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Civil Rights Law—Questioning McDonnell Douglas? #MeToo.: Resolving the McDonnell Douglas Mixed-Motive Question by Adopting the Sixth Circuit's Preference for Hearing Victims

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CIVIL RIGHTS LAW—QUESTIONING *MCDONNELL DOUGLAS*? #METOO.: RESOLVING THE *MCDONNELL DOUGLAS* MIXED-MOTIVE QUESTION BY ADOPTING THE SIXTH CIRCUIT'S PREFERENCE FOR HEARING VICTIMS.

I. INTRODUCTION

On August 27, 2019, nearly two dozen women who had accused Jeffrey Epstein of sexual abuse told their stories in a court of law.[1] At the time they testified, Epstein had been dead for seventeen days.[2] The federal prosecutors had already announced their intention to drop the charges against Epstein—a routine response to the death of a defendant.[3] Judge Richard M. Berman broke routine by ordering a hearing rather than simply dropping the charges.[4] He invited Epstein's alleged victims to speak at that hearing because he understood that it was important for the women to have their day in court.[5] One woman stated, "The fact that I will never have a chance to face my predator in court eats away at my soul."[6] Another woman vowed not to let Epstein or his death silence her voice.[7] The hearing was described as a moment of catharsis for the victims.[8] Perhaps inspired by the #MeToo Movement,[9] Judge Berman recognized the alleged victims' need to speak and to be heard.[10]

All too often, the judicial system fails to allow alleged victims their day in court. Title VII workplace discrimination claims are disproportionately dismissed at the summary judgment stage of litigation, depriving plaintiffs

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1. Ali Watkins, Benjamin Weiser & Amy Julia Harris, *Jeffrey Epstein's Victims*, *Denied a Trial*, *Vent Their Fury: 'He is a Coward*,*'* N.Y. TIMES (Aug. 27, 2019), https://www.nytimes.com/2019/08/27/nyregion/jeffrey-epstein-hearing-victims.html.

2. Tom Winter, *Judge Schedules Hearing for Jeffrey Epstein Victims to Speak*, NBC NEWS (Aug. 21, 2019, 12:24 PM), https://www.nbcnews.com/politics/justice-department/judge-schedules-hearing-jeffrey-epstein-victims-speak-n1044876.

3. Watkins, Weiser, & Harris, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Infra*, Part II, Section E.

10. Renae Merle & Matt Zapotosky, *'The Reckoning Must Not End': Epstein's Accusers Urge Prosecutors to Pursue His Enablers*, WASH. POST (Aug. 27, 2019, 6:40 PM), https://www.washingtonpost.com/national-security/at-hearing-to-dismiss-jeffrey-epsteins-charges-those-who-say-he-abused-them-given-chance-to-be-heard/2019/08/26/35cb03c2-c83a-11e9-a1fe-ca46e8d573c0_story.html?utm_source=reddit.com; *infra* Part II, Section E.

of the opportunity to be heard in a court of law.[11] Disproportionately frequent dismissal of Title VII claims at the summary judgment stage does not occur because such claims are disproportionately frivolous.[12] Scholars have explored numerous reasons for frequent dismissal, such as judges who are hostile to discrimination cases[13] and a lack of consistent guidelines for courts.[14]

Inconsistent application of the *McDonnell Douglas* burden-shifting analysis[15] at the summary judgment stage of mixed-motive discrimination cases[16] plays a significant role as well.[17] Nearly fifty years after adoption of the *McDonnell Douglas* burden-shifting analysis, circuit courts remain split on the proper method of applying that analysis to mixed-motive discrimination claims at the summary judgment stage.[18] The United States Courts of Appeals for the Eighth and Eleventh Circuits hold fast to the original interpretation and application of *McDonnell Douglas*, even to mixed-motive discrimination cases.[19] The Fourth, Fifth, Ninth, and D.C. Circuits apply modified versions of *McDonnell Douglas* to mixed-motive cases.[20] Only the Sixth Circuit has declined to apply the *McDonnell Douglas* burden-shifting analysis to mixed-motive cases, reasoning that its application would be

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11. *See* Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 102 (1999); Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. SCH. L. REV. 671, 672–73 (2012); Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 112 (2011) (stating that it is more difficult for discrimination plaintiffs to survive pretrial motions).

12. *See* Stone, *supra* note 11, at 112.

13. *See* Chin, *supra* note 11, at 672.

14. Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 792–93 (2002).

15. *Infra* Part II, Section B.

16. *Infra* Part II, Section C. A mixed-motive discrimination case is one in which the plaintiff demonstrates that the motivation for the negative workplace interaction was at least partially discriminatory rather than that the motivation for the negative workplace interaction was entirely discriminatory.

17. *See* Christopher J. Emden, Note, *Subverting Rule 56?* McDonnell Douglas*,* White v. Baxter Healthcare Corp*., and the Mess of Summary Judgment in Mixed-Motive Cases*, 1 WM. & MARY BUS. L. REV. 139, 140 (2010).

18. *See* Mark R. Bandsuch, *Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework)*, 37 CAP. U. L. REV. 965, 1044–46 (2009); Beiner, *supra* note 11, at 95–97; Emden, *supra* note 17, at 140.

19. Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004); Cooper v. Southern Co., 390 F.3d 695, 725 n.17 (11th Cir. 2004) (overruled on other grounds) (rejecting the argument that *Desert Palace* overruled *McDonnell Douglas* and noting that the *Desert Palace* court had not even mentioned *McDonnell Douglas*).

20. McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004); Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005); Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004); Fogg v. Gonzalez, 492 F.3d 447, 451 (D.C. Cir. 2007).

overly burdensome to mixed-motive plaintiffs and that the Supreme Court never intended *McDonnell Douglas* to be "onerous."[21] This circuit split shows no signs of consensus and demands Supreme Court resolution.[22]

The #MeToo Movement has created the requisite cultural moment for a resolution to this circuit split that supports and protects plaintiffs' rights. Although few, if any, mixed-motive Title VII discrimination cases may ever rise to the level of the Epstein case, the victims are no less deserving of the opportunity to be heard in a court of law than the two dozen women who spoke at Epstein's hearing. The spirit of the #MeToo Movement encourages all victims of abuse, harassment, and discrimination to speak out about their experiences and demand that the legislature and the judicial system listen to them.[23] It also requires that courts take steps to lessen the obstacles that stand before victims of discrimination and harassment.

This note argues that the #MeToo Movement has created the cultural shift required for a pro-plaintiff resolution of the *McDonnell Douglas* circuit split, and that the Supreme Court should recognize this cultural shift by adopting the Sixth Circuit's decision not to apply *McDonnell Douglas* at the summary judgment stage of mixed-motive discrimination cases. Part II of this note discusses the historical background of Title VII, the *McDonnell Douglas* burden-shifting analysis, the mixed-motive analysis, summary judgment, and the #MeToo Movement. Part III addresses the wide circuit split regarding the appropriate application of *McDonnell Douglas* to mixed-motive discrimination claims at the summary judgment stage. Part IV argues that culture and law are intertwined, that the #MeToo Movement is the kind of cultural movement that supports long-term change, and that the Sixth Circuit's approach to *McDonnell Douglas* best reflects and answers the #MeToo Movement's cultural shift.

II. HISTORICAL BACKGROUND

Title VII and workplace harassment are nebulous subjects that courts have struggled to fit tidily into a structured framework. This section describes the initial intent and enactment of Title VII; examines the adoption of the *McDonnell Douglas* framework for assessing such claims; discusses the creation, codification, and analysis of mixed-motive claims; situates summary judgment in the Title VII discussion; and outlines the background of the #MeToo Movement.

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21. White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008).

22. *See* Bandsuch, *supra* note 18, at 1044–46.

23. *See* Morgan Jerkins, *The Way Forward for Me Too, According to Founder Tarana Burke*, VOX (Oct. 15, 2019, 8:30 AM), https://www.vox.com/identities/2019/10/15/20910298/tarana-burke-morgan-jerkins.

