

**SEX, LIES, & VIDEOTAPES: DENIAL OF WRONGS AGAINST WOMEN**

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## SEX, LIES, &amp; VIDEOTAPES: DENIAL OF WRONGS AGAINST WOMEN

Laurie S. Kohn

*“He totally denies it . . . he says it didn’t happen.” With that, former President Donald Trump dismissed all allegations against then-Senate candidate Judge Roy Moore for sexual misconduct with minors. While in office and since then, Trump has repeatedly displayed the power of denial in the face of allegations of wrongdoing toward women. Trump is largely right that denial works. He is not alone in considering an accused’s denial as the end of the story, even in the face of strong contradictory evidence. In doing so, Trump merely echoes a dominant attitude in the United States. Our culture wants to believe the denials of men who are accused of doing bad things to women. The stark differences between the fates of high-profile men accused of committing wrongs against women who deny their wrongdoing publicly and those who admit to it highlight our culture’s preference for denials and the accompanying incentive structure that encourages denials and punishes admissions. Our legal system mirrors this cultural norm and enshrines denial. Our culture and legal system’s strong inclination toward denial, particularly in the face of wrongs against women regardless of the veracity of the allegations, disserves perpetrators, victims, and our society. It restricts opportunities for accountability, healing, apologies, forgiveness, and redemption. And it thereby enhances the likelihood of recidivism. Changing this cultural norm is a daunting task, especially a norm with deep roots in subordination of women and the discreditation of women’s experiences. This Article explores the incentives in our culture and legal system that encourage denials and disincentivize admissions with an eye toward creating pathways to accountability, apologies, healing, and rehabilitation that will better serve all.*

## INTRODUCTION

*“You’ve got to deny, deny, deny and push back on these women . . . If you admit to anything and any culpability, then you’re dead . . . You’ve got to be strong. You’ve got to be aggressive. You’ve got to push back hard. You’ve got to deny anything that’s said about you. Never admit.”<sup>1</sup>*

Advice to a friend, former President Donald Trump.

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<sup>1</sup> BOB WOODWARD, FEAR: TRUMP IN THE WHITE HOUSE 175 (2018).

“He totally denies it...he says it didn’t happen.” With that, former President Donald Trump dismissed all allegations against then-Senate candidate Judge Roy Moore for sexual misconduct with minors. He went on to also defend Robert Porter, his White House staffer accused of domestic violence, commenting simply that, “he says he’s innocent.” While in office and since then, Trump has repeatedly displayed the power of denial in the face of allegations of wrongdoing toward women. He has pointed to denials by those he supports as definitive proof of the falsity of allegations.

Trump expects the same benefit of the doubt from others who are privy to the numerous allegations against him regarding mistreatment of women. By flatly denying that he has ever groped, grabbed, or molested unwilling women, Trump fully anticipates he will be believed or, at the very least, that he will create sufficient doubt regarding the veracity of the allegations that he won’t be held accountable. When responding to allegations by E. Jean Carroll that he sexually assaulted her, Trump, after noting that she was not “[his] type,” asserted, “[s]he said that I did something to her that never took place. There was no anything. I know nothing about this nut job.”<sup>2</sup>

But Trump is largely right that denial works. He is not alone in considering an accused’s denial as the end of the story, even in the face of strong contradictory evidence. Trump merely echoes a dominant attitude in the United States. Our culture wants to believe the denials of men who are accused of doing bad things to women.<sup>3</sup>

This strong cultural norm is reflected in countless high-profile domestic violence cases and is a connecting thread apparent in the bulk of allegations that filled the news during the #MeToo moment and subsequently. Time and time again, news stories reflect allegations by women of male abuses of power, domestic violence, and sexual harassment. Time and time again, those stories cycle out of the news after denials. And time and time again, the accused perpetrators remain in positions of power, excel in their careers, and exceed expectations at the box office and on the playing field.

In rare instances, however, men admit to the wrongdoing. They do so, perhaps, because the proof against them is simply irrefutable — usually the result of concrete corroboration or the sheer number of consistent

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<sup>2</sup> Larry Neumeister, *Under Oath, Trump Hurling Insults at Woman Who Alleges Rape*, AP NEWS (Jan. 13, 2023, 7:46 PM EDT), <https://apnews.com/article/politics-legal-proceedings-donald-trump-new-york-lawsuits-fcc5f482a1eb99609376078422665bc8>.

<sup>3</sup> Denial is, of course, deployed in response to a wide range of wrongs — sexual misconduct by men against men for example — and otherwise. This Article, however, focuses on the particular use of denial by men in the face of wrongs against women — and how sexual politics, sexism, and male privilege particularly impact the use of denial and its effectiveness in the courtroom and the court of public opinion.

allegations by multiple victims. Or they may do so in an effort to get ahead of the scandal; or even, sometimes, men admit to wrongdoing when motivated by true remorse. When those admissions, which are occasionally accompanied by some form of an apology, are issued, the perpetrator's fate is generally far less secure than it would be had he denied. Most often, he is fired, is forced to relinquish his position, loses a role, or faces public backlash of some sort. Of course, however, some men maintain public support even after admissions of wrongs against women due to skepticism about sexual harassment as transgressive or presumptions about victim culpability and motives.

The overwhelmingly disparate fates of those men accused of wrongs against women who deny the wrongdoing publicly and those who admit to it highlight our culture's preference for denials and the accompanying incentive structure that encourages denials and punishes admissions. Although the case studies set forth in this Article focus on high-profile accused male perpetrators, the cultural norm cuts across class and race lines, influencing and affecting the rich and famous as well as the not-so-rich and famous.<sup>4</sup>

Our legal system in many ways mirrors this cultural norm and enshrines denial. In the face of criminal charges or civil litigation, our legal system counsels against admissions. Denials are routinized in the arraignment system and expected and advised in civil litigation. Of course, the plea bargain system has, in the last fifty years, provided incentives for criminal defendants to admit to wrongdoing. But as expressed even in its name, the admission is offered as a transaction — not because it is tantamount to accountability, nor because it conveys remorse. Moreover, although an in-court admission involves some kind of confession, a plea bargain is otherwise a quiet matter — far from a public hearing. Other procedural practices in criminal law offer additional attractive alternatives to guilty pleas.

These incentives toward and commitments to denial are in contradiction to our dominant religious teachings, mainstream morality, our child-rearing norms, and that which psychology tells us about recovery,

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<sup>4</sup> See generally, e.g., Alexandra Robbins & Nicole Asbury, *Many Teachers Said a Principal Sexually Harassed Them. He was Promoted.*, WASH. POST (Aug. 11, 2023, 5:19 PM EDT), <https://www.washingtonpost.com/education/2023/08/11/joel-beidleman-montgomery-county-principal/>; Donna St. George, *In a Prestigious High School Math & Science Program, Alumni Say #Me-Too*, WASH. POST (Mar. 1, 2018, 6:41 PM EST), [https://www.washingtonpost.com/local/education/in-a-prestigious-high-school-math-and-science-program-alumni-say-metoo/2018/03/01/b17f68ac-f1b6-11e7-b390-a36dc3fa2842\\_story.html](https://www.washingtonpost.com/local/education/in-a-prestigious-high-school-math-and-science-program-alumni-say-metoo/2018/03/01/b17f68ac-f1b6-11e7-b390-a36dc3fa2842_story.html); William Neuman, *Bronx Councilman is Accused of Serial Misconduct, Including Sexual Harassment*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/nyregion/andy-king-councilman-misconduct.html> (articles discussing sexual harassment and assault allegations denied by local principals, educators, and councilman, respectively).

rehabilitation, and redemption. Our humanity ensures that we will all do wrong at some point and in some way, whether it is big or small, once or innumerable times. Our legal system and our culture's strong inclination toward denial, particularly in the face of wrongs against women regardless of the veracity of the allegations, disservices perpetrators, victims, and our society. It restricts opportunities for accountability, healing, apologies, forgiveness, and redemption. And it thereby enhances the likelihood of recidivism.

Changing cultural norms is a daunting task, especially a norm with deep roots in subordination of women and the discreditation of women's experiences. But this Article seeks to explore the incentives in our culture and legal system that encourage denials and disincentivize admissions with an eye toward creating a pathway to admissions, apologies, and rehabilitation that will better serve all. Part I analyzes several high-profile allegations of wrongs against women, considering the accused perpetrators' denials or admissions and the resulting effects on their careers and on public opinion. In Part II, the Article considers how and why alleged male perpetrators are encouraged to deny wrongs against women. Next, in Part III, the Article turns to the civil justice system's disincentives toward admissions generally, looking specifically at medical malpractice and negligence claims. In doing so, the Article also takes a close look at the criminal justice system's relationship with accountability, admissions, and denials. At this point, in Part IV, the Article analyzes the impacts of encouraging denials in both the court of public opinion and the courts of law. Part V concludes by analyzing legal and nonlegal reforms, including restorative justice, that will allow for and even encourage a cycle of accountability in the form of fulsome admissions, apologies, rehabilitation, and perhaps even a pathway to redemption.

#### I. CASE STUDIES: DENIALS AND ADMISSIONS IN THE PUBLIC EYE

Analyzing allegations against high-profile perpetrators of wrongs against women offers insight into the impact and implications of denials on the public and the legal system. When male public figures deny inappropriate or criminal conduct, even in the face of staggering evidence to the contrary, the public generally continues to support them, thereby perpetuating their career successes. The stories of four men who were accused of wrongs against women that involved tangible proof of wrongdoing illustrate the salience of denial in American society and the infrequency and impact of apologies and admissions. Boxer Floyd Mayweather and actor Charlie Sheen offer examples of convicted perpetrators whose public denials facilitated their career triumphs. In contrast, the careers of Baltimore Raven Ray Rice and former Senator Al Franken reveal the career damage caused by deviating from the denial script, admitting wrongdoing, and issuing an apology. Their stories illustrate that publicly admitting a wrong, regardless of the sincerity of the apology and of the signs of penitence, risks permanently ending high-profile careers. All four

narratives convey the importance of changing the denial incentive structure both culturally and within our legal system.

#### A. Floyd Mayweather

Boxing champion Floyd Mayweather, Jr., who was the world's highest paid athlete for several years running,<sup>5</sup> has made headlines over the past three decades for his notorious life in and out of the ring. Famously gifted as a boxer and infamously aggressive in his romantic relationships, Mayweather's titles have outpaced his arrests; but both have garnered media attention.

Mayweather's violence has not been confined to the ring. Allegations of intimate partner violence, harassment, and assaults have followed Mayweather since 2001. Though Mayweather pleaded guilty to several charges of domestic violence over the years, he has universally denied responsibility and illogically challenged the veracity of all allegations.

In 2001, Melissa Brim, with whom Mayweather had a child, first accused Mayweather of assault. According to Brim, the two got into an argument and "Mr. Mayweather struck her in the face with a car door, pushed her into the car, and then proceeded to repeatedly punch her."<sup>6</sup> A few months later, Brim alleged that Mayweather had assaulted her yet again.<sup>7</sup>

Mayweather was prosecuted and pleaded guilty to two counts of domestic violence.<sup>8</sup> In exchange for his guilty plea, Mayweather was sentenced to two days of house arrest, a fine, community service hours, and a suspended period of incarceration.<sup>9</sup>

Josie Harris and Mayweather also had a relationship that was punctuated by allegations of violence, control, and chaos. In 2005, Mayweather was prosecuted for having assaulted Harris in 2003, yet, by the time of the trial, Harris had recanted her allegations and Mayweather was acquitted.<sup>10</sup> Criminal charges would later catch up with Mayweather in his relationship with Harris. Those charges emanated out of an incident in 2010, after the

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<sup>5</sup> See generally Kurt Badenhausen, *The Highest-Paid Athletes of the Decade: Mayweather, Ronaldo, and LeBron Dominate*, FORBES (Dec. 23, 2019, 10:00 AM EST), <https://www.forbes.com/sites/kurtbadenhausen/2019/12/23/the-highest-paid-athletes-of-the-decade-mayweatherronaldo-lebron-score/?sh=39f0c0e672d9> (noting that Floyd Mayweather earned \$115 million more than any other athlete from 2009 to 2019, for a total of \$915 million).

<sup>6</sup> Daniel Roberts, *The Trouble with Floyd Mayweather*, DEADSPIN (July 16, 2014, 7:06 PM), <http://deadspin.com/the-trouble-with-floyd-Mayweather-1605217498>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> The Associated Press, *Plus: Boxing; Suspended Sentence for Mayweather*, N.Y. TIMES (Mar. 30, 2002), <https://www.nytimes.com/2002/03/30/sports/plus-boxing-suspended-sentence-for-mayweather.html?smid=url-share>.

<sup>10</sup> Roberts, *supra* note 6.

couple had broken up.<sup>11</sup> According to court documents, Mayweather, fueled by jealous rage, assaulted and threatened her,<sup>12</sup> stating, “I’m going to kill you and the man you are messing around with.”<sup>13</sup> When police officers arrived at Harris’s residence in Nevada, they sent her to receive treatment for facial and arm injuries.<sup>14</sup>

The next day Mayweather turned himself in to the police, facing grand larceny and domestic violence charges.<sup>15</sup> Harris, for her part, left for California and filed for temporary protection order.<sup>16</sup> In Nevada, Mayweather was charged with two counts of coercion, one count of robbery, one count of grand larceny, one count of battery constituting domestic violence, and three counts of harassment.<sup>17</sup> Mayweather faced thirty-four years in state prison based on the charges.<sup>18</sup>

Mayweather eventually pleaded guilty to one count of misdemeanor battery domestic violence and nolo contendere to two counts of harassment in December 2011.<sup>19</sup> The judge sentenced Mayweather to ninety days in jail, stating “[n]o matter who you are, you have consequences to your actions when they escalate to this level of violence.”<sup>20</sup>

Despite his guilty pleas, Mayweather has repeatedly denied committing any acts of domestic violence. He has boasted that there are no pictures to confirm any allegations. In an interview on CNN, he stated “[o]nce again, no pictures. Just hearsay and allegations.”<sup>21</sup> In an interview on ESPN, Mayweather asserted “[i]f I really did what they say I did, as far as beating a woman or stomping a woman, I’m Floyd Mayweather, they would have brought pictures out instantly. Still no pictures. No nothing.”<sup>22</sup>

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<sup>11</sup> See generally Arrest Rep., Las Vegas Metro. Police Dep’t (Sept. 9, 2010).

<sup>12</sup> See *id.* at 1.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.*

<sup>16</sup> Temporary Restraining Order, Harris v. Mayweather, Case No. BF031865 (L.A. Cnty. Super. Ct. Sept. 14, 2010).

<sup>17</sup> Criminal Complaint, State of Nevada v. Mayweather, Case No. 10F17453X (Just. Ct., Las Vegas Twp. Nev., Sept. 15, 2010).

<sup>18</sup> The Associated Press, *Floyd Mayweather Jr. Pleads Guilty*, ESPN (Dec. 22, 2011, 3:35 PM ET), [http://www.espn.com/boxing/story/\\_/id/7376829/floyd-mayweather-jr-sentenced-90-days-jail-domestic-violence-plea](http://www.espn.com/boxing/story/_/id/7376829/floyd-mayweather-jr-sentenced-90-days-jail-domestic-violence-plea).

<sup>19</sup> Register of Actions, State of Nevada v. Mayweather, Case No. 10F17453X (Just. Ct., Las Vegas Twp.).

<sup>20</sup> The Associated Press, *supra* note 18.

<sup>21</sup> *Mayweather: No Pictures, No Proof*, CNN (Sept. 13, 2014), <https://www.cnn.com/videos/sports/2014/09/13/floyd-mayweather-on-domestic-violence.cnn>.

<sup>22</sup> Kevin Mitchell, *Floyd Mayweather: ESPN Report Fuels Media Storm Over his Violent Past*, THE GUARDIAN (Apr. 26, 2015, 6:00 PM EDT), <https://www.theguardian.com/sport/blog/2015/apr/26/floyd-mayweather-espn-report-violence>.



Referring to the 2010 domestic violence incident involving Harris, Katie Couric asked Mayweather in a televised interview if he felt that he was unfairly accused.<sup>23</sup> Mayweather responded:

Did I kick, stomp and beat someone? No, that didn't happen. I look you in the face and say, 'No, that didn't happen.' Did I restrain a woman that was on drugs? Yes, I did. So if they say that's domestic violence, then, you know what? I'm guilty. I'm guilty of restraining someone.<sup>24</sup>

Further, despite his multiple convictions for domestic violence, Mayweather has cashed in on his fame and boxing talent, rendering him one of the best-paid athletes ever. Earlier in his career, Mayweather typically earned "five-figure paydays" from his fights.<sup>25</sup> When Mayweather won his first boxing title in 1998, he earned \$150,000.<sup>26</sup> After guilty pleas to criminal assault and domestic violence, Mayweather's paydays only increased. During his first PPV fight in 2005, Mayweather earned \$3.2 million.<sup>27</sup> He went on to earn millions and break viewing records in subsequent fights.<sup>28</sup> Mayweather set a record when he earned more than \$70 million in a 2013 fight.<sup>29</sup>

As a result of the revenue he earned from a fight against Manny Pacquiao, Mayweather was named "the world's highest-paid athlete," a title he received for the third time in four years.<sup>30</sup> In 2017, *Forbes* estimated that Mayweather also made roughly \$30 million from endorsements over his career and from his merchandise.<sup>31</sup> Mayweather reported that he became a billionaire in August 2017.<sup>32</sup>

Despite conspicuous and numerous domestic violence charges, convictions, and accusations against Mayweather, professional boxing has

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<sup>23</sup> Steven Shapiro, *Floyd Mayweather on 'Fight of the Century'*, YAHOO NEWS (Apr. 14, 2015), <https://news.yahoo.com/floyd-mayweather-on--fight-of-the-century-145423614.html>.

<sup>24</sup> *Id.*

<sup>25</sup> Kurt Badenhause, *Floyd Mayweather Career Earnings Can Hit \$1 Billion With McGregor Fight*, FORBES (July 13, 2017, 11:01 AM EDT), <https://www.forbes.com/sites/kurtbadenhause/2017/07/13/floyd-mayweather-career-earnings-could-hit-1-billion-with-mcgregor-fight/>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Alan Dawson, *Retired Boxing Champion Floyd Mayweather Says He's Now a Billionaire*, BUSINESS INSIDER (Oct. 3, 2017, 4:51 AM EDT), <https://www.businessinsider.com/floyd-mayweather-now-a-billionaire-2017-10>.

never reprimanded or penalized him.<sup>33</sup> The Nevada State Athletic Commission in particular has the authority to respond to Mayweather's domestic violence.<sup>34</sup> While the Commission's rules do not explicitly address repercussions for acts of domestic violence, the Commission can suspend, revoke, or take other disciplinary action against a licensee who has violated the laws of Nevada.<sup>35</sup>

Despite his lengthy criminal record, the Commission has not invoked this rule against Mayweather.<sup>36</sup> After a Nevada court convicted and sentenced Mayweather for his 2010 violence against Josie Harris, the Commission permitted Mayweather to fight before he was to begin his jail sentence for the offense.<sup>37</sup> By contrast, at approximately the same time, the Commission suspended boxer Julio Cesar Chavez Jr. for nine months and revoked the license of boxer Joel Casamayor, both for testing positive for marijuana.<sup>38</sup> However, neither of these athletes came close to taking boxing by storm the way Mayweather did — where Mayweather retired from boxing with an undefeated 50-0 boxing record and having set multiple pay-per-view records,<sup>39</sup> Casamayor retired having been called “not Mayweather” by the media,<sup>40</sup> and Chavez Jr.'s “overrated” and “embarrassing” career left him unable to emerge from his father's shadow.<sup>41</sup> This differential treatment sends a powerful message about the value the industry assigns to women's bodily autonomy and safety, as well as the differential treatment athletes receive based on their professional success and value to the industry.

Neither the public nor the boxing industry has held Mayweather accountable for his domestic violence convictions; instead, on the basis of his public denials, his value to the boxing industry, and our admiration for his boxing talent, his pockets have been lined and we barely discuss his history as someone who has pleaded guilty to serial abuse.

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<sup>33</sup> See Roberts, *supra* note 6 (“What is unique about Mayweather is the degree to which the sport and media have insulated him from criticism.”).

<sup>34</sup> *Mission*, NEV. ATHLETIC COMM'N, <http://boxing.nv.gov/about/Mission/>.

<sup>35</sup> NEV. ADMIN. CODE § 467.885.

<sup>36</sup> Roberts, *supra* note 6.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Corinne Dorsey, *How Floyd Mayweather Jr. Retired with a \$1.5B Net Worth*, YAHOO FINANCE (Feb. 9, 2024), <https://finance.yahoo.com/news/floyd-mayweather-jr-retired-1-201312752.html?>

<sup>40</sup> Eric Raskin, *In an Ideal World, Casamayor Fights the 'Galaxxy Warrior' Next*, ESPN SPORTS (Mar. 23, 2008, 10:39 PM ET), [https://www.espn.com/sports/boxing/columns/story?columnist=raskin\\_eric&id=3308764](https://www.espn.com/sports/boxing/columns/story?columnist=raskin_eric&id=3308764).

