

# THE WOMEN'S ADVOCATE

## A CATALYST FOR 2019 – 2020



Women and the Law Section Newsletter  
www.txwomenlawsection.org

SPRING

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## State Bar of Texas Women

In this ever changing world, the Women and the Law Section of the State Bar of Texas (“WAL”) continues to strive to meet the needs of its members. Free telephonic CLEs will continue to be hosted with the next CLE scheduled for April 14, 2020, entitled Intellectual Property Traps in Contracts. Additionally, WAL continues to plan for its Annual Meeting to be held at the Hilton Anatole in Dallas, Texas, in conjunction with the State Bar of Texas’ Annual Meeting. WAL’s live CLE is scheduled for Thursday, June 25, 2020, at 3:00 p.m. – 4:15 p.m. The CLE will review the history of women’s rights and address new laws regarding invitro fertilization. The CLE is entitled *From the Right to Own Property and Vote to the Right to Control Her Body*. A reception/happy hour will be held also on Thursday from 6:00 p.m. to 8:00 p.m. at the Hilton Anatole. We are hopeful that we will still be able to host these events as planned. WAL especially looks forward to having the reception to celebrate WAL’s members and friends being able to come together. Additional networking and receptions that were being planned for this Spring have been postponed.

Nicondra “Nikki” Chargois-Allen  
WAL President

## JOIN US TODAY TO CONNECT WITH OTHER WOMEN LAWYERS!

MEMBERSHIP IS ONLY \$25 A YEAR. MEMBERSHIP YEAR IS  
JUNE 1<sup>ST</sup> TO MAY 31<sup>ST</sup>.

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## **WOMEN AND THE LAW COUNCIL**

### ***TEXAS MINORITY COUNSEL PROGRAM***

This year, the Women and the Law Section participated in the Texas Minority Counsel Program (TMCP), which was held November 6-8, 2019 at the Four Seasons Resort and Club in Las Colinas. TMCP is a client development, networking, and CLE event held each year for diverse attorneys in Texas. It was created in 1993 with the mission of increasing opportunities for minority, women, and LGBT attorneys who provide legal services to corporate and government clients, and to expose those organizations to the legal talent of diverse attorneys in Texas. Members of the Women and the Law Section who attend TMCP are entitled to a discount on registration fees. TMCP 2020 will be held in Austin and more information can be found at: <https://www.texasbar.com/Content/NavigationMenu/ForLawyers/BarServiceOpportunities/FindDiversityResources/TMCP.htm>

#### **TMCP 2020 Schedule At A Glance\***

SHERATON AUSTIN HOTEL AT THE CAPITOL

Wednesday, October 28, 2020

9:00-11:00 Networking Through Service  
11:00-5:00 Spa Retreat  
2:00-4:30 Golf Tournament  
6:00-7:30 Conference Registration & Welcome Reception

Thursday, October 29, 2020

8:15-9:00 Registration & Breakfast  
9:00-11:45 CLE presentations; Counsel Connections  
11:45-1:00 Keynote Awards Luncheon  
1:30-5:00 CLE Tracks; Counsel Connections  
4:00-5:00 Law Student Reception  
5:00-6:30 Networking Reception  
7:00-8:30 Dine-Arounds  
9:00-12:00 TMCP Party

Thursday, October 30, 2020

8:15-9:00 Breakfast  
9:00-11:45 CLE presentations; Counsel Connections  
12:15-12:45 Luncheon presentation  
1:00 Closing Remarks

\*Schedule is subject to change. The conference brochure will include the final schedule.

#### **Seeking Contributions**

Are you a WAL Section member and have something you would like to share with the rest of the Membership (i.e. Awards, Honors, Employment move or office relocation, Upcoming CLE speaking engagements, Employment search; hiring or seeking, etc.) Our newsletter reaches over 800 WAL members from across Texas. Please send your announcement(s) to:

**Danae N. Benton, Newsletter Editor**  
[danae@thebentonlawgroup.com](mailto:danae@thebentonlawgroup.com)

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**The Women and the Law Section presents:**

**A Free Telephone CLE:  
COVID-19 and the FFCRA:  
What Employers Need to Know Regarding Mandated Paid Leave**

**Presented by:**  
Tina L. Izadi of Izadi Law Group

**Wednesday, May 6, 2020**  
Noon - 1 p.m. CDT  
(1 hr. MCLE Credit)

Please join us for a free one-hour telephone CLE and learn from the comfort of your office! You will be sent any available course materials, as well as instructions for joining the call, the day before the program.

**RSVP by 3 p.m. CDT Tuesday, May 5 to reserve your spot.**

On March 18, 2020, the Families First Coronavirus Response Act (“FFCRA”) was enacted; the FFCRA requires employers with less than 500 employees to provide employees with paid leave in certain circumstances due to COVID-19. This CLE will provide an overview of the requirements with the FFCRA (and the accompanying DOL regulations), what employers need to know to comply with the law, available exemptions, and recommended best practices.

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## CALLING FOR NOMINATIONS

Each year the Women and the Law Section presents awards to recognize attorneys whose work is in line with the section's mission statement. The awards presented are the Sarah T. Hughes Women Lawyers of Achievement Award and the Louise B. Raggio Award. Nominations of deserving recipients are needed. Please submit the name of the nominee, a brief summary of why the nominee is deserving of the award, and your contact information in case additional information is needed. Nominations should be submitted to the section via email. The deadline for nominations has been extended until May 1, 2020. Should the nominee not be selected in the year in which they were nominated, their nomination will be reconsidered for the award the following year.