A. Title VII History and Purpose

Congress passed Title VII as part of the Civil Rights Act of 1964.[24] Its purpose was to protect against workplace discrimination based on race, color, religion, sex, and national origin.[25] Initially, "sex" was introduced to the list of protected classes to deter Congress from passing the entire bill.[26] Opponents of the Civil Rights Act reasoned that Congress would find protecting sex—which at that time really meant protecting women—as an entire class was too radical.[27] This attempt to thwart Title VII's enactment was unsuccessful, and the category of sex has since become one of the most litigated and relied upon aspects of Title VII.[28]

Legislative history demonstrates the importance Congress placed on handling pervasive workplace discrimination.[29] Although legislators initially viewed workplace discrimination as a rare occurrence resulting from isolated instances of ill-will, time and experience quickly showed otherwise.[30] In 1971, the House of Representatives acknowledged that employment discrimination "is a far more complex and pervasive phenomenon" than originally expected.[31] Studies revealed that employment discrimination was a "problem . . . of 'systems' and 'effects' rather than simply intentional wrongs"[32] and that "[t]he forms and incidents of discrimination which the Commission is required to treat are increasingly complex. . . . [T]heir discriminatory nature may not appear obvious at first glance."[33] Just six years after Title VII passed, Congress strengthened the Act in order to fight harder against employment discrimination.[34]

The Supreme Court of the United States has acknowledged that Congress intended Title VII to be sweeping, prohibitive legislation,[35] and it has even further broadened Title VII's application. In 1986, the Supreme Court extended sex discrimination claims under Title VII to include sexual harassment, stating that "[w]ithout question, when a supervisor sexually harass-

24. 42 U.S.C. § 2000e-2(a)(1) (2020).

25. *Id.*; *see* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459 (1975).

26. Steven K. Sanborn, Note, *Employment Discrimination*—Miller v. Maxwell's International, Inc.*: Individual Liability for Supervisory Employees Under Title VII and the ADEA*, 17 W. NEW ENG. L. REV. 143, 148 (1995). *Contra* Caroline Fredrickson, *How the Most Important U.S. Civil Rights Law Came to Include Women*, 43 HARBINGER 122, 123 (2019) (arguing that female activists worked to have "sex" included in the Civil Rights Act).

27. *See* Sanborn, *supra* note 26, at 148.

28. *Id.*

29. *See* H.R. REP. NO. 92-238, at 2139 (1971).

30. *Id.* at 2143–44.

31. *Id.*

32. *Id.*

33. *Id.*

34. *See id.*

35. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521, 524 (1982).

es a subordinate because of the subordinate's sex, that supervisor 'discriminates' because of sex."[36] In 1989, the Supreme Court created the mixed-motive claim, which only requires the plaintiff to prove that an impermissible factor was one factor amongst others motivating a negative workplace interaction, rather than requiring the plaintiff to prove that the impermissible factor was the sole factor.[37] The court later broadened the mixed-motive claim by holding that a plaintiff may provide either direct or circumstantial evidence of discrimination.[38] Thus, the Supreme Court has consistently broadened the application of Title VII to protect more victims of sex discrimination.

Congress provided the framework of Title VII, and the judicial branch has since attempted to fit employment discrimination claims into a formula that provides accurate and consistent results. The latter has proven more difficult than expected, and the result is that Title VII claims—particularly sex discrimination claims—create confusion.[39] The Supreme Court's adoption of the *McDonnell Douglas* burden-shifting analysis was an early attempt to impose a formula on Title VII cases.[40]

B. Adoption of the *McDonnell Douglas* Burden-Shifting Analysis

The Supreme Court first adopted the *McDonnell Douglas* burden-shifting analysis for Title VII discrimination cases in 1973, intending to facilitate consistent evaluation of workplace conduct.[41] Under *McDonnell Douglas*, the plaintiff bears the burden of proving a prima facie case of discrimination.[42] The burden then shifts to the defendant, requiring the defendant to offer proof of a legitimate, non-discriminatory motivation for the negative workplace interaction.[43] If the defendant does so, the burden shifts back to the plaintiff, who must then rebut the defendant's claim by offering proof of pretext.[44] The Court discussed the pretext prong at length,[45] and the pretext prong would later prove to be the most complex for courts.[46] In its initial discussion, the Court noted that the plaintiff must "be afforded a fair opportunity to show that petitioner's stated reason for [the plaintiff's] rejec-

36. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (alteration omitted).
37. *Infra* Part II, Section C.
38. *Infra* Part II, Section C.
39. *See* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 208 (1993).
40. *See* Emden, *supra* note 17, at 159.
41. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).
42. *Id.* at 802.
43. *Id*.
44. *Id.* at 804.
45. *Id.* at 804–06.
46. McGinley, *supra* note 39, at 208–09.

tion was in fact pretext."[47] The Court repeated itself just paragraphs later, advocating for a "full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for [the plaintiff's] rejection were in fact a coverup for a racially discriminatory decision."[48] The Court's intent was to provide a structure that would promote fairness and the opportunity to be heard, but application of *McDonnell Douglas* has often had the opposite result.[49]

C. Price Waterhouse and Desert Palace

The 1989 Supreme Court *Price Waterhouse v. Hopkins* holding created a mixed-motive Title VII discrimination claim.[50] Ann Hopkins had an excellent work record with Price Waterhouse, and several partners put her name forward for promotion.[51] The partners described Hopkins as incredibly competent and successful, noting that she had played a significant role in a two-year project that resulted in a twenty-five million dollar contract for Price Waterhouse.[52] Client comments praised her work performance, calling Hopkins "strong and forthright" and "energetic and creative."[53] However, negative comments also described Hopkins as "macho" and "suggested that she 'overcompensated for being a woman.'"[54] The Policy Board voted to put Hopkins's promotion on hold and suggested that she would have a better chance of making partner if she "walk[ed] more femininely, talk[ed] more femininely, dress[ed] more femininely, [wore] makeup, [had] her hair styled, and [wore] jewelry."[55]

The district court found that it was legitimate for Price Waterhouse to consider interpersonal skills as a criterion in its promotion decisions, and further found that Price Waterhouse's claims about Hopkins's interpersonal skills were not a pretext to cover outright discrimination.[56] Thus, under *McDonnell Douglas*, Price Waterhouse had met its burden of rebutting Hopkins's prima facie case by providing a legitimate, non-discriminatory motivation.[57] However, the district court found that impermissible gender stereotypes had, at least in part, motivated Price Waterhouse's decision.[58]

47. *McDonnell Douglas Corp.*, 411 U.S. at 804.
48. *Id.* at 805.
49. *See* Emden, *supra* note 17, at 140.
50. 490 U.S. 228, 252 (1989).
51. *Id.* at 233–34.
52. *Id.*
53. *Id.* at 234.
54. *Id.* at 235.
55. *Id.*
56. *Price Waterhouse*, 490 U.S. at 236.
57. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
58. *Price Waterhouse*, 490 U.S. at 258.

The appellate court affirmed, establishing that a workplace action partially motivated by impermissible factors violates Title VII, and the employer may escape liability only if it can prove it would have taken the same action without the influence of the impermissible factor.[59] In a plurality opinion, the Supreme Court adopted the appellate court's conclusions, establishing the mixed-motive analysis.[60] Congress affirmed the plurality's holding when it codified the mixed-motive claim in its 1991 amendment of Title VII.[61]

After *Price Waterhouse,* the mixed-motive analysis became an important tenet of Title VII claim assessment, though courts still struggled to apply it consistently.[62] Mixed-motive claims did not mesh well with the *McDonnell Douglas* analysis, because *McDonnell Douglas*'s third prong required plaintiffs to prove pretext—something that the mixed-motive analysis no longer required. There was no need to prove pretext when an employer responded to allegations by providing some legitimate, nondiscriminatory motivation because mixed-motive claims allowed for the possibility that employers might have both discriminatory and nondiscriminatory motivations.

Additionally, many lower courts interpreted Justice Sandra O'Connor's concurrence in *Price Waterhouse* to require a mixed-motive plaintiff to provide direct evidence of discrimination.[63] In *Desert Palace, Inc. v. Costa*, the Supreme Court determined otherwise.[64] Catherine Costa filed suit against her employer, Desert Palace, for sex discrimination.[65] She claimed that she had been stalked, disciplined more harshly than men, "treated less favorably than men in the assignment of overtime," and discriminated against by her employers who "stacked" her disciplinary record and "used or tolerated" gender-based slurs against her.[66] The case went to a jury trial, and at the conclusion of the trial, the jury received instruction on evaluating whether Costa had proven her claims. Desert Palace objected to the mixed-motive jury instructions, noting that they did not specify that the plaintiff must pro-

59. *Id.* at 237.

