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That Was Then, This Is Now: The Revival of the Proposed Equal Rights Amendment and the Co-optation of the #MeToo Movement

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COMMENT

THAT WAS THEN, THIS IS NOW: THE
REVIVAL OF THE PROPOSED EQUAL
RIGHTS AMENDMENT AND THE
CO-OPTATION OF THE
#METOO MOVEMENT

*KYNDAL CURRIE**

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INTRODUCTION

History, as well as the art that portrays it, has rendered Black¹ women as supporting characters in both the Black and white spaces they navigate.² Both their oppressors and their contemplators oft only consider Black women for the help that they are able to provide.³ However, the very same have averted their gaze when positions are reversed and Black women need the help.⁴

This pattern of selectively considering the experiences and needs of Black women has existed in the United States of America since Black people's introduction into it by way of the transatlantic slave trade.⁵ It is

¹ For a long time, there has been controversy over whether writers should capitalize the term "Black," especially where the writer will not also capitalize the term "white." According to English language mechanics, writers should capitalize the name of ethnic, national, or religious groups to confer honor. However, writers have the choice whether to bestow or withhold this honor. When writers decide to capitalize the term "Black" but not the term "white," the choice is politically signifying. Omi Leissner, *Naming the Unheard Of*, 15 NAT. BLACK L. J. 109, 110 n. 6 (1997–98). For the purposes of this Comment, I will capitalize the term "Black."

² See, e.g., Nadra Kareem Little, *5 Common African American Stereotypes in TV and Film*, THOUGHTCO. (Oct. 4, 2018), <https://www.thoughtco.com/common-black-stereotypes-in-tv-film-2834653> (listing the most pervasive types of supporting roles that Black characters often fulfill in film and television).

³ See, e.g., Carolyn M. West, *Mammy, Sapphire, and Jezebel: Historical Images of Black Women and Their Implications for Psychotherapy*, 32 PSYCHOTHERAPY THEORY RESEARCH & PRACTICE 458, 459 (1995) (explaining that a pervasive Black, female stereotype is that of the Mammy—the faithful, domestic servant to white households); see also, e.g., Nadra Kareem Little, *5 Common African American Stereotypes in TV and Film*, THOUGHTCO. (Oct. 4, 2018), <https://www.thoughtco.com/common-black-stereotypes-in-tv-film-2834653> (listing popular supporting roles that Black people fulfill in film and television, and including in the list helping roles).

⁴ See, e.g., Black Women & Sexual Violence, <https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf> (last visited Jan. 2, 2020) (stating that Black women's claims of sexual abuse are often ignored, due to misconceptions regarding Black women's sexuality); see also, e.g., Jeffrey J. Pokorak, *Rape as A Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L. J. 1, 8 (2006) (exploring the government's refusal to criminalize the rape of slave women during the slavery era).

⁵ See LERONE BENNETT, JR., *BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA* 89 (6th ed. 1987) (examining the role of the "Mammy," and finding that the role existed as early as the slave era and that the role involved the care of the children of white slave owners); see also, Lerone Bennett, Jr., *Before the Mayflower: A History of Black America* 87 (6th ed. 1987) ("The rape of a slave woman, a Mississippi court ruled, is an offense unknown to common or civil law.").

during this then-ensuing, 200-year,⁶ institutionalized enslavement that white slave owners used enslaved Black women to nurse their white children.⁷ Yet, contemporary courts would rule that the rape of these same women was “unknown to [their] laws.”⁸ Over 100 years following the end to American slavery, and while encapsulating the similarly selective gaze of Black men upon Black women,⁹ Alice Walker (“Walker”) wrote the novel *The Color Purple*.¹⁰ This work features protagonist Celie, a young Black girl whose sexually abusive father forces her into a lifetime of caring for a likewise Black and abusive husband.¹¹

Modernly, scholars condemn both the Black and white communities for the ongoing pattern of their men overlooking the plights of Black women, while benefitting from their contributions.¹² In accordance with such condemnations, the third millennium has comprised of social efforts to spotlight the unique ways in which Black women experience oppression, and the equally unique injuries that these women sustain as a result.¹³ In the midst of these efforts is the #MeToo movement.¹⁴

Tarana Burke (“Burke”)—herself a Black woman¹⁵—founded the #MeToo movement primarily to assist young, Black women and girls

⁶ *Id.* at 86.

⁷ *Id.* at 89.

⁸ *Id.* at 87.

⁹ See E. R. Shipp, *Blacks in Heated Debate over ‘The Color Purple,’* THE NEW YORK TIMES (JAN. 27, 1986), <https://www.nytimes.com/1986/01/27/us/blacks-in-heated-debate-over-the-color-purple.html> (examining some scholars’ opinions that *The Color Purple* portrayed the distrust and hatred that Black women have of Black men, due to the cruelty that Black men have inflicted on Black women); see also Alice Walker, *The Color Purple* (1992) (featuring the character Celie, who dedicates the earlier parts of her life to serving her Black father and, later, husband, who both in turn sexually abuse her).

¹⁰ ALICE WALKER, *THE COLOR PURPLE* (1st ed. 1992).

¹¹ *Id.*

¹² See, e.g., Courtland Milloy, *Where Are Black Men in the Fight for Black Women?*, WASH. POST (Nov. 13, 2018), https://www.washingtonpost.com/local/where-are-black-men-in-the-fight-for-black-women/2018/11/13/63030e0c-e771-11e8-a939-9469f1166f9d_story.html (including critiques from various commentators on the absence of Black men in the efforts to support Black, female journalists whom President Trump has targeted with white supremacist tropes, and underscoring that Black men benefit from Black women’s political efforts).

¹³ See, e.g., *About: History & Vision*, ME TOO., <https://metoomvmt.org/about/#history> (last visited Nov. 19, 2018) (explaining that the purpose of the #MeToo movement is to explore and address the needs of specific communities—such as that of Black women—against whom sexual violence is perpetrated); see also, e.g., *Fill the Void. Lift Your Voice. Say Her Name.*, AFR. AM. POL’Y F., <https://aapf.org/shn-moms-network> (last visited Jan. 2, 2020) (identifying the purpose of the Say Her Name campaign to be to bring awareness to the numerous Black women and girls who have experienced racist police violence).

¹⁴ See *id.* (providing that the mission of the #MeToo movement is to address the sexual violence perpetrated against young Black women and girls).

¹⁵ Sandra E. Garcia, *The Woman Who Created #MeToo Long Before the Hashtag*, THE NEW YORK TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/RG8R-LKNN>].

who have survived sexual violence.¹⁶ As for her inspiration for advocating primarily on behalf of young Black women and girls, Burke credits a thirteen-year-old Black girl who once shared with Burke that she had been sexually assaulted.¹⁷ “I didn’t have a response or a way to help her in that moment, and I couldn’t even say ‘me too,’” Burke explained.¹⁸

Although the movement began in 2007,¹⁹ it was not until a 2017 Twitter post by white actress Alyssa Milano (“Milano”) that the movement garnered its presently sizable support.²⁰ On October 15, 2017, Milano posted on Twitter to show support for survivors of sexual violence.²¹ This was in the wake of the growing number of individuals accusing Hollywood film producer Harvey Weinstein of sexual assault and harassment.²² Milano wrote on Twitter: “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.”²³ Within 24 hours after Milano’s post, she garnered over 12 million responses from over 4 million users across multiple social media platforms, including Facebook.²⁴

¹⁶ *About, ME TOO.*, <https://metoomvmt.org/about/#history> (last visited Nov. 19, 2018).

¹⁷ Sandra E. Garcia, *The Woman Who Created #MeToo Long Before the Hashtag*, THE NEW YORK TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/RG8R-LKNN>].

¹⁸ *Id.*

¹⁹ Alanna Vagianos, *Tarana Burke Tells Black Women Me Too Is ‘Your Movement Too,’* HUFFPOST (Sept. 10, 2018), https://www.huffingtonpost.com/entry/tarana-burke-tells-black-women-me-too-is-your-movement-too_us_5b967c8fe4b0162f472f65f6.

²⁰ See Sandra E. Garcia, *The Woman Who Created #MeToo Long Before the Hashtag*, THE NEW YORK TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/RG8R-LKNN>] (including an image of Milano’s Twitter post, which is dated from 2017, and explaining that, soon after Milano’s Twitter post, others flooded social media to share their experiences of sexual abuse).