### AWARD DESCRIPTIONS

#### **Sarah T. Hughes Women Lawyers of Achievement Award**

The Women and the Law Section of the State Bar of Texas established the Sarah T. Hughes Women Lawyers of Achievement Award to honor the accomplishments of women who have achieved outstanding recognition in their professional area and who, by so doing, have paved the way for success for other women attorneys. Sarah T. Hughes was an original Texas trailblazer, breaking down barriers for women in the profession decades before the State Bar even recognized women attorneys as a distinct group. Ms. Hughes put herself through law school while working a day job as a police officer in Washington, D.C. After graduating in 1922, she moved to Texas, where she practiced for some years before serving three terms in the Texas House of Representatives. In 1935, she became the first woman state district judge in Texas, and in 1961, the first woman to serve as a federal district judge in the state. She was a longtime advocate for women and was instrumental in helping to pass a 1954 amendment to the Texas Constitution, allowing women to serve on juries. Speaking to an interviewer in 1977, Ms. Hughes said, "It all depends on whether you're willing to work hard enough to get what you want, not what stands in your way."

#### **Louise B. Raggio Award**

The Louise B. Raggio Award recognizes an attorney who has actively addressed the needs and issues of women in the legal profession and in the community. Louise Raggio graduated from law school in 1952 as the only woman in her class and struggled to find work as an attorney at a time when most law firms wouldn't consider hiring a woman associate. With the help of Sarah Hughes, Ms. Raggio became Dallas County's first female criminal prosecutor and tried the first case before an all-woman jury in Texas. She would become known as the "Texas Tornado" for her work in improving the rights of women. She helped draft the Texas Marital Property Act of 1967, which gave women the right to own property, secure a bank loan, and start a business without their husbands' consent. In 1979, Ms. Raggio became the first woman to be elected to the State Bar's board. Ms. Raggio was a lifelong civil rights activist and a champion for the rights of women and children.

## Supporting Access to Justice



Women and the Law is committed to the goal advocated by the Texas Access to Justice Foundation to provide equal access to the justice system for all. Women and the Law demonstrated its support by donating to the Access to Justice Foundation and supporting the 35<sup>th</sup> Annual Access to Justice Dinner. The dinner featured John Grisham as its key speaker. John Grisham told the attendees of his experience when he practiced law with taking pro bono cases and encouraged lawyers to see the power of their law license by taking pro bono cases.

At the dinner, Richard “Dick” Tate, Chair of the Board of Directors of the Access to Justice Foundation, was honored for his decades of work in bringing legal services to low income Texans. Mr. Tate was awarded the Harold F. Kleinman , which is awarded for exceptional outstanding leadership in providing access to justice to low income Texans. The award is not given every year and is only awarded when a deserving attorney demonstrates the qualities that the award exemplifies. Women and the Law

congratulates Mr. Tate for paving avenues for low income Texans to access legal help.

Information regarding supporting the Texas Access to Justice Foundation can be found at [www.teajf.org](http://www.teajf.org) and for additional information regarding the Texas Access to Justice Commission go to [www.texasatj.org](http://www.texasatj.org).



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## WAL Writing Contest 1<sup>st</sup> Place Article

### **Maternal Mortality and Domestic Violence: The Intersectionality of Pregnancy and Violence<sup>1</sup>**

**By: Khyra Kolidakis**

#### **I. What is the challenge? How are women harmed?**

The maternal mortality rate shocked researchers when it doubled between 2010 and 2012<sup>2</sup>. The researchers found that 148 women died in 2012 as a result of pregnancy.<sup>3</sup> Black women in Texas are dying with frightening frequency after childbirth — at a rate of nearly three times higher than that of white women.<sup>4</sup> No one has figured out why. According to the Texas Tribune three major state and federal agencies, working with several non-profit organizations in Texas, came together in 2013 to provide statistics and solutions for this problem; however, the issue remains at the top of the health disparities list today.

Although the Department of State Health Services' website shows that Texas' maternal mortality rate was 35.2 per 100,000 births between 2012 and 2015 using CDC data, agency officials now say that the number of mothers who died during that period is actually more than 30 percent lower — 24.3 deaths per 100,000 births — as a result of a new methodology the state recently began using to calculate deaths. While state officials say the new, lower mortality rate is more accurate, they stopped short of calling it the official maternal mortality rate because the new methodology is still being “refined”.<sup>5</sup> While the new numbers may be giving state officials a reason to celebrate, it would appear that there is a much different narrative being pushed on the ground. The Texas Tribune has told harrowing tales of mothers enduring medical nightmares: They bled out, had strokes and heart attacks, and lost babies during delivery.

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<sup>1</sup> Khyra Kolidakis Term Paper for Domestic Violence. Fall 2019. Contributions made by Professor Janet Heppard and Professor Diane McManus.

<sup>2</sup> See <https://www.washingtonpost.com/news/morning-mix/wp/2018/04/11/texas-maternal-mortality-rate-was-unbelievably-high-now-we-know-why/>

<sup>3</sup> See *id.*

<sup>4</sup> See [https://www.washingtonpost.com/national/health-science/dying-after-childbirth-women-in-texas-are-at-high-risk-especially-if-theyre-black/2017/07/21/0a835f0a-6b00-11e7-b9e2-2056e768a7e5\\_story.html](https://www.washingtonpost.com/national/health-science/dying-after-childbirth-women-in-texas-are-at-high-risk-especially-if-theyre-black/2017/07/21/0a835f0a-6b00-11e7-b9e2-2056e768a7e5_story.html)

<sup>5</sup> <https://apps.texastribune.org/dangerous-deliveries/>

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Dozens of experts and advocates say maternal deaths are a symptom of a bigger problem. According to the Texas Women’s Healthcare Coalition, 1.3 million women who need routine checkups and birth control cannot afford it and cannot access it, according to the Texas Women’s Health Coalition. Too many Texas women — particularly low-income women — do not have access to health insurance, birth control, mental health care, substance abuse treatment and other services that could help them become healthier before and after pregnancy.

