watch, guard, or patrol agencies).

3. Nondisclosure Agreements and Nondisparagement Agreements

Nondisclosure Agreements and Nondisparagement Agreements (NDAs) may be coupled with threats—either in their formation or their enforcement—but, unlike threats, are acknowledged legal mechanisms for private ordering of competing interests. Nevertheless, NDAs have become increasingly suspect as appropriate legal tools.²⁸⁵ For Stormy Daniels and Karen McDougal, whose cases both involved consensual sexual conduct, it is largely the funds paid as consideration for the agreements that has caused legal problems. The money paid to Daniels and McDougal was arguably campaign finance violations; these are crimes to which Michael Cohen pleaded guilty.²⁸⁶ The other women who have made public allegations about Trump do not have NDAs; this may precisely be the point.

A Misogyny Report inquiry should consider ways to release women who may have entered NDAs with (or on behalf of) Trump, in order that they may testify. Further, like the inquiry into the part attorneys or other professionals may have played in threats and threat-like behaviors, any Misogyny Report inquiry should investigate the role of attorneys in the procurement and execution of NDAs. Although the lawsuit filed by Stormy Daniels against her own attorney, Keith Davidson, and Trump's attorney, Michael Cohen, was settled, the allegations that Davidson's interests were more devoted to his own fee and his relationship with Cohen are more than troubling.²⁸⁷ A Misogyny Report could recommend further ethical rules governing attorneys who draft or represent clients in NDAs and might also recommend that bar associations conduct public education campaigns around the practice. Further, a Misogyny Report inquiry should interrogate the use of mandatory arbitration agreements that often accompany NDAs, especially given that they are used as a further strategy to make silent the perspectives of women involved.

285. See generally Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76 (2018); Jonathan Ence, *"I Like You When You Are Silent": The Future of NDAs and Mandatory Arbitration in the Era of #MeToo*, 2019 J. DISP. RESOL. 165 (2019); Burt Neuborne, *Limiting the Right to Buy Silence: A Hearer-Centered Approach*, 90 U. COLO. L. REV. 411 (2019).

286. See Letter from Robert S. Mueller, Special Counsel, U.S. Dep't of Just., to Guy Petrillo & Amy Lester, Counsel, Petrillo, Klein & Boxer (Aug. 21, 2018), <https://assets.documentcloud.org/documents/4779473/Michael-Cohen-Plea-Agreement.pdf>. For more discussion, see Robson, *supra* note 1.

287. See Robson, *supra* note 1.

A Misogyny Report might also recommend specific legislation governing NDAs. While an NDA pursuant to a divorce may not be unusual—and Trump used one in his divorce from his first wife, Ivana, as well as reportedly in his divorce from his second wife, Marla Maples Trump²⁸⁸—the damages from any type of NDA could be limited by legislation. A Report could support legislation from Congress that would prohibit the use of NDAs in sexual harassment cases, and reference similar legislation in states, even while recognizing that this legislation is limited to employment contexts and thus not covering most of Trump’s alleged sexual misconduct.²⁸⁹ It could also consider a proposal by law professor Ian Ayres, which provides that NDAs would only be enforceable under certain conditions, including the agreement specifically describing the rights that are retained to report the perpetrator’s behavior to investigative authorities; making the accuser’s promises not to disclose conditional on the perpetrator not misrepresenting any of the survivor and perpetrator’s interactions; and providing for the allegations being deposited in an information escrow that could be released for investigation if another complaint is received against the same perpetrator.²⁹⁰ However, again the proposal relies on extant legal regimes that cover employment relationships or educational contexts. Expanding beyond the employment context is admittedly difficult. For example, a Senate Subcommittee investigating the sexual assaults by Larry Nassar as the USA Gymnastics physician included inquiries into a NDA in a settlement in gymnast McKayla Maroney’s lawsuit against U.S. Olympic Committee, USA Gymnastics, and Michigan State University (where Nassar was a faculty member); the Report made no recommendations on the specific issue of NDAs.²⁹¹

In seeking to expand regulation of NDAs beyond employment relationships, a Misogyny Report might consider recommending other innovative approaches. The United States tax code has recently been amended to make payments for sexual harassment not deductible as

288. David A. Graham, *Donald Trump’s Long History of Paying for Silence*, ATLANTIC (Jan. 17, 2018), <https://www.theatlantic.com/politics/archive/2018/01/donald-trumps-long-history-with-hush-money/550745/> (discussing Trump’s agreement with Marla Maples when Trump “floated a presidential run” in 1999). See *supra* notes 163-168 and accompanying text (discussing Ivana Trump NDA).