<sup>41</sup> Brian Mazique, *Julio Cesar Chavez Jr. Should Retire, but if He Doesn't, 168 Pounds is His Best Division*, FORBES (May 10, 2017, 10:43 PM EDT), <https://www.forbes.com/sites/brianmazique/2017/05/10/julio-cesar-chavez-jr-should-retire-but-if-he-doesnt-168-pounds-is-his-best-division/>.

## B. Charlie Sheen

Charlie Sheen has entered multiple guilty pleas to domestic violence, but his public denials have allowed him to succeed in the media industry. Whether he is known for his early days as an actor in movies such as *Platoon*, *Ferris Bueller's Day Off*, and *Wall Street*, for his later roles in *Two and a Half Men* and *Anger Management*, or for his controversial media appearances in the last few years, Sheen has put himself into the national spotlight. Sheen's relationships with women, many of which include allegations of and convictions for mental, emotional, and physical abuse, also deserve attention. Despite his criminal convictions, Sheen has publicly denied the allegations and sought to discredit the victims, claiming they had ulterior motives or were untrustworthy.

Approximately five months into Brittany Ashland's relationship with Sheen, she claimed that during an argument he knocked her unconscious and split her lip when he slammed her onto the marble floor of his home.<sup>42</sup> She further claimed that he threatened to kill her unless she kept silent about the incident.<sup>43</sup> Sheen was arrested and charged with misdemeanor battery with serious injury on the basis of this incident.<sup>44</sup> Sheen pleaded no contest and received a one-year suspended sentence.<sup>45</sup>

On Christmas Day of 2009, Sheen was arrested on felony charges of second-degree assault and menacing, as well as a misdemeanor count of criminal mischief for attacking his then-wife Brooke Mueller.<sup>46</sup> Mueller said that after telling Sheen she wanted a divorce and custody of their children, Sheen became enraged, straddled her, grabbed her by the neck, held a knife to her throat, and threatened to kill her.<sup>47</sup> Police reports from the incident noted that Mueller had red marks on her neck and that there was a knife locked in the open position in Sheen's bag.<sup>48</sup> He pleaded guilty to a misdemeanor third-degree assault charge.<sup>49</sup>

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<sup>42</sup> *Sheen Pleads Not Guilty to Attacking His Girlfriend*, CHI. TRIB. (Feb. 25, 1997, 1:00 AM), [http://articles.chicagotribune.com/1997-02-25/news/9702260057\\_1\\_brittany-ashland-charlie-sheen-jeff-ballard](http://articles.chicagotribune.com/1997-02-25/news/9702260057_1_brittany-ashland-charlie-sheen-jeff-ballard).

<sup>43</sup> Carlin Miller, *Charlie Sheen & His Abusive Past: The Case of Ex-Girlfriend Brittany Ashland*, CBS NEWS (Dec. 29, 2009, 12:00 PM EST), <http://www.cbsnews.com/news/charlie-sheen-and-his-abusive-past-the-case-of-ex-girlfriend-brittany-ashland/>.

<sup>44</sup> *Misdemeanor Battery Charges Filed Against Charlie Sheen*, L.A. TIMES (Feb. 22, 1997, 12:00 AM PT), [http://articles.latimes.com/1997-02-22/local/me-31354\\_1\\_charlie-sheen](http://articles.latimes.com/1997-02-22/local/me-31354_1_charlie-sheen).

<sup>45</sup> Miller, *supra* note 43.

<sup>46</sup> Jo Piazza, *Charlie Sheen's Wife Says He Threatened to Have Her Killed*, CNN (Dec. 29, 2009, 4:44 PM EST), <http://www.cnn.com/2009/SHOWBIZ/TV/12/29/charlie.sheen.report/>.

<sup>47</sup> Decl. of Brooke Mueller at 8, *In re Marriage of Sheen*, No. BD534282 (L.A. Super. Ct. Feb. 28, 2011).

<sup>48</sup> Piazza, *supra* note 46.

<sup>49</sup> Caroline Black, *Charlie Sheen Dodges Jail Time for Assault on Wife Brooke Mueller*, CBS NEWS (Aug. 3, 2010, 2:32 PM),

Despite having pleaded guilty, Sheen publicly maintained his innocence. He denied being violent with any women, stating that his “passion is misinterpreted as anger.” But he admitted that he has a violent side “when it's needed to protect my family, absolutely. And it's not like anything you'll ever see.”<sup>50</sup> In a 2011 “20/20” interview, Sheen dismissed the allegations by women in his life, referring to them as “sad trolls.”<sup>51</sup> He further suggested Mueller wasn't reliable because she was using crack cocaine.<sup>52</sup> Despite the convictions, from 2012 to 2014, Sheen starred in FX's *Anger Management*.<sup>53</sup>

And what was the toll of these criminal convictions on Sheen's career? Was he black-balled from the industry? Unable to find work? After one high-profile violent incident with his then-wife Brooke Mueller, Sheen was offered a two-year contract to return to *Two and a Half Men*, at reportedly \$1.8 million per episode.<sup>54</sup> Sheen's career continued unscathed in spite of the seemingly endless stream of allegations and arrests until he committed the ultimate crime — calling his boss at CBS, Chuck Lorre, a “clown.”<sup>55</sup> With that, his career finally took a hit and he was fired from the show.<sup>56</sup>

However, Sheen has returned as Sheen and Chuck Lorre “are officially back in business.”<sup>57</sup> Sheen starred in the first season of Lorre's new

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<http://www.cbsnews.com/news/charlie-sheen-dodges-jail-time-for-assault-on-wife-brooke-mueller/>.

<sup>50</sup> *Charlie Sheen: 'I'm on a Quest to Claim Absolute Victory'*, CNN (Mar. 1, 2011, 11:29 AM EST), <http://www.cnn.com/2011/SHOWBIZ/02/28/charlie.sheen/index.html>.

<sup>51</sup> Martha Ross, *Charlie Sheen: What About His Violence Towards Women?*, MERCURY NEWS (Nov. 20, 2015, 5:26 AM), <https://www.mercurynews.com/2015/11/20/charlie-sheen-what-about-his-violence-towards-women/>.

<sup>52</sup> *Id.*

<sup>53</sup> Nicholas Hautman, *Charlie Sheen Through the Years: From 'Platoon' to 'Two and a Half Men' and Every Scandal in Between*, US WEEKLY (Mar. 8, 2023), <https://www.usmagazine.com/celebrity-news/pictures/charlie-sheen-through-the-years-two-and-a-half-men-scandals-more/>.

<sup>54</sup> In 2010, Sheen was the highest-paid actor in television when making \$1.8 million per episode. Alexia Fernández, *Charlie Sheen Says He Can No Longer Afford Child Support, Claims He Was 'Blacklisted' in Hollywood*, PEOPLE (Aug. 2, 2018, 7:52 AM EDT), <https://people.com/tv/charlie-sheen-claims-unable-to-afford-child-support/>.

<sup>55</sup> David Carr, *Insulting Chuck Lorre, Not Abuse, Gets Sheen Sidelined*, N.Y. TIMES (Feb. 27, 2011), <https://www.nytimes.com/2011/02/28/business/media/28carr.html>.

<sup>56</sup> *Id.*; see also *Charlie Sheen: 'I'm on a Quest to Claim Absolute Victory'*, *supra* note 50 (“Based on the totality of Charlie Sheen's statements, conduct and condition, CBS and Warner Bros. Television have decided to discontinue production of 'Two and a Half Men' for the remainder of the season.”).

<sup>57</sup> Joe Otterson, *Charlie Sheen Reunited With Chuck Lorre in HBO Max Series 'How to Be a Bookie'*, VARIETY (Apr. 18, 2023, 9:00 AM PT),

(HBO) Max show *How to Be a Bookie*.<sup>58</sup> The progression of their relationship is detailed in an article by *Deadline* — one that fails to even reference any of Sheen’s criminal convictions.<sup>59</sup>

Throughout Sheen’s career, neither the industry nor the public has seemed to look past Sheen’s denials — or they just didn’t care about the underlying abuse and guilty pleas. As long as Sheen entertains us and makes money for the industry, he is seemingly permitted to remain largely successful.

### C. Ray Rice

Former Baltimore Ravens player Ray Rice provides a telling counter-narrative to Mayweather and Sheen. Rice admitted to having assaulted his wife when he punched her into unconsciousness in an elevator. Affirmatively seeking therapy and speaking out about intimate partner violence generally, Rice sought to rehabilitate himself and his image following his admission. However, his football career came to a conclusive end in spite of, or possibly because of, his admission and contrition.

In 2014, Rice was arrested in Atlantic City on simple assault charges.<sup>60</sup> Rice was a six-year veteran in the NFL, considered one of the best running backs in the league,<sup>61</sup> and a key player for the Ravens.<sup>62</sup> It was reported that the couple had gotten into an altercation at the Revel Casino, resulting in what Rice’s attorney described as a “minor physical altercation.”<sup>63</sup> A few days later, however, the world saw video footage of Rice dragging his

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<https://variety.com/2023/tv/news/charlie-sheen-chuck-lorre-hbo-max-series-how-to-be-a-bookie-1235586971/>.

<sup>58</sup> Nellie Andreeva, *Charlie Sheen Reunited with Chuck Lorre, Joins Max Comedy Series ‘How To Be A Bookie’*, DEADLINE (Apr. 18, 2023, 8:47 AM), <https://deadline.com/2023/04/charlie-sheen-chuck-lorre-reunite-how-to-be-a-bookie-casting-1235328729/>.

<sup>59</sup> See generally *id.* (“Sheen and Lorre’s eight-year collaboration on . . . *Two and a Half Men* . . . came to an abrupt end in the spring of 2011 when Sheen’s public meltdown and verbal attacks on Lorre led to his firing.”).

<sup>60</sup> Louis Bien, *A Complete Timeline of the Ray Rice Assault Case*, SBINATION (last updated Nov. 28, 2014, 2:08 PM EST), <http://www.sbnation.com/nfl/2014/5/23/5744964/ray-rice-arrest-assault-statement-apology-ravens>; *Key Events in the Ray Rice Story*, CNN (last updated Sept. 16, 2014, 10:34 AM EDT), <http://www.cnn.com/2014/09/09/us/ray-rice-timeline/>.

<sup>61</sup> See Jim Corbett, *‘Little Ray’ Rice is Out of the Shadows*, USA TODAY (Jan. 29, 2013, 3:05 PM ET), <https://www.usatoday.com/story/sports/nfl/ravens/2013/01/29/ravens-ray-rice-emerges-from-ray-lewis-shadows/1874881/> (noting Rice as “the heart and soul of the Ravens’ offense” and describing his rushing stats as a “league best”).

<sup>62</sup> Bien, *supra* note 60.

<sup>63</sup> *Id.*; Justin Fenton, *Ravens Running Back Ray Rice Arrested After Incident in Atlantic City*, BALTIMORE SUN (Feb. 16, 2014, 12:00 AM), <https://www.baltimoresun.com/2014/02/16/ravens-running-back-ray-rice-arrested-after-incident-in-atlantic-city/>.

then-fiancée Janay Palmer’s limp body from the casino elevator.<sup>64</sup> Rice was charged with aggravated assault in the third degree with the intent to cause bodily injury.<sup>65</sup> Rice pleaded guilty and was offered a pretrial intervention program for first-time offenders that would clear him of charges within six months.<sup>66</sup> Under the program Rice was to be on probation for a year, during which time he was required to attend regular counseling for anger management.<sup>67</sup>

During a press conference several days after the plea, Rice publicly apologized for the incident and assured everyone that he was “working every day to be a better father, a better husband . . . a better role model. . . .”<sup>68</sup> When the NFL considered disciplining Rice for the incident, it initially imposed a lenient punishment: Rice was suspended for the first two games of the 2014 season and would be docked three game checks — a total of \$529,000.<sup>69,70</sup>

Subsequently, a second video from the elevator surfaced and immediately went viral.<sup>71</sup> In that video, the public witnessed the violence that rendered Janay Palmer unconscious. Ravens’ leadership claimed the new footage “changed things” and the Ravens quickly made the decision to terminate Rice’s contract.<sup>72</sup> Later that day, the NFL, claiming the video

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<sup>64</sup> Bien, *supra* note 60.

<sup>65</sup> Don Van Natta Jr., *Sources: Rice Told NFL He Hit Fiancée*, ESPN (Sep. 11, 2014, 4:52 PM ET), [http://www.espn.com/espn/otl/story/\\_/id/11509397/ray-rice-told-nfl-roger-goodell-june-had-hit-wife](http://www.espn.com/espn/otl/story/_/id/11509397/ray-rice-told-nfl-roger-goodell-june-had-hit-wife).

<sup>66</sup> Justin Fenton, *Ray Rice Pleads Not Guilty to Atlantic City Assault Charges*, BALTIMORE SUN (May 1, 2014, 7:40 PM) (last updated June 30, 2019, 3:19 PM), <https://www.baltimoresun.com/2014/05/01/ray-rice-pleads-not-guilty-to-atlantic-city-assault-charges/>.

<sup>67</sup> *Domestic Violence Charges Against Ray Rice Dismissed, Judge Confirms*, NBC NEWS (May 21, 2015), <https://www.nbcnews.com/storyline/nfl-controversy/domestic-violence-charges-against-ray-rice-dismissed-judge-confirms-n362581>.

<sup>68</sup> Pub. Apology Cent., *Ray Rice Apologizes in Press Conf. After Hitting Then Fiancée in Elevator*, YOUTUBE (May 23, 2014), [https://www.youtube.com/watch?v=Co0tO\\_ccBnE](https://www.youtube.com/watch?v=Co0tO_ccBnE).

<sup>69</sup> Peter King, *The Ray Rice Fallout*, SPORTS ILLUSTRATED (July 25, 2014), <https://www.si.com/nfl/2014/07/25/ray-rice-nfl-suspension-ravens>.

<sup>70</sup> Mark Maske, *NFL Says it had not Previously Seen new Ray Rice Video; Not Clear if Penalty Will be Revisited*, WASH. POST (Sept. 8, 2014, 10:52 AM EDT), <https://www.washingtonpost.com/news/sports/wp/2014/09/08/nfl-says-it-had-not-previously-seen-new-ray-rice-video-not-clear-if-penalty-will-be-revisited/>.

<sup>71</sup> Bien, *supra* note 60.

<sup>72</sup> *Id.*

had not been made available to them previously,<sup>73</sup> announced that Rice would be suspended indefinitely.<sup>74</sup>

Although Rice won his appeal against the NFL, lifting his indefinite suspension,<sup>75</sup> he never returned to football. Rice was not signed to a new team after the Ravens cut him in 2014, although he remained a free agent.<sup>76</sup> Rice undertook all of the steps necessary to comply with the court and the League's dictates: he completed his pretrial intervention program and had his charges dismissed and expunged in 2015.<sup>77</sup> As CNN reported in 2014, any team that pursued a contract with Rice risked exposure to criticism given his high-profile assault on his wife.<sup>78</sup> Pundits hypothesized that Rice would need to convince a team that having him as a player long-term would be worth more than the bad publicity the team might initially receive.<sup>79</sup>

In 2016, Rice pledged that if he got signed by a team and returned to the NFL that season, he would "donate his entire salary in 2016 to organizations with programs focusing on education and prevention of domestic violence and supporting survivors and their families."<sup>80</sup>

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<sup>73</sup> Matt Verderame, *NFL Responded to Latest TMZ Report Over Ray Rice Video*, SB NATION (Aug. 20, 2023, 10:45 AM EDT), <http://www.sbnation.com/nfl/2014/9/9/6126269/nfl-response-ray-rice-tmz-video/in/5191279>; Bien, *supra* note 60.

<sup>74</sup> Jason B. Hirschhorn, *Ray Rice Suspended Indefinitely by NFL*, SB NATION (Aug. 14, 2023, 2:46 PM EDT), <http://www.sbnation.com/nfl/2014/9/8/6122029/ray-rice-suspended-indefinitely-nfl-roger-goodell>; Bien, *supra* note 60.

<sup>75</sup> Adam Stites, *Ray Rice Could Be Reinstated This Season, According to Report*, SB NATION (Oct. 19, 2014, 10:01 AM), <http://www.sbnation.com/nfl/2014/10/19/7002419/ray-rice-suspension-reinstatement-indefinite-baltimore-ravens/in/5191279>.

<sup>76</sup> Tom Pelissero, *Ray Rice Pledges to Donate Salary to Domestic Violence Programs if Signed by NFL Team*, USA TODAY SPORTS (last updated July 22, 2016, 7:48 AM), <http://www.usatoday.com/story/sports/nfl/2016/07/21/ray-rice-domestic-violence-baltimore-ravens/87380652>.

<sup>77</sup> Austin Knoblauch, *Ray Rice Domestic-Violence Charge Dismissed by Judge*, L.A. TIMES (May 21, 2015, 8:49 AM), <http://www.latimes.com/sports/sportsnow/la-sp-sn-ray-rice-domestic-violence-case-dismissed-20150521-story.html>.

<sup>78</sup> Jill Martin & Steve Almasy, *Ray Rice Wins Suspension Appeal*, CNN (last updated Nov. 30, 2014, 12:59 AM EST), <http://www.cnn.com/2014/11/28/us/ray-rice-reinstated/>; *see also* Stites, *supra* note 75 ("As a controversial player, there would almost certainly be backlash for a team that signs Rice.").

<sup>79</sup> Stites, *supra* note 75.

<sup>80</sup> Pelissero, *supra* note 76.

In 2017, he partnered with the NFL<sup>81</sup> to create its annual social responsibility video for employees.<sup>82</sup> Although his story was only a small portion of this video, it reportedly included Rice talking about ““decision-making, how things happened in [his] life, how things unfolded.””<sup>83</sup> The video was slated to be released to schools and programs “to get people thinking about ‘healthy choices and healthy masculinity.’”<sup>84</sup> Rice said:

I want my story to be told. There's a lot of detail to it, but I want it to be told. I want to help as many people as I can. Domestic violence is a real issue. It is a real issue. It happens every twelve seconds as we speak. But if you think about it, the conversation wasn't really being had the way it is now because of my video. If I can explain to young men my worst decision, I know that I can save someone.<sup>85</sup>

Currently, Rice reportedly spends his time training in a suburban boot camp facility,<sup>86</sup> speaking to student athletes about his past,<sup>87</sup> and volunteer coaching.<sup>88</sup>

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<sup>81</sup> Matt Bonesteel, *Ray Rice's NFL Career is Likely Over, but he's Partnering with the League on new Educational Video*, WASH. POST (Apr. 18, 2017, 11:59 AM), <https://www.washingtonpost.com/news/early-lead/wp/2017/04/18/ray-rices-nfl-career-is-likely-over-but-hes-partnering-with-the-league-on-new-educational-video/>.

<sup>82</sup> Following the release of the videos “the NFL promised to do better, take gender violence seriously, and improve conditions for women within the league.” Press Release, Letitia James N.Y. State Att’y Gen., Att’y Gen. James Demands NFL Address Gender-Based Discrimination (Apr. 6, 2022), <https://ag.ny.gov/press-release/2022/attorney-general-james-demands-nfl-address-gender-based-discrimination>. But in early 2022, the *New York Times* released reports “describing a hostile workplace for women” from more than thirty former employees. *Id.* Attorney General James, representing a coalition of six attorney generals, warned NFL Commissioner Goodell “that the NFL must address its seeming continued inaction to address these issues.” *Id.*

<sup>83</sup> Bonesteel, *supra* note 81.

<sup>84</sup> *Id.*

<sup>85</sup> Doreen Gentzler & Christina Romano, *After ‘Worst Decision of My Life,’ Ray Rice Speaks Out About Domestic Violence*, NBC4 (last updated Oct. 18, 2016, 8:04 PM), <http://www.nbcwashington.com/news/local/After-Worst-Decision-of-My-Life-Ray-Rice-Speaks-Out-About-Domestic-Violence-397387581.html>.

<sup>86</sup> Josh Dean, *Ray Rice in Exile*, MEN’S J. (May 12, 2022, 3:20 PM EDT), <https://www.mensjournal.com/sports/ray-rice-exile>.

<sup>87</sup> *Id.*

<sup>88</sup> Jane McManus, *Ray Rice Speaks at N.J. Prep School About ‘14 Domestic Violence Incident*, ESPNW.COM (Apr. 3, 2017, 9:12 PM EST), [http://www.espn.com/nfl/story/\\_/id/19071501/ray-rice-speaks-don-bosco-prep-players-domestic-violence-incident](http://www.espn.com/nfl/story/_/id/19071501/ray-rice-speaks-don-bosco-prep-players-domestic-violence-incident).