²¹ See *id.* (showing an image of a Twitter post from Milano’s account that is dated October 15, 2017 and includes language encouraging others to use the “MeToo” hashtag in support of survivors of sexual abuse).

²² *More Than 12M “Me Too” Facebook Posts, Comments, Reactions in 24 Hours*, CBS NEWS (Oct. 17, 2017), <https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/>.

²³ Sandra E. Garcia, *The Woman Who Created #MeToo Long Before the Hashtag*, THE NEW YORK TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/RG8R-LKNN>].

²⁴ *More Than 12M “Me Too” Facebook Posts, Comments, Reactions in 24 Hours*, CBS NEWS (Oct. 17, 2017), <https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/>.

Since Milano's Twitter post,²⁵ the media has gone as far as to credit her as having created the #MeToo movement.²⁶ Beyond incorrectly crediting Milano for founding the movement, media has also attributed the movement itself as having revived past efforts to enact the proposed Equal Rights Amendment ("proposed Amendment").²⁷

Advocates strive to enact the proposed Amendment out of a belief that the proposed Amendment, once enacted, would help attain equal treatment across genders.²⁸ According to its advocates, the Amendment's enactment is necessary because women do not and would not otherwise have equal rights under the United States Constitution.²⁹ At a June 5, 2018 shadow hearing on ratifying the proposed Amendment, Milano testified in support of ratification: "I do not have equal rights under our Constitution. I have a three year old [*sic*] daughter named Bella. She does not have equal rights under the Constitution, either."³⁰

This Comment argues that the anticipated effect of an Equal Rights Amendment on the experiences of Black women and girls who have survived sexual violence is incongruent with the original tenets of the #MeToo movement. To provide context, Part I of this Comment recounts historical efforts to enact the proposed Equal Rights Amendment. Part I also details the concept of "intersectionality," as well as modern campaigns that embrace its meaning to advance the social position of Black women.

In evaluating the efficacy of an Equal Rights Amendment, Part II of this Comment defines the contours of Black women's experiences in surviving sexual assault. This Part identifies observed patterns in the context of sexual assault perpetrated against Black women, and then shows how these patterns arose from pervasive, Black, female stereotypes originat-

²⁵ Sandra E. Garcia, *The Woman Who Created #MeToo Long Before the Hashtag*, THE NEW YORK TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [https://perma.cc/RG8R-LKNN].

²⁶ Rochelle Riley, *#MeToo Founder Blasts the Movement for Ignoring Poor Women*, DETROIT FREE PRESS (Nov. 15, 2018), <https://www.freep.com/story/news/columnists/rochelle-riley/2018/11/15/tarana-burke-metoo-movement/2010310002/>.

²⁷ Marsha Mercer, *#MeToo Fuels A Comeback for the Equal Rights Amendment*, USA TODAY (March 1, 2018), <https://www.usatoday.com/story/news/2018/03/01/metoo-movement-fuels-1970-s-comeback-era/385667002/>.

²⁸ See Miranda Leitsinger, *The Equal Rights Amendment: What You Need to Know*, Cal. Rep. (Apr. 30, 2019), <https://www.kqed.org/news/11743996/the-equal-rights-amendment-what-you-need-to-know> (explaining that the desire to enact the proposed Equal Rights Amendment stems from the belief that a Constitutional amendment pertaining to the treatment of gender will make it less likely that the government will uphold state actions that are discriminatory against gender).

²⁹ See, e.g., Alyssa Milano, *Alyssa Milano: I Don't Have Equal Rights Under the Constitution — Yet*, CNN (Oct. 5, 2018), <https://www.cnn.com/2018/10/05/opinions/kavanaugh-metoo-equal-rights-amendment-alyssa-milano/index.html> (testifying, in the absence of an operating Equal Rights Amendment, that she does not have equal rights under the Constitution).

³⁰ *Id.*

ing from the slavery era. Part III continues the discussion by exploring the anticipated effect of an Equal Rights Amendment on Black women. Then, this Part compares the proposed Amendment's anticipated effect to the unique experiences and needs of Black, female survivors, to in turn show that the proposed Amendment would not adequately remedy Black, female survivors of sexual assault.

Last, Part IV offers two ways in which #MeToo advocates might reconcile their invigorated push for the enactment of an Equal Rights Amendment with the original tenets of the movement. This Part argues that only by supplementing it with support for a modified reasonable person standard and a special damage calculation will efforts to enact an Equal Rights Amendment harmonize with the mission of the #MeToo movement. Only then will the cycle of co-optation end and Black women be made whole.

I. AN OVERVIEW OF THE PROPOSED EQUAL RIGHTS AMENDMENT AND MODERN SOCIAL CAMPAIGNS

A. THE RISE, FALL, AND REVIVAL OF THE PROPOSED EQUAL RIGHTS AMENDMENT

The proposed Equal Rights Amendment was born on the heels of a monumental achievement for American women.³¹ On August 26, 1920, Secretary of State Bainbridge Colby certified the ratification of the Nineteenth Amendment to the United States Constitution ("Constitution"),³² and on July 23, 1923, the National Women's Party ("Party") met to celebrate.³³ The Nineteenth Amendment granted women the right to vote³⁴—a right for which both the Party and the preceding generations of women's suffrage supporters had fought for almost a century.³⁵

³¹ See Thomas H. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, CONGRESSIONAL RESEARCH SERVICE 1, 1 (July 18, 2018), <https://fas.org/sgp/crs/misc/R42979.pdf> (explaining that, following the ratification of the Nineteenth Amendment, Alice Paul announced to the National Women's Party her plans to draft a proposed Equal Rights Amendment).

³² *19th Amendment to the United States Constitution*, OUR DOCUMENTS, <https://www.ourdocuments.gov/doc.php?flash=false&doc=63> (last visited Mar. 15, 2019).

³³ Thomas H. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, CONGRESSIONAL RESEARCH SERVICE 1, 1 (July 18, 2018), <https://fas.org/sgp/crs/misc/R42979.pdf>.

³⁴ *19th Amendment to the United States Constitution*, OUR DOCUMENTS, <https://www.ourdocuments.gov/doc.php?flash=false&doc=63> (last visited Mar. 15, 2019).

³⁵ *Id.*

Alice Paul (“Paul”) was the leader of the Party during the time that it celebrated the enactment of the Nineteenth Amendment.³⁶ In fact, it was at this July 23, 1923 celebration that Paul first announced her plan to create and propose to Congress yet another constitutional Amendment.³⁷ Although many women suffragists were satisfied with the amount in which the Nineteenth Amendment advanced women’s social position, Paul believed that true equality for women had not yet been achieved.³⁸ Accordingly, Paul’s newly proposed Amendment became known as the “Equal Rights Amendment.”³⁹

In the same year that Paul first announced her plans for the proposed Amendment, the Party submitted what ultimately became the first of many drafts to the 68th Congress—a draft that Congress later rejected.⁴⁰ As initially submitted to Congress, the text of the proposed Amendment provided, “Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.”⁴¹ After its initial rejection, advocates continuously rewrote and resubmitted the proposed Amendment to every session of Congress, until the legislature finally passed it in 1972.⁴² By the time that the states received the proposed Amendment to vote on ratification, its text stated, “Equality of rights shall not be denied or abridged by the United States or by any State on account of sex.”⁴³ This is the language that remains today.⁴⁴

Thirty-eight states needed to approve the proposed Amendment by 1979 to ratify it.⁴⁵ However, by the time that the deadline passed, only 35 states had agreed to ratification.⁴⁶ Although Congress added an additional three years to the initial seven-year ratification period, by 1982, the same 35 states had ratified the proposed Amendment.⁴⁷ Consequently, the proposed Amendment expired.⁴⁸

³⁶ Thomas H. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, CONGRESSIONAL RESEARCH SERVICE 1, 1 (July 18, 2018), <https://fas.org/sgp/crs/misc/R42979.pdf>.

³⁷ *Id.*

³⁸ *The History of the Equal Rights Amendment*, ALICE PAUL INSTITUTE, <https://www.alicepaul.org/era/> (last visited Mar. 15, 2019).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ S.J. Res. 6, 115th Cong. (2017).

