

ON AMPLIFICATION: EXTRALEGAL ACTS OF FEMINIST RESISTANCE IN THE #METOO ERA

SHELLEY CAVALIERI*

The movement now referred to as #MeToo has revealed the degree to which misogyny remains a pervasive force in U.S. society. It has also highlighted something far more troubling for feminist legal scholars—the utter inadequacy of law to solve the ways that unconscious, sexist bias continues to infect public life in the twenty-first century. This Article argues that while legal interventions borne from second-wave feminism made substantial, important progress in addressing gender discrimination in the United States, law as currently constituted is frequently found to be an insufficient tool to combat unconscious bias based on gender. Instead, feminist reformers will need to adopt other methods to try to eradicate unconscious bias within the nation. Amplification, an extralegal strategy of feminist resistance, is one of these methods, offering women the opportunity to join together to lend credibility to one another's experiences while seeking to overcome sexism as it now exists.

Prior to the 1960s, explicit discrimination was lawful except insofar as it violated the equal protection clause of the Constitution. Starting in 1964 with the passage of the Civil Rights Act, the law began to respond meaningfully to discrimination. Express acts of racial bias became legally actionable when they occurred in the contexts of public accommodation, employment, and education. This liability extended to bias animated by sex, as well as other protected classes. Yet the law's initial ability to recognize bias was limited to instances of explicit discrimination. Later federal jurisprudence and statutes expanded to encompass disparate impact under some circumstances. However, disparate impact analysis is finite in its applicability because it usually requires both statistical evidence that can be difficult to garner and a challenge to a specific employment practice. This is not especially helpful at a time when bias typically operates via informal norms.

* Associate Professor of Law, University of Toledo College of Law. Thanks to the faculty at Marquette University Law School, the University of Toledo College of Law faculty, and the brilliant students of Professor Jerry VanHoy in two workshops of the Law and Social Thought program at the University of Toledo for their engagement with this project. I am especially grateful for comments from Nancy Chi Cantalupo, Cyra Choudhury, Margot Cohen, RaShya Ghee, Tristin Green, Angela Harris, Jody King, Lisa Massie, Saru Matambanadzo, Usha Natarajan, Nicole Porter, Lisa Pruitt, Courtney Roser-Jones, and Lua Yuille. Marilyn Bourell, Emily Morrison, and Beth Seedorf provided generous research assistance and their own insights into this project. During the time I finished this article while living in Ecuador, Monica Rivera took care of my house and Rosita Toalongo Colcha cared for my daughters, which opened space in my mind and my life; this article would not exist without their work. I dedicate this Article to my Ecuadorian students of Feminist Legal Theory, whose passionate engagement in *la lucha feminista* inspires me daily. While I am grateful for all of the assistance that I have received on this Article, all mistakes remain purely my own.

This trajectory of expanding protections from discrimination has largely ended; there has not been any further substantial expansion of liability for discrimination. Existing jurisprudence has rendered socially illegitimate and legally actionable the kinds of grotesque, express, and intentional discriminatory conduct that previously were simply part of life. Yet in reality, this legal regime is grossly deficient. It does not attach liability to the low-level microaggressions that permeate the experiences of people who belong to vulnerable groups. Furthermore, it does not fully recognize the ways in which implicit, unconscious bias permeates all of our social interactions and shapes the decisions that people in power make, including how and when women's stories of discrimination and assault will be believed or discredited.

Against this backdrop of the law's shortcomings, women have not stood by as passive witnesses. Instead, drawing on a long line of feminist activism, they have adopted what I call extralegal acts of feminist resistance as methods of changing society so that bias is less of an infectious force. I assert that the feminist strategy of amplification, which involves women acting in solidarity to bolster the public speech of other women, is a paradigmatic model of this kind of resistance. I look to recent examples, including the #MeToo movement and acts of workplace solidarity, arguing that the recently documented feminist social action of amplification offers women the chance to adopt extralegal solutions to gender bias, especially unconscious bias. While there are some problems with amplification, including racial bias among white women, women who are complicit with the patriarchy, and women who refuse to act in solidarity, the Article concludes by observing that amplification empowers feminists to address sexist conduct that still occurs.

Introduction	1491
I. Setting the Stage: Anti-discrimination Law's Successes, the Rise of Implicit Bias Analysis, and the Limits of Law's Ability to Rectify Discrimination	1495
II. Amplification: Extralegal Acts of Feminist Resistance	1505
A. Defining Amplification.....	1505
B. Amplification Explained Through Three Examples.....	1507
1. The Original Amplification: Amplification by Reiteration	1508
2. Amplification by Multiplication	1510
3. Structural Amplification	1520
C. Fitting Amplification into the Long History of Feminist Resistance	1523
D. Amplification as a Strategy Under Circumstances of Constrained Autonomy	1525
III. Obstacles to the Implementation of Amplification.....	1527
A. On Race and Amplification.....	1528
B. On Women's Complicity in the Patriarchy.....	1534
C. On the Queen Bee Problem.....	1537
D. On Men's Acts of Amplification.....	1541
Afterword.....	1547

INTRODUCTION

In the early days of the first presidential administration of Barack Obama, the women working in the White House observed that the administration ran as a boys' club, with men serving as two-thirds of top aides.¹ The men who occupied these positions of authority excluded their female colleagues from meetings.² Even when women were present, they noted that men in the room spoke over them, co-opted their ideas, and acted in ways that left them feeling marginalized.³ They found themselves on the fringes of power, in the building but not in the room, or in the room but without recognition of their contributions and skills.

Nobody appears to have proposed lawsuits to rectify this set of problems. In fact, these women quickly recognized that the kinds of sexism that affected their professional roles largely eluded formal legal remedy. But without asserting some kind of intervention, these women were destined to remain on the fringes of power at the White House. They realized that they could most effectively address these issues by acting in concert.⁴ They developed a strategy that they called amplification, which involved a concerted effort to strengthen one another's voices: "When a woman made a key point, other women would repeat it, giving credit to its author. This forced the men in the room to recognize the contribution — and denied them the chance to claim the idea as their own."⁵ Staffers noticed how wildly effective this approach was, with the President calling more frequently on women and junior staffers.⁶ Later commentary on this strategy suggested that women were hungry for such an active intervention in their own empowerment, and that it became popularized as an approach for women seeking to strengthen their roles in other workplaces as well.⁷

Since that time, the #MeToo movement has provided another example of amplification. While historically women have been reluctant to speak out about sexual harassment and violence, often viewing the

1. Juliet Eilperin, *White House Women Want To Be in the Room Where It Happens*, WASH. POST (Sept. 13, 2016 11:16 AM), <https://www.washingtonpost.com/news/powerpost/wp/2016/09/13/white-house-women-are-now-in-the-room-where-it-happens/> [https://perma.cc/S88Z-527U].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Juliet Eilperin, *How a White House Women's Office Strategy Went Viral*, WASH. POST (Oct. 25, 2016, 5:30 AM), https://www.washingtonpost.com/news/powerpost/wp/2016/10/25/how-a-white-house-womens-office-strategy-went-viral/?utm_term=.f27c9966f58a [https://perma.cc/ZMP7-WAH7].

likelihood of reputational harm, being disbelieved, or retaliation⁸ as far outweighing the small possibility of achieving justice, the last two years have demonstrated a shift in the climate around these claims.⁹ Public denunciation of Harvey Weinstein instead led to a chorus of other women amplifying the first claim, lending credibility and rebutting assumptions that women invented such narratives. Likewise, while in the 1980s, far too many lawmakers disregarded Anita Hill's claims about Clarence Thomas's pattern of sexual harassment and, without foundation, considered her to be "a bit nutty, and a bit slutty,"¹⁰ today's claimants are generally encountering a far more credulous environment. Indeed, the recent confirmation battle over Brett Kavanaugh's nomination to the U.S. Supreme Court, in which senators of both parties largely went to great pains to avoid sexist critiques of Dr. Christine Blasey Ford,¹¹ suggests that amplification has forced a

8. Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 50 (2018) (arguing that fears of retaliation are so great as to prevent women from making sexual harassment complaints and advocating for legal strategies to reduce the likelihood of retaliation).

9. It is important to contextualize the experience of women in the U.S. in a broader global setting. While these possibilities substantially reduce the likelihood of women reporting claims of harassment and violence, the climate is far better than in many other places in the world, where women who report these experiences are attacked and killed for speaking out. *See, e.g.*, Mir Sabbir, *Nusrat Jahan Rafi: Burned to Death for Reporting Sexual Harassment*, BBC NEWS (Apr. 28, 2019), https://www.bbc.com/news/world-asia-47947117?fbclid=IwAR3Hk5b7Nsf_I7u_-5pKXIF4I1QVx03x73C1bWWW_aRa9JLWrIqu11pYgGw [https://perma.cc/Y9QL-8YRD] (reporting on the death of Nusrat Jahan Rafi, a nineteen-year-old Bangladeshi student who was doused with kerosene, lit on fire, and died five days later, within two weeks of reporting her headmaster for sexually touching her).

10. David Brock, *The Real Anita Hill*, AM. SPECTATOR, Mar. 1992, at 27. Yet this surely relates in large part to Hill's race and not only to the evolution of the #MeToo movement. Leading intersectional feminist Kimberlé Crenshaw, who was part of Hill's support team during the Congressional hearings, recounts that she "worried that [Hill] would be trapped between an antiracist movement that foregrounded black men, and a feminism that could not fully address how race shaped society's perception of black victims," a fear which later came true. Kimberlé Crenshaw, *We Still Haven't Learned from Anita Hill's Testimony*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/opinion/anita-hill-clarence-thomas-brett-kavanaugh-christine-ford.html> [https://perma.cc/NS2Q-2G4K]. Other commentators have observed that Hill's claims were largely muted because Clarence Thomas insisted that he was being subjected to a "high-tech lynching" and that Hill therefore "was accused of betraying the race by publicly accusing a black man of misdeeds" and of "being a woman who didn't care about protecting the black community." Alexis Okeowo, *Still Thinking About Anita Hill*, NEW YORKER (May 23, 2016), <https://www.newyorker.com/culture/cultural-comment/still-thinking-about-anita-hill> [https://perma.cc/93GK-4UMK]. I revisit the interaction between race and gender at greater depth *infra* in Part IV.A.

11. Jena McGregor, *Why Adding a Female Prosecutor to the Kavanaugh Hearing Still May Not Shift the GOP's Optics*, WASH. POST (Sept. 27, 2018, 8:06 AM), <https://www.washingtonpost.com/business/2018/09/27/why-adding-female-prosecutor->

reckoning by public figures who historically might have sought to discredit complainants as their primary defense strategy.¹² This pattern of amplification has rocked industries from politics, to media and entertainment, and on into the corporate world,¹³ and it suggests that women may be collectively achieving a new moment, one in which the narratives they offer of their own, lived experiences of sexism receive public acceptance.

This Article offers the first complete feminist account of the theory of amplification. I define feminist amplification as women's concerted, public strategy of crediting the words and experiences of other women in order to increase their credibility. I characterize amplification as an extralegal feminist form of resistance, one that women have consciously crafted and strategically enlist in certain moments to overcome the

kavanaugh-hearing-still-may-not-shift-gops-optics/ [https://perma.cc/PCW8-VP79] (observing that having a female attorney conduct the Republican party's questioning of Blasey Ford was intended to inoculate the party against the imagery of only white men interrogating an alleged victim of sexual assault, thereby avoiding the optics that occurred in the questioning of Anita Hill in the 1980s; noting also that research suggests that even the existence of an all-male panel or a panel with token female participation has been documented to create skepticism about the validity of sexual harassment procedures); Britt Peterson, *Why Senators Claim to Believe Ford — but Still Side with Kavanaugh*, WASH. POST (Sept. 28, 2018, 8:39 AM), https://www.washingtonpost.com/outlook/why-senators-believe-ford-but-still-side-with-kavanaugh/2018/09/28/b0d9c68e-c27d-11e8-b338-a3289f6cb742_story.html [https://perma.cc/G9ZF-HDQT]; see also Ariane de Vogue & Manu Raju, *Senate Judiciary Hires Female Outside Counsel to Question Kavanaugh Accuser on Thursday*, CNN (Sept. 26, 2018, 4:42 AM), <https://www.cnn.com/2018/09/25/politics/ford-kavanaugh-hearing-counsel-hired-republicans/index.html> [https://perma.cc/CZ5V-RM7A] (noting with derision that Senate Majority Leader Mitch McConnell referred to her as a “female assistant”). But see Emma Baty, *The 6 Most Blood-Boiling Sexist Things that Happened During Today's Senate Hearing*, COSMOPOLITAN (Sept. 27, 2018), <https://www.cosmopolitan.com/politics/a23497065/sexist-comments-brett-kavanaugh-christine-blasey-ford-senate-hearing/> [https://perma.cc/P7RA-8NX8] (offering links to videos of sexist conduct that occurred during the hearings).

12. The mistreatment of Anita Hill in 1991 led to what was known at the Year of the Woman, when in 1992, four new women joined the two sole female senators who were members of the Senate when Hill's hearing occurred. One of them, Senator Patty Murray of Washington, said that she became a senator “because of how Anita Hill was handled.” Dan Mangan, *There Are Key Differences Between the Possible Brett Kavanaugh Showdown with Accuser Christine Blasey Ford and the Anita Hill-Clarence Thomas Saga*, CNBC (Sept. 18, 2018, 7:20 PM), <https://www.cnbc.com/2018/09/18/hearing-for-brett-kavanaugh-and-accuser-looks-like-anita-hill-case.html> [https://perma.cc/3LDT-DM9N]; see also Ella Nilsen & Li Zhou, *12 Senators on What Kind of Message Brett Kavanaugh's Confirmation Sends to America's Women*, Vox (Oct. 7, 2018, 6:00 AM), <https://www.vox.com/policy-and-politics/2018/10/7/17946218/brett-kavanaugh-senate-confirmation-senators> [https://perma.cc/3R8M-7WLU].

13. David Remnick, *One Year of #MeToo*, NEW YORKER (Oct. 10, 2018), <https://www.newyorker.com/news/news-desk/one-year-of-metoo> (highlighting the widespread nature of claims arising in the #MeToo era).

inadequacy of law to solve the kinds of discrimination that affect women's lives today. In so doing, I gratefully borrow the term from the women of the Obama administration, offering additional expansion, explanation, and argument for its value in contemporary U.S. society. I also do so cognizant that queer theorists and some feminist scholars question the continued validity of "women" as a discrete legal category,¹⁴ particularly in light of the rise of sophisticated legal analyses of gender fluidity and other concepts that reject the construct of the gender binary.¹⁵ However, this Article presupposes that while "woman" is not a monolithic concept,¹⁶ in a society in which most people continue to distinguish among people according to the gender binary, the concept of women remains a legally relevant term to engage as a matter of feminist legal theorizing.

The Article proceeds in four additional parts. Part I offers a brief account of the long historical arc of the successes of legal feminism, tying feminist legal action into a broader movement of anti-discrimination and civil rights law, though arguing that the recent documentation of the phenomenon of implicit bias may mark the outer limits of law's current ability to remediate discriminatory actions. Part II articulates my original theory of amplification, arguing that feminist methods have evolved—though in a manner resonant with earlier feminist legal strategies—to reflect the fact that women must leverage extralegal approaches to rectify discrimination when law is insufficient. I describe three distinct instances of amplification and argue that each is designed to address the limitations of the law. I further frame amplification within the ambit of the partial agency turn in feminist legal theory, arguing that part of amplification's appeal is the reality that it harnesses what power women have, despite extant constraints on

14. See, e.g., Angela Harris, *What Ever Happened to Feminist Legal Theory?*, ISSUES LEGAL SCHOLARSHIP, 2011, at 4–5 (exploring the evolution of feminist legal theory into two tracks, one of which continues to focus on women as a discrete category warranting theorization, and the other of which explores gender as a concept that organizes the socio-legal culture).

15. See, e.g., Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389 (2017) (exploring the legal consequences of gender fluidity and arguing for the possibility of a legal concept of gender as permeable, malleable, and non-exclusive).

16. See generally Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253 (2007). This embracing of gender as fluid and non-binary reflects a relatively recent change in the theoretical framing of gender. See, e.g., Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 21 (1995) (using "gender" to refer to "the social dimension of personhood" such as personal appearance, personality attributes, and behaviors that might be termed masculine or feminine) (emphasis in original).

their agency, and collectivizes it to improve women's condition overall. Part III considers an array of counterarguments to the prospect of amplification, though ultimately concludes that while amplification is not perfect, it remains a plausible and valuable strategy for feminists to achieve their goals of contemporary gender equity. The Afterword concludes, observing in broad ways that amplification is not narrowly a feminist strategy, but a profoundly anti-subordination approach that deeply intersectional groups and coalitions can enlist to fight unconscious bias throughout society. I close with observations about the need for intersectional engagement, noting that the extensive adoption of the theory of amplification will foster acts of solidarity across identity groups.

I. SETTING THE STAGE: ANTI-DISCRIMINATION LAW'S SUCCESSSES, THE RISE OF IMPLICIT BIAS ANALYSIS, AND THE LIMITS OF LAW'S ABILITY TO RECTIFY DISCRIMINATION

The origin of U.S. legal feminism should arguably be traced to the first moment when women's lack of legal identity became a question worthy of public debate.¹⁷ Prior to this time, the legal concept of coverture denied women legal personage.¹⁸ They spent their early lives

17. Some historians link the rise of activism for married women's property rights to the broader feminist activism of the nineteenth century, in which women sought voting rights and an equal rights amendment. See Holly J. McCammon et al., *A Radical Demand Effect: Early US Feminists and the Married Women's Property Acts*, 38 Soc. Sci. Hist. 221, 222–23 (2014) (documenting the role of large-scale feminist activism in creating social pressure towards women's broader legal empowerment, and arguing that states granted property rights as a modest concession instead of the more radical suffrage rights that women sought at the same time). Law professor Tracy Thomas argues that while feminist property reforms were viewed as relatively palatable compared to suffrage claims, multiple diverse motives drove these reforms, including the condition of economic recession and the effort to secure family assets from creditors, in addition to the desire to advance women's rights. See TRACY A. THOMAS, *ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW* 1 (2016). She further notes that many men supported these reforms as a route of protecting familial property by shielding it from their sons-in-law or their own business creditors. *Id.* at 39, 46–47.

18. Allison Anna Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 99 (2015). The most famous definition of coverture in the common law tradition comes from Sir William Blackstone's 1765 Commentaries:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-French a feme-covert.

1 WILLIAM BLACKSTONE, COMMENTARIES 430.

under the legal cover of their fathers,¹⁹ which was then transferred to their husbands as part of the marital ceremony. Married women could not buy, sell, or own property apart from their husbands.²⁰ More generally, while laws varied by state over time, women could not vote,²¹ serve on juries,²² take out loans in their own names,²³ or otherwise function as complete legal citizens. The problems of coverture and women's lack of full legal personage became most apparent for upper-class women, for whom bars on their ability to

19. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* 45 (1985).

20. Tait, *supra* note 18. Early reforms, such as the creation of the Separate Estate, laid the groundwork for the later reforms of the Married Women's Property Acts. See Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 *YALE J.L. & FEMINISM* 165, 167 (2014).