In the end, Rice had no choice but to admit his wrongdoing. Unlike many other perpetrators, his actions were caught unambiguously on videotape.

Unlike Mayweather and Sheen, Rice did not try to justify or rationalize his actions. After his initial not guilty plea, he apologized and showed remorse for his decisions and actions. In this way, Rice also provides a different storyline than Mayweather or Sheen. His is a storyline that led to a broken career — by all accounts, permanently so.

#### D. Former Senator Al Franken

Former Senator Al Franken's storyline is more consistent with Rice's, reflecting significant career consequences following apologies for documented wrongs against women. In 2006, Al Franken was in the midst of his career as a comedian and as a long-standing member of the *Saturday Night Live* writing team in which he would often play overly-forward or jerkish characters for laughs.<sup>89</sup> In his role as a sketch comedian, Franken toured periodically with the U.S.O. to perform with other comedians and performers for soldiers as part of a wartime morale initiative.<sup>90</sup> In late 2006, Franken began one such U.S.O. tour the Middle East.<sup>91</sup> His co-performer was conservative talk-show host Leeann Tweeden.<sup>92</sup> From an outsider's perspective, the tour went smoothly and ended in December of 2006.<sup>93</sup>

In 2008, Franken was elected to the Senate as a Democrat from Minnesota. During his tenure as a senator, Franken earned a reputation for his wit and sharp criticism of the Trump administration.<sup>94</sup> He also garnered a positive track record with feminist groups for his creation of a bill that would make illegal the mandatory arbitration of workplace sexual harassment claims.<sup>95</sup> By 2017, political speculators began circulating Franken's name as a possible challenger to Trump in the 2020 election cycle.<sup>96</sup>

However, Franken's fortunes changed on November 16, 2017, when Tweeden wrote an op-ed entitled "Senator Al Franken Kissed and Groped Me Without My Consent, And There's Nothing Funny About It." In it, she alleged that when she and Franken were on their U.S.O. tour together, Franken devised a sketch in which he would kiss her.<sup>97</sup> She alleged that

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<sup>89</sup> Jane Mayer, *The Case of Al Franken*, NEW YORKER (July 22, 2019), <https://www.newyorker.com/magazine/2019/07/29/the-case-of-al-franken>.

<sup>90</sup> *Id.*

<sup>91</sup> Leeann Tweeden, *Senator Al Franken Kissed & Groped Me Without My Consent, and There's Nothing Funny About It*, KABC (Nov. 16, 2017, 6:40AM), <https://www.kabc.com/2017/11/16/leeann-tweeden-on-senator-al-franken/>.

<sup>92</sup> *Id.*

<sup>93</sup> Mayer, *supra* note 89.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Tweeden, *supra* note 91; Mayer, *supra* note 89.

when they were alone backstage, Franken insisted they rehearse the sketch, at which point he forcefully kissed her.<sup>98</sup> She also alleged that Franken touched her without her consent a second time, when the two were on a plane home from the tour.<sup>99</sup> Tweeden alleged that she had fallen asleep on the flight and Franken used the opportunity to take a photograph of himself mockingly groping her sleeping body over her Kevlar vest.<sup>100</sup>

The following day Franken responded with a lengthy handwritten apology in which he reaffirmed his dedication to taking women's claims of sexual harassment and assault seriously.<sup>101</sup> He characterized his behavior as a joke made with the intention of a comedic routine, but which had the impact of making Tweeden feel violated, for which he apologized.<sup>102</sup> "The intentions behind my actions aren't the point at all," Franken said. "It's the impact these jokes had on others that matters. And I'm sorry it's taken me so long to come to terms with that."<sup>103</sup> While most of the apology centered on Tweeden's feelings about Franken's alleged behavior, Franken maintained a modicum of skepticism about the events, asserting that he didn't quite remember the rehearsal for the skit as Tweeden did.<sup>104</sup>

Tweeden responded to the letter the next day during her appearance on the television show *The View*, where she acknowledged Franken's apology and clarified that she was not asking Franken to step down from his elected position.<sup>105</sup> "He fessed up to it and . . . realized that it's never funny," she said, acknowledging Franken's contrition.<sup>106</sup>

In the following three weeks, seven more women accused Franken of inappropriate sexual behavior.<sup>107</sup> Franken made public statements that he did not recall any of the incidents alleged by the other women and not

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Max Greenwood, *Franken Sent a Letter to Woman who Accused him of Groping*, THE HILL (Nov. 17, 2017, 8:17 PM ET), <https://thehill.com/home-news/senate/360996-franken-sent-a-letter-to-woman-who-accused-him-of-groping/>.

<sup>102</sup> *Al Franken Apologizes for Allegedly Groping Woman*, POLITICO (Nov. 16, 2017, 11:20 AM EST), <https://www.politico.com/story/2017/11/16/full-text-al-franken-apologizes-for-allegedly-groping-woman-244978>.

<sup>103</sup> *Id.*

<sup>104</sup> Mayer, *supra* note 89, ¶ 27.

<sup>105</sup> *Id.* at ¶ 2.

<sup>106</sup> *The Last Word with Lawrence O'Donnell: Mueller Subpoenas Trump Campaign*, (MSNBC television broadcast Nov. 17, 2017) (on file at <https://www.msnbc.com/transcripts/the-last-word/2017-11-17-msna1039946>).

<sup>107</sup> The behaviors alleged ranged from grabbing their buttocks during photos, lingering on a woman's waist, attempting to kiss an unwilling recipient, grabbing someone's breasts, and propositioning someone for sex. See Mallory Shelbourne, *Al Franken's Swift Fall: A Timeline*, THE HILL (Dec. 7, 2017, 12:10 PM ET), <https://thehill.com/homenews/senate/363759-al-frankens-swift-fall-a-timeline/>; Mayer, *supra* note 89, ¶ 5.

heard of them prior to Tweeden’s accusation “firsthand, secondhand, or thirdhand,”<sup>108</sup> but felt bad that any of the accusers “came away from our interaction feeling disrespected.”<sup>109</sup> Franken flatly denied the allegation that he propositioned anyone for sex.<sup>110</sup> One accuser alleged that Franken attempted to kiss her after a radio taping in 2006 and that after the attempted kiss he had stated, “it’s my right as an entertainer.”<sup>111</sup> Franken denied the account in stronger-than-usual terms, stating that the “allegation is categorically not true and the idea I would claim this is my right as an entertainer is preposterous.”<sup>112</sup>

Franken released an apology in which he said he “feel[s] terribly that [he’s] made some women feel badly.”<sup>113</sup> He also suggested that some of his conduct might have been misjudged, citing that he’s a “warm person; I hug people.”<sup>114</sup> Overall, however, he expressed contrition, acknowledging that “I crossed the line for some women — and I know that any number is too many.”<sup>115</sup> He further extended an apology to his constituents for “putting them through this” and stated his commitment to regain their trust.<sup>116</sup>

Republicans quickly focused on the allegations, calling for an ethics committee investigation into the accusations.<sup>117</sup> Conservative TV personality Sean Hannity referred to Franken’s behavior as “disgusting” and praised Tweeden for coming forward.<sup>118</sup> Then-President Trump, in response to the photograph of Franken and Tweeden, tweeted, “The Al Frankenstein (sic) picture is really bad, speaks a thousand words. Where do his hands go in pictures 2, 3, 4, 5 & 6 while she sleeps?”<sup>119</sup>

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<sup>108</sup> Mayer, *supra* note 89, ¶ 83.

<sup>109</sup> Shelbourne, *supra* note 107, ¶ 12.

<sup>110</sup> See *Sen. Al Franken’s Accusers and Their Allegations Against Him*, ABC NEWS (Dec. 6, 2017, 3:51 PM), <https://abcnews.go.com/US/sen-al-frankens-accusers-accusations-made/story?id=51406862>.

<sup>111</sup> Laura McGann, *The Still-Raging Controversy Over Al Franken’s Resignation, Explained*, VOX (May 21, 2018, 6:20 AM EST), <https://www.vox.com/2018/5/21/17352230/al-franken-accusations-resignation-democrats-leann-tweeden-kirsten-gillibrand>.

<sup>112</sup> Shelbourne, *supra* note 107, ¶ 31.

<sup>113</sup> Brandon Conrads, *Franken Pledges to Regain Trust in Thanksgiving Apology*, THE HILL (Nov. 23, 2017, 7:02 PM ET), <https://thehill.com/home-news/senate/361696-franken-pledges-to-regain-trust-in-thanksgiving-apology/>.

<sup>114</sup> *Id.* at ¶ 7.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at ¶ 4.

<sup>117</sup> See Jordain Carney, *McConnell: Ethics Comm. Should Review Franken Allegations*, THE HILL, (Nov. 16, 2017, 11:46 AM EST), <https://thehill.com/blogs/floor-action/senate/360680-mcconnell-ethics-committee-should-review-franken-allegations/>.

<sup>118</sup> Mayer, *supra* note 89, ¶ 72.

<sup>119</sup> Gregory Korte, *Trump Tweets Broadside Against Al Franken: ‘Where Do His Hands Go?’*, USA TODAY (last updated Nov. 17, 2017, 9:58 AM EST),

Senate colleagues on Franken's side of the aisle responded cautiously. Franken's statements were lambasted as insufficiently contrite.<sup>120</sup> With the Roy Moore controversy in full swing, Democrats felt they would be met with scrutiny and criticism for castigating Moore and staying silent on Franken.<sup>121</sup> On December 1, seven female Democrat senators met with Senator Charles Schumer to demand that he seek Franken's resignation.<sup>122</sup> "Enough is enough," Senator Gillibrand, who led the charge against Franken, said on Facebook.<sup>123</sup> "While it's true that his behavior is not the same as . . . Roy Moore, or Harvey Weinstein, or President Trump, it is still unquestionably wrong, and should not be tolerated."<sup>124</sup> On December 6, following the final accusation against Franken, Senator Gillibrand formally demanded his resignation.<sup>125</sup> Thirty-six Democratic senators joined in the demand by the end of the day.<sup>126</sup> The following day, Franken resigned.<sup>127</sup>

In his resignation speech, Franken continued to make the distinction between his actions and how his accusers felt about those actions. "Some of the allegations against me simply are not true. Others, I remember very differently . . . I also wanted to be respectful of the broader conversation, because all women deserve to be heard and their experiences taken seriously . . . I also think it gave some people the false impression that I was admitting to [something] I haven't done," said Franken.<sup>128</sup> He also juxtaposed the pressure to resign from his own party with the support Roy Moore received from the Republican party.<sup>129</sup>

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<https://www.usatoday.com/story/news/politics/2017/11/16/trump-tweets-broad-side-against-al-franken-where-do-his-hands-go/873284001/>.

<sup>120</sup> *Id.* at ¶ 4.

<sup>121</sup> *Id.* at ¶ 7-8.

<sup>122</sup> *Id.*

<sup>123</sup> Martin Pengelly, *Al Franken Rules Out Senate Run Against Gillibrand, Who Led Push to Remove Him*, THE GUARDIAN (Oct. 31, 2021, 12:44 EST), <https://www.theguardian.com/us-news/2021/oct/31/al-franken-rules-out-run-against-kirsten-gillibrand#:~:text=2%20years%20old-,Al%20Franken%20rules%20out%20Senate%20run%20against%20Gillibrand,led%20push%20to%20re-move%20him&text=Al%20Franken%20on%20Sunday%20ruled,over%20allegations%20of%20sexual%20misconduct>.

<sup>124</sup> Mayer, *supra* note 89, ¶ 104.

<sup>125</sup> *Id.* at ¶ 103; *see also* Shelbourne, *supra* note 107, ¶ 33.

<sup>126</sup> Mayer, *supra* note 89, ¶ 112.

<sup>127</sup> Shelbourne, *supra* note 107, ¶ 41.

<sup>128</sup> Amber Phillips, *Al Franken's Defiant, Unapologetic Resignation Speech Annotated*, WASH. POST (Dec. 7, 2017, 12:58 PM EST), <https://www.washingtonpost.com/news/the-fix/wp/2017/12/07/al-frankens-defiant-unapologetic-resignation-speech-annotated/>.

<sup>129</sup> Shelbourne, *supra* note 107.

Following a period of isolation, Franken reemerged into the public sphere with the launch of his Podcast, “The Al Franken Podcast,” which ran its debut episode on May 14, 2019.<sup>130</sup>

Franken began a nationwide standup tour called “The Only Former U.S. Senator Currently on Tour” in September 2021.<sup>131</sup> While he committed not to challenging Senator Gillibrand for a seat in the Senate, Franken has called the prospect of returning to politics “tempting.”<sup>132</sup> “Who knows?” said Franken, punctuating his remark, “I’m only 70.”<sup>133</sup>

Al Franken’s story differs from the other narratives in several critical respects. First, he neither fully denied nor fully admitted to the allegations. Franken tried to walk a line between expressing his respect for allowing women to report misconduct, his contrition for making people feel uncomfortable, and defending his reputation by suggesting the facts may have been different from the way they were expressed and also fully denying some of the more serious and unsubstantiated allegations. Second, although Franken did not issue a flat denial, in retrospect, he questioned his failure to do so and its impact — one that he perceived to be unfair — on his career. Third, because his profession as a comedian with assets allowed him to re-launch his career without reliance on industry support or applying for employment, his return had a greater chance of success after contrition than Rice’s. Finally, Franken, as opposed to Rice, enjoys financial, social, and racial capital as a relatively affluent white politician.

## II. WHAT MAKES MEN’S DENIALS OF WRONGS AGAINST WOMEN SO APPEALING?

Denial by men of wrongs against women is woven into the fabric of our national culture. It also happens to be expedient, effective, and easier than the alternative — for both the wrongdoer and the general public. Denial of allegations of men doing bad things to women is also consistent with prevailing assumptions about gender, credibility, and vulnerability. Taken together, denial of such wrongs appears all but irresistible. This Part considers those powerful incentives in our culture and how they operate in this context.

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<sup>130</sup> The Takeout, *Humor Me: Comedian and Former Senator Al Franken*, CBS NEWS (Apr. 28, 2022), <https://www.cbsnews.com/news/al-franken-ukraine-senate-american-politics-the-takeout/>.

<sup>131</sup> See George Lenker, *Former US Sen. Al Franken Talks Political Downfall, Return to Comedy Before Northampton Show*, MASSLIVE (Sept. 13, 2021, 5:02 AM), <https://www.masslive.com/news/2021/09/former-us-sen-al-franken-talks-political-downfall-return-to-comedy-before-northampton-appearance.html>.

<sup>132</sup> Pengelly, *supra* note 123; Wash. Post Live, *Al Franken Discusses his New Comedy Tour, Current Events and More (Full Stream 2/9)*, YOUTUBE (Feb. 9, 2022), <https://www.youtube.com/watch?v=-kl02FplvXo>.

<sup>133</sup> Wash. Post Live, *supra* note 132.

A. *Denial as a Prevailing Narrative in Trump's America*

Denial as a strategy has become more common since Donald Trump personally deployed it during the 2016 election and his presidency. *The New York Times* pointed out that denial is “increasingly the modus operandi in the age of Donald Trump, regardless of the accusations at hand: Don’t engage with the specifics, just deny, deny, deny.”<sup>134</sup> On the campaign trail, as women raised sexual assault allegations against him, Trump baldly stated: “Every woman lied when they came forward to hurt my campaign . . . Total fabrication. The events never happened. Never.”<sup>135</sup> This statement was typical of his response to all allegations against him, although denials were often followed by threats of legal action against his accusers.<sup>136</sup> Despite these accusations, Donald Trump won the election and nearly won reelection. Although Trump is no longer in the White House, his denials regarding allegations of malfeasance against women still permeate the news cycle.

Since June 2019, Trump has been denying the allegations of E. Jean Carroll, who alleged he sexually assaulted her at Bergdorf Goodman in New York City in the mid-1990s. His denials have been strong and relentless. Only a few hours after Carroll first told her story on TV in 2019, Trump, sitting in the Oval Office, said: “Number one, she’s not my type. Number two, it never happened.”<sup>137</sup> In her 2022 lawsuit,<sup>138</sup> Carroll detailed causes of action for battery and defamation. Trump sat for a deposition in which he doubled-down in his denial: “She said that I did something to her that never took place. There was no anything. I know nothing about this nut job.”<sup>139</sup> He also assured the public that he would “sue her after this is over,” claiming that Carroll was calling him into court over “a complete scam” because she “was promoting a really crummy book.”<sup>140</sup> Trump also let his public denials remain the only words he consented to

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<sup>134</sup> Ed. Bd., *Why America Needs to Hear Brett Kavanaugh's Accuser*, N.Y. TIMES, Sept. 17, 2018, <https://www.nytimes.com/2018/09/17/opinion/kavanaugh-allegations-blasey-ford.html>.

<sup>135</sup> Reena Flores, *Donald Trump Threatens to Sue Sexual Assault Accusers After Election*, CBS NEWS (last updated Oct. 22, 2016, 8:26 PM), <https://www.cbsnews.com/news/donald-trump-threatens-to-sue-sexual-assault-accusers-after-election/>.

<sup>136</sup> *Id.*

<sup>137</sup> Jordan Fabian & Saagar Enjeti, *EXCLUSIVE: Trump vehemently denies E. Jean Carroll allegation, says 'she's not my type'*, THE HILL (June 24, 2019, 6:43 PM EST), <https://thehill.com/homenews/administration/450116-trump-vehemently-denies-e-jean-carroll-allegation-shes-not-my-type/>.

<sup>138</sup> Complaint at 1, *Carroll v. Trump*, S.D.N.Y. (2022) (No. 22-cv-10016-UA), 2022 WL 19826795.

<sup>139</sup> Neumeister, *supra* note 2.

<sup>140</sup> *Id.*

utter on the subject of her allegations, refusing to participate in the civil case.<sup>141</sup>

Trump consistently deployed the denial defense in the face of allegations of wrongdoing against women by his political allies and friends such as Roy Moore and Rob Porter as discussed above, though his response to the allegations against Franken stands in sharp contrast. When Porter left the White House amidst domestic violence allegations, without any signs of exculpation, Trump allegedly considered bringing Porter back to the White House a month or so later.<sup>142</sup>

### B. Denial Works

Denial is so expedient that it has become an industry. Reputation management and reputation restoration services are increasingly in demand. Best practices counsel that when the evidence against an individual is scant or unreliable, denials are recommended regardless of their veracity.<sup>143</sup> Reputational management theory also suggests that blame-shifting may be more effective than outright denial in some cases, because this tactic provides “a target for negative feelings the audience may have.”<sup>144</sup> One often sees denial and blame-shifting deployed in tandem, such as in the narratives of Charlie Sheen, Floyd Mayweather, and a range of Donald Trump allegations.

Denial is a critical device in the toolkit of reputational management agencies. Image restoration theory recognizes five primary strategies that individuals can use to repair their reputation following a scandal or a public recognition of wrongdoing. The first in that list is denial.<sup>145</sup>

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<sup>141</sup> The Associated Press, *Trump Rejects Last Chance to Testify at New York Civil Trial*, CBS NEWS (May 7, 2023, 8:30 PM EST), <https://www.cbsnews.com/news/trump-lawsuit-e-jean-carroll-trump-will-not-testify-rape-defamation/>; see also Adam Reiss & Darih Gregorian, *Trump's lawyers won't present defense witnesses in trial over E. Jean Carroll rape allegation*, NBC NEWS (May 3, 2023, 2:58 PM EST), <https://www.nbcnews.com/politics/donald-trump/trump-wont-put-defense-case-rape-trial-attorney-says-rcna82712>.

<sup>142</sup> Maggie Haberman, *Trump Talks of Bringing Back Rob Porter, Aide Accused of Spousal Abuse*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/us/politics/trump-rob-porter.html>.

<sup>143</sup> William L. Benoit & Robert S. Hanczor, *The Tonya Harding Controversy: An Analysis of Image Restoration Strategies*, 42 COMM'N Q. 416, 419 (1994) (explaining that any form of denial, if accepted by the audience, should help restore the rhetor's image); Tyler Johnson, *Deny and Attack or Concede and Correct? Image Repair and the Politically Scandalized*, 17 J. POL. MKTG., 213, 217 (Aug. 2015) (should denial be accepted, “damage to the accused's reputation . . . should be diminished, if not eradicated”).

<sup>144</sup> Benoit & Hanczor, *supra* note 143, at 419.

