BERKELEY JOURNAL OF GENDER, LAW & JUSTICE

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Dedication

The *Berkeley Journal of Gender, Law & Justice* dedicates this volume to the organizers and activists on the front lines of social, economic, and legal struggles, who advocate fearlessly for justice beyond the limits of the law. We aspire for this scholarship to empower those who seek a more caring and compassionate world in spite of seemingly insurmountable oppression at the hands of powerful institutional actors. *BGLJ* is and will remain a space that fosters solidarity and coalition-building within and between marginalized communities.

From the Membership

The *Berkeley Journal of Gender, Law & Justice* is guided by an editorial policy that distinguishes us from other law reviews and feminist journals. Our mandate is to publish feminist legal scholarship that critically examines the intersection of gender with one or more other axes of subordination, including, but not limited to race, class, sexual orientation, and disability. Therefore, discussions of "women's issues" that treat women as a monolithic group do not fall within our mandate. Because conditions of inequality are continually changing, our mandate also is continually evolving. Articles may come within the mandate because of their subject matter or because of their analytical attention to differences in social location among women. The broad scope of this mandate, and the diversity of scholarship it supports, is reflected in this volume of the *Berkeley Journal of Gender, Law & Justice.*

The majority of pieces submitted to this journal, however, do not fall within the mandate. There are far too few of us in legal education and practice committed to advocating for women, let alone focusing on those women least served by the legal system. Rather than abandon or modify our mandate in response to the limited pool of available scholarship, we hope to cultivate and support such scholarship by recommitting ourselves to the vision our mandate reflects. We need your help. This forum can only exist with the vigorous participation of thinkers and writers nationwide who share our vision and our commitment. We urge you, our readers and friends, to consider the issues raised in the *Berkeley Journal of Gender, Law & Justice* as you pursue your own work. Share your work-in-progress with us. Publish with us. Tell your colleagues, students, and teachers about us. If you read an unpublished paper or hear a speech at conference that addresses the mandate of the *Berkeley Journal of Gender, Law & Justice,* refer it to us. Join us in nurturing and critically engaging the legal research, theories, and strategies required to serve the interest we share in social justice.

From the Editors

We are incredibly proud to present Volume 38 of the *Berkeley Journal of Gender, Law & Justice*. We extend a heartfelt thanks to our wonderful membership and Editorial Board. Their hard work and dedication come through in the work we publish, even amid the stresses of law school and the world at large, where catastrophic shifts have led to an uncertain legal and political landscape. We thank those who have contributed to our online blog, *Under Deconstruction*, as it has remained a place where our members can respond to current developments in the law. We are especially grateful to our readers, who continue to support our journal; this work is fundamentally about coming together and building community, and our readers are a critical part of our efforts. Finally, we acknowledge the work of our predecessors as we continue to build on their remarkable contributions to our journal.

Volume 38 grapples with the challenges of an increasingly hostile legal landscape and offers a vision for how we may continue to fight for a more just world. It has long been apparent that the interests of lawmakers, judges, and administrators are not aligned with those relegated to the margins. This Volume represents our ongoing pursuit to amplify the struggles and voices of those most impacted by implicitly and explicitly gendered regressive laws and policies.

■ ■ ■

Amelia Wilson, in *Force Multiplier: An Intersectional Examination of One Immigrant Woman's Journey Through Multiple Systems of Oppression*, examines one immigrant woman's experiences in the Southeastern United States as she passed through the mental health care system, competency proceedings, the criminal justice system, and the deportation pipeline to explicitly lay bare intertwining forms of systemic subjugation. Wilson proposes four policy recommendations that unite movements for immigrant, racial, gender, and health justice, demonstrating how intersectional solutions are both achievable and necessary for dismantling co-constitutive system of oppression.

We follow this with another piece about immigration laws by Monica Batra Kashyap. Her piece, *Toward a Critical Race Feminism Critique of Immigration Laws That Exclude Sex Workers*, is the first to apply a critical race feminist critique to the specific immigration law which excludes those who engage in sex work. She employs theories of anti-essentialism and intersectionality to show how the law silences women of color sex workers and refuses to recognize the impacts of multiple intersecting systems of oppression. Kashyap further seeks

to strengthen the links between critical race and immigration law scholarship so that scholars can continue to use CRF as an exploratory analytical tool to examine the intersections of race, class, and gender within immigration law.

Next, we present the winner of the 2022 Albiston Prize: Bethool Zehra Haider of the University of California, Irvine School of Law, Class of 2023. The Albiston Prize is awarded to a current law student who submits a manuscript meeting our intersectional mandate. In *Asking the Muslim Woman Question: Understanding the Social and Legal Construction of Muslim Women*, Haider explores the experience of women who observe the hijab in the legal field. Through a historical lens, she analyzes how the manner in which Orientalist conceptions, against the backdrop of imperialism, created dichotomous categories which have caught veiled Muslim women in their fold. Haider argues that a very purposeful, gendered account of Islam, rooted in Orientalism and exemplified by 9/11, affects the way Muslim women are treated in the legal sphere at large, keeping their voices outside of the cultural norm.

In *The Law of Assisted Reproductive Technologies for LGBTQ+ Parents: A Recognition Regime of Family Law Built in Opposition to the Regulatory Regime*, Rose Holden Vacanti Gilroy examines how the law of reproductive assistance technology imposes separate regimes on poor and wealthy LGBTQ+ families. Problematizing the normative assumptions built into family law, Gilroy demonstrates how ART law legitimizes those with the traditional markers of the normative American "family," to the exclusion of non-normative LGBTQ+ families.

Next is the winner of the 2022 Sarah Weddington Prize, Logan K. Jackson of Stetson University College of Law, Class of 2023. The annual Weddington prize is awarded by the national reproductive justice organization, If/When/How, and receives presumptive publication in our journal. In *Willful Disregard: How Ignoring Structural Racism in Maternal Mortality Has Led Black Women to Become Invisible in Their Own Crisis*, Logan K. Jackson details how the failure to contend with structural racism in the maternal mortality crisis has rendered the injustices Black women face invisible. Jackson examines how the legislative response to the crisis fails to address the underlying structural and systemic factors that lead to maternal health disparities for Black women.

Finally, in *How Anti-Sex Trafficking Efforts Should Align With Criminal Justice Reform*, Maura Reinbrecht & Kiricka Yarbough Smith propose that front-end criminal justice reforms—namely reducing the criminalization of poverty, reforming racially biased police practices, and increasing police accountability—could mitigate the disparate impact that policing has on Black individuals being sex trafficked. They argue that aligning anti-sex trafficking efforts with criminal justice reform would prioritize the prevention of sex trafficking as well as the

protection of people who experience trafficking while seeking to prosecute traffickers with less collateral harm to Black individuals.

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On behalf of our journal, thank you for your commitment to intersectional feminism in (and outside) the law. We hope this work inspires you to challenge the boundaries of traditional legal solutions and organize your own communities.

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Thank you so much to all our sponsors and friends for your generous and continuing support. We could not continue publishing intersectional feminist scholarship without you.

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ARTICLES

Force Multiplier: An Intersectional Examination of One Immigrant Woman's Journey Through Multiple Systems of Oppression

Amelia Wilson†

ABSTRACT

The immigrants' rights movement can assume an intersectional and cooperative approach to dismantling co-constitutive systems of oppression that conspire to punish, exclude, and exploit disfavored groups. Racial justice must be at the center of the movement, but so too must we understand the devastating role that gender, disability, and documentation status play in marginalizing immigrants and their communities. This article examines one immigrant woman's experiences in the Southeastern United States as she passed through the mental health care system, competency proceedings, criminal justice system, and the deportation pipeline to explicitly lay bare intertwining forms of systemic subjugation.

Mbeti Ndonga is a member of multiple disfavored groups. She is Black, living with serious mental health disabilities, and now undocumented following years as a permanent resident. She experienced an erosion of safety over time that resulted in her being twice detained in the notorious Irwin County Detention Center, once deported, and ultimately the victim of unconsented-to, harmful gynecological procedures by a doctor who is now at the center of a major federal investigation. A transversal investigation of her life as she interacted with multiple state and federal agencies reveals patterns of subordination that buttress one another and create a perpetual cycle of suffering. Mbeti's experiences, while unique to her, are revealing of the injustices faced by the many similarly situated immigrants who share her positioning.

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†. Assistant Clinical Professor at Seton Hall University School of Law; former Research Scholar and Clinical Instructor at Columbia Law School, Immigrants' Rights Clinic. I am indebted to this article's subject, Mbeti Ndonga, and all the formally detained women of the Irwin County Detention Center who have fought tirelessly to ensure that the events at ICDC were brought to light and never replicated. I am profoundly grateful to my colleague Elora Mukherjee for her careful reading of this article and crucial feedback, her constant support and mentorship, and her indefatigable service to students, advocates, and impacted persons in furtherance of social justice. I am also endlessly thankful to my lifetime mentor and friend Elissa Steglich for her honest and instructive feedback and guidance. This article would also not have been possible without Larisa Antonisse (Columbia Law School class of 2022) who read early drafts and provided critical recommendations. Special thanks to the participants in the Race, Sovereignty, and Immigrant Justice Symposium co-sponsored by the Chacón Center for Immigrant Justice and Maryland Journal of International Law for permitting me to share the nascent draft of this article, and for the thought-provoking discussion that resulted.

Just as oppression is intersectional, so can be the solution. Immigrant justice, racial justice, gender justice, and health justice share reform priorities that can serve one another. This article proposes four policy recommendations that unite these different movements' purposes. They range from alterations to our immigration court system that address serious due process deficiencies as applied to persons with mental health disabilities to ending cooperative agreements between ICE and local law enforcement. The recommendations are concrete, achievable, and offer opportunities for enduring change that would benefit the lives of all noncitizens.

INTRODUCTION

Race interacts with gender, mental health challenges, and the criminalization of undocumented status such that it is virtually impossible for many immigrants to thrive in the United States. Black noncitizens[1] especially encounter barriers to accessing services, wealth, and security that collude to diminish their ability to flourish in this country. Implicit bias, disproportionate policing, and higher rates of detention contribute to this maelstrom, which in turn influence case outcomes as Black immigrants navigate our immigration system. Their prospects dim further when disability, lack of status, and gender are added to the equation. Movement lawyering can assume an intersectional and cooperative approach to understanding and dismantling the co-constitutive systems of oppression that punish, exclude, and exploit disfavored groups. We can then aggressively pursue changes in our laws and policies to resist—and reverse—the status quo.

The experiences of one immigrant woman—Mbeti Ndonga[2]—allow for an in-depth examination of the overlapping identity axes and their effects on immigrants' access to security, dignity, and equal opportunity in the United States. Mbeti is a member of multiple disfavored groups: she is Black, an immigrant, a woman, living with serious mental health issues, and now undocumented following a life as a permanent resident. Mbeti's narrative careens tragically through the mental health care system, the criminal justice system, the immigration courts, immigration detention, the federal courts, Congress, and our society's treatment of women's health and women's bodies. Her path through these institutions is a constant erosion of safety and justice, punctuated with catastrophic events and heartbreaking circumstances. Multiple people and agencies failed to protect her—even after her experiences became publicly known—while others sought to punish and erase her.

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1. Black immigrants are an extremely diverse group who come to the United States from throughout the world, primarily Africa, the Caribbean, Central America, South America, and North America. *See* Juliana Morgan-Trostle, Kexin Zhang & Carl Lipscombe, NYU Sch. of L. Immigrant Rts. Clinic & Black All. for Just Immigr., The State Of Black Immigrants 7, 9 (2016), https://stateofblackimmigrants.com/assets/sobi-fullreport-jan22.pdf [https://perma.cc/KV53-C8X7] (defining Black immigrant as "any person who was born outside the United States, Puerto Rico or other U.S. territories and whose country of origin is located in Africa or the Caribbean" but acknowledging that persons of African heritage "make up a significant percentage of the population of many countries outside Africa and the Caribbean," including Guyana, Honduras, Nicaragua, and Brazil).
2. Mbeti Victoria Ndonga is this author's client before several federal government agencies that deal exclusively with immigration. Ms. Ndonga has consented to the writing of this article and the use of her full name. She was consulted throughout this article's production regarding her personal history, the ways she is presented, and the article's message concerning the treatment of Black noncitizen women and persons suffering from mental health disabilities. She has also spoken publicly of her experiences with several major news outlets including the L.A. Times, VICE News, and members of the Associated Press. Finally, she is a named plaintiff in the class action lawsuit Oldaker v. Giles, No. 7:20-cv-00224-WLS-MSH (M.D. Ga. filed Nov. 9, 2020). Many of the facts the author discusses about the *Oldaker* case and Mbeti's experiences are matters of public information.

Just as oppression is multi-faceted, so must be the solution. Immigrant justice, racial justice, gender justice, and health justice share many reform priorities that can benefit and serve one another. This article offers four policy recommendations that could have ameliorated the wrongdoing Mbeti and similarly situated undocumented immigrants experienced. First, providing counsel to all immigrants facing deportation cures significant due process concerns while mooting arguments used to justify detention. Providing counsel is economically feasible, and successful public defender models already exist. Second, immigration detention must be abolished; doing so does not require major overhaul of our immigration laws. Third, creating an independent immigration judiciary frees the courts from political control and partisan bias, and gives immigration judges the tools to directly protect immigrants like Mbeti who have mental health concerns. All communities will be safer if the current administration ends cooperative agreements between U.S. Immigration and Customs Enforcement (ICE) and local law enforcement. Fourth, guaranteeing mental health care for all persons regardless of immigration status supports multiple social justice movements.

Part I of this article engages in a transversal investigation of Mbeti's life as she interacted with different agencies and systems. It slows down certain pivotal moments in Mbeti's life to dissect how patterns of subordination buttress one another. Part II situates Mbeti in the wider immigrant population to show how the proposed recommendations that follow will impact a large number of individuals. Part III then asks what changes could have been in place to alter the outcome at each juncture, or could be in place moving forward to prevent the outcome's replication in others' lives. The four policy recommendations offer much-needed opportunities for enduring change.

Other scholarly pieces have turned a racial justice lens on immigration issues, or have separately sought discrete answers to problems in our immigration system as related to mental health. What makes Mbeti's story unique is that it provides a rich opportunity to explicitly show the interconnectivity between different modalities of oppression, as well as ways to stitch together interdisciplinary solutions. Her life story is a persuasive argument for this precise kind of change.

I. "HOW COULD THIS HAVE HAPPENED?" MBETI'S JOURNEY THROUGH MULTIPLE SYSTEMS AND INSTITUTIONS

Mbeti's trajectory cannot be encapsulated easily, as it contains many interlocking parts and subparts. Mbeti came to the United States from Kenya as a toddler and always considered herself an American. She became a lawful permanent resident when she was around thirteen years old. She was passionate about singing and shared that she once opened for BB King when she was a senior in high school—one of the proudest moments of her life. She was on her way to finishing college when she started experiencing mental health challenges. She would encounter law enforcement during a mental health crisis that would

trigger a perpetual cycle of suffering and institutional oppression, culminating in her experiencing medical abuse while in custody at the Irwin County Detention Center (ICDC) in rural Georgia.[3] But Mbeti is more than those experiences: she is extremely resilient and a fierce advocate for herself. She engaged in protest while detained;[4] she became a cooperating witness in the investigation by several federal agencies into medical abuse at ICDC; and she became a named plaintiff in a class action lawsuit against the Department of Homeland Security alleging First Amendment violations and retaliation by ICE.[5]

A. House of Horror: Immigration Detention Centers—and One in Particular

I first met Mbeti over the telephone in late September of 2020. She was detained in Ocilla, Georgia, a town three hours south of Atlanta with a population of around 3,500.[6] Georgia-based advocates and organizers from Innovation Law Lab and Project South had reached out to several law clinics to seek assistance in interviewing women who had possibly been victims of medical neglect or even battery. Explosive allegations of gynecological abuse occurring at ICDC had just hit major media outlets.[7] Dawn Wooten, a former nurse at ICDC, had

3. *See* Greg Walters, Carter Sherman & Neda Toloui-Semnani, *'A Disturbing Pattern': ICE Detainees Were Pressured to Have Gynecological Surgery, Doctors Say*, VICE (Oct. 24, 2020, 6:13 PM), https://www.vice.com/en/article/88a95x/ice-detainees-were-pressured-to-have-gynecologicalsurgery-doctors-say [https://perma.cc/R2JC-JSJK]; Molly O'Toole, *19 Women Allege Medical Abuse in Georgia Immigration Detention*, L.A. TIMES (Oct. 22, 2020), https://www.latimes.com/politics/story/2020-10-22/women-allege-medical-abuse-georgia-immigration-detention [https://perma.cc/PCC8-EA97].
4. VICE News, *Woman Who Says ICE Gave Her Unwanted Gynecological Surgery Has Been Released*, YOUTUBE (Jan. 5, 2021), https://www.youtube.com/watch?v=W-El6Ma5ao0 [https://perma.cc/GG4V-KGMA] (featuring Mbeti, who discusses one of her protest signs, which read "Death 2 Prejudice Health Care 4 Black Female here in GA USA! PAY! PAY! USA PAY. I live with pain Everyday!")
5. *See* Consol. Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Declaratory and Injunctive Relief and for Damages at 67, Oldaker v. Giles, No. 7:20-cv-00224-WLS-MSH (M.D. Ga. Dec. 21, 2020) [hereinafter Oldaker Complaint]. The lawsuit was filed on behalf of fourteen women who were detained at ICDC. *Id.* at 1. Each was subjected to non-consensual, medically unindicated, and/or invasive gynaecological procedures by Dr. Mahendra Amin, with the knowledge or participation of other Respondents (ICE, ICDC personnel). *Id.* In total, over forty women provided sworn statements. Press Release, Sirine Shebaya, Nat'l Immigr. Project of the Nat'l Laws. Guild, Breaking: Legal Filing Reveals Growing Number of Women Experienced Medical Abuse in ICE Custody (Dec. 22, 2020), https://www.nipnlg.org/pr/2020_21Dec_oldaker-v-giles.html [https://perma.cc/KR3N-LQSE].
6. Census Report Profile on Oscilla, GA, CENSUS REP., https://censusreporter.org/profiles/16000US1357428-ocilla-ga/ [https://perma.cc/6D34-EE5G] (last visited Sept. 25, 2022).
7. Caitlin Dickerson, *Inquiry Ordered Into Claims Immigrants Had Unwanted Gynecology Procedures*, N.Y. TIMES (Sept. 14, 2020), https://www.nytimes.com/2020/09/16/us/ICE-

come forward via a whistleblower report in which she detailed nonconsensual and overly invasive procedures, the falsifying and shredding of medical records, and inappropriate medical care.[8] Members of Congress publicly analogized the reports coming out of ICDC to our nation's shameful history of forced sterilization.[9] Such a reference was not outrageous, as eugenics through reproductive coercion exists today.[10]

We were eager to participate, thinking the project was discrete in scope but of potential value to women in one of the most geographically remote ICE detention centers in the U.S., with a ghastly reputation of unsanitary conditions, inedible food, and substandard medical care.[11] Together with our students, local organizers, and colleagues nationwide, we helped to investigate, expose, and litigate medical abuses at ICDC. For Mbeti, however, what happened at ICDC was the latest point in a crescendo of injustice.