289. See, e.g., Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting Act—Part 2, S. 2988, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/2988>.

290. Ayres, *supra* note 285, at 79, 81, 84.

291. See *id.* at 18–25 (“Recommendations”); OFFS. MORAN & BLUMENTHAL, *supra* note 24, at 35–39 (discussing NDAs).

business expenses; while this seems most obviously directed at employment relations, it would presumably extend to any payments.²⁹² Using a different approach, a Misogyny Report recommendation could be increased reporting requirements by corporations, including nonprofit corporations, so that this type of “expense” could not be so easily concealed.

When considering recommendations about NDAs, a Misogyny Report should also seriously explore advocating for a rule carving out an exception for enforceability in the public interest. The Fourth Circuit recently held in *Overbey v. Mayor & City Council of Baltimore* that a non-disparagement clause in settlement of a police misconduct claim violated the First Amendment.²⁹³ In reaching that conclusion, the court concluded that the non-disparagement agreement was a waiver of Overbey’s constitutional rights and that her waiver, even if voluntary, was “outweighed by a relevant public policy that would be harmed by enforcement.”²⁹⁴ The court explicitly called the settlement funds “hush money” and stated the court has “never ratified the government’s purchase of a potential critic’s silence merely because it would be unfair to deprive the government of the full value of its hush money.”²⁹⁵ In considering the claim by a media company to declare such NDAs invalid, the court found that the “pervasive use of non-disparagement clauses in settlements with police brutality claimants impedes the ability of [the media] . . . to fully carry out the important role the press plays in informing the public about government actions.”²⁹⁶ To be sure, the First Amendment would not apply to an agreement entered into by pre-presidential Trump, but the enforcement of that agreement by the courts would implicate the First Amendment.²⁹⁷ As to the public policy exception at issue, it need not be so broad as to cover all sexual harassment, sexual misconduct, or sexual matters. Indeed, perhaps it should not. The void as against public policy rule for NDAs might be triggered by a campaign for public office by the person paying the “hush money.” The public, informed by the press, surely has an interest in such matters should the other party to the agreement choose to disclose them. This would be especially important in situations in which there is no litiga-

292. I.R.C. § 162(q) (2019).

293. *Overbey v. Mayor of Balt.*, 930 F.3d 215, 222 (4th Cir. 2019).

294. *Overbey*, 930 F.3d at 223.

295. *Overbey*, 930 F.3d at 226.

296. *Overbey*, 930 F.3d at 230.

297. *See generally* *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (holding that judicial enforcement is constrained by the Fourteenth Amendment). This makes the elimination of private arbitration especially important.

tion—or the litigation documents are sealed—given that there is no other record.

NDA's and other techniques of silencing women who have made sexual misconduct claims against Trump can occur within litigation, as exemplified by the settlement agreement with Jill Harth. But the strategies of silencing are largely directed at not only the continuation of litigation, but also at its prevention. Yet even when a woman contemplates becoming a plaintiff in a civil suit, there are still substantial obstacles to a successful outcome in litigation.

C. *Clearing the Litigation Path*

Any Misogyny Report focused on Trump should carefully examine the extant lawsuits as well as contemplated litigation to uncover the potential and problems of civil litigation to address Trump's sexual misconduct. The Report could investigate and make recommendations regarding civil remedies for sexual misconduct, statutes of limitations, presidential immunity, defamation, the rules of evidence relating to prior sexual misconduct, judicial bias, and sealing court records. This subsection briefly explores these possibilities.

