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## The Light We Shine into the Grey: A Restorative #MeToo Solution and an Acknowledgement of Those #MeToo Leaves in the Dark

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**THE LIGHT WE SHINE INTO THE GREY:  
A RESTORATIVE #METOO SOLUTION AND  
AN ACKNOWLEDGMENT OF THOSE  
#METOO LEAVES IN THE DARK**

*Nora Stewart\**

*In the past year and a half, American women have publicly discussed experiences of sexual assault, harassment, and—notably—grey-area misconduct in an unprecedented manner. The rhetoric of the #MeToo movement is rife with references to “shining a light” on a set of unexplored issues hitherto obscured in cultural darkness, to following women’s experiences into the grey. What is new about #MeToo, and what likely will be the through line that defines its historical importance, has been its sensitivity to nuance. The grey range of #MeToo misconduct is not a new problem. It is emphatically new, however, as a subject of public discourse. As such, and given the unsettled expectations that noncriminal #MeToo accusations have generated, it invites a new legal solution. This Note proposes that solution in the form of a restorative justice response to grey-area #MeToo misconduct, based on indigenous jurisprudential models.*

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#### INTRODUCTION

“Bill Cosby is one thing; but many women don’t want the V.P. of sales who got too handsy at the Christmas party to be banished forever, let alone go to prison.”<sup>1</sup> It is not only the internet that makes #MeToo different from prior movements. Though the broader differences between feminism and #feminism could easily fill several volumes,<sup>2</sup> a primary feature separating #MeToo from its predecessors is the conviction that women<sup>3</sup> have a right to talk about the aforementioned V.P. of sales and be heard.

Before #MeToo, the story of women and sexual misconduct centered on victimization, blame, belief, narrative, ambiguity, power—all with respect to a potential *crime*. Though defining rape and sexual assault presents challenges, both legally and colloquially, those challenges previously concerned a known range of permissible accusations. Tacitly, an allegation had to be serious and important enough for a victim to earn the cultural airtime necessary to tell her story. Women understood that a certain threshold of violence or indignity perpetrated against them was a prerequisite to publicly discussing an allegation; the inevitable process of defending their credibility could only begin once their allegation met that initial bar and entered the public sphere.

#MeToo has changed the rules surrounding women’s public discourse. As distinct from historical feminist movements, it has rapidly become a way to

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1. Katie J. M. Baker, *What Do We Do with These Men?*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/opinion/sunday/metoo-comebacks-charlie-rose.html> [<https://perma.cc/6WQQ-LJRG>].

2. #Feminism is used to describe both a class of activist hashtags created to draw attention to women’s issues and foster social media engagement, *see, e.g.*, Jessica Bennett, *Behold the Power of #Hashtag Feminism*, TIME (Sept. 10, 2014), <http://time.com/3319081/whyistayed-hashtag-feminism-activism/> [<https://perma.cc/RUN6-8B2T>], and as a commentary on the irony or unseriousness of internet culture, occasionally with a nonetheless unironic and serious message about feminism itself, *see, e.g.*, Last Week Tonight (@LastWeekTonight), TWITTER (Mar. 12, 2017, 8:02 PM), <https://twitter.com/lastweektonight/status/841122161045692416> [<https://perma.cc/NK9N-LEHQ>]. #MeToo is commonly referred to with the “#” symbol as part of the movement’s name, but in common parlance this hashtag generally does not connote irony in the way that the hashtag in #feminism sometimes does. Presumably this is because the #MeToo hashtag highlights the movement’s online origins and serves as an embedded invitation to participate.

3. This Note conceives of #MeToo as a women’s movement for purposes of scope. The words “women” and “female” as used here are intended to encompass both cisgender and transgender women. While such experiences are not the focus of this Note, its delineated scope also is in no way intended to minimize the #MeToo movement’s application to men’s experiences as victims of sexual misconduct.

expose women’s realities beyond the confines of the previously acceptable.<sup>4</sup> In 2019, women are “expanding the boundaries of what kinds of stories must be taken seriously—and bringing a much fuller picture of female humanity into view.”<sup>5</sup>

As women work to shine a light<sup>6</sup> on subjects previously unfit for public airing, questions about consequences necessarily follow. If the V.P. of sales’s “handsiness” is now fair game for public discussion and his behavior fit for public condemnation, what happens next—for him and for the unwilling recipient of his attentions? If #MeToo’s legacy is to publicly problematize unacceptable behavior below the threshold of violence and indignity regulated by criminal sanctions, do extant legal models provide a means to adequately respond to that behavior without criminalizing it?

Some recent cultural commentary has suggested that restorative justice models rooted in indigenous<sup>7</sup> jurisprudence<sup>8</sup> are worth exploring as a next phase of the #MeToo movement.<sup>9</sup> This Note takes the position that restorative justice is a legal solution to a specific dimension of #MeToo,

4. See Rebecca Traister, *When the Muzzle Comes Off*, CUT (Sept. 24, 2018), <https://www.thecut.com/2018/09/kavanaugh-sexual-assault-deborah-ramirez-christine-ford.html> [https://perma.cc/7JZY-UFNE] (“[W]hat I do know with absolute assurance is that we are living through a period in which women are enacting crucial, swift, large-scale social and political change. That change is happening whether or not Republicans push Kavanaugh through [to the Supreme Court], whether or not Democrats take the House or the Senate. The change is not simply (or perhaps, not yet) about outcomes, but rather about expectations and what it’s okay to talk about and when.”).

5. *Id.*

6. See, e.g., Chantal Da Silva, *#MeToo Study Finds Nearly All Women and Almost Half of Men in U.S. Have Faced Sexual Harassment or Assault*, NEWSWEEK (Feb. 22, 2018), <https://www.newsweek.com/after-metoo-study-finds-nearly-all-women-and-almost-half-men-us-have-815660> [https://perma.cc/6B57-33Q7].

7. This Note uses the terms “Native American” and “indigenous” interchangeably when speaking about the experiences of tribal citizens living on reservations within the geographical boundaries of the United States. It occasionally makes use of the word “Indian” when referring specifically to laws or legal contexts that employ that term (as in the phrase “Indian Law”) or to the titles or content of works that either reference those legal contexts or make use of the word “Indian” for their own rhetorical purposes. When referring to the people or jurisprudence of a specific tribal community, this Note uses more specific language.

8. As it advocates the adaptation of that jurisprudence, this Note maintains an awareness of the people from whom it is borrowed. In the period leading up to American women’s public exploration of their grey-area #MeToo experiences, the Department of Justice reported that more than one in two Native American and Alaska Native women had experienced sexual violence in their lifetimes. ANDRÉ B. ROSAY, U.S. DEP’T OF JUSTICE, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 13 (2016), <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf> [https://perma.cc/56U5-FGHF]. #MeToo does little for these women. In comparison to their unambiguously violent experiences and the blind eye consistently turned to them, grey-area misconduct is not a pressing issue. #MeToo’s exposure of nuance is, however, a cultural breakthrough that ultimately will benefit all women if suitable consequences are developed. This Note regards the grey range of #MeToo misconduct as an opportunity not only to develop an appropriate legal response to a newly public set of issues but also to expand the application of a successful and undervalued Native American legal model. In so doing, it does not directly benefit Native American women. It seeks nonetheless to amplify awareness of their experiences.

9. See, e.g., Baker, *supra* note 1.

namely, the part of the movement that spotlights ambiguous behavior beyond the purview of criminal sanctions.

That limited context is essential to this Note's proposed solution. While others<sup>10</sup> have seen a possible place for restorative justice across the full spectrum of behaviors pertinent to #MeToo—from those newly entering the sphere of public discourse to those unambiguously categorized as criminal—this Note advocates its use for the “handsiness” end of the spectrum and emphatically not for the rape and sexual assault end. Implicit in the offered solution is the maintenance of space both for victim-centering<sup>11</sup> practices and to examine the cultural implications<sup>12</sup> of the solution itself.

With those parameters in mind, as this Note develops its proposed solution to #MeToo's dearth of grey-area<sup>13</sup> consequences, it is conscious of the experiences of the people from whose jurisprudence it borrows its solution and remains aware of the legal and practical predicament of Native American women with respect to sexual violence. It is through the use of indigenous jurisprudence that this Note identifies a qualified way forward for #MeToo, but in so doing, it also intentionally identifies a group of people for whom #MeToo has done very little.

This Note nonetheless is wary of the ways in which juxtaposing two forms of cultural silence—the previously unreported instances of grey-area bad behavior that #MeToo spotlights,<sup>14</sup> viewed with reference to cultural and legal failures vis-à-vis Native American women<sup>15</sup>—risks creating a narrative of false equivalence, especially when such a juxtaposition is made by a white woman. Where that juxtaposition is pertinent, this Note highlights the ways in which the two experiences are both valid and important but are unambiguously not the same. In so doing, it strives to tackle issues of cultural appropriation head-on and bake questions about the right of white scholars to comment on the experience of Native American women into its structure.

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10. *See infra* Part III.A.1.

11. Where possible in the context of rape and sexual violence, this Note prefers the term “survivor” to the term “victim.” In legal contexts in which “victim” ordinarily is used (e.g., “victim-centering,” “victims’ rights,” and more general uses of “victim” that extend to areas of criminal law beyond the context of sexual violence) this Note uses “victim” instead of “survivor.” It also uses “victim” in the context of sexual misconduct other than rape and sexual violence.

12. *See infra* Part II.A; *see also infra* Part III.B.

13. As used in this Note, the terms “grey-area” and “grey range” refer to nonassaultive physical contact or physical exposure, patterns of belittling pranks or comments, unwanted attentions, and behaviors taking place in a context of partially granted or unwillingly granted consent. These terms seek to capture the noncriminal conduct that alters the course of women's lives and careers subtly and on terms that women and men routinely accepted prior to #MeToo as the way things are. *See infra* Part I.A.

14. *See, e.g.,* Baker, *supra* note 1.

15. *See, e.g.,* Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 460 (2005). *See generally* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997) (fleshing out the connection between legislation and “lawlessness”).