Mbeti and I spoke over Skype—a rare accommodation afforded to attorneys specifically at this facility, owed to the 2018 lawsuit filed against the facility by the Southern Poverty Law Center (SPLC).[12] Most detention facilities only permit in-person attorney-client visits.[13] Mbeti did not have counsel. She was once

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hysterectomies-whistleblower-georgia.html [https://perma.cc/M2G4-24BB] ("The complaint details medical procedures ordered or undertaken by a physician who has treated patients detained at the Irwin County Detention Center, which is run by a private company, LaSalle Corrections, in Ocilla, Ga.").

8. Letter from the Gov. Accountability Project & Project South to Members of the House Comm. on Homeland Sec., Senate Comm. on the Judiciary, and House Comm. on Oversight and Reform 6–7 (Sept. 17, 2020), https://projectsouth.org/wp-content/uploads/2020/09/ICE-ICDC-Whistleblower-Disclosure-to-Congress-091720.pdf [https://perma.cc/2LNM-FDXV].
9. Letter from Members of Congress to Joseph V. Cuffari, Inspector General, Dep't of Homeland Sec. (Sept. 15, 2020), http://jayapal.house.gov/wp-content/uploads/2020/09/DHS-IG-FINAL.pdf [https://perma.cc/QV7N-A9HE].
10. *See* Kalhan Rosenblatt, *Judge Offers Inmates Reduced Sentences in Exchange for Vasectomy*, ABC NEWS (July 21, 2017), https://www.nbcnews.com/news/us-news/judge-offers-inmates-reduced-sentences-exchange-vasectomy-n785256 [https://perma.cc/GAZ2-NR4A] ("Female inmates can also get the birth control implant Nexplanon, which prevents pregnancy for four years, for the same sentence reduction.").
11. *See generally* PENN STATE L. CTR. FOR IMMIGRANTS' RTS. CLINIC & PROJECT SOUTH, IMPRISONED JUSTICE: INSIDE TWO GEORGIA IMMIGRANT DETENTION CENTERS, 40, 44–45, 47–49 (2017), https://projectsouth.org/wp-content/uploads/2017/06/Imprisoned_Justice_Report-1.pdf [https://perma.cc/SCW3-ADYP]; U.S. DEP'T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENF'T, COMPLIANCE INSPECTION FOR THE IRWIN COUNTY DETENTION CENTER OCILLA, GEORGIA 6 (2017).
12. *See* S. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec., No. 18-760 (CKK), 2020 WL 3265533, at *1–2 (D.D.C. June 7, 2020); Complaint at 33, 46, S. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec., No. 1:18-cv-00760 (D.D.C. Apr. 4, 2018) [hereinafter S. Poverty L. Ctr. Complaint].
13. Emma Winger & Eunice Cho, *ICE Makes It Impossible for Immigrants in Detention to Contact Lawyers*, ACLU UNION (Oct. 29, 2021), https://www.aclu.org/news/immigrants-rights/ice-makes-it-impossible-for-immigrants-in-detention-to-contact-lawyers/ [https://perma.cc/AU87-5BX7] ("In many cases, detained immigrants cannot find lawyers because ICE facilities make it so difficult to even get in touch and communicate with attorneys in the first place.")

represented by a private attorney, but she could not afford that attorney anymore and there were very few non-profit providers serving the region. The conversation detoured from Dr. Amin to details about her personal history, how she ended up in ICE custody (twice), her mental health, what happened to her when she was deported to Kenya, and why she returned to the United States. Mbeti was generous with the details of her life and a fantastic historian, displaying near-perfect accuracy with dates, names, and timelines. She wanted to talk about these parts of her life, she explained, because they were relevant to the specific harm she experienced with Dr. Amin.

ICDC is a privately run, for-profit facility operated by LaSalle Corrections.[14] LaSalle Corrections has only been in existence since 2013, and yet has managed in its short history to gobble up ICE contracts throughout Texas, Louisiana, Georgia, and Arizona,[15] profiting richly from the industry of incarceration.[16] Despite having a beneficent-sounding motto ("Family. Caring. Community."[17]), LaSalle Corrections has in reality long been plagued by allegations of physical force resulting in death,[18] medical neglect resulting in

14. *Our Locations*, LASALLE CORR., https://lasallecorrections.com/locations/ [https://perma.cc/774R-QUKU] (last visited June 14, 2021).
15. Cary Aspinwall & Dave Boucher, *'They're Gonna Kill Me': Why Did A Man Die In Jail Near Fort Worth As Untrained Guards Watched?,* THE DALLAS MORNING NEWS (Nov. 18, 2018), https://www.dallasnews.com/news/investigations/2018/11/18/theyre-gonna-kill-me-why-did-a-man-die-in-jail-near-fort-worth-as-untrained-guards-watched/ [https://perma.cc/5TA4-FEVV ("In recent years, LaSalle has won contracts by bidding significantly less than competitors GEO Group and CoreCivic (the prison company formerly known as Corrections Corporation of America). The company has gotten a growing number of contracts in Texas to operate jails by promising to house inmates for as little as $30 per person per day.")
16. *See* Monsy Alvarado, Ashley Balcerzak, Stacey Barcheger, Jon Campbell, Rafael Carranza, Maria Clark, Alan Gomez, Daniel Gonzalez, Trevor Hughes, Rick Jervis, Dan Keemahill, Rebecca Plavin, Jeremy Schwartz, Sarah Taddeo, Lauren Villagran, Dennis Wagner, Elizabeth Weise & Alissa Zhu, *'These People Are Profitable': Under Trump, Private Prisons Are Cashing In On ICE Detainees*, USA TODAY (Dec. 19, 2019), https://www.usatoday.com/in-depth/news/nation/2019/12/19/ice-detention-private-prisons-expands-under-trump-administration/4393366002/ [https://perma.cc/V6QS-6HMT] ("[W]hen President Trump took office, promising to crack down on immigrants[,] [LaSalle co-founder Bill] McConnell saw his next opportunity: the business of immigration detention. LaSalle Corrections quickly opened six more facilities in Louisiana. His detention centers hold more than 7,000 immigration detainees. . . . [T]he companies operating those centers have generated record-setting revenue since 2016."); Matt Clarke, *LaSalle Corrections: A Family-Run Prison Firm*, PRISON LEGAL NEWS (Feb. 15, 2013), https://www.prisonlegalnews.org/news/2013/feb/15/lasalle-corrections-a-family-run-prison-firm/ [https://perma.cc/RVK6-LJJC] ("The McConnell family has steadily expanded their business until now one in seven Louisiana prisoners is held in a LaSalle-owned or operated facility, including a quarter of all offenders incarcerated in parish prisons.")
17. LaSalle Corr., https://lasallecorrections.com/ [https://perma.cc/5NS8-2LTH] (last visited Oct. 5, 2022).
18. *See, e.g.,* Aspinwall & Boucher, *supra* note 15 ("Video obtained by The Dallas Morning News shows [Andy DuBusk] shackled after guards used pepper spray on him in a cell. Jailers then placed him face down and piled on him, making it hard for him to breathe and contributing to his death at age 38, an autopsy found.")

death,[19] suicides,[20] overuse of solitary confinement,[21] harsh and abusive treatment,[22] surgeries performed without informed consent,[23] staffing failures,[24] unsanitary conditions,[25] and "lack of transparency and oversight."[26] Augmenting

19. *See, e.g.*, Matthew Haag & Daniel Victor, *For-Profit Jail Is Accused of Ignoring Man's Pleas for Medical Help Before Death*, N.Y. TIMES (May 25, 2017), https://www.nytimes.com/2017/05/25/us/texas-jail-death-video.html [https://perma.cc/VH4V-Y595]; Aimee Ortiz, *For-Profit Jail Is Accused of Abuse After Death of Woman With H.I.V.*, N.Y. TIMES (Sept. 20, 2020), https://www.nytimes.com/2020/09/17/us/lasalle-corrections-inmate-death.html [https://perma.cc/PXX2-DT7X] ("The complaint filed on Wednesday argues that in the years leading up to 2019 LaSalle 'engaged in a pattern, practice and custom of unconstitutional conduct toward inmates with serious medical needs.'")
20. *See, e.g.*, Gaby Del Valle, *ICE Has Been Ramping Up Its Work with a Private Prison Company Connected to Horrific Allegations*, VICE (Oct. 29, 2019, 3:31 PM), https://www.vice.com/en/article/ywa4v5/ice-has-been-ramping-up-its-work-with-a-private-prison-company-connected-to-horrific-allegations [https://perma.cc/SKQ2-59HR] ("Earlier this month, a migrant held at LaSalle's Richwood Correctional Center in Monroe died by suicide after being put in solitary confinement as punishment for participating in a hunger strike.")
21. *See, e.g.*, *Federal Government Sued Over Intentional Cruelty at Georgia Immigration Center,* MEXICAN AM. LEGAL DEF. AND EDUC. FUND (June 11, 2021), https://www.maldef.org/2021/06/federal-government-sued-over-intentional-cruelty-at-georgia-immigration-center/ [https://perma.cc/3B7G-PQJA] ("Immigration and Customs Enforcement ("ICE") transferred her to the ICDC in June 2018 where she was immediately placed in solitary confinement in the segregated housing unit because she is transgender. She was left in her cell for about 22 hours a day, had very limited physical and mental stimulation, and was deprived of any meaningful human interaction.")
22. *See, e.g.*, Tanya Eiserer & Jason Trahan, *Video Shows For-Profit Jail Guards Slamming Father to the Ground. His Kids Want to Know Why He's Dead,* WFAA NEWS (Feb. 7, 2020), https://www.wfaa.com/article/news/local/investigates/jailedtodeathlouisiana/287-93e49d0c-1d94-4a36-a5b4-87d38be54b58 [https://perma.cc/CJ7T-DHDG].
23. *See, e.g.,* Complaint from Project South et al. to Joseph V. Cuffari, Inspector Gen., Dep't of Homeland Sec. et al. 18–20 (Sept. 14, 2020), https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf [https://perma.cc/NH5S-RK94].
24. *See, e.g., id.* at 8; Tom Aswell, *Reports of Problems at Ruston's LaSalle Corrections Continue; Facilities' and Corporate Web Pages Go Dark,* LA. VOICE (Nov. 13, 2022), https://louisianavoice.com/2020/11/13/reports-of-problems-at-rustons-lasalle-corrections-continue-facilities-and-corporate-web-pages-go-dark/ [https://perma.cc/GSA8-SAWW] ("The Ruston-based private prison company has been cited by authorities for failure to properly train its employees, for falsifying documents certifying that received training courses they never received, falsifying documents certifying that guards checked prisoners periodically when those prisoners ultimately died or had to be transferred to nearby hospitals after their physical conditions deteriorated after beatings or after being denied medications for conditions prison officials were aware of."); Aspinwall & Dave Boucher, *supra* note 15 ("As LaSalle has amassed a growing empire of county jails, state prisons and immigration detention centers, it has been plagued by complaints about temporary workers and lax training, court records show.")
25. ACLU OF GA., PRISONERS OF PROFIT 17–19 (2012), https://www.prisonlegalnews.org/media/publications/georgia_aclu_prisoners_of_profit_immigrants_and_detention_in_georgia_2012.pdf [https://perma.cc/R4FN-788U] (citing serious and systemic hygiene concerns, issues with access to food and medical care, delays in receiving medications, and inadequate mental health care).
26. *See* John Moritz, *Private-Run Lockup Firm Considered in Arkansas Has Share of*

the injustice is that most of LaSalle Corrections' facilities are located in remote, rural parts of their respective states, making it infinitely more difficult for detainees to find lawyers.[27] Nationwide, only around 14 percent of detainees have counsel—though in the Southeast that number drops to around 6 percent.[28] In a 2018 lawsuit brought by SPLC against ICDC and two other detention centers for due process and attorney access violations, lawyers point out that ICDC had only one attorney-visitation room for 700 detainees.[29] Attorney access matters; case outcomes for represented detained respondents are improved by ten and a half times over cases without counsel.[30] Represented detainees are also more likely to secure release from detention.[31] A non-detained immigrant's chance of winning their case is improved by around twenty times over cases heard where the noncitizen is detained.[32]

The Wooten whistleblower complaint may have been nationally sensational, but it was far from the first effort to shine light on the medical atrocities being committed at ICDC. Local advocates and detainees themselves

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Complaints, ARK. DEMOCRAT GAZETTE (Sept. 29, 2019), https://www.arkansasonline.com/news/2019/sep/29/private-run-lockup-firm-has-share-of-co/?news [https://perma.cc/A7ZZ-CMB9] ("[P]rison officials said they were aware of issues with LaSalle, including lawsuits over the deaths of two diabetic inmates in recent years. Officials also acknowledged concerns that LaSalle, which plans to pay guards less than they receive at Correction Department facilities, will have trouble keeping a full staff.")

27. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32, 38 (2015) (finding that only 14 percent of detained immigrants secured legal representation—a number that drops precipitously when the detainee is in a rural area such as Lumpkin, GA, with a representation rate of only 6 percent); *see also* AM. IMMIGR. COUNCIL, *Immigration Detention in the United States by Agency* 4 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf [https://perma.cc/UAN8-CVBW] (finding that in 2015, 48 percent of detained noncitizens were held in "at least one facility at least 60 miles from the nearest nonprofit immigration attorney who practiced removal defense.")
28. *Shadow Prisons: Immigrant Detention in the South*, S. POVERTY L. CTR. (Nov. 21, 2016), https://www.splcenter.org/20161121/shadow-prisons-immigrant-detention-south [https://perma.cc/4T6A-C4VY] ("Only six percent of detainees in the Stewart (Lumpkin), Georgia, and Oakdale, Louisiana, immigration courts are represented by counsel. Nationally, the rate of representation for detained individuals is 14 percent.")
29. S. Poverty L. Ctr. Complaint, *supra* note 12 at 38.
30. *See* Jennifer Stave, Peter Markowitz, Karen Berberich, Tammy Cho, Danny Dubbaneh, Laura Simich, Nina Siulc & Noelle Smart, VERA INST. OF JUST., *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity* 26 (2017), https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf [https://perma.cc/3R8T-NNF3] (estimating that representation increases a detained noncitizen's success rate before the immigration courts in New York City by 1,100 percent).
31. Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC'Y REV. 117, 124 (2016).
32. *See* Eagly & Shafer, *supra* note 27, at 49, 70; *see also* Karen Berberich & Nina Siulc, VERA INST. OF JUST., *Why Does Representation Matter? The Impact of Legal Representation in Immigration Court* (Nov. 2018), https://www.vera.org/downloads/publications/why-does-representation-matter.pdf [https://perma.cc/6K3Q-5UMB] (demonstrating that legal representation increases the likelihood of obtaining bond by three times).

had been endeavoring for years to call attention to instances of medical abuse and neglect that were occurring in the facility.[33] In 2017, Project South and the Penn State Law Center for Immigrants' Rights published the results of scores of interviews with ICDC detainees and deported individuals.[34] Interviewees spoke of a profound lack of medical care,[35] lack of mental health services, unsanitary conditions, and a lack of prenatal care.[36] In 2020, when a group of detained ICDC women uploaded a YouTube video in an attempt to shed light on substandard medical access, [37] they were retaliated against and placed in solitary confinement, where their communication privileges were revoked.[38]

The doctor at the center of the whistleblower's allegations had already been investigated by the Department of Justice (DOJ).[39] Dr. Mahendra Amin was accused of performing medically unnecessary procedures in order to file false

