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## HEARING WOMEN: FROM PROFESSOR HILL TO DR. FORD

Stephanie M. Wildman\*

Abraham Lincoln at Gettysburg said, in words that resonate today (and not just because of his gendered language choices):

Four score and seven years ago our fathers brought forth, upon this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived, and so dedicated, can long endure.<sup>1</sup>

Those words apply today – not to a physical battle pitting north against south – but to the struggle for the soul of this democratic nation, where a large number of people seem unconcerned that democracy can slip away. Benjamin Franklin recognized that fragility when a lady asked him as he left the Constitutional Convention, “What have you given us, Mr. Franklin, a monarchy or a republic?” He replied, “A republic, Madam, if you can keep it!”<sup>2</sup>

\*© Copyright 2018 Stephanie M. Wildman. The author prepared an earlier version of these remarks to deliver at the Scholar Commons Gala, Oct. 25, 2018 at Santa Clara University, a celebration of open-source publishing, where she commented: “The novelist Jorge Luis Borges said, ‘I have always imagined that paradise will be a kind of library.’ Juxtaposing that learned vision of paradise with the current state of national affairs seems so jarring and far afield from that paradise or any other. The country seems to learn of a new trauma every day.” That talk inspired this paper; thank you to Shannon Kealy, the event organizer. Thank you to Sylvia A. Law for a lifetime of encouragement and friendship as well as for thoughtful comments on this paper. Special thanks to Anna Rivard for superlative research assistance and editorial comment and to Margaret Russell, Ellen Platt, and Lisa Kloppenberg for facilitating this essay.

<sup>1</sup> Abraham Lincoln, President, *The Gettysburg Address* (Nov. 19, 1863) (transcript available in the Library of Congress).

<sup>2</sup> See Richard R. Beeman, *Perspectives on the Constitution: A Republic if You Can Keep It*, NAT'L CONST. CTR., <https://constitutioncenter.org/learn/educational-resources/historical->

One of the recent traumas, another skirmish in today's civilian conflict over what kind of society America will be, arose from Dr. Christine Blasey Ford's testimony about sexual assault she had endured.<sup>3</sup> Her composed, measured statement during the now-Justice Brett Kavanaugh confirmation hearing exemplified bravery in the face of adversity.<sup>4</sup> The Senate and the nation's response to her testimony underscored the high stakes in the ongoing ideological conflict, beyond the obvious prize of a Supreme Court seat.<sup>5</sup> Constituents in the current ideological battle had differing reactions to Ford's testimony and to this hearing, reflecting a range of views about a number of topics, including civility, sexual assault, and the criminal justice system.<sup>6</sup>

In addition to these concerns, the specter of race, America's persistent issue,<sup>7</sup> hovered above the proceedings, the unspoken ghost in the room.<sup>8</sup> Race pervaded the Ford-Kavanaugh hearings in ways different from its presence when Professor Anita Hill testified at the Justice Clarence Thomas confirmation proceedings.<sup>9</sup> Race remains present even when ignored.<sup>10</sup> For Professor Hill, Justice Thomas highlighted his race as a black

documents/perspectives-on-the-constitution-a-republic-if-you-can-keep-it (last visited Dec. 22, 2018).

<sup>3</sup> See *Full transcript: Christine Blasey Ford's opening statement to the Senate Judiciary Committee*, POLITICO (Sept. 26, 2018, 6:22 PM), <https://www.politico.com/story/2018/09/26/christine-blasey-ford-opening-statement-senate-845080>.

<sup>4</sup> *Id.*

<sup>5</sup> See *How Americans Across the Country Are Reacting to Christine Blasey Ford's Testimony*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/us/dr-ford-kavanaugh-reaction.html>.

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

<sup>7</sup> W. E. B. Du Bois, *The Souls of Black Folk* 7 (1903) ("The problem of the twentieth century is the problem of the color line,—the relation of the darker to the lighter races of men . . .").

<sup>8</sup> See Stephanie M. Wildman with contributions by Margalynne J. Armstrong, Adrienne D. Davis & Trina Grillo, *Privilege Revealed: How Invisible Preference Undermines America* 44 (1996) (commenting on the erasure of Anita Hill's race, allowing "racism to act as a phantom once again") [hereinafter "*Privilege Revealed*"]. See also Patricia J. Williams, *The Alchemy of Race and Rights* 49 (1991).

<sup>9</sup> See Chaya Crowder, *From Race to #MeToo, What's Changed Between Anita Hill and Christine Blasey Ford — and What Hasn't?*, WASH. POST (Sept. 28, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/28/from-race-to-metoo-whats-changed-between-anita-hill-and-christine-blasey-ford-and-what-hasnt/?utm\\_term=.1e3f8acd424a](https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/28/from-race-to-metoo-whats-changed-between-anita-hill-and-christine-blasey-ford-and-what-hasnt/?utm_term=.1e3f8acd424a).