21. Holly J. McCammon et al., *How Movements Win: Gendered Opportunity Structures and U.S. Women's Suffrage Movements, 1866 to 1919*, 66 *AM. SOCIOLOGICAL REV.* 49 (2001). Women's suffrage in the United States advanced in slow motion, starting from 1865, when Wyoming granted all women the right to vote, until the ratification of the Nineteenth Amendment in 1920, which granted universal women's suffrage. *Id.* Between 1865 and 1920, numerous states expanded women's access to the vote prior to being compelled to do so after the passage of the Nineteenth Amendment. *Id.*

22. Like suffrage rights, the right to serve on juries evolved over time. See, e.g., Aaron H. Caplan, *History of Women's Jury Service in Washington*, 59 *WASH. ST. B. NEWS* 12 (2005) (explaining how Washington Territory permitted female jurors between 1883 and 1887, and then the state granted the right of jury service in 1911, still allowing women to exercise a sex-based exemption to opt out of jury service so that they could remain in the domestic sphere through 1967); Sarah T. Hughes, *Should Women Serve on Juries*, 8 *DALL. B. SPEAKS* 27 (1943) (female judge advocating in 1943 for the inclusion of women in Texas juries); R. Justin Miller, *The Woman Juror*, 2 *OR. L. REV.* 30 (1922) (discussing how Oregon opened juries to women in 1921). The U.S. Supreme Court validated laws permitting women to opt out of jury service as late as 1961, *Hoyt v. Florida*, 368 U.S. 57 (1961), in 1975 barred state statutes granting women's right to sit on juries only if they opted in, *Taylor v. Louisiana*, 419 U.S. 522 (1975), and barred statutes permitting women to opt out of jury service in 1979, *Duren v. Missouri*, 439 U.S. 357 (1979). Jury service seems like an onerous burden to contemporary citizens, but a poem in the Iowa Bar Journal suggests that this sort of entry into public life began to revolutionize women's private lives: "You see I'm spoiled for homely tasks/Of simple, hum-drum sort;/Just sit here counting up the days/Till I'll be back in Court." Henrietta Rate Howell, *The Woman Juror*, *IOWA ST. B. ASS'N Q.*, March 1932, at 16; see also Cristina M. Rodríguez, *Clearing the Smoke-Filled Room: Women Jurors and the Disruption of an Old-Boys' Network in Nineteenth-Century America*, 108 *YALE L.J.* 1805, 1807 (1999) ("[W]omen jurors can be understood as outsiders who invaded the space of the courtroom and challenged the masculinist legal culture that operated according to the internal logic of an 'old-boys' or insiders' network.").

23. Bernie D. Jones, *Revisiting the Married Women's Property Acts: Recapturing Protection in the Face of Equality*, 22 *AM. U. J. GENDER SOC. POL'Y & L.* 91, 94–95 (2013) (highlighting a New Jersey case in which a woman was denied a loan without having her husband on the title for the property in question, and even then the loan was granted to him alone).

control their property and to otherwise conduct their own legal affairs was an affront to their class status, thereby leading to an expansion of legal powers for all women. This situation was somewhat, but not entirely, improved by the passage of the Married Women's Property Acts,²⁴ which had the overall effect of increasing property protections for all women. In reality some of these were illusory for poorer women who had little property to control anyhow and whose husbands retained the right to control wives' wages.

These fights were the primitive harbinger of what is now known as the first wave of feminism, which included the early struggles for equality in property and public rights, but centered primarily on achieving suffrage for women.²⁵ The story of the march towards suffrage is deeply and painfully entwined in the racist history of abolition and suffrage for formerly enslaved people of African descent.²⁶ Early in the abolition movement, white women who would later become suffragists worked together with black abolitionists in an embryonic form of arguably intersectional solidarity,²⁷ in which women's presence in the movement to abolish slavery was framed as a radical and inappropriate departure from their traditional roles.²⁸ But some white women, including high-profile leaders like Susan B. Anthony and Elizabeth Cady Stanton, quickly shifted to racist rhetoric to argue that granting black men the vote while denying it to white women was the height of injustice, all while invoking racist tropes of black men as rapists.²⁹ Universal suffrage for women would not be

24. See generally *id.* See also JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103, 134 (1994).

25. ANNELESE ORLECK, *RETHINKING AMERICAN WOMEN'S ACTIVISM* x–xii, 1 (2015) (referring to the first wave as one that lasted “an awfully long time – nearly 90 years – from the first organized expressions of women's discontent in the 19th century to the achievement of woman suffrage in 1920” while critiquing both the myths of monolithic feminism and of inactivity between waves that the wave analogy creates).

26. SHEILA ROWBOTHAM, *WOMEN IN MOVEMENT: FEMINISM AND SOCIAL ACTION* 45–47 (1992) (arguing that the movements to abolish slavery and grant political rights to women were intertwined).

27. FAYE E. DUDDEN, *FIGHTING CHANCE: THE STRUGGLE OVER WOMAN SUFFRAGE AND BLACK SUFFRAGE IN RECONSTRUCTION AMERICA* 3 (2011) (describing the relationship between African Americans and feminists as “[a] long-standing alliance, marked by incompatibility but durable nonetheless”).

28. ORLECK, *supra* note 25, at 3 (“[W]omen faced strong resistance to their playing leading roles in the abolition movement, especially from religious authorities. Militant women abolitionists represented a counterculture and their views on sex and gender, together with their views on race, marked them as radical – truly different from most of their neighbors, even in the North.”).

29. DUDDEN, *supra* note 27 (quoting Elizabeth Cady Stanton as saying that “[i]f the Fifteenth Amendment is passed,” women will be degraded with “persecutions, insults, and horrors” and Susan B. Anthony and Stanton as both predicting that rape of

granted until the passage of the Nineteenth Amendment in 1920,³⁰ and African American women's suffrage would only be guaranteed through the removal of structural barriers to African Americans' exercise of their right to vote by the passage of the Voting Rights Act in 1965.³¹

Feminist action between the eras of suffrage and women's liberation has largely been overlooked, but focused on an array of rights including those of labor conditions, pay equality, and income supports for mothers, among others;³² the changes in women's employment patterns that accompanied World War II are often considered to be a precursor of the widespread social movement that arose twenty years later.³³ The 1970s exploded with the public feminist activism of the Women's Movement, which resulted in widespread changes in the lives of women in the United States. Second-wave feminism's successes include the insertion of sex in numerous civil rights statutes, thereby barring discrimination on account of sex in housing,³⁴ employment,³⁵ and higher education.³⁶ Women further gained rights to hold credit in their own names,³⁷ to sit on juries,³⁸ and generally to receive formally identical legal treatment as men.³⁹

white women would surely follow); *see also* LORI D. GINZBERG, ELIZABETH CADY STANTON: AN AMERICAN LIFE (2009) (documenting Stanton's racism). *See generally* ROSALYN TERBORGH-PENN, AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850–1920 (1998).

30. U.S. CONST. amend. XIX.

31. Voting Rights Act of 1965, Pub. L. 89–110, 52 U.S.C. § 10101 (2012).

32. DOROTHY SUE COBBLE ET AL., FEMINISM UNFINISHED: A SHORT, SURPRISING HISTORY OF AMERICAN WOMEN'S MOVEMENTS xiv, 1–65 (2014).

33. Marion C. Burke, *Lessons from Labor Feminists: Using Collective Action to Improve Conditions for Women Lawyers*, 26 AM. U. J. GENDER SOC. POL'Y & L. 559, 572 (2017).

34. Fair Housing Act of 1968, Pub. L. No. 90–284, 42 U.S.C. § 3604 (2012) (The Fair Housing Act rendered unlawful “discriminat[ion] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”).

35. Civil Rights Act of 1964, 42 U.S.C. § 2000 (2012) (“It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.”).

36. Education Amendments of 1972, Pub. L. No. 92–318, 86 Stat. 235 (June 23, 1972) (codified at 20 U.S.C. §§ 1681–88 (2012)) (commonly known as Title IX) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”).

37. Equal Credit Opportunity Act, 15 U.S.C. § 1691 (1974) (prohibiting creditors from discriminating against any applicant for a credit transaction on the basis of “race, color, religion, national origin, sex, marital status, or age” or based on receiving all or part of income from public assistance).

The effects of this history of antidiscrimination and civil rights law have been profound. Americans have come to accept that while people may be motivated to make discrete acts of discrimination in their private decisions, explicitly discriminatory conduct or the invocation of expressly discriminatory language has become largely unacceptable in the public sphere. For example, the Fair Housing Act's bar on advertising discrimination, even for parties who are permitted via exemptions to personally discriminate in tenant selection for owner-occupied housing,⁴⁰ reflects a broader understanding that overt acts of public discrimination violate fundamental antidiscrimination values that now animate the American society.⁴¹ As early as the 1980s, allegations that individuals had engaged in this kind of overt discrimination on the basis of race were viewed as disqualifying for serving in positions of leadership.⁴² More recently, even to invoke sexist stereotypes,⁴³

38. See *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979).

39. Ruth Bader Ginsburg is widely understood to be the chief strategist of this movement to seek formal legal equality. Often representing sympathetic male plaintiffs, Justice Ginsburg's litigation strategy revealed the irrationality and discrimination embedded in treating men and women differently under the law. See Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 158, 239 (2002); see also David Cole, *Strategies of Difference: Litigating for Women's Rights in a Men's World*, 2 LAW & INEQ. J. 33, 53–85 (1984) (cataloguing the contributions of now-Justice Ginsburg during her days as a litigator). However, to suggest that these changes occurred without a substantial backlash would be grossly inaccurate. See *infra* Part III.B for discussion of anti-feminist women and backlash.

40. 42 U.S.C. § 3603(b)(2) (2012). The so-called Mrs. Murphy's Exemption comes from the debate around the Civil Rights Act of 1964, when "Republican Senator George D. Aiken of Vermont coined the term 'Mrs. Murphy' when he reportedly suggested that Congress 'integrate the Waldorf and other large hotels, but permit the 'Mrs. Murphys,' who run small rooming houses all over the country, to rent their rooms to those they choose.'" James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 605 n.3 (1999) (citing ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964, at 51 (1990)). The use of this phrase was then extended to the Fair Housing Act. Mrs. Murphy's Exemption has been critiqued as providing too much latitude to discriminate. See, e.g., Walsh, *supra*, at 610–24.

41. 42 U.S.C. § 3604 (2012) (barring discriminatory statements in advertising for housing).

42. For example, Jeff Sessions's 1986 nomination for the U.S. District Court for the Northern District of Alabama was derailed by public testimony that he had referred to black staffers as "boy," spoken positively of the KKK, and described the NAACP and ACLU as "un-American" organizations. As a result, the Senate refused to confirm him. Amber Phillips, *That Time the Senate Denied Jeff Sessions a Federal Judgeship over Accusations of Racism*, WASH. POST (Jan. 10, 2017, 10:21 AM), https://www.washingtonpost.com/news/the-fix/wp/2016/11/18/that-time-the-senate-denied-jeff-sessions-a-federal-judgeship-over-accusations-of-racism/?noredirect=on&utm_term=.265856571691 [https://perma.cc/XUP9-GFQJ];

question the veracity of claims of sexual assault,⁴⁴ use language that demeans people based on socioeconomic class,⁴⁵ or suggest that it may be permissible for others to engage in racially stereotypic commentary⁴⁶ has led to individuals losing their academic positions of leadership. However, it is also clear that quite recently, the national discourse has become far more accepting of express racism and sexism.⁴⁷

see also Philip Shenon, *Senator Urges Withdrawal of Judicial Nominee*, N.Y. TIMES (Mar. 20, 1986), <https://www.nytimes.com/1986/03/20/us/senator-urges-withdrawal-of-judicial-nomination.html> [<https://perma.cc/D75A-JE7P>].

43. Suzanne Goldenberg, *Why Women are Poor at Science*, by Harvard President, THE GUARDIAN (Jan. 18, 2005), <https://www.theguardian.com/science/2005/jan/18/educationgendergap.genderissues> [<https://perma.cc/G3TU-3V4Z>] (documenting Larry Summers's comments regarding women's scientific capacities). Larry Summers later lost his position as the president of Harvard University following a no-confidence vote that was widely perceived as related to his prior comments observing "that women might lack an intrinsic aptitude for math and science." Alan Finder et al., *President of Harvard Resigns, Ending Stormy 5-Year Tenure*, N.Y. TIMES (Feb. 22, 2006), <https://www.nytimes.com/2006/02/22/education/22harvard.html> [<https://perma.cc/643B-RJ3P>].

44. Susan Svrluga, *Catholic U. Dean Suspended After Comment that 'Degraded' a Woman Who Accused Kavanaugh of Sexual Assault*, WASH. POST (Sept. 28, 2018, 5:53 PM), https://www.washingtonpost.com/education/2018/09/28/catholic-u-dean-apologizes-comment-that-degraded-woman-who-accused-kavanaugh-sexual-assault/?utm_term=.e329c3471216&wpisrc=nl_highered&wpmm=1 [<https://perma.cc/E73V-BT33>] (discussing how a social services school dean suggested that sexual assault accuser fabricated claims).

45. See Christine Hauser, *A Yale Dean Lost Her Job After Calling People 'White Trash' in Yelp Reviews*, N.Y. TIMES (June 21, 2017), <https://www.nytimes.com/2017/06/21/us/yale-dean-yelp-white-trash.html> [<https://perma.cc/3D7H-RBX5>] (discussing Yale residential college dean June Chu, who was "placed on leave" and has since "left her position" after it became public that she had used pejoratives regarding poor white people, obese people, and others in online platforms).

46. Erika Christakis, *My Halloween Email Led to a Campus Firestorm — and a Troubling Lesson About Self-censorship*, WASH. POST (Oct. 28, 2016), https://www.washingtonpost.com/opinions/my-halloween-email-led-to-a-campus-firestorm--and-a-troubling-lesson-about-self-censorship/2016/10/28/70e55732-9b97-11e6-a0ed-ab0774c1eaa5_story.html [<https://perma.cc/C4P6-F6KF>].

47. In the 2016 presidential election, many commentators—liberals and conservatives alike—were shocked that Donald Trump's express statements bragging that he had assaulted women and invoking racist sentiments, such as calling Mexicans rapists or suggesting that a judge of Mexican heritage was unable to serve in his position, did not more broadly disqualify him from serving as president in the eyes of voters. See, e.g., Ross Douthat, *A Playboy for President*, N.Y. TIMES (Aug. 13, 2016), <https://www.nytimes.com/2016/08/14/opinion/sunday/a-playboy-for-president.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer> [<https://perma.cc/4HSU-8TRJ>]. For more information on the rise of assaultive speech, see generally MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT, NEW PERSPECTIVES ON LAW, CULTURE, AND SOCIETY (Robert W. Gordon & Margaret Jane Radin eds., 1993).

Setting aside these very recent examples, scholars of discrimination have shown that a culture of express and overt discrimination has largely been replaced by a society in which microaggressions and other low-level forms of discrimination are the predominant experience of bias today.⁴⁸ Defined as “the brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial, gender, sexual-orientation, and religious slights and insults to the target person or group,”⁴⁹ microaggressions create serious harms for those who experience them.⁵⁰ Given that many microaggressions occur without intent, the rising acknowledgement of the role of implicit or unconscious bias, which refers to “discriminatory biases based on implicit attitudes or implicit stereotypes,” may offer a needed corrective.⁵¹ Implicit bias is “especially problematic, because [it] can produce behavior that diverges from a person’s avowed or endorsed beliefs or principles”⁵² and can help explain how these low-level forms of discrimination are commonplace today, even as explicit forms of egregious discrimination are decreasing. While express discrimination generally violates social norms of equality, microaggressions reflect a set of implicit, stereotype-based beliefs that evade easy legal regulation, at least at the moment when they occur.⁵³

48. Tessa E. Basford et al., *Do You See What I See? Perceptions of Gender Microaggressions in the Workplace*, 38 PSYCHOL. OF WOMEN Q. 340 (2013) (describing the decline of overt discrimination and the increase in microaggressions).

49. DERRALD WING SUE, MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION 5 (2010).

50. *Id.* at 6 (summarizing literature to show how microaggressions harm the target with consequences of reducing self-esteem, producing anger and frustration, lowering feelings of well-being and worthiness, generating health problems, reducing life expectancy, and denying equal access to health care, education, and employment opportunities). See *id.* at 65–135 for a thorough discussion of these consequences.

51. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006). Perhaps the most vivid description of unconscious bias appears in Shankar Vedantam’s *The Hidden Brain*, analogizing unconscious bias to swimming in a current in the sea: “Unconscious bias influences our lives in exactly the same manner as that undercurrent . . . Those who travel with the current will always feel they are good swimmers; those who swim against the current may never realize they are better swimmers than they imagine.” SHANKAR VEDANTAM, *THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS, AND SAVE OUR LIVES* 109–10 (2010).

52. Greenwald & Krieger, *supra* note 51.

53. Jessica Fink has advanced a sophisticated consideration of this issue of discrimination that evades legal remedy. See generally Jessica Fink, *Gender Sidelining and the Problem of Unactionable Discrimination*, 29 STAN. L. & POL’Y REV. 57 (2018). Some of the systemic theories of discrimination under Title VII may be able to rectify more subtle forms of discrimination when they systematically create pay or promotion disparities, for example, for groups of similarly situated workers. Likewise, disparate treatment law may be able to capture decisions based on unconscious bias, if

The intersection of this new reality of discrimination with the antidiscrimination law that exists in the United States therefore creates a conundrum. “The very existence of implicit bias poses a challenge to legal theory and practice, because discrimination doctrine is premised on the assumption that, barring insanity or mental incompetence, human actors are guided by their avowed (explicit) beliefs, attitudes, and intentions.”⁵⁴ The law therefore specifically requires intent as an element of disparate treatment, which is the primary theory of discrimination codified in U.S. law.⁵⁵ While inferential evidence of systemic bias can prove such claims, in smaller workplaces it may be hard for plaintiffs to muster the comparative evidence needed to prove bias from inference. As a result of this problem, despite legal mechanisms that purport to protect women from discrimination in various situations, less formal, intuitive processes of discrimination too often evade law’s recognition and remedial reach.⁵⁶

An alternative theory of discrimination applies in instances of “employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”⁵⁷ This theory, known as disparate impact, does not require a showing of intent. Yet success in such a case usually requires plaintiffs to muster statistical evidence that can be difficult, if not impossible, to obtain.⁵⁸ Perhaps

the plaintiff can present proof that she was treated differently because of her sex. Yet these low-level forms of discrimination, whether rooted in conscious or unconscious bias, are not quickly challenged using the law. Thanks to Tristin Green for helpful dialogue on this point.

54. Greenwald & Krieger, *supra* note 51.

55. Charles A. Sullivan, *Disparate Impact: Looking past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 913–38 (2005) (discussing the complications of the element of intent).

56. Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1243–44 (2002); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 92 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 387 (1987); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

57. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335–36 n.15 (1977) (citations omitted). The Court additionally held that evidence of “discriminatory motive . . . is not required under a disparate-impact theory.” *Id.* at 336. Congress subsequently codified this theory in Title VII. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

58. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 769 (2006) (arguing that disparate impact theory was a mistake in part because of the complexity of garnering this level of statistical evidence); Sullivan, *supra* note 55, at 988–89; Michelle A. Travis, *Equality in the Virtual Workplace*, 24

worse for purposes of remedying unconscious forms of bias, successful plaintiffs in disparate impact suits must be able to point to a specific policy that affects them negatively, rather than the diffuse and low-level ways that unconscious bias has been baked into workplace norms and practices.⁵⁹

Furthermore, the law's failure to recognize and resolve intersectional forms of discrimination render women of color and other intersectional identities even more unable to resolve their experiences of discrimination. Intersectional feminist scholar Kimberlé Crenshaw has documented that while antidiscrimination law can grasp discrimination along a single axis, those whose experiences involve bias based on a combination of factors often do not receive legal recognition of their claims.⁶⁰

As a result of this growing awareness of how bias functions, law as currently deployed may not always be a well-honed tool to address today's most common forms of discrimination. Indeed, while legal scholars such as Tristin Green have persuasively argued that Title VII could be read as sufficiently capacious to address more subtle forms of discrimination,⁶¹ today's judicial interpretation of Title VII does not fully work justice for those who experience the kind of low-level discrimination that is based on unstated and unconscious discriminatory assumptions animating individual conduct. Jessica Fink refers to these practices of marginalizing women as gender sidelining.⁶² Recognizing that the most common forms of bias in the contemporary world too

BERKELEY J. EMPL. & LAB. L. 283, 346 (2003) (observing that sex-segregated workplaces make it difficult to assert a statistical case because there are no men to use as a comparison).

59. Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 39 (2005).

60. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 144–45, 151–52. While this claim remains generally accurate, a subset of cases known as “sex plus race” treat intersectional claims of women of color as actionable. See, e.g., *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994) (holding that Asian-American women may experience sex-plus-race discrimination that violates Title VII even where white women and Asian-American men do not because “two bases for discrimination . . . cannot be neatly reduced to distinct components” as “Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women.”); *Jefferies v. Harris Cty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (finding black women to be a discrete subgroup entitled to Title VII protection). Despite the rise of this line of cases, recent scholarly commentary continues to observe the ways that intersectional forms of discrimination experiences by women of color are too often overlooked. See Angela Onwuachi-Willig, *What About #ustoo?: The Invisibility of Race in the #metoo Movement*, 128 YALE L.J.F. 105, 111–19 (2018).

61. TRISTIN K. GREEN, *DISCRIMINATION LAUNDERING* 158 (2017).

62. See Fink, *supra* note 53, at 65–86 (discussing the marginalization of women in field as diverse as the arts, politics, science, and sports).

often evade legal recognition, some threads of even feminist legal theory have turned away from the use of law towards the acknowledgement that women's rights advocates must seek other cures for sexism.⁶³

Feminist legal scholars outside of the field of discrimination have begun to interrogate in a broader way the value of law as a tool to eradicate sexism. Anti-carceral feminists such as Aya Gruber⁶⁴ and Janet Halley⁶⁵ have suggested that the alliance of the feminist movement with an increase in incarceration aligns feminists too closely with the state in ways that increase women's victimization and undermines intersectional feminist efforts to work with anti-racism activists to achieve a broader social justice. Leigh Goodmark's recent book raises the provocative question of whether decriminalizing domestic violence might serve broader feminist goals of furthering women's agency and denying the state power over the nuclear family.⁶⁶ These efforts are all part of a broader trend to question the value of law as a tool of social change.⁶⁷ In the specific setting of feminist legal theory, these critiques reveal an increasing skepticism about whether law as it is currently constituted can be enlisted to serve feminist goals, or whether law itself reflects existing patriarchal and racist hierarchies that undermine feminist efforts to achieve equality.⁶⁸ These scholars are making what I

63. See *id.* at 100.

64. Aya Gruber, *Race, Feminism, and the War on Crime*, 84 WASH. L. REV. 581 (2009).

65. Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 340–42 (2006). Halley's subsequent suggestion that we should "take a break from feminism" raises questions about the kind of continued feminist engagement I here advocate. JANET E. HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006). But feminist scholarship and engagement remains robust, and many others are skeptical of whether this break is a good idea. See, e.g., Pamela D. Bridgewater, *Splitting the Difference: A Reaction to Janet Halley's Split Decisions: How and Why to Take a Break from Feminism*, 19 YALE J.L. & FEMINISM 259 (2007); Adam P. Romero, *Methodological Descriptions: "Feminist" and "Queer" Legal Theories*, 19 YALE J.L. & FEMINISM 227 (2007).

66. See generally LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* (2018).

67. See generally Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007) (discussing both the consequences of legal cooptation and cooptation of extralegal strategies to accomplish social change).

68. See, e.g., Gruber, *supra* note 64, at 615–18 ("The structural concern is that the criminal law is inherently incapable of being more woman-friendly. Prosecutorial discretion combined with state actors' drive to win leads law enforcers to abandon 'loser' cases, which often involve sexual and racial minority victims The current American criminal justice system is intimately tied to a philosophical program and set of social norms highly antithetical to feminism.").

call extralegal moves—moves that seek to engage with social problems usually viewed through the lens of law, but by adopting expressly non-legal strategies. Such strategies are enacted in recognition of the limits of law.

One might be tempted to query whether feminist legal theory remains relevant, if in fact feminist legal theorists find themselves rejecting law as the tool of feminist change. Research on social movements, however, suggests that legal change occurs in short periods that punctuate ongoing efforts to create social reform.⁶⁹ Social reforms often result from broader reform advocacy efforts and culminate in legal change that alters the social frameworks in which women live their lives. Indeed, the kind of advocacy for which I argue in this Article is a response to law's failings, but is not a fulsome indictment of law's potential as a tool of feminist advocacy. Feminist legal theorists will continue to use an array of social and legal tools to alter the existing, sexist legal regime. This Article develops one extralegal possibility: amplification.

II. AMPLIFICATION: EXTRALEGAL ACTS OF FEMINIST RESISTANCE

Against this backdrop of the recognition that law alone cannot solve the problems of discrimination that currently plague women's lives, women have not stood silent. Rather, feminist methods have evolved to work in conjunction with law. In this part, I define the strategy of amplification and offer examples of its operation. I then fit amplification into a long series of feminist strategies of protest and resistance that were designed to leverage the power that women possess in a particular historical moment even when explicit legal intervention is impossible due to the operation of sexism within society.

A. *Defining Amplification*

Feminist amplification is women's concerted, public strategy of crediting the words and experiences of other women in order to increase their credibility. I consciously borrow the term amplification from the women of the Obama administration, who used this word to describe their effort to repeat one another's points, giving both credit and weight to the contributions being made by the other women who were their colleagues.⁷⁰ Amplification as a scientific concept involves

69. See Magnus Lundgren et al., *Stability and Change in International Policy-Making: A Punctuated Equilibrium Approach*, 13 REV. OF INT'L ORGS. 547, 548–49 (2018).

70. Eilperin, *supra* note 1.

the use of a device to increase the volume of sound waves. As a feminist strategy, amplification likewise increases volume. The metaphorical use of the term amplification must be contextualized in a patriarchal society that normalizes the practices of men speaking over women⁷¹ and allowing male listeners to literally disregard the voices of women—amplification serves to figuratively increase the audibility of women’s words. A central aspect of the claim of amplification is that increasing women’s volume also increases women’s credibility, in part by recognizing that while women usually experience these kinds of discrimination in an individual way, they occur within a set of social structures that make them common and therefore political in nature. As a result, amplification applies a similarly group-based response, calling for women’s voices to be heard in concert. Amplified voices are stronger and therefore more likely to be valued, respected, and believed. While it remains troubling and problematic that so many women’s voices must be combined to be credible,⁷² this remains the reality of life under patriarchy.

Amplification has two key aspects. First, amplification can play an important role in increasing awareness of who is the author of an idea. When a woman’s words are repeated, with proper attribution, this reduces the likelihood of the idea being claimed or coopted by someone else. Amplification makes the originator of an idea more visible and increases her notoriety. Putting it another way, amplification either gives credit where it is due or, if an idea has already been taken, returns credit where it should have been in the first place.

Second, amplification can literally or figuratively amplify the author’s voice. By repeating a point with attribution, the idea is more likely to be heard and credited properly to its originator. But at times amplification will also figuratively make a woman’s voice louder by

71. This experience is not limited to women in social situations or women who lack power in their workplaces. When Tonja Jacobi and Dylan Schweers published their groundbreaking study of the disparities in interruptions that U.S. Supreme Court Justices experienced based on gender, it caused a great splash. Tonja Jacobi & Dylan Schweers, *Justice Interrupted: the Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379 (2017); see also Tonja Jacobi & Dylan Schweers, *Female Supreme Court Justices Are Interrupted More by Male Justices and Advocates*, HARV. BUS. REV. (Apr. 11, 2017), <https://hbr.org/2017/04/female-supreme-court-justices-are-interrupted-more-by-male-justices-and-advocates> [<https://perma.cc/BA4U-QALJ>]. Chief Justice John Roberts apparently felt compelled to respond to the situation. Tonja Jacobi, *Gendered Interruptions at the Court*, SCOTUS OA (Aug. 2, 2018), <https://scotusoa.com/gendered-interruptions-at-the-court/> (describing Roberts’s response).

72. Deborah Tuerkheimer has documented and critiqued the general attitude of incredulity with which the legal system receives women’s claims of sexual violence, arguing that it constitutes a form of discrimination and a denial of equal protection. See generally Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017).

increasing its credibility and making it more likely that a hearer will believe the claim. In this regard, contributing further justification or an additional argument are important forms of amplification that can bolster the claim of another woman. In some instances, the person amplifying might have gravitas to lend to the author of a claim, thereby trading on privilege to increase the credibility of another's point. Taking action in reliance on belief in a woman's claim can also be a powerful form of amplification.⁷³ In a society that too often talks over or disbelieves women, amplification provides the rhetorical strength to women's claims to ensure that women might be believed.

Amplification fits squarely within the move described above away from reliance on legal structures to address inequality. Whereas many of the original feminist movements had legal reform as their ultimate goal, in moments of amplification, women recognize the reality that law alone may not be a sufficient tool to resolve the problems they are facing. Instead, amplification is self-consciously extralegal, by which I mean operating outside of the legal system itself. Those who employ amplification have not necessarily abandoned law—it remains one of an array of options. But extralegal strategies like amplification are designed to overcome the deficiencies of law as currently constituted. Although antidiscrimination law could evolve to address the defects described in the prior part, in the absence of this evolution, amplification functions as an extralegal strategy that seeks remedy for women despite the apparent inability of law to achieve such a goal.

B. Amplification Explained Through Three Examples

In this part, I offer three examples of amplification, starting with the mothers of the term in the Obama administration. I next consider the most contemporary version of amplification, the #MeToo movement in the United States, before concluding with the possibility of the structural adoption of amplification as a way of advancing the theory in a more formal fashion. I enlist these examples to highlight the various ways that amplification functions as an extralegal form of resistance, designed to overcome specific gaps in the operation of anti-discrimination law. The examples also serve to further refine the definition of amplification, explaining the operation of amplification such that others might be able to enlist the term to describe similar acts of resistance in different contexts.

73. Structural actions predicated on believing women are the topic of Part II.B.3. See *infra* Part II.B.3.

1. THE ORIGINAL AMPLIFICATION: AMPLIFICATION BY REITERATION

Despite the ostensibly progressive leanings of the newly elected president, many of the women named to positions of authority within the first Obama administration observed that it functioned essentially as a boys' club.⁷⁴ The majority of top aides were men.⁷⁵ Women were excluded from important meetings, and even when present, they found that the men in the room claimed their ideas, interrupted them in meetings, and acted to marginalize them.⁷⁶ While they occupied positions of authority, they lacked the actual power to contribute to the work of the new administration.⁷⁷

To rectify these problems, the women adopted the strategy that they named amplification, making a calculated, strategic effort to lend credibility to one other's work.⁷⁸ When a woman spoke, other women repeated the point, attributing credit to its originator.⁷⁹ This increased the attention paid to the contributions women made.⁸⁰ It also importantly denied men the chance of coopting the ideas of their female colleagues.⁸¹ The women concluded that this strategy was wildly successful, adding to their effectiveness in their work and increasing the likelihood that they would be included in meetings.⁸²

This original use of feminist amplification offers the paradigm of the strategy. There are three key aspects of what I define as amplification. First, in all instances of amplification, women identify a problem that they face relating to the operation of gender and power within society, and specifically a problem that the law is either unable to resolve or for which they determine that the relative costs of legal intervention are too high, due to reputational harm or retaliation. In the case of the Obama administration, the law simply will not recognize this kind of low-level omnipresent discrimination that does not appear to result in a discernable disparity in a work outcome. Workplace antidiscrimination law requires a higher level of discrimination—an adverse employment action or harassment—than what the women of the Obama administration experienced.⁸³ To consider this somewhat

74. Eilperin, *supra* note 1.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. To succeed in a Title VII case, the plaintiff must be able to point to an adverse employment action, which is one that creates a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with

differently, the women sought an expressly non-legal remedy because they recognized that the problems they experienced were non-cognizable as discrimination under the law. In some cases, such disparities could compound over time and create visible differences in women's success, which would then be justiciable. But amplification may empower women to stem low-level disparities before they would be susceptible to legal remedy. In other cases, while the law might conceptually possess the capacity to address the situation of discrimination, such as in instances of harassment, women may determine that the personal costs of pursuing legal remedy are too high because the risks of reputational harm or retaliation are significant.⁸⁴

Second, women elect to use their voices to address this problem. In most instances, this will be a collective decision. For example, in the situation of the Obama administration women, they acted in concert to consider options and adopt a strategy to ameliorate their problem. Yet in other cases, women might individually use their voices in such a way that amplification results, despite the fact that they did not collectively strategize in advance to adopt amplification as a tactic.

Third, the choice to amplify is targeted to specifically counteract the problem that the women identified in step one. In the instance of the Obama administration women, the reality that their experiences of low-level exclusion would not be legally actionable gave rise to a strategy that was designed to quickly render them less marginal. The key aspect of this characteristic of amplification is that it expressly neutralizes the failing that the women noted in adopting the strategy. That low-level forms of exclusion based in implicit bias may initially evade legal recognition meant that the women of the Obama administration needed to find a way to pursue a timely solution before the situation became worse. In this instance, deploying an extralegal strategy meant that the women received a place in the room and credit for their ideas even though the law does not imagine this kind of immediate remedial solution, expressly increasing the credibility of the voices used in step two.

significantly different responsibilities, or a decision causing a significant change in benefits." *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 532 (10th Cir. 1998) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). Adverse employment actions can also include retaliation. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006) (holding that retaliation can be an adverse employment action if it was "harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination"). Sexual harassment also violates Title VII.

84. See Porter, *supra* note 8 (discussing retaliation). Amplification in instances where the discrimination is legally cognizable but legal action undesirable is the topic of Part II.B.2. See *infra* Part II.B.2.

2. AMPLIFICATION BY MULTIPLICATION

Starting in the fall of 2016, during the presidential race between Hillary Clinton and Donald Trump, a series of women began to come forward with allegations that Trump had sexually assaulted them.⁸⁵ Trump's misogyny seemed to be further confirmed with an array of public statements he made during the campaign⁸⁶ and by the release of a tape in which he is clearly heard to brag about his conduct of forcibly kissing women and grabbing them by their genitals.⁸⁷ Despite these claims, which were widely believed by Democrats and Republicans alike due to the amplification of multiple women coming forward with similar claims, and a historically high gender gap of eleven points,⁸⁸ Trump was elected president in November 2016.⁸⁹

85. Meg Kelly, *President Trump and Accusations of Sexual Misconduct: The Complete List*, WASH. POST (Nov. 22, 2017, 2:00 AM), https://www.washingtonpost.com/news/fact-checker/wp/2017/11/22/president-trump-and-accusations-of-sexual-misconduct-the-complete-list/?utm_term=.0787c9880c05 [<https://perma.cc/T95S-9M5Z>] (documenting fourteen claims of sexual misconduct against Donald Trump).

86. See, e.g., Paul Solotaroff, *Trump Seriously: On the Trail with the GOP's Tough Guy*, ROLLING STONE (Sept. 9, 2015, 3:56 PM), <https://www.rollingstone.com/politics/politics-news/trump-seriously-on-the-trail-with-the-gops-tough-guy-41447/> [<https://perma.cc/H7EK-NKVL>] (mocking Carly Fiorina's appearance).

87. It is worth quoting Trump at length:

I moved on her like a bitch. But I couldn't get there. And she was married. . . . You know, I'm automatically attracted to beautiful—I just start kissing them. It's like a magnet. Just kiss. I don't even wait. And when you're a star, they let you do it. You can do anything. . . . Grab 'em by the pussy. You can do anything.

Mark Makela, *Transcript: Donald Trump's Taped Comment About Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html> [<https://perma.cc/VVU3-FERV>]. The Washington Post originally broke the story during the 2016 campaign. David Farenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.fb6e2c5901f3 [<https://perma.cc/GQ66-MUGW>].

88. Only once before, in 1996, had an eleven-point gender gap been recorded. Erin C. Cassese & Tiffany D. Barnes, *Reconciling Sexism and Women's Support for Republican Candidates: A Look at Gender, Class, and Whiteness in the 2012 and 2016 Presidential Races*, 41 POL. BEHAV. ONLINE 677, 679 (2018) (citing CTR. FOR THE AM. WOMAN AND POL., EAGLETON INST. OF POL., RUTGERS U., *THE GENDER GAP: VOTING CHOICES IN PRESIDENTIAL ELECTIONS* (2017), <http://www.cawp.rutgers.edu/sites/default/files/resources/ggpresvote.pdf> [<https://perma.cc/9WSH-NDFC>]).

89. Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html> [<https://perma.cc/3ZF9-MZFW>].

In light of Trump's electoral victory, women united in protest.⁹⁰ The January 2017 Women's March attracted hundreds of thousands of people in its primary location of Washington, D.C.;⁹¹ an estimated 3,267,134 to 5,246,670 people participated in 653 marches in cities around the United States.⁹² Marchers held signs featuring images of uteruses that read variously "This Machine Kills Fascists," "Don't Tread on Me," and "Shed Walls"; others with less graphic imagery said "Fight Like a Girl," "Abortion Is Health Care," and "This Pussy Bites Back," among thousands more.⁹³ Protesters embraced Fiona Apple's new song, chanting "We don't want your tiny hands anywhere near our underpants" as they marched.⁹⁴

At nearly the same time, a series of women came forward to accuse comedian Bill Cosby of sexual assault and rape.⁹⁵ While more than sixty women alleged that Cosby had assaulted or harassed them, dating back to the 1960s,⁹⁶ the flood of claims in this era appeared to

90. Rebecca Traister's recollection of the marches and the rage that inspired them evokes a clear sense of the roots of these protests. See REBECCA TRAISTER, *GOOD AND MAD: THE REVOLUTIONARY POWER OF WOMEN'S ANGER* 28–32 (2018).

91. Susan Chira & Yamiche Alcindor, *Defiant Voices Flood U.S. Cities as Women Rally for Rights*, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/us/women-march-protest-president-trump.html> [<https://perma.cc/BEY8-5SMS>].

92. Erica Chenoweth & Jeremy Pressman, *This Is What We Learned by Counting the Women's Marches*, WASH. POST (Feb. 7, 2017, 4:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/07/this-is-what-we-learned-by-counting-the-womens-marches/?utm_term=.513f9de5a710 [<https://perma.cc/H77R-M936>].

93. Forrest Wickman, *The Best, Nastiest Protest Signs from the Women's March on Washington*, SLATE (Jan. 21, 2017, 10:52 AM), <https://slate.com/human-interest/2017/01/the-best-protest-signs-from-the-womens-march-on-washington.html> [<https://perma.cc/EJM8-8556>]. At the march in Ann Arbor, Michigan, my four-year-old daughter Aurelia held a sign of her own authorship and artistry, which read "BE NICE," the most scathing admonition of which she could think. Embellished with stickers, her sign featured a backwards N. Photo on file with author. One of my Ecuadorian students perhaps has named the feminist instinct for protest with great clarity: "[I]t wasn't only our empathy as women and all of us feeling as victims that made us march, it was also each one's agency and desire of self-control over our lives without being afraid that made us march." Interview with Maria Natalia Barona Martinez (Mar. 19, 2019) (on file with author).

94. Jon Blistein, *Hear Fiona Apple's Scathing Anti-Trump Chant for Women's March*, ROLLING STONE (Jan. 18, 2017, 1:58 AM), <https://www.rollingstone.com/music/music-news/hear-fiona-apples-scathing-anti-trump-chant-for-womens-march-110729/> [<https://perma.cc/BF2Y-8T6P>].

95. Manuel Roig-Franzia, *Bill Cosby Sentenced to 3 to 10 Years in State Prison*, WASH. POST (Sept. 25, 2018, 4:25 PM), https://www.washingtonpost.com/lifestyle/style/bill-cosby-sentenced-to-3-to-10-years-in-state-prison/2018/09/25/9aa620aa-c00d-11e8-90c9-23f963eea204_story.html?utm_term=.f81068613dcc [<https://perma.cc/K6HN-7RHK>].