33. Azadeh Shahshahani & Shoba Sivaprasad Wadhia, *The Cruel But Usual Conditions Inside Two Georgia Immigration Detention Centers*, THE HILL (May 19, 2017), https://thehill.com/blogs/pundits-blog/crime/334076-the-cruel-but-usual-conditions-inside-two-georgia-immigration?rl=1 [https://perma.cc/L47T-DJ2X] ("Stewart and Irwin are two of more than 200 detention facilities but in many ways exemplify the deepest flaws with the U.S. immigration detention system which in October 2016, held more than 40,000."); Det. Watch Network, Expose and Close: Irwin County Detention Center 1–3 (2012), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Irwin%20County.pdf [https://perma.cc/47TU-SYSA].
34. Penn State L. Ctr. for Immigrants' Rts. Clinic & Project South, *supra* note 11, at 1, 5.
35. *See id.* at 48 (quoting a detainee who stated: "I had lumps in my chest and blood had begun discharging from my breast. When I requested medical care, sometimes no one would reply. I was not given medical care until ICE later approved it. When I reached out for medical help, I was placed in solitary confinement.")
36. *See* Nikhel Sus, Eli Lee, Azadeh N. Shahshahani, Priyanka Bhatt, Sirine Shebaya & Khaled Alrabe, Citizens for Resp. in Wash., PROJECT SOUTH & NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD, *Deliberate Indifference: Records Show ICE's Systemic Failures at Georgia Detention Facility at the Center of Gynecological Abuse Investigations* 9 (2021), https://projectsouth.org/wp-content/uploads/2021/06/ICE-ICDC-Report.pdf [https://perma.cc/48WN-35SA] ("In one case, a woman reported experiencing a swollen abdomen and pain and numbness in her legs after undergoing a 'gynecological surgery' the preceding month. In the other, a pregnant woman reported not receiving 'any type of prenatal care treatment' at ICDC despite having 'a history of failed pregnancies.'")
37. Rachel Taber, *Women Detained at Irwin County ICE Processing Center Fight for Their Lives Against COVID19*, YOUTUBE (Apr. 13, 2020), https://www.youtube.com/watch?v=aQt6QbkWsLI [https://perma.cc/VMD5-45QZ] (showing women that are holding Spanish-language signs that read "We Have The Right To Live" while they say that the facility is overcrowded with poor sanitation).
38. Debbie Nathan, *Women in ICE Detention Face Reprisals for Speaking Up About Fears of COVID-19*, THE INTERCEPT (Apr. 28, 2020), https://theintercept.com/2020/04/28/ice-detention-coronavirus-videos/ [https://perma.cc/7CJG-5QLM]; *see also* Priyanka Bhatt, Katie Quigley, Azadeh Shahshahani, Gina Starfield & Ayano Kitano, PROJECT SOUTH, *Violence & Violation: Medical Abuse of Immigrants Detained at the Irwin County Detention Center* 18–19 (Harvard Immigr. and Refugee Clinical Program et al. eds., 2021), https://projectsouth.org/wp-content/uploads/2021/09/IrwinReport_14SEPT21.pdf [https://perma.cc/8XSJ-HTZZ] (highlighting the testimony of individuals who experienced medical abuse at ICDC).
39. Complaint, United States v. Hosp. Auth. Of Irwin Cnty., No. 7:13-cv-00097-HL (M.D. Ga. July 8, 2013).

claims between 2013 and 2015.[40] The DOJ alleged that Dr. Amin had a standing order at Irwin County Hospital to run certain tests on pregnant patients, without any medical evaluation and regardless of the woman's condition.[41] That investigation was settled for $520,000.[42]

B. Jails over Care: Law Enforcement's Disproportionate Treatment of Psychologically Distressed Persons and its Impact on Mental Health

Mbeti started experiencing paranoia and depression in college, and was eventually diagnosed with schizoaffective disorder and bipolar disorder. She became entangled in the criminal justice system not long after her mental health diagnosis.

Mbeti's first encounter with law enforcement was in 2007, when she was pulled over by police.[43] Mbeti says she was unmedicated at the time and experiencing a mental health crisis. But she was also Black in the rural southeast, where racial profiling and targeting of Black and Brown people is well-documented.[44] She was arrested for "acting erratically" and being "uncooperative." Police, however, have a documented history of applying these and similar terms to people of color to justify their arrest and worse.[45]

Mbeti's psychiatric distress increased once in police custody. Frustrated while trying to make a phone call she slammed the phone into the receiver—damaging it in the process. This was charged as a felony on the assertion that the phone was federal property. And so, on December 14, 2007, Mbeti faced two serious charges: "Obstruction/Hindering Law Enforcement Officers" (for

40. *Id.* at 27.

41. *Id.* at 15.

42. Hospital Authority of Irwin County Resolves False Claims Act Investigation for $520,000, U.S. Dep't of Just. (Apr. 29, 2015), https://www.justice.gov/usao-mdga/pr/hospital-authority-irwin-county-resolves-false-claims-act-investigation-520000 [https://perma.cc/9M27-ZCT3].

43. Criminal records on file with the author.

44. *See Racial Profiling In Louisiana: Unconstitutional And Counterproductive*, S. POVERTY L. CTR. (Sept. 18, 2018), https://www.splcenter.org/20180918/racial-profiling-louisiana-unconstitutional-and-counterproductive ("In 2016, for instance, black adults comprised only 30.6% of Louisiana's adult population but 53.7% of adults who were arrested and 67.5% of adults in prison. Overall, black adults are 4.3 times as likely as white adults to be serving a felony prison sentence in Louisiana"); Timothy Bella, *HBCU lacrosse team accuses police of racial profiling in search of bus*, WASH. POST (May 10, 2022, 4:30 PM), https://www.washingtonpost.com/sports/2022/05/10/women-lacrosse-drug-search-race-delaware/.

45. *See* Joshua Budhu, Méabh O'Hare & Altaf Saadi, *How "Excited Delirium" is Misused to Justify Police Brutality*, BROOKINGS INST. (Aug. 10, 2020), https://www.brookings.edu/blog/how-we-rise/2020/08/10/how-excited-delirium-is-misused-to-justify-police-brutality/ [https://perma.cc/2FN8-96PL]; Lisa Cacho & Jodi Melamed, *How Police Abuse the Charge of Resisting Arrest*, BOSTON REV. (June 29, 2020), https://bostonreview.net/articles/lisa-cacho-jodi-melamed-resisting-arrest/ [https://perma.cc/22LW-A34B]; Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 972–73, 954–55, 965 (2020).

disobeying the police during the traffic stop), and felonious "Interference with Government Property" (for damaging the phone).[46] She was convicted via "negotiation"—essentially, a plea deal—and sentenced to one to two years by the Superior Court of Fayette County. Mbeti now ponders how she was considered competent to negotiate this plea; she was so mentally unwell at the time that she had to be hospitalized in a psychiatric facility for four months following the sentencing.[47]

Mbeti describes that she experienced a worsening of psychiatric and medical symptoms during her first incarceration, in particular a deepening depression and hopelessness.

C. Walls Closing in: How Criminal and Immigration History Intersect with Accessing Care

Two years later, Mbeti's convictions were hobbling her ability to find employment. She was uninsured, untreated, and increasingly paranoid. She still enjoyed permanent resident status, but status alone does not confer access to services. As a nation, we fall woefully short on caring for those with mental health issues, with over half of those needing treatment not receiving it within at least one calendar year.[48]

Lawfully present immigrants[49] are over twice as likely to be uninsured than citizens, while undocumented residents[50] are over four times as likely to be uninsured as citizens.[51] A 2018 Kaiser Family Foundation study found that several factors contribute to this lack of access. First, noncitizens are more likely to be low income and therefore unable to afford private insurance or unlikely to find themselves employed in industries that offer insurance.[52] Race figures in as well. Black immigrants have the highest unemployment rates among all

46. On file with the author.
47. Psychological report on file with the author.
48. *Id.*
49. Lawfully present immigrants include: individuals who are authorized to live in the United States either permanently or temporarily (legal permanent residents, persons admitted as refugees, persons granted asylum ("asylees"), persons granted status by an immigration judge, students, recipients of Deferred Action for Childhood Arrivals (DACA), persons with Temporary Protective Status (TPS), parolees for humanitarian reasons, and others).
50. Undocumented residents are foreign-born individuals present in the United States without authorization because they entered without inspection, they entered with authorization but their authorization expired or lapsed, or they were formally documented and then lost their status.
51. *Health Coverage of Immigrants*, KAISER FAM. FOUND. (Apr. 6, 2022), https://www.kff.org/racial-equity-and-health-policy/fact-sheet/health-coverage-of-immigrants/ [https://perma.cc/W6UY-ECLB] ("26% of lawfully present immigrants and about four in ten (42%) undocumented immigrants were uninsured compared to less than one in ten (8%) citizens.").
52. *See id.* ("Nonelderly noncitizens . . . have lower incomes because they are often employed in low-wage jobs and industries that are less likely to offer employer-sponsored coverage. Given their lower incomes, noncitizens also face increased challenges affording employer-sponsored coverage when it is available or through the individual market.").

immigrant communities while earning the lowest wages, despite being among the most educated.[53] A person's geography can hurt as well; Georgia residents with mental health issues are over four times as likely, compared to the national average, to be forced out of in-network mental health care by insurance companies, making treatment unattainable except by the wealthiest of those in need.[54]

Documented noncitizens qualify for some federal services like Medicaid, however, their eligibility is subject to restrictions and time requirements that do not apply to citizens.[55] Mbeti was additionally afraid that her conviction rendered her ineligible for benefits or could expose her to ICE. Many noncitizens share her fear. Recent changes in immigration law, in particular the Trump era 2019 "public charge" rule,[56] acted as wealth tests. As a result of the public charge rule, many immigrants became afraid to seek benefits they were entitled to such as Supplemental Nutrition Assistance Program, housing assistance, and nonemergency Medicaid due to concerns that doing so would imperil future efforts to remain in the United States.[57]

Mbeti remembers feeling anxious and desperate on the morning of January 25, 2010; she recounted that, without insurance or any prospect of employment, she felt she would never receive steady treatment for her mental health conditions. She says that as irrational as it sounds, she wanted to be locked up

53. *See* Morgan-Trostle et al., *supra* note 1, at 13; Ann M. Simmons, *African Immigrants Are More Educated Than Most — Including People Born in U.S.*, L.A. TIMES (Jan. 12, 2018), https://www.latimes.com/world/13frica/la-fg-global-african-immigrants-explainer-20180112-story.html [https://perma.cc/N46R-LB73].

54. *See Mental Health in Georgia*, NAT'L ALL. ON MENTAL ILLNESS (Feb. 2021), https://www.nami.org/NAMI/media/NAMI-Media/StateFactSheets/GeorgiaStateFactSheet.pdf [https://perma.cc/SCJ2-MSTG].

55. Health Coverage of Immigrants, *supra* note 50; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

56. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) (expanding the INA's inadmissibility public charge grounds to include any applicant who has received one or more public benefits, as defined in 22 CFR 40.41(c), for more than 12 months within any aggregate 36-month period).

57. The 2019 public charge rule is no longer in effect, however, fear in immigrant communities combined with the glacial rate at which updates to our complex immigration system reach those communities means that hesitancy to access health care may linger for years to come. *See* Holly Straut-Eppsteiner, NAT'L IMMIGR. L. CTR., *Documenting Through Service Provider Accounts Harm Caused by the Department of Homeland Security's Public Charge Rule*, at iii–iv (2020), https://www.nilc.org/wp-content/uploads/2020/02/dhs-public-charge-rule-harm-documented-2020-02.pdf [https://perma.cc/Z9W7-KSX4] ("In many cases, 'chilled' populations are not themselves targets of the rule, demonstrating the widespread, spillover harm fear about public charge creates for immigrant communities and members of immigrant families, including those who are already lawful permanent residents or U.S. citizens, as well as for survivors of domestic violence, trafficking, or other serious crimes who are applying for U or T status."); Ajay Chaudry, Claudia Babcock, Benjamin Zhu & Sherry Glied, *Immigrant Participation in SNAP in a Period of Immigration Policy Changes, 2017-2019*, at 4–6 (May 30, 2021) (working paper) (one file with the NYU Wagner School of Public Service Research Paper Series) (showing that immigrant participation in SNAP declined during the Trump administration).

again so she could get medication.[58] This statement was not off base; jails and prisons became surrogate mental health facilities after they were deinstitutionalized in the 1970s.[59] She was driving aimlessly when she spotted a police vehicle parked outside a diner. The intervening memories are foggy for her, but Mbeti knows she struck the unoccupied car several times. She was promptly arrested.

Like so many Black defendants,[60] Mbeti was not shown leniency in her criminal arraignment—despite the fact that her crimes did not result in injuries to any person, were only property-related, and were borne out of untreated mental health conditions. She was charged with the highest allowable crime associated with her conduct and given years of prison time for it despite her history of mental health institutionalization. Mbeti was convicted of felony "Interference with Government Property"[61] and was sentenced to a term of imprisonment of five years.[62]

D. "Criminal Alien": How Mbeti's Convictions made her an ICE Priority for Detention and Deportation

Mbeti's two property offenses grievously implicated her immigration status and set off a catastrophic chain reaction. First, her conviction triggered removal proceedings on the grounds that she had committed "crimes involving moral turpitude"[63] and "crimes of violence."[64] Second, she was subject to mandatory custody.

Mbeti's specific ICE charges are just two examples of the many ways that criminal offenses imperil a noncitizen's immigration status. Congress introduced

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58. During a 2020 psychiatric evaluation that was performed while she was in ICE custody at ICDC, Mbeti stated, "I was not in my right mind [in January 2010] because I was stressed and depressed at the time so I wanted to go back to prison because it seemed easier to be in prison." Dr. Sean Massie, Psy.D., Psychological Evaluation of Mbeti Victoria Ndonga (Feb. 17, 2020) (on file with the author).
59. *See, e.g.,* RISDON N. SLATE & W. WESLEY JOHNSON, THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS & OPPORTUNITY FOR THE JUSTICE SYSTEM 28 (1st ed. 2008); Christina Canales, *Prisons: The New Mental Health System*, 44 CONN. L. REV. 1725, 1732 (2012); Fox Butterfield, *Asylums Behind Bars: A Special Report.; Prisons Replace Hospitals for the Nation's Mentally Ill*, N.Y. TIMES (Mar. 5, 1998), https://www.nytimes.com/1998/03/05/us/asylums-behind-bars-special-report-prisons-replace-hospitals-for-nation-s.html [https://perma.cc/49E3-C9ME].
60. *See infra* notes 86–88.
61. Ga. Code Ann. § 16-7-24 (2010).
62. Criminal records on file with the author. Mbeti served two years of the five-year sentence.
63. *See* Immigration and Nationality Act, 8 U.S.C. § 1227; Moral Turpitude, Black's Law Dictionary (6th ed. 1990) (defining moral turpitude as "[an] act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty").
64. *See* Immigration and Naturalization Act § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (providing that any noncitizen "who is convicted of an aggravated felony at any time after admission is deportable"); id. § 1101(a)(43)(F) (defining aggravated felony to include "a crime of violence . . . for which the term of imprisonment [is] at least one year").

"crimes involving moral turpitude" as a new ground for deportation in 1996 with the passage of the "Illegal Immigration Reform and Immigrant Responsibility Act" (IIRIRA).[65] This category of crimes is as vague in actual definition as it has been wide-ranging in interpretation.[66] Congress has repeatedly expanded the scope of another of its crime-based deportation laws: the frightfully named "aggravated felony."[67] Today the list of so-called "aggravated felonies" includes crimes that are neither aggravated nor felonies, such as simple battery[68] and theft.[69] Many status-generated crimes—such as entering the U.S. without authorization, working without a work permit, or driving without a license in a state that does not permit most immigrants to obtain a license—can brand a noncitizen a "criminal alien" because of the continuous expansion of that category.

Another IIRIRA creation was mandatory custody[70] without the possibility for release on bond during the pendency of proceedings,[71] meaning Mbeti had little hope for release. Immigration detention is euphemized as "civil" (non-punitive) in nature[72]—and yet it is substantially similar to criminal incarceration.[73] This was true for Mbeti; while detained at the Irwin County

65. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 303, 110 Stat. 3009-546, 585 (codified as amended in scattered sections of 8 and 18 U.S.C.) (referring to Immigration and Naturalization Act § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i)). With its passage, Congress added almost 100 new crimes that would subject a noncitizen to removal. *See id.*

66. *See* Dan Kesselbrenner & Lory D. Rosenberg, Immigration Law and Crimes § 6:2 (June 2022 ed.), Westlaw IMLC.

67. *See* 8 U.S.C. § 1101(a)(43), which defines "aggravated felony" within the Immigration and National Act and has been amended over time by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 8 U.S.C. § 1101(a)(43); Immigration Act of 1990, Pub. L. 101-649, § 501, 104 Stat. 4978, 5048; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, § 222, 108 Stat. 4305, 4320; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 440(e), 110 Stat. 1214, 1277; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, div. C, § 321, 110 Stat. 3009-546, 627.

68. Immigration and Nationality Act § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (referring to 18 U.S.C. § 16).

69. *Id*. § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

70. 8 U.S.C. § 1226(c)(1)(C) ("The Attorney General shall take into custody any alien who . . . is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year").

71. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1946–47 (2000).

72. *See* Zadvydas v. Davis, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) ("Where detention is incident to removal, the detention cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish.").

73. *See* Mary Bosworth & Emma Kaufman, *Foreigners in A Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL'Y REV. 429, 439 (2011) ("Given the similarities between the incarcerated populations, it is unsurprising to find that there is considerable resemblance between the policies governing prisons and immigration detention regimes, as well as overlap between the individuals and companies who run such institutions."); see César Cuauhtémoc García Hernández, *Immigration Detention as*

Detention Center she wore an orange jumper, had scarce access to sunlight, was guarded by people in uniform, and enjoyed only fleeting moments to speak to loved ones on the telephone.