In October of 2018, a legislative task force released a report showing that the Texas women most at risk of dying after giving birth include black women over 40, unmarried women, women who use Medicaid, women who have little or no insurance and women who give birth through cesarean delivery.<sup>6</sup> These same women are also more likely to enter pregnancy with health problems like obesity, diabetes, high blood pressure and smoking habits.<sup>7</sup>

Women make up half the workforce, and, according to census figures, a slight majority of the U.S. population; so, their suffering and undiagnosed health problems create costs and burdens that ultimately hurt our economy and slow our businesses. For example, growing obesity in Texas women and increased cases of hypertension and other ailments while pregnant make low-income women a health risk unlike any seen in recent years<sup>8</sup>. Faced with alarming public health statistics that drew national attention, Texas lawmakers created a Task Force on Maternal Mortality and Morbidity in 2013 to study the problem and make recommendations to curb the state’s rising rate.

The Texas Tribune’s investigation found that lawmakers have squandered opportunities to help more women access services that could save their lives. Hundreds of thousands of low-income women who, under federal law, would be eligible for publicly funded health insurance do not qualify for coverage in Texas because state leaders rejected a Medicaid coverage expansion offered under the Affordable Care Act.<sup>9</sup> According to Jamila Taylor, an advocate at the Center for American Progress, state legislators’ decision in 2011 to change how Texas offers women’s health services has left thousands of women without “crucial” health care before, during and after pregnancy.<sup>10</sup> That included a \$73.6

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<sup>6</sup> *See id.*

<sup>7</sup> *See id.*

<sup>8</sup> *See* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2621047/>

<sup>9</sup> *See* <https://www.kff.org/medicaid/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid/>

<sup>10</sup> <https://www.americanprogress.org/issues/women/reports/2019/05/02/469186/eliminating-racial-disparities-maternal->

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million cut to Family Planning Services which led to roughly 100,000 fewer people being served in 2012.<sup>11</sup> That same year, Republican state leaders moved to exclude Planned Parenthood funding even though its participating clinics were not performing the Texan-scorned abortions.<sup>12</sup> It is worth noting that Planned Parenthood has been the top healthcare provider for low-income women, and that the healthcare being mentioned includes more than abortions.

In the place of defunded Planned Parenthood clinics that offered real women's health services (like pap smears and birth control), unfamiliar clinics have sprung up with solo practitioners offering behavioral health services; a.k.a. pills. For women to receive care if they are uninsured, they have to attend a location for mental health, a separate location for birth control and gynecology services, another location for general primary care; and they have to pay a hefty cost at each different location. If a woman is not married and without a college education, above the age of 26, or without a stable home, living in Texas it is likely that she cannot afford healthcare. So, when we ask the question "why are low-income women dying from childbirth?"; we should be aware that the climate these women are forced to live in has been created by the Texas legislature.

## II. What is the relevant law(s)?

According to the National Institutes of Health, intimate partner violence (IPV), or domestic violence, affects as many as 300,000 pregnant women every year in the U.S. from every age group, religion, ethnicity, socioeconomic level and educational background.<sup>13</sup> IPV increases behavioral risk factors in pregnant women, such as smoking, drug or alcohol abuse, possibly because these are coping mechanisms for survivors.<sup>14</sup> "Intimate partner violence during pregnancy has been found to be associated with fatal and non-fatal adverse health outcomes for the pregnant woman and her baby due to the direct trauma of abuse to a pregnant woman's body, as well as the physiological effects of stress from current or past abuse on fetal growth and development."<sup>15</sup> "Physical, sexual and psychological intimate partner violence during pregnancy [is] associated with higher levels of depression, anxiety, and stress, as well as suicide attempts,

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infant-mortality/

<sup>11</sup> See <https://apps.texastribune.org/dangerous-deliveries/>

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

<sup>13</sup> <https://www.domesticshelters.org/articles/statistics/when-pregnancy-triggers-violence>

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

<sup>15</sup> [https://apps.who.int/iris/bitstream/handle/10665/70764/WHO\\_RHR\\_11.35\\_eng.pdf?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/70764/WHO_RHR_11.35_eng.pdf?sequence=1)



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lack of attachment to the child and lower rates of breastfeeding.”<sup>16</sup> “Possible explanations are that women smoke, drink or take drugs for self-medication to cope with the stress, shame, and suffering caused by the abuse.”<sup>17</sup>

The Task Force was a result of the legislative charge to curb maternal mortality and severe morbidity through recommendations. Because accurate and actionable data is integral for the success of efforts to curb maternal deaths, the Department of State Health Services worked to complement the Task Force and legislative efforts through continued analysis of available maternal mortality data. This has included, but is not limited to, an analysis that breaks down causes of maternal death along a pregnancy and postpartum timeline. The timeline analysis has also been used to support the work of the Department of State Health Services and other agencies to identify opportunities within the few existing programs to prevent maternal deaths and severe morbidity outcomes.