<sup>145</sup> Catherine A. Sheldon & Lynne M. Sallot, *Image Repair in Politics: Testing Effects of Communication Strategy and Performance History in a Faux Pas*,

## C. Denial is Easier

Our society also encourages denial by celebrity wrongdoers because it is easier and serves the audience and fans well personally. Denial allows us to avoid complicated, ambivalent, or negative feelings about those we revere and about ourselves. This is particularly true in the context of celebrities, whose denials are more public and impactful expressively, but is also relevant in the context of our peers and family. We look up to celebrities, project qualities upon them, and rely upon them to remain worthy of our admiration.<sup>146</sup>

We are inclined to dismiss negative facts about and accept the denials of celebrities we like so we can maintain our admiration and enjoy their talents.<sup>147</sup> Interpersonally we are also inclined to disbelieve negative information about people we admire due to confirmation bias.<sup>148</sup> Denial is tidier than having to contend with messy facts that contradict our impressions. Denial permits us to look away from vulnerabilities and see only strengths.

Denial also allows us to avoid judging our own behavior. If we must consider a celebrity's actions against women as wrong, then it may force us to contend with our own behavior. When a public figure such as journalist John Hockenberry characterizes the manifold allegations against him of sexual harassment as merely "improper, failed, and awkward attempts at courtship,"<sup>149</sup> then we can also see our own actions as similarly benign.

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21 J. PUB. RELS. RSCH. 25, 26 (2009) ("denial, involving simple denial or shifting blame; evasion of responsibility, such as provocation, defeasibility, accident, and good intention; reducing offensiveness of the event, including bolstering, minimization, differentiation, transcendence, attacking the accuser, and compensation; corrective action to solve the problem or prevent reoccurrence; and mortification, outright apology.").

<sup>146</sup> See, e.g., Jeremy D. Holden, *Why We're So Forgiving of Celebrities*, HUFFPOST (last updated Dec. 30, 2012), [https://www.huffpost.com/entry/celebrity-book\\_b\\_2002806](https://www.huffpost.com/entry/celebrity-book_b_2002806) ("When we form a social contract with a celebrity, we are tricked by our sub-conscious into believing that we know that person intimately, whereas in fact our impression is being formed by remote snippets of information we've processed . . . we refuse to be swayed from it, whatever inconvenient facts arise to contradict it.").

<sup>147</sup> See generally, CLAIRE DEDERER, *MONSTERS: A FAN'S DILEMMA* (2023) (discussing how we should view the art of those who transgress).

<sup>148</sup> See generally, Elizabeth Kolbert, *Why Facts Don't Change our Minds: New Discoveries about the Human Mind show the Limitations of Reason*, THE NEW YORKER (Feb. 19, 2017), <https://www.newyorker.com/magazine/2017/02/27/why-facts-dont-change-our-minds>.

<sup>149</sup> John Hockenberry, *Exile*, HARPER'S MAG. (Oct. 2018), <https://harpers.org/archive/2018/10/exile-4/>. See generally Suki Kim, *Public-Radio Icon John Hockenberry Accused of Harassing Female Colleagues*, THE CUT (Dec. 1,



*D. Denial of Wrongs Against Women is Consistent with Gender Norms*

The act of denial is also, as Donald Trump suggested, wrapped up in masculinity. Admitting wrongdoing — especially when accused by a woman — can feel and be perceived as weak. As one commentator describes, “[i]t is often difficult to recognize our own misbehavior, and it is embarrassing to admit that we have acted wrongly. Taking responsibility cedes control, creates vulnerability, and can be a hit to self-image.”<sup>150</sup> Just as those accused do not want to reveal vulnerabilities, images of masculinity also lead the public to seek and accept their denials. Vulnerable men contradict our visions of true maleness.<sup>151</sup>

Incentivizing denials by men of their wrongs against women also is consistent with and perpetuates the credibility discount our culture imposes on women — especially regarding allegations against powerful men. As one scholar explained, “[i]ndeed, credibility discounting stands on its own as an essential aspect of the female experience. Doubt, skepticism, and trivializing are familiar phenomena to women.”<sup>152</sup> Men’s denials of harms against women allow us to play out the all-too-familiar dynamic of a woman’s narrative being doubted, her allegations being pilloried, and her suffering more harm for having made the allegations in the first place.

Social media has made lodging allegations particularly fraught for women and has easily weaponized denials into attacks. The wildfire of social media condemnation of Amber Heard in the aftermath of the Johnny Depp civil verdict in summer 2022 illustrates just how aggressive and powerful social media can be in seeking to silence women who speak up.<sup>153</sup> This cycle is mutually reinforcing, since “[c]redibility discounts and

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2017), <https://www.thecut.com/2017/12/public-radio-icon-john-hockenberry-accused-of-harassment.html>.

<sup>150</sup> Lesley Wexler et al., *#MeToo, Time’s Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 75 (2019).

<sup>151</sup> See Andrew Reiner, *How Men Can Save Relationships by Learning to be Vulnerable*, WASH. POST (Aug. 2, 2022, 9:00 AM EST), <https://www.washingtonpost.com/wellness/2022/08/02/masculinity-men-emotions/> (noting that vulnerability is considered a feminine trait and that men are discouraged from becoming vulnerable for fear of appearing weak or unattractive).

<sup>152</sup> Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing their Experiences*, 167 U. PA. L. REV. 399, 460 (2019).

<sup>153</sup> See generally Deborah Epstein & Ray Epstein, *How Social Media Ensures that No One Hears Amber Heard*, THE NATION (Nov. 30, 2022), <https://www.thenation.com/article/society/how-social-media-ensures-that-no-one-hears-amber-heard/>; see also Ed. Bd., *Why America Needs to Hear Brett Kavanaugh’s Accuser*, *supra* note 134 (“[T]here is no upside for women who come forward with stories of sexual harassment or assault, especially when the accused is a famous or powerful man. It doesn’t matter how credible the story is. Simply by telling it, a woman can expect to be pilloried in the press and suffer far worse on social media, if not in real life.”).

experiential trivialization harm women in an abundance of ways — up to and including the supremely destabilizing process of prompting women to question the truth of their own experience.”<sup>154</sup> One of the reasons we valorize men’s denials of wrongs against women is because those denials reinforce our cultural assumption that women are untrustworthy and opportunistic.<sup>155</sup>

All of these forces conspire to create an ecosystem in which denials are far more attractive than admissions — for both the perpetrator but also for their fans. The mutually reinforcing system of denials in the context of wrongs against women sends a powerful message about allegations of such malfeasance and further incentivizes denials.

### III. THE LEGAL SYSTEM DISCOURAGES FULSOME ADMISSIONS AND RESPONSIBILITY-TAKING

Our legal system similarly discourages fulsome admissions, apologies, and responsibility-taking. This section considers the incentives in the civil and criminal justice systems for denials. These legal incentives also permeate American culture, further encouraging individuals in situations vulnerable to litigious responses to deny or remain silent.

#### A. *The Civil Legal System Incentivizes Denials or Silence*

Young drivers learn to stay silent after an accident as early as they are taught to perform a three-point turn.<sup>156</sup> No one expects to hear a doctor take responsibility for a botched surgery or a mistaken prescription. A recent study of three hundred physicians revealed that seventy percent

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<sup>154</sup> Epstein & Goodman, *supra* note 152, at 453.

<sup>155</sup> See Jaclyn Friedman, *Deadly silence: what happens when we don't believe women*, THE GUARDIAN (Jan. 21, 2020, 4:15 AM EST), <https://www.theguardian.com/lifeandstyle/2020/jan/21/what-happens-when-we-dont-believe-women> (“[S]ocial researchers have long demonstrated that it’s not just that we hold women to much higher standards than we do men before we believe them. It’s more perverse than that: we *prefer* not finding women credible. As a culture, we hate to believe women, and we penalize them for forcing us to do so.”).

<sup>156</sup> See *Should You Admit Fault in a Car Accident?*, MORELLI L. FIRM, <https://www.morellilaw.com/faqs/should-you-admit-fault-in-a-car-accident/> (last visited Aug. 23, 2023) (“If you are involved in a car accident, you should never admit fault. Should you admit fault in a car accident, you may lose your right to collect compensation from the other driver for the losses you suffered in the accident. Even if you believe that you may be at fault, avoid admitting this to the other driver, the police officer on the scene, or the insurance companies.”); cf. Jennifer K. Robbennolt, *Apologies & Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 467 (2003) (“Thus, attorneys and others fear that any apology will be admitted into evidence as an admission of fault . . . [L]awyers and insurance companies may be unlikely to advise their clients to apologize or to make any statement that could be construed as an apology. In fact, they may actively discourage such statements.”).

would refrain from offering an apology or explanation in the case of physician error in the form of a missed diagnosis of breast cancer or a delayed response to a patient's symptoms; instead, they indicated they would provide "only a limited or no apology, limited or no explanation, and limited or no information about the cause."<sup>157</sup> Medical school establishes the culture in which admissions are discouraged. As one doctor wrote in *The Washington Post*:

Like me, many of my colleagues were never taught how to disclose errors in medical school . . . [W]e were not to discuss them with patients unless absolutely necessary. When I joined a private practice . . . our hospital and malpractice lawyers told us never to admit guilt . . . If patients' families had questions, we were to be vague with our responses, essentially brushing them off.<sup>158</sup>

The rationale informing the refusal to admit wrongdoing is logical given the litigiousness of American culture. An admission or an apology could give rise to liability.<sup>159</sup> Under the Federal Rules of Evidence, a statement by a party opponent can be admitted even though it would otherwise be hearsay, and therefore excluded or unreliable.<sup>160</sup> Denial or silence is strategically sound from a civil legal perspective.

#### *B. The Criminal System's Transactional Exchange*

The criminal justice system, while encouraging admissions for legal expediency through plea bargains, incentivizes merely a coerced assent to facts that make up the charged offense. Little attention is paid as to authenticity or accountability. As such, the criminal justice system perpetuates a practice of responsibility-abdication and misses a powerful opportunity to model a culture of fulsome, healing admissions. Since 1970, the

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<sup>157</sup> Lawrence Schlachter, *Medical Culture Encourages Doctors to Avoid Admitting Mistakes*, STAT (Jan. 13, 2017), <https://www.statnews.com/2017/01/13/medical-errors-doctors/>.

<sup>158</sup> Manoj Jain, *Medical Errors are Hard for Doctors to Admit, but it's Wise to Apologize to Patients*, WASH. POST (May 27, 2013, 2:28 PM), [https://www.washingtonpost.com/national/health-science/medical-errors-are-hard-for-doctors-to-admit-but-its-wise-to-apologize-to-patients/2013/05/24/95e21a2a-915f-11e2-9abd-e4c5c9dc5e90\\_story.html](https://www.washingtonpost.com/national/health-science/medical-errors-are-hard-for-doctors-to-admit-but-its-wise-to-apologize-to-patients/2013/05/24/95e21a2a-915f-11e2-9abd-e4c5c9dc5e90_story.html).

<sup>159</sup> See, e.g., Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law & Culture in Japan and the United States*, 20 L. & SOC'Y REV. 461, 483 (1986) ("A crucial inhibition to a person making an apology in an American legal proceeding is the possibility that a sincere apology will be taken as an admission: evidence of the occurrence of the event and of the defendant's liability for it.").

<sup>160</sup> FED. R. EVID. 801(d)(2).

criminal justice system has relied on plea bargaining to function.<sup>161</sup> In return for a reduction in charges and/or the recommendation of a lighter sentence, criminal defendants are regularly offered deals by the prosecution wherein they plead guilty to an offense or offenses. According to a recent report by the Vera Institute of Justice, more than ninety percent of convictions are the result of some kind of plea bargaining.<sup>162</sup> Because there is much at stake in this bargain with the government, defendants' decisions to take a plea deal and to state their guilt in the courtroom are influenced by many factors unrelated to truth and accountability, not the least of which is pressure from a legal system that relies on plea deals to remain functional.<sup>163</sup>

In plea colloquies, the prosecutor announces the facts that would have been found at trial that would have made out the elements of the criminal offenses. The defendant then has the opportunity to affirm or deny that version of the events. A denial or a correction potentially derails the entire plea agreement. Therefore, the pressure on the defendant to merely accept that version of the facts in open court is significant, and as one commentator explained, "it tips the scales of justice from factual accuracy or truth to procedural and economic pragmatism."<sup>164</sup> The facts presented for the plea, therefore, may bear little resemblance to the truth, and the guilty plea may have no relationship to an actual assumption of responsibility for an act.<sup>165</sup> The effectiveness of the system as one that elicits truthful

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<sup>161</sup> See generally Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, THE ATLANTIC (May 2, 2017), <https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/>.

<sup>162</sup> Ram Subramanian et al., *In the Shadows: A Review of the Research On Plea Bargaining*, VERA INST. JUST. (Sept. 2020), <https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf>; see also Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> ("The vast majority of felony convictions are now the result of plea bargains — some 94 percent at the state level, and some 97 percent at the federal level.").

<sup>163</sup> See Walsh, *supra* note 161 ("Most fundamentally, basic economics supports their use. Trials are expensive and protracted. Two rational parties, goes the logic, can more cheaply and quickly come to an agreeable outcome through stripped-down bartering: The prosecutor offers a lenient charge if the defendant foregoes trial and admits guilt.").

<sup>164</sup> Ken Strutin, *Truth, Justice & the American Style Plea Bargain*, 77 ALB. L. REV. 825, 839 (2013); see also Allison D. Redlich et al., *Understanding Guilty Pleas Through the Lens of Social Science*, 23 PSYCH., PUB. POL'Y, & L. 458, 460 (2017) ("Perhaps unsurprisingly, analyses of real-world cases indicate that defendants confronted with stronger cases (i.e., higher probability of conviction at trial) and less severe charges have been found to be more likely to plead guilty.") (internal citations omitted).

<sup>165</sup> Strutin notes that the confession in a plea bargain may be "a first cousin" of the facts set forth in the indictment. Strutin, *supra* note 164, at 839.

admissions is further belied by the disproportionate representation in the plea bargain system of those with the least political capital.<sup>166</sup>

Moreover, the plea bargaining system does nothing to encourage or foster apologies or contrition which could help address the wrong that was committed.<sup>167</sup> Remorse most often serves merely as a defense tactic in the plea bargaining system in an attempt to influence sentencing.<sup>168</sup> Greater remorse might induce a judge to reduce a sentence; less remorse could result in an enhanced sentence.<sup>169</sup> But in general, the opportunity for such expressions is rare and most of the time, the victim is not even present for the plea.<sup>170</sup>

The prevalence of *Alford*<sup>171</sup> and *nolo contendere* pleas further enhances the culture of shirking accountability in the criminal justice system. Defendants taking *nolo* pleas neither accept nor deny responsibility for the charges, but instead agree to consent to punishment as if they were found guilty.<sup>172</sup> As opposed to a true guilty plea or finding of guilt, a plea of *nolo contendere* cannot be used against a defendant in a future cause of action because there is no formal admission of guilt.<sup>173</sup> In *Alford* pleas, defendants formally accept guilt for the charges while simultaneously

<sup>166</sup> See Nick Smith, *Just Apologies: An Overview of the Philosophical Issues*, 13 PEPP. DISP. RESOL. L.J. 35, 60 (2013) (“In retrospect, traditions of repentance often seem like thinly veiled justifications to compound the suffering of the disadvantaged. Whether women were ritually shamed for being sexually assaulted by men or colonial subjects were tortured in the name of Christian repentance, Radzik warns that ‘society’s most vulnerable groups are likely to suffer disproportionately under atonement systems.’”) (citing LINDA RADZIK, MAKING AMENDS: ATONEMENT IN MORALITY, LAW, AND POLITICS 18 (2009)).

<sup>167</sup> See Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 89-90 (2004) (discussing the shortcomings of the criminal justice system and the importance of apologies).

<sup>168</sup> See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford & Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1399 & nn.194-95 (2003) (“[M]ost guilty pleas are not the fruit of genuine repentance. Instead, defendants feign repentance to earn sentence reductions.”).

<sup>169</sup> See STANDARDS FOR CRIM. JUST. STANDARD 14-1.8(a)(i) (AM. BAR ASS’N 1999) (“It is proper for the court to approve or grant charge and sentence concessions to a defendant who enters a plea of guilty” when there is substantial evidence that “the defendant is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct.”). U.S. SENT’G GUIDELINES § 3E1.1(a) (U.S. SENT’G COMM’N 2023) (the Federal Sentencing Guidelines also provide for a two-level offense level reduction where “the defendant clearly demonstrates acceptance of responsibility for his offense.”).

<sup>170</sup> See Bibas & Bierschbach, *supra* note 167, at 88 (discussing how the routinization of criminal justice “leaves little room for remorse and apology.”).

<sup>171</sup> *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970).

<sup>172</sup> *Nolo Contendere*, LEGAL INFO. INST. (July 2023), [https://www.law.cornell.edu/wex/nolo\\_contendere](https://www.law.cornell.edu/wex/nolo_contendere).

<sup>173</sup> *Id.*

expressing their innocence towards those same charges on the record.<sup>174</sup> They differ from *nolo contendere* pleas in that *Alford* pleas can be used against a defendant in a future proceeding given that they have formally admitted guilt.<sup>175</sup>

According to one commentator, “*Nolo* and *Alford* pleas interfere with the defendant's contrition, education, and reform, and send muddled messages that obstruct catharsis and vindication of social norms and victims.”<sup>176</sup> By permitting *nolo* and *Alford* pleas, the criminal justice system encourages denials and the avoidance of responsibility-taking and further reinforces our culture of denial.

#### IV. INCENTIVIZING DENIALS IS COUNTERPRODUCTIVE FOR PERPETRATORS, SURVIVORS, AND OUR CULTURE

Incentives for denial of wrongdoing are powerful and prevalent in our culture and our legal system — particularly when they involve wrongs against women. This Part considers the harm of a system that encourages denials and, conversely, the benefits of accountability, admissions, and apologies. A legal system and culture that incentivize perpetrators to deny their wrongdoing fail to serve justice or the needs of transgressors, victims, or our society generally.

##### A. Denial Is Antithetical to Reform and Rehabilitation for Perpetrators

A denial of wrongdoing absolves perpetrators from having to grapple with their behavior, confront it, and address it in a fashion that promotes healing, reform, rehabilitation, and safety. Denial simultaneously deprives the wrong-doer access to support systems that have opportunity to provide tools for reform. This self-perpetuating cycle has few long-term benefits.<sup>177</sup>

A wide range of interventions for mental health and substance abuse commences with an admission of the problem and steps toward accountability.<sup>178</sup> Alcoholics Anonymous, for example, begins with an honest

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<sup>174</sup> *Alford Plea*, LEGAL INFO. INST. (June 2022), [https://www.law.cornell.edu/wex/alford\\_plea](https://www.law.cornell.edu/wex/alford_plea).

<sup>175</sup> *Id.*

<sup>176</sup> Bibas, *supra* note 168, at 1389.

<sup>177</sup> One benefit might be to minimize or eliminate some prison sentences in the criminal justice system. This Article does not advocate for eliminating or reducing the reliance on the plea bargaining system if the only alternative remains prison sentences.

<sup>178</sup> See, e.g., Nachman N. Gutowski, *Stop the Count; The Historically Discriminatory Nature of the Bar Exam Requires Adjustments in How Bar Passage Rates are Reported, If At All*, 21 SEATTLE J. SOC. JUST. 589, 611-12 (2023) (“[A]dmitting a problem exists is always the first step toward recovery.”) (citing *12 Step Recovery*, GUARDIAN RECOVERY NETWORK, <https://www.guardianrecoverynetwork.com/addiction-treatment/12-step-recovery/step-1-admit-powerlessness-over-addiction/>).

admission of one's powerlessness over alcohol.<sup>179</sup> Only after a confession of the problem can the issue be addressed. Similarly, one who has perpetrated wrongs against women cannot take steps himself to address the wrongdoing, nor can he receive effective support, without an acknowledgement of the initial wrong.<sup>180</sup>

Indeed, research, particularly in the domestic violence field, has illustrated that accountability is key to successful interventions and to minimizing recidivism. Researchers have found that those who have an inclination for denial are more likely to recidivate.<sup>181</sup> As one commentator noted, “[d]enial prevents therapists from examining cognitive distortions, detecting warning signs, and nurturing empathy for victims . . . Denial, in short, obstructs treatment, which in turn greatly increases the risk of recidivism.”<sup>182</sup>

Further, professional interventions such as therapy or treatment are less likely to be successful for perpetrators who deny responsibility for their transgressions. “Denial is almost always characterized as an obstacle to treatment progress, whereas acceptance of responsibility is typically considered a treatment goal.”<sup>183</sup> Specifically, those who deny are more likely to terminate treatment prematurely<sup>184</sup> and are less likely to comply with treatment goals and activities.<sup>185</sup> Perpetrators of domestic violence who deny or blame victims are believed to be more dangerous to women than men who are accountable.<sup>186</sup>

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<sup>179</sup> *The Twelve Steps*, ALCOHOLICS ANONYMOUS (2024), <https://www.aa.org/the-twelve-steps>.