96. *Id.*

change the legal result. Widespread allegations meant that while Cosby had evaded liability in a series of early lawsuits in which none of the claims stuck, a new criminal charge brought in 2017 landed in a different cultural milieu.⁹⁷ While Cosby's public reputation was already in tatters and Spelman University had returned his philanthropic contributions,⁹⁸ several universities withdrew his honorary doctorates in the most recent spate of allegations.⁹⁹ In April 2018, a Pennsylvania jury found Cosby guilty of three counts of aggravated indecent assault for drugging and sexually assaulting a woman.¹⁰⁰ In September of that year, Cosby was sentenced to three to ten years in prison for his crimes.¹⁰¹ News reports documented that "Cosby's case was the first high-profile sexual assault trial to unfold in the aftermath of the #MeToo movement," generating a verdict that was "a watershed

97. *Id.*

98. Kimberly Hutcherson, *Spelman College Discontinues Professorship Funded by Cosbys*, CNN (July 26, 2016, 12:06 PM), <https://edition.cnn.com/2015/07/25/us/cosby-selman-college/index.html> [https://perma.cc/Y8RM-FZUU]. Cosby's donations had long posed a dilemma for philanthropic entities. See, e.g., L.S. Hall, *Tainted Money? The Dilemma of Bill Cosby's Campus Cash*, INSIDE PHILANTHROPY (Dec. 1, 2014), <https://www.insidephilanthropy.com/home/2014/12/1/tainted-money-the-dilemma-of-bill-cosbys-campus-cash.html> [https://perma.cc/NJB6-3RKF]; Maria Puente, *Cosby's Philanthropy also Affected by Rape Claims*, USA TODAY (Nov. 26, 2014, 1:53 PM), <https://www.usatoday.com/story/life/people/2014/11/26/cosbys-philanthropy-also-affected-by-rape-claims/70100242/> [https://perma.cc/XPG2-L462]. The University of Southern California likewise returned a five million dollar gift from Harvey Weinstein, though Rutgers kept a \$100,000 donation Weinstein made in honor of Gloria Steinem. See Stephanie Saul, *University of Pennsylvania Takes Away Steve Wynn's Honors. And Bill Cosby's, Too*, N.Y. TIMES (Feb. 1, 2018), <https://www.nytimes.com/2018/02/01/us/penn-wynn-cosby-metoo.html> [https://perma.cc/2XFM-Y7D3].

99. Emily Shugerman, *Five Universities Revoke Bill Cosby's Honorary Degrees After Sexual Assault Conviction*, INDEPENDENT (Apr. 28, 2018), <https://www.independent.co.uk/news/world/americas/bill-cosby-convicted-sexual-assault-honorary-degrees-revoked-temple-university-a8326491.html> [https://perma.cc/BT7B-M5W8] (documenting that Carnegie Mellon University, Johns Hopkins University, Notre Dame, Boston College, and Temple University all withdrew the honorary degrees they had given Cosby); Adam Harris, *Cosby's Honorary Degree Is the First Yale Has Rescinded in 300-Plus Years*, THE ATLANTIC (May 2, 2018), <https://www.theatlantic.com/education/archive/2018/05/yale-bill-cosby-honorary-degree/559490/> [https://perma.cc/BUM7-BWDH]. Other men accused of sexual assault, including Charlie Rose and Steve Wynn, have also seen their degrees revoked. See Saul, *supra* note 98.

100. Graham Bowley & Jon Hurdle, *Bill Cosby Is Found Guilty of Sexual Assault*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/26/arts/television/bill-cosby-guilty-retrial.html> [https://perma.cc/8C4Z-RDX5].

101. Roig-Franzia, *supra* note 95.

moment, one that reflected that, going forward, the accounts of female accusers may be afforded greater weight and credibility by jurors.”¹⁰²

The claims surrounding these two public figures might have simply offered small examples of amplification, in both effective and ineffective cases. But when allegations of sexual harassment and assault broke against media mogul Harvey Weinstein,¹⁰³ rapid amplification by other women in Hollywood¹⁰⁴ led to the widespread use of the term #MeToo to describe sexual harassment and assault not as a personal problem, but as a public and political one that affected women en masse and was therefore susceptible to being recast as a systemic social phenomenon. Social activist Tarana Burke is widely credited as the mother of the phrase “Me Too,” which she began to use in 2006 as part of a movement to create empathy for women of color who had survived sexual abuse.¹⁰⁵ After the initial Weinstein allegations, the amplifying power of #MeToo became evident. Within twenty-four hours of Alyssa Milano deploying #MeToo in a tweet, it had been used more than 500,000 times on Twitter¹⁰⁶ and more than 12 million times by more than 4.7 million people on Facebook.¹⁰⁷ This deep reliance on media to disseminate ideas and advance the feminist cause profoundly highlights

102. Bowley & Hurdle, *supra* note 100.

103. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?module=inline> [<https://perma.cc/64YX-ZHQN>].

104. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/5BKZ-BA9F>] (documenting allegations of thirteen more women against Weinstein).

105. Burke is currently engaged in a serious effort to create a documentary about her work. Abby Ohlheiser, *The Woman Behind 'Me Too' Knew the Power of the Phrase when She Created it—10 Years Ago*, WASH. POST (Oct. 19, 2017, 7:38 AM), <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/> [<https://perma.cc/YR7K-2GVX>]. The movement now known as #MeToo also diverged from Burke's original message regarding sexual assault and violence, instead focusing on professional harm and power abuse. See TRAISTER, *supra* note 90, at 38, 141, 167. The failure to give Burke, a black woman, credit for her origination of the phrase “Me Too” has likewise been the topic of scholarly commentary. See, e.g., Onwuachi-Willig, *supra* note 60, at 106–07.

106. Lisa Respers France, *#MeToo: Social Media Flooded with Personal Stories of Assault*, CNN (Oct. 16, 2017, 7:12 PM), <https://www.cnn.com/2017/10/15/entertainment/me-too-twitter-alyssa-milano/index.html> [<https://perma.cc/ZA2Z-WF74>].

107. Cassandra Santiago & Doug Criss, *An Activist, a Little Girl and the Heartbreaking Origin of “Me Too,”* CNN (Oct. 17, 2017, 3:36 PM), <https://edition.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html> [<https://perma.cc/PZ3W-EZ4K>].

Bridget Crawford's observation that contemporary feminism's reliance on media strategy would begin to define the movement—without the internet, Facebook, and Twitter, this movement could not have occurred.¹⁰⁸ The force of such amplification was surely heightened by the engagement of other high-profile actors such as Gwyneth Paltrow, Mira Sorvino, and Angelina Jolie, who stated that Weinstein had harassed them,¹⁰⁹ and from Meryl Streep, Judi Dench, and George Clooney, who publicly indicated that they believed the women,¹¹⁰ thereby lending credibility to the growing tide of allegations.

Indeed, in the fall of 2017, the #MeToo movement opened the amplification floodgates and spread its use far beyond these three initial sets of claims against Trump, Cosby, and Weinstein. The allegations reached deeply into entire fields of public life. In the popular culture realm, claims rippled beyond Cosby and Weinstein to include actor Kevin Spacey¹¹¹ and eventually R. Kelly.¹¹² In the news field, broadcast personalities Matt Lauer,¹¹³ Charlie Rose,¹¹⁴ and Mark Halperin,¹¹⁵ and

108. Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 127–29 (2007). While Crawford made this observation specifically about third-wave feminists in the context of her research on feminism and pleasure as a response to the pornography wars, the reality is that today's feminists—including those who reject the moniker of “third-wave”—still embrace these approaches. Of course, social media is a double-edged sword for women, providing not only a potential site for empowerment via amplification but also opening yet another forum in which women are harassed. Anita Bernstein, *Abuse and Harassment Diminish Free Speech*, 35 PACE L. REV. 1, 5 (2014) (arguing that “women receive more and worse abuse in response to their online speech than do men”).

109. See generally *Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC News (May 10, 2019), <https://www.bbc.com/news/entertainment-arts-41594672> [<https://perma.cc/X3TR-Y4JX>].

110. *Id.*

111. Sopan Deb, *Kevin Spacey Faces Felony Charge in Misconduct Case*, N.Y. TIMES (Dec. 24, 2018), <https://www.nytimes.com/2018/12/24/movies/kevin-spacey-criminal-charges.html> [<https://perma.cc/R3MH-VKQ9>]. More than a dozen people eventually claimed Spacey harassed or assaulted them, leading to felony charges. *Id.*

112. Elizabeth A. Harris, *R. Kelly Charged With 10 Counts of Sexual Abuse in Chicago*, N.Y. TIMES (Feb. 22, 2019), <https://www.nytimes.com/2019/02/22/arts/music/r-kelly-charged-indicted.html> [<https://perma.cc/M87T-BDVM>] (noting that while allegations of sexual misconduct have trailed Kelly for fifteen years, “in the intervening years, the world around him has changed”).

113. Ellen Gabler et al., *NBC Fires Matt Lauer, the Face of ‘Today’*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/business/media/nbc-matt-lauer.html> [<https://perma.cc/G5RL-E4AB>].

114. John Koblin & Michael M. Grynbaum, *Charlie Rose Fired by CBS and PBS After Harassment Allegations*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/business/media/charlie-rose-fired-cbs.html> [<https://perma.cc/5ZNE-GPMA>].

producer Leslie Moonves¹¹⁶ lost their jobs after allegations of sexual impropriety. In the political realm, members of Congress¹¹⁷ and a White House aide¹¹⁸ resigned after accusations of abuse and harassment. Judges retired early¹¹⁹ or struggled to see their nomination to the U.S. Supreme Court confirmed.¹²⁰ State level political leaders ranging from an attorney general¹²¹ to a governor¹²² stepped down from their offices.

115. Christina Caron, *NBC News and MSNBC Cut Ties with Mark Halperin*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/business/media/mark-halperin-msnbc.html> [https://perma.cc/8BBG-QL5M].

116. Edmund Lee, *CBS Chief Executive Les Moonves Steps Down After Sexual Harassment Claims*, N.Y. TIMES (Sept. 9, 2018), <https://www.nytimes.com/2018/09/09/business/les-moonves-longtime-cbs-chief-may-be-gone-by-monday.html?module=inline> [https://perma.cc/7TQ7-432T].

117. Amber Phillips, *Nine Members of Congress Have Lost Their Jobs Over Sex in Six Months*, WASH. POST (Apr. 28, 2018, 7:00 AM), https://www.washingtonpost.com/news/the-fix/wp/2018/04/28/nine-members-of-congress-have-lost-their-job-over-sex-in-six-months/?utm_term=.16d7d5718bbe [https://perma.cc/VHU3-N4Y3].

118. Maggie Haberman & Katie Rogers, *Rob Porter, White House Aide, Resigns After Accusations of Abuse*, N.Y. TIMES (Feb. 7, 2018), <https://www.nytimes.com/2018/02/07/us/politics/rob-porter-resigns-abuse-white-house-staff-secretary.html?module=inline> [https://perma.cc/TSR6-WY9J].

119. Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html> [https://perma.cc/FQ2J-27QH] (documenting sexual harassment allegations); Matt Zapotosky, *Judge Who Quit Over Harassment Allegations Reemerges, Dismaying Those Who Accused Him*, WASH. POST (July 24, 2018, 6:07 PM), https://www.washingtonpost.com/world/national-security/judge-who-quit-over-harassment-allegations-reemerges-dismaying-those-who-accused-him/2018/07/23/750a02f2-89db-11e8-a345-a1bf7847b375_story.html?utm_term=.aa9380cc4471 [https://perma.cc/WFX4-D9W6] (documenting that more than a dozen women accused Kozinski of sexually inappropriate conduct).

120. John Cassidy, *Brett Kavanaugh's Supreme Court Nomination Is in Big Trouble*, NEW YORKER (Sept. 17, 2018), <https://www.newyorker.com/news/our-columnists/brett-kavanaughs-supreme-court-nomination-is-in-big-trouble> [https://perma.cc/2NEF-RFS7].

121. Danny Hakim & Vivian Wang, *Eric Schneiderman Resigns as New York Attorney General Amid Assault Claims by 4 Women*, N.Y. TIMES (May 7, 2018) (reporting rapid resignation by New York State Attorney General on the same day as the publication of physical abuse allegations); *see also* Jane Mayer & Ronan Farrow, *Four Women Accuse New York's Attorney General of Physical Abuse*, NEW YORKER (May 7, 2018), <https://www.newyorker.com/news/news-desk/four-women-accuse-new-yorks-attorney-general-of-physical-abuse> [https://perma.cc/SLD7-CWBD] (breaking news of the allegations).

122. Mitch Smith & Julie Bosman, *Missouri's Governor, a Rising G.O.P. Star, Resigns Amid Scandal*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/us/eric-greitens-resigns.html>

Later, even religious communities were affected by #MeToo, with the Catholic church generating the new hashtag #NunsToo in response to the admission that priests had not only abused children, as had been known for years, but also had raped and impregnated nuns, with the church then compelling them into forced abortions or lives of exile from their profession.¹²³

By early 2018, the deeper and permanent impact of the #MeToo movement could be felt. When the allegations came forth about Matt Lauer, claims from multiple women were no longer necessary—NBC removed Lauer from his position within less than forty-eight hours,¹²⁴ though some speculated that this was because Lauer’s conduct had been known and kept largely under wraps over a longer period of time.¹²⁵

In the earliest stages, these claims of sexual assault, harassment, and impropriety demonstrated the operation of amplification. When women alleged that Trump, Cosby, or Weinstein assaulted them, a chorus of voices of other survivors of assault by the same man gave credibility to the claims of the individual. Whereas allegations brought by a single woman were easily discredited by being chalked up to personal vendetta or consensual sex that was later regretted—as had previously happened with claims against Cosby—multiple voices alleging that a single man had a pattern of violent, criminal sexual conduct lent credibility to all of the women making such claims against an individual. One woman calling Trump, Cosby, or Weinstein an aggressor could be paid off or silenced, but multiple women acting in concert had power even against powerful men. While some claims, such as those against Cosby, resulted in a legal remedy, the use of amplification here highlights how many women had long believed that the law could not help. In Weinstein’s situation, fears of professional repercussions and payoffs silenced women from denouncing his violence.¹²⁶ In the case of Cosby, prior cases had failed because women

[<https://perma.cc/3B2R-G3WD>]; see also John Eligon, *Sex Claims Against Gov. Eric Greitens of Missouri Vividly Detailed in Report*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/us/missouri-greitens-house-impeachment-inquiry.html?module=inline> [<https://perma.cc/4K46-WCFX>] (documenting the nature of abuse allegations against Eric Greitens).

123. Jason Horowitz & Elizabeth Dias, *Pope Acknowledges Nuns Were Sexually Abused by Priests and Bishops*, N.Y. TIMES (Feb. 5, 2019), <https://www.nytimes.com/2019/02/05/world/europe/pope-nuns-sexual-abuse.html?action=click&module=Top%20Stories&pgtype=Homepage> [<https://perma.cc/L5SS-HK2J>].

124. Gabler et al., *supra* note 113.

125. *Id.*

126. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/2JJ5-QYXN>].

were generally ignored, but amplification made legal remedy possible because it shifted the epistemological dynamics of how knowledge of assault could be produced and believed.¹²⁷

Yet as the #MeToo movement gained steam, its deeper genius became more apparent. On a society-wide level, the #MeToo movement's use of amplification showed that "[i]t's no longer he said vs. she said. Now it's he said vs. *they* said."¹²⁸ The social impact of this profound use of amplification is that it has increased the overall credibility of women's claims of sexual assault and harassment. Whereas in its earliest iterations, amplification applied to the claims of multiple women regarding a single man, by the later stages, enough voices had proclaimed the epidemic of sexual assault and violence to be a public problem that amplification became far more systemic. Survivors' claims were believed not because they related to specific individual aggressors, but because the movement amplified ALL survivors' experiences of assault and harassment as credible.¹²⁹

This can be most evidently seen in the recent use of the "Why I Waited" hashtag and the accompanying articles that highlighted a common experience that survivors of assault amplified across the culture. When Dr. Christine Blasey Ford's allegations that Brett Kavanaugh had sexually assaulted and attempted to rape her became public, she was critiqued for failing to voice her claims at the time of the alleged conduct.¹³⁰ However, while President Trump initially referred to her as a "very credible witness" who gave "very

127. Timothy Williams, *Cosby Verdict Is Hailed a Breakthrough. Here's Why It Was an Anomaly*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/us/cosby-metoo.html> [<https://perma.cc/G8WD-MG4X>]; see also *Timeline: Bill Cosby: A 50-Year Chronicle of Accusations and Accomplishments*, L.A. TIMES (Sept. 25, 2018, 11:34 AM), <https://www.latimes.com/entertainment/la-et-bill-cosby-timeline-htmlstory.html> [<https://perma.cc/HP7C-5BMW>].

128. James Hohmann et al., *The Daily 202: Can Kavanaugh Survive? 10 Questions After a Second Woman Accuses Him of Sexual Misconduct*, WASH. POST (Sept. 24, 2018), <https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2018/09/24/daily-202-can-kavanaugh-survive-10-questions-after-a-second-woman-accuses-him-of-sexual-misconduct/5ba7f4221b326b7c8a8d15fc/>.

129. Legal scholar Linda Edwards has suggested a similar use of amicus briefs within the court system via "voice briefs," which would provide a fascinating way for amplification to inform even litigation itself. See generally Linda H. Edwards, *Telling Stories in the Supreme Court: Voices Briefs and the Role of Democracy in Constitutional Deliberation*, 29 YALE J.L. & FEMINISM 29 (2018).

130. Lance Morrow, *A Spectral Witness Materializes: The Passage of Time Sometimes Causes People to Forget, Sometimes to Invent or Embellish*, WALL STREET J. (Sept. 17, 2018, 7:04 PM), <https://www.wsj.com/articles/a-spectral-witness-materializes-1537225498> [<https://perma.cc/RJV9-W8Z6>].

compelling” testimony before the Senate Judiciary Committee,¹³¹ he later suggested that she was less credible because she waited.¹³² In so doing, he unleashed a torrent of amplifying voices that lent credibility to Blasey Ford’s decision to wait to reveal her claims as a choice consistent with that of many other women, many of whom took to Twitter with the hashtag #WhyIWaited.¹³³ Even ambivalent gender commentators like Caitlyn Flanagan amplified Blasey Ford, offering powerful and indicting amplification of why women choose not to report their assaults.¹³⁴ In one especially poignant iteration, journalist

131. Catherine Lucey et al., *Trump Calls Ford Testimony ‘Compelling;’ Backs Kavanaugh*, ASSOC. PRESS (Sept. 29, 2018), <https://apnews.com/38fe5fe0ffc74c20a24234280d023e9a>.

132. “I have no doubt that, if the attack on Dr. Ford was as bad as she says, charges would have been immediately filed with local Law Enforcement Authorities by either her or her loving parents. I ask that she bring those filings forward so that we can learn date, time, and place!” Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 21, 2018, 6:14 AM), https://twitter.com/realDonaldTrump/status/1043126336473055235?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1043126336473055235&ref_url=http%3A%2F%2Fslate.com%2Fnews-and-politics%2F2018%2F09%2Fdonald-trump-christine-blasey-ford-police-report-memory.html [https://perma.cc/87J9-HQ39]. Later, Trump mocked Ford even more aggressively, revealing his misunderstanding of how trauma functions. Josh Dawsey & Felicia Sonmez, *Trump Mocks Kavanaugh Accuser Christine Blasey Ford*, WASH. POST (Oct. 2, 2018, 9:15 PM), https://www.washingtonpost.com/politics/trump-mocks-kavanaugh-accuser-christine-blasey-ford/2018/10/02/25f6f8aa-c662-11e8-9b1c-a90f1daae309_story.html?utm_term=.66d05824f234 [https://perma.cc/LDY3-W53B] (“‘I don’t know. I don’t know.’ ‘Upstairs? Downstairs? Where was it?’ ‘I don’t know. But I had one beer. That’s the only thing I remember,’ Trump said of Ford, as he impersonated her on stage. ‘I don’t remember,’ he said repeatedly, apparently mocking her testimony.”); see also Maggie Haberman & Peter Baker, *Trump Taunts Christine Blasey Ford at Rally*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/2018/10/02/us/politics/trump-me-too.html?action=click&module=RelatedLinks&pgtype=Article> [https://perma.cc/E2FP-6PCF].