The work of the Task Force (the only known legal action in Texas addressing the maternal mortality issue so far) can best be understood by their final report issued in December of 2017 and a table that was published in this report. To distinguish those maternal deaths directly related to pregnancy from those not directly related, the Department of State Health Services examined the timing and cause of all 382 confirmed maternal deaths that took place between 2012 and 2015. The Task Force noted that analysis of more comprehensive data was necessary to offer a full and complete report, but the only existing comprehensive data for the state of Texas is as follows:

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

*Table 1: Confirmed Maternal Deaths by Timing and Cause of Death  
Texas, Over a Four-Year Period, 2012-2015*<sup>18</sup>

<i>Cause of Death</i>	<i>While Pregnant</i>	<i>0-7 Days Post-partum</i>	<i>8-42 Days Post-partum</i>	<i>43-60 Days Post-partum</i>	<i>61+ Days Post-partum</i>	<i>Total</i>
<i>Amniotic Embolism</i>	1	9	0	0	0	10
<i>Cardiac Event</i>	2	12	9	5	27	55
<i>Cerebrovascular Event</i>	0	8	9	1	9	27
<i>Drug Overdose</i>	0	3	7	5	49	64
<i>Hemorrhage</i>	3	12	2	0	3	20
<i>Homicide</i>	2	1	5	2	32	42
<i>Hypertension/Eclampsia</i>	0	7	4	0	7	18
<i>Infection/Sepsis</i>	1	3	14	3	11	32
<i>Pulmonary Embolism</i>	2	3	4	2	2	13
<i>Substance Use Sequelae (e.g., liver cirrhosis)</i>	0	0	2	0	3	5
<i>Suicide</i>	0	1	2	2	28	33
<i>Other</i>	5	5	6	3	44	63
<b>Total</b>	<b>16</b>	<b>64</b>	<b>64</b>	<b>23</b>	<b>215</b>	<b>382</b>

Homicide was found to be the second-leading cause of injury-related death for pregnant women, after car accidents, in a study by the National Institute of Health.<sup>19</sup> “The NCADV found that between 1990 and 2004, 1,300 pregnant women in the U.S. were murdered, with 56 percent being shot to death (the rest were stabbed or strangled).”<sup>20</sup> “More than two-thirds were killed during their first trimester.”<sup>21</sup> “In other words, partners who batter pregnant women are often particularly more dangerous and more likely to kill their partners.”<sup>22</sup>

While this data may seem comprehensive, the Task Force overlooks several contributing factors to the rising maternal mortality rate that especially effect low-income mothers. When neighborhoods work well, they are a place where individuals derive many social benefits. However, when neighborhoods are characterized by residential segregation, often linked to ethnic/racial minority population concentrations, then women living in those neighborhoods have higher rates of morbidity and mortality.

<sup>18</sup> <https://dshs.texas.gov/mch/pdf/Dec2017-Investigating-Maternal-Mortality-Brief-FINAL.pdf>

<sup>19</sup> See <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449204/>

<sup>20</sup> <https://www.domesticshelters.org/articles/statistics/when-pregnancy-triggers-violence>

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

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Residential segregation that creates concentrated neighborhoods where residents are predominantly poor, racial/ethnic minority, or of immigrant status are social spaces with concentrated social problems. This increases the chances that residents, whatever their individual backgrounds, will experience greater exposure to stressful environments while also having fewer resources with which to cope with these exposures. “Even though Hispanic and [B]lack women have similar rates of chronic health issues like obesity, diabetes and heart disease, [T]ask [F]orce members and researchers say they can’t explain why Hispanic mothers are more likely to survive pregnancy complications.”<sup>23</sup> Perhaps this discrepancy has to do with the cultural support systems inherent in Hispanic families, as opposed to Black women who are often stereotyped and expected to be single mothers.

Quality maternal mortality data is sorely lacking. The U.S. government hasn’t published an official nationwide rate since 2007. Researchers, including Texas’ maternal mortality Task Force members, primarily rely upon the National Vital Statistics System, which compiles data from each state based on death certificates completed by doctors and coroners. This data is deeply flawed and inconsistent because there simply aren’t enough resources to analyze the data that exist. In addition, the data is easily manipulated to reflect the desires of a state with vested political interest.

### III. How should the challenge be addressed?

There are a diverse number of disciplines involved in pregnancy-related violence research including such fields as sociology, psychology, criminal justice, nursing, education, and public health, to name a few. “[I]t is relatively uncommon for researchers in these fields to work together to develop a multidisciplinary research project. Such collaboration could prove to be extremely beneficial in increasing the range of knowledge on the subject of pregnancy-related violence and ultimately working toward its reduction.”<sup>24</sup> Although the Department of State Health Services, Maternal Mortality Task Force, and the Health and Human Services Commission is still working together to interpret legislation from the 85<sup>th</sup> Texas legislature, the solutions proposed so far have been immensely inadequate.

Research indicates that there have been several answers proposed to solve to this looming problem including: maternal safety bundles, bills in the legislature to extend behavioral health services for women a year after delivery or in the treatment of opioid use, and several proposed forums to strategize on more solutions that can span throughout

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<sup>23</sup> <https://apps.texastribune.org/dangerous-deliveries/>

<sup>24</sup> Jasinski, J., “Pregnancy and Domestic Violence: A Review of the Literature,” *TRAUMA, VIOLENCE, & ABUSE*, Vol. 5, No. 1, at 58 (Jan. 2004) (hereinafter, “Jasinski”).

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Texas. The answer will not be simple and easy, nor will it narrow the numbers of women being addressed (as the current strategy seems to do). Clinical prevention methods will be needed at different points in time, in multiple locations, both within and outside of the hospital setting.

According to the American College of Obstetricians and Gynecologists, a maternal safety bundle is guidance and literature that is issued by several organizations in a collaborative fashion to various hospitals.<sup>25</sup> The guidance represents best practices for maternity care and includes “action plans” (or suggestions) on systems to be implemented by hospital staff to address several complications that could lead to maternal death during pregnancy or the postpartum period including hemorrhaging, severe hypertension, deep vein thrombosis, low-risk C-sections, and peripartum/postpartum racial disparities. It is worth noting that these safety bundles are touted most often by the state as the best solution; however, there isn’t a single website that explains what these bundles will do in terms that are reasonable for a consumer (a.k.a. the mother, the patient). Maternal safety bundles sound great for those that have insurance or can afford to pay hospital costs out of pocket. For those without insurance, maternal safety bundles -in terms of a solution- mean nothing.