One recommendation could be a reinstatement of the civil remedy of VAWA as a federal statute, crafted to avoid the lack of Congressional power that the United States Supreme Court found fatal in *United States v. Morrison*.²⁹⁸ Such a statute could be so narrow as to apply to persons occupying federal offices, including the president, thus avoiding the federalism issue that troubled the Court in *Morrison*. Such a law could have a generous statute of limitations unlike state torts, and more problematically apply to acts before a person assumed federal office. Similar to other statutes establishing commissions, such as Title VII establishing the EEOC, a VAWA federal official statute could establish a Commission to investigate and adjudicate such claims.

A Misogyny Report could also make specific recommendations regarding presidential immunity. As the Court acknowledged in *Clinton v. Jones*, Congress has such power that it has not exercised.²⁹⁹ Such a statute might reaffirm the holding in *Clinton v. Jones* that the president is subject to federal courts, and might clarify that the president is also subject to state courts agreeing with the New York courts in *Zervos v.*

298. See *United States v. Morrison*, 529 U.S. 598, 628 (2000).

299. See *Clinton v. Jones*, 520 U.S. 680, 709 (1997).

Trump.³⁰⁰ Further, a statute might make specific findings or even include particular provisions regarding a president's obligation to participate in a case, including appearing for depositions in a timely fashion.

On the difficult issue of defamation, a Misogyny Report might explore specific statutes governing libel and slander by the president, or perhaps including presidential candidates or federal officials. Such a rule might recognize that persons are not situated equally with respect to the president in order to engage in "counterspeech" or "more speech,"³⁰¹ and thus the president should be subject to a stricter standard. This could be extended to the president as a plaintiff and work toward ameliorating some of the presidential threats of bringing litigation.

A Misogyny Report investigation should carefully consider the case campaign worker Alva Johnson brought against Donald Trump and make specific recommendations.³⁰² One avenue of exploration is Federal Rule of Evidence 415, which was part of a package of rules originally proposed as part of the Women's Equal Opportunity Act in 1991, but which Congress adopted in 1994 as part of the Violent Crime Control and Law Enforcement Act.³⁰³ Rule 415 applies to civil cases involving "sexual assault" and provides that the "court may admit evidence that the party committed any other sexual assault or child molestation." In assessing the Rule, feminist legal scholar Jane Aiken argued that the definition of sexual assault should be broadened to include sexual misconduct and harassment, even as the definition of prior acts should be narrowed so that the acts should be similar.³⁰⁴ A Misogyny Report could

300. See *Zervos v. Trump*, 94 N.Y.S.3d 75, 82–84 (N.Y. App. Div. 2019), affirming *Zervos v. Trump*, 74 N.Y.S.3d 442 (N.Y. Sup. Ct. 2018).

301. See Tirrell, *supra* note 245, at 2435–36, 2445.

302. See *supra* notes 139–150 and accompanying text; *Johnson v. Trump for President, Inc.*, No. 819CV00475T02SPF, 2019 WL 2492122 (M.D. Fla. June 14, 2019).

303. For discussions of adoption of FED. R. EVID. 415, see Jane Harris Aiken, *Sexual Character Evidence in Civil Actions: Refining the Propensity Rule*, 1997 WIS. L. REV. 1221, 1236 (1997); Daniel L. Overbey, *Federal Rule of Evidence 415 and Paula Corbin Jones v. William Jefferson Clinton: The Use of Propensity Evidence in Sexual Harassment Suits*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 343, 344–47 (1998); Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U.L. REV. 153, 177–79 (2008).

304. Aiken, *supra* note 303, at 1263–67. Aiken argues:

Social science evidence suggests that the predictive value of behavior depends on its similarity to the alleged activity. This modification of Rule 415 draws on that insight. For example, given the similarity in circumstances and situation, a plaintiff should be able to show a defendant's character as a sexual harasser through the testimony of other employees in other workplaces who also experienced offensive touching. She might also draw parallels between the defendant as a customer in a bar fondling

make specific recommendations, perhaps limited to cases involving the president or other federal officials, including those campaigning for federal office, to expand further on Jane Aiken's suggestion. For example, when considering the complaint by Alva Johnson,³⁰⁵ Rule 415 seemed to be inapplicable given that Johnson alleged unwanted kissing rather than defined sexual contact, but the judge also stated that the prior acts her complaint alleged were not relevant because they did not occur during a presidential campaign.³⁰⁶ Further, a Misogyny Report might consider recommending that judicial discretion be limited, changing the "may admit" to a "shall admit" the evidence when a federal public official is involved.