133. Petula Dvorak, *Millions of Women Understand Christine Blasey Ford’s Decades of Silence*, WASH. POST (Sept. 20, 2018, 1:51 PM), https://www.washingtonpost.com/local/but-why-did-kavanaughs-accuser-wait-37-years-to-say-something/2018/09/20/04118d42-bcdd-11e8-be70-52bd11fe18af_story.html?utm_term=.e38406d964c9 [https://perma.cc/XM4R-J8V8].

134. Caitlin Flanagan, *I Believe Her: When I Was in High School, I Faced my Own Brett Kavanaugh*, THE ATLANTIC (Sept. 17, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/me-too/570520/> [https://perma.cc/A5XK-UFCG]. Flanagan emotively describes receiving not just one, but two apologies from the boy who tried to rape her in high school. Most incisively, she reminds the reader that even then, in the same era as Kavanaugh allegedly assaulted Blasey Ford, that young people knew this kind of conduct was morally wrong. Flanagan describes the written apology she received as “an astonishing thing for an 18-year-old kid to have written; it took courage and self-reflection.” She contrasts this with Kavanaugh’s conduct, “But if Ford’s story is true, Brett Kavanaugh never apologized. He never tried to make amends, never took responsibility for what he did.” *Id.*

Connie Chung wrote of being assaulted over fifty years earlier, by the very family physician who had delivered her, proclaiming in an open letter to Blasey Ford that “I am writing to you because I know that exact dates, exact years are insignificant. We remember exactly what happened to us and who did it to us. We remember the truth forever.”¹³⁵

While the key argument of this Article is that amplification is a valuable strategy that can complement the shortcomings of legal approaches to addressing gender-based discrimination, there are limits to its effectiveness. Even prior to the #MeToo movement, women’s experiences of sexual harassment altered their career trajectories—for some, they voluntarily left industries to flee harassment, giving up their careers, aspirations, and livelihoods to keep themselves safe.¹³⁶ For others, the choice to sue led to them being blacklisted in their professional fields.¹³⁷ Indeed, one woman who sued her corporate employer for sexual harassment remarked that “[t]he very same people who publicly applaud you for speaking up about bad behavior will never hire you into their own organizations because you are forever

Beyond these personal narratives, research by the U.S. Department of Justice documents the myriad reasons why those who have been assaulted choose not to report. In the 2005–2010 study period, sixty-four percent of those raped or assaulted chose not to report the crime, with twenty percent of that figure stating that their fear of reprisal led them not to report. MICHAEL PLANT ET AL., U.S. DEP’T OF JUSTICE, SPECIAL REPORT: FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010 7 tbl.9 (2013), <https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> [https://perma.cc/2QC2-J398]. Other reasons stated for not reporting included:

- Police would not do anything to help: 13%
- Personal matter: 13%
- Reported to different official: 8%
- Not important enough to respondent: 8%
- Did not want to get offender in trouble with law: 7%
- Police could not do anything to help: 2%
- Other/unknown/more than one reason: 30%

Id.

135. Connie Chung, *Dear Christine Blasey Ford: I, Too, Was Sexually Assaulted — and It’s Seared into My Memory Forever*, WASH. POST (Oct. 3, 2018, 11:47 AM), https://www.washingtonpost.com/opinions/dear-christine-blasey-ford-i-too-was-sexually-assaulted--and-its-seared-into-my-memory-forever/2018/10/03/2449ed3c-c68a-11e8-9b1c-a90f1daae309_story.html?utm_term=.b6f96ffb7e&wpisrc=nl_ideas&wpmm=1 [https://perma.cc/USC9-JKBS].

136. Bryce Covert, *Sexual Harassment Will Change Your Career Forever*, THE CUT (Oct. 24, 2017), <https://www.thecut.com/2017/10/sexual-harassment-affects-women-career.html> [https://perma.cc/VEC3-YJLD] (reporting that women left opera, publishing, and technology after being harassed).

137. *Id.*

pegged as a whistleblower and a troublemaker.”¹³⁸ Some commentators suggest that women who have been active in the #MeToo movement have effectively been blacklisted as well.¹³⁹ Others who sought to use the strategy of amplification and speak out about harassment have found themselves unable to advance in their careers and are now relying on lawsuits to rectify the retaliation they allege happened as a result of their public efforts to speak out about sexual harassment and gender discrimination.¹⁴⁰

3. STRUCTURAL AMPLIFICATION

Lest these examples create the impression that amplification is a strategy used only in high-profile industries or against public figures, chef and restaurateur Erin Wade has written about the system that her macaroni-and-cheese restaurant, Homeroom, adopted to stop the harassment of her female servers and staff.¹⁴¹ While acknowledging that a lack of female midlevel managers had created a problem whereby female waitstaff had to explain and justify their experiences of harassment to male supervisors, Wade and her employees together structured a process designed to believe women’s stories of harassment in the workplace and stop exposing women to continued harassment.¹⁴² Wade and her restaurant colleagues created a color-coded system in which different types of customer behavior are categorized as yellow, orange or red.¹⁴³ “Yellow refers to a creepy vibe or unsavory look.”¹⁴⁴ “Orange means comments with sexual undertones, such as certain compliments on a worker’s appearance.”¹⁴⁵ “Red signals overtly sexual

138. Diana Falzone, “*You Will Lose Everything*”: Inside the Media’s #MeToo Blacklist, VANITY FAIR (Apr. 16, 2019), <https://www.vanityfair.com/news/2019/04/the-metoo-blacklist> [https://perma.cc/2DGX-Z872].

139. *Id.*

140. Jonah S. Berger & Molly C. McCafferty, *Jury Could Hear Former Associate Professor’s Gender Discrimination Suit Against Harvard, Judge Says*, HARV. CRIMSON (Apr. 8, 2019), <https://www.thecrimson.com/article/2019/4/8/theidon-discrimination-case-appeal-ruling/> [https://perma.cc/T6SS-ZZN6] (reporting on appellate argument of Harvard Associate Professor Kimberly S. Theidon for her denial of tenure, which she argues was retaliation for her decision to speak out against sexual harassment and discrimination on Harvard’s campus).

141. Erin Wade, *I’m a Female Chef. Here’s How My Restaurant Dealt with Harassment from Customers*, WASH. POST (Mar. 29, 2018, 8:24 AM), https://www.washingtonpost.com/opinions/how-my-restaurant-successfully-dealt-with-harassment-from-customers/2018/03/29/3d9d00b8-221a-11e8-badd-7c9f29a55815_story.html?utm_term=.bddfca7a31c9 [https://perma.cc/93A5-RQ3P].

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

comments or touching, or repeated incidents in the orange category after being told the comments were unwelcome.”¹⁴⁶

Managers receive staff member reports of the experience of harassment and its level, which correspond to a specific, required action by the manager.¹⁴⁷ In the instance of a red-level event, the manager ejects the customer from the restaurant.¹⁴⁸ When orange-level events occur, the manager assumes responsibility for waiting on the table of the harasser.¹⁴⁹ If a yellow-level event occurs, the harassed staff member decides if the manager should take over the table.¹⁵⁰ Importantly, “[i]n all cases, the manager’s response is automatic, no questions asked.”¹⁵¹

Wade further reports that “[i]n the years since implementation, customer harassment has ceased to be a problem.”¹⁵² In the experience of her staff, believing women’s reports of yellow and orange-level harassment events have largely stopped the escalation of harassing behavior to the red level.¹⁵³ Wade describes her female staff as “hav[ing] a canny sixth sense for unwanted attention” since many customers initiate harassment with low-level conduct before escalating to groping or overtly sexual comments.¹⁵⁴

This example highlights the fact that when feminists occupy positions of power, they can enlist amplification not merely as a personal approach, but as a structural strategy that has the power to alter the lives of many people. In the case of the Homeroom harassment policy, the strategy has three main benefits. First, it shifts power back to the women who are making claims of harassment because they are automatically believed. Second, it prevents male managers from filtering women’s experiences through the managers’ gendered reality, which too often led to them making judgment calls that minimized the severity of harassment. The system acknowledges the differences in the ways men and women view others’ conduct, while creating a safer workplace. Third, while systematic, this approach is expressly extralegal as it evades the legal system entirely. This has the important effects of both obviating the need for a truth-finding process and accomplishing rapid remedy for the affected women. Although fact-finding remains a crucial part of anti-harassment policies and practices

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

in many educational or professional settings,¹⁵⁵ this kind of structural embrace of an amplification strategy immediately frees harassment victims from continued contact with their harasser. Even more importantly, it removes the burden of advancing a harassment claim from the victim, instead shifting this obligation onto the workplace management structure itself.

Structural amplification therefore offers the enticing possibility that these strategies need not be used in a reactive fashion by women after the experience of harassment, microaggressions, or other misogynistic conduct. Instead, when amplification-based strategies are woven into the structure of workplaces, they can prevent women from facing these experiences in the first place. Such strategies are expressly extralegal because they do not engage the law or assume that legal processes can protect women adequately. They rather start from the place of believing women's narration of their own experiences and using them to stop escalations of harassment before they become sufficiently severe and pervasive to rise to the level of legally actionable.

The deployment of amplification in a restaurant also provides an example of its usefulness in a setting other than white-collar workplaces or high-prestige fields. In the previously mentioned examples, women of relatively privileged social status leveraged some of their economic or class privilege to strategically deploy amplification. Yet the use of amplification in a restaurant suggests that even women occupying more precarious economic positions can benefit from this strategy, at least under certain circumstances. Management may need to act in solidarity with such workers for this to serve women's needs in workplaces where workers have relatively little autonomy; this likely means that workers in rigid fields like housekeeping or fast food work may not be able to use amplification except in rare cases. This reality reveals that amplification is probably not equally available to people in all kinds of workplaces. However, this example highlighting how restaurant servers have effectively used amplification suggests it may be available in some instances beyond the confines of rarefied workplaces and industries.

155. In a pair of recent articles, Deborah Tuerkheimer observes that while these kinds of informal reporting networks are a reasonable response to the inadequacies of existing reporting processes, they pose a set of risks that reveal the need for more formal accountability measures for sexual assault and harassment. See Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1146–53 (2019) [hereinafter Tuerkheimer, *Beyond #MeToo*] (discussing the inadequacies of existing formal reporting systems); Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo Era*, 2019 U. CHI. LEGAL F. (forthcoming 2019) (manuscript at 1) [hereinafter Tuerkheimer, *Unofficial Reporting in the #MeToo Era*] (discussing the existence of and risks posed by informal reporting practices).

C. Fitting Amplification into the Long History of Feminist Resistance

Of course, this strategy of amplification is not new—women’s resourceful development of strategies to handle sexism far predates the examples I have described. Prior to the broad adoption of anti-discrimination law, women systematically used these kinds of strategies to cope with the ways that gender limited their options and power as they moved through the world.¹⁵⁶ Indeed, feminists have long recognized that law was not sufficient as a means of addressing sexism and misogyny in society and have used concerted solidarity to give strength to their arguments and claims. Public protest itself functions as a kind of amplification; the images of suffragists marching en masse in white dresses¹⁵⁷ or of women’s libbers protesting by the thousands¹⁵⁸ literally involved voices unifying in chants to demand rights for women. Women continue to use this kind of strategy of public protest in the contemporary era.¹⁵⁹

Beyond collective protest, feminist social movements have likewise embraced media strategies¹⁶⁰ and public performance¹⁶¹ to draw attention to issues that require reform. Feminists have also used less public strategies to foster their efforts towards reform—the consciousness-raising groups of the 1960s served to radicalize women and draw them into the movement¹⁶² and women have engaged in union

156. See *infra* Part II.D for a discussion on framing amplification through the feminist legal theory concept of partial agency.

157. But see ROWBOTHAM, *supra* note 26, at 171 (arguing that while the Equality League of Self Supporting Women and the National Women’s Party did adopt strategies of demonstrations and direct action, women in the U.S. never reached the same level of public militancy as British suffragists).

158. COBBLE ET AL., *supra* note 32, at 69–75 (cataloging the various facets and protests of the Women’s Liberation Movement).

159. See, e.g., Chira & Alcindor, *supra* note 91 (2017 Women’s March); SUSAN CHANDLER & JILL B. JONES, CASINO WOMEN: COURAGE IN UNEXPECTED PLACES 1–11 (2011) (documenting protests of women in the Labor Movement).

160. See generally Vanessa Valenti & Courtney Martin, *#FemFuture: Online Revolution*, BARNARD CTR. FOR RES. ON WOMEN (New Feminist Sols. Series, Vol. 8 2012), <http://bcrw.barnard.edu/wp-content/nfs/reports/NFS8-FemFuture-Online-Revolution-Report-April-15-2013.pdf> [<https://perma.cc/H34R-NSY2>].

161. See, e.g., Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1478 n.161 (2014) (discussing the SlutWalk as a form of social movement that included performative aspects such as pole-dancing and the deployment of dress as performance).

162. See, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 89–90 (1989) (describing early women-led consciousness-raising groups as helping individual women conceptualize their experiences of gender-based violence not as private and isolated but as political and systemic). See also Max Waltman, *Appraising the Impact of Toward a Feminist Theory of the State: Consciousness-Raising, Hierarchy Theory, and Substantive Equality Laws*, 35 LAW & INEQ. 353, 353

organizing to increase their rights as workers.¹⁶³ Even today, women's efforts to protect one another have been documented through research on whisper networks¹⁶⁴—"a form of organizing for the powerless, sharing information quietly, person-to-person"¹⁶⁵—in order to communicate information and warnings that can help prevent others from being victimized.¹⁶⁶ Recent research has identified women's social and communication networks as integral to their professional successes.¹⁶⁷

Today's amplification is perhaps somewhat more systematic and strategic in the sense that it has deeply pervaded society. The efforts just described reach into countless fields and are consciously being framed as related to a general sense that women need to take their empowerment into their own hands. Today's amplification is a response to a society that says it has addressed sexism but in practice has few tools to handle the reality of women's lives. In response, women are

(2017) (discussing MacKinnon as creating space for an academic form of consciousness-raising).

163. See CHANDLER & JONES, *supra* note 159, at 6–7; see also Nicole Buonocore Porter, *Women, Unions, and Negotiation*, 14 NEV. L.J. 465, 466 (2014) (arguing that "because women stand to benefit so significantly from increased participation in unions . . . we should work to increase women's membership in unions").

164. Anna Babel, *The Invisible Walls of the Whisper Network*, 65 ANTHRO. NEWS (May 10, 2018), <https://anthrosource.onlinelibrary.wiley.com/doi/abs/10.1111/AN.859> [<https://perma.cc/5ZXF-5CJD>].

165. Sarah Jaffe, *The Collective Power of #MeToo*, DISSENT MAG., Spring 2018, at 80, 81 (documenting the best-known recent whisper network of the "now-infamous 'Shitty Media Men' list, begun by journalist Moira Donegan, [which] turned the whisper network into a spreadsheet, where women could add layers to each report. The crowd-sourced Google document, which collected women's anonymous stories of more than seventy men in media in the few hours it was live, was designed to collectivize the incomplete information that individuals receive based on their social networks.").

166. Amelia Tait, *Can Women Experiencing Sexual Harassment Safely Take Their Whisper Networks Online?*, NEW STATESMAN AM. (Jan. 11, 2018), <https://www.newstatesman.com/science-tech/technology/2018/01/can-women-experiencing-sexual-harassment-safely-take-their-whisper> [<https://perma.cc/75CN-Y8TH>] (explaining rationale of whisper networks but documenting the risks of their use online); see also Tuerkheimer, *Unofficial Reporting in the #MeToo Era*, *supra* note 155 (manuscript at 16–18) (analyzing two forms of whisper networks, which she calls the Traditional Whisper Network, in which accusers are in a closed network and the identity of accusers is known, and the Double Secret Whisper Network, in which accusers are in a closed network yet the accusers remain anonymous).

167. Yang Yang et al., *A Network's Gender Composition and Communication Pattern Predict Women's Leadership Success*, 116 PROC. NAT'L ACAD. SCI. U.S. 2033, 2033 (2019) (documenting that women who obtain leadership positions have a robust social network with a female-dominated inner circle).

strategizing in a widespread way to develop an additional tool that can be deployed in the struggle against discrimination.

D. Amplification as a Strategy Under Circumstances of Constrained Autonomy

The appeal of amplification as an extralegal strategy to address gender bias in society offers a concrete instantiation of the continued relevance of the partial agency turn in feminist legal theory. This approach, closely associated with Kathryn Abrams¹⁶⁸ and Martha Mahoney,¹⁶⁹ argues that the description of women as purely defined by their victimization mischaracterizes the experience most women have of seeking to strategize for their own empowerment despite the constraints imposed by patriarchy.¹⁷⁰ The partial agency perspective rebuffs the claim arising from dominance feminism that discrimination and victimization pervasively characterize women's existence,¹⁷¹ instead arguing that women historically have used and still today continue to use the resources they control to structure their own lives. Inherent in this approach is the assumption that all people operate with less than the full complement of autonomy that typifies traditional liberal legal theory.¹⁷² As a result, partial agency or constrained autonomy is the reality of life for men and women alike, not a unique condition of oppression. Reframing life through partial agency therefore involves the rejection of a narrow circumscription of women's lives as shaped wholly by the extrinsic force of the patriarchy,¹⁷³ instead focusing on the possibility of agentic action under the reality of constraints.¹⁷⁴

168. See, e.g., Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITT. L. REV. 337, 348 (1996).

169. See, e.g., Martha Mahoney, *Whiteness and Women, in Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217, 217–18 (1993).

170. Abrams, *supra* note 168, at 348–49; see also Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 304–06 (1995) [hereinafter Abrams, *Sex Wars Redux*].

171. See generally CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

172. Abrams, *Sex Wars Redux*, *supra* note 170, at 352.

173. See *id.* Indeed, this aspect of dominance feminism remains its most disempowering facet. To acknowledge the existence of the patriarchy does not necessarily require resignation to its hegemonic power.

174. I have previously explored this concept in multiple sites of women's lives. In the context of trafficking for sex work, I have argued that women of limited economic means sometimes strategically seek to be trafficked in order to expand their options. See generally Shelley Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 IND. L.J. 1409 (2011). In a forthcoming manuscript, I likewise consider how women's housing-related social

Abrams offers not only a descriptively accurate rendition of the way many women feel about their own lives, but also a normatively compelling one that opens avenues of social engagement as a strategy for women to deepen the partial agency that they already experience.

The partial agency approach helps explain why amplification is so very compelling. Amplification is a strategy for women to harness what power they do possess to overturn the social forces that deny them full agency under the law. It offers an example of what Abrams calls “a more complex account[] of women’s subjectivity under conditions of oppression.”¹⁷⁵ But as an extralegal strategy, amplification moves beyond the legally focused applications of partial agency that Abrams proposes,¹⁷⁶ and instead, recognizing law itself as a further limitation, seeks new ways of advancing women’s agency.