While legal scholarship on the #MeToo movement is in its infancy, there is a large amount of cultural literature on the subject,<sup>16</sup> and this Note relies on that literature where legal scholarship is lacking. Moreover, there is significant legal scholarship relating to restorative justice's theoretical dimensions but relatively little legal scholarship about the more practical dimensions of tribal models and follow-on models in nonindigenous settings. To explicate these practices, this Note relies in part on interviews with Eric Gross, who studied Navajo Peacemaking jurisprudence in situ.<sup>17</sup> This Note's contribution to existing literature stems from its concentration on the category of #MeToo wrongdoing to which restorative justice can offer a solution, noting where pertinent the dearth of overlap between Native American women's experiences and the conditions that have made a restorative justice application to #MeToo possible.

Part I of this Note sketches the origins and early aims of the #MeToo movement, with a focus on the new kinds of narratives that it has enabled women to bring into public discourse alongside more traditionally acceptable or "credible" accusations with a higher bar for damage to the survivor. It then turns to the cultural backlash against #MeToo and the movement's struggle to define a fair and workable set of consequences across the sexual misconduct spectrum. Part II discusses the use of indigenous jurisprudence by nonindigenous people before laying out the legal framework for forms of restorative justice used in both tribal jurisprudences and legal models inspired by them. Part III carefully posits a limited application of restorative justice to the grey category of behavior onto which #MeToo has shone the first public light. It does so by advocating for a Peacemaking docket attached to state trial courts, which should be procedurally administered under the framework of an "Adjournment in Contemplation of Restoration." It then touches on what #MeToo, as well as this proposal, can and cannot do for Native American women.

### I. WHOSE LIGHT IS IT ANYWAY?

This Part examines the early history of #MeToo and its development from a movement catalyzed by the unambiguous predations of powerful men into one that also reckons with the ramifications of grey-area misconduct. It catalogues some paradigmatic examples of the grey-area behavior of public figures: Louis C.K., Al Franken, and Deborah Ramirez's allegations against

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16. Since consensus emerged that #MeToo is a movement of historical importance and not (as was initially assumed) a few days of Twitter traffic, journalists and essayists have devoted considerable space to analyzing its scope and implications. *See, e.g.*, Baker, *supra* note 1; Da Silva, *supra* note 6; Rebecca Traister, *Too Much, Too Soon*, CUT (Aug. 28, 2018), <https://www.thecut.com/2018/08/louis-c-k-and-matt-lauer-what-do-their-comebacks-mean.html> [<https://perma.cc/ST75-D25X>].

17. Interview with Eric Gross, Recipient, Dep't of Justice Fellowship Grant to Evaluate and Assess Navajo Peacemaking, in N.Y.C., N.Y. (Dec. 4, 2018) (notes on file with author) [hereinafter Interview 1 with Eric Gross]; Interview with Eric Gross, Recipient, Dep't of Justice Fellowship Grant to Evaluate and Assess Navajo Peacemaking, in N.Y.C., N.Y. (Dec. 20, 2018) (notes on file with author) [hereinafter Interview 2 with Eric Gross].

Brett Kavanaugh. It then turns to the cultural backlash against #MeToo in the context of the movement's struggle to determine what comes next.

#### A. #MeToo History

On October 15, 2017, in response to the growing scandal around film producer Harvey Weinstein's decades of predatory behavior toward women, actress Alyssa Milano posted the tweet that began the 2017 incarnation<sup>18</sup> of the #MeToo movement: "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet."<sup>19</sup>

The original *New York Times* story about Mr. Weinstein's trail of misconduct, intimidation, and oppressively wielded power broke on October 5, 2017.<sup>20</sup> The story featured recollections of a hotel room ambush from actress Ashley Judd (it would later emerge that Mr. Weinstein worked to derail Ms. Judd's career after the encounter described in the *Times* article<sup>21</sup>) alongside tepidly apologetic quotes provided to the *Times* by Mr. Weinstein, which implied that he expected the unwelcome publicity to die down quickly.<sup>22</sup> It also catalogued various settlement payments and nondisclosure agreements that Mr. Weinstein and those representing him had engineered over the course of almost three decades.<sup>23</sup> Perhaps most disturbingly, it detailed the strategies regularly employed by women in Mr. Weinstein's orbit to avoid his unwanted advances as they attempted to get on with their careers: one woman advised a colleague to wear a parka in Mr. Weinstein's presence, and female executives frequently "double[d] up" when attending meetings with Mr. Weinstein in order to mitigate the inevitable consequences of being alone with him.<sup>24</sup>

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18. Me Too (as opposed to #MeToo) previously existed as a movement founded in 1997 by Tarana Burke. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/D7TP-XM8A>] (detailing Ms. Burke's initial worry that Ms. Milano would co-opt the #MeToo hashtag in the way that Ms. Burke had previously experienced white feminists to do with the initiatives of feminist women of color; as well as Ms. Milano's subsequent assurances that she was initially unaware of Ms. Burke's work, and her public and private attribution of #MeToo to Ms. Burke upon becoming aware of it).

19. Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), [https://twitter.com/Alyssa\\_Milano/status/919659438700670976](https://twitter.com/Alyssa_Milano/status/919659438700670976) [<https://perma.cc/4SSW-R4VJ>].

20. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/2CPX-8HVL>].

21. Rebecca Rubin, *Ashley Judd, Mira Sorvino Respond to Peter Jackson's Claims That Weinstein Blacklisted Them*, VARIETY (Dec. 15, 2017), <https://variety.com/2017/film/news/ashley-judd-mira-sorvino-weinstein-blacklist-peter-jackson-1202642211/> [<https://perma.cc/35S6-BWFL>].

22. "I appreciate the way I've behaved with colleagues in the past has caused a lot of pain, and I sincerely apologize for it. Though I'm trying to do better, I know I have a long way to go." Kantor & Twohey, *supra* note 20.

23. *Id.*

24. *Id.*

Five days later, the *New Yorker* published an account of Mr. Weinstein's behavior that was darker yet.<sup>25</sup> This account was not only of prolonged, almost prosaic, abuses of power; or of coercion, fear, and shame (on the survivors' end); but of rapes and assaults as well.<sup>26</sup> The *New Yorker* article was the result of a ten-month investigation and featured interviews with thirteen women who said that Mr. Weinstein had harassed or assaulted them.<sup>27</sup> It noted that various publications had made prior attempts to expose Mr. Weinstein's abuses but that Mr. Weinstein and his associates had employed "nondisclosure agreements, payoffs, and legal threats" to ensure that those attempts consistently "fell short of the demands of journalistic evidence."<sup>28</sup>

The combined effect of the two stories was powerful. Under ordinary circumstances, these articles and the strong but specific outrage that they spawned<sup>29</sup> might have been the end of the conversation. On October 13, 2017, however, an opinion piece by actress Mayim Bialik appeared in the *New York Times*.<sup>30</sup> In this piece, Ms. Bialik framed the "casting couch" encounters that her peers had experienced as connected, in some measure, to their failure to make "conservative choices" and "dress modestly."<sup>31</sup> She also characterized her own lack of firsthand experience with predatory industry giants in hotel rooms as the "upside of not being a 'perfect ten.'"<sup>32</sup>

The social media backlash was swift.<sup>33</sup> Among the responses was a searing tweet on October 15, 2017, from actress Gabrielle Union: "Reminder. I got raped at work at a Payless shoe store. I had on a long tunic & leggings so miss me w/ 'dress modestly' shit."<sup>34</sup> Later that day, Alyssa

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25. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [https://perma.cc/AT8H-99VE].

26. *Id.*

27. *Id.*

28. *Id.*

29. See, e.g., Monica Hesse & Dan Zak, *Violence. Threats. Begging. Harvey Weinstein's 30-Year Pattern of Abuse in Hollywood*, WASH. POST (Oct. 14, 2017), [https://www.washingtonpost.com/lifestyle/style/violence-threats-begging-harvey-weinsteins-30-year-pattern-of-abuse-in-hollywood/2017/10/14/2638b1fc-aeab-11e7-be94-fabb0f1e9ffb\\_story.html](https://www.washingtonpost.com/lifestyle/style/violence-threats-begging-harvey-weinsteins-30-year-pattern-of-abuse-in-hollywood/2017/10/14/2638b1fc-aeab-11e7-be94-fabb0f1e9ffb_story.html) [https://perma.cc/UH6S-378T].

30. Mayim Bialik, Opinion, *Being a Feminist in Harvey Weinstein's World*, N.Y. TIMES (Oct. 13, 2017), <http://www.nytimes.com/2017/10/13/opinion/mayim-bialik-feminist-harvey-weinstein.html> [https://perma.cc/W3YU-4HK3].

31. *Id.*

32. *Id.*

33. See Elahe Izadi, *Mayim Bialik Apologizes for Weinstein Op-Ed: 'I Am Truly Sorry for Causing So Much Pain'*, WASH. POST (Oct. 19, 2017), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/10/15/mayim-bialik-fires-back-at-weinstein-op-ed-critics-its-so-sad-how-vicious-people-are-being/> [https://perma.cc/JE63-CNVB].

34. Gabrielle Union (@itsgabrielleu), TWITTER (Oct. 15, 2017, 9:28 AM), <https://twitter.com/itsgabrielleu/status/919600825101705217> [https://perma.cc/9URQ-RRDK]. This tweet, appearing earlier in the same day in which Alyssa Milano sent her #MeToo tweet, is notable for several reasons. Everything about it—its milieu (Twitter), its reference to Payless (woman-of-the-people), its use of profanity (unpretentious)—stands in stark contrast to Ms. Bialik's op-ed. Where Ms. Bialik's piece was othering, Ms. Union's



Milano sent her #MeToo tweet, seemingly in reaction to Ms. Bialik as much as to Mr. Weinstein.<sup>35</sup> By the following morning, nearly 40,000 people had replied.<sup>36</sup> By the forty-eight-hour mark, users had posted the hashtag close to a million times on Twitter alone.<sup>37</sup>

Perhaps because of the inclusive tone that premised Ms. Milano's tweet,<sup>38</sup> or due to years of dormant frustration with Bialik-type responses to Weinstein-type horrors,<sup>39</sup> or because of the nascent movement's timing relative to broader cultural patterns,<sup>40</sup> #MeToo went on to become something far beyond an internet campaign.<sup>41</sup> One year after its inception, #MeToo was

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tweet is universalizing. In describing the horrific experience of a beautiful actress, it makes abundantly clear in fewer than 140 characters that any woman could have been attacked as she was attacked. Though it is difficult to pinpoint precisely what produced the longevity and breadth of the #MeToo movement, the quality of inclusiveness exemplified by this tweet and made explicit in the invitational Alyssa Milano tweet that followed it likely were contributing factors.