⁴⁴ *Id.*

⁴⁵ Thomas H. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, CONGRESSIONAL RESEARCH SERVICE 1, 1 (July 18, 2018), <https://fas.org/sgp/crs/misc/R42979.pdf>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

Although the ratification period for the proposed Amendment ended long ago, extant advocacy in favor of enacting the proposed Amendment has not.⁴⁹ Present-day advocates insist that there is still a need for an Equal Rights Amendment to the Constitution.⁵⁰ They urge Congress to vote once again—this time in favor of the proposed Amendment—and to then submit the proposed Amendment to the states for ratification.⁵¹ Alternatively, they ask that Congress uphold the actions of the 35 states that had already ratified the proposed Amendment by 1982, and then re-extend the ratification period to allow the requisite three more states to join.⁵²

To support their argument in favor of the continued need for an Equal Rights Amendment, both advocates and legal scholars analogize it to the Fourteenth Amendment to the Constitution.⁵³ Unlike the failed Equal Rights Amendment, the states have long ratified the Fourteenth Amendment.⁵⁴ In interpreting the Equal Protection Clause of the latter Amendment, the United States Supreme Court has treated both race and gender classifications as presumptively invalid.⁵⁵

Nevertheless, some perceive that the Constitution affords greater protection on the basis of race than gender.⁵⁶ This perception arises because the government's burden of surmounting the presumption of inva-

⁴⁹ See, e.g., Alyssa Milano, *Alyssa Milano: I Don't Have Equal Rights Under the Constitution — Yet*, CNN (OCT. 5, 2018), <https://www.cnn.com/2018/10/05/opinions/kavanaugh-metoo-equal-rights-amendment-alyssa-milano/index.html> (recounting Milano's modern-day efforts to enact the proposed Amendment).

⁵⁰ See, e.g., *id.* (stating that Milano testified in favor of ratifying the proposed Amendment and implying in her testimony that women do not and would not enjoy equal rights under the Constitution in the absence of an Equal Rights Amendment).

⁵¹ *The History of the Equal Rights Amendment*, ALICE PAUL INSTITUTE, <https://www.alicepaul.org/era/> (last visited Mar. 15, 2019).

⁵² *Id.*

⁵³ See, e.g., Lisa Baldez et. al., *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35(1) U. CHI. J. LEGAL STUD. 243, 245–47 (2006), <https://cpb-us-e1.wpmucdn.com/sites.dartmouth.edu/dist/d/73/files/2012/11/ERA.pdf> (resolving whether there is still need for an Equal Rights Amendment and analyzing the way in which the Fourteenth Amendment operates to draw a conclusion).

⁵⁴ See 14th Amendment to the U.S. Constitution: Civil Rights (1868), OUR DOCUMENTS, <https://www.ourdocuments.gov/doc.php?flash=false&doc=43> (last visited Mar. 15, 2019) (providing that the states ratified the Fourteenth Amendment in 1868).

⁵⁵ See 16B AM. JUR. 2D *Constitutional Law* § 861 (2018) (explaining that the government has the burden of justifying challenged gender classifications); see also 16B AM. JUR. 2D *Constitutional Law* § 862 (2018) (explaining that the government has the burden of proving that racial classifications do not violate notions of equal protection).

⁵⁶ See Lisa Baldez et. al., *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35(1) U. CHI. J. LEGAL STUD. 243, 247–49 (2006), <https://cpb-us-e1.wpmucdn.com/sites.dartmouth.edu/dist/d/73/files/2012/11/ERA.pdf>.

lidity is lessened when a gender classification is disputed.⁵⁷ According to proponents of an Equal Rights Amendment, the differing burdens show that there is lessened protection based on gender, inherent in the Constitution itself.⁵⁸

The argument follows then that the Equal Rights Amendment would heighten protection based on gender by requiring the government to show more to uphold gender classifications.⁵⁹ Advocates theorize that the government would have to make the same showing as it would in defending race-based classifications, which would then lessen the likelihood of gender classifications being upheld.⁶⁰ Regardless of the merits, this theory then does not resolve the question as to whether the predicted results would align with and further the mission of the #MeToo movement.

B. CO-OPTION BOTH WITHIN AND WITHOUT THE #METOO MOVEMENT

Proponents of an Equal Rights Amendment have narrowly focused on remedying gender-based injustices.⁶¹ However, other advocates have honed their efforts on advancing the position of women who have incurred harm on account of both their race and gender.⁶² Since the turn of

⁵⁷ See 16B AM. JUR. 2D *Constitutional Law* § 861 (2018) (explaining that the government need only show that a gender classification is substantially related to an important government interest to prevail); see also 16B AM. JUR. 2D *Constitutional Law* § 862 (2018) (explaining that the government has the high burden of proving that a racial classification is narrowly tailored to a compelling government interest).

⁵⁸ See Miranda Leitsinger, *The Equal Rights Amendment: What You Need to Know*, Cal. Rep. (Apr. 30, 2019), <https://www.kqed.org/news/11743996/the-equal-rights-amendment-what-you-need-to-know> (explaining that the desire to enact the proposed Equal Rights Amendment stems from the belief that a Constitutional amendment pertaining to the treatment of gender will make it less likely that the government will uphold state actions that are discriminatory against gender).

⁵⁹ Lisa Baldez et. al., *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35(1) U. CHI. J. LEGAL STUD. 243, 246 (2006), <https://cpb-us-e1.wpmucdn.com/sites.dartmouth.edu/dist/d/73/files/2012/11/ERA.pdf>.

⁶⁰ See Miranda Leitsinger, *The Equal Rights Amendment: What You Need to Know*, Cal. Rep. (Apr. 30, 2019), <https://www.kqed.org/news/11743996/the-equal-rights-amendment-what-you-need-to-know> (explaining that the desire to enact the proposed Equal Rights Amendment stems from the belief that a Constitutional amendment pertaining to the treatment of gender will make it less likely that the government will uphold state actions that are discriminatory against gender).

⁶¹ See, e.g., Alyssa Milano, *Alyssa Milano: I Don't Have Equal Rights Under the Constitution — Yet*, CNN (OCT. 5, 2018), <https://www.cnn.com/2018/10/05/opinions/kavanaugh-metoo-equal-rights-amendment-alyssa-milano/index.html> (defining Milano's mission to be to achieve equal rights across gender, without mention of other social factors).

⁶² See, e.g., *About, ME TOO.*, <https://metoomvmt.org/about/#history> (last visited Nov. 19, 2018) (explaining that the purpose of the #MeToo movement is to address the plight of Black, female survivors of sexual abuse); See also, e.g., *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/herstory/> (last visited Nov. 19, 2018) (providing that the intent behind the Black

the most recent millennium, the desire behind these efforts has catalyzed Black women into starting various social justice movements.⁶³ Consistent with their founders' desires, the purpose behind these movements has been to address the injustices that Black women uniquely experience as both gender and racial minorities.⁶⁴

Thus, the theory of "intersectionality" underlies and thereby unites these recent movements. University of California, Los Angeles, law professor Kimberlé Crenshaw ("Professor Crenshaw") introduced the theory of intersectionality in her 1991 *Stanford Law Review* article entitled *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*.⁶⁵ Professor Crenshaw defined intersectionality as the reality that arises when one is dually a racial and gender minority.⁶⁶

Professor Crenshaw also elaborated on tensions that arise for individuals who belong to more than one minority group.⁶⁷ As she explained, one's oppressive experiences that are unique to being the former compound and overlap with one's oppressive experiences that uniquely arise from being the latter.⁶⁸ Particular to Black women, their status as a gender minority distinguishes their oppressive experiences from those of Black men.⁶⁹ Likewise, their status as a racial minority distinguishes their oppressive experiences from those shared by white women.⁷⁰

Ultimately, Professor Crenshaw dictated that the result of having intersectional needs is that those needs often remain unmet. For example, Black women's oppressive experiences are often ill-addressed because anti-misogynist efforts cater to white women—a racially-privileged sub-

Lives Matter movement is to combat police brutality against Black people, including those who belong to other overlapping social groups).

⁶³ See e.g. *About, ME TOO.*, <https://metoomvmt.org/about/#history> (last visited Nov. 19, 2018) (stating that it was founded in 2006); see also, e.g., *Herstory, BLACK LIVES MATTER*, <https://blacklivesmatter.com/about/herstory/> (last visited Nov. 19, 2018) (providing 2013 as the founding date of the movement).

⁶⁴ *About, ME TOO.*, <https://metoomvmt.org/about/#history> (last visited Nov. 19, 2018) (stating that it was founded in 2006); *Herstory, BLACK LIVES MATTER*, <https://blacklivesmatter.com/about/herstory/> (last visited Nov. 19, 2018) (providing 2013 as the founding date of the movement).