Partial agency provides the theoretical underpinnings for why the strategy of amplification resonates with contemporary feminists. The employment of amplification as a response to the experience of assault, harassment, or public efforts to silence women subverts women’s disempowerment. Instead of focusing on limitations and weakness as the defining characteristics of women’s public lives, amplification reminds us that women have resources they can use to destabilize patriarchal structures. When men in power use compelled silence as a means of forcing women to remain subservient, amplification suggests that many silenced people together can unify in the creation of a collective agentic voice.

Partial agency can also help explain why amplification offers an appealing alternative to the state of silence that women felt compelled to occupy in the past. The paradox of amplification is the possibility that a group of disadvantaged people can have more power than those who are actually powerful. For women who possess less power due to their gender in a sexist society, amplification offers a strategy to increase one’s force by leveraging the power of others who are similarly situated. When women speak up to amplify the voices of other women who had the same experiences, they demonstrate their recognition that

movements represent a similar turn, by which women refuse to accept conditions of substandard housing as fixed and inevitable, instead organizing to seek improvements in the condition of their housing through concerted social movements. See Shelley Cavalieri, *Women’s Housing-Related Social Activism: A Strategy of Agency and Resilience* (forthcoming) (on file with author). With Judge Daniela Salazar, Vice President of Ecuador’s Constitutional Court, I have also addressed strategic action through the efforts of Ecuadorian women’s movement to constitutionalize its rights claims in Ecuador’s 2008 Constitution. See Shelley Cavalieri & Daniela Salazar, *Advocating for Women’s Rights in the Era of the Rule of Rights*, 43 SEATTLE U. L. REV. (forthcoming 2020) (on file with authors).

175. Abrams, *Sex Wars Redux*, *supra* note 170, at 306.

176. *Id.* at 354–76 (describing ways to advance women’s complex agency within the law).

while one woman alone may not be believed, multiple women speaking in unison collectively bear greater credibility. Crucially, as catalogued among the successes of amplification in Part II.B, women together may possess more power than those whom they wish to denounce and unseat.¹⁷⁷ And when feminist men engage in amplification, they choose to subvert their gender privilege, instead investing themselves in solidarity.¹⁷⁸

In this regard, the technical, scientific definition of amplification becomes relevant—to amplify is to make larger, greater, or stronger.¹⁷⁹ Amplification in the feminist sense is an act of enlargement and strengthening of the power that women bear in society. As a matter of partial agency, amplification demonstrates that women may not only subvert narratives of their subordination in society, but can do so through the expression of solidarity realized via the “creative action” that anti-essentialist feminist Angela Harris envisioned.¹⁸⁰ In this sense, amplification, especially realized in a fully intersectional fashion,¹⁸¹ offers the possibility that those who lack power in the hierarchy can act in concerted solidarity to achieve the kinds of ends that cannot be accomplished by individual action. And as a matter of extralegal action, amplification suggests that the law’s limits do not form a boundary for the liberation of people who occupy disadvantaged positions in the social hierarchy. Rather, the law may well serve as a floor, a jumping-off point for those who are fatigued of the constant struggle for equality, and for whom amplification offers a tangible strategy in moments of oppression.

III. OBSTACLES TO THE IMPLEMENTATION OF AMPLIFICATION

Amplification is a promising framework to help conceptually organize an array of strategies that women use in addressing the experience of misogyny or gender-based discrimination in their lives. But it is no panacea—and in fact is imperfect. For solidarity-based movements, organizing collective action can create a host of problems. An array of obstacles may similarly limit the implementation of amplification as a strategy for addressing women’s lived experiences of bias. In this Part, I consider the limitations of amplification and offer

177. See *supra* Part II.B.

178. See *infra* Part III.D for a discussion of men’s acts of amplification.

179. See *Amplify*, MERRIAM-WEBSTER DICTIONARY AND THESAURUS 27 (2007).

180. Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 612 (1990) (arguing that black women have historically found solidarity not through the realization of victimization, but by collective effort to oppose dominant social forces).

181. See *infra* Part III.A for a discussion of racism and cross-racial solidarity.

suggestions on how to overcome these problems to implement the strategy of amplification in a pragmatic fashion.

A. On Race and Amplification

One reasonable critique of this approach observes that while women of color have been watching out for one another for eons, white women are uniquely and perniciously capable of leveraging their white privilege against other women. This is a reasonable and common framing of the 2016 presidential election, in which the frequently cited exit poll statistic is that fifty-two percent of white women voted for Donald Trump,¹⁸² though other, more recent studies of the 2016 exit polls suggest that forty-seven percent of white women voters voted for Trump, with forty-five percent voting for Clinton.¹⁸³ Whether a majority or plurality of white women voted for Trump, they cast their ballots despite his invocations of racist¹⁸⁴ and Islamophobic¹⁸⁵ language, his mockery of a reporter with a disability,¹⁸⁶ his sexist critiques of women,¹⁸⁷ including female candidates¹⁸⁸ and reporters,¹⁸⁹ and his

182. Cassese & Barnes, *supra* note 88, at 679. *But see* Molly Ball, *Donald Trump Didn't Really Win 52% of White Women in 2016*, TIME (Oct. 18, 2018), <http://time.com/5422644/trump-white-women-2016/> [<https://perma.cc/Y9PL-7HRD>].

183. PEW RES. CTR., FOR MOST TRUMP VOTERS, 'VERY WARM FEELINGS' FOR HIM ENDURED 11 (2018), <http://www.people-press.org/2018/08/09/an-examination-of-the-2016-electorate-based-on-validated-voters/> [<https://perma.cc/5NN9-HQFH>].

184. David Leonhardt & Ian Prasad Philbrick, *Donald Trump's Racism: The Definitive List, Updated*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html> [<https://perma.cc/E4QP-8JWQ>] (quoting Donald Trump as referring to Mexicans arriving in the United States as "criminals," and as "rapists" and that Nigerians, once seeing the United States, would never "go back to their huts" in Africa).

185. Theodore Schleifer, *Donald Trump: 'I Think Islam Hates Us,'* CNN (Mar. 10, 2016), <https://edition.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/index.html> [<https://perma.cc/358D-FSUI>] (stating in an interview with Anderson Cooper that "I think Islam hates us").

186. Daniel Arkin, *Donald Trump Criticized After He Appears to Mock Reporter Serge Kovalski*, NBC NEWS (Nov. 26, 2015, 4:51 PM), <https://www.nbcnews.com/politics/2016-election/donald-trump-criticized-after-he-appears-mock-reporter-serge-kovalski-n470016> [<https://perma.cc/K2BR-AQHM>] (reporting that in a public speech, Trump appeared to move his arms in a fashion mimicking the movements of a reporter with a disability).

187. Michael D. Shear & Eileen Sullivan, *'Horseface,' 'Lowlife,' 'Fat, Ugly': How the President Demeans Women*, N.Y. TIMES (Oct. 16, 2018), <https://www.nytimes.com/2018/10/16/us/politics/trump-women-insults.html> [<https://perma.cc/TD6B-2SLH>] (cataloging the array of sexist comments used by Donald Trump); *see also* Rebecca Coates Nee & Mariana De Maio, *A 'Presidential Look'? An Analysis of Gender Framing in 2016 Persuasive Memes of Hillary Clinton*, 63 J. BROADCASTING & ELECTRONIC MEDIA 304, 305 (2019) (discussing the role of sexist framing during the 2016 presidential election).

history as a sexual harasser.¹⁹⁰ Some commentators frame this as a situation in which Trump's activation of race as a wedge issue led to white women voting their racial interests rather than their gender or a vision of intersectional solidarity;¹⁹¹ an alternative interpretation instead suggests that white women overlooked Trump's problematic statements on race, religion, and gender in order to vote their economic interests.¹⁹² A body of political science scholarship argues that household income, educational attainment, and attitudes of hostile sexism among white women account for this discrepancy in voting behavior, even when controlling for partisanship and ideology.¹⁹³ Without regard for the cause, however, this election revealed white

188. Trump used sexism to mock Carly Fiorina, stating "Look at that face! . . . Would anyone vote for that? Can you imagine that, the face of our next president? . . . I mean, she's a woman, and I'm not s'posedta say bad things, but really folks, come on. Are we serious?" Solotaroff, *supra* note 86 (emphasis omitted). Trump also referred to Hillary Clinton as lacking a "presidential look," which some have argued was a reference to her gender. Coates Nee & De Maio, *supra* note 187. Nee and De Maio also observe that sexist framing was broadly used to critique Clinton for her appearance and character during the 2016 presidential election. *See id.* at 314–16.

189. Regarding Ariana Huffington, Trump tweeted the following: "[Ariana Huffington] is unattractive, both inside and out. I fully understand why her former husband left her for a man-he made a good decision." Donald Trump (@realDonaldTrump), TWITTER (Aug. 28, 2012, 9:54 AM), <https://twitter.com/realDonaldTrump/status/240462265680289792> [<https://perma.cc/FG5N-ZTXG>]. Trump referred to Megyn Kelly as having "blood coming out of her eyes, blood coming out her, wherever." Jim Rutenberg, *Megyn Kelly's Cautionary Tale of Crossing Donald Trump*, N.Y. TIMES (Nov. 15, 2016), <https://www.nytimes.com/2016/11/16/business/media/megyn-kellys-cautionary-tale-of-crossing-donald-j-trump.html> [<https://perma.cc/7P8N-4AK6>].

190. Jan Ransom, *Trump Doesn't Have to Answer Questions About Multiple Sexual Harassment Claims, Judge Rules*, N.Y. TIMES (Oct. 26, 2018), <https://www.nytimes.com/2018/10/26/nyregion/trump-sexual-harassment-summer-zervos-apprentice.html> [<https://perma.cc/3NLX-3SPL>]; Michael D. Shear, *Trump Sexual Misconduct Accusations Repeated by Several Women*, N.Y. TIMES (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/us/politics/trump-accused-sexual-misconduct.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer> [<https://perma.cc/8JMU-XJB5>].

191. Vanessa Williams, *White Female Voters are Accused—Again—of Supporting Their Party Over #MeToo*, WASH. POST (Oct. 11, 2018, 3:49 PM), https://www.washingtonpost.com/nation/2018/10/11/white-women-voters-are-accused-again-supporting-their-party-over-metoo/?utm_term=.99927174ee7a [<https://perma.cc/HAW5-4JL5>].

192. *Id.*; see also Lisa R. Pruitt, *The Women Feminism Forgot: Rural and Working-Class White Women in the Era of Trump*, 49 U. TOL. L. REV. 537 (2018) (arguing for a more complex vision of the women who voted for Donald Trump); Joan C. Williams, *The Dumb Politics of Elite Condescension*, N.Y. TIMES (May 27, 2017), <https://www.nytimes.com/2017/05/27/opinion/sunday/the-dumb-politics-of-elite-condescension.html> (arguing that abandonment of condescending rhetoric towards working-class whites and adoption of a class-based plan for economic improvement would overcome some of the voting gap).

193. Cassese & Barnes, *supra* note 88, at 678.

women's failure as a class to be reliable allies for people of color harmed by Trump's invocation of racism, highlighting their refusal to foreground the mistreatment of people of color as an issue relevant to their choice for president.

The critique of white women's racist feminism dates back far further than the 2016 election; it is likewise repeated and historical in nature. In the era of the suffrage movement, white women suffragists articulated explicitly racist rationales for extending the vote to women, arguing that if women were not extended the vote, black men would possess the franchise while white women still would be disenfranchised.¹⁹⁴ Similarly, while some white women had been engaged in the civil rights movement, others sought to add sex to the Civil Rights Act of 1964 in the hope that the inclusion of something as radical as sex equality would lead to the defeat of a bill they opposed due to their desire to maintain racial inequality.¹⁹⁵ Some proponents of adding the sex amendment relied on racism to try to advance their feminist goals, arguing on the House floor that without the sex amendment, "white women would be the last at the hiring gate. . . . A vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister."¹⁹⁶ Feminist advocates from the National Women's Party had a statement read into the Congressional record in which they argued that without "any reference to civil rights for women," "white native-born American women of Christian religion" would experience discrimination.¹⁹⁷

Intersectional feminist Kimberlé Crenshaw forcefully advanced this critique of white women's failure to engage in cross-racial solidarity into legal feminism, observing that

Contemporary white feminists inherit not the legacy of [Sojourner] Truth's challenge to patriarchy but, instead, Truth's challenge to their forbearers. Even today, the difficulty that white women have traditionally experienced in sacrificing racial privilege to strengthen feminism renders them susceptible to Truth's critical question. When feminist theory and politics that claim to reflect women's experience and women's aspirations do not include or speak to Black women, Black women must ask: "Ain't We Women?" If this

194. Nell Irvin Painter, *Voices of Suffrage: Sojourner Truth, Frances Watkins Harper, and the Struggle for Woman Suffrage*, in *VOTES FOR WOMEN: THE STRUGGLE FOR SUFFRAGE REVISITED* (Jean H. Baker ed., 2002); GINZBERG, *supra* note 29, at 121–27.

195. COBBLE ET AL., *supra* note 32, at 55–56.

196. *Id.* at 57 (quoting 110 CONG. REC. 2578, 2580 (1964) (statement of Rep. Griffiths)).

197. *Id.* (quoting 110 CONG. REC. 2582 (1964) (statement of Rep. May)).

is so, how can the claims that “women are,” “women believe” and “women need” be made when such claims are inapplicable or unresponsive to the needs, interests and experiences of Black women?¹⁹⁸

Again and again, white women have invoked their white privilege to gain power over women of color. When this occurs, any solidarity of sisterhood takes a backseat to the way race allows white women to navigate society with more power than other women possess.

There is little comfort to be found in light of these bleak facts, which threaten to undermine the value of amplification as a strategy to challenge bias in society. However, while those debates happened on the House floor, another white Congresswoman argued that she opposed the addition of sex to the Civil Rights Act because she feared that it would cause the bill to fail, arguing that “[i]f I have to wait a few years to end this discrimination against me, [I am willing] if the rank discrimination against Negroes will be finally ended.”¹⁹⁹ In today’s context, the flip side of the many white women voters who cast ballots for Donald Trump are the many more who did not vote for Donald Trump. Some of these women were clearly disaffected and opted not to vote at all. Some voted for Hillary Clinton based on a non-intersectional analysis, motivated not by anti-racist instincts but by other factors. Today, just as during the Civil Rights era, there is no monolithic block of white women, and many white women today will be willing to engage in amplification as a strategy to combat unconscious gender bias and to do so in an expressly anti-racist fashion. Indeed, the challenge that intersectional feminism makes to legal feminism in general is for feminists to advance the struggle of all women without erasing their complex identities.

Complex intersectional feminism therefore may invite a closer consideration of the possibilities of cross-racial coalitions. Just as there is a history of white women invoking white privilege and failing their sisters of color, so too is there a history of cross-racial feminist acts of solidarity, which has been documented during abolition, suffrage, and the labor rights movement.²⁰⁰ One interesting account comes from Midge Wilson and Kathy Russell’s monograph Divided Sisters: Bridging the Gap Between Black Women and White Women. While their book discusses quotidian interactions between women of different races, its most compelling passage focuses on the Civil Rights Movement, in which black and white women worked together to

198. Crenshaw, *supra* note 60, at 154 (emphasis omitted). See *id.* at 144–45 and 151–52 for more elaboration of this argument.

199. COBBLE ET AL., *supra* note 32, at 57–58.

200. CHANDLER & JONES, *supra* note 163.

advance the cause of civil rights for black people. They describe the experience as eye-opening for white women, who “experienced a revelation about the potential strength and toughness of women.”²⁰¹ They were exposed to powerful black female activists and “became aware of the courage of the often uneducated, completely impoverished Black women living in the most remote areas of the rural South.”²⁰² Yet there were tensions for sure—when the Southern Nonviolence Coordinating Committee finally put white women on the front lines of voter registration efforts during the Freedom Rides, it drew national attention and caused a rift between black and white women, since black women had long been taking risks in the name of the struggle.²⁰³ As the civil rights movement gave way to the early days of the women’s rights movement, black women resented white women’s invocation of slavery to describe their domestic condition and found absurd the focus on consciousness-raising, ridiculing the failure of white women to have previously grasped a political analysis of their subordination.²⁰⁴ This example of cross-racial coalition building among women reveals that it remains possible, if imperfect, as a means of advancing shared goals.

Furthermore, to assume that amplification will engage all women identically is similarly erroneous due to other aspects of racism in the United States. Although white women’s social roles have been defined by a historical assumption of passivity that invites a greater degree of activism through strategies like amplification, such work can only be advanced while bearing witness to the racialized aspects of the construction of femininity. As Kimberlé Crenshaw noted in the earliest wave of intersectional feminist writing, only white women have been culturally associated with the presumption of gendered passivity.²⁰⁵ Black women, in contrast, have long struggled against cultural tropes of anger and aggression, as Trina Jones and Kimberly Jade Norwood have

201. MIDGE WILSON & KATHY RUSSELL, *DIVIDED SISTERS: BRIDGING THE GAP BETWEEN BLACK WOMEN AND WHITE WOMEN* 190 (1997).

202. One white woman activist described her experience of working with black female activists as “[f]or the first time [having] role models [she] could really respect.” *Id.*

203. *Id.* at 191.

204. *Id.* at 196.

205. Crenshaw, *supra* note 60, at 155 (arguing that while “men and women are taught to see women as dependent, limited in abilities, and passive . . . this ‘observation’ overlooks the anomalies created by crosscurrents of racism and sexism. Black men and women live in a society that creates sex-based norms and expectations which racism operates simultaneously to deny; Black men are not viewed as powerful, nor are Black women seen as passive.”); *see also* WILSON & RUSSELL, *supra* note 201, at 190 (describing white women as “groomed in a tradition of passivity and sweetness” but inspired by black woman activists).

recently considered.²⁰⁶ So whereas white women were understood to be passive victims of sexism, black women were too often framed as agentic beyond the social power they actually bore.²⁰⁷ Against this backdrop, while black women may still be socially marginalized, their acts of resistance bear a different kind of racialized meaning than those of white women. As a result, black women's engagement in amplification may well be riskier than that of white women, since it could reinforce existing stereotypes of black women's femininity.

Yet women of color, including black women, have persevered in their resistance despite these problems. Black women engaged in powerful acts of struggle against slavery, guiding others to freedom²⁰⁸ and engaging in the abolition movement despite substantial criticism for their refusal to conform to social norms.²⁰⁹ In the civil rights movement, while coalitional politics advanced the work of the Freedom Summer, the Student Nonviolent Coordinating Committee made a habit of establishing its first contact in the rural communities of the south with black women known as mamas—who were “willing to catch hell for [their] beliefs” and “could cajole the others in [the] community into taking whatever risks were necessary to register to vote.”²¹⁰ In the labor movement, women of color served as leaders who skillfully negotiated on behalf of all of the women in their unions.²¹¹

This history helps contextualize the risks for women of color who decide to engage in amplification. The lesson for the strategy's advancement is to seek cross-racial coalitions that engage women of color cognizant of these risks, while recognizing such women's agency to determine the best approach for themselves. It may be that in particular instances, when asked to do so, white women need to speak to avoid the deployment of amplification in a way that reinforces racist tropes of black women's stridency. Amplification will only be effective if it can harness cross-racial engagement.

206. Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017, 2045–51 (2017) (arguing that “the trope of the ‘Angry Black Woman’ is innately intersectional” and its “salience . . . comes from the combination of blackness and non-conforming femininity”).

207. Crenshaw, *supra* note 60, at 156–57 n.47 (discussing perceptions of black women as violating traditional sex roles by working and observing that black women during slavery were stereotyped as being “immoral and sexually loose” or “licentious” and “always ready for any sexual encounter” (internal citations omitted)).

208. ROWBOTHAM, *supra* note 26, at 44–45, 48–49.

209. *Id.* at 46–48.