35. Heidi Stevens, *#MeToo Campaign Proves Scope of Sexual Harassment, Flaw in Mayim Bialik's Op-Ed*, CHI. TRIB. (Oct. 16, 2017, 11:15 AM), <https://www.chicagotribune.com/lifestyles/stevens/ct-life-stevens-monday-me-too-mayim-bialik-1016-story.html> [<https://perma.cc/3SNR-EPWQ>]. It is possible that frustration with Ms. Bialik's op-ed (and the broader cultural assumptions of which it was emblematic) was also a contributing factor in #MeToo's strength and duration as a movement. Mr. Weinstein's decades of predation are truly appalling, but it is somewhat difficult to see why he—and not Roman Polanski or Woody Allen, for instance—produced a response that has amounted to a cultural shift. The timing of Ms. Bialik's op-ed might go some way toward explaining this distinction. Tonally, the op-ed was a kind of synecdoche for the typical response that follows revelations of misconduct (inadequate horror, victim-blaming, exhortation that women adapt to their regrettable surroundings instead of seeking to alter them, negligible change), and #MeToo was born in part of a determination that the overall response to the Weinstein scandal would not be business as usual.

36. *Id.*

37. *More Than 12M "Me Too" Facebook Posts, Comments, Reactions in 24 Hours*, CBS NEWS (Oct. 17, 2017, 6:50 PM), <https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/> [<https://perma.cc/9RB8-GFFE>].

38. *See id.* (citing Ms. Milano's premise that her campaign was constructed to demonstrate the magnitude of the issue by shifting the focus "away from the predator and to the victim"); *see also supra* note 34.

39. *See supra* note 35.

40. *See* Jeremy Diamond, *Trump Says It's 'a Very Scary Time for Young Men in America,'* CNN (Oct. 2, 2018), <https://www.cnn.com/2018/10/02/politics/trump-scary-time-for-young-men-metoo/index.html> [<https://perma.cc/LU58-5UEQ>] (detailing the progression from the release of the *Access Hollywood* tape of Donald Trump—and the various subsequent accusations of sexual harassment and assault leveled against the then-candidate seemingly without effect—in October 2016, to the beginning of #MeToo in October 2017, to then-nominee Brett Kavanaugh's fraught U.S. Supreme Court confirmation hearings in October 2018). It is also likely that legal developments over a longer arc in some sense prepared the way for the unprecedented features of #MeToo. Broadly, the force requirement that once was a ubiquitous element of proving rape has in recent decades given way to more nuanced understandings of consent. *See, e.g.,* Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 959; Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119, 120–21 (1999). This legal shift, both statutory and common law, may well be among the forces making the cultural acknowledgement of nuanced sexual misconduct possible in the #MeToo era.

41. *See* Jia Tolentino, *One Year of #MeToo: What Women's Speech Is Still Not Allowed to Do*, NEW YORKER (Oct. 10, 2018), <https://www.newyorker.com/news/our-columnists/one-year-of-metoo-what-womens-speech-is-still-not-allowed-to-do> [<https://perma.cc/8L4N->

producing both grim calls to arms<sup>42</sup> and reflections on the new varieties of discourse that the movement has engendered.<sup>43</sup>

The latter variety of analysis showcases the grey-area behaviors that would have been emphatically categorized as trivial before #MeToo.<sup>44</sup> In September 2018, Rebecca Traister wrote that the story told by Deborah Ramirez when she came forward during Brett Kavanaugh’s Supreme Court confirmation hearings was

the kind of encounter most women I know have always assumed they’d never be able to recount in public—least of all in the midst of a highly scrutinized, high-stakes political battle—because it didn’t meet the impossibly high standards the world has set for women who’ve been abused or assaulted and want to be believed.<sup>45</sup>

Ms. Ramirez had described a night of drinking at Yale in which, though she did not remember everything that occurred, she remembered her classmate, Mr. Kavanaugh, “pulling down his pants and thrusting his penis in her face against her will.”<sup>46</sup>

Ms. Traister focused on the “patchiness” of Ms. Ramirez’s memory and narrative, namely on her willingness to come forward with an optically imperfect story and society’s newfound willingness to listen. While this focus gives due credit to a monumental social development catalyzed by #MeToo,<sup>47</sup> there is an equally important facet of Ms. Ramirez’s experience on which the piece does not focus.<sup>48</sup> The act alleged—Mr. Kavanaugh exposed himself to Ms. Ramirez against her will, using enough force to prompt her choice of the word “thrust” in her description of the encounter,<sup>49</sup> but no more—is not necessarily a form of sexual assault or even unambiguously a crime. Depending on jurisdictional norms, it might qualify as indecent exposure, criminalized lewd behavior, or lewd touching,<sup>50</sup> but,

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TK3T] (“Th[e] revanchism is not a sign of #MeToo’s overcorrection, or even of its success—it is merely evidence of its existence.”).

42. See, e.g., *id.*

43. See, e.g., Traister, *supra* note 4.

44. See *id.*

45. *Id.* (noting further that the likely lack of legal or political resolution to Ms. Ramirez’s allegations was in a sense beside the point when compared to the public airing of the *kind* of narrative presented by Ms. Ramirez).

46. *Id.*

47. See *id.*

48. See *id.* Ms. Traister is admirably focused on Ms. Ramirez’s experience and the qualities of *her* narrative: “But part of what #MeToo has always been about—despite the obsessive focus on the consequences faced by men—is what happened to the women . . . . It’s been about the exposure of their realities.” *Id.* In a somewhat contrasting approach, this Note posits that the *type* of misconduct experienced is also essential to “what happened to the women,” even though it describes the actions of the perpetrators.

49. Ronan Farrow & Jane Mayer, *Senate Democrats Investigate a New Allegation of Sexual Misconduct, from Brett Kavanaugh’s College Years*, NEW YORKER (Sept. 23, 2018), <http://www.newyorker.com/news/news-desk/senate-democrats-investigate-a-new-allegation-of-sexual-misconduct-from-the-supreme-court-nominee-brett-kavanaughs-college-years-deborah-ramirez> [<https://perma.cc/RPC7-7C64>].

50. Ms. Ramirez said that she touched Mr. Kavanaugh’s penis without her consent as she pushed him away. *Id.*

given the ostensibly friendly and relaxed context of a college gathering, it is at best difficult to classify.

Reporting this grey-area bad behavior at all is as new to public discourse as entertaining an imperfect narrative like the one presented by Ms. Ramirez. Prior to #MeToo, women justifiably worried that their actual rapes and assaults would appear insufficiently credible under public scrutiny; behavior outside of those categories, and plenty inside them, fell into the range of stories that women simply were expected not to tell.<sup>51</sup>

Two other examples also typify such grey-area behaviors but occurred too early in the series of #MeToo accusations that began in October 2017 to immediately receive the kind of lensing that Ms. Traister applied to Ms. Ramirez's accusations as they occurred. In November 2017, comedian Louis C.K.<sup>52</sup> and then-Senator Al Franken<sup>53</sup> were accused, respectively, of masturbating in front of female colleagues and forcibly kissing and groping a female colleague. The women involved—a group of women made accusations simultaneously in Louis C.K.'s case, while initially only newscaster Leeann Tweeden came forward in Mr. Franken's case—did not suggest that either man had assaulted them in the traditionally understood sense.

The Louis C.K. accusations in particular were notable in that they did not involve any physical force at all, and at least one of the women concerned had felt obliged to consent to the behavior at the time.<sup>54</sup> Two of Louis C.K.'s accusers, comedians Dana Min Goodman and Julia Wolov, described to the *New York Times* their feeling that he had done something to them that ought to have consequences but seemed unlikely to be criminal.<sup>55</sup> After Louis C.K. took off his clothes and masturbated in front of them in a hotel room in 2002 (at which time their careers were beginning to take off), they attempted to build outrage within their profession by telling colleagues about his behavior.<sup>56</sup> Ms. Wolov and Ms. Goodman felt that those they told were either unreceptive or constrained by Louis C.K.'s power in the industry.<sup>57</sup> The two comedians began avoiding the many projects to which Louis C.K. and his manager Dave Becky were connected after Mr. Becky told the women's managers that he wanted them to stop telling others about the encounter.<sup>58</sup> Fifteen years later, Ms. Wolov and Ms. Goodman felt that #MeToo had provided them with an opportunity, as well as a responsibility,

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51. See Traister, *supra* note 4.

52. See Melena Ryzik, Cara Buckley & Jodi Kantor, *Louis C.K. Is Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html> [<https://perma.cc/RL9K-QZRP>].

53. See Nicholas Fandos, *Al Franken Issues Apology After Accusation of Forcible Kissing and Groping*, N.Y. TIMES (Nov. 16, 2017), <https://www.nytimes.com/2017/11/16/us/politics/al-franken-sexual-harassment-groping-forcible-kissing.html> [<https://perma.cc/F6XU-9F3U>].