⁶⁵ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1251-52 (1991).

⁶⁶ *Id.* at 1252.

⁶⁷ *Id.* at 1251-52.

⁶⁸ See *id.* (explaining that when individuals are members of more than one minority group, the interests of those groups tend to conflict and might result in tension).

⁶⁹ See *id.* at 1251-53 (1991) (situating women of color into the intersection of race and gender and explaining the difficulties that might arise for such women when they attempt to address certain forms of oppression).

⁷⁰ See *id.* at 1252 (1991) (situating women of color into the intersection of race and gender and explaining the difficulties that might arise for such women when they attempt to address certain forms of oppression).

set of women—while similarly, anti-racist efforts cater to Black men, whose gender confers privilege. Professor Crenshaw concluded by urging Black women to assert the difference that their race makes in anti-misogynist discourse and that their gender makes in anti-racist discourse. In this way, Professor Crenshaw proposed, social discourse will meet Black women’s intersectional needs.ep]

Four Black women have put Professor Crenshaw’s article to practice, more than a decade following its release.⁷¹ In 2006, Tarana Burke founded the #MeToo movement, which operated primarily to assist young Black women and girls who have survived sexual violence.⁷² The Black Lives Matter movement followed in 2013, which Patrisse Khan-Cullors, Alicia Garza, and Opal Tometi founded to combat the violence that the government systematically inflicts upon members of the Black community.⁷³ Advocates of the Black Lives Matter movement also intended to emphasize the violence directed at Black women and queer Black youth.⁷⁴

The #MeToo movement garnered only minimal support from the white feminist community, immediately following its conception. For example, in 2016—approximately 10 years following the founding of the #MeToo movement—Black actress and comedian Leslie Jones (“Jones”) starred in a remake of the film *Ghostbusters*, alongside an otherwise all-white, female cast. Following the announcement of the film and the corresponding cast list, Jones was subjected to a barrage of disparaging Twitter messages. The language in many of the Twitter posts likened Jones to a primate, often calling her “an ape.” There was no massive outrage at the attacks that Jones had to endure. However, it was only a year later that white actress Alyssa Milano posted one message on Twitter and garnered over 12 million responses within 24 hours.

Similar to the fate of #MeToo movement, the focus of the Black Lives Matter movement has shifted away from the Black, female victims that the movement was initially designed to protect. Although police brutality is a reality that affronts Black people of all genders, when it comes to Black women, police brutality is often also sexual in nature. Even when the discussion pertains solely to use of excessive force—a form of police brutality that has resulted in the death of a significant number of Black women—Black women have rarely been the focal point of mass outcries and campaigns.

⁷¹ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

⁷² *About, ME TOO.*, <https://metoomvmt.org/about/#history> (last visited Nov. 19, 2018).

⁷³ *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/herstory/> (last visited Nov. 19, 2018).

⁷⁴ *Id.*

To the contrary, Black men and boys who have died from excessively forceful police tactics have become household names. To bridge the gap in visibility, community organizers have urged the public to “say her name,” and have created a movement with this phrase as its title.

Now, the media has credited the #MeToo movement as having sparked the renewed fervency in support of enacting a long-proposed Equal Rights Amendment. However, the media’s attribution comes during a time when Black women have begun to voice their frustration with the fact that the #MeToo movement no longer advances the interests of Black women and girls. These women say that, “pretty girls” and “Hollywood” have co-opted the movement instead. “The #MeToo movement has forgotten us,” they have concluded.

It is necessary to explore and define Black women’s experiences with sexual violence to then evaluate whether the perceived objective of the #MeToo movement to enact an Equal Rights Amendment aligns with the express mission of the movement. To accomplish this, the following section discusses the way in which Black women experience the sexual violence perpetrated against them. The following section also draws upon the historical treatment of Black women to add context.

II. BLACK, FEMALE STEREOTYPES AND BLACK WOMEN’S EXPERIENCES OF SEXUAL VIOLENCE

America’s system of institutionalized slavery, though now abolished,⁷⁵ has informed many of the stereotypes and patterns of oppression that contribute to Black women’s experiences with sexual assault.⁷⁶ Many of the Black stereotypes that have persisted to present day were created to justify the enslavement of Black people.⁷⁷ Unlike the American slave system, which is no longer enforceable following its abolition,⁷⁸ these same stereotypes continue to reinforce many of the patterns that uniquely arise surrounding the sexual assault of Black women.⁷⁹

⁷⁵ U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

⁷⁶ See Andrea L. Dennis, *Because I Am Black, Because I Am Woman: Remediating the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 561 (1996) (crediting the historical treatment of Black women as the cause of Black women’s unique experiences with sexual harassment, and drawing support from as early as the slave era).

⁷⁷ *Popular and Pervasive Stereotypes of African Americans*, NAT’L MUSEUM OF AFR. AM. HIST. & CULTURE, <https://nmaahc.si.edu/blog-post/popular-and-pervasive-stereotypes-african-americans> (last visited Dec. 1, 2019).

⁷⁸ U.S. CONST. amend. XIII, § 1.

⁷⁹ See Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remediating the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 562 (1996) (arguing that although the most pervasive Black, female stereotypes originated during the slavery era, the

Observed patterns pertaining to the sexual assault of Black women are numerous.⁸⁰ Moreover, the assault patterns arise due to a wide range of factors, spanning from reporting practices to perpetrators' motivations for assault.⁸¹ As numerous and diverse the relevant assault patterns,⁸² most fall under one of two broader categories describing Black women's positions in society: (1) hypervisibility, or (2) invisibility.⁸³ The following discussion juxtaposes hypervisibility and invisibility of Black women in society, as well as the corresponding stereotypes that have contributed to these realities.

A. THE IMAGE OF JEZEBEL AND THE HYPERVISIBILITY OF BLACK WOMEN AS VICTIMS OF SEXUAL VIOLENCE

The three most prevalent stereotypes of Black women are popularly conceptualized in the form of a trifecta.⁸⁴ The first in the trifecta is the image of the "Jezebel."⁸⁵ Jezebel personifies the stereotype that Black women are hypersexual, promiscuous, and laden with animalistic and uncontrollable sexual urges.⁸⁶ Jezebel also conjures up the image of Black women as manipulative.⁸⁷ Accordingly, Jezebel is often visualized as

same stereotypes exist at present day and contribute to the unique sexual harassment that Black women experience).

⁸⁰ See, e.g., *Black Women & Sexual Violence*, <https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf> (last visited January 2, 2020) (listing no less than three assault patterns, each pertaining to Black, female survivors' reporting habits; resources for Black, female sexual assault survivors; or the correlation between Black women's survival of sexual violence and their subsequent incarceration).

⁸¹ See, e.g., *id.* (explaining that many Black women are refrain from reporting their Black, male assaulters for fear of reinforcing the stereotype of Black people as aggressive and dangerous); see also, e.g., Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remediating the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 562–63 (1996) (explaining that the perception of Black women as sexually available remains following the slave era, and recounting the facts of a case in which in the midst of sexually harassing a Black woman, the perpetrator expressed his wish that slavery would return so that the perpetrator could sexually train the Black, female victim).

⁸² See, e.g., Carolyn M. West, *Sexual Violence in the Lives of African American Women: Risk, Response, and Resilience*, RESEARCHGATE 1, 3–4 (Aug. 14, 2014), <http://www.drcarolynwest.com/publications/2006-sexual-violence.pdf> (listing various risk factors for Black women as pertaining to sexual violence).

⁸³ Vrushali Patil & Bandana Purkayastha, *Sexual Violence, Race and Media (In)Visibility: Intersectional Complexities in a Transnational Frame*, 5 SOCIETIES 598, 599 (2015); Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. Cal. L. Rev. 1467, 1469–70 (1992).

⁸⁴ See, e.g., Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remediating the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 561 (1996) (listing the Black, female stereotypes of "Sapphire," "Mammy," and "Jezebel" in a triad).

⁸⁵ Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 J. Leisure Res. 644, 650 (2013).