60. *Id.*

61. Civil Rights Act of 1991, Pub L. No. 102-66, § 3, 105 Stat. 1071, 1071 (1991) (stating that "[t]he purposes of this act are . . . to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination"); *see* Bandsuch, *supra* note 18, at 1001.

62. Desert Palace, Inc. v. Costa, 539 U.S. 90, 95 (2003).

63. *Id.*; *Price Waterhouse*, 490 U.S. at 270–71 (noting that *McDonnell Douglas* does not apply where a plaintiff provides direct evidence of discrimination and suggesting that a mixed-motive plaintiff must provide direct evidence).

64. 539 U.S. at 92.

65. *Id.* at 96.

66. *Id.*

vide "direct evidence," as required by Justice O'Connor's concurrence, but not in the text of the 1991 Act.[67]

The Supreme Court held that the text of the 1991 Act superseded Justice O'Connor's *Price Waterhouse* concurring opinion, and thus there was no need to analyze her "direct evidence" statements nor to determine if her concurring opinion was *Price Waterhouse*'s holding.[68] The Supreme Court then noted that the text of the 1991 Act calls for the plaintiff to "'demonstrate' that an employer used a forbidden consideration," which alone does not require direct evidence.[69] Thus, the Supreme Court concluded that the plaintiff is not required to provide direct evidence of discrimination and the jury instruction provided was sufficient.[70] Justice O'Connor wrote a separate concurrence, acknowledging that the 1991 Act allowed for both direct and circumstantial evidence to prove mixed-motive claims.[71]

Desert Palace's holding that plaintiffs could use either direct or circumstantial evidence of discrimination to prove mixed-motive cases further confused courts.[72] Generally, the *McDonnell Douglas* burden-shifting analysis governed where plaintiffs had not provided direct evidence of discrimination.[73] After *Desert Palace,* the distinction between *McDonnell Douglas* Title VII cases and mixed-motive Title VII cases blurred even further.[74] Consistent, accurate evaluation thus became that much harder at any litigation stage—particularly the summary judgment stage.

D. The Role of Summary Judgment

Courts disproportionately rule against Title VII plaintiffs at the summary judgment stage of litigation.[75] That is not because mixed-motive dis-

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67. *Id.* at 97.
68. *Id.* at 98.
69. *Id.* (alteration omitted).
70. *Desert Palace, Inc.*, 539 U.S. at 101–02.
71. *Id.* at 102 (O'Connor, J., concurring).
72. *Infra* Part III.
73. TWA v. Thurston, 469 U.S. 111, 121 (1985).
74. *Infra* Part III.
75. Stone, *supra* note 11, at 112 ("In one recently conducted evaluation and analysis of federal civil cases filed between 1970 and 2006, the authors found that employment discrimination claims that go before a bench are more likely than other kinds of claims to fail, both at the district court and at the appellate level."). *See generally* Beiner, *supra* note 11, at 102; Chin, *supra* note 11, at 672. The role of summary judgment is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Organized Sec. Life Ins. Co. v. Munyon, 247 Ark. 449, 467 (1969). A court must view the entire record in the light most favorable to the nonmoving party and draw all inferences in favor of the nonmoving party. Federal Rules of Civil Procedure dictate that a summary judgment may only be entered when the pleadings and discovery "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

crimination cases are disproportionately unsubstantiated. Rather, it is in part because applying the *McDonnell Douglas* burden-shifting standard at the summary judgment stage increases the burden on Title VII plaintiffs.[76] Accurately navigating an intricate and confusing set of standards based on pleadings and discovery alone is a potentially insurmountable task—certainly one that the courts have struggled to undertake with any measure of consistency. Nevertheless, reliance on summary judgment grows.

In 1986, a trio of Supreme Court cases collectively paved the way for increased reliance on summary judgment.[77] *Anderson v. Liberty Lobby* held that, at the summary judgment stage, courts must not only determine if there is a factual dispute but also whether the plaintiff has met the requisite evidentiary burden applicable at trial.[78] *Celotex Corp. v. Catrett* held that a defendant may successfully move for summary judgment if the defendant can demonstrate that the plaintiff does not have sufficient evidence to meet the evidentiary burden, effectively requiring plaintiffs to "meet the ultimate burden of proof at the summary judgment stage."[79] In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Supreme Court determined that courts may assess matters of intent and motive at the summary judgment stage and even suggested that the courts should weigh evidence.[80] This trio of cases made it much easier for courts to justify granting summary judgment, even in nuanced, fact-based cases traditionally reserved for juries.[81]

Following this trio of decisions, the approach to summary judgment began to change. Federal Judge Patricia Wald wrote in 1998 that summary judgment, "fueled by the overloaded dockets of the last two decades . . . has spread swiftly through the underbrush of undesirable cases, taking down some healthy trees as it goes."[82] The result is that only plaintiffs who can present a strong case based only on pleadings can hope to survive a motion for summary judgment.[83]

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76. *See generally* William R. Corbett, *Of Babies*, *Bathwater*, *and Throwing Out Proof Structures: It Is Not Time to Jettison* McDonnell Douglas, 2 EMP. RTS. & EMP. POL'Y J. 361, 380 (1998); Christopher R. Hedican, Jason M. Hedican & Mark P.A. Hudson, McDonnell Douglas *Alive and Well*, 52 DRAKE L. REV. 383, 402 (2004); Barrett S. Moore, *Shifting the Burden: Genuine Disputes and Employment Discrimination Standards of Proof*, 35 U. ARK. LITTLE ROCK L. REV. 113, 121 (2012); Emden, *supra* note 17, at 140.

77. Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); *see* Emden, *supra* note 17, at 151.

78. 477 U.S. at 244.

79. McGinley, *supra* note 39, at 241–42; *Celotex Corp.,* 477 U.S. at 319.

80. 475 U.S. at 596–98; *see* Beiner, *supra* note 11, at 93–94; Emden, *supra* note 17, at 152–53.

81. Beiner, *supra* note 11, at 94.

82. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1941 (1998).

83. *Id.* at 1942.

Summary judgment has taken on an increased role for sex discrimination cases in particular. Prior to the 1990s, courts in the Eighth Circuit repeatedly stated that summary judgment was disfavored in employment discrimination cases because such cases often required intent determinations and were "inherently fact-based."[84] However, as the 1990s progressed, the Eighth Circuit courts referenced this disfavor while nevertheless granting summary judgment with increasing frequency.[85] In 2011, the Eighth Circuit abandoned pretense, stating, "There is no 'discrimination case exception' to the application of summary judgment, which is a useful pretrial tool to determine whether any case, including one alleging discrimination, merits a trial."[86] District Judge Milton I. Shadur stated that courts were particularly prone to granting summary judgment in employee discrimination cases.[87] In a Second Circuit case, Judge Jack Weinstein observed a "robust use" of summary judgment in sex discrimination cases—a trend he found particularly dangerous.[88]

As reliance on summary judgment increased, the circuit split regarding the *McDonnell Douglas* burden-shifting analysis controversy became more significant. The truth of plaintiff experiences can easily get lost in the barren nature of black text on white paper, and the complexity of relationships and interactions fades when forced into a clinical formula. The burden this reliance creates for the plaintiff only worsens when courts apply inconsistent and even contradictory formulas. After *Desert Palace*, there are at least four different applications of *McDonnell Douglas* to mixed-motive claims at the summary judgment stage of litigation.[89] Mixed-motive plaintiffs facing potential summary judgment may find more consistency in a random roll of the dice than in the judge's chambers.

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84. *E.g.*, Mayer v. Nextel W. Corp., 318 F.3d 803, 806 (8th Cir. 2003); Mark W. Bennett, *From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 688 (2012) (collecting cases); *see also* Beiner, *supra* note 11, at 102 ("Judging whether an environment would or would not be harassing to a 'reasonable person' . . . is a particularly difficult job. Indeed, it is often inappropriate for a court to make such a determination on a motion for summary judgment.").