<sup>10</sup> See *id.*

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man, in essence “deracing” Professor Hill.<sup>11</sup> Justice Kavanaugh, in contrast, exercised white racial privilege by conducting himself in a manner unthinkable for a Black man.<sup>12</sup> This essay contrasts those two events and concludes with lessons to be learned from the ordeals of Dr. Ford and Professor Hill.

Senator Charles Grassley opened the recent proceedings with an apology to Dr. Ford and then Judge Kavanaugh for the treatment they had received prior to the hearing, including death threats in Dr. Ford’s case.<sup>13</sup> Grassley made a plea for civility.<sup>14</sup> The veneer of the Senate hearing setting and protocol met a social norm for decorum. Dr. Ford was particularly solicitous of her examiners while Senators or the special prosecutor questioned her, making sure she could be heard by them and even demurring about her own breaks in order not to disrupt proceedings.<sup>15</sup> She epitomized civility. In contrast, Justice Kavanaugh, in his testimony, exhibited intense anger toward the proceedings and many individuals.<sup>16</sup> Memorably, he engaged in an interchange with Senator Amy Klobuchar that was so disrespectful that he returned from a break and apologized for his outburst.<sup>17</sup> Senator Klobuchar

<sup>11</sup> See 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>. See also PRIVILEGE REVEALED, *supra* note 8, at 43-44.

<sup>12</sup> See Paul Krugman, *The Angry White Male Caucus*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/opinion/kavanaugh-white-male-privilege.html>.

<sup>13</sup> See Melissa Quinn, *Chuck Grassley Apologizes to Brett Kavanaugh and Accuser, Makes Plea for Civility During Hearing*, WASH. EXAMINER (Sept. 27, 2018, 10:33 AM), <https://www.washingtonexaminer.com/news/chuck-grassley-apologizes-to-kavanaugh-and-blasey-ford-makes-plea-for-civility-during-hearing>.

<sup>14</sup> See *id.*

<sup>15</sup> See Peter Baker, *In Emotional Hearing, Kavanaugh and Blasey Present Senators with Stark Choice; News Analysis*, N.Y. TIMES (Sept. 27, 2018, 7:08 PM), <https://www.nytimes.com/2018/09/27/us/politics/dr-blasey-ford-testimony-kavanaugh.html?module=inline> (commenting that Dr. Ford asked for nothing during the trial except “a chance to speak and some caffeine” before declining an offer for a break). See also Marisa Schultz, Gabrielle Fonrouge & Ruth Brown, *Cory Booker Swiftly Brings Coffee to Ford During Hearing*, N.Y. POST, <https://nypost.com/2018/09/27/cory-booker-swiftly-brings-coffee-to-ford-during-hearing/> (last updated Sept. 27, 2018, 1:11 PM).

<sup>16</sup> See Peter Baker, *She Said. Then He Said. Now What Will Senators Say?*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/us/politics/dr-blasey-ford-testimony-kavanaugh.html>.

<sup>17</sup> See Peter Baker & Nicholas Fandos, *Show How you Feel, Kavanaugh was Told, and a Nomination was Saved*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/kavanaugh-vote-confirmation-process.html> (discussing Justice Kavanaugh’s calmer demeanor and apology to Senator Klobuchar following a break).

had been questioning him about whether he had suffered memory loss from alcohol consumption.<sup>18</sup> He had said, “You’re asking about blackout, I don’t know, have you?”<sup>19</sup> Even Justice Kavanaugh apparently recognized that this hostile exhibition, “answering” a Senator’s question with a sarcastic question of his own, stepped over a line.<sup>20</sup>

The concept of civility in public discourse has become politicized, just like everything else during this conflict for the nation’s soul. Perhaps, however, rather than politicization at work, what these hearings have made visible is the imbalanced opportunity that segments of the populace, situated differently, have in relation even to civility. Oppressed groups and individuals face discrimination and hostility that their more privileged counterparts do not. Asking someone to remain civil in the face of violent oppression poses an unreasonable request. Calls made for civility by more powerful elites faced with protestors hearken back to Dr. Martin Luther King’s Letter from Birmingham Jail, where he explained why confrontation was necessary to combat the incivility of discrimination.<sup>21</sup> Civility might be better served if society demanded politeness, a form of caring, from those with more power in any given situation.

Differing views toward sexual assault also emerged as commentators asked why Dr. Ford had not reported the alleged crime earlier.<sup>22</sup> Many news reports and articles surfaced in response to the hearings, explaining why survivors of attacks might not come forward. Some survivors said they had never come forward precisely to avoid the traumatization that occurred in

<sup>18</sup> See Dan Merica, *Kavanaugh Gets Combative with Democratic Senator Over Questions About Drinking*, CNN, <https://www.cnn.com/2018/09/27/politics/kavanaugh-klobuchar-questions-about-drinking/index.html> (last updated Sept. 27, 2018, 9:18 PM).

<sup>19</sup> *Id.*

<sup>20</sup> Many noticed his injudicious comportment, generating an unprecedented letter from law professors noting his lack of judicial temperament and urging a no vote on his confirmation. *The Senate Should Not Confirm Kavanaugh*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/interactive/2018/10/03/opinion/kavanaugh-law-professors-letter.html>.