54. See Ryzik et al., *supra* note 52.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

to speak.<sup>59</sup> Their decision to do so helped to change the terms of what constituted an acceptable #MeToo subject. Only a week separated their accusations from Ms. Tweeden's, which itself altered not only the acceptable content but the vocabulary of the movement.<sup>60</sup>

Following numerous additional allegations of groping, Mr. Franken resigned from the Senate.<sup>61</sup> Recriminations were quick to follow his resignation,<sup>62</sup> and Mr. Franken himself did little to afford his departure a sense of finality or fairness.<sup>63</sup> Louis C.K. disappeared from the public stage for approximately ten months before performing a surprise set at the Comedy Cellar in New York City.<sup>64</sup> He was greeted with a standing ovation before the set began.<sup>65</sup> Reportedly, he told a joke about rape whistles.<sup>66</sup> When approached for comment, the club's owner essentially threw up his hands:

This has been very hard for us. We know that it is not right that he shouldn't be able to perform again, but there is no clear time to decide how long is appropriate. He showed up and now we're thrown into it and we hope it turns out OK.<sup>67</sup>

### B. #MeToo Challenges

Because the #MeToo movement strives to hold accountable the perpetrators of noncriminal behaviors, it struggles with a dearth of acceptable consequences.<sup>68</sup> Banishment from public life is a recurring suggestion<sup>69</sup> and arguably is the prevailing thrust of the attempts at "consequences" made thus far in the lifespan of #MeToo. Nevertheless, efforts to banish offenders

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59. *See id.*

60. *See* Fandos, *supra* note 53. Prior to Ms. Tweeden's accusation, "forcible kissing" was not a phrase in common parlance. After her accusation, it became a subject of public debate. *See, e.g.*, Crystal Marie Fleming (@alwaystheself), TWITTER (May 4, 2018, 6:57 AM), <http://twitter.com/alwaystheself/status/992402778181001217> [<http://perma.cc/X7HZ-D6XK>] ("There needs to be a whole #MeToo conversation that is JUST ABOUT forcible kissing as a form of sexual assault. It's widespread, enraging, disgusting and abusive and doesn't get talked about nearly enough.").

61. Helaine Olen, *Stop Second-Guessing Al Franken's Resignation. He Has to Go*, WASH. POST (Dec. 19, 2017), <https://www.washingtonpost.com/blogs/plum-line/wp/2017/12/19/stop-second-guessing-al-frankens-resignation-he-has-to-go/> [<https://perma.cc/LQ58-WQU4>].

62. *Id.*

63. *See* Molly Ball, *Al Franken Is Not Sorry*, TIME (Dec. 9, 2017), <http://time.com/5057462/al-franken-resignation-sorry/> [<https://perma.cc/SJL7-UFXN>].

64. Clarisse Loughrey, *Louis CK Tells 'Rape Whistle' Joke in First Stand-Up Set Since Sexual Misconduct Admission*, INDEPENDENT (Aug. 30, 2018), <http://www.independent.co.uk/arts-entertainment/comedy/news/louis-ck-rape-whistle-joke-new-york-comedy-cellar-set-sexual-misconduct-a8514031.html> [<http://perma.cc/Y283-92M2>].

65. Traister, *supra* note 16.

66. Loughrey, *supra* note 64.

67. *Id.*

68. *See generally* Baker, *supra* note 1.

69. *Id.*

whose acts do not rise to the level of criminal behavior have tested the collective American<sup>70</sup> attention span and found it wanting.<sup>71</sup>

The movement's struggle with consequences also has alienated some observers. Perceptions of #MeToo as a witch hunt or an indiscriminate panic have run the gamut from the rough-hewn<sup>72</sup> to the relatively rigorous.<sup>73</sup> Tacitly uniting these criticisms is the unsettling idea that any man is vulnerable at any time. If no one knows what will happen to offenders or even what behaviors count as offenses, it becomes easy to dismiss #MeToo—and especially the new grey range that it has exposed—as a “mania.”<sup>74</sup> A Harvey Weinstein's behavior (or some overtly criminal subset of it) is capable of producing a defined resolution if not a fully satisfactory one.<sup>75</sup> At present, a Louis C.K.'s behavior<sup>76</sup> is not.

Tarana Burke<sup>77</sup> has characterized the movement in its present form as “lost.”<sup>78</sup> Her central criticism is that #MeToo has been too focused on perpetrators to the detriment of survivors of sexual violence.<sup>79</sup> As of this writing, she plans to build a three-pronged program geared toward #MeToo's rape and sexual assault survivors.<sup>80</sup> Ms. Burke's solution to the #MeToo lacuna that she identifies is not itself a legal one, but it is one suited to coexist with legal mechanisms already in place<sup>81</sup> and arguably made the more necessary by the adversarial criminal justice system's lack of survivor-centric resources.<sup>82</sup> It is also (rightly, given Ms. Burke's experiences and expertise) a #MeToo response that does not focus on the newly identified

70. #MeToo has an international dimension, but this Note discusses it as a primarily American phenomenon for purposes of scope.

71. *See, e.g.*, Traister, *supra* note 16.

72. *See, e.g.*, *Metoo'd*, URB. DICTIONARY, <https://www.urbandictionary.com/define.php?term=Metoo%27d> [<https://perma.cc/5WD5-QBCY>] (last visited Feb. 12, 2019) (listing, as of this Note's publication, the top definition of the term as, “When a woman Ruins Your Life by accusing you of sexual assault or sexual harassment without any evidence or pass [sic] the time that any evidence could be collected”).

73. *See, e.g.*, Andrew Sullivan, *It's Time to Resist the Excesses of #MeToo*, INTELLIGENCER (Jan. 12, 2018), <http://nymag.com/intelligencer/2018/01/andrew-sullivan-time-to-resist-excesses-of-metoo.html> [<https://perma.cc/SVY3-FLLQ>].

74. *See id.*

75. *See* Maria Puente, *Judge Rules Harvey Weinstein Sexual Assault Case Can Move Forward to Trial*, USA TODAY (Dec. 20, 2018), <https://www.usatoday.com/story/life/2018/12/20/harvey-weinstein-court-new-york-sex-crimes-charges-judge/2294182002/> [<https://perma.cc/F8SH-86WD>].

76. *See* Ryzik et al., *supra* note 52.

77. *See* Garcia, *supra* note 18.

78. *See* Liz Rowley, *The Architect of #MeToo Says the Movement Has Lost Its Way*, CUT (Oct. 23, 2018), <https://www.thecut.com/2018/10/tarana-burke-me-too-founder-movement-has-lost-its-way.html> [<https://perma.cc/8YQM-NJ8Z>].

79. Ms. Burke's pre-#MeToo Me Too campaign involved “healing circles” for survivors of sexual violence. The circles were survivor-only support circles based on sharing experiences. *See id.*

80. *Id.*

81. The ethos and to some extent the form of Ms. Burke's response also dovetails well with this Note's proposed grey-area solution despite the latter's legal character. *See infra* Part III.A.2.

82. This is not to imply that the adversarial criminal justice system as it exists ought to be survivor-centric. *See infra* note 104.

grey range of misconduct. Given the ambiguous and uneven consequences currently experienced by grey-area victims and offenders alike, a clear legal solution that incorporates both parties is both more appropriate and more necessary in the grey range than it would be in response to sexual violence.<sup>83</sup>

As #MeToo stands presently, grey-area offenders' return from nebulous banishments—sometimes greeted by apparent acclaim and relief—produces frustration among commentators and observers of the movement.<sup>84</sup> Some have suggested restorative justice as a possible way forward,<sup>85</sup> but the legal contours of that solution thus far have lacked clarity.

## II. ILLUMINATING EXTANT RESTORATIVE MODELS

This Part considers the use of indigenous legal models by outsiders. It then fleshes out current incarnations of some of those models as well as models based on them. In so doing, it lays the jurisprudential foundation for the legal solution to grey-area #MeToo misconduct that Part III advocates.

### A. *Some Thoughts on Outsiders' Use of Restorative Justice*

In her 1997 remarks “Lessons from the Third Sovereign: Indian Tribal Courts,” Justice Sandra Day O’Connor called for the American state and federal court systems to take notice of and draw on the restorative justice practices of tribal court systems.<sup>86</sup> She spoke of “traditional tribal values” in somewhat general terms.<sup>87</sup> She also mentioned that by the 1934 passage of the Indian Reorganization Act, “most tribes had only a dim memory of traditional dispute resolution systems” and therefore had to work to incorporate traditional features into the tribal court systems that they set up following the Act’s passage.<sup>88</sup>

Justice O’Connor’s commentary is instructive in part because—with great respect for her scholarship and wider aims—it falls into a number of the traps that the work of white scholars tends to fall into when discussing tribal courts and restorative justice. For instance, while it uses specific examples,<sup>89</sup> it treats tribal communities’ experiences as largely equivalent to one another.<sup>90</sup>

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83. *See infra* Part III.A.1.

84. *See* Traister, *supra* note 16.

85. *See* Baker, *supra* note 1.

86. Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 3–6 (1997).

87. *Id.* at 2.

88. *Id.* at 1–2.

89. *Id.* at 4.

90. *Id.* (“[R]elatively few civil disputes were decided [by tribal courts]. This disparity might reflect the time and expense required for civil cases, the courts’ reluctance to handle civil cases because of a lack of familiarity or advanced legal training, or perhaps may have arisen because tribal courts serve a less litigious community. Development of alternative methods of dispute resolution allows the tribal courts to take advantage of their strengths in order to provide efficient and fair resolution of such conflicts.”).

And in discussing tribal courts' strengths, it assumes that those strengths and the values underlying them are monolithic.<sup>91</sup>

As this Note turns to a discussion of contemporary indigenous restorative justice practices and restorative justice practices inspired by the work of indigenous people, it does not escape these pitfalls. Like Justice O'Connor's remarks, what follows draws on a combination of specific examples and generalized principles and values.<sup>92</sup> What it can and should also do is pause over the connection between the kitchen-sink qualities of the contemporary restorative justice umbrella<sup>93</sup> and the history of American violence—legislative and literal—against the various communities whose jurisprudence and values present-day outsiders often aggregate by default.

Justice O'Connor mentioned the "enormous disruptions in customary Native American life . . . wrought by factors such as forced migration, settlement on the reservations, the allotment system, and the imposition of unfamiliar Anglo-American institutions," but in the same breath, she discussed the Indian Reorganization Act in a remarkably positive light.<sup>94</sup> While it is accurate that passage of the Act to some degree "allowed the tribes to organize their governments, by drafting their own constitutions, adopting their own laws through tribal councils, and setting up their own court systems,"<sup>95</sup> it is also the case that the Act, as ultimately passed, curtailed tribal sovereignty because Congress intended that it should.<sup>96</sup> To the extent that the practices of "traditional Indian fora for dispute resolution" have been lost or homogenized,<sup>97</sup> American legislative and judicial interventions have contributed to that loss and homogenization in what often has been a concerted effort to weaken indigenous culture and erode tribal autonomy.<sup>98</sup>

Of course, Justice O'Connor's position on these broader cultural forces in some sense is not the point. She saw the appeal of various tribal jurisprudences, regarded tribal courts' restorative justice practices with respect, and hoped that the state and federal court systems could learn from

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91. *Id.* at 3 ("To further these traditional Native American values, tribal courts may employ inclusive discussion and creative problem-solving. The focus on traditional values in contemporary circumstances has permitted tribal courts to conceive of alternatives to conventional adversarial processes.").