Moreover, the recommendations of a Misogyny Report could extend to an inquiry into judicial handling of the case including discipline or education. The judge's opinion in *Johnson v. Trump* should be carefully reviewed: The judge's statement characterizing Johnson's experience and her complaint—"this simple battery appears to have lasted perhaps 10–15 seconds, Plaintiff has spent 29 pages and 115 paragraphs in the Complaint setting it forth," including "19 unrelated incidents involving women upon whom Defendant Trump allegedly committed nonconsensual acts, over the past four decades with differing circumstances."³⁰⁷ Further, the judge impugned her motives as "political": If

his server and the defendant's and plaintiff's relationships within the office. The testimony would be probative of his tendency to assume sexual access to subordinate females, thus corroborating the plaintiff's assertion that he sexually harassed her on the claimed occasion.

The application of the factors allows room for argument. For example, domestic violence could at first appear to lack similarity to charges of sexual harassment. However, an argument could be made, depending on the factual circumstances, that the defendant's power relationship to his subordinate shares many of the characteristics of the power relationship between a husband and wife, and therefore, the domestic violence may corroborate an alleged sexual harassment victim's claims.

305. For further discussion of Alva Johnson, *see supra* notes 139–50 and accompanying text. *Johnson v. Trump for President, Inc.*, No. 8:19-cv-00475, 2019 WL 2492122 (M.D. Fla. June 14, 2019).

306. *Johnson*, 2019 WL 2492122, at *1–3.

307. *Johnson*, 2019 WL 2492122, at *1–2. The judge continued,

Most of the incidents do not resemble the present allegation; some do. For example, Plaintiff hopes to prove and introduce at trial evidence that Defendant Trump 'was like an octopus' when groping one woman on a commercial flight in the early 1980s, or that 15 years before the instant claim he entered a dressing room where beauty contestants were unclothed. These allegations, salacious and in florid language, appear to come from media reports. Indeed, in attempting to set forth a cause of

she “wishes to make a political statement or bring a claim for political purposes, this is not the forum.”³⁰⁸ The judge’s failure to take allegations of sexual harassment seriously should be interrogated, especially when a judge is assigned to adjudicate the president who recently appointed him.

Finally, the practice of sealing court documents in cases involving the president might be explored. Cabining the problem of national security and focusing on problems of sexual misconduct, a Misogyny Report could recommend a statute that presumptively unseals all litigation involving a presidential candidate. This may have the potential to invade the privacy of those who have been involved in lawsuits with someone who becomes a president, but the court should be able to order inspection of the documents as in *Maxwell*.³⁰⁹ As with the subjects of NDAs, it may be questionable whether the public should know the “more salacious details about Donald Trump’s consensual sex life” or whether “as president, everything he does is grist for the public mill,”³¹⁰ but perhaps the public should be trusted to separate consensual acts from more troubling sexual misconduct when evaluating our political leaders.

CONCLUSION

The sexual misconduct allegations against Trump that have surfaced in various contexts need to be resolved and addressed if the United States is to make progress in combatting misogyny. There needs to be a renewed commitment to ending sexual violence and harassment and in achieving gender and sexual equality. While Trump and his supporters might complain that it is unfair to single him out, the president is a singular figure in our constitutional system and our national culture. Further, the president as tone-setter conveys what is acceptable in the nation.

Civil litigation and media publicity have been woefully unsatisfactory thus far. An investigation, either by Congress or some other body, and a resulting Report, with remedies, could provide the necessary reckoning.

action for simple battery, the Complaint cites approximately 40 different media reports or newspaper articles.

308. *Johnson*, 2019 WL 2492122, at *1.

309. See *Brown v. Maxwell*, 929 F.3d 41, 49–52 (2d Cir. 2019).

310. See *Neuborne*, *supra* note 285, at 438–39.