85. Bennett, *supra* note 84, at 688; *see* Melvin v. Car-Freshener Corp., 453 F.3d 1000, 1003–04 (8th Cir. 2006) (Lay, J., dissenting).

86. Torgerson v. City of Rochester, 643 F.3d 1031, 1043 (8th Cir. 2011).

87. Bennett, *supra* note 84, at 692.

88. Gallagher v. Delaney, 139 F.3d 338, 343 (2d Cir. 1998).

89. *See* Bandsuch, *supra* note 18, at 1045–46; *infra* Part III.

E. The #MeToo Movement

Overlapping and confusing evidentiary structures currently serve as a stumbling block to discrimination plaintiffs, but there is momentum for change. The #MeToo Movement is a cultural movement, spurred on by the power of social media, that demands justice for victims of sexual harassment, abuse, and assault.[90] It exploded onto the global scene in 2017 when actress Alyssa Milano tweeted the #MeToo hashtag[91] and told her thousands of followers to retweet her message if they had also experienced sexual harassment or violence.[92] The Movement has since taken over media, influenced politics, and infiltrated the legal system.[93] In just the twenty-four hours after Alyssa Milano's initial #MeToo post, over one million people tweeted or retweeted the #MeToo hashtag.[94] Through the #MeToo hashtag, many people shared stories of sexual harassment and abuse, creating a national conversation and building momentum for change. Many of those stories centered on workplace interactions.[95]

Harvey Weinstein, a Hollywood mogul who produced numerous blockbuster movies, faced intense media backlash after Ashley Judd and Rose McGowan publicly accused him of sexual harassment and sexual assault.[96] Following Judd and McGowan's accusations, a chorus of other women who had worked with and for Harvey Weinstein told their stories, connecting them to the #MeToo Movement.[97] The picture was bleak. This man who had achieved professional greatness in the film industry had used his power, success, and fame as a means to harass, assault, bully, and con-

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90. Jerkins, *supra* note 23.

91. A hashtag refers to a word or a phrase preceded by a hash sign (#), used on social media platforms to identify messages pertaining to a specific topic. Hashtags can be used to promote and organize messages connected to a topic or movement.

92. Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 3:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en; *see also* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 230, 231 (2018).

93. Jerkins, *supra* note 23. *See generally* Jihad Sheikha, Comment, *Punishing Bad Actors: The Expansion of Morals Clauses in Hollywood Entertainment Contracts in the Wake of the #MeToo Movement*, 43 NOVA L. REV. 203, 204 (2019).

94. Jamillah Bowman Williams, Lisa O. Singh & Naomi Mezey, *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 371, 374 (2019).

95. Jerkins, *supra* note 23.

96. Tippett, *supra* note 92, at 230.

97. *Id.*; Salma Hayek, *Harvey Weinstein Is My Monster Too*, N.Y. TIMES (Dec. 12, 2017), https://www.nytimes.com/interactive/2017/12/13/opinion/contributors/salma-hayek-harvey-weinstein.html; Sara Khorasani, *Mixed Messages: Harvey of Hollywood: The Face that Launched a Thousand Stories*, 41 HASTINGS COMM. & ENT. L.J. 103, 104 (2019); Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017, 11:27 AM), https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/.

trol the women who auditioned for his movies, worked as his assistants, or wanted to be part of his production company.[98]

Weinstein's accusers were hardly the only ones to speak out. Women in Hollywood began to expose the rampant sexual harassment and abuse that took place in the power-hungry industry.[99] Charlie Rose, a highly respected television journalist, lost his position at CBS after several women accused him of sexual harassment, bullying, and indecent behavior in the workplace.[100] CBS CEO Les Moonves also lost his job after multiple women accused him of sexual harassment in the workplace.[101] Comedian Louis C.K, politician Al Franken, and actor Kevin Spacey all saw their careers suffer or end after multiple sexual harassment or assault allegations.[102]

As #MeToo gained momentum, its influence grew beyond Hollywood. Roy Moore, a Republican senate candidate from Alabama, ran and lost a campaign completely overshadowed by the improper sexual conduct allegations against him.[103] After approximately 150 women came forward accusing former USA gymnastics team doctor, Larry Nasser, of sexual abuse, he pled guilty to child pornography charges and was sentenced to sixty years in prison.[104] In 2019, renewed accusations against Jeffrey Epstein surfaced, though Epstein had previously accepted a plea deal after facing charges for sexually abusing underage girls.[105] In the months prior to Epstein's July 6th arrest, many new victims, inspired by #MeToo Movement culture, had be-

98. Khorasani, *supra* note 97, at 104.

99. *See id.* at 104–05; Tippett, *supra* note 92, at 231–32.

100. Kayla Epstein, *Former Charlie Rose Makeup Artist Alleges His Talk Show Was a 'Sexual Hunting Ground' in New Lawsuit*, WASH. POST (Sept. 20, 2019, 2:08 PM), https://www.washingtonpost.com/arts-entertainment/2019/09/20/former-charlie-rose-makeup-artist-alleges-his-talk-show-was-sexual-hunting-ground-new-lawsuit/.

101. Elahe Izadi & Travis M. Andrews, *Former CBS Chairman Les Moonves Fired for Cause, Will Not Receive Severance in Wake of Sexual Misconduct Allegations*, WASH. POST (Dec. 17, 2018, 6:02 PM), https://www.washingtonpost.com/arts-entertainment/2018/12/17/former-cbs-chairman-les-moonves-fired-cause-will-not-receive-severance-wake-sexual-misconduct-allegations/.

102. Katie Warren & Liz Lane, *The Powerful Men in the News Accused of Sexual Misconduct*, NBC WASH. (Oct. 24, 2017), https://www.nbcwashington.com/news/national-international/the-powerful-men-accused-of-sexual-harassment/2076369/.

103. *Id.*

104. Eric Levenson, *Larry Nassar's Sexual Abuse Victims Finally Get Their Days in Court*, CNN (Jan. 15, 2018, 12:27 PM), https://www.cnn.com/2018/01/15/us/larry-nassar-gymnastics-me-too-sentence/index.html.

105. Mahita Gajanan, *Here's What to Know About the Sex Trafficking Case Against Jeffrey Epstein*, TIME (Jul. 17, 2019, 12:00 PM), https://time.com/5621911/jeffrey-epstein-sex-trafficking-what-to-know/.

gun to speak out about the longtime abuser's conduct, making Epstein one of the most prominent #MeToo cases.[106]

In December of 2018, Time Magazine announced that "The Silence Breakers" were collectively Person of the Year.[107] "The Silence Breakers" consisted of the #MeToo activists, both named and unnamed, who came from all walks of life—celebrities and housekeepers alike.[108] They were unified by the fact that they had spoken out.[109] Time Magazine's choice demonstrated how influential #MeToo had become, the significance of victims who spoke out, and the nation's willingness to hear all victims of sexual discrimination and abuse.

The #MeToo Movement created a "watershed moment," and it was not long before the Movement had a legal branch.[110] On January 1, 2018, The New York Times ran an open letter announcing "Time's Up," an initiative created by three hundred women in Hollywood.[111] Time's Up included (1) a legal defense fund to help protect underprivileged women against sexual harassment or abuse and the consequences of reporting it, (2) proposed legislation to penalize companies that allow persistent sexual misconduct, (3) a plan to promote gender parity in male-dominated fields, such as the film industry, and (4) a call for women attending the Golden Globes to wear black as a method of raising awareness.[112] Time's Up's ultimate goal was to make sure that women who traditionally did not have voices in society were heard.[113] Since its creation in 2018, Time's Up has helped pay legal fees for victims of harassment and discrimination and promoted important legislative changes.[114]

Once #MeToo branched into legislation, it transcended a mere cultural movement and began to fuel long-term change. One of the most prominent #MeToo legal discussion centers on non-disclosure agreements that powerful employers require employees to sign in order to keep them silent.[115] It

106. *Id.*; Katie Reilly, *How the #MeToo Movement Helped Make New Charges Against Jeffrey Epstein Possible*, TIME (Jul. 9, 2019, 7:49 PM), https://time.com/5621958/jeffrey-epstein-charges-me-too-movement//.