<sup>180</sup> Research shows that an even further step, apology, can have a beneficial effect on perpetrators by fostering therapeutic guilt. Susan Daicoff, *Apology, Forgiveness, Reconciliation & Therapeutic Jurisprudence.*, 13 PEPP. DISP. RESOL. L.J. 131, 154 (2013).

<sup>181</sup> See, e.g., Kris Henning & Robert Holdford, *Minimization, Denial, and Victim Blaming by Batterers: How Much Does The Truth Matter?*, CRIM. JUST. AND BEHAV., 110, 125 (2006) (“Whereas impression management is probably unrelated to or negatively correlated with recidivism, self-deception is more likely to predict recidivism because it represents a dispositional characteristic.”).

<sup>182</sup> Bibas, *supra* note 168, at 1395-96 (citations omitted).

<sup>183</sup> Sandra L. Schneider & Robert C. Wright, *Understanding Denial in Sexual Offenders: A Review of Cognitive & Motivational Processes to Avoid Responsibility*, 5 TRAUMA, VIOLENCE & ABUSE 5 (2004).

<sup>184</sup> Kris Henning, Angela R. Jones & Robert Holdford, “*I didn’t do it, but if I did I had a good reason*”: *Minimization, Denial, and Attributions of Blame Among Male and Female Domestic Violence Offenders*, 20 J. FAM. VIOLENCE 131, 132 (2005).

<sup>185</sup> Henning & Holdford, *supra* note 181, at 110.

<sup>186</sup> *Id.*

B. *Denial Is Antithetical to Survivor Healing, Whereas Confessions and Apologies Can Facilitate Recovery*

A system that incentivizes denial also hurts survivors. Encouraging perpetrators to reject truthful allegations of harm committed against another person is a system of mass gaslighting.<sup>187</sup> Not being believed, and worse, being publicly charged with fabrication, can take a significant emotional toll on survivors and put them at increased mental health risk. Denial and rejection of women's allegations of wrongs intensify the harm and create barrier to a just resolution and healing.<sup>188</sup>

Conversely, admissions can facilitate healing by vindicating the survivor and validating that her injuries are real.<sup>189</sup> Research has shown that confessions and apologies support healing and safety. Domestic violence trauma expert Judith Herman notes that, especially in the case of wrongs against women, truth-telling is a critical step to victim recovery.<sup>190</sup>

Apologies can fall anywhere on the spectrum from performative to content-filled,<sup>191</sup> and can serve a wide range of goals for involved individuals and the community.<sup>192</sup> Although some have posited that apologies are part of a continuum of healing that progresses from apology to forgiveness to reconciliation, apologies, when offered, can also stand alone and have been shown to accrue value to both injured and injuring parties.<sup>193</sup>

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<sup>187</sup> This is a term that is based on the 1938 stage play and later film, *Gaslight*, that the American Psychological Association defines as “manipulat[ing] another person into doubting their perceptions, experiences, or understanding of events.” *Gaslight*, AM. PSYCH ASS'N (last visited Aug. 25, 2023), <https://dictionary.apa.org/gaslight>; see also Veronica E. Johnson et al., “It’s Not in Your Head”: *Gaslighting, ‘Splaining, Victim Blaming, & Other Harmful Reactions to Microaggressions*, 16 PERSPS. PSYCH. SCI. 1024, 1029 (2021) (“Scholars in both psychology and sociology have argued that the definition of gaslighting can be extended to include a single act or series of acts perpetrated by any person in a position of power designed to manipulate less powerful others to doubt themselves or question their own sanity or memory.”) (citations omitted).

<sup>188</sup> Epstein & Goodman, *supra* note 142, at 403.

<sup>189</sup> See C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence*, 35 HARV. J.L. & GENDER 311, 326 (2012) (“[O]n both a therapeutic and a symbolic level, a public admission can serve as a vindication for the victim that the violence she suffered was real, which can aid in her recovery.”).

<sup>190</sup> See generally JUDITH LEWIS HERMAN, *TRAUMA & RECOVERY* (1992); see also *id.* at 321-22 (discussing Herman’s theories and victim recovery).

<sup>191</sup> Nick Smith provides an excellent overview of apologies both structurally and philosophically. See generally Smith, *supra* note 166.

<sup>192</sup> See Daicoff, *supra* note 180, at 150-51 (discussing the various roles an apology can play).

<sup>193</sup> See *id.* at 135 (discussing the continuum of healing that begins with apologies).



For those who are injured, apologies have been shown to promote healing and greater psychological wellbeing. One researcher notes that “[a]pologies help to restore [victims’] sense of self-esteem and control, and victims who receive apologies find it easier to heal and forgive.”<sup>194</sup> Apologies validate the injured parties’ perception and experience of having been injured, allowing them to cease asserting their credibility and to move toward healing and past the anger<sup>195</sup> and injury instead.<sup>196</sup>

While confessions and apologies do not always and should not always lead to forgiveness, they are an offering to the survivor who then has the *opportunity* to forgive. Research on forgiveness strongly suggests that it generally leads to better physical and mental health outcomes in victims. In a study of women stalking victims, researchers found that holding on to negative emotions and seeking revenge was correlated with higher levels of PTSD and significantly correlated with lower levels of general health.<sup>197</sup> Another researcher found that in part of her sample, after “a heartfelt apology, victims . . . report feeling a near instantaneous erosion of anger and pain.”<sup>198</sup> Denial eliminates the opportunity for this kind of healing in the aftermath of an injury.

### C. Encouraging Denial of Wrongs Against Women Perpetuates Women’s Credibility Discount

A system that encourages men to deny wrongs against women perpetuates the systemic discounting of women’s credibility. Women are less likely to be believed than men in the U.S.<sup>199</sup> When women make

<sup>194</sup> Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 336 (2007).

<sup>195</sup> Johanna Kirchhoff et al., *Apologies: Words of Magic? The Role of Verbal Components, Anger Reduction, and Offense Severity*, 18 PEACE & CONFLICT: J. PEACE PSYCH. 109, 120 (2012).

<sup>196</sup> See generally Daicoff, *supra* note 180, at 155 (discussing the myriad of therapeutic benefits to injured parties of receiving apologies).

<sup>197</sup> Anna Constanza Baldry et al., *The Complex Link Between Forgiveness, PTSD Symptoms and Well-Being in Female Victims of Intimate Partner Stalking*, 9 J. AGGRESSION, CONFLICT & PEACE RSCH. 230, 232-33 (2017).

<sup>198</sup> Erin A. O’Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1124 (2002).

<sup>199</sup> See Deborah Epstein, *Discounting Credibility: Doubting the Stories of Women Survivors of Sexual Harassment*, 51 SETON HALL L. REV. 289, 316 (2021) (“Credibility assessments are inherently comparative in nature; there is an ‘intimate relationship’ between the credibility *discounts* imposed on women victims and the credibility *inflations* accorded to the men who harass them.”). An example of this can be seen in the Bill Cosby cases; women accused him of sexual assault for years, but the allegations got taken much more seriously when a man, comic Hannibal Buress, came forward with accusations. See Andrew Dalton, *Chicago comic Hannibal Buress, who called Cosby a rapist in 2014 standup act, now credited after his conviction*, CHI. TRIB. (Apr. 27, 2018, 12:46 PM),

allegations against men for sexual harassment, sexual assault, or domestic violence, their credibility plummets even further.<sup>200</sup> Incentivizing denials by men creates a system whereby women's stories are obliterated and derided. Those incentives result in women's credibility being increasingly discounted.<sup>201</sup>

*Harper's Magazine* considered women's credibility prior to the #MeToo movement, concluding that:

[C]redibility is such a foundational power . . . because women are so often accused of being categorically lacking in this department. Not uncommonly, when a woman says something that impugns a man . . . or an institution . . . the response will question not just the facts of her assertion but her capacity to speak and her right to do so.<sup>202</sup>

This credibility discount, moreover, does not cut equally across all demographics, but can be compounded by a woman's identity and the trauma she experiences. As one commentator noted: "Indeed, a wide array of women may be viewed as untrustworthy because of who they are — women, Black women, poor women, women who exhibit trauma symptoms that are easily conflated with a lack of credibility, and women who are many or all of the above."<sup>203</sup>

In order to address wrongs against women meaningfully, our system of redress should allow and expect admissions and remorse — and should not be constructed to further entrench stereotypes and biases against women and their credibility.

#### *D. Incentivizing Denials Impedes Social Change and Systemic Effective Responses*

Permitting denials of wrongs against women to stand without further exploration impedes society's ability to confront underlying systemic problems. Although the #MeToo movement made significant progress in exposing our culture to the prevalence of sexual harassment and in spurring systemic change discouraging and address sexual harassment, the culture of denial in the face of allegations impedes true systemic change and healing. This concept, which underlies processes such as South Africa's Truth and Reconciliation Commission, rests on the understanding that

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<https://www.chicagotribune.com/entertainment/ct-hannibal-buress-cosby-conviction-20180427-story.html>.

<sup>200</sup> See *Why We Often Don't Believe Women Who Report Sexual Assault*, PBS NEWS (Jun. 28, 2019, 6:30 PM EST), <https://www.pbs.org/newshour/show/why-we-often-dont-believe-women-who-report-sexual-assault> (“[T]he culture in general attributes lying to women who come forward.”).

<sup>201</sup> See Epstein & Goodman, *supra* note 152, at 403.

<sup>202</sup> Rebecca Solnit, *Cassandra Among the Creeps*, HARPER'S MAG. 1, 4 (Oct. 2014), <https://harpers.org/archive/2014/10/cassandra-among-the-creeps/>.

<sup>203</sup> Epstein & Goodman, *supra* note 152, at 437-38.

only when truth and accountability are the norm can systemic change take place.<sup>204</sup>

Further, a legal system and culture that encourage responsibility-taking and confessions serve a larger expressive function. Such systems convey the message not only that wrongdoing will be taken seriously but also that truth-telling is a first step to recovery, healing, and redemption. As one commentator noted in the context of intimate partner violence: “[A]n enhancement of justice systems’ responses that encourage rather than discourage public acceptance of responsibility can serve a larger expressive or symbolic function. We should consider the potential impact of such public truth-telling provisions in the law on society more generally.”<sup>205</sup>

*E. Denial Can Lead to Worse Legal and Mental Health Outcomes for Perpetrators*

Moreover, an admission might even benefit defendants. In studying admissions and transgressions, a team of psychologists observed: “The more responsible an individual is held for an adverse event, the greater the negative feelings and retributive behaviors directed toward that person. Yet when an individual confesses, thereby accepting full responsibility and blame, the adverse actions directed towards that person are reduced.”<sup>206</sup>

Research shows that results in civil litigation are more favorable for defendants after an apology or an admission in a wide range of litigation arenas.<sup>207</sup> One scholar reviewing empirical data concluded, “[b]uilding on findings in the social sciences, legal scholarship and legislation now reinforce the belief that strategically timed and worded apologies can prevent litigation altogether, reduce damage payments and jury awards by considerable amounts, or shave years from prison sentences.”<sup>208</sup> Specifically, numerous studies illustrate that full apologies have a consistent positive

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<sup>204</sup> See Hopkins, *supra* note 189, at 328 (“[P]ublic acceptance of responsibility by offenders can support and enhance other processes that aim to interrupt offending patterns, such as domestic violence counseling and batterer intervention programs. Requiring batterers to admit to their behavior can help initiate the steps towards permanent behavioral change. In other words, public truth-telling may ultimately prevent future reoffending by the confessing individual, thus reducing overall prevalence rates of intimate violence.”).

<sup>205</sup> *Id.* at 355.

<sup>206</sup> Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Grp. Identity, & Expectancies About Repeating a Transgression*, 22 BASIC & APPLIED SOC. PSYCH., 291, 291 (2000).

<sup>207</sup> See Daicoff, *supra* note 180, at 147. There is also robust literature on the format of apologies themselves that correlates to their effectiveness. See, e.g., Robbennolt, *supra* note 156, at 473-74, 479-80; Donna L. Pavlick, *Apology & Mediation: The Horse & Carriage of the Twenty-First Century*, 18 OHIO ST. J. DISP. RESOL. 829, 856 (2003).

<sup>208</sup> Smith, *supra* note 166, at 38-39 (citations omitted).

effect on the way injured parties perceive wrongdoers, leading to decreased anger and increased sympathy for injuring parties.<sup>209</sup> Further, the studies reveal that full apologies also impact settlement decision-making in civil cases, inducing injured parties to more favorably assess settlement offers and to less frequently seek revenge in the process of a civil case.<sup>210</sup> For example, seventy-three percent of victims in tort actions were willing to accept a settlement offer when offered a full apology compared to fifty-two percent of whom were amenable to the same settlement offer without an apology.<sup>211</sup> In the medical malpractice context, where the correlation between apologies and settlement has been most extensively studied, the findings are striking. In a study looking at medical malpractice in New York City hospitals, when an apology was offered, ninety-one percent of cases settled.<sup>212</sup>

The issuance of apologies themselves can positively serve those who injure.<sup>213</sup> Apologies, and forgiveness when granted, have been shown to correlate with reduced levels of shame and negative self-perceptions that interfere with reintegration and motivation to refrain from repeating the

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<sup>209</sup> See Robbennolt, *supra* note 156, at 473.

<sup>210</sup> *Id.* at 484-86.

<sup>211</sup> *Id.*

<sup>212</sup> Chris S. Hyman & Clyde B. Schechter, *Mediating Medical Malpractice Lawsuits Against Hospitals.: N.Y.C.'s Pilot Project*, 25 HEALTH AFFS. 1394, 1395-97 (2006). See also Steve S. Kraman & Ginny Hamm, *Risk Management: Extreme Honesty May Be the Best Policy*, 131 ANNALS INTERNAL MED. 963, 966 (Dec. 21, 1999) (“[A]n honest and forthright risk management policy . . . allows avoidance of lawsuit preparation, litigation, court judgments, and settlements at trial.”); Alexander Gray Blandina, *It’s Personal and Not Just Business: The Effects of Admitting Transgressions on the Perceptions of Transgressors*, UNF GRADUATE THESES & DISSERTATIONS 1, 33 (Apr. 2013) (noting about his study that “participants think more positively of a transgressor who provided apologies in response to a transgression accusation than one who denied committing a transgression.”); Donald L. Ferrin et al., *Silence Speaks Volumes: The Effectiveness of Reticence in Comparison to Apology & Denial for Repairing Integrity- & Competence-Based Trust Violations*, 92 J. APPLIED PSYCH. 893, 897 (2007) (“[A]pology is effective because it provides an expression of remorse that may positively influence a perceiver’s beliefs about the accused party’s motives and intentions, and reduce the perceiver’s concerns about continued vulnerability.”). But see Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 148 (1994) (finding that in landlord-tenant cases, apologies had only a marginal impact on plaintiffs’ assessment of settlement offers).

<sup>213</sup> One researcher noted that those who transgress generally experience forecasting errors and misperceive the benefits and detriments of an apology, believing it will weaken them and failing to foresee that it is more likely to improve their wellbeing. See generally J.M. Leunissen et al., *Forecasting Errors in the Averseness of Apologizing*, 27 SOC. JUST. RSCH. 322 (Sept. 2014).

transgression in the future.<sup>214</sup> Research further suggests that those who injure others generally experience positive emotional benefits as a result of issuing an apology.<sup>215</sup>

*F. Incentivizing Denial Contradicts Society's Core Moral Beliefs*

Finally, encouraging denial of wrongs flies in the face of our dominant moral code and our founding stories. The American education system for centuries attempted to teach children the value of honesty by recounting the story of George Washington and the cherry tree.<sup>216</sup> Children are taught that when Washington was a boy he took a hatchet to his father's beloved cherry tree, and, while at first lying to his father, he soon succumbed to the truth and was rewarded for his honesty.<sup>217</sup> This myth was crafted after the Revolution to show young American children examples of others being rewarded for honest behavior.<sup>218</sup> Abraham Lincoln benefited greatly from his renowned nickname "Honest Abe" — Lincoln was elected President in large part because his campaign made his nomination synonymous with the nickname.<sup>219</sup> Studies illustrate that as a cultural norm, Americans tend to reward honesty more than they punish dishonesty.<sup>220</sup> Valuing admissions is likewise seen in the world's major religions, each of which encourages confessions and redemption.<sup>221</sup> A system that

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<sup>214</sup> See Bibas, *supra* note 194, at 329 ("Forgiveness, while acknowledging the wrongfulness of the act, separates that act from the actor and paves the way for the offender to return to the moral fold."); see generally Harry M. Wallace et al., *Interpersonal Consequences of Forgiveness: Does Forgiveness Deter or Encourage Repeat Offenses?*, 44 J. EXPERIMENTAL SOC. SCI. 453-54 (Mar. 2008) (discussing a study that suggested that forgiveness deters recidivism); Kristina Murphy & Irene Helmer, *Testing the Importance of Forgiveness for Reducing Repeat Offending*, 46 AUSTL. & N.Z. J. CRIMINOLOGY 138 (Apr. 2013) (analyzing a study that revealed that, in the context of tax evasion, wrongdoers were less likely to repeat offend when forgiven rather than shamed).

<sup>215</sup> Leunissen et al., *supra* note 213, at 324.

<sup>216</sup> See generally Ann David, *Burying the Hatchet: Ideology in Early Am. Readers through the Story of George Washington & the Cherry Tree*, 43 AM. EDUC. HIST. J. 149 (Sept. 2016).

<sup>217</sup> *Id.* at 153-54.

<sup>218</sup> *Id.* at 154.

<sup>219</sup> See David S. Reynolds, *Preface to ABE: ABRAHAM LINCOLN IN HIS TIMES*, at xiii (2020).

<sup>220</sup> Cynthia W. Wang & Angela Leung, *The Cultural Dynamics of Rewarding Honesty & Punishing Deception*, 36 PERSONALITY & SOC. PSYCH. BULL. 1529, 1538 (2010).

<sup>221</sup> See generally Sharon Hymer, *Therapeutic & Redemptive Aspects of Religious Confession*, 34 J. RELIGION & HEALTH 41 (Spring, 1995). See also Saul M. Kassir & Gisli H. Gudjonsson, *The Psych. of Confessions: A Rev. of the Literature & Issues*, 5 PSYCH. SCI. PUB. INT. 33, 35 (2004).

entrenches denial contradicts these dominant cultural and religious norms and is nothing short of hypocrisy.<sup>222</sup>

V. NORM CHANGING REQUIRES LEGAL REFORM, A FULSOME RESTORATIVE JUSTICE SYSTEM, AND A PATHWAY TO REDEMPTION

In order to change norms around accountability for and healing in the aftermath of wrongs against women, legal reform is the beginning but far from the final step. In addition, a substantial framework for restorative justice interventions must be developed and a pathway to redemption must be visible — though not guaranteed — for those who commit wrongs.

A. *Civil Legal System Reforms*

The civil legal system disincentivizes accountability which in turn burdens the system with more protracted litigation and, perversely, worsens outcomes for both wrong-doers and victims as discussed above. The admissibility of out-of-court statements to prove liability, as discussed above, incentivizes individuals who have injured others or otherwise committed transgressions to remain silent and abdicate responsibility for the wrong. Protection of statements of remorse and contrition from admission in court could serve to encourage accountability, reduce litigation, and improve results for all involved parties. This Part considers evidentiary rule reform that could facilitate and encourage expressions of remorse in civil litigation.

While hearsay rules generally exclude out-of-court statements, admissions are broadly admissible in court.<sup>223</sup> Statements made in the context of a settlement negotiation are inadmissible under Federal Rule 408 to prove liability, but this protection does not apply outside of the negotiation context.<sup>224</sup>

Evidentiary rule reform could serve to incentivize both expressions of sympathy and apologies. There has been movement nationally in this direction in the past few decades.<sup>225</sup> Leading the way in 1986, Massachusetts

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<sup>222</sup> See generally Pavlick, *supra* note 207 (discussing the cultural specificity of apologies and their greater importance among adult behavior in collectivist societies compared to the U.S., which prioritizes individualism in adults despite its messaging to children regarding contrition).

<sup>223</sup> See, e.g., Rule 801(d)(2) of the FED. R. EVID. and analogous state provisions provide that an admission by a party-opponent is “not hearsay” and hence not excluded from admissibility by the hearsay rule; see also FED. R. EVID. 804(b)(3) (providing an exception to the hearsay rules for statements made against the declarant’s interests).

<sup>224</sup> FED. R. EVID. 408 (“Evidence of conduct or statements made in compromise negotiations is . . . not admissible [to prove liability for or invalidity of a claim or its amount].”).

<sup>225</sup> See generally Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819 (2002) (discussing the advantages and disadvantages of apology legislation).

passed legislation that precludes the admission of statements of remorse in subsequent civil litigation related to the incident:

Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action.<sup>226</sup>

Other states have followed that example with the passage of statutes that protect expressions of sympathy from being admitted in civil litigation.<sup>227</sup> Colorado has taken a step further in the medical context by rendering apologies in civil suits in the health care context inadmissible.<sup>228</sup> Thirty-six states currently have laws that render inadmissible certain expressions of sympathy or remorse and some statements of fault.<sup>229</sup> There is no uniformity in what is protected by this legislation,<sup>230</sup> but the growing number of states that have engaged in this type of reform suggests a trend toward protecting, at the very least, statements of remorse.