Mandatory custody without the possibility of bond has no parallel in any other civil proceeding.[74] Professor Alina Das acknowledges that defenders of laws like IIRIRA and others that weld criminality and deportation[75] may argue that criminal conduct—not racism—lead to the laws' creation. But, she argues, "[i]f racist ideas lead to criminal labels, then those racist ideas justify the system, not criminality itself."[76] The effect is clear. Racialized policing of Black individuals followed by overcharging of crimes conspire to result in higher rates of Black immigrants in detention. Black immigrants make up just 7.2 percent of the noncitizen population in the U.S.,[77] but comprise 20.3 percent of immigrants facing detention on criminal grounds.[78] Once detained, Black immigrants face harsher treatment by custodial agents.[79] Where immigrants are eligible for release on bond, Black immigrants see their bonds set higher than non-Black immigrants,[80] possibly because of a criminal conviction but also because immigration judges at times bring implicit bias into hearings.[81] Detention inflicts hardships on all those hoping to remain in the United States: limited access to counsel,[82] hearings that move on a much faster docket than those on the non-

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Punishment, 61 UCLA L. REV. 1346, 1384 (2014); *see also* Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEENS'S L.J. 55, 61 (2014) (noting the "precarious distinction" between immigration and criminal confinement).

74. ALINA DAS, NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS 72–73 (2020).
75. Anti-Drug Abuse Act of 1988, § 7342, 8 U.S.C. § 1101(a)(43) (referring to 18 U.S.C. § 924(c)(2)) (establishing new grounds for deportation for low-level controlled substance offenses, including possession of small amounts of marijuana).
76. Das, *supra* note 74, at 30.
77. Morgan-Trostle et al., *supra* note 1, at 11.
78. *Id*. at 20.
79. Spencer Woodman, *U.S. Isolates Detained Immigrants from Majority-Black Countries at High Rate, Study Finds*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 21, 2020), https://www.icij.org/investigations/solitary-voices/u-s-isolates-detained-immigrants-from-majority-black-countries-at-high-rate-study-finds/ [https://perma.cc/Z6LV-25PE] (citing University of California, Irvine study that found Black immigrants in detention are six times more likely to be held in solitary confinement).
80. *See Black Immigrant Lives Are Under Attack*, RAICES TEXAS, https://www.raicestexas.org/2020/07/22/black-immigrant-lives-are-under-attack/ [https://perma.cc/MDP9-EVD3] (last visited Oct. 6, 2022) ("Between June 2018 and June 2020, the average bond paid by RAICES was a whopping $10,500. But bonds paid for Haitian immigrants by RAICES averaged $16,700, 54% higher than for other immigrants. The result: Black immigrants stay in ICE jails longer because of the massive disparity in their bonds.").
81. *See* Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, 54 JUDGES' J. 20 (2015).
82. *Supra* notes 27–28.

detained docket,[83] geographic isolation,[84] unfavorable circuit law,[85] and immigration judges with the worst grant rates in the country.[86] And paths for relief are statutorily more narrow for those with criminal convictions versus those without criminal convictions.

Labeling immigrants like Mbeti "criminal aliens" uses racist and xenophobic fearmongering to justify the deportation assembly-line.[87] Legal scholars argue that a history of racism is threaded throughout all our criminal and immigration laws. Engaging with that history is crucial to dismantling systems of oppression that impact noncitizens. Professor Das draws clear historic lines between racial animus and our most punitive deportation laws.[88] She writes: "Racism against immigrants has fueled and capitalized upon a public safety narrative to criminalize communities of color and justify harsh immigration policies against people with and without criminal records."[89] With Black people exposed to higher rates of arrests, more significant criminal charges following arrest, higher likelihood of conviction, and harsher sentences once

83. *See Immigration Court Processing Time by Outcome*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php [https://perma.cc/94JK-XZC2] (last visited Oct. 21, 2022) (showing that detained cases are resolved in several months, versus non-detained cases which take years on average to resolve); *see also* Emily R. Summers, *Prioritizing Failure: Using the "Rocket Docket" Phenomenon to Describe Adult Detention*, 102 IOWA L. REV. 851, 854 (2017).

84. NAT'L IMMIGRANT JUST. CTR., *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court* 7 (2010), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2017-04/Isolated-in-Detention-Report-FINAL_September2010.pdf [https://perma.cc/QC2E-J8SX] ("NGOs and law firms that can provide pro bono counsel to immigrant detainees are most commonly located in metropolitan areas, but a significant number of detention facilities are located more than 100 miles from these cities.").

85. *See Mapping U.S. Immigration Detention*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/map [https://perma.cc/X9K6-BPQS] (last visited Oct. 21, 2022) (showing that Texas and Louisiana hold the highest populations of detainees; these states fall under the jurisdiction of the Eleventh Circuit which is considered unfavorable for immigrants).

86. Jeremy Redmon, *Georgia's Immigration Court Judges Among Toughest In Nation For Asylum*, THE ATLANTA J.-CONST. (July 25, 2019), https://www.ajc.com/news/breaking-news/georgia-immigration-court-judges-among-toughest-nation-for-asylum/svQ2CmRGXS5Hgi2utVTmrO/ [https://perma.cc/J26B-S9UL]("An Atlanta Journal-Constitution analysis of TRAC's data shows Georgia's two immigration courts — located in South Georgia and Atlanta — have the second and third highest average asylum denial rates in the nation at 95% and 94% for that same time-frame, respectively. Only the immigration court in Chaparral, N.M., had a higher average denial rate last year at 96%. The national average was 58%.").

87. *See* Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 614 (2012) (cataloging developments in immigration law and immigration enforcement that have led to hyper-criminalization of noncitizens).

88. Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 194 (2018) ("Modern laws to identify, convict, incarcerate, detain, and deport immigrants rest on . . . racially oppressive foundations, which must be understood in order to be deconstructed.")

89. Das, *supra* note 74, at 23.

convicted,[90] racism and anti-immigration sentiments harmonize and reinforce one another.

Immigrants suffer incalculably in detention, even when detained for brief periods and under "adequate" conditions.[91] According to one international survey of detainees held in detention centers throughout the world, incarcerated individuals consistently reported increased anxiety, depression, somatization, panic, suicidal ideation, and PTSD.[92] Prolonged detention seems to more adversely impact women, though the effects are largely understudied.[93]

When a detainee (regardless of gender) has a history of trauma or suffers from preexisting mental health disabilities, the risk of harm rises precipitously.[94] Solitary confinement is a shuddersome and well-documented reality for those with mental health issues[95] despite evidence that it can result in acute, irreversible damage to the brain.[96] Mbeti recalls feeling elevated fear, confusion, and isolation during this first period of detention at ICDC. The worst was yet to come.

The Department of Homeland Security alleged that Mbeti was removable because of her crimes and was not entitled to release.[97] Congress had stripped immigration judges of the power to balance mitigating factors such as length of

90. *Id.* at 24.

91. Janet Cleveland, Rachel Kronick, Hanna Gros & Cécile Rousseau, *Symbolic Violence and Disempowerment as Factors in the Adverse Impact of Immigration Detention on Adult Asylum Seekers' Mental Health*, 63 INT. J. PUB. HEALTH 1001, 1005 (2018).

92. Martha von Werthern, K. Robjant, Z. Chui, R. Schon, L. Ottisova, C. Mason & C. Katona, *The Impact of Immigration Detention on Mental Health: A Systematic Review*, BMC PSYCHIATRY, Dec. 2018, at 1, 10.

93. *Id.* at 12.

94. *Id.* at 3.

95. Erika Voreh, *The United States' Convention Against Torture Ruds: Allowing the Use of Solitary Confinement in Lieu of Mental Health Treatment in U.S. Immigration Detention Centers*, 33 EMORY INT'L L. REV. 294, 287 (2019).

96. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 333 (2006) (explaining that solitary confinement results in either "severe exacerbation or recurrence of preexisting illness, or the appearance of an acute mental illness in individuals who had previously been free of any such illness"); Sarah Dávila-Ruhaak, *ICE's New Policy on Segregation and the Continuing Use of Solitary Confinement Within the Context of International Human Rights*, 47 J. MARSHALL L. REV. 1433, 1447–51 (2014) (arguing that the infliction of solitary confinement—especially on vulnerable populations who have previously experienced trauma and instability such as asylum seekers—is an act of torture in violation of international human rights law). *See generally* Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104 (2010) (arguing that the costs of solitary confinement are clinically distressing, psychologically harmful, and extremely severe); Alex Kozinski, *Worse Than Death*, 125 YALE L.J. FORUM 230 (2016) (arguing that solitary confinement is the harshest form of punishment, above even death); NAT'L IMMIGR. JUST. CTR. & PHYSICIANS FOR HUM. RTS., *Invisible In Isolation: The Use of Segregation and Solitary Confinement in Immigration Detention* 1 (2012), https://immigrantjustice.org/sites/default/files/content-type/issue/documents/2017-01/InvisibleinIsolationReport-September%202012.pdf [https://perma.cc/F5QR-W5L3].

97. Charging document on file with the author.

time in the United States, family ties, or community support when deciding whether take away a permanent resident's status.[98] Mbeti fell in that category of noncitizens for whom there could be no exercise of discretion, even though she had been in the United States nearly all of her life, had all of her immediate family here, and had only committed crimes that resulted in property damage—acts that resulted directly from her mental health issues. The immigration judge ordered her deported.[99]

E. Around and Around it Goes: Release from ICE, Return to ICE, Deportation, Return to the U.S., Another Arrest, and Back Once More in ICDC

Mbeti received a deportation order but was released from ICE detention on an order of supervision. ICE can place an individual on an order of supervision in lieu of actual deportation in a variety of circumstances, such as where a person has extensive family in the United States or when actual removal is not likely to happen in the immediate future.[100] Her situation was extremely precarious at that moment. The judge's decision had revoked her permanent resident status—rendering her "undocumented," and therefore ineligible for many public benefits.[101] Just prior to the instigation of removal proceedings against her, Mbeti had finally qualified for Supplemental Security Income benefits based on her mental health disabilities, since permanent residents are one of the few noncitizen groups covered by the law. Following the deportation order, she was no longer eligible for this benefit.[102] The deportation order similarly disqualified

98. 8 U.S. Code § 1229b(a)(3) (barring "Cancellation of Removal" for any permanent resident in removal proceedings who has committed an "aggravated felony" as defined by 8 U.S.C. § 1101(a)(43); 8 U.S. Code § 1229b(a)(2) (statutorily precluding "Cancellation of Removal" for the same population if they committed any crime listed in 8 U.S.C. §1182(a)(2), 8 U.S.C. §1227(a)(2) or 8 U.S.C. §1227(a)(4) within the first seven years of their having been admitted in the United States (referred to as the "Stop-Time Rule")).

99. Removal order on file with the author.

100. 8 C.F.R. § 241.13(h)(1) (2006); *see also* Memorandum from John P. Torres, Acting Dir., Off. of Det. and Removal Operations, to Field Off. Dirs. (Mar. 27, 2006), https://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf [https://perma.cc/N49Z-LWNU] (discussing a revision to the Detention and Removal Operations Policy and Procedure Manual, which is attached to the memorandum).

101. *Citizenship and Residency FAQs*, GA. MEDICAID, https://medicaid.georgia.gov/citizenship-and-residency-faqs [https://perma.cc/G2QQ-QXCX] (last visited Oct. 6, 2022) ("To obtain full Medicaid benefits in Georgia, you must be a Georgia resident and either a U.S. citizen or a legally residing noncitizen. Noncitizens (residing legally or illegally) can qualify for coverage for emergencies and labor and delivery services if income requirements are met.").

102. *See* 8 U.S.C. § 1611 (making noncitizens who are not "qualified aliens" ineligible for Federal public benefits, with limited exceptions); 8 U.S.C. § 1641 (defining "qualified aliens" as a limited group that includes noncitizens who have lawful permanent residence status); *see also What Should I Know About Supplemental Security Income (SSI)?* GA. LEGAL AID, https://www.georgialegalaid.org/resource/what-should-i-know-about-supplemental-security-income-ssi?ref=8Hdbq [https://perma.cc/6RDS-9GJG] (last visited Oct. 6, 2022) (explaining the benefits and eligibility requirements of Supplemental Security Income).

her from access to healthcare. Under the Affordable Care Act, undocumented noncitizens are barred from participating in health insurance marketplaces.[103] Undocumented immigrants can access some care through federally qualified health centers (FQHCs), community-operated centers providing health care to low-income communities.[104] However, Fayette County in Georgia, where Mbeti resided following her removal order, had none.[105]

As in most states, Georgia law does not permit undocumented residents to obtain a driver's license.[106] Living in rural Georgia without a license made it nearly impossible for Mbeti to get a job; it also made it difficult for Mbeti to get to one of the few county hospitals or neighboring county FQHCs that offered mental health services to uninsured, indigent individuals.

For a brief time, the mental health system in Georgia did work for Mbeti. Her family connected her with an assertive community treatment (ACT) team after her release, which offered her a positive but short-lived comprehensive mental health care experience. ACT, also known as the Training in Community Living program, is a supportive model of treatment that is managed by a multidisciplinary team of mental health professionals and paraprofessionals that focuses on medication compliance, counseling, rehabilitation, and integration in the job market.[107] Mbeti recalls feeling some hope during this time in her life. The ACT team checked in with her, assigned her a social worker, and helped her make some of her mental health appointments. Her hope would not last. The next time Mbeti had a mental health crisis, the police responded instead of her social worker.

The local police turned Mbeti directly over to ICE. They could do this because they had been deputized to investigate and enforce federal immigration

103. 42 U.S.C.A. § 18032(f)(3) (West 2010).

104. *Overcoming Immigrant Barriers to Coverage: Options for Health Care When Major Programs Don't Cut It*, NAT'L COUNCIL OF LA RAZA (2011), https://www.unidosus.org/wp-content/uploads/2021/07/HealthCareHighBarrierNLR.pdf [https://perma.cc/AV4X-GVQ8].

105. *Federally Qualified Health Centers (FQHC)*, GEORGIA DEP'T OF CMTY. HEALTH, STATE OFF. OF RURAL HEALTH (2021), https://dch.georgia.gov/federally-qualified-health-centers-fqhcs-community-health-centers-chcs [https://perma.cc/SG6B-7M5V].

106. *Information for Non-US Citizens*, GA. DEP'T OF DRIVER SERVS., https://dds.georgia.gov/information-non-us-citizens#:~:text=Georgia%20law%20does%20not%20allow,Georgia%20license%20or%20Identification%20card [https://perma.cc/6MNZ-4Y6D] (last visited Oct. 6, 2022) ("Georgia law does not allow non-US citizens, non-resident drivers to operate a motor vehicle if he or she does not have lawful status in the United States."); *see generally States Offering Driver's Licenses to Immigrants*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 11, 2022), https://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx [https://perma.cc/7TJD-3KMC] ("Eighteen states and the District of Columbia have enacted laws to allow unauthorized immigrants to obtain driver's licenses.")

107. Mary Ann Test, *Continuity of Care in Community Treatment*, 2 NEW DIRECTIONS FOR MENTAL HEALTH SERVS. 15, 19–21 (1979); Paul A. Deci, Alberto B. Santos, D. Walter Hiott, Sonja Schoenwald & James K. Dias, *Dissemination of Assertive Community Treatment Programs*, 46 PSYCHIATRIC SERVS. 676, 676 (1995).

laws, owing to a program known as 287(g).[108] This practice is not unique to Georgia. Since 2002, ICE has been engaging local law enforcement across the country to perform federal immigration enforcement duties[109]—effectively authorizing local police forces to do ICE's job for them.[110] Even a traffic officer can now investigate civil immigration violations, hold people suspected of immigration violations in order to provide ICE an opportunity to investigate the individual's status, and set people on the path to deportation.[111] Other DHS programs like "Secure Communities" ensure that immigrants enter the deportation conveyor belt as soon as a state or local agency arrests them.[112]

The link between law enforcement and ICE denies noncitizens access to the services and protection law enforcement is intended to provide.[113] Victims of (and witnesses to) crimes have faced arrest for immigration violations rather than protection by the criminal justice system.[114] The program has a motley coalition of critics that spans immigrant advocates as well as members of law enforcement.[115] Many point to innumerable and egregious instances of racial and

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108. Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g); *see Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENF'T., https://www.ice.gov/identify-and-arrest/287g [https://perma.cc/9A9N-49US] (last visited Oct. 6, 2022).

109. *See* CONG. RSCH. SERV., IF11898, *The 287(g) Program: State and Local Immigration Enforcement* (2021), https://crsreports.congress.gov/product/pdf/IF/IF11898 [https://perma.cc/5RXQ-UATP]; *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra* note 108.

110. *See National Map of 287(g) Agreements*, IMMIGRANT LEGAL RES. CTR. (Dec. 6, 2021), https://www.ilrc.org/national-map-287g-agreements [https://perma.cc/JG63-FQQP] (showing agreements in 142 jurisdictions).

111. Bill Ong Hing*, Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 256 (2012) ("[Sheriff] Arpaio's zealous workplace immigration raids and traffic checkpoint sweeps made the county the largest participant in the 287(g) program, responsible for tens of thousands of deportations of immigrants.").

112. *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/secure-communities [https://perma.cc/N2M4-F869] (last visited Oct. 6, 2022).

113. *See* Nik Theodore, UNIV. OF ILL. AT CHI., *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 1 (2013), https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf [https://perma.cc/F5ZX-DH33].

114. *Id.* at 6 ("Similarly, 45 percent of Latinos stated that they are less likely to voluntarily offer information about crimes, and 45 percent are less likely to report a crime because they are afraid the police will ask them or people they know about their immigration status.").