⁸⁶ *Id.*

⁸⁷ *Id.*

having light skin, long hair, and curves—all features popularly believed to be alluring to men.⁸⁸

The Jezebel stereotype lends itself to efforts to justify sexual violence against Black women.⁸⁹ The theory that arises is that Black women are incapable of being raped due to them always seeking and being available for sexual intercourse.⁹⁰ This theory also contributes to perpetrators' motivations for sexually abusing Black women.⁹¹ Many scholars turn to the depiction of Black women in pornography to support the assertion that misconceptions regarding Black women's attitudes toward sexual intercourse motivate their sexual abuse and exploitation.⁹²

Both the pornography industry and pornographers financially the stereotype of Black women as sexually insatiable.⁹³ It is with the understanding that an overwhelming majority of consumers subscribe to the notion of white, male dominance that pornographers endeavor to sexually satisfy their consumers by playing upon gender and racial stereotypes.⁹⁴ Due to their dual statuses as gender and racial minorities, the pornography industry exploits Black women in a way that utilizes the intersection of both stereotypes.⁹⁵ The image of Black women as sexually voracious is an example of such a stereotype that combines racial and gender pre-conceptions.⁹⁶

Pornographers' depiction of the Jezebel perpetuates the social disadvantage that slavery conferred upon Black women, consistent with the fact that the stereotype of Black women as sexually insatiable arose dur-

⁸⁸ See *id.* (explaining that women embodying the Jezebel stereotype are thought to use their physical features to ensnare others, as well as capture their devotion and material wealth).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *id.* (explaining that the Jezebel stereotype justifies exploitation of Black women and that sexual exploitation fosters violence against women); see also Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remediating the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 561 (1996) (“[T]he Jezebel stereotype most obviously support[s] the sexual exploitation of Black women . . .”).

⁹² See, e.g., Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 J. Leisure Res. 644, 650 (2013) (identifying pornography as a form of commercialized sexual exploitation of Black women, as imagined in the image of the Jezebel); see also, e.g., Jewel D. Amoah, *Back on the Auction Block: A Discussion of Black Women and Pornography*, 14 NAT. BLACK L. J. 204, 210 (1997) (arguing that pornographers play upon Black, female stereotypes by depicting Black women as sexually insatiable, all to sexually satisfy consumers, who largely share “white supremacist notions of dominance”).

⁹³ Jewel D. Amoah, *Back on the Auction Block: A Discussion of Black Women and Pornography*, 14 NAT. BLACK L. J. 204, 211 (1997).

⁹⁴ *Id.* at 210.

⁹⁵ *Id.* at 209.

⁹⁶ *Id.* at 209–10 (explaining that pornographers depict Black women in accordance with both gender and racial stereotypes, then also offering the image of “an unsatiable [*sic*] sex animal” as one way that pornographers depict Black women).

ing the slavery era.⁹⁷ Moreover, it is exactly this harkening to slavery that motivates pornographers to create art around the idea of the Jezebel.⁹⁸ The motive is economic and pornographers acquire it in a way relevant to the historical treatment of Black women's bodies.⁹⁹

The way in which pornographers become economically motivated to exploit Black women by utilizing the image of the Jezebel is related to one of the original justifications for enslaving Black women.¹⁰⁰ The image of the Jezebel originates from a time when Black, female slaves' value largely derived from their ability to bear more slaves.¹⁰¹ Thus, the rape of Black, female slaves was used to impregnate Black, female slaves and thereby maintain the slave population.¹⁰² At the time, the rape of a Black, female slave did not constitute a crime.¹⁰³ To the contrary, to justify the practice of raping enslaved women, many conjured up and entertained the idea of the Jezebel¹⁰⁴—a woman incapable of being raped, because she always made herself available for sexual intercourse.¹⁰⁵

Modern pornographers draw upon the justification for slavery that underlies the stereotype of the Jezebel by depicting Black women as teeming with insatiable, animalistic lust.¹⁰⁶ Furthermore, many pornographic depictions feature Black women laden in tools of bondage, adopting a submissive posture, and surrounded by white men.¹⁰⁷ This depiction is reminiscent of the trappings of slavery, which enslavers used to reinforce the belief that Black people were inferior to their white counterparts¹⁰⁸—a belief foundational to the very institution of slavery.¹⁰⁹

Accordingly, when viewers who adhere to the idea of white, male dominance consume these oft-depicted images of white men restraining a

⁹⁷ *Id.* at 210–11.

⁹⁸ *Id.* at 211.

⁹⁹ *Id.* at 210–11.

¹⁰⁰ Carolyn M. West, *Mammy, Sapphire, and Jezebel: Historical Images of Black Women and Their Implications for Psychotherapy*, 32 *PSYCHOTHERAPY THEORY RESEARCH & PRACTICE* 458, 462 (1995).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Jeffrey J. Pokorak, *Rape as A Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 *NEV. L. J.* 1, 8 (2006).

¹⁰⁴ *Id.* at 9–10.

¹⁰⁵ Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 *J. Leisure Res.* 644, 650 (2013).

¹⁰⁶ See Jewel D. Amoah, *Back on the Auction Block: A Discussion of Black Women and Pornography*, 14 *NAT. BLACK L. J.* 204, 210–11 (1997) (discussing the racist stereotypes that underlie the depictions of Black women in pornography and identifying as a frequent depiction of Black women the image of Black women as sexually insatiable).

¹⁰⁷ *Id.* at 210.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

seemingly wanton and animalistically lustful Black woman, they derive sexual satisfaction from the displays of gender and racial superiority.¹¹⁰ Thus, both the pornographers and the pornography industry become economically motivated to exploit the Jezebel stereotype, while leaving Black women in no better position than before.¹¹¹ The sexual exploitation of Black women is itself an act of sexual violence.¹¹² However, pornographic depictions that perpetuate the image of the Jezebel are also relevant to motivations to sexually abuse Black women in other ways.¹¹³

For example, in numerous sexual harassment cases brought by Black women, fact findings show that in the midst of harassing the Black, female claimants, the harassers expressed their desire to emulate certain pornographic depictions.¹¹⁴ In *Brooms v. Regal Tube Company*, for instance, the harasser showed the Black, female claimant a photograph depicting interracial sodomy and told the claimant that the photograph demonstrated the “talent” of Black women.¹¹⁵ The harasser later showed the claimant a different photograph, which was a racially-charged depiction of bestiality, and told the claimant that she would emulate the depicted image.¹¹⁶ Serving as another example, in *Continental Can Company v. Minnesota*, the harasser, while referencing the movie *Mandingo*, expressed to the claimant that he wished that slavery would resume so that he could sexually train the claimant and make her his property.¹¹⁷

All of the preceding anecdotes involved a harasser motivated by depictions of Black, female sexuality,¹¹⁸ and the examples also share another commonality—all of the sexual depictions are consistent with the

¹¹⁰ See *id.* at 209–11 (explaining that consumers embracing notions of white, male dominance derive sexual satisfaction from pornographic depictions of male and white superiority, and then stating that pornographers often depict Black women in slave-like bondage and surrounded by white men).

¹¹¹ *Id.*

¹¹² Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 J. Leisure Res. 644, 650 (2013) (labeling commercialized sexual exploitation as a pervasive form of sexual violence that affronts Black women).

¹¹³ See, e.g., Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remediating the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 563–64 (1996) (discussing perpetrators’ express references to pornographic depictions of Black women while sexually harassing Black women).

¹¹⁴ E.g., *id.*

¹¹⁵ *Brooms v. Regal Tube Co.*, 881 F.2d 412, 417 (7th Cir. 1989).

¹¹⁶ *Id.*

¹¹⁷ *Continental Can Co. v. Minnesota*, 297 N.W.2d 241, 246 (Minn. 1980).

¹¹⁸ See *Brooms*, 881 F.2d at 417 (finding that while harassing the Black, female claimant, the harasser expressed a desire to emulate certain pornographic depictions of Black women); see also *Continental Can*, 297 N.W.2d at 246 (recounting the harasser’s reference to the movie *Mandingo* and statement to the Black, female claimant that he wished that slavery could return so that he sexually train and own her).

idea of Black women as Jezebels. The image of the Jezebel embodies the belief that Black women are hypersexual and possess sexual urges that are animalistic in nature.¹¹⁹ In *Brooms* and *Continental Can*, the depictions that the harassers referenced pertained either to the perceived sexual prowess, or to the animalistic or sexual nature of Black women,¹²⁰ which are all qualities subsumed under the idea of the Jezebel.¹²¹ In this way, the Jezebel stereotype at least partially motivated the harassers' sexual abuse of the Black, female claimants.