<sup>21</sup> Martin Luther King, Jr., *Letter from a Birmingham Jail*, LIBERATION: AN INDEPENDENT MONTHLY, June 1963, at 10.

<sup>22</sup> See Jaweed Kaleem, *Trump Asked Why Kavanaugh’s Accuser Didn’t Report Him at the Time. History Provides Some Answers*, L.A. TIMES (Sept. 22, 2018, 12:20 PM), <https://www.latimes.com/nation/la-na-ford-kavanaugh-police-2018-story.html>.

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plain view as Dr. Ford testified.<sup>23</sup> These hearings retriggered trauma for survivors.<sup>24</sup>

The hearings also showcased strikingly different attitudes toward the American criminal justice system. Many observers defending Justice Kavanaugh urged that a grown man should not be judged harshly based on his behavior as a youth, even if part of the story were true.<sup>25</sup> This attitude toward the criminal justice system highlights one racialized aspect of the hearings. Black and Latino youth find themselves in a school to prison pipeline,<sup>26</sup> beginning with minor offenses or school suspensions. Even these minor offenses tarnish their adult records, making educational attainment and job advancement impossible.<sup>27</sup> Where are their defenders, saying these men should not be judged by the misdemeanors perpetrated in their youth? Society judges youthful indiscretion through a lens of race, with harsher penalties to black and brown children.<sup>28</sup> Imagine Justice Kavanaugh as a Black youth.

These topics, civility, sexual assault, and the criminal justice system, share a common thread mirroring the role of race in society. Because Dr. Ford and Justice Kavanaugh are both white,

<sup>23</sup> See *id.*; Eileen McClure Nelson, *I Know why Christine Blasey Ford Didn't Come Forward Earlier. I Didn't, Either.*, WASH. POST (Sept. 21, 2018), [https://www.washingtonpost.com/outlook/i-know-why-christine-blasey-ford-didnt-come-forward-earlier-i-didnt-either/2018/09/21/4f9921ea-bd0e-11e8-b7d2-0773aa1e33da\\_story.html?utm\\_term=.3ceff80fd684](https://www.washingtonpost.com/outlook/i-know-why-christine-blasey-ford-didnt-come-forward-earlier-i-didnt-either/2018/09/21/4f9921ea-bd0e-11e8-b7d2-0773aa1e33da_story.html?utm_term=.3ceff80fd684).

<sup>24</sup> Deborah Bloom, *Sexual Assault Victims Are Reliving Their Trauma, Triggered by Kavanaugh Hearing*, WASH. POST (Sept. 28, 2018), [https://www.washingtonpost.com/health/2018/09/28/sexual-assault-victims-are-reliving-their-trauma-triggered-by-kavanaugh-hearing/?utm\\_term=.df39ecea30f](https://www.washingtonpost.com/health/2018/09/28/sexual-assault-victims-are-reliving-their-trauma-triggered-by-kavanaugh-hearing/?utm_term=.df39ecea30f) (accounts of women who suffered flashbacks, anxiety, and other symptoms after being reminded of their own assaults). The Rape, Abuse & Incent National Network reported a 201% increase in calls during the hearing. *See id.*

<sup>25</sup> See Kate Kelly & David Enrich, *Kavanaugh's Yearbook Page Is Horrible, Hurtful to a Woman it Named*, N.Y. TIMES (Sept. 24, 2018), <https://www.nytimes.com/2018/09/24/business/brett-kavanaugh-yearbook-renate.html>.

<sup>26</sup> Anna Deavere Smith, *Notes from the Field*, ANNA DEAVERE SMITH, <http://www.annadeaveresmith.org/category/notes-from-the-field> (last visited March 4, 2019) ("Poor black, brown and Native American children are suspended and expelled more frequently than their middle-class counterparts, and that these suspensions are directly linked to the likelihood that they will be incarcerated at some point in their lives.").

<sup>27</sup> Catherine Y. Kim et al., *The School-to-Prison Pipeline: Structuring Legal Reform* 113 (2010) (explaining that improper school arrests nearly double the chance of students dropping out of school and future interaction with criminal justice system, lower standardized test scores, and negatively affect future employment opportunities).

<sup>28</sup> Smith, *supra* note 26.

commentators on the hearings rarely mentioned race.<sup>29</sup> Did white race give Justice Kavanaugh a pass on his uncivil and injudicious behavior? Did Dr. Ford's white race help convince Senators and media to believe that indeed she had been assaulted by someone? Did race again play a role in Senators' and others' willingness to overlook Justice Kavanaugh's behavior as a youth? Across civility, sexual assault, and views on the criminal justice system, race once again proves to be "a great wound" in the image of democracy.<sup>30</sup>

In 1991, another confirmation hearing for now Justice Clarence Thomas, in which Professor Anita Hill testified about sexual harassment she had endured, split the nation.<sup>31</sup> Provost Adrienne Davis and I published an article reacting to Professor Anita Hill's brave testimony during those hearings and the divided ideological state of the national response.<sup>32</sup> That article remains relevant today; this essay reflects on those two events. In both cases, the hearings mesmerized the country.