92. It also draws on them from an unequivocal outsider's perspective. I am a white woman and have no direct experience of the practices outlined here.

93. See Shailly Agnihotri & Cassie Veach, *Reclaiming Restorative Justice: An Alternate Paradigm for Justice*, 20 CUNY L. REV. 323, 326 (2017).

94. O'Connor, *supra* note 86, at 1.

95. *Id.*

96. L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 832–33 (1996) ("If anything, the legislative history suggests that Congress specifically considered and rejected a scheme of broad-based tribal sovereignty over territory.").

97. O'Connor, *supra* note 86, at 2.

98. See, e.g., Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147, 164 (2000) (parsing the extent to which superimposing Anglo-American ideas of land ownership onto disputes involving tribal sovereignty and property can abrogate the rights of tribes to self-determine, even in the name of ostensibly liberal values).

tribal courts and incorporate aspects of their approaches. Similarly, this Note proposes an application of restorative justice to a context outside of indigenous culture. As many nonindigenous practitioners have seen, restorative justice models are effective legal tools; practitioners have every reason to want to borrow and adapt them. But it is this Note's position that in 2019, the context—reflection on what will be borrowed, from whom, and the implications of the borrowing against a backdrop of centuries of cultural assault on indigenous people—ought always to precede the borrowing.

*B. Structures and Applications of Restorative Justice Models  
Based on Indigenous Jurisprudence*

Modern restorative justice models and the terms used to describe them vary, but a set of characteristics is common to many. Typically, they are nonhierarchical.<sup>99</sup> Many of them are circle-based,<sup>100</sup> meaning that a group of participants sits together in a circle, usually with a facilitator, and all parties have opportunities to speak.<sup>101</sup> Values reflected in the use of a circle include equality<sup>102</sup> and a sense that a given proceeding will not be resolved in any predetermined manner.<sup>103</sup>

Contrast with adversarial justice systems is stark. Though attempts have been made to incorporate other perspectives into the American criminal justice system,<sup>104</sup> it is by design a two-power system that pits defendants against the government.<sup>105</sup> Goals in the criminal justice system are largely retributive, and the system is not built to interrogate root causes.<sup>106</sup> In general, repairing relationships and searching for the sources of behavior are

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99. See, e.g., Agnihotri & Veach, *supra* note 93, at 327.

100. Many, but by no means all. Victim-offender mediation and community boards both fall outside of the circle model but are sometimes categorized as restorative justice practices. See *id.* at 328–29 (distinguishing these models from circle-based models for purposes of establishing the authors' working definition of restorative justice).

101. See, e.g., *id.* at 327.

102. Gender equality in particular was reflected in precolonial indigenous jurisprudential models. See SARAH DEER, *THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA* 16–17 (2015) (citing a Mvskoke rape law, written down in English in 1825, that makes reference to rape survivors with the phrase “what she say it be law”).

103. See Agnihotri & Veach, *supra* note 93, at 327 (noting the facilitator's lack of predetermined agenda for a given matter's resolution and analogizing the circle to a vessel capable of containing various emotions and modes of discourse).

104. See, e.g., Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 612–16 (2009) (detailing the rise of the crime victims' rights movement, the support that the movement garnered for a victims' rights addition to the Sixth Amendment, and the sweeping statutory gains that the movement achieved after that bid failed). Out of concern for defendants' due process rights, this Note does not advocate increasing victims' power in the adversarial system as it presently exists.

105. Agnihotri & Veach, *supra* note 93, at 329.

106. See Susan J. Butterwick et al., *Tribal Court Peacemaking*, 94 MICH. B.J. 34, 36 (2015).



not part of the adversarial process.<sup>107</sup> Rates of recidivism are concomitantly high.<sup>108</sup>

Recidivism rates in the wake of Peacemaking, a form of restorative justice based in Navajo jurisprudence, are shockingly low.<sup>109</sup> During a two-year study focused on domestic violence on the Navajo Reservation, the recidivism rate for Peacemaking participants was between 15 percent and 20 percent.<sup>110</sup> For study participants who went through the adversarial model and served a prison term, it was approximately 70 percent over one year.<sup>111</sup> Other tribes using the Peacemaking model have also experienced excellent outcomes: the Alaskan Kake tribe measured the results of Peacemaking over the course of four years and found a 97.5 percent success rate in sentence fulfillment.<sup>112</sup>

As practiced by Navajos themselves, Peacemaking<sup>113</sup> in particular is diametrically opposed to the American adversarial justice system in both method and ethos.<sup>114</sup> A central tenet underlying the process is that the vast majority of people are not fundamentally evil, no matter the acts that they have committed.<sup>115</sup> According to the Navajo conception of justice, labeling those who have acted wrongly as criminals or abusers—even as defendants—would be needlessly stigmatizing and is irrelevant to the Peacemaking process; there is no word for punishment in the Navajo language.<sup>116</sup>

Labeling is an embedded feature of the American system.<sup>117</sup> In a typical criminal justice context, defendants either experience the nearly ubiquitous plea-bargaining process<sup>118</sup> or opt at trial to exercise their periodically debated privilege against self-incrimination.<sup>119</sup> Thus, people accused of crimes often

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107. *Id.*

108. *Id.*

109. Interview 1 with Eric Gross, *supra* note 17. Mr. Gross's grant funded his work from 1996 to 1998, though his affiliation with the Peacemaking Division of the Navajo Nation Judicial Branch continued for several years thereafter. The purpose of the grant was to assess the effectiveness of Navajo Peacemaking in reducing recidivism in the area of domestic violence specifically. Therefore, the study focused in part on cases that would have gone to family court in the absence of a Peacemaking option. However, Mr. Gross also observed Peacemaking proceedings that took place as an alternative to criminal proceedings, and his study tracked individuals whose cases were adjudicated through the criminal justice system.

110. *Id.*

111. *Id.*

112. Butterwick et al., *supra* note 106, at 35.

113. The process has another name in the Navajo language, but Navajo practitioners prefer not to share it outside of their own people and use the word "Peacemaking" when speaking to non-Navajos. Interview 2 with Eric Gross, *supra* note 17.

114. *Id.*

115. *Id.*

116. *Id.*

117. See Butterwick et al., *supra* note 106, at 36.

118. See, e.g., Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sept. 15, 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> [<https://perma.cc/QH9L-RHWZ>] ("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. Estimates for misdemeanor convictions run even higher.")

119. See, e.g., Jeffrey Bellin, *Reconceptualizing the Fifth Amendment Prohibition of Adverse Comment on Criminal Defendants' Trial Silence*, 71 OHIO ST. L.J. 229, 285–86

either remain entirely silent in the courtroom or are compelled to verbally admit guilt and say nothing more, in exchange for a reduced sentence.<sup>120</sup> Thereafter, they are assigned a new label: criminal, felon, convict, inmate.<sup>121</sup> The Peacemaking model, by contrast, is constructed around an idea that hearing and validating the experience of the *offender* is an important step on the road to reaching an outcome that restores a positive relationship among the parties involved in a conflict and prevents future offenses.<sup>122</sup>

Though notoriously difficult to describe in detail,<sup>123</sup> a Navajo Peacemaking might go like this<sup>124</sup>: A young man breaks his mother's jaw in a drunken rage. The mother asks for a Peacemaking. The son agrees. Before the Peacemaking, the facilitator asks the mother not to mention her broken jaw. The broken jaw is heavily bandaged; its existence is visible and known. The Peacemaking takes place in a circle. Present are the mother, the son, the son's father, the son's girlfriend, and the facilitator, a traditional counselor. The facilitator asks the mother to speak. She speaks for as long as she wants to. Mostly, she shares memories of her son's childhood. During the time that she speaks, the son covers his face with his hands and sobs. She looks directly at him the whole time. The father speaks next. The girlfriend speaks after the father. This has all taken about two hours. The facilitator tells the son that it is now his turn to speak. The son also speaks for as long as he wants to. Among other things, he tells his mother that the day of the Peacemaking will be his first day as a new person. When he is done speaking, the facilitator asks the mother and son how they would like to resolve their conflict. The son says that he wants his mother to write the Peacemaking agreement and that he will be guided by what she says. She writes an agreement that they both sign. Among its provisions is her hope that he will visit home more. The facilitator concludes the Peacemaking. During the two years that his case is tracked, the son never reoffends.

More broadly, Navajo Peacemaking is built in practice around equal opportunities to speak.<sup>125</sup> A facilitator—typically a traditional counselor or healer—is always present in a nonleadership role to ensure that all parties speak to one another, sometimes for several hours.<sup>126</sup> Participants are encouraged to speak from the heart, but, as in the foregoing example, in some contexts a given participant may be asked before the Peacemaking to refrain from making direct reference to the harm or violent act that necessitated the

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(2010) (advocating alterations to the constitutional rule prohibiting adverse comment by the government on criminal defendants' silence on grounds that it is doctrinally precarious).

120. Interview 2 with Eric Gross, *supra* note 17.

121. See Butterwick et al., *supra* note 106, at 36.

122. Interview 2 with Eric Gross, *supra* note 17.

123. Peacemaking and related jurisprudential models are built to adapt to a given set of circumstances; they are difficult to describe because they are fluid by design. See Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 36 (1999).

124. The following is an anonymized account of a Peacemaking observed during Mr. Gross's study. Interview 2 with Eric Gross, *supra* note 17.