The preceding exploration of the pornography industry and review of individual instances of sexual misconduct reveals that Black, female stereotypes partially motivate perpetrators to sexually abuse Black women. However, recurring motivations for sexual violence are not the only recognized patterns in the context of the sexual assault of Black women.¹²² Beyond the one pertaining to the visibility of Black women, another recognized pattern, with corresponding Black, female stereotypes underlying it,¹²³ relates to the invisibility of Black, female survivors' experiences with sexual assault.¹²⁴

B. HOW THE IMAGES OF MAMMY AND SAPHIRE CONTRIBUTE TO THE INVISIBILITY OF BLACK WOMEN'S EXPERIENCES OF SEXUAL VIOLENCE

The remaining two of the most prevalent Black, female stereotypes are those of the "Mammy"¹²⁵ and of the "Sapphire."¹²⁶ Mammy embod-

¹¹⁹ Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 J. Leisure Res. 644, 650 (2013).

¹²⁰ See *Brooms*, 881 F.2d at 417 (stating that the harasser lauded a pornographic photograph for showing Black women's sexual "talent"); see also *Continental Can*, 297 N.W.2d at 246 (explaining that the harasser referenced the movie *Mandingo* before expressing a desire to sexually own the Black, female claimant).

¹²¹ Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 J. Leisure Res. 644, 650 (2013).

¹²² See, e.g., *Black Women & Sexual Violence*, <https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf> (last visited January 2, 2020) (listing no less than three assault patterns, each pertaining to Black, female survivors' reporting habits; resources for Black, female sexual assault survivors; or the correlation between Black women's survival of sexual violence and their subsequent incarceration).

¹²³ See, e.g., *id.* (explaining that many Black women are refrain from reporting their Black, male assaulters for fear of reinforcing the stereotype of Black people as aggressive and dangerous).

¹²⁴ See Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remediating the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 562 (1996) (stating that abuse claims of Black women fitting the description of the "Mammy" stereotype would go unbelieved, due to the asexual nature of such women).

¹²⁵ Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 J. Leisure Res. 644, 651 (2013).

¹²⁶ *Id.* at 652.

ies the image of Black women as a darker-skinned, large-framed, asexual, yet nonthreatening and nurturing figure.¹²⁷ Understood to have remained as a domestic servant in the households of former slave owners following the abolition of slavery. Mammy is also believed to exhibit undying loyalty, subordination, and self-sacrifice in executing her domestic duties.¹²⁸ Following the abolition of slavery, it is even believed that Mammy remained in the households of former slave owners.¹²⁹ With the traits of Mammy falling short of Eurocentric beauty, Black women who emulate this stereotype are viewed as devoid of attractiveness or femininity.¹³⁰

Distinct from the image of the Mammy, the Sapphire stereotype—also known as the angry Black woman stereotype—personifies the belief that Black women are aggressive, domineering, and emasculating.¹³¹ Largely reinforced by the radio show *Amos N' Andy*, which featured Sapphire as the hostile and nagging wife of the Black, male character Starfish, the image of Sapphire portrays Black women as strong-willed and contemptuous of Black men.¹³² Similar to the image of the Mammy,¹³³ Sapphire is imagined to be of a darker complexioned and large—though not obese,¹³⁴ somewhat unlike Mammy.¹³⁵

Although the stereotypes of the Mammy and the Sapphire are antitheses,¹³⁶ they similarly correlate with the visibility of Black women's experiences of sexual violence.¹³⁷ Their shared correlation relating to the visibility of such experiences is that Black women who embody the qualities of Mammy or Sapphire are either often ignored or not often believed

¹²⁷ *Id.* at 651.

¹²⁸ Carolyn M. West, *Mammy, Sapphire, and Jezebel: Historical Images of Black Women and Their Implications for Psychotherapy*, 32 *PSYCHOTHERAPY THEORY RESEARCH & PRACTICE* 458, 459 (1995).

¹²⁹ *Id.*

¹³⁰ Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 *J. Leisure Res.* 644, 651 (2013).

¹³¹ *Id.* at 652.

¹³² Carolyn M. West, *Mammy, Sapphire, and Jezebel: Historical Images of Black Women and Their Implications for Psychotherapy*, 32 *PSYCHOTHERAPY THEORY RESEARCH & PRACTICE* 458, 461 (1995).

¹³³ See Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 *J. Leisure Res.* 644, 651 (2013) (describing Mammy as having a darker complexion and large stature).

¹³⁴ Carolyn M. West, *Mammy, Sapphire, and Jezebel: Historical Images of Black Women and Their Implications for Psychotherapy*, 32 *PSYCHOTHERAPY THEORY RESEARCH & PRACTICE* 458, 461 (1995).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See *id.* at 562 (explaining that claims of sexual violence expressed by women befitting the image of the Mammy or Sapphire are often unbelievably).

when they claim sexual abuse.¹³⁸ The claims of Black women who exhibit the characteristics of Mammy are not believed because of existing skepticism that someone would lust for a seemingly asexual woman.¹³⁹ Claims of sexual abuse by women who emulate Sapphire are often ignored because society views such women as “troublemakers” who lack loyalty.¹⁴⁰

Thus, claims of sexual abuse by Black women befitting either stereotype are ignored out of suspicion that such claims are dishonest.¹⁴¹ Furthermore, this practice of ignoring Black women’s claims of sexual violence both directly and indirectly obscures the visibility of sexual violence perpetrated against Black women. The practice directly threatens visibility of Black women’s experiences because it is impossible for individuals to know that in which they do not believe. This lack of knowledge that stems from disbelief thwarts advocacy efforts, because it is likewise impossible for individuals to combat that of which they are not aware.

The indirect relationship between the distrust of Black women’s claims of sexual assault and their visibility relates to such women’s reporting practices and, partially, the internalization of Black, female stereotypes.¹⁴² Generally, Black women share a reluctance to report their experiences of sexual violence, following their occurrence, due in part to their awareness of Black, female stereotypes aligning with the images of Sapphire and Mammy.¹⁴³ Black women often refrain from notifying authorities of these specific acts of violence, resigned to the likelihood that others will either ignore or distrust their claims of sexual violence.¹⁴⁴

The reporting practices of Black, female survivors of sexual violence and the perpetrators’ motives for sexually abusing Black women show that Black women experience sexual violence in a way that uniquely implicates their dual statuses as gender and racial minorities. Subscribers to the #MeToo movement endeavor to address the unique

¹³⁸ Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remediating the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 562 (1996).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See *Black Women & Sexual Violence*, <https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf> (last visited January 2, 2020) (attributing in part Black, female survivors’ reluctance to report instances sexual violence to an awareness of myths surrounding their sexuality).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

injuries inflicted upon Black, female, survivors of sexual violence.¹⁴⁵ Thus, the proposed Equal Rights Amendment aligns with the ideology driving the movement only if the effect of the proposed Amendment is to remedy the intersectional injuries of these Black, female survivors.

III. THE INADEQUACY OF THE PROPOSED EQUAL RIGHTS AMENDMENT

A wealth of scholarship exists supporting of the idea that Black women will likely benefit from the enactment of an Equal Rights Amendment.¹⁴⁶ There are three main theories supporting the idea that Black women will benefit from an Equal Rights Amendment.¹⁴⁷ Such scholars assert various reasons in support of their view.¹⁴⁸ The following discussion will only elaborate on three of these operating theories. Notably, although scholars have circulated the following theories since as early as 1971,¹⁴⁹ they still underly modern-day arguments in favor of an Equal Rights Amendment.¹⁵⁰

First, scholars contend that an Equal Rights Amendment would psychologically benefit Black women.¹⁵¹ The implementation of an Equal Rights Amendment would confer upon Black women a new, constitutionally-protected status on account of their gender.¹⁵² The recognition alone that their gender is worthy of constitutional protection would have a positive, psychological effect on Black women.¹⁵³ As concludes this theory, the Equal Rights Amendment is the only available means by which Black women would be able to realize such advantages.¹⁵⁴

Second, some argue that the effort required to persuade Congress and the states to enact an Equal Rights Amendment would require signif-

¹⁴⁵ See *About, ME TOO.*, <https://metoomvmt.org/about/#history> (last visited Nov. 19, 2018) (explaining that the mission of the #MeToo movement is to spotlight the experiences of young Black women and girls).

¹⁴⁶ See, e.g., Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.C.L. L. REV. 243, 243 (1971) (asserting that Black women have the most to gain from the enactment of the Equal Rights Amendment).