Expanding behavioral health services for women one year after delivery is certainly a start; however, this sort of allocation of services that should be considered mandatory is not nearly enough. The risk of moderate to severe violence appears to be greatest in the postpartum period. “Women may need protection from violence and intimidation by their partners and it is important that there are provisions to accommodate this need.”<sup>26</sup> According to the Texas Department of Human Health Services, 33 mothers were lost from 2012 to 2015 as a result of suicide. How many of those deaths could have been prevented with the proper support systems already in place? There are children who will never see their mothers simply because the state government didn’t care enough to provide access. And, what about the 64 mothers in Texas that died from drug overdose in 2012 to 2015 after a 61-day period? The data from the National Vital Statistics System does not begin to estimate how much of those drug-related deaths were from opioid use; but at least the Texas legislature will begin to cover prevention and treatment for those women-after their baby is born.

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<sup>25</sup> See <https://www.acog.org/news/news-releases/2018/08/aim-program-awarded-millions-to-expand-efforts-to-reduce-maternal-mortality-and-morbidity>

<sup>26</sup> Mezey, G. and Bewley, S., “Domestic Violence and Pregnancy: Risk is Greatest After Delivery,” *BMJ* VOLUME 314 at 1295 (May 3, 1997).

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2 million women are physically assaulted annually and more than 50 million are assaulted in their lifetime. Consequences of pregnancy-related violence include later entry into prenatal care, low birth weight babies, premature labor, fetal trauma, unhealthy maternal behaviors, and health issues for the mother.<sup>27</sup> “There’s a racial divide in postpartum care in Texas, too. Hispanic women in Texas skip postpartum visits at a rate of 18.9 percent; 10.1 percent of black mothers don’t get postpartum checkups, nor do 9.6 percent of white women, according to the 2015 Pregnancy Risk Assessment Monitoring System.”<sup>28</sup> “The issue of research sample . . . remains an important factor to consider when interpreting prevalence estimates.”<sup>29</sup> “Notably, analysis of population-based data from the Centers for Disease Control and Prevention’s (1999) Pregnancy Risk Assessment Monitoring System (PRAMS) 1996 Surveillance Report found reported rates of pregnancy-linked abuse to be much lower than studies using hospital-based samples, ranging from 2.9% to 5.7% among several thousand women across 11 states participating in PRAMS . . .”<sup>30</sup>

When women lack access to livable wages, flexible scheduling, and paid family leave, it can have a harmful impact on both their physical and mental health, leading to negative impacts on the population as a whole. “PRAMS 1996 Surveillance Report asks only a few limited questions on abuse and questions are not behaviorally specific.”<sup>31</sup> Women were asked whether they were “physically abused by a husband or partner during the 12 months preceding their most recent pregnancy.”<sup>32</sup> “Both the limited number of items and the use of the term “abuse” . . . may lead to underestimates of assaults preceding or coinciding with pregnancy.”<sup>33</sup> A lack of insurance makes it harder for women to manage long-term health issues — and for women of child-bearing age to get the prenatal care that can help prevent maternal deaths. “Kami Geoffray, CEO of the Women's Health and Family Planning Association of Texas, an organization that works to increase access to family planning programs, said lawmakers haven’t gotten serious about addressing shortcomings in the state’s health care programs for women,”<sup>34</sup> and I would agree.

“Although studies using probability samples seem to agree that pregnancy does not increase the risk for violent victimization, they were not designed to specifically look at this issue and therefore have not included the necessary

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<sup>27</sup> See Jasinski at 55.

<sup>28</sup> <https://apps.texastribune.org/dangerous-deliveries/>

<sup>29</sup> Jasinski at 48.

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

<sup>31</sup> *Id.* at 49.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> <https://apps.texastribune.org/dangerous-deliveries/>

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questions to create a complete picture of the violence-pregnancy relationship.”<sup>35</sup> Studies have consistently reported no difference in risk due to pregnancy. “However, persistent violence was more likely to occur among couples in which the male partner perceived that the pregnancy of his female partner occurred sooner than intended.”<sup>36</sup> “Regardless of the exact dynamics of pregnancy-related violence, most of the research finds that women who were abused while they were pregnant had a history of victimization. . . . This would suggest that women who have a history of victimization should be identified as an at-risk group, with specific intervention efforts targeted to them.”<sup>37</sup> “One factor that has emerged as a consistent risk factor for violence is low socio-economic status (measured with educational levels, income, and/or employment) . . .”<sup>38</sup> “[W]omen who are abused do not have the same levels of social support as do women who are not abused.”<sup>39</sup> “[A] pregnancy not planned by the male partner might represent something that he could not control and therefore increases risk for violence.”<sup>40</sup> “Violence tends to be higher when certain conditions are present, such as a high level of conflict and stress in the family, and intervening variables such as belief in the legitimacy of violence to deal with family members who do wrong.”<sup>41</sup>

#### IV. Conclusion

Pregnant women who are screened for previous violence in their relationship should be provided with information about available services if they should need them either during or after the child is born. “Health care providers should also provide follow-up services to women postpartum in order to prevent any reoccurrence of violent behavior.”<sup>42</sup> Medical documentation can be used to substantiate assertions of abuse, to obtain protective relief in the form of a restraining order, and/or to be eligible for certain exemptions or statuses related to housing, insurance, and financial assistance. “Isaac and Enos suggested that health care providers can be of most assistance legally by improving their record keeping.”<sup>43</sup>

In short, the expansion of treatment and healthcare for women is necessary, now. Lawmakers must come

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<sup>35</sup> Jasinski at 52.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 54.

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

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 55.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 59.

<sup>43</sup> *Id.* at 60.