125. *Id.*

126. *Id.*

Peacemaking.<sup>127</sup> Though not ubiquitous, this aspect of Peacemaking is an example of elements that may appear jarring when one's frame of reference is the American criminal justice system.<sup>128</sup> In the criminal justice framework and across the adversarial model in general, accusations are evidence-based, and demonstration of harm to the factfinder is central to any possible resolution.<sup>129</sup> In Peacemaking, the harm is known and visible without having additional attention drawn to it.<sup>130</sup> What is important is creating a forum conducive to mending the relationship among the parties.<sup>131</sup> When an agreement is reached, it is reached by the parties and originates with them in the context of speaking to one another and experiencing one another's emotional responses.<sup>132</sup> It is never superimposed by authorities with an agenda external to the dispute or harm.<sup>133</sup> According to Navajo Peacemaking practitioners, this legal model<sup>134</sup> is based on human nature.<sup>135</sup> Traditional counselors take the position that Peacemaking is not the Navajo way; it *is* justice.<sup>136</sup>

As such, in the hands of careful practitioners, Peacemaking principles can be adapted for use outside of tribal settings.<sup>137</sup> Washtenaw County, Michigan, for example, has successfully operated a Peacemaking Court on its docket since the fall of 2013.<sup>138</sup> It is the first state court project of its kind and receives funding from the Michigan Supreme Court, premised on the idea that "tribal peacemaking principles [can] be successfully applied in state court proceedings to resolve cases, increase satisfaction of litigants, and

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127. *Id.*

128. *Id.*

129. *Id.*

130. Indeed, from the perspective of the Peacemaking ethos, a legal model that necessitates drawing undue attention to and proving the harm such that the claims of the victim must be put to the test and defended is itself counterproductive because it is revictimizing rather than caring. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Instinctually, those accustomed to adversarial justice sometimes view Peacemaking and other forms of restorative justice as legally illegitimate or incomplete rather than simply as an unfamiliar legal model of conflict resolution and harm amelioration. Compounding the tendency of adversarial practitioners to see nonadversarial models as doctrinally suspect (because they are nonretributive) or lacking in deterrent force (because they are nonpunitive) is the fact that Peacemaking maintains a particularly unfamiliar set of values with respect to outcome: "The goal of Peacemaking is to restore 'good feelings' among disputants. This doesn't necessarily mean to [award] 'damages' or make good on broken promises, although it might mean that. The details are unimportant. What is important is the quality of the interpersonal feelings." *Id.* To the adversarial purist, this framework can be difficult to fathom. Though this Note emphatically regards restorative justice practices as a legitimate alternative legal model (and though these practices are regularly used in contexts where they carry legal force and produce outcomes that surpass the success rates of adversarial practices), its proposal does not require that the adversarial-model-trained skeptic accept restorative justice as a wholesale substitute for the adversarial system but rather as an effective supplement in a limited context.

135. *Id.*

136. *Id.*

137. *Id.*

138. Butterwick et al., *supra* note 106, at 34.

improve public trust in justice.”<sup>139</sup> The Peacemaking Court began by taking referrals, including civil, family, and probate cases, and has since expanded to handle juvenile abuse and neglect dockets and newly filed cases across its purview.<sup>140</sup> In practice, the court makes use of traditional circles,<sup>141</sup> sometimes including family members and other supporters of those directly involved in a dispute.<sup>142</sup> The court also uses circles in pre- and post-proceeding contexts to fortify connections and gains developed during the Peacemaking itself.<sup>143</sup>

Another model using techniques similar<sup>144</sup> to Navajo Peacemaking is the Hollow Water Community Holistic Circle Healing process, begun in the Hollow Water community in Canada in response to rampant sexual abuse and assault.<sup>145</sup> The model is based on Ojibwa jurisprudence and makes use of a multistep process involving a series of Peacemaking-like circles, which take place in the wake of a guilty plea before a judge.<sup>146</sup> The Hollow Water program, especially the initial circle, stresses helping the offender to accept and communicate responsibility for his actions.<sup>147</sup> In subsequent circles, he is able to sit with and hear the survivor of his offense in order to begin to understand his actions in the context of their impact on her life.<sup>148</sup> Later circles can include the families of the offender and of the survivor so that the presence of both communities is incorporated into the offender’s understanding of his actions and acceptance of responsibility, and so that the survivor has a support network present.<sup>149</sup>

By the numbers, the Hollow Water process is successful: in a study by the Native Counseling Service of Alberta, only two offenders out of sixty-five who completed the program were charged with subsequent sexual offenses over a two-year period.<sup>150</sup> This result reflects the degree to which Peacemaking-type models are well suited to offenses involving intimate relationships and emotionally fraught harms.<sup>151</sup> Family conflicts are an ideal

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139. *Id.*

140. *Id.*

141. Mr. Gross noted that right angles are disfavored in Navajo culture because Navajos tend to prefer the nonhierarchical symbolism of circles. Interview 2 with Eric Gross, *supra* note 17.

142. Butterwick et al., *supra* note 106, at 37.

143. *See id.* at 36.

144. Interview 2 with Eric Gross, *supra* note 17.

145. Jessica Metoui, Comment, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, 2007 J. DISP. RESOL. 517, 531–32 (“In 1994, the Hollow Water Community Holistic Circle Healing . . . team estimated that three out of four members of the Hollow Water community had been victims of sexual abuse and that one in three members of the community had been an abuser.”).

146. Because it follows a plea, the Hollow Water method demonstrates a version of restorative justice that coexists with some of the familiar features of the adversarial model. *See id.* at 532.

147. *Id.* at 533. This Note, like Ms. Metoui’s Comment, speaks in general terms of male offenders and female survivors, but of course, other gender combinations are possible.

148. *Id.*

149. *Id.*

150. *Id.* at 534.

151. Interview 1 with Eric Gross, *supra* note 17.

construct because of the emotional investment typically present within a family unit, but the Hollow Water program suggests that sexual offenses also fall into the category of intimate wrongs for which Peacemaking is an effective model for redress and resolution.<sup>152</sup> That said, application of Peacemaking methods to *violent* sexual offenses is not without its critics.<sup>153</sup> As this Note discusses in Part III, when searching for solutions and consequences in the aftermath of sexual harms, there is good reason to differentiate between sexual harms at the violent end of the spectrum and harms that instead constitute a grey area of behavior. This latter category encompasses behaviors newly visible under the #MeToo aegis.<sup>154</sup>

### III. LIGHTING THE WAY FORWARD

This Part lays out a proposed legal response to grey-area #MeToo misconduct that uses a modified restorative justice framework based on Peacemaking principles and practices. It then reflects on the limits of what the #MeToo movement, and this Note's proposal, can do for Native American women.

#### *A. Restorative Justice in a Limited #MeToo Context*

Restorative justice models like Peacemaking work—as demonstrated by a sense of resolution, satisfaction, and justice among participants,<sup>155</sup> as well as high rates of sentence fulfillment<sup>156</sup> and low rates of recidivism<sup>157</sup>—because through Peacemaking offenders come to understand their actions in the context of their own lives and the lives of those that they have affected.<sup>158</sup> To the extent that #MeToo is *not* working—to the extent that it has broken new ground in cultural discourse<sup>159</sup> but left those affected searching for consequences and next steps<sup>160</sup>—it has stalled because it lacks a sense of resolution, satisfaction, and justice for those involved as well as any means of assuring that offenders understand their actions and will not continue exactly as before after an indeterminate period of social banishment.<sup>161</sup> Restorative justice provides a workable way forward<sup>162</sup> in the wake of the grey-area misconduct that #MeToo has exposed but to which no uniform solution currently exists.

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152. Interview 2 with Eric Gross, *supra* note 17.

153. *See, e.g.*, DEER, *supra* note 102, at 128–33.

154. *See supra* Part I.A.

155. *See, e.g.*, Butterwick et al., *supra* note 106, at 34.

156. *See, e.g., id.* at 35.

157. Interview 1 with Eric Gross, *supra* note 17.

158. *See, e.g.*, Metoui, *supra* note 145, at 533.

159. *See, e.g.*, Traister, *supra* note 4.

160. *See, e.g.*, Baker, *supra* note 1.

161. *See id.*

162. *See id.*

### 1. Why a Limited Context

There are several reasons that this Note does not propose restorative justice solutions outside of grey-area #MeToo misconduct. First, rape and sexual assault have a defined range of consequences in the criminal justice system. This Note does not take the position that those consequences or that system are perfect in either theory or execution—merely that they already exist. Second, restorative justice models that do not differentiate between sexual violence and other forms of sexual misconduct face justifiable criticism. In her critique of the Hollow Water program,<sup>163</sup> Professor Sarah Deer has argued that for rape survivors in particular, many of the offender-centric practices that characterize the model are potentially revictimizing for survivors.<sup>164</sup> In particular, the degree to which offenders’ understanding of their actions’ impact is predicated on an exposure of survivors’ pain makes survivors responsible for offenders’ healing to a troubling extent.<sup>165</sup> Professor Deer suggests that Peacemaking’s de-emphasis on fact-finding and lack of mechanism to confront consistent denials run the risk of exposing a rape survivor’s pain and producing no accountability to justify the exposure.<sup>166</sup> She also worries that in the limited set of cases in which a perpetrator does reoffend following a Peacemaking, the demoralizing effect on a rape survivor who participated in a failed circle would be acute.<sup>167</sup> These concerns are legitimate. They are also typical of the critique that prevents the widespread use of Peacemaking models notwithstanding their effectiveness. In order both to respect the rights and wishes of rape and assault survivors and to advocate the use of Peacemaking techniques in a context well suited to those techniques’ strengths, this Note aligns with Professor Deer’s position on violent sexual crimes. It does not suggest restorative justice for the Harvey Weinsteins exposed by the #MeToo movement.

Finally, the very newness<sup>168</sup> of grey-area allegations presents a context in which a novel legal solution is not only warranted but also possible. The hunger for consequences and next steps engendered by #MeToo has not come from a single group or political party. Rather, the commentary from largely progressive-leaning columnists<sup>169</sup> can be read to seek the same thing that President Trump presumably sought when he noted that the fall of 2018 was a “very scary time for young men in America.”<sup>170</sup> Both viewpoints express a yearning for stability, for a framework that conveys to men and women that there can be justice and a clearly delineated way forward following

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163. *See* Metoui, *supra* note 145, at 533.

164. DEER, *supra* note 102, at 130.

165. *Id.* at 129.

166. *Id.* at 133.

167. *Id.* at 132–33.

168. *See* Traister, *supra* note 4.

169. *See, e.g.,* Jessica Bennett, *The #MeToo Moment: What’s Next?*, N.Y. TIMES (Jan. 5, 2018), <https://www.nytimes.com/2018/01/05/us/the-metoo-moment-whats-next.html> [<https://perma.cc/R22H-62NC>].