¹⁴⁷ See, e.g., *id.* at 258–59 (asserting that Black women have the most to gain from the enactment of the Equal Rights Amendment).

¹⁴⁸ See, e.g., *id.* (listing three broad ways in which an Equal Rights Amendment would benefit Black women).

¹⁴⁹ See, e.g., *id.* (discussing all three theories in a 1971 publication).

¹⁵⁰ See, e.g., Sage Howard, *The ERA: Why Black Women Need It the Most, We News* (Aug. 8, 2018), <https://womensenews.org/2018/08/the-era-why-black-women-need-it-most/> (advocating for the enactment of an Equal Rights Amendment and supporting this position by arguing that the Amendment would help combat pervasive forms of gender discrimination).

¹⁵¹ E.g., Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.C.L. L. REV. 243, 258 (1971).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

icant, mental exertion—all of which would be educational to Black women.¹⁵⁵ Furthermore, discussions surrounding the debate to enact the proposed Amendment would unavoidably involve detailed review of all extant law and policy affecting.¹⁵⁶ Black women would also enjoy a platform from which they are more effectively able to draw attention to problems specifically affecting Black women, in interacting with multiple levels of government to garner support for the proposed Amendment.¹⁵⁷

Last, proponents of an Equal Rights Amendment predict that it will obviate the powerlessness that Black women experience.¹⁵⁸ With this newly-bestowed authority, Black women would be able to participate in societal decision-making processes in a way equal to their more privileged counterparts.¹⁵⁹ In turn, Black women will begin to fill more leadership positions and acquire the ability to guarantee that their rights are protected, instead of having to rely on higher-powered others.¹⁶⁰

The three preceding theories are alike because they all pertain to ways in which an Equal Rights Amendment would address Black women's experiences with gender-based oppression.¹⁶¹ They are also alike in that they fail to show how an Equal Rights Amendment would remedy oppression that Black women experience at the intersection of gender and race. This absence of any mention of intersectionality reveals that, although it might improve Black women's social position on account of gender, an Equal Rights Amendment is unlikely to remedy the harms that are unique to Black women's dual-minority status.

Other factors also reveal the inadequacies of an Equal Rights Amendment in attempting to remedy harms that Black women uniquely incur. For example, the text of the proposed Amendment is itself evidence that an Equal Rights Amendment would not address harms that arise from both racism and misogyny. The current version of the proposed Amendment states, "Equality of Rights under the law shall not be denied or abridged by the United States or by any State on account of sex."¹⁶² Gender is the only classification expressly protected by the pro-

¹⁵⁵ E.g., *id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 259.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See *id.* at 258–59 (identifying ways in which an Equal Rights Amendment would elevate Black women's social position as women, yet omitting any discussion of difficulties that draw upon both Black women's gender and race).

¹⁶² S.J. Res. 6, 115th Cong. (2017).

posed Amendment.¹⁶³ The absence of any mention of race in the language of the proposed Amendment suggests that the drafters did not intend for it to address injuries incurred on account of race.

It is likely that the proposed Amendment would advance the social position of Black women, if enacted.¹⁶⁴ However, the proposed Amendment would not as fully remedy the oppressive injuries that Black women incur as it would for those incurred by white women. This is because the proposed Amendment only addresses gender-based oppression.¹⁶⁵ While the entirety of white women's minority status stems from their gender,¹⁶⁶ the same is not so for Black women.¹⁶⁷ After all, Black women also experience racialized oppression,¹⁶⁸ which the proposed Amendment would leave unaddressed.¹⁶⁹

The proposed Equal Rights Amendment is not a wholly lacking remedy, but is rather an incomplete one. Thus, in lieu of completely abandoning the proposed Amendment, a way to reconcile its effect with the mission of the #MeToo movement is to supplement it with another legal device—this additional device that addresses both the gendered and racial aspects of Black women's experiences of sexual violence perpetrated against them.

IV. SUPPLEMENTAL REMEDIES TO THE PROPOSED EQUAL RIGHTS AMENDMENT

The very process of amending the Constitution is wholly unamenable to addressing intersectional needs. It is a bedrock principle in Amer-

¹⁶³ See *id.* (“Equality of Rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”).

¹⁶⁴ See Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.C.L. L. REV. 243, 243 (1971) (arguing that Black women will benefit from ratification of the proposed Equal Rights Amendment).

¹⁶⁵ See, e.g., S.J. Res. 6, 115th Cong. (2017) (reciting the text of the proposed Equal Rights Amendment, which excludes any mention of race or provides any other indication that the proposed Equal Rights Amendment will address race-based injuries).

¹⁶⁶ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1251–52 (1991) (explaining that when individuals are members of more than one minority group, the interests of those groups tend to conflict and might result in tension, and then contrasting the experience with that of white women).

¹⁶⁷ See *id.* (explaining that women of color's experiences are both raced and gendered).

¹⁶⁸ See *id.* at 1251–52 (stating that the oppressive experiences of women of color implicate their dual statuses as gender and racial minorities).

¹⁶⁹ See Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.C.L. L. REV. 243, 258–59 (1971) (exploring the ways in which an Equal Rights Amendment would combat gender-based oppression, yet neglecting discussion of race-based oppression).

ican law that, although the Constitution is a “living document,”¹⁷⁰ there is a strong presumption against amending it.¹⁷¹ This presumption arises from the view that the Constitution should be stable, in the sense that it enumerates the core, foundational principles that govern the nation.¹⁷² Furthermore, the Constitution is believed to operate in a realm separate from, and higher than, politics.¹⁷³ To continue altering the Constitution in accordance with ever-changing political and social revelations, notwithstanding their merit, undermines the purpose and function of this founding document.¹⁷⁴

Unlike the proposed Equal Rights Amendment—or all constitutional amendments, for that matter—which is resistant to social whims,¹⁷⁵ there are other legal devices better-suited to addressing intersectional concerns.¹⁷⁶ Due to their ability to remedy individuals who incur intersectional injuries,¹⁷⁷ these devices would supplement an enacted Equal Rights Amendment. Accordingly, affiliates of the #MeToo movement should advocate for a modified, reasonable person standard, as well as apportioned damages, both to be used in litigating claims for sexual violence brought by Black, female claimants.

A. THE VALUE OF A MODIFIED REASONABLE PERSON STANDARD

In adjudicating claims of sexual harassment, courts have determined the severity of the harassment by adopting the perspective of the claimant.¹⁷⁸ Thus, instead of inquiring whether a reasonable person would engage in the allegedly harassing behavior, courts question whether a reasonable person would feel harassed by the alleged conduct.¹⁷⁹ Beyond merely adopting the victim’s perspective, courts have also articulated the

¹⁷⁰ See, e.g., Joe Carter, *Justice Scalia Explains Why the ‘Living Constitution’ Is a Threat to America*, ACTION INST. (May 14, 2008) (stating that the modern view is that the Constitution is a living and evolving document).

¹⁷¹ Kathleen Sullivan, *Constitutional Amendmentitis*, AM. PROSPECT (Dec. 19, 2001), <https://prospect.org/power/constitutional-amendmentitis/>.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See *id.* (explaining that society imagines the Constitution to remain impervious to contemporary social whims).

¹⁷⁶ See Angela Onwuahi-Willig, *What about #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L. J. F. 105, 109–10 (2018) (proposing a modified reasonable person standard to address the intersectional experiences of Black, female sexual assault claimants).

¹⁷⁷ See *id.* (detailing how a modified reasonable person standard would address the intersectional injuries and concerns).

¹⁷⁸ E.g., *Ellison v. Brady*, 924 F.2d 872, 878–79 (9th Cir. 1991).