These reforms should be made universal and across a wider range of civil cases in order to encourage contrition and accountability. The potential healing power of expressions of remorse — for the injured, the wrongdoers, the industries at issue, and to help reduce the court burden of tort cases — seem to outweigh the evidentiary and ethical drawbacks.

First, from an evidentiary perspective, expressions of remorse, short of fulsome apologies, have little probative value in court, providing merely circumstantial evidence of fault. Their exclusion only negligibly increases the burden on plaintiffs to make out their cases. Legislation that precludes the admissibility of apologies certainly could have a greater impact on the plaintiff's ability to meet her burden of proof because an apology is far more probative of fault — though still circumstantial. However, if the apology is functionally an admission, the admissibility protection dissolves anyway based on the admissibility of party admissions.<sup>231</sup> Further, the evidentiary protection afforded to statements made for the purposes of settlement illustrates a compromise that has already been made in favor of facilitating settlements through evidentiary rules — and one

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<sup>226</sup> MASS. GEN. LAWS ch. 233, § 23D (1986).

<sup>227</sup> See, e.g., CAL. EVID. CODE § 1160 (West 2001); FLA. STAT. § 90.4026 (2001); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (West 1999); WASH. REV. CODE § 5.66.010(1) (2008).

<sup>228</sup> See COLO. REV. STAT. § 13-25-135(1) (2003) (also referred to as “I’m sorry” legislation).

<sup>229</sup> *States with Apology Laws*, SORRY WORKS!, <https://sorryworks.net/apology-laws> (last visited Sept. 1, 2023).

<sup>230</sup> See Robbennolt, *supra* note 156, at 470-73 (describing various levels of coverage under different state statutes).

<sup>231</sup> FED. R. EVID. 801(d)(2).

that has not been overly damaging to the legal system or to individual litigants. Because apologies have been shown to facilitate settlements or even pre-litigation resolutions of disputes or injuries, on balance, excluding them from litigation most likely would have a minimally burdensome impact on injured parties.

Rendering apologies and expressions of remorse inadmissible also enables parties to bargain with such statements — to allow them to be exchanged in a settlement without fear of negative repercussions in court. The evidentiary protections commodify remorse in a way that may appear morally suspect and less meaningful.<sup>232</sup> Some are skeptical about reform in the apology arena, asserting that such an instrumentalist approach seeks only to lessen legal repercussions rather than to promote healing and reform.<sup>233</sup> While these concerns are valid, facilitating the exchange of apologies may serve the needs of some injured parties, some wrong-doers, and serve to lessen demands on the court system, thereby providing a possible approach to reform.<sup>234</sup> Ultimately, civil legal reform in this area that facilitates accountability-taking is unlikely alone to create a fulsome cultural or legal change in offender-accountability or victim well-being after injury. It may, however, move the needle slightly — if implemented uniformly — toward reducing incentives for blanket denials by wrong-doers. Once those expressions of remorse are protected and no longer deterred by the civil legal system, then true accountability, healing, and reform could take place through therapeutic and restorative justice for those whom it is necessary, appropriate, or helpful, as discussed below.

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<sup>232</sup> Research suggests that the value of apologies is lessened when they are inauthentic, incomplete, or instrumental. *See generally* Korobkin & Guthrie, *supra* note 212 (discussing studies that assess the effectiveness of a range of apologies).

<sup>233</sup> *See, e.g.*, Smith, *supra* note 163, at 93-96.

<sup>234</sup> Such expressions would be far more likely to be exchanged, particularly in high profile cases, if they were also protected from disclosure to the press. If the statements of remorse are exchanged in active litigation that results in a settlement, the terms of the agreement can include nondisclosure of the expressions of remorse in the future. However, there is nothing to provide assurance or protection against publicity to those offering apologies outside of a litigation context or even within a pending case prior to what might become an ultimate settlement. These statements could be protected by a nondisclosure agreement or, alternatively, state legislation could create liability for disclosure of expressions of remorse when litigation is foreseeable. However, while such protection could encourage apologies, it could also serve to revictimize victims — as we have seen in the use of defamation and NDA litigation in crimes against women. In addition, an apology that is issued in confidence could serve to privately vindicate an injured party, but oftentimes, the publicity of that admission is necessary for a victim to heal by combatting assaults on her credibility. For these reasons, laws and principles creating liability for disclosure of expressions of remorse and apologies would most likely create more problems than they would address.



### B. Criminal Justice System

The criminal justice system as currently configured is not well-suited to foster accountability and recovery. However, if the criminal justice system remains the prevalent response to criminal wrongdoing, the plea-bargaining system must be reformed to achieve better outcomes for all parties and to express an authentic preference for admissions, remorse, and healing over denials. Reforms that might serve these goals include providing victims — especially in bodily injury crimes — more control over and involvement in the plea-bargaining system; codifying a requirement of more fulsome, content-filled pleas that include statements of accountability; mandating judicial consideration of the genuineness of a plea when assessing both the acceptance of a plea and the imposition of a sentence; and finally abolishing *Alford* and *nolo contendere* pleas.

#### 1. Complaining Witness Involvement

Complaining witness involvement in the plea-bargaining process — from the initial offer to the taking of the plea — is critical to rendering pleas more than transactional tools. In fact, the current system may do more harm than good for survivors.<sup>235</sup> Under federal law, crime victims have the right to be kept informed of hearings, developments in the case, and plea bargains; however, that right is merely to information, not to involvement.<sup>236</sup> Some victims might far prefer a plea bargain, which would absolve them of the obligation to testify, be cross examined, and possibly endure re-traumatization. Some victims may reasonably fear that a contested trial would expose them to danger or retaliation.

While it would likely be inappropriate to vest sole decision-making control in the hands of complaining witnesses,<sup>237</sup> their input should be mandated in the consideration of making a plea offer. For some victims, the public airing of facts may be a critical step to recovery. A plea offer — that would preclude a victim's opportunity to testify and to have the facts on the record and available to the public — may well significantly impede an effective recovery from injury.<sup>238</sup> For some crimes, particularly those

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<sup>235</sup> See generally David A. Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 865 (1992) (indicting the plea-bargaining system for its impact on victims).

<sup>236</sup> See 18 U.S.C. § 3771(a) ("A crime active has the following rights: . . . The right to be informed . . . of any plea bargain.").

<sup>237</sup> Vesting control in the hands of a complaining witness might also put them at a heightened risk of coercion or injury from the defendant, particularly in domestic violence cases.

<sup>238</sup> See Dana Pugach & Michal Tamir, *Nudging the Criminal Justice System Into Listening to Crime Victims in Plea Agreements*, 28 HASTINGS WOMEN'S L.J. 45, 46 (2017) ("Pleas have become more visible, but the victims still remain hidden. Despite criticism directed at the control of prosecutors' and defendants' control over the process, victims' involvement has seldom been discussed as a remedy.").

committed by high-profile defendants or those involving multiple victims, a public airing of the facts can provide not just healing for victims, but vindication for victims who were doubted and an invitation for more victims to come forward. As one commentator noted:

In such highly charged contexts, should the parties be permitted to deny the public of the educative and the deterrent role that attaches to a contested and visible public trial? It is obvious that, in many such cases, the public has a greater than ordinary interest in knowing the full facts of the case.<sup>239</sup>

Complaining witnesses should also be consulted when considering which charges are bargained with. Prosecutors have been criticized for bargaining away charges that make out harm to complaining witnesses in return for guilty pleas to property crimes or other “victimless crimes.”<sup>240</sup>

Although many state and federal guidelines require that prosecutors inform complaining witnesses about court dates and other developments in prosecutions, very often they are not present at the entry of a plea.<sup>241</sup> For a plea to have impact on victim recovery, the victim would need to have the opportunity to hear or read the transcript of the plea colloquy.<sup>242</sup>

Another opportunity for victims to tell their stories and for perpetrators to express remorse is at sentencing. Consider, for example, the Larry Nassar trial in 2018. Nassar plead guilty to seven counts of sexual assault.<sup>243</sup> At the sentencing hearing, Judge Rosemary Aquilina took the

<sup>239</sup> Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 S.M.U. L. REV. 567, 576 (1996).

<sup>240</sup> See, e.g., Rachel Swan & Megan Cassidy, *S.F. Parolee Accused of Killing Pedestrians Faced Life Sentence in Earlier Case, but Got Five Years*, S.F. CHRON. (Jan. 8, 2021 4:28 PM), <https://www.sfchronicle.com/crime/article/Fatal-hit-and-run-DA-Boudin-charges-suspect-15845917.php>; see also John N. Mitchell, *U.S. Attorney Files New Charges in Krasner Case, Calls Him ‘Too Lenient’*, THE PHILA. TRIB. (Feb. 28, 2019), [https://www.phillytrib.com/news/local\\_news/u-s-attorney-files-new-charges-in-krasner-case-calls-him-too-lenient/article\\_41182af8-34fa-5677-810c-74954c10b7cb.html](https://www.phillytrib.com/news/local_news/u-s-attorney-files-new-charges-in-krasner-case-calls-him-too-lenient/article_41182af8-34fa-5677-810c-74954c10b7cb.html).

<sup>241</sup> See Crime Victims’ Institute at the Criminal Justice Center at Sam Houston State University, *Inviting Victim Participation in Plea Agreements* (2005), [http://dev.cjcenter.org/\\_files/cvi/no22005.pdf](http://dev.cjcenter.org/_files/cvi/no22005.pdf) (“[Only] [a] third of the states . . . permit the victim to be heard, either orally or in writing, at plea entry proceedings.”).

<sup>242</sup> See Margareth Etienne & Jennifer K. Robbennolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295, 315 (2007) (“[G]iven the absence of direct victim and offender participation, apologies in the context of plea bargaining may be less effective than in other contexts.”).

<sup>243</sup> Nicole Chavez & Eric Levenson, *Ex-USA Gymnastics Doctor Apologizes, Pleads Guilty to Criminal Sexual Conduct*, CNN (Nov. 22, 2017, 10:48 PM), <https://www.cnn.com/2017/11/22/us/us-gymnastics-doctor-plea-hearing/index.html>.

statements of more than 150 women who reported that he sexually abused them.<sup>244</sup> The sentencing process permitted victims to tell their stories and address Nassar directly. Sentencing does not provide for dialogue, but Nassar had the opportunity to address the judge, the victims, and the public. He himself took limited advantage of the opportunity by offering very few words; however, the words he offered expressed remorse rather than denial.<sup>245</sup> The statements were made possible because his plea deal included the right for the court to hear from a wide range of survivors at sentencing.<sup>246</sup>

If plea bargains are extended, prosecutors should more often follow the Nassar model and include, as a condition, the opportunity for a full airing of facts without limitations from survivors and their families at sentencing. Such statements have an expressive message that the system cares about truth and accountability. Input from survivors of bodily injury and autonomy crimes is critical to the decision to offer a plea and at the sentencing phase if the criminal justice system seeks to take accountability, safety, healing, and justice for victims seriously.

## 2. Reforming Standards and Procedures for Pleas

Another reform of the plea bargain system that would render pleas more healing to both defendants<sup>247</sup> and survivors and also convey a

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<sup>244</sup> Eric Levenson, *Larry Nassar Apologizes, Gets 40 to 175 Years in Prison for Decades of Sexual Abuse*, CNN (Feb. 5, 2018, 2:17 PM), <https://www.cnn.com/2018/02/05/us/larry-nassar-sentence-eaton/index.html>.

<sup>245</sup> *This is Larry Nassar's Full Statement Before He was Sentenced*, CNN (Jan. 24, 2018, 11:17 PM), <https://www.cnn.com/2018/01/24/us/larry-nassar-full-statement/index.html>.

<sup>246</sup> John Barr & Dan Murphy, *Larry Nassar Thinks Sentence for Sexual Abuse Too Harsh*, ABC NEWS (July 15, 2018, 12:26 PM), <https://abcnews.go.com/Sports/larry-nassar-thinks-sentence-sexual-abuse-harsh/story?id=56812588>.

<sup>247</sup> While some refer to those who take pleas as perpetrators, there is, of course, an innocence problem. The plea-bargaining system can induce innocent defendants to take a plea to avoid a harsher sentence. Some defendants engaged in taking a plea have not committed the offense that they are pleading guilty to. According to one report, “[n]umerous scholars have examined the innocence problem of plea bargaining and have estimated that anywhere from 1.6% to 27% of defendants who plead guilty may be factually innocent.” NAT’L ASS’N CRIM. DEF. LAWS, *THE TRIAL PENALTY: THE SIXTH AMEND. RIGHT TO TRIAL ON THE VERGE OF EXTINCTION & HOW TO SAVE IT* 17 (2018). Another report states that “in a 2018 study of 166 attorneys, 148 of the participants said that they had been involved in at least one case in which their client chose to plead guilty despite maintaining their innocence.” Subramanian et al., *supra* note 162, at 44. *But see* Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 339 (2012) (“[W]e identify the striking ‘cost of innocence,’ wherein innocents suffer harsher average sanctions than similarly situated guilty defendants. Yet our findings also show that the innocence effect directly causes an overrepresentation of

message about the importance of accountability would be to heighten the standards for what constitutes an acceptable plea. Such a requirement would emanate from both the prosecution and the bench. The content of pleas can be influenced by agreement of justice system actors to do more than merely convey words that make out a legally sufficient statement of guilt.<sup>248</sup> Prosecutors and judges could require that the plea be far more content-filled and more closely related to the facts alleged in the indictment.<sup>249</sup> While currently pleas require only that defendants admit to the facts making up the charges, prosecutors and judges could also require an overt apology to those who were hurt by the criminal wrongdoing.<sup>250</sup>

Reconceiving the plea as more of a discussion than a monologue followed by a highly scripted colloquy might also enhance the value of pleas.<sup>251</sup> Instead, a defendant could be required to state the facts that make up the guilty plea, doing so either independently or through a dialogue with the judge or defense counsel.<sup>252</sup> Defendants, further, could be required to name the people whom their actions harmed, enhancing the accountability aspect of a plea. The defendant could also engage in a dialogue with the judge or the defense attorney regarding decision-making they might take in the future to avoid hurting others or engaging in criminal acts. All of these reforms to the plea system would hinder the

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the guilty among plea bargainers and an overrepresentation of the innocent among those who choose trial. In this way, the innocence effect beneficially reduces the rate of wrongful convictions — including accepted plea bargains — even when compared to a system that does not allow plea bargaining.”).

<sup>248</sup> See Strutin, *supra* note 164, at 875 (noting that in a plea agreement “the accused is the chief exponent of the facts based on agreement by the lawyers and oversight from the court.”).

<sup>249</sup> See *id.* at 839 (calling the facts stated at a plea colloquy “the first cousin to the allegations in the indictment.”).

<sup>250</sup> See, e.g., Chris Francescani, *A court-ordered apology to a 10-year-old leaves his family furious*, ABC NEWS (Jan. 18, 2019, 10:03 PM), <https://abcnews.go.com/US/court-ordered-apology-10-year-leaves-family-furious/story?id=60483458> (reporting on a judge who sentenced a defendant who struck a young boy with his car to write an apology letter); Jay Mathews, *Freedom Means Having to Say You're Sorry*, WASH. POST (Nov. 9, 1986), <https://www.washingtonpost.com/archive/politics/1986/11/09/freedom-means-having-to-say-youre-sorry/f11711d4-6878-4e4c-b18e-8a7a496e719c/> (documenting a program in which the District Attorney launched an “apology ad” program where local judges would, as part of a plea bargain and as a condition of probation instead of jail time, mandate that the convicted individual write an apology to be published in the local newspaper.).

<sup>251</sup> See FED. R. CRIM. P. 11; see, e.g., *Questions for Taking Guilty Plea*, U.S. DIST. CT. FOR E. DIST. OF MICH., <https://www.mied.uscourts.gov/pdffiles/Clelandrule11colloquy.pdf>.

<sup>252</sup> See Bibas, *supra* note 194, at 336 (“At plea hearings, judges could probe defendants’ stories.”); Bibas & Bierschbach, *supra* note 167, at 140 (noting that in plea hearings “defendants provide very brief factual statements explaining what they did.”).

efficiency of the system and most likely reduce the number of pleas entered; they would result in a greater burden on the justice system. However, they also might reduce recidivism, enhance victim healing, and encourage truth-telling, accountability, and values in our culture that might, in turn, reduce criminal behavior.

### 3. Rendering the Genuineness of Pleas Relevant

The genuineness of a plea should be relevant to both the acceptance of a plea bargain and to sentencing.<sup>253</sup> Judges may reject a plea on a variety of bases.<sup>254</sup> None of the bases articulated in the Federal Sentencing Guidelines, however, relate to the authenticity of the plea itself.<sup>255</sup> However, amending the federal and state rules to explicitly direct the judicial officer to consider genuineness of a plea stipulation and the defendant's remorse would provide greater assurance that judges assess that issue, thus incentivizing remorseful and genuine pleas. Such a requirement would track with the Federal Sentencing Guidelines downward departures for responsibility-taking.<sup>256</sup> Under the Guidelines, convicted defendants can receive a downward departure in sentencing based on indications that they accept responsibility for the crime.<sup>257</sup> An overt statement of responsibility is the primary proof that can result in a downward departure.<sup>258</sup> Voluntary withdrawal from criminal conduct or associations, voluntary payment of restitution prior to a guilty adjudication, and post-offense rehabilitative efforts are among the factors a judge can consider as circumstantial proof of accountability.<sup>259</sup> The Guidelines emphasize the judge's ability to render this

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<sup>253</sup> See generally Bibas, *supra* note 194, at 336.

<sup>254</sup> See generally FED. R. CRIM. P. 11(c)(3); MASS. R. CRIM. P. 12(a)(3).

<sup>255</sup> See generally UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL §6B1.2 (Nov. 2021); FED. R. CRIM. P. 11(b); *United States v. Gonzalez*, 62 F.4th 954, 959 (5th Cir. 2023) (noting that the district court must consider the Sentencing Guidelines and may not accept a plea unless satisfied that the sentence is within the applicable guideline range or is otherwise outside the range for “justifiable reasons . . . set forth with specificity.”); *United States v. Rodriguez-Armentariz*, 329 F.R.D. 277, 279 (D.N.M. 2018) (quoting *Hughes v. United States*, 138 S. Ct. 1765, 1773 (2018) (“In deciding whether to accept an agreement that includes a specific sentence, the district court must consider the Sentencing Guidelines.”)).

<sup>256</sup> UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL §3E1.1 (Nov. 2021).

<sup>257</sup> *Id.*

<sup>258</sup> UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL §3E1.1 cmt. n.1(A) (Nov. 2021) (noting the factors for consideration in determining whether a defendant has accepted responsibility, including “truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).”).

<sup>259</sup> UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL §3E1.1 cmt. n.1 (Nov. 2021).

assessment in the sentencing context.<sup>260</sup> Similarly, the judge could make such an assessment at the entry of a plea stage. Such a reform could result in more meaningful pleas that could serve to decrease recidivism and enhance healing — while, of course, again, potentially reducing the prevalence of successful plea entries.

#### 4. Abolish *Alford* and Nolo Contendere Pleas

The availability of *Alford* and nolo contendere pleas should be greatly limited, if not extinguished, to instill a greater sense of accountability, remorse, and healing in the criminal justice system. These two plea mechanisms routinize denials in the context of contradictory facts. Data suggests that these pleas are limited but certainly have a presence in the justice system. The most recently available data estimate that eleven percent of federal and seven percent of state inmates entered nolo contendere or *Alford* pleas.<sup>261</sup>

Under both plea systems, defendants can maintain their denials and avoid a public airing of facts. Not all states allow the use of nolo pleas.<sup>262</sup> Currently, forty-seven states and the District of Columbia permit *Alford* pleas, although many states limit their use by offering them in limited circumstances.<sup>263</sup> Limitations on these pleas is appropriate; however, the elimination of such pleas would be far better in service of expressing a cultural and legal preference for accountability and truth-telling over denial and abdication. As one commentator asserted, referring to the availability of these pleas, “[u]nfortunately, this autonomy, privacy, and dignity come at the expense of education, repentance, reconciliation, and vindication. Offenders have abused their autonomy and privacy and need to humbly accept responsibility for their wrongdoing.”<sup>264</sup> Further, such pleas do not serve factually guilty defendants in the long run because they allow

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<sup>260</sup> UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL §3E1.1 cmt. n.5 (Nov. 2021) (“The sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.”).

<sup>261</sup> Tina M. Zottoli et al., *State of the States: A Survey of Statutory Law, Regulations and Court Rules Pertaining to Guilty Pleas Across the United States*, 37 BEHAV. SCI. & L. 388, 391 (2019).