210. WILSON & RUSSELL, *supra* note 201, at 190.

211. CHANDLER & JONES, *supra* note 163, at 50–53 (black women), 61 (immigrant women).

B. On Women's Complicity in the Patriarchy

Since the fight for the Equal Rights Amendment starting in the 1960s, it has been common for a significant swath of women in American society to reject feminism out of hand. During the effort to ratify the Equal Rights Amendment, a strong anti-feminist backlash sprang up to oppose ratification.²¹² Led by Phyllis Schlafly, the founder of STOP ERA, the anti-feminist social movement managed to defeat the Equal Rights Amendment by convincing some states to refuse to ratify the amendment, or even withdraw ratification in the cases of Nebraska and Tennessee.²¹³ Feminist legal scholar Joan C. Williams describes Schlafly as “one of the early architects of class conflict as expressed through culture wars, as a way to stop the progress of the equality ideals of the professional management elite.”²¹⁴ Schlafly masterfully exploited conservative gender bias, maintaining an ardent public stance that law should support women’s performance of their traditional duties as “homemaker, companion[,] and mother, who has a right to protection from the darker side of life”²¹⁵ and fighting against public childcare, even while maintaining her own household with the help of paid in-home childcare workers.²¹⁶

These anti-feminist attitudes among women have not entirely disappeared in the intervening decades. Some women continue to believe that traditional gender roles remain the appropriate ones for women to play in society.²¹⁷ One conservative woman recently summarized her opinions on electing women to the presidency by

212. SUSAN BASSNETT, *FEMINIST EXPERIENCES: THE WOMEN’S MOVEMENT IN FOUR CULTURES* 32 (2013).

213. *Id.*

214. Susan Chira, *Do American Women Still Need an Equal Rights Amendment?*, N.Y. TIMES (Feb. 16, 2019), <https://www.nytimes.com/2019/02/16/sunday-review/women-equal-rights-amendment.html> [<https://perma.cc/7EAV-2VNS>].

215. BASSNETT, *supra* note 212, at 33.

216. Meghan Daum, *Phyllis Schlafly: Back on the Attack*, L.A. TIMES (Mar. 31, 2011, 12:00 AM), <https://www.latimes.com/opinion/la-xpm-2011-mar-31-la-oe-daum-column-schlafly-20110331-story.html> [<https://perma.cc/93Y6-RJ26>] (quoting an interview with Schlafly’s coauthor and niece, who stated that Schlafly “had domestic help.... She wouldn’t have called them nannies, but she had people in her home.”) (ellipsis in original). For an overview of Schlafly’s brand of anti-feminism, see generally PHYLLIS SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* (1977) or PHYLLIS SCHLAFLY & SUZANNE VENKER, *THE FLIPSIDE OF FEMINISM: WHAT CONSERVATIVE WOMEN KNOW — AND MEN CAN’T SAY* (2011).

217. Susan Chira, *Women Don’t Think Alike. Why Do We Think They Do?*, N.Y. TIMES (Oct. 12, 2018), <https://www.nytimes.com/2018/10/12/sunday-review/conservative-women-trump-kavanaugh.html?action=click&module=Opinion&pgtype=Homepage> [<https://perma.cc/W6V5-RSEG>].

observing that “[i]n the Bible it says that a man is responsible for leading his household And a woman’s only supposed to step up if he’s not willing. Aside from that, women are just too emotional. I feel like it would be dangerous to have a woman in a position to potentially start a war.”²¹⁸ As recently as 2011, Schlafly, who died in 2016, was still writing and defending an anti-feminist position that women should not seek equality in a public or formal sense, and instead should embrace distinct gender roles in which they continue to prioritize domestic caretaking functions of homemaking and child-rearing.²¹⁹ Women who embrace this position appear to believe that feminism harms women by removing them from the roles that they should play in their families.²²⁰

Such women may pose a problem for the potential of amplification, as the strategy in theory would offend the sensibilities of women who believe that public employment and education are not appropriate sites for women’s engagement in the world. To suggest that women not only should adopt more public roles, but should do so vocally and act in solidarity to address the sexism they encounter, could undermine this entire belief structure. Of course, Schlafly herself was a bit of a conundrum from this perspective, as she conducted her own push for women to embrace domesticity while playing an unusually vocal and public role.²²¹ Even today, some evangelical women are advancing more public personas, though encountering substantial criticism for doing so.²²² Yet for many conservative women, their rejection of a feminist identity or one that advances women’s rights, and their embrace of a life conducted largely in a private sphere, is connected to a greater personal dedication to identities other than gender.²²³

218. *Id.*

219. *See generally* SCHLAFLY & VENKER, *supra* note 216.

220. *Id.*

221. *See* TRAISTER, *supra* note 90, at 100 (describing Schlafly as having been “rarely pressed too hard on the disingenuousness of her message: as a powerful political woman who traveled the country, she was regularly telling other women that their calling was to stay at home.”).

222. *See, e.g.,* Sarah Pulliam Bailey, *Southern Baptists are Supposed to Talk About Sexual Abuse. But Right Now They’re Discussing Whether One Woman Can Preach.*, WASH. POST (June 9, 2019, 7:00 AM), https://www.washingtonpost.com/religion/2019/06/09/southern-baptists-are-supposed-talk-about-sex-abuse-right-now-theyre-discussing-whether-one-woman-can-preach/?utm_term=.4b4430429483 [https://perma.cc/5GUW-BSCY] (discussing conflict in the Southern Baptist Convention over a woman being allowed to speak at a public Sunday morning church service).

223. Chira, *supra* note 217 (“It depends on which identities — woman, wife, mother, race, political or religious affiliation — are more central for which woman.”); *see also* Michelle Nickerson & Emily S. Johnson, *Women Are Deeply Divided on Brett Kavanaugh. Here’s Why.*, WASH. POST (Sept. 30, 2018, 10:43 PM),

Amplification may not interest some of these women, in part because many of them will not be in the situations of employment where it is most likely to be invoked. But it also may not be of interest to them because amplification as a strategy recognizes and problematizes the existence of a gendered ordering of power relationships in society. More bluntly, amplification is feminist, and women who reject feminism will likely reject amplification as well. This is not a problem about amplification alone, of course, but it reveals the pervasiveness of the patriarchy and some women's decisions to embrace it explicitly, either in part or in full, as the correct ordering of society.

One glimmer of possibility remains, though, that women who would not intentionally don the mantle of feminism will recognize the ways that they suffer under the patriarchy even in sites of traditional gender performance. The family itself presents a possible site for amplification. To be fair, it is not entirely clear how far the strategy can reach within the nuclear family, because there is not a community of women to amplify one another. Extended families might offer an important opening to deploy amplification, however, whereby women of multiple generations could seek to give voice to one another's experiences. Other sites where women who perform traditional gender roles gather might also provide space for embracing amplification, even if they do not call it feminism. For example, social science research documents how even women within religious communities known for traditional gender roles often seek to subvert these expectations by resisting the imposition of gender norms.²²⁴ Women in Southern Baptist Churches, which bar female clergy, are speaking out about sex abuse in

https://www.washingtonpost.com/outlook/2018/10/01/women-are-deeply-divided-brett-kavanaugh-heres-why/?utm_term=.16550e19bb30&wpisrc=nl_everything&wpmm=1 [<https://perma.cc/PZ6S-MF73>] (“[M]any women in America are — and have always been — driven more by political beliefs than sisterly solidarity, a trend not limited to the political right.”).

224. See, e.g., Orit Avishai, “*Doing Religion*” in *a Secular World: Women in Conservative Religions and the Question of Agency*, 22 GENDER & SOC’Y 409 (2008) (rejecting analysis of complicity and instead advancing a theory of religious performance and agency); Orit Avishai, *Theorizing Gender from Religion Cases: Agency, Feminist Activism, and Masculinity*, 77 SOC. RELIGION 261, 265–70 (2016) (reviewing studies of subversion, resistance, and generative agency of religious women); Reid J. Leamaster & Rachel L. Einwoner, “*I’m Not Your Stereotypical Mormon Girl*”: *Mormon Women’s Gendered Resistance*, 60 REV. RELIGIOUS RES. 161 (2018) (analyzing how some Mormon women express agency with the Church of Latter-Day Saints not only within traditional structures but by actively resisting the traditional gender roles of Mormonism); Elizabeth Shively, “*I’m No Donna Reed*” *Postfeminist Rhetoric in Christian At-Home Daughterhood Texts*, 10 GIRLHOOD STUD. 22 (2017) (discussing the embrace of gender role progress but the rejection of feminist politics in conservative Christian communities).

their congregations.²²⁵ That women band together even in these situations suggests that amplification might still prove useful to them.

The nation may also be entering a new era in which conservative women's beliefs about gender may be diverging from those of conservative men in important ways that have real implications for the value of amplification. A recent nonpartisan poll sought to compare data on sexism in society from before and after the Kavanaugh hearings. It reports that while in 2016, thirty-one percent of Republican women and thirty-three percent of Republican men agreed with the statement that "[m]en generally make better political leaders than women," in December 2018, twenty-six percent of Republican men and only eleven percent of Republican women still agreed with the statement.²²⁶ Similarly, while in 2016, sixty-six percent of Republican men and women agreed that "[i]n general men and women make equally good political leaders," in 2018, that figure diverged significantly, with eighty-five percent of Republican women and only seventy percent of Republican men agreeing.²²⁷ While both Republican men and women appear to be experiencing attitudinal shifts towards greater beliefs in gender equality, it is striking how much more quickly Republican women are embracing these ideas. Conservative women may therefore offer a ready body of allies for the advancement of amplification, especially if these trends continue.

C. On the Queen Bee Problem

The possibility that amplification will fail due to the inability of women to form real coalitions of solidarity extends beyond questions of racial identity or the complete refusal to embrace feminism. Another possible critique of amplification, and other approaches that require the creation of movements and engagement through gender-based solidarity, is that competition among women will prevent amplification from ever becoming a social force capable of meaningfully challenging the most insidious aspects of sexism and misogyny as they remain today.

The Queen Bee Syndrome, a term coined in the 1970s, was originally used to describe women in roles of authority who were more critical of female subordinates than male ones.²²⁸ In more recent usage,

225. Bailey, *supra* note 222.

226. PERRY UNDEM, THE IMMEDIATE, SHORT-TERM, AND LONG-TERM EFFECTS OF THE KAVANAUGH HEARINGS ON THE ELECTORATE 73 (Apr. 15, 2019) https://view.publitas.com/perryundem-research-communication/kavanaugh-ford-survey-report_f/page/73 [https://perma.cc/83BZ-FU5V].

227. *Id.*

228. Graham Staines et al., *The Queen Bee Syndrome*, 7 PSYCHOL. TODAY, Jan. 1974, at 55.

following the publication of *Queen Bees and Wannabes* in 2002,²²⁹ the term has been employed more broadly to describe a kind of female-gendered bullying. This mean-girl narrative is of course not limited to the interactions of girls; women are likewise believed to act with competition instead of solidarity. In theory, competition among women can lead to women undermining each other, perceiving that there is only space for one woman in power, and therefore exacerbating the mistreatment of other women to ensure personal power or status.²³⁰

Indeed, amplification relies upon women acting in solidarity with one another, and if that kind of solidarity cannot be activated, amplification will not work. Yet several reasons suggest that this possibility of solidarity is at least somewhat accurate and remains a powerful potential force for undermining contemporary unconscious sexism. First, to problematize competition among women when treating competition as normal when it occurs among men is in itself sexist²³¹ and essentializing.²³² Interpersonal competition is not somehow unique

229. ROSALIND WISEMAN, *QUEEN BEES AND WANNABES* 24–27 (2002); *see also* RACHEL SIMMONS, *ODD GIRL OUT: THE HIDDEN CULTURE OF AGGRESSION IN GIRLS* (2002) (offering a largely anecdotal description of girls bullying other girls).

230. This concept has been humorously captured in a music video entitled *Lady Boss*, which was featured in the comedy show *Crazy Ex-Girlfriend*. In this song, the main character Rebecca Bunch and a chorus of other women musically bemoan the struggles of women in authority, while vignettes from the lives of female managers play out on screen. Taylor, one of Rebecca’s employees, shoves Rebecca, culminating in the following hallway dialogue:

Rebecca: “Seriously, Taylor, what is your problem with me?”

Taylor: “I don’t know, I guess deep down I just think that your success means my failure.”

Rebecca: “Wow, okay, um, let’s talk about that.”

An impromptu group therapy session then ensues in the hallway.

Hillary Busis, *Rachel Bloom’s Brilliant New Song “Ladyboss” Proves That Leaning In Ain’t Easy*, VANITY FAIR (Apr. 20, 2017), <https://www.vanityfair.com/hollywood/2017/04/rachel-bloom-ladyboss-video> [<https://perma.cc/ZX24-HVNM>].

The queen bee issue has also been considered in more scholarly ways. For example, since the original article of Staines et al., numerous studies of competition among women have appeared in the management arena, Sharon Mavin, *Queen Bees, Wannabees and Afraid to Bees: No More ‘Best Enemies’ for Women in Management?*, 19 BRIT. J. MGMT. S75 (2008) and in psychology, Bella Derks et al., *Do Sexist Organizational Cultures Create the Queen Bee?*, 50 BRIT. J. SOC. PSYCHOL. 519 (2011) and Naomi Ellemers et al., *The Underrepresentation of Women in Science: Differential Commitment or the Queen Bee Syndrome?*, 43 BRIT. J. SOC. PSYCHOL. 315 (2004).

231. Mavin, *supra* note 230, at S79.

232. I use the term essentializing to mean embracing the assumption that women are monolithic in character and lack the heterogeneity that men are assumed to possess. KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY*, 963–64 (4th ed. 2006) (describing four distinct meanings of

to women, and in fact research shows that men are on average more competitive than women.²³³ Without regard for gender, people compete with one another for positions of power and prestige, for relationships, or for resources. However, when competition involves two women, patriarchal society pretends that this is somehow inherent in the nature of being female, largely because competition is a social norm violation for women.²³⁴ Some evidence does exist suggesting that women avoid competition with men because it so strongly violates social norms, and instead are more competitive with other women.²³⁵ Male competition, however, is not viewed as casting negative aspersions on their entire gender.²³⁶ More importantly, this is reflective of the fact that male competition is consistent with men's traditional role as public figures who engage in acts of rivalry. In contrast, traditional tropes of femininity frame women as occupying private, nurturing spheres and embodying traits of passivity.²³⁷ Competition among women is therefore categorized as pathological, whereas it is normalized among men. As a result, to treat competition among women as somehow evidence of women's inability to act collectively and strategically only reifies patriarchal assumptions about women's social roles.

Second, the Queen Bee myth of women demonstrating greater competition among themselves than with men has been critiqued. To the extent that there is recent documentation of the Queen Bee phenomenon in the workplace, it has been found to exist in professions that remain largely male-dominated and in which those few women who made it did so by embracing masculine gender performance, thereby leading to an internalized denigration of other more gender normative women.²³⁸ Phrased more bluntly, where queen bees exist, it is due to the coping strategies women have adopted to deal with sexist workplaces that systematically exclude women.²³⁹

the term essentialism); *see also* Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1, 15–17 (1994).

233. SeEun Jung & Radu Vranceanu, *Willingness to Compete: Between- and Within-Gender Comparisons*, 40 MANAGERIAL & DECISION ECON. 321, 321 (2019).

234. Sun Young Lee et al., *Gender Differences in Response to Competition with Same-Gender Coworkers: A Relational Perspective*, 110 J. PERSONALITY & SOC. PSYCHOL. 869, 871 (2016); *see also* Kathrin J. Hanek et al., *Gender and Competitive Preferences: The Role of Competition Size*, 101 J. APPLIED PSYCHOL. 1122, 1123 (2016) (reviewing studies finding that competition violates gender norms for women).

235. *See* Silvia Saccardo et al., *On the Size of the Gender Difference in Competitiveness*, 64 MGMT. SCI. 1541, 1551–52 (2018).

236. Lee et al., *supra* note 234, at 870, 882, 884.

237. Crenshaw, *supra* note 60, at 155 (arguing that passivity is attributed only to white women, not black women).

238. Ellemers et al., *supra* note 230, at 325, 330–32.

239. Derks et al., *supra* note 230, at 520, 530.

Third, this notion of competition among women may be in its decline as more women gain positions in traditionally male-dominated organizations. Women may have competed against one another in especially hostile ways in an era when women played only tokenized roles, as they fought over very small amounts of turf. If there was only space for one woman in an organization, she could not serve as a comrade for other women aspiring to join her.²⁴⁰ Yet the increasing presence of women in workplaces, educational institutions, and social organizations means that there is likely more space for women to occupy, and so to the extent this critique had any historical merit, it may be declining in accuracy. Furthermore, it is increasingly common to observe discussion of what is popularly referred to as shine theory, capturing the idea that the success of surrounding friends and colleagues reflects onto the individual, causing her to shine.²⁴¹ Shine theory is predicated on the assumption that there is enough turf to go around, and that by supporting one another, women can increase the amount of turf that can be allocated to women. Creating systems of mutual support and solidarity will make more resources and opportunities available to women, so competition due to scarcity declines. A highly regarded recent study documented that women who were successful in leadership roles were far more likely to have a robust set of social networks that included an inner circle dominated by other women,²⁴² lending credence to the possibility that as women move into these leadership positions, they are doing so while intentionally abandoning queen bee practices.

Fourth, the historical record is replete with discrete instances of women choosing to act in solidarity with one another, as described above in the context of cross-racial solidarity. The suffrage movement and the women's liberation movement are the most obvious examples of historical moments when women in the United States collaborated to advance collective goals. Indeed, while framing amplification as a distinct strategy of solidarity in light of the current legal moment is a new concept, acts of solidarity are nothing unusual as detailed in Part II.A.²⁴³ Despite fears of competition among women, in an array of historical moments and locations, women have formed coalitions across

240. See *id.* at 520, 522–23, 532 (concluding that male-dominated workplaces and the struggles women undertake to succeed in them create the queen bee).

241. Aminatou Sow and Ann Friedman promulgated the idea of shine theory on their popular podcast *Call Your Girlfriend*. *About Us*, CALL YOUR GIRLFRIEND, <https://www.callyourgirlfriend.com/about> [<https://perma.cc/2B9F-UV8J>]; see also Ann Friedman, *Shine Theory: Why Powerful Women Make the Greatest Friends*, THE CUT (May 31, 2013), <https://www.thecut.com/2013/05/shine-theory-how-to-stop-female-competition.html> [<https://perma.cc/B484-XQ7J>].

242. Yang, *supra* note 167, at 2036–37.

243. See *supra* Part II.A.

different groups to engage in actions designed to empower them collectively.²⁴⁴ There is no logical justification for doubt as to whether it could happen again.

D. On Men's Acts of Amplification

Despite the increasing presence of women in workplaces, educational institutions, and social organizations throughout the United States, the reality is that in some sites, there may still only be a small number of women present, and at times even just a single woman. As I have thus far presented the theory of amplification, it presumes that women will act in concert; but in the absence of women, amplification remains a viable and potent strategy of feminist resistance.

Engagement in amplification is not limited to women because women are not the only possible participants in acts of anti-sexist amplification. People of good conscience, no matter their gender, are capable of responding to sexism with acts of solidarity. Men, in particular, can play a key role in speaking truth to the exercise of gendered power against women throughout society. The fact that there are not enough women present in certain settings shifts an express responsibility onto men to engage in amplification as an act of feminist solidarity. The possibility of bystander intervention invites feminist men to consider amplification as a public responsibility in which they could help disrupt existing gender and power imbalances when women cannot act alone to do so.²⁴⁵

Men also might choose to amplify experiences after the fact, bearing witness to the veracity of women's claims. In the instance of Brett Kavanaugh, while none of his male friends expressly stated that they knew Blasey Ford's story was true, some did state unequivocally that Kavanaugh had spent much of his youth and early adulthood as a heavy drinker who became belligerent when drunk.²⁴⁶ These

244. See, e.g., Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 2001 (1994) (framing the labor movement as a site of feminist social change across class, race, and gender lines); WILSON & RUSSELL, *supra* note 201, at 190–91 (describing solidarity in the Civil Rights Movement).