¹⁷⁹ *Brady*, 924 F.2d at 878–79.

need to consider how gender influences perception.¹⁸⁰ For example, courts have warned that men and women tend to disagree on the objectionableness of some modes of conduct.¹⁸¹

Inquiry into individuals' perspectives, while considering their gender alone, does not implicate the concept of intersectionality. However, courts should also consider how race influences perception, for reasons similar to those that persuaded the courts to consider the effect of gender.¹⁸² In this way, courts would call for the consideration of both the race and the gender of Black, female claimants, as well as how these same women's experiences as double minorities informs the sexual violence perpetrated against them. Some scholars have already called on courts to consider the perspective of "a reasonable person *in the [claimants] intersectional and multidimensional shoes*. . . ."¹⁸³

From a broader view than of the help this modified standard would be to individual, Black, female claimants, this modification would also help improve the overall social position of Black women. Whereas the stereotypes of Mammy and Sapphire contribute to societal distrust and ignoring of Black women's claims of sexual violence¹⁸⁴, a modified reasonable person standard forces decisionmakers to consider Black women's allegations of sexual abuse, and moreover, to resolve how the claimants' Blackness informs their perceptions of the abuse. This added consideration would restore credibility to long-discredited women.¹⁸⁵

B. DAMAGES AS AN OPPORTUNITY TO EXPLOIT RACISM, MISOGYNY, AND BLACK, FEMALE STEREOTYPES

Another way to supplement the recent push for an Equal Rights Amendment is by altering damage calculations in discrimination lawsuits. Currently, prevailing claimants in discrimination lawsuits are entitled to recover for the shame and humiliation experienced on account of the discriminatory conduct, among other things.¹⁸⁶ In assessing the severity of the emotional injury, courts are instructed to rely on the facts of the case that relate to the severity of the discriminatory conduct.¹⁸⁷ Thus,

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Angela Onwuahi-Willig, *What about #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L. J. F. 105, 109–10 (2018).

¹⁸³ *E.g., id.* (emphasis in original).

¹⁸⁴ Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remediating the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 562 (1996).

¹⁸⁵ *See id.* (stating that the claims of sexual violence by Black women embodying the Mammy or Sapphire often go unbelieved).

¹⁸⁶ Kate Sablosky Elengold, *Clustered Bias*, 96 N.C. L. R. 457, 503–04 (2018).

¹⁸⁷ *Id.* at 504–05.

the amount of damages becomes directly proportional to the claimants' experiences of degradation.¹⁸⁸

This measure of damages invites factfinders to explore the dimensions of claimants' harm. Particular to Black women, the harm that follows from another's discriminatory conduct relates to the claimants' experiences with at least racism, misogyny, and the perpetuation of Black, female stereotypes related to sexuality.¹⁸⁹ This also occurs when Black, female claimants' Blackness and womanhood are not expressly implicated in a given discrimination lawsuit.¹⁹⁰

Thus, there is an incentive for claimants to allege race and gender discrimination, since they will receive a higher damages award upon courts finding evidence of both.¹⁹¹ In this way, individuals of dual-minority status, in particular, Black women, are able to exploit the very practice that injured them: discrimination.¹⁹² Beyond bestowing upon Black women a newfound power that they have long been without, this damages calculation remedies them as a whole, where society has long tried to separate their Blackness from their womanhood and dissect their experience into parts.¹⁹³ This is also the benefit of intersectional remedies: the acknowledgment of the whole of a group whose efforts are often co-opted and eclipsed.¹⁹⁴

CONCLUSION

Although an Equal Rights Amendment would benefit Black women in some ways,¹⁹⁵ the #MeToo movement's perceived push for its enact-

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 505–06.

¹⁹⁰ *See id.* at 507 (explaining that the race and gender of a claimant in a discrimination lawsuit might affect the outcome, regardless of whether those factors are directly involved).

¹⁹¹ *Id.*

¹⁹² *See id.* at 505–06 (explaining that claimants of dual minority status are able to exploit the discrimination perpetrated against them by alleging as many forms as possible, which will thereby increase the damage award upon a successful verdict).

¹⁹³ *See* *Vuyanich v. Republic Nat'l Bank*, 82 F.R.D. 420, 434–35 (1979) (prohibiting a Black woman from serving as representative of a putative class because her interests as a woman conflicted with those of the Black, male class members and her interests as a Black individual conflicted with those of the white, female class members).

¹⁹⁴ *See* Rochelle Riley, *#MeToo Founder Blasts the Movement for Ignoring Poor Women*, DETROIT FREE PRESS (Nov. 15, 2018), <https://www.freep.com/story/news/columnists/rochelle-riley/2018/11/15/tarana-burke-metoo-movement/2010310002/> (detailing Black women's frustrations with the fact that "Hollywood" and "pretty girls" have taken over the #MeToo movement).

¹⁹⁵ *See* Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.C.L. L. REV. 243, 243 (1971) (arguing that Black women will benefit from ratification of the proposed Equal Rights Amendment).

ment is inconsistent with the movement's original tenets.¹⁹⁶ Ignited by widespread dissatisfaction with the lack of discussion pertaining to Black women's experiences in social discourse, a Black woman¹⁹⁷ founded the #MeToo movement.¹⁹⁸ Although the movement's original goal was to advocate on behalf of young, Black, female survivors of sexual violence, Hollywood and the white feminist community later co-opted it.¹⁹⁹ This co-optation further relegated Black women to a state of invisibility, a state that the #MeToo movement was designed to combat.²⁰⁰

Now, the media has credited the #MeToo movement for inciting a recent spike in efforts to enact the long-proposed Equal Rights Amendment.²⁰¹ Regardless of whether this is a misattribution, the proposed Amendment misaligns with the original intent behind the #MeToo movement, which was to more fully address the experiences of Black, female survivors of sexual violence. However, this is also where the proposed Amendment fails to align with the movement's mission. Due to its own qualities,²⁰² as well as other qualities inherent to the constitutional amendment process,²⁰³ an Equal Rights Amendment would fail to provide Black women full redress for sexual harms.

From a broad viewpoint, an Equal Rights Amendment would benefit Black women.²⁰⁴ However, its inadequacies arise from the fact that such

¹⁹⁶ See, e.g., *About, ME TOO.*, <https://metoomvmt.org/about/#history> (last visited Nov. 19, 2018) (explaining that the purpose of the #MeToo movement is to address the plight of Black, female survivors of sexual abuse).

¹⁹⁷ Sandra E. Garcia, *The Woman Who Created #MeToo Long Before the Hashtag*, THE NEW YORK TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/RG8R-LKNN>].

¹⁹⁸ See *About, ME TOO.*, <https://metoomvmt.org/about/#history> (last visited Nov. 19, 2018) (recounting Tarana Burke's founding of the #MeToo movement).

¹⁹⁹ See Rochelle Riley, *#MeToo Founder Blasts the Movement for Ignoring Poor Women*, DETROIT FREE PRESS (Nov. 15, 2018), <https://www.freep.com/story/news/columnists/rochelle-riley/2018/11/15/tarana-burke-metoo-movement/2010310002/> (exploring the assertion that "Hollywood" and "pretty girls" have taken over the #MeToo movement).

²⁰⁰ See, e.g., *About, ME TOO.*, <https://metoomvmt.org/about/#history> (last visited Nov. 19, 2018) (explaining that the purpose of the #MeToo movement is better spotlight the plight of Black, female survivors of sexual abuse).

²⁰¹ Marsha Mercer, *#MeToo Fuels A Comeback for the Equal Rights Amendment*, USA TODAY (March 1, 2018), <https://www.usatoday.com/story/news/2018/03/01/metoo-movement-fuels-1970-s-comeback-era/385667002/>.

²⁰² See, e.g., S.J. Res. 6, 115th Cong. (2017) (reciting the text of the proposed Equal Rights Amendment, which excludes any mention of race or provides any other indication that the proposed Equal Rights Amendment will address race-based injuries).

²⁰³ See Kathleen Sullivan, *Constitutional Amendmentitis*, AM. PROSPECT (Dec. 19, 2001), <https://prospect.org/power/constitutional-amendmentitis/> (explaining that there should be resistance to amending the Constitution to accommodate contemporary social and political notions).

²⁰⁴ See Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.C.L. L. REV. 243, 243 (1971) (arguing that Black women will benefit from ratification of the proposed Equal Rights Amendment).

an Amendment would have no way of accounting for the significance of intersectionality on Black women's experiences of sexual violence.²⁰⁵ Thus, an Equal Rights Amendment would only partially advance the social position of Black women, who exist at the intersection of at least race and gender.²⁰⁶ Only when administered in conjunction with other, intersectional devices—such as a modified reasonable person standard and damage apportionment—would an Equal Rights Amendment align with the ideology of the #MeToo movement. Moreover, only then do Black women finally rise alongside the revival of this long-proposed Amendment.

²⁰⁵ See, e.g., S.J. Res. 6, 115th Cong. (2017) (providing the language of the proposed Equal Rights Amendment, which is devoid of mention of social factors beyond gender).

²⁰⁶ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1251–53 (1991) (situating women of color into the intersection of race and gender and explaining the difficulties that might arise for such women when they attempt to address certain forms of oppression).