For Professor Hill, the hearings and their aftermath could be encapsulated in a debate over who told the truth.<sup>33</sup> This debate continued after the hearings, even becoming the subject of a television sit-com in an episode of *Designing Women*.<sup>34</sup> But issues of truth aside, at least one Senator dismissed Professor Hill's

<sup>29</sup> See generally Amanda Klonsky, *What Brett Kavanaugh Can Teach Us About Racism in America's Legal System*, CHIC. SUN TIMES (Oct. 4, 2018, 3:02 PM), <https://chicago.suntimes.com/opinion/brett-kavanaugh-racism-criminal-justice-senate/>; Krugman, *supra* note 12.

<sup>30</sup> James Wood, *Tocqueville in America: The Grand Journey, Retraced and Reimagined*, NEW YORKER (May 17, 2010), <https://www.newyorker.com/magazine/2010/05/17/tocqueville-in-america> ("And nothing is subjected to angrier analysis in "Democracy in America" than those two great wounds in nineteenth-century American society: the institution of slavery and the steady eviction and extermination of the Indian tribes."). See also Sally Gershman, *Alexis de Tocqueville and Slavery*, 9 (No. 3) FRENCH HIST. STUD. 467, 471 (1976) (examining Tocqueville's focus on slavery; pointing to question Tocqueville raised to John Q. Adams: "Do you look upon slavery as the great affliction of the United States?").

<sup>31</sup> Julia Jacobs, *Anita Hill's Testimony and Other Key Moments from the Clarence Thomas Hearings*, N.Y. TIMES (Sep. 20, 2018), <https://www.nytimes.com/2018/09/20/us/politics/anita-hill-testimony-clarence-thomas.html>.

<sup>32</sup> See generally Stephanie M. Wildman & Adrienne D. Davis, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. CAL. L. REV. 1367 (1992).

<sup>33</sup> See Jane Mayer & Jill Abramson, *Strange Justice: The Selling of Clarence Thomas* (Graymalkin Media eds., 1994).

<sup>34</sup> See Patricia A. Sullivan & Steven R. Goldzwig, *Women's Reality and the Untold Story: Designing Women and the Revisioning of the Thomas/Hill Hearings* 230 (Paul Siegel eds., 1996) (reviewing the episode and critiquing the message) (ebook).



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allegation of sexual harassment as trivial, stating she would experience “real harassment” during the hearing.<sup>35</sup> One senator’s wife, who called Senators before the confirmation vote, was shocked to learn that the Senators on the committee knew about the sexual harassment before the hearing, but that knowledge did not trouble them or affect their vote.<sup>36</sup> Most disturbing was the erasure of Professor Hill as a black woman, as Justice Thomas claimed blackness by charging the proceedings amounted to a high-tech lynching.<sup>37</sup> In essence, he turned sexual harassment into a white woman’s issue. Ironically, it has been black women who have been at the forefront of combatting sexual harassment in court cases, most notably Michelle Vinson, in the landmark case declaring that Title VII of the Civil Rights Act forbade sexual harassment as an illegal form of discrimination in employment.<sup>38</sup>

Dr. Ford did not face the same incredulity to her story that Professor Hill had faced. At least the Democrats on the Senate Judiciary Committee seemed to believe her,<sup>39</sup> and even Fox News conceded that she had been credible.<sup>40</sup> In order to circumvent a

<sup>35</sup> *Comments by Senators on Thomas Nomination*, N.Y. TIMES, Oct. 10, 1991, at 14 (quoting Senator Alan Simpson: “[Hill] will be injured and destroyed and belittled and hounded and harassed, real harassment, different from the sexual kind.”).

<sup>36</sup> See *Privilege Revealed*, *supra* note 8, at 69.

<sup>37</sup> See *id.* at 76 (“[Hill] became a part of the white racist conspiracy that Thomas asserted was after him.”).

<sup>38</sup> See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 57 (1986). See also Adrienne D. Davis, *Slavery and the Roots of Sexual Harassment in Extensions*, in DIRECTIONS IN SEXUAL HARASSMENT 457, 470 (Catherine MacKinnon & Reva B. Siegel, eds., Yale U. Press 2012) (discussing African American women’s significant impact on the development of early sexual harassment law and policy, specifically examining Vinson’s case); Tanya Katerí Hernández, “What Not to Wear”—Race and Unwelcomeness in Sexual Harassment Law: *The Story of Meritor Savings Bank v. Vinson*, in WOMEN AND THE LAW STORIES 277, 278 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011).