170. Diamond, *supra* note 40.

potentially career-ending accusations. Hiring fewer women<sup>171</sup> cannot be a long-term solution any more than banishing offenders and hoping that they divine the decent and correct moment to return<sup>172</sup> can be. Frustration and confusion<sup>173</sup> are evident on all sides of the issues.

## 2. #MeToo Peacemakings

There is ample evidence that many #MeToo offenders do not understand why their actions now occasion public censure.<sup>174</sup> To a certain extent, this is to be expected; prior to 2017, the grey range of allegations that some #MeToo offenders face would have been brushed aside as inconsequential by offenders and victims alike.<sup>175</sup> Though it is amply possible to take a blame-sharing perspective on #MeToo misconduct too far,<sup>176</sup> American culture as a whole tolerated subtle bad behavior and abuses of power right up until the moment that it did not. It might be argued then that Al Franken, Louis C.K., fired *Today Show* host Matt Lauer, fired *CBS This Morning* host Charlie Rose, and those whose behavior has been comparable to theirs should be forgiven both for their behavior and for their subsequent consternation because “everybody was doing it.”

The broader cultural explicability of grey-area offenders’ befuddlement, however, renders a legal solution with a focus on understanding one’s actions more—not less—essential. If offenders who demonstrably do not understand their behaviors’ impact on victims’ lives continue to experience indefinite

171. See, e.g., Jorge L. Ortiz, *Will #MeToo Turn into #NotHer?: Movement May Come with Unintended Workplace Consequences*, USA TODAY (Oct. 4, 2018), <https://www.usatoday.com/story/news/2018/10/04/metoo-movement-unintended-career-consequences-women/1503516002/> [<https://perma.cc/TLE9-GGZM>].

172. See, e.g., Loughrey, *supra* note 64.

173. Unanswered questions in grey-area cases currently include: How bad is the ambiguous behavior? Should it be forgiven? How much public contrition does an offender need to demonstrate? How long is a reasonable banishment? Does the length depend on the behavior? Does it depend on the public trust placed in the offender prior to the accusations? On whom he harmed and how many victims came forward? On the size and devotion of his public fan base before the accusations? Can he return to his career? A similar career?

174. See, e.g., Amanda Arnold, *Charlie Rose Will Reportedly Host a Show About Men Brought Down by #MeToo*, CUT (Apr. 25, 2018), <https://www.thecut.com/2018/04/charlie-rose-has-plans-to-host-a-show-about-metoo-report.html> [<https://perma.cc/FZ74-P9N7>]; Ball, *supra* note 63; Loughrey, *supra* note 64; Emily Zogbi, *Is Matt Lauer Planning His Television Comeback?*, NEWSWEEK (Sept. 1, 2018), <https://www.newsweek.com/matt-lauer-planning-his-television-comeback-1101134> [<https://perma.cc/Y67R-KDWE>]. The behavior described in the foregoing articles suggests, at the very least, that these men expect to be forgiven for their actions and consider their returns to public life likely if not assured. More fundamentally, it suggests that they do not understand why they are being “punished.”

175. The degree to which the kind of grey-area misconduct exposed by #MeToo previously was a largely invisible and thus routinely accepted element of American culture is reflected in vitriolic pop cultural debates like the one occasioned by “Baby, It’s Cold Outside” in 2018. See, e.g., Andrea Peyser, *When They Go After ‘Baby It’s Cold Outside,’ You Know #MeToo Has Gone Mad*, N.Y. POST (Dec. 4, 2018), <http://nypost.com/2018/12/04/when-they-go-after-baby-its-cold-outside-you-know-metoo-has-gone-mad/> [<https://perma.cc/Q7V3-DA8N>].

176. See, e.g., Claire Zillman, *Democratic Congresswoman Says It’s the ‘Responsibility of the Female’ to Prevent Sexual Harassment*, FORTUNE (Oct. 19, 2017), <http://fortune.com/2017/10/19/sexual-harassment-women-to-blame-democrat/> [<https://perma.cc/LE8Z-UPDW>].

banishments enforced on an ad hoc basis, many of them will wait out those banishments and then return to their former careers and, likely, their former proclivities. This is not a doomsday scenario; on the contrary, it would be business as usual. Under this outcome, #MeToo would have been a brief aberration in an ultimately immutable power structure that, though it may newly have condemned subtle and systemic trespasses, simply was not equipped to build long-lasting solutions.

Grey-area misconduct exposed by and following #MeToo should be addressed with Peacemaking. The Peacemaking envisioned here would not be necessarily identical to Navajo Peacemaking or to the Ojibwa-influenced Peacemaking-type model used in the Hollow Water program. It also would not be identical to the Washtenaw County, Michigan, Peacemaking Court's model (which refers to its practice as Peacemaking in part after the Navajo model). Rather, it would be an amalgamation of some of the essential features of each, under a restorative justice umbrella flexible both to local jurisdictional needs and to the needs of individual participants. Ideally, judges would be trained by indigenous practitioners, but they could also be trained by nonindigenous practitioners familiar with Peacemaking-type models in practice, such as Judge Timothy Connors in Michigan.<sup>177</sup>

Peacemaking dockets should be attached to lower-level state courts,<sup>178</sup> as Washtenaw County, Michigan, has done successfully with its Peacemaking docket since 2013.<sup>179</sup> Though state court systems vary, the docket should be attached to whichever trial-level court generally hears civil suits in a given state to avoid any suggestion of criminal liability. Peacemaking training for one judge per state subdivision—likely per county in most states—could be funded either by the state's highest court<sup>180</sup> or by an independent initiative such as Time's Up.<sup>181</sup>

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177. See Butterwick et al., *supra* note 106, at 34.

178. Anchoring the program to state courts would ensure a degree of political diversity among participating judges, as many state court judges are elected. This would maximize the public perception of fairness, given that members of both major political parties have a tendency to look with suspicion on the impartiality of judges appointed by the other party. Compare Charlie Savage, *Trump Is Rapidly Reshaping the Judiciary. Here's How*, N.Y. TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html> [<https://perma.cc/8Q4X-FAP3>], with Thomas Jipping, *On the Democrats' Confirmation-Process Report*, NAT'L REV. (June 7, 2018, 11:38 AM), <https://www.nationalreview.com/bench-memos/republicans-stacking-courts-democrats-claims-false/> [<https://perma.cc/32TS-4DWJ>].

179. See Butterwick et al., *supra* note 106, at 34.

180. In Washtenaw County, the Michigan Supreme Court's Court Performance Innovation Fund provides funding for the program. *Id.* A similar ethos of strengthening, among other values, public trust in justice through nontraditional means would be important to the viability of this Note's proposal.

181. See Natalie Robehmed, *With \$20 Million Raised, Time's Up Seeks 'Equity and Safety' in the Workplace*, FORBES (Feb. 6, 2018), <https://www.forbes.com/sites/natalierobehmed/2018/02/06/with-20-million-raised-times-up-seeks-equity-and-safety-in-the-workplace/> [<https://perma.cc/QDA8-CL2E>]. Time's Up bills itself as a coalition committed to change across industries and seeking solutions through diverse channels. If it or an initiative like it were to partially fund a grant, such a grant could in turn fund Peacemaking dockets as a public-private partnership without raising ethical issues.



Only nonviolent misconduct that did not rise to the level of criminal behavior would be eligible for the Peacemaking dockets.<sup>182</sup> Conflicts would reach the dockets in one of two ways. First, the victim of the misconduct could request a Peacemaking. In that situation, the victim would initiate a claim, but the claim would proceed no further if the alleged offender did not agree to the Peacemaking.<sup>183</sup> Alternately, the offender could request a Peacemaking, likely in response to a series of triggering events, such as a victim's accusation followed by a firing or forced resignation.

Offenders would be incentivized to request or agree to Peacemakings because the Peacemakings' outcome would legally restore them to their preaccusation community status. Once a Peacemaking was initiated, the court on whose docket the Peacemaking appeared would formally open and then immediately adjourn a proceeding. Procedurally, this would resemble an Adjournment in Contemplation of Dismissal (ACD).<sup>184</sup> For Peacemaking, the procedure would be termed an "Adjournment in Contemplation of Restoration" (ACR).<sup>185</sup>

The proceeding itself would consist of three circles, taking place over the course of six months.<sup>186</sup> In the first circle, the offender would sit with the facilitator (a judge trained in the Peacemaking model) and, once the program was well established, a small group of former offenders who had already completed Peacemakings.<sup>187</sup> Three months later in the second circle, the offender would sit with the victim or victims<sup>188</sup> and the facilitator and listen

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182. Harassment prohibited or likely prohibited (in the case of especially nebulous misconduct) by the policies of a given workplace would qualify as long as the conduct were not criminal.

183. Navajo Peacemaking requires that all parties to a dispute formally consent to the process; if they do not, it cannot proceed. *See* DEER, *supra* note 102, at 129. Under this Note's proposed framework, some alleged offenders simply would not agree to a Peacemaking, and they would be free to decline. This voluntary dimension is important for several reasons. First, it maintains fidelity to the scheme's indigenous antecedents. Second, it underscores the scheme's operation separate from criminal process and criminal liability. Lastly, it serves as a bulwark against the perception, otherwise inevitable in any #MeToo context, that it is a mechanism for women to pursue unjustifiable witch hunts. *See supra* Part I.B.

184. *See, e.g.*, N.Y. CRIM. PROC. LAW § 170.55(8) (2018) ("Upon the dismissal of the accusatory instrument . . . the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.").

185. The use of the new procedural term "Adjournment in Contemplation of Restoration" would serve to distinguish ACRs from ACDs and to frame the Peacemaking as a *restorative* proceeding both procedurally and by virtue of jurisprudential lineage and ethos.

186. During the six-month pendency of the process, the offender would be encouraged to avoid unnecessary exposure (if a public figure) or to seek employment outside of his former field (if a private citizen). The #MeToo movement's instinct toward banishment may be merely an unregulated attempt at retribution. On the other hand, however impractical and undefined, it may also typify a societal instinct to send the offender away to think about what he has done and improve himself. The six-month duration of a #MeToo Peacemaking would leave room for the positive implications of this latter impulse without allowing the "banishment" to go on indefinitely.