<sup>262</sup> *Nolo contendere*, LEGAL INFO. INST. (July 2023), [https://www.law.cornell.edu/wex/nolo\\_contendere](https://www.law.cornell.edu/wex/nolo_contendere).

<sup>263</sup> See Sydney Schneider, *When Innocent Defendants Falsely Confess: Analyzing the Ramifications of Entering Alford Pleas in the Context of the Burgeoning Innocence Movement*, 103 J. CRIM. L. & CRIMINOLOGY 279, 283-84 (2013). Many federal courts discourage *Alford* pleas and federal prosecutors are reluctant to offer them due to the Department of Justice’s policy. *Id.* at 284. In addition, under *Alford*, judges are not required to accept an *Alford* plea. *Id.* at 283; Curtis J. Shipley, *The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1063-64 (1987).

<sup>264</sup> Bibas, *supra* note 168, at 1403.

them to maintain their own false narrative of innocence.<sup>265</sup> Of course, like all reforms to the plea bargain system that have been discussed, the abolition of *Alford* and nolo pleas would reduce the prevalence of plea bargains and in turn would likely burden the criminal justice system with more contested cases. However, this impact could be short-term if accountability results in reduced recidivism.

The criminal justice system's use of plea bargaining suggests a preference for admissions of guilt and remorse. However, a closer look at the operation of the plea bargain system and the presence of special pleas that abdicate guilt reveals a system that is not about truth and accountability, but rather about systemic expedience and legal transactions. This system expresses a cultural acceptance of abdication of responsibility for wrongs and renders victims operationally irrelevant. Addressing these problems by implementing reforms could improve the outcomes and expressive operation of the criminal justice system's treatment of wrongs against women.

### C. Restorative Justice

Restorative justice could begin to address our justice system and culture's incentive structures related to denials and admissions in response to wrongs against women. A system that seeks to directly meet and respond to the injuries that were caused, the injured parties' needs, and the offenders' future behavior could better address wrongs against women — especially when compared to a system that has yet to illustrate its effectiveness in this arena. Restorative justice encompasses an increasingly large collection of practices aimed at healing individuals, relationships, and communities.<sup>266</sup> With roots in Native American and other Indigenous communities, its use has become far more universal as part of the criminal justice system, parallel to it, and as a national response to mass atrocities.

Restorative justice interventions seek to address wrongdoing and injuries by engaging not only the offender — as the criminal justice system does — but also the victim and relevant community alike. By addressing victims' needs and engaging offenders' capacity for rehabilitation, restorative justice proponents seek to work outside or alongside the traditional justice system to achieve broader and more flexible resolutions.

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<sup>265</sup> See Starkweather, *supra* note 235, at 867 (“If an offender is allowed to escape recognition of guilt, he or she will never come to the point of ‘atonement,’ and the goal of retribution will never be achieved.”). *But see* Warren v. Richland Cnty. Cir. Ct., 223 F.3d 454, 459 (7th Cir. 2000) (finding that a defendant who took an *Alford* plea can, consistent with his plea, be compelled to admit to his wrongdoing in court-ordered counseling that is a part of his probation).

<sup>266</sup> See generally Wexler et al., *supra* note 150, at 68-70 (providing an overview of restorative and transformative justice programs and practices).

Restorative justice programs focus on addressing the rift between the parties as well as healing the community more generally.<sup>267</sup>

Principles and programs now categorized as restorative justice have been used throughout history,<sup>268</sup> particularly in Native American and Native Canadian justice systems, as well as in indigenous populations in South Africa, Australia, and New Zealand. In the 1970s, restorative justice programs began to appear in the juvenile justice system and, over the years, have become more common in additional practice areas in the U.S. and internationally.<sup>269</sup> Over the past several decades many U.S. jurisdictions have started to experiment with restorative justice principles in the criminal justice system, as evidenced by the large number of state statutes either encouraging or mandating the use of restorative justice.<sup>270</sup>

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<sup>267</sup> See HOWARD H. ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 28 (2002); Paul C. Friday, *Community-Based Restorative Justice: The Impact on Crime*, in *CRIME PREVENTION & NEW APPROACHES* 370, 371 (Helmut Kury et al. eds., 2003) (“[T]here are three primary stakeholders from a restorative justice perspective: victim, offender and community.”).

<sup>268</sup> Commentators identify many examples throughout history of criminal justice practices which focused on the victim’s needs and restoring the relationships between offender, victim, and the community. See generally, e.g., Chris Cunneen, *Reviving Restorative Justice Traditions?*, in *HANDBOOK OF RESTORATIVE JUSTICE* 113 (J. Johnstone & D. Van Ness eds., 2007); Elmar G. M. Weitekamp, *The History of Restorative Justice*, in *RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME* 157 (Gordon Bazemore & Lode Walgrave eds., 1999).

<sup>269</sup> Peggy Grauwiler et al., *Justice is in the Design: Creating a Restorative Justice Treatment Model for Domestic Violence*, in *FAMILY INTERVENTIONS IN DOMESTIC VIOLENCE: A HANDBOOK OF GENDER-INCLUSIVE THEORY & TREATMENT* 579, 580 (John Hamel & Tonia Nicholls eds., 2006) (citing John Braithwaite, *Restorative Justice: Assessing Optimistic & Pessimistic Accounts*, 25 *CRIME & JUST.* 1 (1999)); see, e.g., MARLENE A. YOUNG, *RESTORATIVE COMMUNITY JUSTICE: A CALL TO ACTION* (1995); Ted Keys & Anna Rockhill, *Family Group Decision Making in Oregon*, in *FAMILY GROUP CONFERENCE: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD & FAMILY PRACTICE* 271 (Gale Burford & Joe Hudson eds., 2000); Robert Yazzie & James W. Zion, *Navajo Restorative Justice: The Law of Equity & Harmony*, in *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVE* 157 (Burt Galaway & Joe Hudson eds., 1996); Sarah Curtis-Fawley & Kathleen Daly, *Gendered Violence & Restorative Justice*, 11 *VIOLENCE AGAINST WOMEN* 603, 606 (2005).

<sup>270</sup> See Lydialyle Gibson, *Restoring Justice*, *HARV. MAG.* (July-Aug. 2021) (noting that forty-five states have statutes relating to the use of restorative justice). See also Laurie S. Kohn, #MeToo, *Wrongs Against Women, & Restorative Justice*, 28 *KAN. J.L. & PUB. POL’Y* 561, 579 n.90 (2019) (listing state statutes regarding the use of restorative justice).



Victim-offender mediation is the oldest<sup>271</sup> and most widespread restorative justice model,<sup>272</sup> and features face-to-face meetings between the injured party and the perpetrator accompanied by one or more mediators. Its central principles dictate that a victim has the desire to represent her needs, to talk honestly, and that offenders will take responsibility for their actions.<sup>273</sup> Victim safety critically informs the screening process.<sup>274</sup> Together with mediators, the parties meet to brainstorm resolution of the harmful behavior at issue. Whatever the format of a restorative justice session, it provides the “touchstones” for a categorical apology that not only accepts blame, but addresses reform, redress, and is centered on empathy.<sup>275</sup>

### 1. How Would Restorative Justice Address the Epidemic of Denial?

Restorative justice provides an alternative to denial of wrongs against women. It could better meet the needs of parties, our community, and could provide an answer to the shortcomings of our civil and criminal systems. Its principles are more consistent with our society’s moral and religious teachings than our legal systems, which promote and incentivize denials or contentless, transactional confessions.

To those who have injured others, restorative justice incentivizes admissions and accountability by offering both healing but also, critically, a possible route to redemption. Denial is a nearly irresistible option when taking responsibility leads only to irretrievable ruin. The stories of Al Franken and Ray Rice, as compared to Floyd Mayweather and Charlie Sheen, illustrate the divergent pathways for men when faced with allegations of wrongs against women. Although there are certainly some exceptions to these storylines, our court of public opinion has generally

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<sup>271</sup> Loretta M. Frederick & Kristine C. Lizdas, *The Role of Restorative Justice in the Battered Women’s Movement* 1, 8 (2003), [http://www.antonioacasella.eu/restorative/Frederick\\_2003.pdf](http://www.antonioacasella.eu/restorative/Frederick_2003.pdf); see also Paul McCold, *The Recent History of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 23, 24 (Dennis Sullivan & Larry Tiffit eds., 2006) (“Community mediation in the United States was the first generation mediation movement in the early 1970s.”).

<sup>272</sup> Mark S. Umbreit et al., *Victim-Offender Dialogue in Violent Cases: A Multi-Site Study in the United States*, ACTA JURIDICA 22, 22 (2007); see also Christa Pelikan & Thomas Tenczek, *Victim Offender Mediation & Restorative Justice: The European Landscape*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 63, 64 (Dennis Sullivan & Larry Tiffit eds., 2006) (“VOM is just one — but in the European context the most important — model, or practice of restorative justice (RJ).”).

<sup>273</sup> Alan Edwards & Jennifer Haslett, *Domestic Violence and Restorative Justice: Advancing the Dialogue*, VICTIM OFFENDER MEDIATION ASS’N (VOMA) 1, 2 (2003), <http://www.voma.org/docs/DVandRJPaper2003.pdf>.

<sup>274</sup> *Id.* at 5-6.

<sup>275</sup> See generally Smith, *supra* note 166, at 53-55 (discussing the standards for categorical apologies).

adjudicated those who admit wrongdoing as irredeemable. Restorative justice is not the only pathway to redemption, but it's one route.

Restorative justice offers the possibility of making things right with the people you have wronged, the chance — though not the guarantee — of forgiveness. The philosophy of restorative justice creates an opportunity for forgiveness that “separates [the] act from the actor and paves the way for the offender to return to the moral fold.”<sup>276</sup> Dialogue with the injured party and community members can provide a pathway to redemption. Without that hope of redemption, confessions are a hard sell.

For injured parties, the opportunity to hear the offending party take responsibility and even to apologize provides greater potential for healing. One scholar studying restorative justice as an alternative to the criminal justice system, for example, reported that empirical studies and anecdotal evidence confirms the importance of face-to-face meetings between injured and offending parties.<sup>277</sup> For example, in four studies involving 550 offenders, seventy-four percent of offenders apologized when given the opportunity to do so in a restorative justice conference as opposed to seventy-one percent of those who did not do so when given the opportunity to do so in the courtroom.<sup>278</sup> These studies also illustrated that a substantial percentage of injured parties want to meet with offenders and when they do, they are 2.6 times more likely to forgive an offender than if they do not meet.<sup>279</sup> Finally, studies also show that victims get much from apologies.<sup>280</sup>

Finally, restorative justice offers a resolution for wrongs against women that is far more consistent with our dominant non-legal approaches to wrongdoing — accountability and contrition. Rendering restorative justice interventions more prevalent would send a powerful message about our society's expectations after wrongdoing and may well lead to fewer injuries.<sup>281</sup>

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<sup>276</sup> Bibas, *supra* note 194, at 329.

<sup>277</sup> See Bibas & Bierschbach, *supra* note 167, at 90, 114-16 (citations omitted) (discussing the benefits of “face-to-face interaction[s] between offender and offended.”).

<sup>278</sup> *Id.* at 116 (citations omitted).

<sup>279</sup> *Id.* (citations omitted).

<sup>280</sup> See *id.* at 116-17 (citations omitted) (discussing empirical evidence suggesting that victims value “emotional reconciliation” more than “material or financial reparation.”).

<sup>281</sup> See Hopkins, *supra* note 189, at 328 (“[P]ublic acceptance of responsibility by offenders can support and enhance other processes that aim to interrupt offending patterns, such as domestic violence counseling and batterer intervention programs. Requiring batterers to admit to their behavior can help initiate the steps towards permanent behavioral change. In other words, public truth-telling may ultimately prevent future reoffending by the confessing individual, thus reducing overall prevalence rates of intimate violence.”).

## 2. What Would Restorative Justice Look Like as a Response to Wrongs Against Women?

Restorative justice processes can intervene in the justice system in both the civil and criminal contexts or can operate entirely separately from the justice system. All models can be found in the United States, and each has its benefits and shortcomings. More prevalent use of restorative justice in the context of wrongs against women — whatever the model—could serve to change denial norms and promote healing and accountability.

In the criminal justice system, restorative justice is most often offered as a diversion.<sup>282</sup> For example, a prosecutor may refer the perpetrator to a restorative justice program as an alternative to prosecution, jail time, or release.<sup>283</sup> After successful completion of these interventions, defendants may receive a dismissal of the charges or release from probation.<sup>284</sup> For example, Men as Peacemakers runs a program that focuses on those who commit repeated domestic violence offenses after attending court-mandated intimate partner intervention programs.<sup>285</sup> The program runs Circles for offenders, involving community-based dialogues between those who have used violence in intimate relationships and facilitators that are “intended to help participants build awareness, repair harm they have caused, live non-violently, and contribute to helping their communities thrive.”<sup>286</sup> The set of principles that a participant develops in the Circles become conditions of release, monitored by the court.<sup>287</sup> Some programs are run out of the prosecutor’s office itself such as in the District of Columbia;<sup>288</sup> others, such as in Vermont, are collaborative ventures between the prosecutor’s office and community partners.<sup>289</sup>

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<sup>282</sup> Lindsey Pointer, *What is “Restorative Justice” and How Does it Impact Individuals Involved in Crime?* BUREAU OF JUST. ASSISTANT, U.S. DEP’T OF JUST. (Aug. 5, 2021), <https://bjatta.bja.ojp.gov/media/blog/what-restorative-justice-and-how-does-it-impact-individuals-involved-crime> (“[Restorative justice] is often used as a diversion, with cases being referred directly by police officers or judges . . . Many restorative justice programs also accept direct community referrals, allowing the criminal justice system to be bypassed entirely.”).

<sup>283</sup> See, e.g., CTR. FOR JUST. INNOVATION, <https://www.innovatingjustice.org/about> (last visited Sept. 9, 2023).

<sup>284</sup> See, e.g., *id.*

<sup>285</sup> See *Domestic Violence Restorative Circles*, MEN AS PEACEMAKERS, <https://www.menaspeacemakers.org/dvrc> (last visited Sept. 9, 2023).

<sup>286</sup> *Id.*

<sup>287</sup> See *id.* (“Violating or failing to abide by commitments can trigger legal consequences.”).

<sup>288</sup> See *generally Restorative Justice Program*, OFF. ATT’Y GEN. D.C., <https://oag.dc.gov/public-safety/restorative-justice-program> (last visited Sept. 9, 2023).

<sup>289</sup> See VT. STAT. ANN. tit. 28, § 2a (West 2012) (proclaiming that “[i]t is the policy of [Vermont] that principles of restorative justice be included in shaping how the criminal justice system responds to persons charged with or convicted of

Restorative justice programs in the U.S. also may divert cases from the civil justice system and result in a court order, a case dismissal, or a private agreement. For example, the San Diego Restorative Dialogue and Mediation Program helps parties address civil disputes by reaching civil agreements, that are then entered in court.<sup>290</sup> Some U.S. restorative justice interventions operate entirely separately from the justice system, such as the National Medical Malpractice Advocacy Association's Restorative Justice Initiative.<sup>291</sup> The Initiative connects victims of malpractice to facilitators who host conversations between victims and doctors using restorative justice principles.<sup>292</sup> Similarly, Turning Points, a mediation group that focuses heavily on landlord-tenant disputes, offers restorative justice mediation to tenants and property owners.<sup>293</sup> Colville Tribes in Washington State runs a Peacemaker Circle to help community members heal by addressing divorce, custody, and domestic violence entirely separately from the justice system.<sup>294</sup> Other U.S. restorative justice programs operate in universities, professional organizations, unions, or trade associations. These programs tend to act through voluntary referrals, not mandates from courts or alternatives to prosecution.<sup>295</sup> Any of these models could be adapted or deployed to address individual wrongs against women, subject to the guidelines discussed below. These interventions could achieve better outcomes for all parties and begin to change norms around denials and admissions.

One context that has been scarcely tried in the United States but has had some traction abroad is the creation of commissions or circles to address wrongs generally — both historical and contemporary — and to promote healing and safety. These processes can involve those who have perpetrated wrongs and those harmed by them; but their involvement is not

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criminal offenses . . . The policy goal is a community response to a person's wrongdoing.”).

<sup>290</sup> *Restorative Dialogue & Mediation Program*, SAN DIEGO RESTORATIVE JUST. MEDIATION PROGRAM, <https://sdrjmp.org/restoratedialogue> (last visited Sept. 9, 2023).

<sup>291</sup> See, e.g., *About Us*, NAT'L MED. MALPRACTICE ADVOC. ASS'N, <https://www.nmmaa.org/about-me-picture> (last visited Sept. 9, 2023) (“[The NMMAA] dedicates itself as a national network to end medical practice through partnerships with local and national organizations across America.”).

<sup>292</sup> *What Do We Do*, NAT'L MED. MALPRACTICE ADVOC. ASS'N, <https://www.nmmaa.org/nmmaa-initiatives> (last visited Sept. 9, 2023).

<sup>293</sup> *Civil & Community Mediations*, TURNING POINTS, <https://turning-points.solutions/civil-mediation/> (last visited Sept. 9, 2023).

<sup>294</sup> *Peacemaker Circle*, COLVILLE TRIBES, <https://www.cct-pmc.com/> (last visited Sept. 9, 2023).

<sup>295</sup> GWYNN ALEXANDER & DAVID R. KARP, IMPLEMENTING RESTORATIVE JUSTICE PRACTICES AT THE UNIVERSITY OF TEXAS AT AUSTIN, CLASE RESTORATIVE JUSTICE RESEARCH PROJECT FINAL REPORT (July, 2020), <https://sites.utexas.edu/idvsa/research/campus-initiatives/clase-project/restorative-justice/>.

always required. These processes can address wrongs committed by individuals against others or institutional wrongs.<sup>296</sup> South Africa's Truth and Reconciliation Commission exemplifies one such process that incorporated restorative justice principles in the service of addressing past wrongs entirely outside of the justice system. More recently, restorative justice principles informed the Canadian response to the Catholic Church's operation of residential schools in the late 19th and early 20th centuries.<sup>297</sup>

The Canadian Truth and Reconciliation Commission stands as a recent example of a restorative justice intervention addressing cultural and institutional harms. The format — involving stories of survivors and those harmed by the wrong, apologies, and concrete calls to action — could be adapted to abuses such as domestic violence in the National Football League,<sup>298</sup> USA Gymnastics,<sup>299</sup> and even #MeToo abuses. A #MeToo Commission could focus on an industry, such as media or film in which harassment of women is and was pervasive and in which the institutional response was and is sorely lacking. Alternatively, a commission could more broadly address sexual abuse and sexual harassment and seek to create calls to actions across industries, the legal system, and in our culture generally. Such an intervention could raise awareness, potentially support healing in survivors by storytelling and by building support and community among survivors, and concretely develop steps for reform and reparation. One could also imagine such a commission in a community to

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<sup>296</sup> Institutions that have perpetrated injuries also have been known to deny the wrongs. For example, the Japanese internment during World War II, the Tuskegee Syphilis Study, and the Catholic Churches' response to sexual abuse by priests are all institutional wrongs that were long denied and unaddressed.

<sup>297</sup> See generally Anderson Cooper, *Canada's Unmarked Graves: How Residential Schools Carried Out "Cultural Genocide" Against Indigenous Children*, CBS NEWS (Feb. 6, 2022, 6:57 PM), <https://www.cbsnews.com/news/canada-residential-schools-unmarked-graves-indigenous-children-60-minutes-2022-02-06/> (discussing the Catholic Church's treatment of indigenous children at Residential Schools in Canada from the 1880s to the early 1900s).

<sup>298</sup> See generally Jenny Vrentas, *NFL Players Pay a Small Price When Accused of Violence Against Women*, N.Y. TIMES (July 13, 2022), <https://www.nytimes.com/2022/07/13/sports/football/nfl-players-pay-a-small-price-when-accused-of-violence-against-women.html>.