<sup>39</sup> See *Kavanaugh Hearing: Transcript*, WASH. POST (Sept. 27, 2018), [https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?noredirect=on&utm\\_term=.e3d2edc983e8](https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?noredirect=on&utm_term=.e3d2edc983e8). Two Democratic committee members told Dr. Ford during the hearing that they believed her, according to the hearing transcript. See *id.* Blumenthal said “I want to join in thanking you for being here today. And just tell you I have found your testimony powerful, incredible and I believe you.” *Id.* Committee member Harris said “[t]hat’s extremely persuasive about your motivation for coming forward. And so I want to thank you, I want to thank you for your courage and I want to tell you I believe you. I believe you.” *Id.*

<sup>40</sup> See Britt Peterson, *Why Senators Claim to Believe Ford—But Still Side with Kavanaugh*, WASH. POST (Sept. 28, 2018), [https://www.washingtonpost.com/outlook/why-senators-believe-ford—but-still-side-with-kavanaugh/2018/09/28/b0d9c68e-c27d-11e8-b338-a3289f6cb742\\_story.html?utm\\_term=.0b318c54074f](https://www.washingtonpost.com/outlook/why-senators-believe-ford—but-still-side-with-kavanaugh/2018/09/28/b0d9c68e-c27d-11e8-b338-a3289f6cb742_story.html?utm_term=.0b318c54074f). During the afternoon of the hearing, Sen. John Cornyn (R-Tex.) told reporters, “I found no reason to find [Ford] not credible.” *Id.* Looking back at the hearing, a New York Times reporter recalled that “even



visual of a panel of men questioning Dr. Ford directly and to sidestep any charges of bullying, the Republican committee members tried to change the optics of the hearing.<sup>41</sup> To accomplish that goal, they asked Rachel Mitchell,<sup>42</sup> a career prosecutor with a background in sexual assault cases, to conduct the examination.<sup>43</sup> But the hearing still evidenced a gender and racialized imbalance about conduct and credibility.<sup>44</sup> Justice Kavanaugh could have a temper tantrum and still be regarded as a credible witness. But to earn this same mantle of credibility during her own testimony Dr. Ford had to remain completely composed. While acknowledging Dr. Ford's credibility, Senators expressed outrage at what they perceived as an ordeal that Justice Kavanaugh and his family faced.<sup>45</sup> In short, Justice Kavanaugh exhibited a white, male, power complaint, as he cast himself as a victim and thus free to rant away.

In the two transfixing political moments, represented by these hearings, patriotic women subjected themselves to national scrutiny, putting their sense of duty before their personal comfort.<sup>46</sup> But the same result, confirmation of the men accused ensued, giving a message to women that we do not really matter

Republicans were calling Ford "credible" in a way that, for a moment, felt like a real sea change." Kavanaugh, Kanye, Beyoncé, 'Black Panther': Washington on Pop Culture in 2018, *N.Y. TIMES* (Dec. 31, 2018), <https://www.nytimes.com/2018/12/30/arts/kavanaugh-kanye-beyonce-washington-pop-culture.html>.

<sup>41</sup> See Britt Peterson, *Why Senators Claim to Believe Ford—But Still Side with Kavanaugh*, *WASH. POST* (Sept. 28, 2018).

<sup>42</sup> See Matt Stevens, *What We Know About Rachel Mitchell, The Prosecutor Who Questioned Christine Blasey Ford*, *N.Y. TIMES* (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/rachel-mitchell-bio-facts.html?module=inline> (Dr. Blasey [Ford] requested to be questioned directly by the senators instead of by a lawyer; Senator McConnell referred to Ms. Mitchell, the questioner, as a "female assistant").

<sup>43</sup> See *id.*

<sup>44</sup> See Doreen St. Félix, *The Ford-Kavanaugh Hearing Will be Remembered as A Grotesque Display of Patriarchal Resentment*, *NEW YORKER*, (Sept. 27, 2018) <https://www.newyorker.com/culture/cultural-comment/the-ford-kavanaugh-hearings-will-be-remembered-for-their-grotesque-display-of-patriarchal-resentment>.

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

<sup>46</sup> Russell Berman, *Brett Kavanaugh: This Conformation Process Has Become A National Disgrace*, *ATLANTIC*, (Sept. 27, 2018) <https://www.theatlantic.com/politics/archive/2018/09/christine-blasey-ford-brett-kavanaugh-testify-senate/571489/> ("I'm here today not because I want to be . . . I am here because I believe it is my civic duty to tell you what happened to me. . .").

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in this society.<sup>47</sup> What can we learn from bearing witness to their experiences?

This essay focuses on three lessons from these hearings and their aftermath:

First, “Ask the Other Question.”<sup>48</sup> “Ask the Other Question,” a technique proposed by Professor Mari Matsuda, pulls back the curtain of obfuscation and reveals underlying systems of oppression that intersect to maintain the status quo.

Second, Commit to “Make Trouble.”<sup>49</sup> “Make Trouble” in whatever way you can, within your own boundaries of comfort.

Third, “Vote, Vote, Vote.”