115. *See* Craig E. Ferrell Jr., *Immigration Enforcement, Is It a Local Issue?* POLICE CHIEF (Feb. 2004), https://www.policechiefmagazine.org/immigration-enforcement-is-it-a-local-issue/ [https://perma.cc/CH42-SGV6] (last visited Oct. 19, 2022); MAJOR CITIES CHIEFS, *M.C.C. Immigration Committee Recommendations for Enforcement of Immigration Laws By Local Police Agencies* 6 (2006), https://www.houstontx.gov/police/pdfs/mcc_position.pdf [https://perma.cc/5JJA-XDXG] (expressing concern that 287(g) undermines public order by interfering with the "trust, communication, and cooperation" between police and the immigrant community); U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-109, *Immigration Enforcement: Better Controls Needed Over Program Authorizing State and Local*

ethnic profiling[116] by overzealous municipal agents on the "hunt" for undocumented persons.[117]

Section 287(g) agreements and immigrants' subsequent detention also harm U.S. citizens[118] and create multi-generational impacts.[119] Average households are plunged into poverty when a noncitizen provider is detained.[120] Children of detained noncitizens are at risk of being placed in the child welfare system,[121]

Enforcement of Federal Immigration Laws 10 (2009), http://www.gao.gov/new.items/d09109.pdf [https://perma.cc/U62Z-JGXM] (finding myriad failures in the program such as a failure to comply with terms of memoranda of agreement between local law enforcement and ICE; a failure to focus on noncitizens who pose a threat to public safety or are a danger to the community; inadequate ICE training and oversight; and significant gaps in reporting processes); ACLU OF GA., *Terror and Isolation in Cobb: How Unchecked Police Power Under 287(g) Has Torn Families Apart and Threatened Public Safety* 5–7 (Azadeh Shahshahani ed., 2009), https://www.aclu.org/sites/default/files/field_document/asset_upload_file306_41281.pdf [https://perma.cc/C2VB-XCS3]; Letter from Cory Booker, U.S. Sen., Mike Quigley, U.S. Rep., & Pramila Jayapal, U.S. Rep., to Hon. Alejandro Mayorkas, Sec'y, Dep't of Homeland Sec. (Apr. 22, 2021), https://www.booker.senate.gov/imo/media/doc/senator_booker_seeks_to_rescind_287g_program.pdf [https://perma.cc/EZ5U-SS4Y] (urging DHS to terminate all 287(g) agreements).

116. ACLU OF GA., THE PERSISTENCE OF RACIAL PROFILING IN GWINNETT: TIME FOR ACCOUNTABILITY, TRANSPARENCY, AND AN END TO 287(G) 5–8 (Azadeh Shahshahani ed., 2010), http://uncoverthetruth.org/wp-content/uploads/2010/04/ACLU_Gwinnett_Racial_Report.pdf [https://perma.cc/57J9-UJD5].

117. *See* ACLU OF N.C. LEGAL FOUND. & IMMIGR. & HUM. RTS. POL'Y CLINIC, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA 8 (2009), https://law.unc.edu/wp-content/uploads/2019/10/287gpolicyreview.pdf [https://perma.cc/VV52-PC9Y] (describing 287(g) as a tool used to "purge towns and cities of 'unwelcome' immigrants").

118. *See* Matthew Boaz, *Practical Abolition: Universal Representation as an Alternative to Immigration Detention*, 89 TENN. L. REV. 199, 209-15 (2021) (discussing how immigrant detention policies harm mixed-status families and broadly contribute to the otherization of non-white individuals); Joanne Lin, *End It: 287(g) is Beyond Repair and Harms Local Communities Every Day*, ACLU BLOG OF RTS. (Apr. 5, 2010), https://www.aclu.org/blog/end-it-287g-beyond-repair-and-harms-local-communities-every-day [https://perma.cc/5VW5-9HGU].

119. *See* Ralph De La Cruz, '*The Police Took Mommy': How Reporting a Crime Nearly Resulted in Deportation for Florida Woman*, FLA. CTR. FOR INVESTIGATIVE REPORTING (Jan. 31, 2011), https://fcir.org/2011/01/31/the-police-took-mommy-how-reporting-a-crime-nearly-resulted-in-deportation-for-florida-woman/ [https://perma.cc/T78P-T7YS] (describing how a mother and wife to U.S. citizens was detained and nearly deported after she reported a crime to local police).

120. Julia Preston, *The True Cost of Deportation*, THE MARSHALL PROJECT (June 18, 2020), https://www.themarshallproject.org/2020/06/22/the-true-costs-of-deportation [https://perma.cc/URV6-R369] (finding that around 6.1 million U.S. citizen children have at least one undocumented family member, and that household income "plummets by as much as 45%" when that family member is taken away—in turn forcing "many families that once were self-sufficient [to] rely on social welfare programs to survive").

121. *See* AM. IMMIGR. COUNCIL, U.S.-CITIZEN CHILDREN IMPACTED BY IMMIGRATION ENFORCEMENT 4 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_childr

and many children are funneled into the foster-care-to-prison pipeline.[122] Where the detained noncitizen is Black, the remaining family is more susceptible to being reported to child services.[123] Black children of immigrants are more likely to be placed in foster homes rather than given services to keep the family together.[124] Mbeti did not have children, but she was a caregiver to her infant nephew. Her child-caring role allowed the child's father, Mbeti's brother, to work.

Those who justify immigration detention claim it serves the twin goals of safeguarding communities while ensuring that immigrants appear for their court hearings.[125] Some even claim that the threat of detention acts as a "deterrent" to hypothetical immigrants contemplating coming to the United States.[126] These reasons are consistently contradicted by data. Longer and more punishing periods of detention have not resulted in a sustained reduction in asylum seekers arriving at the southern U.S. border.[127] 99 percent of non-detained asylum

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en_impacted_by_immigration_enforcement_0.pdf [https://perma.cc/S9GZ-PRG2] (finding that children in foster care where 287(g) is in place are 29% more likely to have "detained or deported parents compared to non-287(g) counties").

122. *See* Shanta Trivedi, *Police Feed the Foster Care-To-Prison Pipeline by Reporting on Black Parents*, NBC NEWS (July 29, 2020), https://www.nbcnews.com/think/opinion/police-feed-foster-care-prison-pipeline-reporting-black-parents-ncna1235133 [https://perma.cc/94RB-7RN6] ("A survey of foster care alumni showed that, by their 25th birthdays, 81 percent of males had been arrested, and 35 percent had been incarcerated.").

123. *See* Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, 5 RUSSELL SAGE FOUND. J. SOC. SCIS., 50, 57 (2019) (examining data that demonstrates that Black families are consistently investigated for mistreatment and neglect far above any other group, including being almost twice as likely to be investigated as a white family).

124. SETH FREED WESSLER, APPLIED RSCH. CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 17 (2011), https://www.raceforward.org/research/reports/shattered-families [https://perma.cc/5MXB-ACNQ] ("[R]esearch shows that child welfare departments are more likely to remove children of color (Black children in particular) from their parents rather than offering services to help them stay together") (citing DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001)); Trivedi, *supra* note 122 (citing two studies that found that even when Black families were given a lower risk assessment by child protective services, they were nevertheless "20 percent more likely to have their case opened for services, and 77 percent more likely to have their children removed instead of being provided with family-based safety services").

125. Boaz, *supra* note 118, at 215.

126. *See* Maureen A. Sweeney, Sirine Shebaya & Dree K. Collopy, *Detention as Deterrent: Denying Justice to Immigrants and Asylum Seekers*, 36 GEO. IMMIGR. L.J. 291, 292–97 (2021). *See generally* Stephanie J. Silverman, *Immigration Detention in America: A History of Its Expansion and a Study of Its Significance* (Ctr. on Migration, Policy, & Soc'y, Working Paper No. 80, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1867366 [https://perma.cc/7URK-DQ7M].

127. *See* Karen Musalo & Eunice Lee, *Seeking a Rational Approach to a Regional Refugee Crisis: Lessons from the Summer 2014 "Surge" of Central American Women and Children at the US-Mexico Border*, 5 J. ON MIGRATION & HUM. SEC. 137, 139 (2017) (discussing how the Obama administration's heightened anti-immigration enforcement policies did not significantly change the numbers of Central American asylum seekers arriving each year).

seekers attend their court hearings,[128] and over 95 percent of all immigrants (asylum-seekers and otherwise) appear for their hearings if represented by counsel.[129] Overzealous detention practices not only directly harm individuals (including U.S. citizens), but they also fail to positively impact public safety outcomes. [130] In fact, communities are actually safer and have lower crime rates as immigrant population numbers increase. [131]

Detention is also exorbitantly expensive,[132] with most funds funneled to for-profit private prisons.[133] Since the 1980s when mass incarceration of immigrants skyrocketed,[134] detention times have grown longer, conditions have deteriorated, and there is little accountability or oversight.[135]

ICE would not show Mbeti any forgiveness this time around; it rescinded her order of supervision and deported her to Kenya on January 20, 2018.[136] Mbeti's brief stay in Kenya was fraught with terror, isolation, homelessness, and sexual violence.[137] She experienced a violent sexual assault by a stranger that resulted in her hospitalization.[138] Her family, fearful that she would die if left

128. *Record Number of Asylum Cases in FY 2019*, TRAC IMMIGR. (Jan. 8, 2020), https://trac.syr.edu/immigration/reports/588/ [https://perma.cc/4ZCK-RKGF].

129. AM. IMMIGR. COUNCIL, IMMIGRANTS AND FAMILIES APPEAR IN COURT: SETTING THE RECORD STRAIGHT 2 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_and_families_appear_in_court_setting_the_record_straight.pdf [https://perma.cc/77CR-PW4M]; *see also* Boaz, *supra* note 118, at 228 (noting that represented immigrants are more likely to be released from custody and appear at their removal hearings following release).

130. *See supra* notes 118–24.

131. Lauren E. Bartlett, *One of the Greatest Human Tragedies of Our Time: The U.N., Biden, and A Missed Opportunity to Abolish Immigration Prisons,* 43 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC., 37, 48 (2022).

132. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT BUDGET OVERVIEW FISCAL YEAR 2020, at 10 (2020), https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf [https://perma.cc/EH2J-53UJ] (showing that the United States spends billions of dollars each year incarcerating immigrants).

133. *See* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 15 (2021).

134. *See* Melina Juárez, Bárbara Gómez-Aguiñaga & Sonia P. Bettez, *Twenty Years after IIRIRA: The Rise of Immigrant Detention and its Effects on Latinx Communities across the Nation*, 6 J. ON MIGRATION & HUM. SEC. 74, 77 (2018).

135. *2009 Immigration Detention Reforms*, IMMIGR. & CUSTOMS ENF'T (Dec. 12, 2011), https://www.ice.gov/factsheets/2009detention-reform [https://perma.cc/28WW-CM95] ("The present immigration detention system is sprawling and needs more direct federal oversight and management. While ICE has over 32,000 detention beds at any given time, the beds are spread out over as many as 350 different facilities largely designed for penal, not civil, detention. ICE employees do not run most of these. The facilities are either jails operated by county authorities or detention centers operated by private contractors.").

136. On file with author.

137. *See* Oldaker Complaint, *supra* note 5, at 72 ("Ms. Ndonga does not have anyone to receive her or anywhere to stay in Kenya, and she will likely not have access to appropriate healthcare.")

138. *See* Gianna Toboni, Carter Sherman, Ana Sebescen & Nicole Bozorgmir, *Woman Says*

alone and unmedicated in a country she had not lived in since she was a toddler, arranged for her return to the United States that same summer.

Mbeti was back in the United States with her family but still unable to access vital care for her mental health. She was without status and moreover without authorization to be in the United States following her prior removal—a situation far worse than when she was on an order of supervision, where she could at least seek a work permit.[139] She decompensated drastically in early 2019, which exposed her to yet another arrest by local police. Local police again notified ICE. ICE took Mbeti back to ICDC.[140]

An immigration judge found that Mbeti was "mentally incompetent."[141] The judge said that Mbeti had "had a habit of jumping in" and was "difficult to work with,"[142] so he revoked her testimonial right and instead gave it to her mother—who was not in Kenya during the events that gave rise to Mbeti's protection claim. Mbeti's mother admitted on the witness stand that she did not know many details about what happened to Mbeti, nor why Mbeti might be afraid to live in Kenya. The judge thereafter denied her request for protection.[143]

Mbeti was unrepresented from that moment on. She attempted to file her own series of appeals, motions to reopen, and requests for bond before the Board of Immigration Appeals,[144] as well as various federal causes of action challenging her detention and alleging civil rights violations.[145] The Board of Immigration Appeals, despite knowing that Mbeti had been adjudicated incompetent, did not appoint counsel to represent her; it instead dismissed her efforts as "untimely" and unfounded in the law.[146]

Georgia ICE Facility Gave Her Unwanted Gynecological Surgery. Now She's Being Deported., VICE (Nov. 23, 2020, 4:27 PM), https://www.vice.com/en/article/pkdgpk/woman-in-ice-gynecology-scandal-faces-deportation-almost-a-death-sentence [https://perma.cc/W368-VM4P] ("When she landed in [Kenya], Ndonga was surprised by one feeling: relief. While living in an African country, she didn't experience the same racism she had faced in the U.S. But then, she was raped by a driver while riding in his car, she said. Ndonga still struggles with symptoms of post-traumatic stress disorder.").

139. *See Employment Authorization,* U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 9, 2020), https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/employer-information/employment-authorization [https://perma.cc/LW47-Z872] (indicating that an order of supervision qualifies a person for employment authorization).

140. Notice To Appear dated 04/18/2019 on file with the author.

141. *See* Matter of M-A-M-, 25 I. & N. Dec. 474, 479 (BIA 2011) ("[T]he test for determining whether an [individual] is competent to participate in immigration proceedings is whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses.").

142. Digital Audio Recording on file with the author.

143. Decision of the Immigration Judge on file with the author.

144. Mbeti's pro se appeals, motions, and complaints on file with the author.

145. Mbeti's habeas corpus actions and § 1983 civil rights complaints file with the author.

146. All BIA decisions relating to Mbeti's pro se efforts on file with the author.

Had Mbeti been detained in the Ninth Circuit, she would have been assigned counsel before the Board at government expense rather than left to fight her case alone. That is because a class of detained noncitizens with serious mental health concerns successfully sued ICE and the immigration court system. The suit challenged the due process deficiencies inherent in prosecuting *pro se*, detained, mentally incompetent immigrants without the provision of appointed counsel.[147] The Central District of California's injunction in *Franco-Gonzalez v. Holder* (often shorthanded to "the Franco protections") which guarantees counsel[148] and bond hearings[149] for detained individuals adjudicated mentally incompetent, however, only applies to certain detained persons in California, Arizona, and Washington (which are under Ninth Circuit jurisdiction).[150]

Detained noncitizens facing removal outside these three states do not enjoy the court-mandated *Franco* protections.[151] Instead, these respondents are covered by a watered-down program that the Executive Office for Immigration Review (EOIR)—the component agency within the Department of Justice that oversees the immigration courts—voluntarily created in 2013 called the "Nationwide Policy."[152] The Nationwide Policy extends some of the *Franco* protections to detained individuals outside the Ninth Circuit.[153] Both the

147. Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 8115423, at *1 (C.D. Cal. Apr. 23, 2013).

148. Ord. Further Implementing this Ct.'s Permanent Injunction at *8, Franco-Gonzalez v. Holder, No. CV-10-02211, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) [hereinafter Franco-Gonzalez Order] ("EOIR shall have 21 days from the date of the [incompetency] determination to arrange for provision of a Qualified Representative.").

149. *Franco-Gonzalez*, 2013 WL 8115423, at *1.

150. Third Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at ¶ 143, Franco-Gonzalez v. Holder, No. CV 10-2211, 2011 WL 12677104 (C.D. Cal. Oct. 25, 2011) [hereinafter Franco-Gonzalez Complaint].

151. *See* Amelia Wilson, *Franco I Loved: Reconciling the Two Halves of the Nation's Only Government-Funded Public Defender Program for Immigrants,* 97 WASH. L. REV. ONLINE 21, 21 (2022).

152. *See* Memorandum from Brian O'Leary, Chief Immigr. J, Exec. Off. for Immigr. Rev., U.S. Dep't of Just., to All Immigr. JJ. (Apr. 22, 2013) (announcing the Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions).

153. *See National Qualified Representative Program (NQRP)*, EXEC. OFF. FOR IMMIGR. REV. (Feb. 18, 2020), https://www.justice.gov/eoir/national-qualified-representative-program-nqrp [https://perma.cc/DZ2S-P4PX]; *see also* GREG CHEN & JORGE LOWEREE, AM. IMMIGR. COUNCIL & AM. IMMIGR. L. ASS'N, POLICY BRIEF: THE BIDEN ADMINISTRATION AND CONGRESS MUST GUARANTEE LEGAL REPRESENTATION FOR PEOPLE FACING REMOVAL 2 (Jan. 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_biden_administration_and_congress_must_guarantee_legal_representation_for_people_facing_removal.pdf [https://perma.cc/S6BF-NJZ4] (recognizing and advocating for the expansion of programs like the National Qualified Representative Program, which provides legal counsel to people with mental disabilities).