107. Meghan D. Maria, *The Secret Message Behind that Elbow on* Time*'s Person of the Year Cover*, REFINERY29 (Dec. 6, 2017, 10:20 AM), https://www.refinery29.com/en-us/2017/12/184096/time-2017-person-of-the-year-cover-elbow-anonymous-woman.

108. *Id.*

109. *Id.*

110. Khorasani, *supra* note 97, at 119.

111. Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, N.Y. TIMES (Jan. 1, 2018), https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html.

112. *Id.*

113. *Id.*

114. *See id.*; Tippett, *supra* note 92, at 234–35.

115. Tippett, *supra* note 92, at 234–35.

was a logical first foray into legislation, given that Weinstein, the man whose conduct formed the basis for the #MeToo movement, had long used non-disclosure agreements to hide his abusive behavior.[116] Since the #Me-Too Movement, multiple states have considered reforms of their non-disclosure agreement laws, intending to better protect employees who speak out against workplace harassment.[117]

Scholars also predict that the #MeToo Movement may alter the way that courts define particular sexual harassment terms, such as "severe and pervasive."[118] In *Meritor Savings Bank v. Vison,* the United States Supreme Court ruled that conduct qualifies as "harassment" when it is so "severe or pervasive" that it alters the terms or conditions of employment.[119] However, "severe and pervasive" is a vague term that courts often interpret narrowly and against the plaintiff's interests.[120]

Legal scholars have hypothesized about why "severe and pervasive" has become a legal barrier. One suggestion is that the courts' interpretation of "severe and pervasive" stems from a few key early cases that provide an abundance of legal justification for judges who wish to dismiss future harassment cases.[121] Another explanation is that courts are hesitant to cross the line into interfering with normal workplace activity.[122]

The Eighth Circuit has observed that the Supreme Court has indicated that teasing, offhand comments, gender-related jokes, and "sporadic use of abusive language," do not usually rise to the level of sexual harassment.[123] Ultimately, the Eighth Circuit concluded that behavior might be "vile or inappropriate" without "ris[ing] to the level of actionable sexual harassment."[124] In 2009, the Eighth Circuit held that a supervisor who rubbed an employee's back and shoulders, called her "baby doll," complained that she didn't want to be "one of his girls," suggested that she go to bed with him, and implied to her that "getting along with him" would be good for her career had not engaged in actionable sexual harassment.[125]

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116. *Id.*

117. Current non-disclosure law and proposed changes to non-disclosure law are beyond the scope of this Note. The topic, however, is an important one that closely connects with the importance and power of allowing victims to be heard. For a full discussion of non-disclosure law and the #MeToo Movement, see Tippett, *supra* note 92, beginning at 255.

118. Tippett, *supra* note 92, at 237.

119. *Meritor*, 477 U.S. 57, 67 (1986).

120. *See* Beiner, *supra* note 14, at 797–802.

121. *See* SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 37–38 (2017).

122. *Id.*

123. Blomker v. Jewell, 831 F.3d 1051, 1057 (8th Cir. 2016)

124. *Id.* at 1058.

125. Anderson v. Family Dollar Stores of Ark., Inc., 579 F.3d 858, 862 (8th Cir. 2009).

Whether the reason for these decisions is animus toward sexual harassment claims or confusion as to what crosses the line into dictating civility, there is clearly a disconnect between what courts consider harassment and what the average person would consider harassment.[126] The Supreme Court has stated that courts must evaluate sexual harassment claims in light of "social context."[127] The #MeToo Movement's entirely new social context has great potential to sway courts to abandon precedent and redefine actionable sexual harassment.

Although the #MeToo Movement has already begun to inspire legal change, its potential will be stunted if the legal system does not harness the power of the Movement to resolve the contradictory and overlapping standards courts use to evaluate Title VII claims. As long as the courts remain split on how to determine if the plaintiff gets into the courtroom, there can be little true advancement. The Supreme Court should consider the cultural shift associated with the #MeToo Movement when resolving the *McDonnell Douglas* circuit split and adopt the Sixth Circuit's approach that allows more plaintiffs into court.

III. THE CIRCUIT SPLIT

After *Desert Palace,* there is great disparity in how the circuits analyze mixed-motive Title VII cases at the summary judgment stage. The Eighth and Eleventh Circuits have held that *Desert Palace* had no impact on the *McDonnell Douglas* summary judgment analysis for mixed-motive Title VII cases.[128] The Fifth Circuit has applied a modified *McDonnell Douglas* analysis to mixed-motive case.[129] The Fourth, Ninth, and D.C. Circuits have attempted to find the middle ground, allowing plaintiffs to proceed under *McDonnell Douglas* or provide direct or circumstantial evidence of discrimination.[130] The First, Third, and Tenth Circuits have avoided deciding whether *Desert Palace* has altered the summary judgment analysis for mixed-motive cases,[131] and the Second and Seventh Circuits have not yet considered the issue.[132] The Sixth Circuit, an outlier, has held that, after *Desert Palace,* the *McDonnell Douglas* burden-shifting analysis does not apply

126. *See* Beiner, *supra* note 14, at 793.

127. Oncale v. Sundowner Offshore Servs., Inc, 523 U.S. 75, 81–82 (1998).

128. Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004); Cooper v. Southern Co., 390 F.3d 695, 725 n.17 (11th Cir. 2004) (overruled on other grounds).

129. Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004).

130. Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004); Fogg v. Gonzalez, 492 F.3d 447, 451 (D.C. Cir. 2007).

131. White v. Baxter Healthcare Corp., 533 F.3d 381, 399 (6th Cir. 2008).

132. Emden, *supra* note 17, at 153 n.110.

to mixed-motive Title VII cases at the summary judgment stage.[133] The following section discusses each approach, beginning with the most burdensome to the plaintiff and ending with the least burdensome to the plaintiff.

A. Holding Fast: The Eighth and Eleventh Circuits

The Eighth Circuit has held that *Desert Palace* did not alter the *McDonnell Douglas* analysis in any way.[134] The court reasoned that *Desert Palace* involved a post-trial jury instruction about mixed-motive cases—not a summary judgment issue—and did not reference or even cite to *McDonnell Douglas.*[135] While the Eighth Circuit acknowledged that summary judgment and judgment as a matter of law standards typically reflect each other, it noted that the context for the two processes is significantly different.[136] At the judgment as a matter of law stage, the court must consider whether the presence of multiple motives, both legitimate and illegitimate, defeats the plaintiff's case,[137] whereas at the summary judgment stage, the only appropriate consideration is whether there is sufficient evidence of a discriminatory motive.[138] Given these two different contexts, the Eighth Circuit held that *Desert Palace* did not apply to summary judgment analysis.[139]

In *Cooper v. Southern Co.*, the Eleventh Circuit relies on the same arguments that the Eighth Circuit made regarding the relationship—or lack thereof—between *Desert Palace* and *McDonnell Douglas*.[140] The *Cooper* plaintiffs had argued that *Desert Palace* overruled *McDonnell Douglas* and placed a heavier burden on defendant to prove that it would have still acted without the discriminatory motive.[141] The court rejected this argument, stating that *Desert Palace* narrowly addressed jury instructions in mixed-motive cases, that *Desert Palace* had not referred to *McDonnell Douglas*, and that for some time after *Desert Palace,* the Eleventh Circuit had continued to apply *McDonnell Douglas* at the summary judgment stage without contradiction.[142] Though the court's discussion of this issue is brief and hidden in a footnote of a disparate-impact case, its reasoning indicates that the Eleventh Circuit aligns with the Eighth Circuit, concluding that *Desert Palace* did not alter the application of *McDonnell Douglas*.[143]

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133. *White*, 533 F.3d at 400.
134. Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004).
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. Cooper v. Southern Co., 390 F.3d 695, 725 n.17 (11th Cir. 2004).
141. *Id.*
142. *Id.*
143. *See* White v. Baxter Healthcare Corp., 533 F.3d 381, 398 (6th Cir. 2008).