187. *See* Metoui, *supra* note 145, at 533.

188. Additional victims would be permitted to join a Peacemaking, regardless of whether it was initiated by a victim or by the offender. Before a multivictim Peacemaking, the facilitator would meet with each victim and ask her to agree to present only her own words

to the victim or victims speak. The facilitator would ensure that the offender also used his opportunity to speak. In the final circle six months after the Peacemaking was initiated, a few members of the victim's<sup>189</sup> and the offender's communities (in most cases, their families), would sit with them.<sup>190</sup> The facilitator would again ensure that all parties spoke. Then the parties—guided by the exigencies of their particular circumstances—would draw up and sign a memorandum of understanding, which could take any form that they mutually chose to conclude the Peacemaking. The memorandum of understanding would remain a private document among the parties.

There would exist no explicit benchmark for “success” within the Peacemaking itself. What would matter, as in Navajo Peacemaking, would not be the form of the agreement reached but the effect of the experience as between the parties.<sup>191</sup> However, there would be a mechanism by which success would be publicly communicated. If the facilitator determined that the offender had demonstrated a good-faith effort to participate in the three circles and commit to the outcome chosen by the parties, the court in which the Peacemaking claim was initially filed would produce a “Record of Restoration” document to conclude the ACR. This document would signal to the former offender's community, to future employers, and—in the case of public figures—to the widest community aware of his actions, that he should be deemed eligible for restoration to the community status that he occupied prior to his victim's accusations.

Unlike criminal sanctions, Peacemaking is both nonpunitive and geared to enhance the understanding of the offender; it is in large part for this latter reason that it is successful as an alternative to adversarial criminal justice processes.<sup>192</sup> It is as well suited, if not better suited, to address noncriminal #MeToo behaviors. Their accusers and subsequent public condemnation have communicated to the likes of Louis C.K. and Al Franken that what they did is something we now consider to be wrong. In no meaningful sense have they been told why.

Peacemaking is built on participants listening to one another. In part this is to give all parties a voice and a sense of resolution.<sup>193</sup> In part it is so that the offender can begin to change the way that he views himself.<sup>194</sup> In part the process is built to help each party to gain a heightened understanding of the other; in the case of the offender, change occurs most powerfully when

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and feelings. Such limited, ex parte-type communications have a precedent in Navajo Peacemaking. Interview 2 with Eric Gross, *supra* note 17. Victims would then speak sequentially during the Peacemaking itself. For cases with accusations from more than three victims, additional victims would be required to initiate a separate Peacemaking naming the same offender.

189. In the case of an offender with multiple victims, the final circle could be divided into multiple circles over successive days in order to accommodate the victims' communities.

190. See Metoui, *supra* note 145, at 533.

191. Interview 2 with Eric Gross, *supra* note 17.

192. See, e.g., Butterwick et al., *supra* note 106, at 35.

193. See *id.* at 34.

194. See Coker, *supra* note 123, at 56.

he comes to understand both the roots of his behavior<sup>195</sup> and that behavior's effect on the victim's life.<sup>196</sup> #MeToo Peacemaking not only would provide a venue and process to afford resolution to victims and communicate to offenders the negative effects of their actions. It also would provide a venue and process to satisfactorily *define* grey-area harms that the #MeToo movement has identified but has struggled to delineate and circumscribe.<sup>197</sup>

For grey-area offenders who declined to participate in a Peacemaking, nothing would change.<sup>198</sup> The uncertainty that currently prevails in all grey-area cases simply would linger in their cases. However, the existence of Peacemakings and of Records of Restoration would incentivize participation because participating offenders would opt out of that uncertainty. The Peacemakings' existence also would clarify by accretion<sup>199</sup> the contours of grey-area misconduct itself as well as societal expectations for offenders, even nonparticipating offenders. Finally, the existence of a nonpunitive set of consequences for the grey range of misconduct would benefit victims by providing them with a meaningful resolution; offenders by affording them insight as well as certainty; and the public by grounding the #MeToo movement's way forward in a measured, voluntary, and predictable legal process.

#### B. *What #MeToo Peacemakings Can(not) Do for Native American Women*

The sexual violence experienced by indigenous women is anything but grey. According to Professor Sarah Deer, in its brutality and in the social perceptions that it engenders, sexual violence has not changed much for Native American women in the past five hundred years.<sup>200</sup> It is important to understand that this is so by design.<sup>201</sup> It is also important to understand that

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195. See Butterwick et al., *supra* note 106, at 36.

196. See Metoui, *supra* note 145, at 533.

197. This proposition runs the risk of sounding as if #MeToo has decided that certain behaviors are wrong and has not bothered to determine why. In reality, the contours and scope of grey-area misconduct *should* be difficult to pinpoint because no mass movement has ever before succeeded in objecting to that misconduct. Ideally, in a context in which offenders became cognizant through Peacemaking of the harms their behavior had caused, they should be in nearly as good a position as victims to articulate appropriate behavioral boundaries in the grey range. It is my hope that—far from contributing to #MeToo detractors' contention that the movement is panic-based and indiscriminately invested in demonizing all men, see, for example, Sullivan, *supra* note 73—this Note's proposal will appeal to #MeToo proponents and critics alike because it will put grey-area offenders in a position to exercise informed agency as normative boundaries gradually are set.

198. Similarly, for offenders who participated in the process, obtained a Record of Restoration, and then reoffended, the "punishment" would be a return to the limbo currently experienced by all grey-area offenders (albeit with a presumable increase in reputational damage).

199. The Peacemakings would, of course, lack true binding precedential force.

200. Deer, *supra* note 15, at 458–59.

201. Professor Deer has highlighted four systematic developments in American federal law that de jure or de facto have stripped tribal governments of jurisdiction over sexual crimes against Native American women: the Major Crimes Act, Public Law 280, the Indian Civil Rights Act, and *Oliphant v. Suquamish*. *Id.* at 460. The combined effect of these developments

the colonialist underpinnings of this design are reflected not only in the legislative and judicial scheme that has enabled violence against Native American women in record numbers but also in the character of the violence itself.<sup>202</sup>

Following decades of outright legal assault on Native American women's autonomy,<sup>203</sup> the current détente among federal jurisdiction, state jurisdiction, and tribal jurisdiction has largely abandoned them.<sup>204</sup> More than indigenous women “need”<sup>205</sup> #MeToo, they need resources, and they need to live within the borders of a country that both recognizes their people's sovereignty and refuses to look away when—by the numbers<sup>206</sup>—the current systems are not working for them.

It is possible to argue that the #MeToo movement's recognition of new grey forms of sexual misconduct is trivial in comparison to the experiences of many indigenous women. This Note takes the position that it is not trivial; it is different. Further, the identification of a grey range of sexual misconduct and the development of an appropriate legal response thereto ultimately would benefit all women who have survived rape or sexual assault as well as all women who have experienced grey-area misconduct. It would signal that nuanced, targeted legal recourse were available to both groups. It also would signal that the American legal system were prepared to begin the work of validating the experiences and addressing the needs of the full spectrum of survivors.

In its specific mechanics, this Note's proposal also would create a hybrid jurisprudential model that could serve as a template for future collaborations between indigenous jurists and jurists trained in the Anglo-American model. The web of semiconflicting jurisdictions currently operating on tribal land produces an uneasy jurisprudential hybrid born of colonialism, lack of resources, and neglect. The proposal outlined in Part III.A of this Note is an *intentional* jurisprudential hybrid. Though it does not directly ameliorate Native American women's dire situations with respect to sexual violence, it is constructed with an eye to the future. Developing the jurisprudential flexibility inherent in a carefully constructed hybrid system that honors and amplifies tribal values is a small step down a long road. But it is this Note's

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is a jurisdictional scheme that is at best ambiguous and at worst actively contributory to an atmosphere of “lawlessness” in some communities on reservations. *See generally* Goldberg-Ambrose, *supra* note 15 (drawing the direct line from legislation to lawlessness).

202. *See* DEER, *supra* note 102, at x.

203. Cases like *State v. Williams*, 484 P.2d 1167 (Wash. Ct. App. 1971), are a grim illustration of the havoc that federal policies regarding Native American children have wreaked in the lives of Native American women in recent history.

204. *See, e.g.*, Rachel Monroe, *The Delay*, *ESQUIRE* (Apr. 18, 2018), <https://www.esquire.com/news-politics/a19561163/ashlynnemikeamber-alert-navajoreservation/> [<https://perma.cc/2XEL-2KBB>]; *see also* MaryAnne Golon, *Most Sex Crimes Go Unpunished at this Sioux Reservation. So These Survivors Turn to Traditional Healing*, *LILY* (Apr. 15, 2018), <https://www.thelily.com/most-sex-crimes-go-unpunished-at-this-sioux-reservation-so-these-survivors-turn-to-traditional-healing/> [<https://perma.cc/VP6T-LEBR>].

205. This Note does not seek, nor can it, to prescribe what Native American women “need” but rather to compare the relative urgency of various problems as externally perceived.

206. *See* ROSAY, *supra* note 8, at 13.

hope that the end of that road holds flexible and nontraditional jurisprudential designs that serve the needs of indigenous women without encroaching on indigenous sovereignty.

#### CONCLUSION

The #MeToo movement has newly publicly identified a grey category of sexual misconduct. Grey-area behavior—paradigmatically, the conduct of an Al Franken or a Louis C.K.—is something that victims have never before been able to talk about without having their experiences trivialized. As #MeToo stands, however, accusations of misconduct in the grey range are tried in the court of public opinion and “punished” by haphazardly banishing offenders for an undefined period. Rather than accept this uncertainty indefinitely, state courts should institute Peacemaking dockets and process voluntary #MeToo claims with Adjournments in Contemplation of Restoration. Victims would find resolution in this process. Former offenders would gain both insight into their actions and a concrete legal channel through which to restore an earned reputational and professional stability. Finally, the use of indigenous jurisprudential techniques for grey-area claims—though it would do nothing for the sexual violence crisis faced by Native American women today—would be a step down the road to smart, hybrid jurisprudential models capable of adaptation to the needs of all three sovereigns.