Nationwide Policy and *Franco's* court-mandated program are administered by EOIR's National Qualified Representative Program (NQRP).[154]

The Nationwide Policy has many gaps and failings. First, because the Nationwide Policy was created voluntarily, it can be voluntarily ended. It would take only a shift in executive branch priorities to extinguish the program altogether. Second, the Nationwide Policy only guarantees government-paid counsel for 90-days following the individual's release from ICE custody, alongside other funding limitations.[155] Third, while *Franco* class members are guaranteed counsel through the entire pendency of their removal proceedings through the appeals process,[156] respondents falling under the Nationwide Policy's purview have neither such guarantee.[157]

Exacerbating the inherent limitations of the Nationwide Policy is that Nationwide Policy immigration judges are given weakened (and less frequent) training on the judicial competency process in comparison to their *Franco* counterparts.[158]

The *Franco* immigration judges receive robust, periodic training on conducting competency hearings and best practices for proscribing safeguards once an incompetent respondent appears before them.[159] In contrast, many Nationwide Policy locations—including entire states with multiple detention centers—only have one provider contracted to represent detained individuals who have been adjudicated incompetent.[160]

F. "You Haven't Even Heard the Worst of it": Dr. Amin's Medical Abuse and ICE's Efforts to Silence the Women Speaking Out About it.

A positive consequence of Mbeti's storm of *pro se* legal appeals and complaints is that they stalled yet another deportation to Kenya because her case

154. *National Qualified Representative Program (NQRP), supra* note 153; CHEN & LOWEREE, *supra* note 153; CONG. RSCH. SERV., IF12158, U.S. IMMIGRATION COURTS: ACCESS TO COUNSEL IN REMOVAL PROCEEDINGS AND LEGAL ACCESS PROGRAMS (2022), https://crsreports.congress.gov/product/pdf/IF/IF12158/3 [https://perma.cc/FS9T-GQET].

155. *See* Wilson, *supra* note 151, at 32–34 (examining nearly ten years of NQRP operational and programmatic documents obtained through two Freedom of Information Act Requests).

156. Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034, 1051–58 (C.D. Cal. 2010) (mandating accommodation under the Rehabilitation Act in the form of providing "Qualified Representatives" for "*the entirety of their immigration proceedings*") (emphasis added).

157. Wilson, *supra* note 151, at 36–39 (identifying how *Franco* respondents are flagged and tracked throughout the pendency of their entire removal proceedings versus those respondents who fall under the Nationwide Policy).

158. *Id.* at 39–42, 46 (analyzing internal EOIR training data that shows that Nationwide Policy IJs are trained differently—and less often—than their *Franco* counterparts, resulting in case processing delays and prolonged detention periods for Nationwide Policy respondents).

159. *Id*. at 41 (showing through FOIA results that only 49% of active Nationwide Policy IJs received an "Initial Competency Hearing" and less than 5% attended a refresher training in identifying competency or conducting competency trainings).

160. Michael Corradini, *National Qualified Representative Program*, VERA INST. OF JUST., https://www.vera.org/projects/national-qualified-representative-program [https://perma.cc/M8MC-4BQ2] (last visited Oct. 6, 2022).

was still considered "pending" before the Board of Immigration Appeals, and therefore not administratively final.[161] Yet she languished in immigration detention for months—22 in total— and was still unrepresented. Mbeti had also become one of the many ICDC survivors of unnecessary, invasive, unconsented-to gynecological procedures by Dr. Mahindra Amin.[162]

Mbeti was experiencing heavy menstrual bleeding and incapacitating cramps while at ICDC. She was referred to Dr. Amin twice: first on July 31, 2019 and again on August 16, 2019.[163] During the first visit, Dr. Amin told her that she had a cyst in her uterus "the size of a melon" and that she likely needed to undergo additional medical procedures.[164] He did not explain "what those procedures would be, why they were necessary, what less invasive options might be [available], or the benefits or risks of the procedures."[165]

During her second visit, Mbeti's medical team prepped for her for surgery and placed her under general anesthesia, though she had no idea why.[166] She awakened with surgical incisions on her stomach but did not know their origin or purpose.[167] The procedure was especially violating to Mbeti because of the sexual assault she had recently survived in Kenya.[168] Following the procedure, she developed a surgical site infection that lasted months but received no follow-up care.[169] The feeling that her body was not her own reverberated for some time afterward.

Mbeti did not consent to this procedure. "Informed consent" is integral to the practice of medicine; it is an ethical imperative[170] and a legal requirement.[171] A physician must explain what will happen during the procedure, why the

161. 8 C.F.R. § 1241.1 (2008) (instructing that an immigration judge's order of removal does not become final until such time that a noncitizen has exhausted their appeal rights before the Board of Immigration Appeals, or their statutorily guaranteed appeal period has expired).

162. Oldaker Complaint, *supra* note 5, at 68–69.

163. *Id.*

164. *See id.* at 43; Molly O'Toole, *ICE is Deporting Women at Irwin Amid Criminal Investigation into Georgia Doctor*, L.A. TIMES (Nov. 19, 2020, 4:58 PM) https://www.latimes.com/politics/story/2020-11-18/ice-deporting-women-at-irwin-amid-criminal-investigation-into-georgia-doctor [https://perma.cc/HF7Y-M39L].

165. Oldaker Complaint, *supra* note 5, at 69.

166. *See* Toboni et. al., *supra* note 138 (quoting Mbeti: "I didn't know how much trouble I was in until that moment when [the nurse] said a hysterectomy, and I kind of looked over to the other lady that was in surgery with me. I was just expressionless, like, what's happening to us? Like what's going to happen to us? What did we get ourselves into?").

167. Oldaker Complaint, *supra* note 5, at 69*; see also* Toboni et al., *supra* note 138 ("Asked at what point she first understood she'd had a surgery, Ndonga said, 'When I woke up and saw the incisions'").

168. Oldaker Complaint, *supra* note 5, at 69; Toboni et al., *supra* note 138.

169. *See* Oldaker Complaint, *supra* note 5, at 69.

170. *Informed Consent: Code of Medical Ethics Opinion 2.1.1*, AM. MED. ASS'N, https://www.ama-assn.org/delivering-care/ethics/informed-consent [https://perma.cc/NS5E-VDFY] (last visited Oct. 6, 2022).

171. Canterbury v. Spence, 464 F.2d 772, 782 (D.C. Cir. 1972) (establishing a physician's duty to obtain a patient's informed consent prior to beginning treatment).

procedure is recommended, and any effects, alternatives, or possible complications associated with it.[172] There are legal consequences if a doctor fails to secure informed consent for a procedure.[173] "Consent" represents "the cornerstone of ethical medical and surgical practice because it enshrines respect for patients."[174] It is a process, not merely a signature on a form. Through this process Mbeti should have been empowered to accept or decline Dr. Amin's medical care.[175] Instead, Mbeti did not know she was going to be put under general anesthesia, and after she awoke, she had no idea what had happened to her.

Informed consent is particularly challenging in the context of immigration detention; language barriers, stress, lack of opportunity for a second opinion, and the inherent power imbalance between detainees and their custodians conspire to diminish a patient's ability to meaningfully participate in medical decisions.[176] As Mbeti said when interviewed by the *LA Times* about her experiences with medical treatment while at ICDC: "I don't have a choice in here."[177]

Doctors have an even higher duty of care when the patient has a significant psychiatric diagnosis.[178] Mbeti was receiving regular anti-psychotic medications and had been on suicide watch.[179] She was adjudicated "mentally incompetent" by the immigration judge prior to Dr. Amin's treatment of her. The attorney representing the Department of Homeland Security during Mbeti's competency

172. *Id.*

173. Matthies v. Mastromonaco, 733 A.2d 456, 463 (N.J. 1999) (establishing that a failure to obtain informed consent amounts to medical negligence).

174. James L. Bernat & Lynn M. Peterson, *Patient-Centered Informed Consent in Surgical Practice*, 141 ARCHIVES SURGERY 86, 87 (2006).

175. *See* GINNY L. RYAN, KRISTYN BRANDI & THE AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS COMM. ON ETHICS, ACOG COMMITTEE OPINION NO. 819: INFORMED CONSENT AND SHARED DECISION MAKING IN OBSTETRICS AND GYNECOLOGY, at e34 (2021), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2021/02/informed-consent-and-shared-decision-making-in-obstetrics-and-gynecology.pdf [https://perma.cc/MD2G-YRJH].

176. Eugenia Pyntikova, *Mental Illness in Immigration Detention Facilities: Searching for the Rights to Receive & Refuse Treatment*, 25 GEO. IMMIGR. L.J. 151, 170 (2010); *see also* RYAN ET AL., *supra* note 175, at e35–e36 (explaining that cultural and language barriers may lead to ambiguity and confusion when communicating medical information which may complicate informed consent).

177. O'Toole, *supra* note 164 (discussing her horror if she later discovered that she could not have children because of the procedure she underwent by Dr. Amin).

178. PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBS. IN MED. & BIOMEDICAL & BEHAV. RSCH., MAKING HEALTH CARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP 169–75 (1982); *see also* Loren H. Roth, Alan Meisel & Charles W. Lidz, *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCHIATRY 279, 279–80 (1977) (detailing various tests of competency to consent to treatment).

179. Irwin County Detention Center medical records on file with the author.

inquiry[180] actually requested that competency hearing, and even submitted psychiatric records in anticipation of the same.[181]

By the time we spoke to Mbeti in September of 2020, she still had not seen her gynecological medical records despite making multiple requests with the facility. It had been 14 months since she had been forced to undergo the invasive surgical procedure at the hands of Dr. Amin. We obtained those records in October 2020. A medical review team composed of nine board-certified gynecologists and two advanced practice nurses scrutinized over 3,200 pages of medical records of nineteen women alleging medical abuse.[182] Their initial findings revealed a pattern of unindicated and nonconsensual diagnostic procedures and surgeries.[183] Specifically, the medical review team determined that "Dr. Amin subjected women to aggressive and unethical gynecological care. . . . Dr. Amin quickly scheduled surgeries when non-surgical options were available, misinterpreted test results, performed unnecessary injections and treatments, and proceeded without informed consent."[184] On October 26, 2020, Dr. Ted Anderson and Dr. Haywood Brown testified to this medical abuse before a closed session of Democratic members of the Senate.[185] The hearings provoked

180. *See In re* M-A-M-, 25 I. & N. Dec. 474, 479–83 (BIA 2011) (providing the first ever guidance for immigration judges to identify possible incompetence, evaluate a respondent's competence, and proscribe safeguards where required to comport with fundamental fairness); *see also* Memorandum from Brian O'Leary, *supra* note 152 (mandating that immigration judges conduct competency hearings for detained, unrepresented individuals where the judge has a bona fide doubt as to the respondent's ability to meaningfully participate in their own removal proceeding).

181. On file with the author.

182. TED ANDERSON, HAYWOOD L. BROWN, SARAH COLLINS, CARON JO GRAY, JULIA GEYNISMAN-TAN, GERI D. HEWITT, MARGARET MUELLER, ANDREA SHIELDS, GEOFFREY SCHNIDER, MICHELLE COLLINS & SUZANNE MCMURTRY BAIRD, EXECUTIVE SUMMARY OF FINDINGS BY THE INDEPENDENT MEDICAL REVIEW TEAM REGARDING MEDICAL ABUSE ALLEGATIONS AT THE IRWIN COUNTY DETENTION CENTER 1, 5 (2020), https://www.scribd.com/document/481646674/Executive-Summary-of-Medical-Abuse-Findings-About-IrwinDetention-Center#download [https://perma.cc/GD2M-W588]; *see* Letter from Jeffrey A. Merkley, U.S. Sen., et al. to Tony H. Pham, Senior Off. Performing the Duties of the Dir., Dep't of Homeland Sec., et. al (Nov. 19, 2020), https://www.warren.senate.gov/imo/media/doc/STOP%20Removal%20of%20potential%20witnesses%20at%20ICDC_%20Bi-Cameral%20Letter.pdf [https://perma.cc/B5WX-JRMS].

183. ANDERSON et al., *supra* note 182.

184. STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, 117TH CONG., MEDICAL MISTREATMENT OF WOMEN IN ICE DETENTION 10 (2022), https://www.hsgac.senate.gov/imo/media/doc/2022-11-15%20PSI%20Staff%20Report%20-%20Medical%20Mistreatment%20of%20Women%20in%20ICE%20Detention.pdf [https://perma.cc/9KLW-7MGN].

185. *Id.* at 63–65; *Closed Session Briefing Before The Democratic Caucus of the United States Senate* 2 (Oct. 26, 2020) (on file with author).

a formal Congressional investigation into medical abuse at ICDC by the House Oversight Committee and Homeland Security Committee.[186]

It was through this independent review that Mbeti understood for the first time, as explained by a doctor, what had happened to her body while she was under anesthesia.[187] She wanted to know, would she be able to have children? This was a question she may have asked 14 months earlier before undergoing the procedure had she had the opportunity.

Many of the detained women—including Mbeti—started speaking publicly about their experiences with Dr. Amin.[188] They also agreed to provide testimony to federal investigators looking into possible wrongdoing. Survivors started coming forward from all over the world—some who had been released from detention years earlier, others who had been deported long ago.[189] They were predominantly women of color and had encountered ICE for a constellation of reasons: Some were in abusive relationships where the abuser called the police, some were seeking asylum, and others, like Mbeti, entered the deportation pipeline following an encounter with law enforcement.[190] Many were mothers of U.S.-citizen children or had spouses, parents, and siblings who were lawfully present in the U.S.[191] In swift succession, the women detained at ICDC who spoke out about their experiences were expeditiously deported or slated for imminent removal.[192] Mbeti was one of them.

Mbeti had an initial interview about her medical abuse with federal investigators from the Department of Justice and the Department of Homeland

186. Matthew Choi, *House Dems Subpoena ICE Detention Facility Over Allegations of Medical Abuse*, POLITICO (Nov. 25, 2020), https://www.politico.com/news/2020/11/25/ice-detention-facility-subpoena-440681 [https://perma.cc/TPV3-D2ZF].

187. Oldaker Complaint, *supra* note 5, at 69.

188. Michelle Hackman & Alicia A. Caldwell, *Pattern of Unnecessary Gynecological Treatments Identified at Georgia ICE Facility*, WALL ST. J. (Oct. 27, 2020), https://www.wsj.com/articles/pattern-of-unnecessary-gynecological-treatments-identified-at-georgia-ice-facility-11603803379 [https://perma.cc/D9QK-W72N].

189. John Washington & José Olivares, *Number of Women Alleging Misconduct by ICE Gynecologist Nearly Triples*, THE INTERCEPT (Oct. 27, 2020), https://theintercept.com/2020/10/27/ice-irwin-women-hysterectomies-senate/ [https://perma.cc/NJ2N-ZFC8].

190. *See* Oldaker Complaint, *supra* note 5, at 67–68; O'Toole, *supra* note 164.

191. *See* BHATT ET AL., *supra* note 38, at 3.

192. *See* Amy Goodman, "*They Wanted to Take My Womb Out": Survivor of Medical Abuse in ICE Jail Deported After Speaking Out*, DEMOCRACY NOW (Oct. 26, 2020), https://www.democracynow.org/2020/10/26/ice_irwin_detention_center_invasive_surgeries [https://perma.cc/SEK7-T6P9]; Adolfo Flores, *ICE Is Trying to Deport Immigrant Women Who Witnessed Alleged Misconduct by a Gynecologist, Attorneys Say*, BUZZFEED NEWS (Nov. 11, 2020), https://www.buzzfeednews.com/article/adolfoflores/ice-deporting-gynecologist-witnesses [https://perma.cc/HEQ9-QZSZ]; Nomaan Merchant, *US Deports Migrant Women Who Alleged Abuse by Georgia Doctor*, AP NEWS (Nov. 11, 2020), https://apnews.com/article/us-deports-migrant-women-georgia-doctor-b6a5fc1e2d4a822eb3767f9a858ea670 [https://perma.cc/P4RN-R7GJ]; *see also* Oldaker Complaint, *supra* note 5, at 1–2 (detailing the retaliation Petitioners faced for speaking out about abuse they suffered, including deportation or threats to deport Petitioners).

Security. Within hours, ICE informed Mbeti that a hold on her deportation had been lifted.[193]

ICE has a policy of not pursuing the removal of potential witnesses, victims, and plaintiffs in criminal or civil matters,[194] and yet one by one the women at ICDC were at risk of retaliatory deportation. Advocates were increasingly concerned that ICE's decision to deport cooperating witnesses in an active investigation amounted to an obstruction of justice, not only by literally removing the evidence (the women's bodies and testimony), but also by chilling the will of other potential witnesses who wanted to come forward. These removals shocked members of Congress as well, who called for ICE to cease the removal of women who were cooperating with the investigation.[195]

I filed an emergency request for Mbeti's release the night we learned that her hold had been lifted. The request was based on the unconstitutionally long period of time Mbeti had been in ICE custody following her removal order.[196] The following day I filed a second request, this time predicated on the possibility that Mbeti would face serious harm or death if she contracted COVID-19 due to several comorbidities.[197] ICE immediately denied both requests, stating that Mbeti "would pose a flight risk and threat to public safety" if released,[198] and that her removal had been set for early December.[199]

Mbeti was desperate to be released. Her father's health was not well, and she was now watching helplessly as the story of medical battery at ICDC—and now ICE retaliation against the survivors, including herself[200]—unfolded in national and international media. Release seemed like a dim prospect; she had already been detained nearly 600 days. This was an extraordinarily long time, even by U.S. immigration detention standards. In 2019, the average period of

193. Oldaker Complaint, *supra* note 5, at 22 ("Moreover, Federal and ICDC Respondents attempted to deport Petitioners Oldaker, Ndonga, and Reyes Ramirez soon after they spoke out about the abuse they suffered or made known that they were willing to speak out. *Petitioner Ndonga, for example, was informed by ICE that it had lifted a hold on her deportation within hours of her speaking with investigators from DOJ, DHS OIG, and FBI*") (emphasis added).

194. Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to All Field Off. Dirs., All Special Agents in Charge & All Chief Couns. (June 17, 2011), https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf [https://perma.cc/S4KX-U7B8] ("[I]t is . . . against ICE policy to remove individuals in the midst of a legitimate effort to protect their civil rights or civil liberties").

195. Letter from Jeffery A. Merkley et. al, *supra* note 182.

196. On file with the author. This request was made pursuant to the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), which placed constitutional limits on how long a person can be detained post-final order of removal.

197. On file with the author. This request was made pursuant to the preliminary injunction issued by the Central District of California in *Fraihat v. U.S. Immigr. & Customs Enforcement*, No. 5:19-cv- 01546-JGB-SHK, 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020).

198. Email from the Atlanta Field Office on file with the author.

199. Email from the Atlanta Field Office on file with the author.

200. Goodman, *supra* note 192; Flores, *supra* note 192; Merchant, *supra* note 192.

detention was 55 days.[201] For those fighting their removal before an immigration judge, the average period of detention rises to roughly 180 days.[202] For detainees suffering from mental health issues, the time stretches even further in large part because they do not have counsel.[203] Navigating labyrinthine immigration laws can be challenging even for skilled practitioners; for Mbeti, it was nearly impossible.

Yanira Oldaker was detained alongside Mbeti. Her story is more widely known than Mbeti's for several reasons. First, the retaliation Yanira experienced was equally swift but more dramatic: not long after Yanira's name became known to ICE as a victim and witness, her commissary account was "zeroed out" and she was scheduled for a flight to Mexico.[204] Second, a cinematic, eleventh hour emergency lawsuit staved off Yanira's removal as she was literally sitting on the tarmac awaiting her flight.[205] And third, as the lead plaintiff Yanira became the literal and figurative face of the class action lawsuit *Oldaker v. Giles*. The lawsuit was brought by fourteen detainees who had been subject to similar medical abuse while in ICE custody.

The uproar was effective. ICE paused the deportations of those not yet deported.[206] Over the ensuing weeks, advocates successfully sought the release of every plaintiff and witness held at ICDC.[207] Mbeti was released in mid-December 2020. By April 2021, zero women remained detained at ICDC. In May 2021, DHS announced it would terminate its contract with ICDC.[208] In

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201. AM. IMMIGR. COUNCIL, *supra* note 27.

202. *Id.*

203. Pyntikova, *supra* note 176, at 167 (attributing longer periods of detention among this population to not having counsel and because immigration judges, who are unsure how to proceed, set the case for multiple master calendars).

204. Oldaker Complaint, *supra* note 5, at 30–31.

205. Adam Gabbatt, *'He Hurt Me': Migrants Who Accused ICE Gynecologist of Abuse Speak Out*, THE GUARDIAN (Nov. 21, 2020, 6:00 AM), https://www.theguardian.com/us-news/2020/nov/21/congress-ice-gynecologist-abuse-allegations-petition [https://perma.cc/366Q-5MAE]; *see* Gianna Toboni, Carter Sherman, Ana Sebescen, Nicole Bozorgmir & Neda Toloui-Semnani, *ICE Tried to Deport Yet Another Potential Witness in the Gynecology Scandal*, VICE (Nov. 10, 2020, 7:53 PM), https://www.vice.com/en/article/wx85k5/ice-tried-to-deport-yet-another-potential-witness-in-the-gynecology-scandal [https://perma.cc/SFF7-VBXL]; Jasmine Aguilera, More *Than 40 Women File Class Action Lawsuit Alleging Medical Misconduct by ICE Doctor at Georgia Detention Center*, TIME (Dec. 22, 2020, 2:55 PM), https://time.com/5924021/women-lawsuit-irwin-detention-ice/ [https://perma.cc/8842-3G53].

206. Colin Dwyer, *U.S. Agrees to Pause Deportations for Women Alleging Abuse At ICE Facility*, NPR NEWS (Nov. 24, 2020, 3:43 PM), https://www.npr.org/2020/11/24/938456423/u-s-agrees-to-pause-deportations-for-women-alleging-abuse-at-ice-facility [https://perma.cc/X3RH-YLJJ].

207. *See* Press Release, Nat'l Immigr. Project of the Nat'l Laws. Guild, Last Petitioner in Georgia Gynecological Abuse Class Action Secures Release from ICE Custody (Jan. 22, 2021), https://nipnlg.org/pr/2021_22Jan_oldaker-v-giles.html [https://perma.cc/YE3S-R79E].

208. *See* Press Release, Dep't of Homeland Sec., ICE to Close Two Detention Centers (May 20, 2021), https://www.dhs.gov/news/2021/05/20/ice-close-two-detention-centers

December 2021, four congressional committees, including the Committee on Homeland Security and the Subcommittee on Border Security, Facilitations, & Operations, urged the Georgia Composite Medical Board to open a full investigation into Dr. Amin.[209]

The *Oldaker* litigation on behalf of the ICDC women did not materialize out of thin air. It was the result of years of advocacy, exposure, and hard work by local organizers and attorneys—and most crucially, the women of ICDC themselves.[210] The tragedy is that horrific treatment while in ICE custody is not rare. Azadeh Shahshahani, the Legal & Advocacy Director at Project South located in Atlanta, points out that other local detention centers are equally inhumane but lack ICDC's notoriety.[211] For example, one of the facilities where the last of the ICDC women was transferred to has one of the highest death rates in the United States.[212] As recently as 2017, the Stewart Detention Center had no psychiatrist on staff, and the Inspector General described its medical staffing shortages as "chronic."[213] Groups such as the Detention Watch Network have come out in force to point out that ICDC is "emblematic of how the immigration detention system as a whole is inherently abusive, unjust and fatally flawed beyond repair."[214]

[https://perma.cc/6MM7-XDMH]; Maria Sacchetti, *ICE To Stop Detaining Immigrants at Two County Jails Under Federal Investigation*, WASH. POST (May 20, 2021, 10:00 AM), https://www.washingtonpost.com/immigration/ice-detentions-county-jails-halted/2021/05/20/9c0bdd1e-b8de-11eb-a6b1-81296da0339b_story.html [https://perma.cc/7JAE-85ZZ].

209. Letter from Bennie G. Thompson, Chairman, Comm. on Homeland Sec., et. al. to Hon. Alejandro Mayorkas, Sec'y of Homeland Sec. (Dec. 3, 2021), https://homeland.house.gov/imo/media/doc/Letter-DHS%20ICDC%20Update.pdf [https://perma.cc/W2JK-HCET].

210. *See, e.g.,* HUM. RTS. WATCH, DETAINED AND DISMISSED: WOMEN'S STRUGGLES TO OBTAIN HEALTH CARE IN UNITED STATES IMMIGRATION DETENTION (2009), https://www.hrw.org/report/2009/03/17/detained-and-dismissed/womens-struggles-obtain-health-care-united-states [https://perma.cc/37BP-347F].

211. *See* Charles R. Davis, *ICE Transfers Women Out of Detention Center That Became Infamous Over Allegations of Forced Sterilization*, BUS. INSIDER (May 3, 2021, 11:29 AM), https://www.businessinsider.com/ices-irwin-county-detention-center-transfers-remaining-women-lawyer-says-2021-4 [https://perma.cc/D5J4-8VFA].

212. *See* Tina Vásquez, *ICE Is Now Detaining Women At One Of The Nation's Most Deadly Facilities*, PRISM (Feb. 2, 2021), https://prismreports.org/2021/02/02/ice-now-detaining-women-at-one-of-nations-most-deadly-facilities/ [https://perma.cc/37UK-XP7L].

213. Elly Yu, *Exclusive: An ICE Detention Center's Struggle with 'Chronic' Staff Shortages*, WABE (May 31, 2018), https://www.wabe.org/exclusive-an-ice-detention-centers-struggle-with-chronic-staff-shortages/ [https://perma.cc/9HFT-LU5D] ("According to the [Department of Homeland Security Office of Inspector General], Stewart's health services administrator noted 'chronic shortages of almost all medical staff positions.' As of February 2017, the facility had no psychiatrists and about one in four registered nurse positions were vacant. Stewart's health administrator . . . also noted the lack of mental health treatment centers in the local area.").

214. Press Release, Det. Watch Network, After Years of Advocacy, No Immigrant Women Are Currently Detained at the Irwin County Detention Center (Apr. 29, 2021), https://www.detentionwatchnetwork.org/pressroom/releases/2021/after-years-advocacy-

Elected officials have done little to address our broken immigration and detention system. President Biden promised on the campaign trail to end private immigration detention; however, his January 26, 2021, executive order directing the elimination of federal contracts with privately operated detention centers only applied to institutions holding criminal detainees.[215] ICE detainees are outside the order's ambit.[216] Put another way, ICDC may be closing, but the mass incarceration of immigrants shows no sign of ending. Unless and until we abolish all immigration detention and pursue other major systemic changes, horrors like what happened to the women of ICDC can happen again.

II. SITUATING MBETI WITHIN THE WIDER IMMIGRANT POPULATION

One risk of sharing a client's individual story as a vehicle for discussion is that critics can argue that the individual's lived experience is merely anecdotal or not widely replicated outside of themselves. In this Part, I look beyond Mbeti to place her within the wider immigrant populations of which she is a member. Doing so not only illustrates how many similarly situated persons may have been exposed to similar treatment within our systems, but also how many might be impacted by the proposed changes outlined below in Part III.

Publicly available annual reports provide aggregate data on immigrant populations in a given year. The data, however, categorizes individuals by "country of birth" rather than by race.[217] The same is true for data-viewing tools such as the ones created by the Transactional Records Access (TRAC) out of Syracuse University, which permits users to organize immigration data by age, gender, citizenship, detention location, and so on.[218] A person's country of origin does not capture their race. Honduras, for example, has a population of over 10 million[219] and yet the Garifuna population (descendants of African-Caribbean

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no-immigrant-women-are-currently-detained-irwin-county [https://perma.cc/CR3C-PWHC].

215. *See* Exec. Order No. 14006, 86 Fed. Reg. 7483 (Jan. 26, 2021).

216. Christina Vukovich, *The Executive Order Loophole: Private Prisons and ICE*, ACLU OF OHIO (Oct. 7, 2021, 9:00 AM), https://www.acluohio.org/en/news/executive-order-loophole-private-prisons-and-ice [https://perma.cc/LZ9L-JVC5].

217. *See* DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STAT., 2020 YEARBOOK OF IMMIGRATION STATISTICS, at iii–iv (2022), https://www.dhs.gov/sites/default/files/2022-07/2022_0308_plcy_yearbook_immigration_statistics_fy2020_v2.pdf [https://perma.cc/4M6G-L9VM] (providing statistics on permanent resident populations, naturalizations, and admissions all by country of birth, residence, or citizenship).

218. *Immigration and Customs Enforcement Detention*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/detention/ [https://perma.cc/Y4EX-5BB3] (last visited Sept. 29, 2022).

219. *Honduras Population 2022 (Live)*, WORLD POPULATION REV., https://worldpopulationreview.com/countries/honduras-population [https://perma.cc/4X88-YZHS] (last visited Sept. 29, 2022).

exiles from St. Vincent) numbers around 43,000.[220] Complicating this issue is that race and Blackness are defined differently across the diaspora.[221]

The Black Alliance for Just Immigration (BAJI), together with NYU School of Law's Immigrant Rights Clinic, performed a careful examination of data obtained from the American Community Survey, the 2014 Yearbook of Immigration Statistics published by DHS, and TRAC to calculate the number of Black immigrants in the United States.[222] They concluded that there are around 5 million foreign-born Black individuals in the United States,[223] which represents 8.7 percent of the overall immigrant population.[224]

The BAJI study also carefully examined raw data collected by the immigration court database, combined with ICE's published reports on detention populations, and tools on TRAC to gain insights into the number of Black immigrants in detention.[225] They found that of the entire detained population in removal proceedings in the year 2014 (which totaled 128,872), Black immigrants made up almost 5 percent, or 6,223.[226] Black immigrants were significantly more likely to be facing removal on criminal grounds.[227] Nearly one in every five detained persons in removal proceedings, or 17.4 percent, was Black.[228] Detained Black immigrants remain in detention longer than any other group, and are six times more likely to be placed in solitary confinement.[229]

220. *Garifuna*, MINORITY RTS. GRP. INT'L (May 2018), https://minorityrights.org/minorities/garifuna-2/#:~:text=Gar%C3%ADfuna%20are%20the%20third%20largest,coast%20in%20the%20eighteenth%20century [https://perma.cc/57CR-PXGR].

221. *See* ALEJANDRO SANCHEZ-LOPEZ, MANUEL PASTOR, VÍCTOR SÁNCHEZ, BENJAMIN NDUGGA-KABUYE & CARL LIPSCOMBE, USC CTR. FOR THE STUDY OF IMMIGRANT INTEGRATION & BLACK ALL. FOR JUST IMMIGR., THE STATE OF BLACK IMMIGRANTS IN CALIFORNIA 7 (Opal Tometi ed., 2014) (recognizing that "race and Blackness can be defined differently across the diaspora, and oftentimes immigrants come from a context that does not align with how race is perceived in the United States.").

222. MORGAN-TROSTLE ET AL., *supra* note 1, at 6.

223. *Id.* at 10.

224. *Id.* at 11.

225. *Id.* at 7.

226. *Id.* at 26.

227. *Id.*

228. *Id.*

229. Peniel Ibe, *Immigration Is a Black Issue*, AM. FRIENDS SERV. COMM.: NEWS & COMMENT. (Feb. 16, 2021), https://www.afsc.org/blogs/news-and-commentary/immigration-black-issue [https://perma.cc/WQ97-Z4N7] ("Advocates recorded that the lengthiest recorded ICE detentions in 2019 were of Black African migrants. Black immigrants are also six times more likely to be sent to solitary confinement than other groups.").

One in four people with serious mental health disabilities[230] have been arrested by the police,[231] and 10–20 percent of incarcerated individuals live with mental health disabilities.[232] An arrest that may only lead to probation for a citizen can trigger months or years of immigration detention, and ultimately, deportation for a noncitizen.[233]

Arresting individuals with serious mental health concerns[234] creates a cycle of incarceration that harms not only the directly impacted individual, but also their families and communities.[235] Most crimes committed by persons with mental health issues are minor in nature (vagrancy, trespassing, public urination, or property damage) but lead to incarceration rather than hospitalization.[236] Encounters with police are far more fatal for those with serious mental health concerns than for those without—up to 16 times more so.[237] Prisons and jails are ill-equipped to properly care for and treat those with serious mental health

230. E. FULLER TORREY, LISA DAILEY, H. RICHARD LAMB, ELIZABETH SINCLAIR & JOHN SNOOK, TREATMENT ADVOC. CTR., TREAT OR REPEAT: A STATE SURVEY OF SERIOUS MENTAL ILLNESS, MAJOR CRIMES AND COMMUNITY TREATMENT 8 (Sept. 2017), https://www.treatmentadvocacycenter.org/storage/documents/treat-or-repeat.pdf [https://perma.cc/KGX7-NTC3] ("This term is defined differently in different studies but almost always includes those diagnosed with schizophrenia, schizoaffective disorder, bipolar disorder or major depression with psychotic features.").

231. *Mental Health in Georgia*, *supra* note 53.

232. *See* TORREY ET AL., *supra* note 229, at 28.

233. *See* Morawetz, *supra* note 70, at 1939.

234. E. FULLER TORREY, AARON D. KENNARD, DON ESLINGER, RICHARD LAMB & JAMES PAVLE, TREATMENT ADVOC. CTR. & NAT'L SHERIFFS' ASS'N, MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 8, 13 (2010) [hereinafter TORREY ET AL., MORE MENTALLY ILL PERSONS IN JAILS AND PRISONS] (placing the U.S.'s hospitalization to incarceration ratio of the seriously mentally ill at a level not seen since 1840); *Prisons See More Inmates Requiring Mental Health Care*, GWINNETT DAILY POST (Jan. 25, 2016), https://www.gwinnettdailypost.com/archive/prisons-see-more-inmates-requiring-mental-health-care/article_969866d5-9f8c-5b2e-bc15-0f01829c4c40.html [https://perma.cc/7LV9-ZB49] ("'The schizophrenic and chronically ill mental population just exploded and we found ourselves being the hospital,' [Dr. Dana] Tatum said.").

235. *See* R. L. Elliott, Editorial, *Jailing Mentally Ill for Minor Offenses Helps No One*, THE ATLANTA J.-CONST., Apr. 4, 2002, at A16.

236. E. FULLER TORREY, JOAN STIEBER, JONATHAN EZEKIEL, SIDNEY M. WOLFE, JOSHUA SHARFSTEIN, JOHN H. NOBLE & LAURIE M. FLYNN, NAT'L ALL. FOR THE MENTALLY ILL & PUBLIC CITIZEN'S HEALTH RSCH. GRP., CRIMINALIZING THE SERIOUSLY MENTALLY ILL: THE ABUSE OF JAILS AS MENTAL HOSPITALS 46-48 (1992) [hereinafter TORREY ET AL., CRIMINALIZING THE SERIOUSLY MENTALLY ILL] (surveying prisons and jails throughout the United States and finding that the most common offenses leading to the jailing of mentally distressed people were assault/battery, theft, disorderly conduct, alcohol and drug-related charges, and trespassing).