### I. “ASK THE OTHER QUESTION.”

The reminder to “ask the other question” reveals intersecting systemic oppression. The idea of intersectionality began in the work of Professor Kimberlé Crenshaw, who originally envisioned a two-dimensional intersection, using the example of roads meeting.<sup>50</sup> Her work focused on the intersection of race and gender, highlighting the idea that the oppression of women of color was not gender plus race or race plus gender, but rather arose from the intersection of those categories.<sup>51</sup> Following Crenshaw, a number of theorists, including myself, pictured the intersection as three-dimensional.<sup>52</sup>

<sup>47</sup> See Laura McGann, *Donald Trump Finally Just Said it: He Doesn't Care if Kavanaugh's Accuser is Telling the Truth*, VOX (Oct. 14, 2018, 9:07 PM) <https://www.vox.com/2018/10/14/17976620/donald-trump-ford-lesley-stahl-60-minutes-kavanaugh-accuser>.

<sup>48</sup> Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991).

<sup>49</sup> Thanks to Professor Angela Riley for articulating this principle in the context of advice she gives to her students on their last day of class.

<sup>50</sup> See 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, 149 (analogizing intersectionality with a four-way intersection where discrimination, like traffic, can flow in any direction). “If a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.” *Id.*

<sup>51</sup> See *id.* at 140; Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* xiv (Routledge, 2d ed. 2000).

<sup>52</sup> See Collins, *supra* note 51, at 4; Ebonye Guissine Wilkins, *It's Time to Stop Ignoring the Intersections of Marginalized Identities*, ROOTED RIGHTS (May 25, 2018), <https://rootedinrights.org/its-time-to-stop-ignoring-the-intersections-of-marginalized-identities/> (“Intersectionality . . . is a lens through which you can see where power comes and collides, where it interlocks and intersects. . . [I]t's not simply that there's a race

In my book *Privilege Revealed*, I talk about the koosh ball – the children’s toy with all the rubber-band-like strands coming out of it – moving and changing shape as you toss it.<sup>53</sup> I called it the perfect post-modern ball, usable for throwing and catching, but ever-changing in shape.<sup>54</sup> The koosh ball metaphor highlights that each of us possesses multiple strands of identity that interact in different contexts, giving the ball – giving us – a changing and even contradictory shape. These identity strands, or categories, may be central in some interactions and recede in importance in others.<sup>55</sup>

Just as our identity strands interact and impact each other, multiple forms of oppression also interact. With her directive to “ask the other question,” Professor Matsuda reminds us that it is easy to see the racism in the murder of Vincent Chin by white, out-of-work autoworkers, who thought that this Chinese-American man was Japanese and thus responsible for their loss of jobs.<sup>56</sup> They hurled anti-Japanese racial epithets as they bludgeoned him.<sup>57</sup> But Matsuda challenges us to consider where is the sexism in that conduct?<sup>58</sup> How are boys reared in this culture so that they can even imagine committing acts of aggression like that homicide?<sup>59</sup> And she asks where is the homophobia in that act, in a culture that teaches a macho meaning to “real man” and glorifies some forms of violence.<sup>60</sup>

Asking the other question helps us see the link between forms of oppression in a misogynistic society where gender-based

problem here, a gender problem here, and a class or LGBTQIA+ problem there. Many times that framework erases what happens to people who are subject to all of these things.”); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1276, 1292 (1997) (exploring a version of intersectionality that does not focus primarily on women of color because that model poses a danger of pushing issues of sexual orientation, class, religion, and able-bodiedness to the margins); Darren Lenard Hutchinson, *Identity Crisis: Intersectionality, Multidimensionality, and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 290, 309 (2001) (discussing multidimensionality, which arises out of intersectionality theory and focuses on the relationships between racism, heterosexism, patriarchy, and class oppression).

<sup>53</sup> *Privilege Revealed*, *supra* note 8, at 22.

<sup>54</sup> *Id.* at 23.

<sup>55</sup> *See id.*

<sup>56</sup> *See Matsuda*, *supra* note 48, at 1189.

<sup>57</sup> *Id.* at 1189-90.

<sup>58</sup> *Id.* at 1189.

<sup>59</sup> *See id.* at 1190.

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

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violence remains all too prevalent. Asking the other question in the context of these judicial confirmation hearings shows that identity categories impacted societal response to witnesses. Picture a black judicial candidate responding as Justice Kavanaugh did. Might the hypothetical black candidate have appeared unreasonable to those who found Justice Kavanaugh's behavior acceptable? What if Dr. Ford had been loud and complaining? Would she have been seen as "too aggressive" and not credible by those who believed her?

## II. "MAKE TROUBLE."

The call to "make trouble" is self-explanatory; change doesn't happen without speaking truth to power in some way.<sup>61</sup> With Dr. Ford's testimony, social media played a role in influencing the outcome that did not exist for Professor Anita Hill.<sup>62</sup> Two women activists, Ana Maria Archila and Maria Gallagher, confronted Senator Jeff Flake as he was boarding an elevator, telling him of their own experiences with sexual assault.<sup>63</sup> The video went viral and Flake later moved the nomination forward on the condition that the FBI would reopen its background investigation.<sup>64</sup> Now with hindsight, we know that request for further investigation did not change either Senator Flake's vote or the ultimate outcome of Justice Kavanaugh's confirmation.<sup>65</sup> But the empowerment embodied by that resistance provides another example of the skirmishes needed in today's struggle for democracy.<sup>66</sup> Social media in this instance enabled grass roots democratic reaction.