<sup>299</sup> The sentencing of Larry Nassar, involving victim statements by hundreds of victims, addressed this issue in part; however, the role of USA Gymnastics in creating and failing to respond to the abuse remains an unresolved injury for many survivors. See generally Devlin Barrett, *Simone Biles to Congress: 'I blame Larry Nassar, & I also blame an entire system'*, WASH. POST (Sept. 15, 2021, 4:51 PM EST), [https://www.washingtonpost.com/national-security/gymnasts-nassar-fbi-investigation-hearing/2021/09/14/de4832cc-159f-11ec-9589-31ac3173c2e5\\_story.html](https://www.washingtonpost.com/national-security/gymnasts-nassar-fbi-investigation-hearing/2021/09/14/de4832cc-159f-11ec-9589-31ac3173c2e5_story.html) (one survivor discussing the pain and the blame she directs to USA Gymnastics); *Statement from USA Gymnastics Board Chairman Paul Parilla & CEO Steve Penny*, USA GYMNASTICS (Feb. 16, 2017), <https://usagym.org/statement-from-usa-gymnastics-board-chairman-paul-parilla-and-ceo-steve-penny/> (providing an overview of USA Gymnastics role).

address domestic violence. Hosted by community members, the government, or a nonprofit, the commission could provide a forum for survivor narratives. Such a commission would align with the initial goals of the #MeToo movement.<sup>300</sup>

### 3. Restorative Justice Is not a Panacea for Addressing Wrongs Against Women; its Development and Use Must Be Thoughtful

Restorative justice interventions, while holding much promise for effectively reforming our legal system and culture's responses to wrongs against women, feature their own inherent challenges and require careful design and implementation. Some of restorative justice's potential shortcomings are practical; others involve more theoretical and expressive challenges.

#### *i. Practical Challenges of Restorative Justice*

First, restorative justice can be expensive and time-consuming. Facilitators should be highly trained to manage dialogues and to remain constantly attentive to coercion, power differentials, and trauma.<sup>301</sup> If not handled effectively, dialogues could retraumatize survivors and entrench mindsets that initially led to the wrongdoing. The cost of restorative justice interventions renders its use potentially skewed toward those who can afford it.<sup>302</sup> Although facilitators could provide their services voluntarily, that model is not sustainable, nor could it be scaled to provide for widespread availability. Restorative justice interventions also take time. Most effective interventions require multiple meetings<sup>303</sup> of several hours each.

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<sup>300</sup> See Wexler et al., *supra* note 150, at 68-69, 99 (citations omitted) (discussing the potential of restorative justice to address #MeToo allegations and how “[e]fforts to deal with particular cases of harassment and abuse are being framed as important for their own sake but also as helping to enforce the idea that certain conduct tolerated in the past will no longer be tolerated in the future. And efforts to address individual cases are also being complemented by campaigns like Time's Up that are explicitly focused on broader institutional reform.”).

<sup>301</sup> See, e.g. THE RESOLUTION CENTER, <https://theresolutioncenter.org/services/facilitation/rj-dialogue.html#:~:text=Trained%20facilitators%20first%20meet%20individually,individual%20voluntarily%20wishes%20to%20participate>. (last visited Aug. 31, 2023) (providing an overview of the screening and counseling process).

<sup>302</sup> See Gibson, *supra* note 270 (“[T]he problems of crime and incarceration fall disproportionately on minority communities. In those places, restorative justice has a real potential to bring change, advocates say, and yet, many programs are in white, suburban neighborhoods, dealing primarily with nonviolent offenses . . . In talking to the Harvard Law students, Coleman recalled discovering the concept of restorative justice and thinking, ‘Wow, the people who need it most don’t have this.’ I was like, ‘Damn, man, I need this more than anybody.’”).

<sup>303</sup> Edwards & Haslett, *supra* note 273, at 6.

Although the justice system is similarly far from efficient,<sup>304</sup> restorative justice takes institutional and individual commitment.

Restorative justice programs have little to calibrate them, resulting in varied and unpredictable outcomes. Outcomes will depend on facilitators, parties, community members, and of course, on the nature of the wrongdoing. One commentator advocating for restorative justice, for example, discussed the disparate outcomes in communities in which certain kinds of wrongdoing is more prevalent; in such communities, he notes, the outcomes might be harsher than in others.<sup>305</sup>

Restorative justice's principles, requiring voluntary participation by victim and offender as well as offender accountability, mean that restorative justice may not be widely appropriate.<sup>306</sup> In cases of intimate partner violence, sexual assault, and sexual harassment, it's particularly important that survivors are provided counseling so that they can thoughtfully consider participation in a restorative justice intervention given the risks of coercion and trauma.

The requirement that those accused of wrongdoing must be willing to take responsibility for their wrongdoing requires more than what is required of a defendant who is willing to take a guilty plea. In a restorative justice intervention, not only must perpetrators take responsibility for their actions, but they must also be willing to accept an uncertain outcome in return. This requirement will exclude those unwilling to be held accountable, those unwilling to face the survivor and accept uncertain outcomes, as well as those who assert their innocence.

An additional practical consideration that merits consideration and possible statutory or regulatory responses involves the liability complainants face when alleging wrongdoing — particularly women reporting transgressions by men. The recent increase in defamation suits against accusers and the prevalence of nondisclosure agreements intended to silence women's allegations render the participation of survivors of domestic violence or sexual assault in restorative justice interventions fraught.<sup>307</sup>

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<sup>304</sup> Brian J. Ostrom, Lydia E. Hamblin, Richard Y. Schauffler & Nial Raan, *Timely Justice in Criminal Cases: What the Data Tells Us*, NATIONAL CENTER FOR STATE COURTS, [https://www.ncsc.org/\\_data/assets/pdf\\_file/0019/53218/Timely-Justice-in-Criminal-Cases-What-the-Data-Tells-Us.pdf](https://www.ncsc.org/_data/assets/pdf_file/0019/53218/Timely-Justice-in-Criminal-Cases-What-the-Data-Tells-Us.pdf) (“The average time to disposition is 256 days for a felony case and 193 days for a misdemeanor.”).

<sup>305</sup> Smith, *supra* note 166, at 77-78.

<sup>306</sup> *But see* Bibas & Bierschbach, *supra* note 167, at 116 (citations omitted) (“Numerous studies show that a substantial percentage of victims want to meet with offenders. ‘The [empirical] evidence suggests that victims see emotional reconciliation to be far more important than material or financial reparation.’ According to one study, the more that victims are emotionally upset by the offense, the more they want to meet with offenders.”).

<sup>307</sup> See Bryce Covert, *Years After #MeToo, Defamation Cases Increasingly Target Victims Who Can't Afford to Speak Out*, THE INTERCEPT (July 22, 2023),

Given this reality, reform would need to address immunity for complainants in restorative justice interventions — both individual interventions and commissions.

*ii. Theoretical and Expressive Challenges of Restorative Justice*

Restorative justice also has a range of theoretical and expressive challenges that must be addressed in its design and implementation. First, restorative justice derives from indigenous practices and, over time, adoption has been undertaken without appropriate acknowledgment.<sup>308</sup> Restorative justice practices have further been adapted in a way that may be considered untethered from their original principles.<sup>309</sup> Any program should explicitly reference its roots in indigenous practices, as well as its deviations from those practices when necessary.

Second, as discussed above, the majority of restorative justice interventions in the United States are connected to, if not based in, the criminal justice system. As such, most restorative justice interventions are inherently coercive. Much like the current plea-bargaining system, restorative justice participation can become transactional when it is part of a system in which those who offend have little autonomy and free will to decision-make absent government influence. This influence can induce those who offend to take part in restorative justice when they may not believe in its principles, may not be factually guilty, be willing to accept responsibility, and/or be open to accepting and abiding by the intervention's agreements. Significant consideration should be given to program design and when possible, programs should operate with autonomy, independent of the government.

Third, some critique restorative justice as insufficiently punitive.<sup>310</sup> Those who seek retribution are unsatisfied by diverting crimes from the penal system and express concern that outcomes are inadequately harsh to convey moral judgment.<sup>311</sup> However, although jail time is not an available restorative justice outcome, interventions may well convey deep moral

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6:00 AM), <https://theintercept.com/2023/07/22/metoo-defamation-lawsuits-slapp/>.

<sup>308</sup> Gibson, *supra* note 270 (“Perhaps the biggest concern has to do with race. On one hand, restorative practices that originated in indigenous communities have been adopted without credit or adapted in ways that sever them from their original purpose and meaning. This kind of cultural appropriation ‘is a huge issue in the field.’”).

<sup>309</sup> *Id.*

<sup>310</sup> *See id.* (“Indeed, one common critique of restorative justice is that it allows offenders to escape proper punishment.”).

<sup>311</sup> *See* ERIN KELLY, *THE LIMITS OF BLAME: RETHINKING PUNISHMENT & RESPONSIBILITY* (“A lot of times, people think that individual moral accountability only makes sense within a retributive framework. I think a lot of people naturally put together the ideas of moral accountability, blame, and punishment. And they think that if we pull them apart, then we’re not being morally serious.”).



and ethical judgment throughout their sessions as well as in the final agreements.

Finally, diverting cases to a restorative justice process could convey the message that the wrongs are not sufficiently serious to merit criminal law punishment. The long history of wrongs against women being treated as private matters,<sup>312</sup> unworthy of justice system intervention, renders this message particularly fraught. For that reason, restorative justice interventions should never be the only recourse for survivors of gender-based wrongs and domestic violence, but they should remain an option. Moreover, the increasing use of restorative justice to address a wide range of crimes should, over time, minimize the message that restorative justice reflects a minimization of this particular type of wrongdoing.

Ultimately, these shortcomings, while legitimate, can be addressed by broader funding for restorative justice and thoughtful design and implementation. The critiques should remain front and center for those designing restorative justice inventions for individual wrongs as well as commissions to address wrongful gender-related behavior more generally.

#### CONCLUSION

In the face of allegations of wrongs against women, denial is likely to remain the more prevalent response without radical reform in our legal system and our culture's values and assumptions. Given the deep skepticism about women's credibility, denial of wrongdoing against women is likely to prevail, absent unassailable proof and corroboration. The dire personal and professional consequences of admissions will further entrench denial. Until our legal system and culture incentivize authentic admissions and accountability, denial will persist. A key to incentivizing admissions is providing a potential pathway to redemption and reintegration. Although our legal system may not take wrongs against women seriously, our societal response to men admitting their wrongdoing, like Ray Rice or Al Franken, sends a clear message that accountability may lead to personal and/or professional ruin.<sup>313</sup>

On the other hand, if there is a pathway to reintegration for those who commit wrongs, then perhaps more men would be more likely to choose to admit, take accountability for their actions, seek to offer healing to those

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<sup>312</sup> See Richard Johnson, *Changing Attitudes About Domestic Violence*, 50 L. & ORD. 60 (2002) (discussing the evolution of American society's perception of domestic violence throughout the 19th, 20th, and 21st centuries).

<sup>313</sup> See Helen Lewis, *Why I've Never Believed in 'Believe Women'*, THE ATLANTIC (May 14, 2020), <https://www.theatlantic.com/international/archive/2020/05/believe-women-bad-slogan-joe-biden-tara-reade/611617/> ("A man who becomes '#MeToo accused' — but whose case is never publicly aired in full — carries a miasma of unspecified wrongdoing. And if there is no possibility of 'serving your time,' all the incentives point toward denial rather than confession.").

they have hurt, and engage in the work required to avoid reoffending.<sup>314</sup> Redemption is a key aspect of Judeo-Christian values, as well as prevailing recovery theory in the form of making amends.<sup>315</sup> Reintegration is itself a key outcome for restorative justice interventions.<sup>316</sup> Healthy reintegration is also consistent with prevailing theories of punishment in the criminal justice system.<sup>317</sup> While retributive justice seeks generally to punish transgressors and incapacitation theory seeks to remove and isolate the offender for the safety of society, rehabilitation, restoration, and deterrence are all served by seeking to ultimately reintegrate those who offend back into society.<sup>318</sup> And yet the storyline of successful reintegration and redemption is hard to find in the aftermath of admitted wrongs against women. Al Franken may have partially resuscitated his comedy career but a return to the Senate seems very unlikely.

Indefinite social and professional ostracism are — in many cases — unlikely to produce outcomes that serve our society or the survivors of the initial transgressions. Such treatment can entrench anti-social, transgressive attitudes that put others even more at risk. One commentator explains the risks of retributive justice without the possibility of reintegration, noting “[t]he point of punishment is not to ostracize criminals into a permanent underclass, embittered and tempted to revictimize a society that shuns them. The point is to exact appropriate retribution and prepare offenders to return to the fold.”<sup>319</sup>

Of course, some who commit serial or particularly heinous offenses may have foreclosed their own pathway to reintegration. Consider, for

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<sup>314</sup> See generally Brenda V. Smith, *Battering, Forgiveness and Redemption*, 11 AM. U. J. GENDER, SOC., POLY. & L. 921 (2003).

<sup>315</sup> See, e.g., Russell G. Pearce, *The Jewish Lawyer's Question*, 27 TEX. TECH. L. REV. 1259, 1267 (1996) (“Every person is called upon to be a redeemer, and redemption takes place every moment, every day.”); Andrew Simmonds, *Amah and Eved and the Origin of Legal Rights*, 46 S.D. L. REV. 516, 519 n.13 (2001) (“Among other things, a large part of Judeo-Christian theology is based upon redemption from slavery.”); see also SAMHSA's *Working Definition of Recovery: 10 Guiding Principles of Recovery* (2010), <https://store.samhsa.gov/sites/default/files/d7/priv/pep12-recdef.pdf> (noting that a guiding principle of recovery from addiction is that a person must overcome and acknowledge their mistakes to redeem themselves from their past with addiction).

<sup>316</sup> See Wexler et al., *supra* note 150, at 81-83 (discussing the importance of reintegration as “[o]ne of the tenets of restorative justice.”).

<sup>317</sup> See Adam J. McKee, *Criminal Justice: An Overview of the System, Section 2.5: Theories of Punishment* (2023), <https://www.docmckee.com/WP/cj/criminal-justice-an-overview-of-the-system/criminal-justice-section-2-5-theories-of-punishment/>.

<sup>318</sup> Gordon Bazemore, *Restorative Justice & Earned Redemption: Communities, Victims, & Offender Reintegration*, 41 AM. BEHAV. SCI. 768 (1998).

<sup>319</sup> Bibas, *supra* note 194, at 342.

example, Larry Nassar or Harvey Weinstein.<sup>320</sup> The long lines of women wronged by their decades of transgressions — committed against those who were vulnerable and dependent on them — may be better served by therapeutic justice interventions such as truth and reconciliation commissions or sentencing hearings such as the forum Judge Aquilina created for the gymnasts who suffered from Nassar’s abuse.

Further, much needs to be considered in creating pathways for reintegration. First, who decides when an individual is eligible for reintegration?<sup>321</sup> In cases of transgressions against individual people, does the survivor decide? Given that individuals may have different thresholds for forgiveness or varying methods of assessing contrition, how could that approach serve our society generally? What impact would lack of uniformity of consequences have on deterrence? In the cases of those who transgress within an industry or against a group of survivors, would a central body make the assessment? A representative group of survivors? Does context matter? How would a group assessing rehabilitation consider nuance, context, and background of those who transgress?

Further, in developing pathways to reintegration, we do not want to neglect the wellbeing of survivors and healing of those who have been harmed. Many steps precede reintegration that need to be considered before focusing on that ultimate step. As Michelle Goldberg considered in the *New York Times* when thinking about reintegration of those accused during the #MeToo movement:

Before we do that, though, we should clarify a few things. It’s one thing to say that people who have harmed others, and feel remorse, deserve an opportunity to make amends, and shouldn’t be pariahs forever. Most people shouldn’t be defined by the worst thing they’ve ever done. There’s a difference, however, between arguing that

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<sup>320</sup> But see Bryan Cranston, ‘*There May Be a Way Back for Weinstein*’, BBC NEWS (Nov. 13, 2017), <http://www.bbc.com/news/av/entertainment-arts-41973917/bryan-cranston-there-may-be-a-way-back-for-weinstein> (“If [Harvey Weinstein and Kevin Spacey] were to show us that they put the work in, and are truly sorry, and making amends, and not defending their actions, but asking for forgiveness, then maybe down the road there is room for that, maybe so . . . We shouldn’t close it off and say, ‘To hell with him, rot and go away from us from the rest of your life.’ Let’s not do that.”)

<sup>321</sup> The accuracy of this assessment is the direct analog to the accuracy of parole release assessments, which have been found to be extremely problematic. See Sonja B. Starr, *The New Profiling: Why Punishing Based on Poverty & Identity Is Unconstitutional & Wrong*, 27 FED. SENT’G. REP. 229, 229-30 (2015) (discussing the bias inherent in parole assessments); Mirko Bagaric et. al., *The Solution to the Pervasive Bias & Discrimination in the Criminal Justice System: Transparent & Fair A.I.*, 59 AM. CRIM. L. REV. 95, 124-27 (2022) (discussing the methodology for AI-assisted risk assessments and how these assessments are susceptible to human bias).

someone merits a second chance, and insisting that he didn't do anything all that wrong in the first place, that his accusers are exaggerating, or that his humiliation makes him the real victim.<sup>322</sup>

#MeToo survivors have also joined the conversation about reintegration — emphasizing the importance of considering how we treat survivors before we focus on how we treat those who have hurt them. As Ashley Judd noted: “There’s an appropriate sequence. Accountability, amends, introspection, restitution, then redemption. You don’t get to skip the stages that lead to redemption.”<sup>323</sup>

Whatever the reintegration process looks like, it should be informed by restorative justice principles that involve accountability,<sup>324</sup> contrition, and willingness to make amends and articulate the injuries.<sup>325</sup> Reintegration should not occur merely because the consequences of having behaved badly are too harsh, unfair, or otherwise uncomfortable.<sup>326</sup> Reintegration

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<sup>322</sup> Michelle Goldberg, *The Shame of the MeToo Men: I feel bad for them. Do they feel bad for women?*, N.Y. TIMES (Sept. 14, 2018), <https://www.nytimes.com/2018/09/14/opinion/columnists/metoo-movement-franken-hockenberry-macdonald.html>.

<sup>323</sup> Anna Silman, *7 Actresses on Whether the Men of #MeToo Should Get a Path to Redemption*, THE CUT (May 1, 2018), <https://www.thecut.com/2018/05/should-metoo-perpetrators-be-allowed-a-path-to-redemption.html>; see also *The Accuser & The Accused*, #METOO, NOW WHAT? (Feb. 9, 2018), <http://www.pbs.org/video/the-accuser-and-the-accused-fnc15l/> (“You don’t just get to show up and say, ‘Hey sorry, my bad’ and then just keep going. That’s just not . . . how it works.”).

<sup>324</sup> See, e.g., Yeshim Iqbal & Rezarta Bilali, *The Impact of Acknowledgement & Denial of Resp. For Harm on Victim Groups’ Perceptions of Just., Power, & Intergroup Attitudes*, 48 EUR. J. SOC. PSYCH., 1, 1 (2017) (“Acknowledgement of responsibility is a precondition for reconciliation . . . and a key element of many strategies and interventions to overcome past violence and stop cycles of conflict, including public apologies . . . truth and reconciliation commissions . . . and various restorative justice processes.”).

<sup>325</sup> See Wexler et al., *supra* note 150, at 85 (“[T]o be reintegrated into the community, offenders . . . should make restitution to their victims, engage in service to the relevant community, confront the harm caused by their behavior, and learn from their experiences while helping others to do so as well.”).

<sup>326</sup> John Hockenberry, a journalist who was accused of sexual improprieties during the #MeToo movement and who suffered professional consequences, wrote about reintegration and provides a view into the mindset of someone seeking redemption without, it appears, having done the necessary work: “Being a misguided romantic, or being born at the wrong time, or taking the wrong cues from the sexual revolution of the Sixties, or having a disability that leaves one impotent at the age of nineteen — none of this is a justification for offensive behavior toward women. But is a life sentence of unemployment without possibility of furlough, the suffering of my children, and financial ruin an appropriate consequence? Does my being expunged from the profession in which I have worked for decades constitute a step on the road to true gender equality? Is my

will often involve work — counseling, volunteering, taking part in classes or group discussions about the wrongdoing or the underlying assumptions that underlie the behavior.<sup>327</sup>

Reintegration should not be an entitlement. However, its availability is critical to incentivize healthy admissions and accountability and to overcome the overwhelming attractiveness of denials. Without a visible pathway to reintegration, for at least some of those who commit wrongs against women, we risk entrenching negative behavior, suppressing the talents of some who committed wrongs in the past but who have addressed their behavior and have more to offer, and foreclosing healthy accountability that is more likely to lead to better behavior and healthy recovery for victims than denial. Reforms and alternatives to the legal system might pave the road for a cultural shift toward accountability in wrongdoing generally — a shift that would render more consistent our legal system with our prevailing or pretextual moral and religious values. Such a shift may ultimately facilitate a norm of truth-telling and healing in gender violence and harassment that could reduce recidivism and promote general healing for both those who injure and those who are injured.

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life a reasonable price exacted in the pursuit of justice, or is my situation an injustice born of a deeper dysfunction in the matters of gender and a fear of confronting anything beyond revenge, purges, and humiliation?” Hockenberry, *supra* note 149.

<sup>327</sup> See, e.g., Bazemore, *supra* note 318, at 768 (advocating for a restorative reintegration model emphasizing community control over justice processes and increased access to education, employment, and personal development programs for young people in the system, citing success that such systems have had in New Zealand, Canada, and different communities around the United States).