Thus, the Eighth and Eleventh Circuits remain stalwarts of *McDonnell Douglas*, imposing a heavy burden on plaintiffs at the summary judgment stage. As a result, fewer plaintiffs have the opportunity to be heard in a court of law, to put their case to a jury, or to face those whom they accuse.[144] In the Eighth and Eleventh Circuits, the *McDonnell Douglas* burden-shifting analysis routinely keeps plaintiffs out of the courtroom.[145]

B. Middle Ground and Modification: The Fourth, Ninth, D.C., and Fifth Circuits

The Fourth, Ninth, and D.C. Circuits apply "middle ground" versions of *McDonnell Douglas*, all taking a similar approach.[146] The Fifth Circuit has modified the *McDonnell Douglas* analysis for mixed-motive claims, blending *McDonnell Douglas* and *Price Waterhouse* into one formula.[147] This subsection will first address the Fourth, Ninth, and D.C. Circuits middle-ground application of *McDonnell Douglas* post-*Desert Palace*, then address the Fifth Circuit's modified approach to the same.

1. McDonnell Douglas Middle Ground

The Fourth, Ninth, and D.C. Circuits interpret the *Desert Palace* holding to require that plaintiffs present either direct or circumstantial evidence of discrimination or proceed under the *McDonnell Douglas* pretext formula.[148] In April of 2002, Rovilma Diamond, an African-American woman, filed a claim against Colonial Life & Accident Insurance Company for wrongful denial of promotion and retaliation.[149] When the court granted summary judgment against Diamond, she appealed, arguing that *Desert Palace* had done away with the *McDonnell Douglas* burden-shifting analysis at the summary judgment stage and that courts must analyze all Title VII claims as mixed-motive claims.[150]

The Fourth Circuit rejected Diamond's reasoning and affirmed its post-*Desert Palace* precedent, which allows plaintiffs to survive summary judgment by either (1) providing "direct or circumstantial evidence that raises a

144. Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 912 (2005).

145. Bandsuch, *supra* note 18, at 1044–45 (citing McGinley, *supra* note 39, at 229).

146. Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004); Fogg v. Gonzalez, 492 F.3d 447, 451 (D.C. Cir. 2007). *See generally* Emden, *supra* note 17, at 164–66.

147. Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004).

148. *See Diamond*, 416 F.3d at 318; *McGinest*, 360 F.3d at 1122; *Fogg*, 492 F.3d at 451. *See generally* Emden, *supra* note 17, at 165.

149. *Diamond*, 416 F.3d at 313–14.

150. *Id.* at 316.

genuine issue of material fact as to whether an impermissible factor . . . motivated the employer's . . . decision" or (2) "proceed[ing] under the *McDonnell Douglas* 'pretext' framework."[151] Unlike the Eighth and Eleventh Circuits, the Fourth Circuit acknowledged that *Desert Palace* had an effect on the analysis of mixed-motive cases at the summary judgment stage.[152] However, rather than abandoning or modifying the *McDonnell Douglas* structure itself, the Fourth Circuit modified the alternative "direct evidence" requirement to include circumstantial evidence.[153] The Ninth Circuit has adopted the same analysis with the same language.[154] The D.C. Circuit has also adopted, in practical effect, the same analysis structure.[155]

This middle-ground approach incorporates the *Desert Palace* holding into its summary judgment analysis. The result provides more opportunity for plaintiffs to raise an issue of fact at the summary judgment stage than the Eighth and Eleventh Circuits' approaches.[156] However, it leaves intact the *McDonnell Douglas* structure, to which the court still defaults if the employer rebuts the plaintiff's evidence of discrimination with some legitimate, non-discriminatory motivation.[157]

2. The Fifth Circuit and McDonnell Modification

The Fifth Circuit modified *McDonnell Douglas* itself.[158] In 2004, the Fifth Circuit considered Ahmed Rachid's age discrimination case, which he had lost at the summary judgment stage.[159] The Fifth Circuit's holding blended *McDonnell Douglas* with *Price Waterhouse*.[160] The court noted that *Desert Palace* had made it more difficult to distinguish between the mixed-motive analysis and the *McDonnell Douglas* analysis; thus one structure that accommodated both analyses was most appropriate.[161] In the modified structure, the first two prongs of *McDonnell Douglas* remain the same—the plaintiff must establish a prima facie case and the defendant must offer some legitimate, non-discriminatory motivation for the negative employment action.[162] At the third prong, the plaintiff may establish either (1) that the de-

151. *Id.* at 318.
152. *See* Emden, *supra* note 17; Bandsuch, *supra* note 18; *Diamond*, 416 F.3d at 317–18.
153. *Diamond*, 416 F.3d at 318.
154. McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004).
155. Fogg v. Gonzalez, 492 F.3d 447, 451 (D.C. Cir. 2007).
156. *See Diamond*, 416 F.3d at 318.
157. *See id.*
158. Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004).
159. *Id.* at 307, 311 (concluding that the mixed-motive analysis applied to ADEA claims as well as Title VII claims).
160. *Id.* at 312; *See* Emden, *supra* note 17, at 164–65.
161. *Rachid*, 376 F.3d at 310, 312.
162. *Id.* at 312.

fendant's proffered motivation is a pretext or (2) that "the defendant's reason, while true, is only one of the reasons for its conduct."[163] If the plaintiff follows the second option, the defendant must then prove that it would have taken the same negative employment action even without the prohibited motivation.[164]

Whether the Fifth Circuit's approach is any more lenient for plaintiffs than the Fourth, Ninth, and D.C. Circuit's approach is difficult to ascertain. Both approaches attempt to incorporate the *Desert Palace* holding into established precedent, but neither are willing to go so far as to say that the *McDonnell Douglas* framework is no longer applicable to mixed-motive cases. Only the Sixth Circuit has adopted that approach.[165]

C. The Outlier: The Sixth Circuit

In *White v. Baxter Healthcare Corp*., the Sixth Circuit abandoned *McDonnell Douglas* at the summary judgment stage of Title VII mixed-motive cases because the three-prong analysis was "onerous."[166] The court reasoned that imposing such a burdensome standard on plaintiffs contradicted legislative intent and judicial precedent.[167] The Sixth Circuit noted that "since *Desert Palace*, the federal courts of appeals have, without much, if any, consideration of the issue, developed widely differing approaches to the question of how to analyze summary judgment challenges in Title VII mixed-motive cases."[168] Prior to *White*, the Sixth Circuit had side-stepped several opportunities to decide how *Desert Palace* affected its Title VII mixed-motive case precedents.[169] However, the *White* majority opinion demonstrated careful consideration of the issue and a confident ruling.[170]

The Sixth Circuit's primary motivation for abandoning *McDonnell Douglas* for mixed-motive Title VII cases was that the burden-shifting analysis simply was not useful nor relevant to assessing whether the plaintiff had provided evidence of a discriminatory motive.[171] Not only had *Desert Palace* blurred the line between the mixed-motive analysis and the *McDonnell Douglas* analysis, but the very nature of the mixed-motive case eradicated the need for any pretext evidence at the summary judgment stage.[172] All the

163. *Id.*
164. *Id.*
165. White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008).
166. Bandsuch, *supra* note 18, at 1045; Emden, *supra* note 17, at 155; *White*, 533 F.3d at 399.
167. *White,* 533 F.3d at 399–401.
168. *Id.* at 398.
169. *Id.* at 399.
170. *See id.* at 400.
171. *Id.* at 401–02.
172. *Id.* at 401.

plaintiff is required to do in a mixed-motive case is provide sufficient evidence—direct or circumstantial—that an illegitimate motive existed.[173] If the plaintiff does so, no burden-shifting is required and summary judgment is not appropriate.[174]

The Sixth Circuit's reasoning is so simple that it gives a moment's pause. The court engaged in none of the parsing of intermediate evidentiary burdens and comparisons of different standards that other circuits did when explaining why and how *McDonnell Douglas* is still appropriate for mixed-motive cases. Rather, the court clearly and concisely got to the heart of the issue—there is no place for discussions of pretext in mixed-motive cases and forcing that discussion is overly burdensome to the plaintiff.[175] The Sixth Circuit well demonstrates that the tangled knot of evidentiary burdens and analysis structures obstructs the ultimate goal—to allow plaintiffs who have demonstrated genuine issues of material facts to speak in a court of law.[176] The Sixth Circuit's reasoning both reflects the legislative intent originally behind Title VII and the cultural shift toward hearing victims that the #MeToo movement has created.