<sup>61</sup> See Anita Hill, *Speaking Truth to Power* 7 (1st ed. 1997) (explaining Hill's need to speak up and not allow fear to silence her to enable a better understanding of her experiences).

<sup>62</sup> See Haley Sweetland Edwards, *How Christine Blasey Ford's Testimony Changed America*, TIME (Oct. 4, 2018), <http://time.com/5415027/christine-blasey-ford-testimony/>.

<sup>63</sup> Niraj Chokshi & Astead W. Herndon, *Jeff Flake is Confronted on Video by Sexual Assault Survivors*, N.Y. TIMES (Sept. 29, 2018), <https://www.nytimes.com/2018/09/28/us/politics/jeff-flake-protesters-kavanaugh.html>.

<sup>64</sup> *Id.*

<sup>65</sup> See Annie Daniel, Jasmine C. Lee & Sara Simon, *How Every Senator Voted on Kavanaugh's Confirmation*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/interactive/2018/10/06/us/politics/kavanaugh-live-vote-senate-confirmation.html>.

<sup>66</sup> Ana Maria Archila, *I confronted Jeff Flake over Brett Kavanaugh. Survivors Like me Won't Stand for Injustice.*, USA TODAY, <https://www.usatoday.com/story/opinion/voices/2018/09/29/brett-kavanaugh-jeff-flake->

Another difference in the societal milieu from the Senate Judiciary Committee's conducting first the Hill-Thomas hearing and then the Ford-Kavanaugh hearing is the presence of the #MeToo Movement.<sup>67</sup> Born of women naming their sexual harassment, #MeToo has become a global phenomenon of women speaking truth to power, claiming a workplace free of gender oppression.<sup>68</sup> Judge Thomas could claim he was being vilified for his race because sexual harassment was so rooted in normality at the time of the Hill-Thomas hearing.<sup>69</sup> The #MeToo Movement offers an example of positive trouble-making.<sup>70</sup> It laid a foundation in which many could believe Dr. Ford, even though ultimately that belief was not enough for the Senate to listen.<sup>71</sup> But women violating the norm of silence generated a major cultural shift across many professional fields and industries.<sup>72</sup>

Civility often serves as a cap on the instinct to make trouble, at least for those of us raised to be "good girls and boys." But make trouble we must, in whatever manner comports with our comfort level, because saving democracy is at stake. Even asking polite questions can make trouble. Noticing racial hierarchy and pointing out unfair treatment will make trouble with the status quo. Make trouble provides a good application for the slogan "Just Do It."<sup>73</sup>

elevator-confirmation-blasey-ford-column/1459239002/ (last updated Sept. 30, 2018, 1:08 PM).

<sup>67</sup> See Kate Zernike & Emily Steel, *Kavanaugh Battle Shows the Power, and the Limits, of #MeToo Movement*, N.Y. TIMES (Sept. 29, 2018), <https://www.nytimes.com/2018/09/29/us/politics/kavanaugh-blasey-metoo-supreme-court.html>.

<sup>68</sup> See Meredith Conroy, Alexander Agadjanian & Hayley Cohen, *Data for Politics #20: A #MeToo Effect? Attitudes About Gender Equality and Workplace Harassment*, DATA PROGRESS (Sept. 11, 2018), <https://www.dataforprogress.org/blog/2018/9/7/a-metoo-effect-attitudes-about-gender-equality-and-workplace-harassment>.

<sup>69</sup> Conversations with Sylvia Law, Professor of Law, Medicine and Psychiatry, New York University School of Law, in New York, N.Y.

<sup>70</sup> See Maya Salam, *One Year After #MeToo, Examining a Collective Awakening*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/us/me-too-movement-women.html> (discussing the "very abrupt change in social norms" caused by #MeToo).

<sup>71</sup> See Jacey Fortin, *#MeToo Leaders Thank Christine Blasey Ford: Your Sacrifice Was Not Made in Vein*, N.Y. TIMES (Oct. 10, 2018), <https://www.nytimes.com/2018/10/10/us/me-too-letter-dr-ford.html>.

<sup>72</sup> See Salam, *supra* note 70.

<sup>73</sup> See Hunter Schwartz, *How Nike's Just Do It Became a Slogan About Activism too*, CNN, <https://www.cnn.com/2018/09/04/politics/just-do-it-activism/index.html> (last updated Sept. 4, 2018, 6:23 PM).