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together with legal providers on the ground to provide mandatory healthcare for those who need it. It is no longer an answer to cut off healthcare for those who can't afford it because eventually the truth will present itself. The added burden of gender discrimination and lack of structural supports in the workplace are also critically important when examining what will help women experience better maternal health outcomes. The continuing legacy of poor health in women of color despite the overall improved conditions of their lives is one compelling reason to take a closer look at the role that discrimination may play in healthcare. No collaborative committee or expensive institutional report is required to see that without the expansion of proper healthcare for women there is a generation of children in Texas who will go without their mothers, and the fault (or cost) will rest with the state.

“At the federal level, the idea of extending postpartum Medicaid is getting more attention.”<sup>44</sup> At a September House hearing, representatives from the American Medical Association, the Icahn School of Medicine and the Kaiser Family Foundation called for expanding postpartum Medicaid as a possible solution to the maternal mortality crisis.<sup>45</sup> “The American College of Obstetricians and Gynecologists has also recommended it. (Kaiser Health News is an editorially independent program of the foundation).”<sup>46</sup> “Beyond protecting women during the medically vulnerable time after they deliver, experts think increasing Medicaid could go a long way toward addressing the racial disparities that exist in maternal mortality rates.”<sup>47</sup>

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<sup>44</sup> <https://khn.org/news/medicaid-tweak-might-offer-means-to-improve-u-s-maternal-health/>

<sup>45</sup> *See id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

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## WAL Writing Contest Runner-Up Article

### **#MeToo and #TimesUp: Social Media and the Law Converge**

**By Tara Bush**

In October 2017, I was deeply immersed in my first semester of law school when the #MeToo movement went viral. I, like all women, marveled that something so ubiquitous could only finally be unmasked by social media. Then, on January 1, 2018, #TimesUp, a sister movement fighting against sexual harassment, assault, and discrimination in the workplace, was born. As a student returning to law school later in my career, I had experienced sexual harassment on the job in various forms over the years. I thought, “It’s about time.”

Now, just over two years later as I finish my final semester of law school, what impact have #MeToo and #TimesUp had on the laws both nationally and in my lifelong home state of Texas? Has the promise of these nascent social media movements effected any change to the seemingly immutable status quo?

#### ***Shining a spotlight on the harm***

While the story of Harvey Weinstein was certainly a catalyst for #MeToo and #TimesUp, the vast majority of women across the country with their own #MeToo stories work in fields considerably less glamorous and high-profile than Hollywood. Sexual harassment cuts across every industry, from agriculture to tech, banking to the service industry, and healthcare to law. Essentially about the power dynamic at its core, sexual harassment has thrived in fields historically dominated by men. In fact, the problem is often most rampant where women work in low-income jobs and are most vulnerable.<sup>48</sup>

Title VII of the Civil Rights Act of 1964 prohibits sex discrimination in the workplace, which includes sexual harassment.<sup>49</sup> Sexual harassment is unwelcome behavior a worker experiences because of his or her sex and does not have to involve physical contact or be motivated by sexual desire.<sup>50</sup> Words alone can be enough to implicate sexual

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<sup>48</sup> See WORKPLACE JUSTICE: SEXUAL HARASSMENT IN THE WORKPLACE at 1 (Nat’l Women’s Law Ctr. ed., 2016).

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*



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harassment.<sup>51</sup> Hostile or derogatory remarks about women in general or non-conformance to gender stereotypes, unwelcome sexual advances, and requests for sexual favors all represent various forms sexual harassment takes in the workplace.<sup>52</sup>

The widespread incidence of workplace sexual harassment transcends age and whether a woman works in a white-collar or blue-collar role, both of which have no relation to the likelihood she has been harassed.<sup>53</sup> The effects for women can be devastating. While 63% of all women report having been harassed, only 20% of women who were harassed actually reported the incident.<sup>54</sup> Fears of retaliation, hurting their careers, being labeled a troublemaker, or embarrassment prevent the majority of women from making a complaint.<sup>55</sup> Many women simply quit their jobs, resulting in lost wages.

Beyond the serious toll sexual harassment can take on a victim's physical and emotional health, employers are also discovering the significant financial harm resulting from loss of worker productivity caused by increased use of employee sick leave and job turnover.<sup>56</sup> Employers can also be liable for sexual harassment against their employees under certain circumstances and held responsible for the victim's back-pay and damages, as well as potential costs of litigating claims.<sup>57</sup>

### ***The national impact of #MeToo—where we started and how far we have come***

Pre-#MeToo in March 2017, during his first 100 days in office, President Trump signed an executive order revoking the Fair Pay and Safe Workplaces order put in place in 2014 by President Obama.<sup>58</sup> The move represented a significant step backward for women in the workplace by repealing regulations that mandated paycheck transparency and banned

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<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See Tim Bower, *The #MeToo Backlash*, HARV. BUS. REV.: GENDER (Sept.–Oct. 2019), <https://hbr.org/2019/09/the-metoo-backlash>.

<sup>54</sup> See *id.*

<sup>55</sup> See Nat'l Women's Law Ctr., *supra* note 1, at 1–2.

<sup>56</sup> See *id.* at 2.

<sup>57</sup> See *id.*

<sup>58</sup> See Andrea Johnson, *Trump Just Signed a Law Ditching Fair Pay and Safe Workplaces*, NAT'L WOMEN'S LAW CTR. BLOG (Mar. 28, 2017), <https://nwlc.org/blog/trump-just-signed-a-law-ditching-fair-pay-and-safe-workplaces/>.