IV. CULTURAL MOMENTUM AND LEGAL CHANGE

Like the Sixth Circuit, proponents of the #MeToo Movement argue for erring on the side of hearing victims. This cultural movement has already bled into the legal field, and it has the potential to continue to demand legal change. To demonstrate the legal impact cultural movements can have, this section first examines the relationship between culture and law, arguing that a cultural shift must occur if legal change is going to have practical effect. It then argues that the #MeToo Movement is the kind of social movement that can support legal change. Finally, this section argues that the #MeToo Movement has created a cultural shift that demands and can support adopting the Sixth Circuit's pro-victim approach as a resolution of the *McDonnell Douglas* circuit split.

A. Courts and Culture

For change to be meaningful, the law and culture must work in tandem. In fact, within the context of true social change, the two are difficult to sepa-

173. *White*, 533 F.3d at 401–02.
174. *Id.*
175. *Id.* at 400.
176. *See generally id.*

rate.[177] Law professors Gerald Torres and Lani Guinier have written extensively about the relationship between social movements and legal change, concluding that without a cultural shift, true lawmaking does not occur.[178] Torres and Guinier developed the term "demosprudence," a concept that claims that "social movement activism is as much a source of law as are statutes and judicial decisions."[179] Torres and Guinier do not argue that social movement activism influences lawmaking—rather, they argue that social movement is an intrinsic part of lawmaking because it changes "the sense of what is practically possible and the sense of what is possible to imagine."[180] In other words, lawmaking occurs when a change in the rules brings the law in line with a cultural shift that has already taken place.[181] To look more closely at this relationship between culture and lawmaking, this Note will briefly contrast the progression of African American rights and LGBTQ rights.[182]

The development of African American rights demonstrates that legal change without cultural support is largely ineffective. After the Civil War, the Reconstruction Congress passed legislation that abolished slavery, provided citizenship regardless of race, and guaranteed voting rights regardless of race.[183] Additionally, Congress adopted a series of civil rights laws intended to undermine pervasive racism and promote equality.[184] Southern states resisted these laws, adopting systems that allowed them to retain their racist constructs despite the new legislation—systems like sharecropping

177. Stacey L. Sobel, *Cultural Shifting at Warp Speed: How the Law, Public Engagement, and Will & Grace Led to Social Change for LGBT People*, 89 ST. JOHN'S L. REV. 143, 144 (2015).

178. *Id*. at 152.

179. Gerald Torres, *Legal Change*, 55 CLEV. ST. L. REV. 135, 135–36 (2007).

180. Gerald Torres & Lani Guinier, *The Constitutional Imaginary: Just Stories About We the People*, 71 MD. L. REV. 1052, 1068–69 (2012) (quoting JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 11 (2011).

181. *See* Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 946 (2006).

182. The following discussions of both the African American and LGBTQ civil rights movements are not intended nor asserted to be comprehensive. These discussions are overviews, intended only to establish the different outcomes when there is or is not cultural support for a legal change. Given that both the African American and LGBTQ civil rights movements are outside the scope of this article, the treatment of each is purely a summation that unfortunately glosses over the struggles, successes, and failures of each. The following discussion is not intended to ignore the fact that much is left to be done before either the African American or LGBTQ communities enjoy full, unqualified equality.

183. *See* John E. Nowak, *Federalism and the Civil War Amendments*, 23 OHIO N.U. L. REV. 1209, 1211 (1997).

184. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1437 n.213 (1992).

and segregation.[185] Despite the fact that the laws had changed, these discriminatory systems persisted for more than seventy years because there was no cultural support in the South for the new laws. Society and the courts ignored, actively circumvented, and delegitimized the laws that Congress had passed.[186] It was not until the 1950s and 1960s, when powerful activism began a cultural shift toward tolerance and inclusion, that effective civil rights lawmaking occurred. During the Reconstruction era, lawmakers attempted to legislate tolerance and inclusion that society—Southern society in particular—was not willing to accept, effectively making the laws moot.

Conversely, the LGBTQ movement demonstrates that cultural change can accelerate legal change by making a previously invisible, criminalized group of people so visible that legal change rapidly follows. In the 1990s, a cultural shift in the way that people viewed LGBTQ people occurred, and as a result, courts began to reason differently about LGBTQ rights.[187] Multiple LGBTQ-favorable legal decisions followed, beginning to change the landscape of LGBTQ rights. In 1983, approximately seventy-five percent of people stated that they *did not* know anyone who was LGBTQ.[188] Thirty years later, eighty-seven percent of people said they *did* know a person who is LGBTQ.[189] This increase in exposure to LGBTQ people has mirrored an increase in acceptance of LGBTQ lifestyles, and the Supreme Court's decisions have mirrored that increase in acceptance.[190] In 1986, when the United States Supreme Court ruled that homosexual sodomy was not a protected right, just thirty-two percent of Americans believed that consensual homosexual sex should be legal.[191] In 2003, when the Supreme Court reversed that decision, more than sixty percent of Americans already believed consensual homosexual sex should be legal.[192] Similarly, in 2014, public support for same-sex marriage rose to an all-time high, just one year before the Court's *Obergefell* holding created marriage equality.[193]

These two examples clearly demonstrate that cultural and legal advancement must occur together, and change is swifter and more effective

185. *See* john a. powell & Caitlin Watt, *Corporate Prerogative, Race, and Identity Under the Fourteenth Amendment*, 2011 CARDOZO L. REV. DE NOVO 885, 895 (2011).

186. *See generally* Sobel, *supra* note 177, at 154.

187. Sobel, *supra* note 177, at 164–75.

188. *Id.* at 176.

189. *Id*.

190. *Id*.

191. Frank Newport, *Public Shifts to More Conservative Stance on Gay Rights*, GALLUP (July 30, 2003), https://news.gallup.com/poll/8956/public-shifts-more-conservative-stance-gay-rights.aspx.

192. *Id*.

193. Justin McCarthy, *Same-Sex Marriage Support Reaches New High at 55%*, GALLUP (May 21, 2014), https://news.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx.

when they do. These examples support Torres and Guinier's proposition that social change impacts what people believe to be possible.[194] Attempting to enforce laws that do not reflect the culture of a society inevitably results in that society finding a way around or ignoring the spirit of those laws. However, when changing the rule brings the law in line with a true cultural shift, real change takes place.

B. The #MeToo Movement Has Opened the Door to Legal Change

The #MeToo Movement has increased the visibility of discrimination and sexual assault victims, generating public support for holding victimizers accountable. It has begun to chip away at the shame that victims have often felt about telling their story, and it has normalized holding abusers accountable. #MeToo has become a household term, permeating the national consciousness through the power of social media,[195] working its way into political discussions, and taking on legal force. It is a cultural movement that can support legal change.

Thomas B. Stoddard identified four factors that must be present in a social movement before it can effect true change.[196] Those factors are "(1) A change that is . . . broad or profound; (2) Public awareness of that change; (3) A general sense of the legitimacy (or validity) of the change; and (4) . . . continuous enforcement of the change."[197] Stoddard's assertion is well-founded, as social movements can at times be fleeting, socially unpopular, or unenforceable. Such movements may not be able to inspire or support a rule change. The #MeToo Movement easily meets Stoddard's four factors.

The #MeToo Movement has created "broad or profound" change because it has changed what victims of sexual discrimination, harassment, or violence collectively believe that they have to endure. This is evidenced by the number of people who continue to speak out and face potential backlash because they know that they do not have to suffer alone in silence. Instead, there is an assurance that if they speak out, society will validate their protest and take action.