### III. "VOTE, VOTE, VOTE."

Many political protestors assert that voting does not matter.<sup>74</sup> Sometimes, non-voters say they see no difference in the political parties or between candidates.<sup>75</sup> Or they feel disenfranchised because no one who "looks like them" runs for office.<sup>76</sup> But if voting does not matter, then why have efforts to suppress the right to vote been rampant?<sup>77</sup> Historically, Americans have agitated, fought, and died to protect the right to vote in the face of these suppression efforts.<sup>78</sup> Furthermore, non-voters fail to understand the role of the majority party in court appointments, especially on the U.S. Supreme Court, where judges serve with life tenure.<sup>79</sup> Even when candidates seem similar, their party's judicial choices usually differ significantly. Ceding power by not voting can have a generational impact on the judicial system. Voting is the most fundamental way to practice democracy.

Lani Guinier has suggested a definition for democracy: "democracy means that ordinary people should participate in making the decisions that affect their lives."<sup>80</sup> She compares democracy and baseball, observing that both democracy and baseball have become spectator sports.<sup>81</sup> Guinier asserts

<sup>74</sup> See Jennifer Marer, *They Might Protest on the Weekends but Do They Vote on Tuesdays*, ENTITY (July 5, 2018), <https://www.entitymag.com/2018-voter-turnout/>.

<sup>75</sup> See Scott Ostler, *49ers' Colin Kaepernick Says Voting Would be Hypocritical*, HEARST, <https://www.sfchronicle.com/49ers/article/49ers-Colin-Kaepernick-says-voting-would-be-10612259.php> (last updated Nov. 14, 2016, 8:05 AM) ("You know, I think it would be hypocritical of me to vote. I said from the beginning I was against oppression, I was against the system of oppression. I'm not going to show support for that system. And to me, the oppressor isn't going to allow you to vote your way out of your oppression.").

<sup>76</sup> See Adam Gorlick, *Researchers Say Voters Swayed by Candidates who Share Their Looks*, STANFORD U. (Oct. 22, 2008), <https://news.stanford.edu/news/2008/october22/morph-102208.html>. See also Lenore Look, *My Mother's Vote*, 97 PRINCETON ALUMNI WKLY. 56 (1997) (telling the story of her immigrant mother's choice to vote for the first time because there was a candidate from the same racial background as her).

<sup>77</sup> See Ari Berman, *How Voter Suppression Could Swing the Midterms*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/opinion/sunday/voter-suppression-georgia-2018.html> (discussing November 2018 Georgia, Florida, and Kansas governor races; various newer voting restrictions such as onerous voter ID laws, cutbacks to early voting, and registration obstacles).

<sup>78</sup> Sean F. Callahan, *Men and Women Fought (and Died) for Your Right Vote*, VOTERGY.ORG (Mar. 9, 2018) <https://votergy.org/2018/03/09/men-and-women-fought-and-died-for-your-right-to-vote/>.

<sup>79</sup> U.S. CONST. art. III § 1.

<sup>80</sup> Lani Guinier, *More Democracy*, 1995 U. CHI. LEGAL F. 1, 1.

<sup>81</sup> *Id.* at 2.



democracy is about participation, and she retells a story involving her son.<sup>82</sup>

His children's magazine pictured six children deciding what game to play.<sup>83</sup> Four children raised their hands to play tag, and two kept their hands down, wanting to play hide and seek.<sup>84</sup> She asked her son, "What game will [they] play?" He replied, "First they will play tag, because four kids want to play tag, and then they will play hide and seek because there are two who want to play hide and seek."<sup>85</sup> Of course her son is right. Democracy need not mean the most votes decide every game, every time. Democratic representation needs to ensure participation and voice for all society members.

These judicial confirmation hearings make us think about who we are and what we are becoming as a society. As the writer Susan Orlean wrote in her recent publication, *The Library Book*: "It becomes harder all the time to think of places that welcome everyone."<sup>86</sup> The 2018 midterm election cycle did not spend enough time on commonalities or how to heal divisiveness with welcoming spaces. Intersectionality can be an aid here in building alliances as we speak up. These intersectional frameworks remain key for those of us trying to do progressive work and dismantling oppressive forces. Perhaps these frameworks are especially important for progressives, because even with good intentions, well-meaning activists may still be just reinforcing paradigms of exclusion. Intersectionality can serve as a lifeline to help advocates sort through our thinking in order to move forward, taking inclusive steps.

In this civil conflict, voting is an act of resistance. Let's not lose the country by staying home. Interviewed in the aftermath of the Ford-Kavanaugh hearing, Professor Anita Hill cited the need for "Leaders who publicly commit to fighting harassment and creating

<sup>82</sup> *Id.* at 1.

<sup>83</sup> *Id.* at 12.

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

<sup>85</sup> *Id.*

<sup>86</sup> Susan Orlean, *The Library Book* 67 (2018). Libraries are still that welcoming place and the birth of collections like the Digital Commons enlarges that space for the modern era.



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a diverse workplace.”<sup>87</sup> Professor Hill further commented: “But I’m ever hopeful. Political bodies change, leadership changes, people can make better choices.”<sup>88</sup> We can further hope that hearing women will be part of this future.

<sup>87</sup> Susan Chira, *Clearly the Tide Has Not Turned: A Q&A with Anita Hill*, N.Y. TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/us/anita-hill-sexual-harassment-metoo.html>.

<sup>88</sup> *Id.*