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forced arbitration clauses for sexual harassment, sexual assault, and discrimination claims.<sup>59</sup> Secret mandatory arbitration proceedings for sex discrimination claims silence victims and allow companies to hide abuses by bypassing the public court system. The repeal of the Fair Pay order pursuant to the Congressional Review Act prevented any future president or the Department of Labor from reissuing substantially similar regulations.<sup>60</sup>

Fast forward to December 2017, two months after #MeToo, and President Trump's signing of the Tax Cuts and Jobs Act. A small but noteworthy provision in the Act prohibits businesses from deducting any settlement payments and attorney's fees related to claims for sexual harassment or abuse that were subject to a nondisclosure agreement.<sup>61</sup> Commonly referred to as the "Weinstein tax," this section of the federal tax code became one of the first post-#MeToo laws to shine a spotlight on and disincentivize the use of NDAs.<sup>62</sup>

The two years following the emergence of #MeToo and #TimesUp have proved uneven in progress made on the national front. Aggregating the changes made in individual state laws shows that real advances have been made across the country. The National Women's Law Center (NWLC) created the #20Statesby2020 initiative to compel state legislators to enact policy reforms.<sup>63</sup> The NWLC reported that as of December 2019, state legislators had introduced 200 bills to strengthen workplace protections, and fifteen states plus New York City had enacted new anti-harassment laws, many with bipartisan support.<sup>64</sup>

Notwithstanding this progress in state legislatures, a May 2018 ruling by the U.S. Supreme Court that upheld an employer's right to include mandatory arbitration clauses in employment contracts could have a potentially chilling effect on employees' abilities to pursue sexual harassment claims. In a 5-4 decision in *Epic Systems Corp. v. Lewis*, Justice

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<sup>59</sup> See Janet Burns, *Trump Order Drops Pesky Regulations on Equal Pay, Sexual Harassment*, FORBES (Apr. 4, 2017, 2:59 p.m.), <https://www.forbes.com/sites/janetwburns/2017/04/04/trump-order-drops-pesky-regulations-on-equal-pay-sexual-harassment/#2ec24515c100>.

<sup>60</sup> See Johnson, *supra* note 11.

<sup>61</sup> See Robert W. Wood, *IRS Gives Tax Break to Sexual Harassment Victims*, FORBES (Mar. 4, 2019, 8:45 a.m.), <https://www.forbes.com/sites/robertwood/2019/03/04/irs-gives-tax-break-to-sexual-harassment-victims/#d9652e629b71>.

<sup>62</sup> See *id.*

<sup>63</sup> See Andrea Johnson, Kathryn Menefee, and Ramya Sekaran, PROGRESS IN ADVANCING ME TOO WORKPLACE REFORMS IN #20STATESBY2020 at 2 (Nat'l Women's Law Ctr. ed., 2019).

<sup>64</sup> See *id.*

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Neil Gorsuch wrote for the majority, “the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written.”<sup>65</sup> Writing for the dissent, Justice Ruth Bader Ginsburg countered that the decision was “egregiously wrong” because for employees it would mean “[e]xpenses entailed in mounting individual claims will often far outweigh potential recoveries.”<sup>66</sup> Allowing employers to force employees into arbitration rather than joining with other employees in filing class action lawsuits for sexual harassment claims eliminates a critical tool for women to hold employers to public account.

In what could be viewed as a response to the Supreme Court’s decision in *Epic Systems*, in April 2019, Congress acted with the most comprehensive federal legislation proposed so far with the introduction of the BE HEARD in the Workplace Act sponsored by Senator Patty Murray and co-sponsored by 19 Senate and four House Democrats.<sup>67</sup> This bill tackles head-on several of the most systemic practices that have allowed sexual harassment to pervade the workplace in the past. Key proposed reforms include the following:

- extending Title VII protections against employment discrimination to employees of all companies not just those with more than 15 employees;
- expanding the definition of “employee” to include independent contractors, interns, and volunteers;
- prohibiting employers from requiring that workers sign employment contracts with mandatory arbitration agreements for work disputes and blanket non-disclosure agreements;
- extending the statute of limitations period for filing a charge or making a complaint; and
- providing grants for legal assistance to low-income workers with needs related to employment discrimination.<sup>68</sup>

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<sup>65</sup> *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018).

<sup>66</sup> *Id.* at 1633, 1647; see Jena McGregor, “A Nail in the Coffin”: What the Supreme Court’s Decision This Week Means for Workers, WASH. POST (May 24, 2018), <https://www.washingtonpost.com/news/on-leadership/wp/2018/05/24/a-nail-in-the-coffin-what-the-supreme-courts-decision-this-week-means-for-workers>.

<sup>67</sup> See Ramya Sekaran, *Congress Finally Introduces Groundbreaking Workplace Harassment Legislation for the Rest of Us*, NAT’L WOMEN’S LAW CTR. BLOG (Apr. 9, 2019), <https://nwlc.org/blog/congress-finally-introduces-groundbreaking-workplace-harassment-legislation-for-the-rest-of-us>.

<sup>68</sup> See S. 1082, 116th Congress, 1st Session (2019); Marisa Endicott, *Democrats Just Introduced Sweeping #MeToo Legislation. It Would Have a Huge Impact on the Service Industry.*, MOTHER JONES (Apr. 9, 2019), <https://www.motherjones.com/politics/2019/04/democrats-just-introduced-sweeping-metoo-legislation-it-would-have-a->

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Passage of the BE HEARD in the Workplace Act by Congress would signify real reform for women nationwide.