245. See generally Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975.

246. Erin Schaff, *Chad Ludington's Statement on Kavanaugh's Drinking and Senate Testimony*, N.Y. TIMES (Sept. 30, 2018), <https://www.nytimes.com/2018/09/30/us/politics/chad-ludington-statement-brett-kavanaugh.html> [<https://perma.cc/ST7W-BXGT>] ("For the fact is, at Yale, and I can speak to no other times, Brett was a frequent drinker, and a heavy drinker. I know, because, especially in our first two years of college, I often drank with him. On many occasions I heard Brett slur his words and saw him staggering from alcohol consumption, not all of which was beer."); Mike McIntire & Ben Protess, *At the*

corroborating accounts serve a strong amplification purpose of lending credibility to the statements that women make.

Men furthermore can decry the role they played in creating a society in which women are assaulted and little is done. Men can name the wrongfulness of these experiences in their own social circles, and perhaps most powerfully, to their own sons, attempting to create a new society in which women's full humanity is taken seriously. For example, in his painfully disclosive essay, former reporter Don Palmerine describes attending a party in the 1960s at which he witnessed a rape and participated in a sexual assault.²⁴⁷ He does not stop with his confession, however, instead writing powerfully about his decision to discuss this story with his own teenaged sons as part of a deeper lesson about the importance of consent.²⁴⁸

The possibility of men amplifying women's experiences raises three key problems. First, men have to recognize and problematize misogyny when they encounter it. However, in a society that socializes people to perform sexism, this is difficult. Men and women alike normalize social interactions that reflect deeply gendered allocations of power and privilege and do not label them as sexist in many instances.²⁴⁹ Research documents that men overestimate the degree to which other men support sexism,²⁵⁰ suggesting that men believe sexism to be more acceptable and commonplace than it actually is. For men to amplify women, they must take the initial step of becoming aware of sexist conduct such that they can recognize it when it occurs. Even recognizing sexist behavior is not enough; men must then view sexist conduct as problematic rather than natural or inevitable. For men to reject sexism would require a far more thorough interrogation of

Center of the Kavanaugh Accusations: Heavy Drinking, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/politics/kavanaugh-drinking-yale-high-school.html> [<https://perma.cc/SHJ3-2XSU>] (documenting statements of several friends and acquaintances of Kavanaugh of their knowledge of his heavy drinking).

247. Don Palmerine, *I Watched a Rape. For Five Decades, I Did Nothing*, WASH. POST (Oct. 5, 2018, 9:56 AM), https://www.washingtonpost.com/outlook/i-watched-a-rape-for-five-decades-i-did-nothing/2018/10/05/f28d9cf8-c805-11e8-b2b5-79270f9cce17_story.html?utm_term=.836e36f781dc&wpisrc=nl_everything&wpmm=1 [<https://perma.cc/7PEM-TNJS>].

248. *See id.*

249. Julia C. Becker & Janet K. Swim, *Seeing the Unseen: Attention to Daily Encounters with Sexism as Way to Reduce Sexist Beliefs*, 35 PSYCHOL. WOMEN Q. 227, 228 (2011); *see also* Sarah J. Gervais et al., *Confronting Sexism: The Role of Relationship Orientation and Gender*, 63 SEX ROLES 463, 464 (2010) (documenting that benevolent sexism and subtle forms of sexism are harder for men to see and label as sexism).

250. Christopher Kilmartin et al., *A Real Time Social Norms Intervention to Reduce Male Sexism*, 50 SEX ROLES 264, 264 (2008).

culture than many are willing to conduct, in no small part because it implicates their own conduct or that of others they know personally.

Second, men have to not only see and reject instances of misogyny, but they also have to decide to address it instead of tolerate it. Yet the problem of diffuse responsibility is legendary; the human instinct not to get involved runs deep and is well-documented as a legal matter.²⁵¹ The publicly observed but unreported murder of Kitty Genovese has been the topic of numerous law review articles in the past, many of which attempt to seek approaches that engage more people in the act of intervention.²⁵² Sexism is no different, and scholars have documented men's reluctance to get involved in anti-sexism efforts.²⁵³ The development of a robust practice of bystander intervention as a method of preventing sexual assault likewise reflects a non-legal example of efforts to address diffuse responsibility.²⁵⁴

For men to decide to amplify women's voices in a misogynistic society may well be a challenge because it will threaten their performance of masculinity, which often turns on the denigration of women. That men perform sexism, sexual violence, and the mockery of women to gain status with their male friends is well-documented.²⁵⁵ Indeed, during the Kavanaugh confirmation hearings, several commentators observed that the allegations of sexual assault appeared to be based on conduct performed primarily for the amusement of other men²⁵⁶ and for purposes of male relationship building,²⁵⁷ which Lili

251. See, e.g., Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws*, 40 SANTA CLARA L. REV. 971 (2000).

252. Amelia J. Uelmen, *Crime Spectators and the Tort of Objectification*, 12 U. MASS. L. REV. 68, 83–84 (2017).

253. Elad N. Sherf et al., *It Is Not My Place! Psychological Standing and Men's Voice and Participation in Gender-Parity Initiatives*, 28 ORG. SCI. 193, 194 (2017).

254. Swan, *supra* note 245, at 986–87; see also Amy L. Brown et al., *College Students as Helpful Bystanders Against Sexual Violence: Gender, Race, and Year in College Moderate the Impact of Perceived Peer Norms*, 38 PSYCHOL. WOMEN Q. 350, 351 (2014).

255. A. Ayres Boswell & Joan Z. Spade, *FRATERNITIES AND COLLEGIATE RAPE CULTURE: Why Are Some Fraternities More Dangerous Places for Women?*, 10 GENDER & SOC'Y 133, 138, 141 (1996); Nancy Chi Cantalupo, *Masculinity & Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887, 907–10 (2014) (reviewing literature in an expansive discussion of an idealized masculinity that centralizes sexual conquest and assault).

256. Lili Loofbourow, *Brett Kavanaugh and the Cruelty of Male Bonding: When Being One of the Guys Comes at a Woman's Expense*, SLATE (Sept. 25, 2018, 3:27 PM), <https://slate.com/news-and-politics/2018/09/brett-kavanaugh-allegations-yearbook-male-bonding.html> [<https://perma.cc/L3P2-GHBQ>] (“And yet both the Kavanaugh accusations share certain features: There is no penetrative sex, there are always male onlookers, and, most importantly, there's *laughter*. In each case the other men—not the woman—seem to be Kavanaugh's true intended audience. In each story, the cruel and bizarre act the woman describes—restraining Christine Blasey Ford and

Loofbourow described as a form of “toxic homosociality . . . that involves males wooing other males over the comedy of being cruel to women.”²⁵⁸

Third, to assert that men can engage in amplification might raise the possibility of a sort of feminist chivalry, which violates some of the essential precepts of amplification. Chivalry presupposed both women’s passivity in the face of men’s agency²⁵⁹ and the belief that women beneath the scope of chivalric protection could be abused at will.²⁶⁰ Scholars have documented that this kind of rescue effort is at times undertaken under the auspices of benevolent sexism, a worldview that believes that women deserve to be protected and coddled, and not motivated by a desire to achieve gender equality.²⁶¹ Yet the possibility of a feminist form of bystander intervention has also been posited, in which solidarity, not the drive to rescue powerless women from aggressors, motivates intervention.²⁶²

attempting to remove her clothes in her allegation, and in Deborah Ramirez’s, putting his penis in front of her face—seems to have been done in the clumsy and even manic pursuit of male approval. . . . In other words: The awful things Kavanaugh allegedly did only imperfectly correlate to the familiar frame of sexual desire run amok”) (emphasis in original).

257. Jia Tolentino, *Brett Kavanaugh, Donald Trump, and the Things Men Do for Other Men*, NEW YORKER (Sept. 26, 2018), <https://www.newyorker.com/news/our-columnists/brett-kavanaugh-donald-trump-and-the-things-men-do-for-other-men> [https://perma.cc/HR22-7RCJ] (“Women’s bodies become the tools with which men perform intimacy and solidarity with one another; at least at first glance, women are not potential partners so much as potential means for upholding male self-interest.”).

258. Loofbourow, *supra* note 256.

259. “While foregrounding masculine activity, chivalry reveals itself as an impossible project without the presence of the feminine, and indeed, *only* possible when the feminine is present in a subjugated position.” DORSEY ARMSTRONG, *GENDER AND THE CHIVALRIC COMMUNITY IN MALORY’S MORTE D’ARTHUR* 36 (2003), <http://ufdcimages.uflib.ufl.edu/AA/00/01/16/82/00001/GenderandtheChivalricCommunity.pdf> [https://perma.cc/5YBL-WKTE].

260. Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64, 68–69 (2012) (arguing that chivalric codes were violated when rape occurred against women of high social class whose male protectors had not been vanquished; rape of lower-class women and those women whose male protectors had been defeated was permissible).

261. Swan, *supra* note 245, at 1043 (“[B]ystander intervention often seems to reify the very gender norms that it purports to work against. In fact, the very idea of bystander intervention and “rescue” has gendered connotations. Many bystander intervention programs appeal to traditional masculinity standards, asking men to take on a heroic mantle to intervene to save others. In this way, these programs participate in the expectation that men must meet a standard of ‘manly courage’ in order ‘to adhere to an ideal of manliness.’ Men are ‘expected to prove their manliness through acts of valor,’ of which bystander intervention is one demonstration.”) (quoting John M. Kang, *Does Manly Courage Exist?*, 13 NEV. L.J. 467, 470 (2013)).

262. See generally Benjamin James Drury, *Confronting for the Greater Good: Are Confrontations that Address the Broad Benefits of Prejudice Reduction Taken Seriously?* (2013) (unpublished Ph.D. dissertation, Washington University) (available at

Such actions also require men to acknowledge their own past role in the perpetuation of the patriarchy. In 1992, Senator Cory Booker was a college student at Stanford.²⁶³ He wrote a column for the Stanford student newspaper, in which he undertook a serious, if youthful, analysis of gender and race issues.²⁶⁴ In one column, Booker reflected on his feminist awakening as generated by his work as a peer counselor.²⁶⁵ He both admitted his own prior acts of sexism²⁶⁶ and called for men to engage in opposition to the patriarchy.²⁶⁷ At the same time, Booker suggested that his dawning recognition of the existence of sexism left him with no clear conclusion as a “conclusion would speak of a simplicity I do not feel. I can find little clarity in the torment of emotions I now experience when even allusions to [sexual assault] are made.”²⁶⁸ Booker’s admission in the midst of a call to action reflects a certain humility embedded in the recognition that such changes require both a comeuppance and a reluctance to profess possession of all of the needed answers.²⁶⁹

Despite these problems, amplification by men offers a particularly subversive model of amplification because of the way that it can leverage male privilege to undo the harms of male privilege. Men’s acts

<https://digital.lib.washington.edu/researchworks/handle/1773/22767>
[<https://perma.cc/TZC8-ERRQ>].

263. Isaac Stanley-Becker, *In 1992, Cory Booker Wrote of ‘Groping’ a High School Friend as They ‘Fumbled Upon a Bed’ and Issues a Call for Sexual Respect*, WASH. POST (Sept. 21, 2018, 7:53 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/09/21/in-1992-cory-booker-admitted-to-groping-a-high-school-classmate-and-issued-a-call-for-sexual-respect/> [<https://perma.cc/FNK4-4CYJ>].

264. Katie Keller & Berber Jin, *Presidential Hopeful Cory Booker’s Intimate Daily Columns on Race, Homosexuality and Groping Incident Resurface*, STAN. DAILY (Feb. 1, 2019), <https://www.stanforddaily.com/2019/02/01/presidential-hopeful-cory-bookers-intimate-daily-columns-on-homosexuality-and-groping-incident-resurface/> [<https://perma.cc/CY7J-47SE>].

265. Cory Booker, *So Much for Stealing Second*, STAN. DAILY, Feb. 19, 1992, at 4, <https://stanforddailyarchive.com/cgi-bin/stanford?a=d&d=stanford19920219-01.2.16> [<https://perma.cc/AFY8-52RJ>].

266. *Id.* Booker’s admissions in this article include an act of groping, which has somewhat haunted his political career.

267. *Id.*

268. *Id.*

269. Indeed, Booker mocked himself in acknowledging that he had adopted the zeal of a convert:

Once, during my sophomore year, in response to a slew of my verbiage, a friend of mine chidingly called me a man-hater. In retrospect, my soliloquy titled ‘The Oppressive Nature Of Male Dominated Society And Its Violent Manifestations: Rape, Anorexia, Battered Wives’ may have been a surreptitious attempt to convince her that I was a sensitive man, but more likely I was trying to convince myself that my attitudes had changed.

Id.

of amplification can be particularly valuable in settings where machismo performance is occurring entirely in the absence of women. Yet men's acts of amplification can also occur where women are present, but can serve an additional function beyond women's amplification. When men police other men's masculinity, they can alter the acceptable range of masculine gender performance.²⁷⁰ While women in these settings can give voice to each other, and perhaps can even police the boundaries of social engagement, men possess a powerful ability to police the boundaries of acceptable performance of masculinity.²⁷¹ Research indicates that men who confront perpetrators of gender discrimination are taken more seriously than women who confront perpetrators.²⁷²

I have been the beneficiary of this kind of action. In a faculty meeting earlier in my career, a male colleague of my level of seniority aggressively exaggerated and mocked an argument I had made. A senior male colleague then interjected to both bolster the point I had made and to police the conduct of my critic. While I could have defended my own position, due to the lack of male privilege, I could not have as easily policed his aggressive performance of masculinity. Furthermore, while senior female colleagues could have likewise amplified my voice, for them to do so would not serve the same function of correcting and policing the acceptable range of masculinity performance.

Men's acts of amplification may come at a cost, especially within a sexist society that reifies machismo. Following a recent outcry at Swarthmore College about the role of fraternities in perpetuating sexual violence on campus, Swarthmore's only two fraternities decided to voluntarily disband.²⁷³ One of these fraternities, writing on its Facebook

270. Cantalupo, *supra* note 255, at 985 (discussing tactics of an organization called "Men Can Stop Rape" to advance new modes of masculine gender performance); Anna Carline et al., *Too Drunk to Consent? Exploring the Contestations and Disruptions in Male-Focused Sexual Violence Prevention Interventions*, 27 SOC. & L. STUD. 299, 313–14 (2018) (arguing for interventions that open space for contesting and disrupting conventional forms of masculinity). See generally Nancy E. Dowd, Nancy Levit, & Ann C. McGinley, *Theorizing Multidimensional Masculinities: Feminist Legal Theory Meets Masculinities Theory*, in MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH (Frank Rudy Cooper & Ann C. McGinley eds., 2011).

271. Cantalupo, *supra* note 255, at 906–07.

272. Drury, *supra* note 262, at 61–62, 94 (documenting that men and white people may be more effective in responding to perpetrators of discrimination because they have the credibility of in-group status, but that evidence is mixed whether targets of discrimination who employ a "greater good" strategy instead of speaking on their own behalf are as effective as in-group allies in confrontations).

273. Julie Turkowitz, *Swarthmore Fraternities Disband After Uproar Over 'Rape Attic' Documents*, N.Y. TIMES (May 1, 2019), <https://www.nytimes.com/2019/05/01/us/swarthmore-fraternities-rape-attic.html> [https://perma.cc/79M8-DN4L].

page, described the situation as follows: “We were appalled and disgusted by the content of [written records of discussions of assault in our fraternity house], which led us to question our affiliation with an organization whose former members could write such heinous statements. We cannot in good conscience be members of an organization with such a painful history.”²⁷⁴ Yet this decision cost them part of their social life and likely a significant aspect of their campus identity. Men who amplify may well find themselves violating social norms and sacrificing portions of their lives in order to oppose sexism. But to do so is a powerful contribution to the movement to end discrimination against women, including acts of violence.

When men speak out to denounce sexism where they see it, their acts represent a particular use of power to address hierarchy. Yes, it involves the use of male privilege, but in service of the disruption of male privilege’s perpetuation. In workplaces or educational institutions, men can choose to disrupt gendered dynamics in which women’s ideas are co-opted, women are interrupted, or women are kept out of the room entirely. Research suggests that when men learn that other men embrace social norms rejecting sexism, they are more likely to reduce their own sexist attitudes.²⁷⁵ These possibilities suggest that men may make powerful amplifiers, especially when doing so serves as a public corrective to toleration of sexism.

AFTERWORD

The #MeToo moment in American feminism casts this project through an important lens. It reveals just how common it is that gendered social power masquerades as sex, and how frequently women struggle in their workplaces to be employed subjects instead of sexualized objects. It suggests that acts of misogynistic oppression are far more omnipresent than many people previously understood. It demonstrates that women’s lack of power renders them vulnerable to men who hold power. It highlights that while one woman speaking up alone might be overlooked, multiple voices together are potentially influential, which is the entire point of amplification as a feminist strategy.

Yet this moment can be misjudged as limiting the value of amplification. While even post-#MeToo, the purpose of amplification remains the same—giving force to the voices of other women, rendering their narratives credible, and validating their lived experiences—it might suggest that amplification is only valuable when problems of harassment, violence, or assault arise. One might misread

274. *Id.*

275. Kilmartin et al., *supra* note 250, at 263, 271–72.

this moment to narrow the scope of amplification as only valuable where egregious acts are perpetuated.

Ending acts of bodily assault and sexual harassment against women clearly matters. Yet to understand the #MeToo moment as being purely about physical sexual assault and harassment misses the point. It provides too modest and narrow of a framework for grasping the import of the possibilities when women throughout society stop accepting the condition of patriarchal oppression and start banding together to demand change. For every physical assault on women, dozens of lower-level acts of sexism pervade women's daily lives. Women are trivialized and judged, denied opportunities, penalized for their gender, and discriminated against in countless ways that do not involve physical assault or harassment. These microaggressions harm those who experience them in countless ways. But the deployment of amplification in the Obama administration offers the tantalizing possibility that when women collectively speak up about these experiences, they will be believed. If this is the case with regard to actual violence and physical harassment, it may also be possible in workplaces, social organizations, and extended families, where women can jointly articulate an experience and demand response. The #MeToo movement, then, highlights that amplification is a powerful antidote to the ways that law fails to solve the experience of sexism in women's contemporary lives.

Amplification also may represent an unusually flexible tool in the struggle against sexism. It can be deployed situationally, immediately, and unpredictably. Because it is so rapid to use, it can respond beautifully to the lethargic pace of law, offering a needed corrective for the failure of law to rapidly resolve gender-based discrimination. Used consistently, amplification may be able to create conscious space in which law could ultimately evolve to address unconscious bias. Women's record-breaking levels of participation in the 2018 midterm elections—both as candidates and as voters—suggests that women have not given up entirely on law. Rather, a consequence of widespread amplification seems to be that women have been driven into politics with a goal of reforming some of the underlying, structural problems that limit law's effectiveness.

Amplification's value might even be broader than this. If the kind of cross-identity activism of amplification develops as I suggest in Part IV, in which women of all racial groups act in solidarity and feminist men join in as well, amplification may provide a strategy that can be used to respond not only to sexism in the public sphere, but to all of the forms of bias that evade legal recognition. Ideally the women who have embraced amplification, like those in the Obama administration, will extend an invitation across identity categories to others who are also easily excluded or victimized. Amplification then can ideally serve as a

form of public creation of accountability, in which more than a majority of people decide they are no longer going to tolerate the kinds of bias that remain despite years of advances in civil rights. Instead, this strategy invites a new world in which people who have historically occupied the margins seize a form of collective power to work together towards the eradication of discrimination.