The media focus of the #MeToo Movement ensures that there is widespread "public awareness" of the change that has occurred. Although some criticize social media activists, on the whole social media platforms provide a voice to those who otherwise would not have the resources or the opportunity to be heard.[198] #MeToo's potential for creating change is largely root-

194. Torres & Guinier, *supra* note 180, at 1068–69 (2012).
195. Williams, Singh & Mezey, *supra* note 94, at 377.
196. Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 978 (1997).
197. *Id.*
198. Williams, Singh & Mezey, *supra* note 94, at 377–78.

ed in the conversation that has developed and perpetuates on social media between people of different genders, races, backgrounds, and socioeconomic status.[199] Not only is the public aware of the #MeToo Movement's message, people are actively interacting with the Movement—even if only by scrolling through their social media feeds and reading the stories of their friends and family members.[200]

As with all cultural movements, there are some who question the #MeToo Movement's legitimacy.[201] Some say that #MeToo has spun out of control and is doing more harm than good.[202] Some say that women who speak out about harassment in the workplace simply make men afraid to interact with women at work—and that the consequence will be fewer women in the business sector.[203] Some say that the #MeToo Movement is merely a political agenda in disguise.[204] #MeToo has its naysayers, but it is difficult to argue that the desire to protect victims from sexual discrimination, sexual harassment, and sexual violence is not legitimate. The overwhelming response to #MeToo accusers is support and encouragement, demonstrating the legitimacy Stoddard requires.[205] Hashtags such as "#BelieveWomen," "#BelieveSurvivors," and "#WhyIDidn'tReport" have dominated social media.[206]

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199. *Id.*

200. *See generally id.*

201. Libby Emmons, *When Men Kill Themselves Over Unproven Allegations, Me Too Has Gone Too Far*, THE FEDERALIST (Sept. 24, 2019), https://thefederalist.com/2019/09/24/when-men-kill-themselves-over-unproven-allegations-me-too-has-gone-too-far/.

202. *See* Megan Garber, *Is #MeToo Too Big?*, ATLANTIC (Jul. 4, 2018), https://www.theatlantic.com/entertainment/archive/2018/07/is-metoo-too-big/564275/.

203. Arwa Mahdawi, *Men Now Avoid Women at Work—Another Sign We're Being Punished for #MeToo*, GUARDIAN (Aug. 29, 2019, 1:00 AM), https://www.theguardian.com/lifeandstyle/2019/aug/29/men-women-workplace-study-harassment-harvard-metoo.

204. *See* Sandra E. Garcia, *Calls for Kavanaugh's Impeachment Come Amid New Misconduct Allegations*, N.Y. TIMES (Sept. 15, 2019), https://www.nytimes.com/2019/09/15/us/brett-kavanaugh-allegations-trump-impeach.html.

205. Char Adams, *Meet the Unsung Heroes of the #MeToo Movement: 'It's Powerful to Be Honored,'* PEOPLE (May 21, 2019, 10:35 AM), https://people.com/human-interest/me-too-movement-heroes-black-women-breakthrough/; Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html; Catherine Thorbecke, *Celebrities Who Helped Launch #MeToo Movement React to Kavanaugh Hearing*, ABC NEWS (Sept. 27, 2018, 1:18 PM), https://abcnews.go.com/gma/news/celebrities-helped-launch-metoo-movement-react-kavanaugh-hearing/story?id=58126207 (praising Christine Blasey Ford for speaking out about Kavanaugh).

206. Thorbecke, *supra* note 205.

Men and women alike have openly praised victims who speak out for having the courage to inspire others to do the same.[207]

Finally, the #MeToo Movement is enforcing the change that is occurring. Whether or not it is always popular, people continue to tell their stories of victimization. Harvey Weinstein, whose victims started the present incarnation of the #MeToo Movement, has been convicted of a criminal sex act in the first degree and rape in the third degree.[208] His victims continue to speak out against him, bringing the #MeToo momentum full circle to hold accountable the man who terrorized Hollywood for decades. In 2018, a jury convicted Bill Cosby of sexual assault, proving "that there is accountability."[209] In 2017, pop icon Taylor Swift sued radio DJ David Mueller for lifting her skirt and touching her inappropriately.[210] She requested one symbolic dollar in damages, and she spoke bluntly in the courtroom, refusing to be intimidated by the tactics of the defendant's lawyer.[211] The president of the Rape, Abuse, and Incest National Network stated that Swift's principled claim was "a great demonstration to other victims that there is strength in coming forward and pursing [sic] justice."[212] Whether by costing a perpetrator his career, convicting him in court, or demanding a dollar as a symbolic admission of guilt, accusers are enforcing change and people are taking notice.

Thus, the #MeToo Movement meets Stoddard's four factors social movements must have to effect true change.[213] The discussion surrounding sexual harassment and discrimination has permanently changed. Even though these issues are far from resolved and there is much need for further advancement, there is also now a new awareness and acceptance that prom-

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207. *E.g.*,Tom Philip, *Terry Crews Delivered a Powerful Testimony on Sexual Assault*, GQ (Jun. 26, 2018), https://www.gq.com/story/terry-crews-delivered-a-powerful-testimony-on-sexual-assault.

208. Ed Pilkington, *Harvey Weinstein Convicted of Rape at New York Trial*, GUARDIAN (Feb. 24, 2020, 5:09 PM), https://www.theguardian.com/film/2020/feb/24/harvey-weinstein-guilty-trial-charges-verdict; *see also* Adam Reiss & Daniel Arkin, *Harvey Weinstein Trial: Prosecution Rests After Two Weeks of Graphic Testimony*, NBC NEWS (Feb. 6, 2020, 3:02 PM), https://www.nbcnews.com/news/us-news/harvey-weinstein-trial-prosecution-rests-after-two-weeks-graphic-testimony-n1131886.

209. Meredith Mandell, *Bill Cosby's Conviction was Hailed as a #MeToo Victory. But Advocates Say More Needs to Be Done*, NBC NEWS (May 3, 2018, 11:36 AM), https://www.nbcnews.com/storyline/bill-cosby-scandal/bill-cosby-s-conviction-was-hailed-metoo-victory-advocates-say-n870796.

210. Emily Yahr, *Taylor Swift Explains Her Blunt Testimony During Her Sexual Assault Trial*, WASH. POST (Dec. 6, 2017, 12:19 PM), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/12/06/taylor-swift-explains-her-blunt-testimony-during-her-sexual-assault-trial/.

211. *Id.*

212. *Id.*

213. *See* Stoddard, *supra* note 196, at 978.

ises progress. Even the language surrounding sexual harassment has changed, incorporating social media hashtags and new terminology. Most importantly, it has become harder to silence victims who want to be heard. They can speak in the public sphere, and they ought to be able to speak in court as well.

C. The Court Must Walk Through the Open Door

Adopting the Sixth Circuit's approach to *McDonnell Douglas* at the summary judgment stage of mixed-motive discrimination cases changes the rules to reflect the cultural change that has already occurred. The Sixth Circuit's approach strips away the overly-complex, blurred, and overlapping formulas that have developed over years of ad hoc modifications. It opens the courtroom to discrimination plaintiffs so that they can be heard. The Eighth and Eleventh Circuits' approaches are outdated—reflective of a culture that no longer dominates society. The middle ground and modified *McDonnell Douglas* approaches make advancements but still do not fully answer the cultural demand for hearing victims. Adopting the Sixth Circuit's *White* holding should be part of the national answer to the #MeToo Movement's demand for alleged victims to be given greater access to justice.

Embracing the #MeToo Momentum would not be a step away from what Congress and the courts originally intended. Rather, adopting the Sixth Circuit's *White* holding would bring greater alignment with legislative intent and judicial precedent.[214] The legislative intent behind Title VII was always to eradicate workplace harassment and provide a lenient and all-encompassing avenue of relief for victims of workplace discrimination, harassment, and assault.[215] The Supreme Court has consistently expanded Title VII's scope, with Congress's express support.[216] Title VII is intended to be a broad umbrella under which plaintiffs can find shelter—not a narrow opening through which only a few can fit. Similarly, *McDonnell Douglas* was never meant to be a roadblock for plaintiffs, [217] and the #MeToo Movement should provide the cultural momentum required to push the obstacle out of the way.

V. CONCLUSION

Though it was never intended to be, *McDonnell Douglas* is a burdensome standard for Title VII mixed-motive plaintiffs. The #MeToo Move-

214. *Supra* Part II, Section A.
215. *Supra* Part II, Section A.
216. *Supra* Part II, Section A.
217. *See* White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008).

ment has created the kind of cultural shift that can support a sweeping change in the law, eradicating the *McDonnell Douglas* burden at the summary judgment stage of mixed-motive cases and granting discrimination plaintiffs greater access to the courts. This is the cultural moment for the Supreme Court to adopt the Sixth Circuit's *White* holding and open the courtroom door to plaintiffs.

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