### *Texas's measured response to #MeToo*

Because the Texas legislature only meets every two years, Texas's response to #MeToo was necessarily delayed. The 86<sup>th</sup> legislative session opened on January 8, 2019, over a year after #MeToo and #TimesUp went viral. The Texas House moved decisively in a unanimous vote just two days into the legislative session to pass reforms to the chamber's internal sexual harassment policies.<sup>69</sup> This action boded well for an impactful session of workplace reforms in which legislators filed almost 100 bills relating to sexual assault and harassment.<sup>70</sup>

However, while almost as many bills filed aimed to help victims of sexual harassment as survivors of sexual assault, fewer harassment bills passed.<sup>71</sup> Representative Victoria Neave, D-Dallas, passed several major sexual assault bills with bipartisan support that represent major steps forward for Texas women.<sup>72</sup> The most important bill, House Bill 8, extends the statute of limitations for testing sexual assault evidence, sets timelines for more prompt testing of rape kits, and requires a new audit of backlogged rape kits in Texas.<sup>73</sup> By contrast, none of the eight sexual harassment bills Rep. Neave filed passed due to less bipartisan support for sexual harassment issues and pushback from the business lobby.<sup>74</sup> Senate Bill 46, the session's most significant sexual harassment bill with more than 50 co-sponsors and the most bipartisan support, passed the Senate but failed in the House after House leadership failed to prioritize it.<sup>75</sup> The bill would have enabled employees at companies with less than 15 employees to file sexual harassment claims with the Texas Workforce Commission.<sup>76</sup>

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huge- impact-on-the-service-industry.

<sup>69</sup> See Alex Ura & Jolie McCullough, *Texas House Votes to Strengthen Sexual Harassment Investigations*, TEX. TRIB. (Jan. 9, 2019, 11:00 AM), <https://www.texastribune.org/2019/01/09/texas-house-sexual-harassment-investigations>.

<sup>70</sup> See Andrea Zelinski, *#MeToo Bills Gain Momentum in Texas Legislature*, HOUS. CHRON. (Apr. 22, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/MeToo-bills-gain-momentum-in-Texas-Legislature-13781641.php>.

<sup>71</sup> See Kate Groetzinger, *Texas Lawmakers Took on Sexual Assault this Session, but Largely Ignored Sexual Harassment*, TEX. OBSERVER (May 30, 2019, 6:00 AM), <https://www.texasobserver.org/texas-legislature-addresses-sexual-assault-ignores-harassment>.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

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One bright spot of the 2019 session was the passage of Senate Bill 212 relating to sexual harassment at Texas universities.<sup>77</sup> The law makes it a misdemeanor and a fireable offense for employees to fail to report incidents of sexual harassment, assault, stalking, or dating violence on college campuses.<sup>78</sup> Texas is breaking new ground in the arena of higher education, as it is currently the only state to go beyond institutional accountability to impose individual criminal responsibility for failure to follow mandatory reporting requirements.<sup>79</sup> This law will be watched closely, but clearly, Texas still has a way to go in enacting meaningful legislation to address sexual harassment in the broader workplace.

### ***Novel solutions catalyzed by #MeToo and #TimesUp***

Going forward, the power of grassroots movements like #20Statesby2020 cannot be underestimated. The strength in such movements lies in their ability to mobilize individual states to fill in the gaps in existing federal laws and policies and to promote accountability. To this end, #20Statesby2020 advises workplace policy solutions that are comprehensive and multi-pronged rather than simply focusing on one issue, such as eliminating non-disclosure agreements.<sup>80</sup>

Mandatory prevention training programs for all employees, including management, that are tailored to the specific type of workplace have the greatest impact on reducing workplace sexual harassment.<sup>81</sup> Specifically, training centered around the relationship between sexism and character has been found more effective than traditional workplace sexual harassment training programs that simply instruct how to identify sexual harassment behaviors.<sup>82</sup> Employer policies must also offer employees multiple reporting options to encourage more women to report incidents of harassment.

Progress has also been made through laws developed by conducting a close examination of workers' needs for protection based on industry type. For example, hotel workers, who are particularly vulnerable to sexual harassment and assault because of the isolated nature of their work, have pushed many cities to pass ordinances requiring hotels to

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<sup>77</sup> See Maria Mendez, *Under New Texas Law, College Employees Could Be Fired and Charged for Not Reporting Sexual Misconduct*, DALL. MORN. NEWS (Dec. 30, 2019, 6:15 AM), <https://www.dallasnews.com/news/politics/2019/12/30/under-new-texas-law-college-employees-could-be-fired-and-charged-for-not-reporting-sexual-misconduct>.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See Johnson, et al., *supra* note 16, at 3–4.

<sup>81</sup> See *id.* at 12.

<sup>82</sup> See Bower, *supra* note 6, at 4.

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install panic buttons workers can use to call for help if sexually harassed or assaulted.<sup>83</sup> This approach has inspired similar laws on the state level that apply to the retail, security guard, property services, and casino industries.<sup>84</sup> More unique solutions tailored to specific industries would benefit all women in the workplace.

Finally, only time will tell whether proposed federal policies and regulations such as the BE HEARD in the Workplace Act will receive the bipartisan support required to become law. Enacting legislation on a national level banning forced arbitration agreements for sexual harassment claims, mandating stricter employer reporting requirements, prohibiting the practice of NDAs in settling claims, and eliminating statutes of limitations for making claims would significantly expand women's rights to workplace safety and equality. The untapped potential of the federal government to make truly groundbreaking changes for women by finally addressing workplace sexual harassment remains to be seen.

### ***Conclusion***

The progress #MeToo and #TimesUp have reaped so far in a very short period of time is truly compelling. Perhaps the most monumental result of these movements is at the same time, the most obvious: increased awareness of an issue that is so essential for working women. Workplace sexual harassment and NDAs have been frequent topics of the Democratic presidential debates this campaign season and have now become part of the national vernacular. With the convergence of social media and the election of a record number of women to Congress in 2018, the time has never been more ripe for enduring change.

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<sup>83</sup> See Johnson, et al., *supra* note 16, at 14.

<sup>84</sup> See *id.*