237. DORIS A. FULLER, H. RICHARD LAMB, MICHAEL BIASOTTI & JOHN SNOOK, TREATMENT ADVOC. CTR., OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 1 (2015), https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf [https://perma.cc/TPP5-7DWH] (concluding through examining official and unofficial reports that "a minimum of 1 in 4 fatal police encounters ends the life of an individual with severe mental illness.").

disabilities,[238] resulting in precipitously higher rates of inmate placement in solitary confinement,[239] victimization by other inmates,[240] and self-harm and suicide.[241] Prolonged periods of improper or incomplete care have extremely detrimental effects on inmates with serious mental health concerns.[242]

Data relating to the number of immigrants in removal proceedings who suffer from mental health concerns is difficult to find. Some insights can be gained into the question, however, by looking at ICE statistics relating to mental health care. In 2020, ICE's Health Service Corps performed 69,985 "mental health interventions."[243] This number does not tell us how many discreet individuals had an intervention, but in confidential memos the Division of Immigration Health Services estimated that around 15percent of its detained population had serious mental health concerns.[244] Applying that figure to today's detention numbers (current estimates place the detained population at around

238. Christie Thompson & Taylor Elizabeth Eldridge, *Treatment Denied: The Mental Health Crisis in Federal Prisons*, MARSHALL PROJECT (Nov. 21, 2018, 6:00 AM), https://www.themarshallproject.org/2018/11/21/treatment-denied-the-mental-health-crisis-in-federal-prisons?ref=hp-1-100%20 [https://perma.cc/H3CJ-9QWA] (uncovering that staffing shortages resulted in the converting of mental health care professionals to inmate escorts and corrections officers, and the downgrading of individuals' mental health classifications to save money); OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS' USE OF RESTRICTIVE HOUSING FOR INMATES WITH MENTAL ILLNESS 34 (2017), https://oig.justice.gov/reports/2017/e1705.pdf [https://perma.cc/R2MK-MVH6] ("We found that the [Bureau of Prisons] cannot accurately determine the number of inmates who have mental illness, including inmates in [Restrictive Housing Units], because institution staff do not always document inmates' mental disorders.").

239. AZZA ABUDAGGA, SIDNEY WOLFE, MICHAEL CAROME, AMANDA PHATDOUANG & E. FULLER TORREY, PUB. CITIZEN'S HEALTH RSCH. GRP. & TREATMENT ADVOC. CTR., INDIVIDUALS WITH SERIOUS MENTAL ILLNESSES IN COUNTY JAILS: A SURVEY OF JAIL STAFF'S PERSPECTIVES 11–12 (2016), https://www.treatmentadvocacycenter.org/storage/documents/jail-survey-report-2016.pdf [https://perma.cc/6Q6K-3GRT] (surveying jails around the U.S., nearly 70% of which reported segregating individuals with serious mental health disabilities).

240. TORREY ET AL., CRIMINALIZING THE SERIOUSLY MENTALLY ILL, *supra* note 235, at 58–60.

241. TORREY ET AL., MORE MENTALLY ILL PERSONS IN JAILS AND PRISONS, *supra* note 233, at 10 (referencing studies showing that approximately half of all inmate suicides are committed by persons suffering from serious mental health disorders).

242. TORREY ET AL., CRIMINALIZING THE SERIOUSLY MENTALLY ILL, *supra* note 235, at 62–64 (providing testimonials from impacted individuals and their families regarding a severe psychiatric and medical deterioration during periods of incarceration).

243. U.S. IMMIGR. & CUSTOMS ENF'T, ICE HEALTH SERVICE CORPS FISCAL YEAR 2020 ANNUAL REPORT 11 fig.3 (2020), https://www.ice.gov/doclib/ihsc/IHSCFY20AnnualReport.pdf [https://perma.cc/9M5J-MDZ3].

244. Dana Priest & Amy Goldstein, *Suicides Point to Gaps in Treatment*, WASH. POST (May 13, 2008), https://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d3p1.html [https://perma.cc/2LL8-7A3B].

50,000),[245] it is possible that 7,500 people currently in immigration detention have serious mental health disabilities.

Between 2013 and January 2020, the NQRP provided court-appointed counsel to over 2,000 detained immigrants with mental health concerns.[246] The problem with this information is that it applies to a very specific set of data points. First, the noncitizens provided counsel through the NQRP must have been detained;[247] second, they must have been adjudicated "mentally incompetent" by an immigration judge following a Judicial Competency Inquiry.[248] Those who are not detained are not reflected in the NQRP's statistics; nor does this statistic capture those left outside the competency hearing process because the IJ did not find *indicia* of incompetence, and therefore did not conduct a competency hearing in the first place. This data does tell us, at a bare minimum, that the number of similarly situated detainees in removal proceedings with serious mental health concerns numbers in the thousands—and likely much higher.

III. REIMAGINING MBETI'S STORY IN A QUEST TO FIND SOLUTIONS

The recommendations below, if implemented, will positively impact the lives of many immigrants, from Black noncitizens experiencing racialized criminalization and higher rates of detention and removal proceedings, to all noncitizens (detained and non-detained) with serious mental health disabilities. Implementing these recommendations are vital; if not for the national spotlight on the human rights crisis at ICDC and the flurry of litigation filed in its wake to stop the removal of potential and cooperating witnesses, Mbeti would have been deported to Kenya long ago.

Mbeti is out of detention on an order of supervision. But life is not easy for her. We speak several times a week whenever she can borrow a phone or get ahold of a burner. Sometimes she will call from a psychiatric center where she is receiving temporary emergency care. The lawsuit has brought her unwelcome attention in her local community. "It feels like I have a scarlet letter on me," she said recently. She is undocumented, uninsured, experiencing housing insecurity, and only intermittently medicated. She lost her disability benefits and driver's license. She cannot get a job. She does not have a social worker. She does not know what the future holds.

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245. DET. WATCH NETWORK, IMMIGRATION DETENTION 101, https://www.detentionwatchnetwork.org/issues/detention-101 [https://perma.cc/SB6H-8568] (last visited Oct. 6, 2022).

246. Corradini, *supra* note 160.

247. Wilson, *supra* note 150, at 31.

248. EXEC. OFF. FOR IMMIGR. REV., PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS 3 (2013), https://immigrationreports.files.wordpress.com/2014/01/eoir-phase-i-guidance.pdf [https://perma.cc/HE3U-Y2DQ] ("The judge asks a series of questions to determine whether there is 'reasonable cause' to believe that the respondent may be incompetent to represent him- or herself. At the conclusion of the judicial inquiry, the judge may find that the respondent is competent or incompetent to represent him- or herself.").

Reflecting on Mbeti's life, I wonder what may have changed the landscape in which she found herself at each stage. The "what went wrongs" were so many, and so varied. After all, I chose to tell Mbeti's story precisely because her life trajectory through multiple systems contained so many overlapping and intersectional injustices. Her arc was always downward, a seemingly irreversible Matthew effect[249] up until when she became part of the Oldaker litigation.

In Part III, let us reimagine Mbeti's life, only this time asking at each pivotal stage: what may have modified the outcome? How realistic is the modification? What agency, branch of government, or individual could execute the desired modification? How can we as advocates support the change?

Just as we walked step-by-step through Mbeti's actual life to illustrate how systems failed and punished her, I would like to now reconceptualize her life in a search for ways to support and empower her. The process enables us to envision solutions while acknowledging that social justice happens on a continuum rather than all at once or by one singular action. We cannot literally undo Mbeti's experience. But embracing theories of change, prioritizing dignity, and pursuing practical adaptations in law and policy can bring about durable improvements—and hopefully prevent replication of her experience in the future.

A. Dispelling the Myth of the "Criminal Alien": How Racial Justice, Criminal Justice, and Immigrant Justice can Work Together to Support People in Mbeti's Position.

The mythology of the "criminal alien" holds many in its thrall. The "good" versus "bad," "deserving" versus "unworthy" dichotomy replicates in all systems—and especially in the space where the criminal justice system meets the immigration system. Even self-identified liberals continue to embrace the nomenclature, wielding it to categorize which immigrants deserve to be represented by a defense attorney and which do not.[250]

When I argued that she was not a danger to the community, Mbeti's deportation officer snorted in disbelief in October 2020. "She's never committed an act of violence against any person," I said. He laughed derisively and responded that she was an *aggravated felon.*[251] He laughed for some time thereafter, like I had told him the funniest joke in the world.

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249. Also referred to as the "Cumulative Advantage/Disadvantage Theory," whereby those with advantage become exponentially advantaged over time, while those with disadvantage become exponentially disadvantaged over time. *See* Robert K. Merton, *The Matthew Effect in Science, II: Cumulative Advantage and the Symbolism of Intellectual Property,* 79 ISIS 606, 606–07 (1988).

250. *See* DAS, *supra* note 73, at 9–12.

251. *See supra* notes 66–67 and accompanying discussion. The irony of the term "aggravated felony" is that many crimes that constitute aggravated felonies under the Immigration & Nationality Act are neither aggravated, nor felonies. Examples include simple theft, simple battery, filing a false tax return, failing to appear in court. And yet, despite the often trial and nonviolent nature of many so-called "aggravated felonies," the term is frequently used by

As I reflect on Mbeti's interactions with Georgia police officers, I revisit the instances where they turned her over to ICE and changed her life forever. I have discovered no evidence that she was ever charged with a crime following her last arrest because, as far as anyone knows, she had not committed one. And yet, the decision to involve ICE rather than a medical professional was structurally justified through the criminal alien narrative. Mbeti was a "danger to the community" and always would be.

Ferreting out, containing, and extracting so-called "dangers to the community" finds perfect synergy and a self-fulfilling prophecy when state and local laws, law enforcement, federal agencies, Congress, and the executive branch work together. We see and understand the interlocking parts of the chain of oppression: status-generated laws continually generate more "criminal aliens;" over-policing and targeting of Black communities create opportunities to convert Black and Brown noncitizens into a "criminal aliens;"[252] information and resource-sharing between ICE and local law enforcement through programs like Secure Communities and Section 287(g) conveniently usher the newly-branded "criminal alien" directly into ICE's hands.[253] Congress repeatedly expands the definition of "deportable offense."[254] Indefinite detention pairs perfectly with a strict deportation agenda because detention makes it harder for the "criminal alien" to get a lawyer and win their case.

The immigrant justice movement must continue to see racial justice as central to its mission and vice versa if either hope to interrupt mutually enforcing systems of subordination. Too often movements experience a "siloing" of their issues; the immigrant justice movement, for example, might say that so-called criminal aliens are not criminals in the "true sense, as many status-generated convictions (such as illegal entry or driving without a license) are incident to an individual's documentation status rather than their culpability. Immigration attorneys inadvertently enable this narrative when we argue, for example, that a client's convictions are not "depraved"[255] because they do not carry the same culpability as "true crimes".

Siloing can occur on an advocacy level: proponents for criminal justice reform call for greater use of expungements for drug-related crimes,[256] and for alternatives to incarceration such as increased use of diversion programs and pre-plea arrangements (enrollment in a rehabilitation or drug program in lieu of jail

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ICE officials to justify negative discretionary determinations (such as release on bond, or permission to remain in the United States under a stay of removal).

252. DAS, *supra* note 73, at 84.

253. *See supra* notes 107–11.

254. *See* HILLEL R. SMITH, CONG. RSCH. SERV., R45151, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY, 7–8, 32 (2021), https://sgp.fas.org/crs/homesec/R45151.pdf [https://perma.cc/B3E9-RJG5] (discussing how Congress has repeatedly expanded the categories of criminal activity that will subject a noncitizen to removal proceedings).

255. *See supra* note 62 (discussing Congress' creation of "crimes involving moral turpitude").

256. J.J. Prescott and Sonja B. Starr, *The Case for Expunging Criminal Records*, N.Y. TIMES (Mar. 20, 2019), https://www.nytimes.com/2019/03/20/opinion/expunge-criminal-records.html [https://perma.cc/K6YQ-93YM].

time, counseling, or continued education, for example).[257] These two reforms are critical. But neither will do much good for immigrants. Expunged convictions never go away for immigration purposes, while the Immigration and Nationality Act defines "conviction" in a manner that still views pre-trial adjudications and negotiations as actual convictions.

How can the racial justice and immigrants' rights movements work together more effectively? We must envision ways to build coalitions and solidarity for the crucial work of challenging systemic oppression, without excluding one another. For example, we can unite to advocate that expungements have the same practical effect for immigrants as they do for citizens. We must also urge the repeal of laws that disproportionally impact immigrants and their communities. Such efforts serve both movements. The Black Alliance for Just Immigration is one example of an organization that seeks change through racial, social, and economic movement work, through scholarship and direct advocacy, and by directly supporting Black and immigrant communities by providing direct services and education.[258]

Both movements must urge President Biden to follow through on his campaign promise to end information and resource sharing between ICE and law enforcement by immediately ending these agreements. The President pledged to disentangle immigration enforcement from law enforcement, and yet as recently as January 21, 2022, U.S. Department of Homeland Security Secretary Alejandro Mayorkas lauded and urged continued cooperation between the two.[259] Such a reversal on the part of the Biden administration erodes trust, undermines public safety, and creates multi-generational effects that impact not just immigrants of color, but all communities of color.

B. Integrating Disability Justice into Immigration Reform: The Need to Provide Counsel and Establish an Independent Judiciary.

Two adjustments to our immigration court system would go far in mitigating the disaster that was Mbeti's competency case. First, we need to end the patchwork provision of counsel for detained, mentally incompetent respondents nationwide[260]—with its irregular IJ training on competency[261] and serious limitations outside the Ninth Circuit[262]—and instead provide universal counsel for all immigrants. And second, we need an independent judiciary for immigration judges

257. *See generally ACLU Policy Priorities for Prison Reform*, ACLU, https://www.aclu.org/other/aclu-policy-priorities-prison-reform [https://perma.cc/LG4U-4WWA] (last visited Oct. 3, 2022).

258. *Who We Are*, BLACK ALL. FOR JUST IMMIGR., https://baji.org/who-we-are/. [https://perma.cc/6Z3H-KKZ8] (last visited Oct. 3, 2022).

259. Press Release, Nat'l Immigr. Proj. of the Nat'l Laws. Guild, DHS Secretary Mayorkas Comments to U.S. Mayors Betray Administration's Commitment to Disentangle Local Police from Immigration Enforcement (Jan. 21, 2022), https://www.nationalimmigrationproject.org/pr/2022_21Jan_Mayorkas-sanctuary-remarks.html [https://perma.cc/ACC2-WMK6].

260. *See supra* notes 146–58.

261. *See supra* note 158 and accompanying text.

262. *See supra* notes 152–58 and accompanying text.

Turning a mental health justice lens on Mbeti's proceedings reveal that EOIR utterly failed Mbeti as a disabled person, and violated her right to a fundamentally fair proceeding. Under the Rehabilitation Act, federal agencies have an affirmative obligation to ensure people like Mbeti have meaningful access to services and programs.[263] EOIR falls under the Department of Justice, and must therefore comport with the requirements of the Rehabilitation Act. The Supreme Court recognized this duty in *Tennessee v. Lane* when it emphasized that agencies must make accommodations for disabled individuals to ensure their fundamental right of access to the courts under due process protections.[264]

The 2013 class action lawsuit *Franco-Gonzalez v. Holder* constituted a leap forward insofar as disability rights was concerned for noncitizens facing removal. Prior to *Franco,* only a small, opaque cluster of regulations—and one published Board decision[265]—provided guidance on how immigration courts should handle cases of respondents living with mental health concerns.[266]

On April 23, 2013, Judge Dolly Gee issued a partial judgment and permanent injunction that held that the Rehabilitation Act compelled EOIR to provide counsel to all detained, *pro se* respondents with an attorney to represent them in their entire removal proceedings, at government expense, following an incompetency adjudication.[267] The *Franco* injunction and EOIR's voluntary expansion of the *Franco* (the Nationwide Policy)[268] are both extremely limited in scope[269]—and neither apply to Mbeti's circumstance. While she was detained, she had counsel during her removal proceeding. The presence of counsel automatically placed her outside the NQRP.[270]

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263. 29 U.S.C. § 794(a); 28 C.F.R. § 39.130 (1984) (applying the Rehabilitation Act to the Department of Justice).

264. Tennessee v. Lane, 541 U.S. 509 (2014).

265. *In re* M-A-M-, 25 I. & N. Dec. 474, 474 (BIA 2011).

266. *See* 8 C.F.R. § 103.8(c)(2)(ii) (2011) (providing that service of a Notice to Appear upon an incompetent noncitizen is only proper where effectuated in person upon someone with whom the individuals resides, and a near relative, guardian, committee or friend); 8 C.F.R. § 1240.10(c) (2021) (instructing that IJs cannot accept an admission of removability from a *pro se*, unaccompanied respondent who lacks competence); 8 C.F.R. §§ 1240.4, 1240.43 (2003) (permitting waiver of a respondent's presence where, for reasons of mental incompetency, it is impracticable for the respondent to be present); Immigration and Nationality Act § 240(b)(3), 8 U.S.C. § 1229a(b)(3) ("the Attorney General shall prescribe safeguards to protect the rights and privileges" of noncitizens with serious mental health concerns).

267. Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 8115423, at *1 (C.D. Cal. Apr. 23, 2013).

268. *See supra* notes 151–53 and accompanying text.

269. Neither *Franco* nor the Nationwide Policy offer guarantees for most individuals in non-detained proceedings (of which there are roughly 1.8 million pending cases before EOIR per the Syracuse University *Immigration Court Backlog Tool*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/ [https://perma.cc/LFG4-ENXZ] (last visited Nov. 7, 2022), to any individuals in "expedited removal" (Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. 104-208 (1996), 110 Stat. 3009-546 § 302), or to any detained individuals in EOIR's "Institutional Hearing Program" (created in 1998 to comply with the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, which instructed the Attorney General to "begin any deportation proceeding [against removal noncitizens] as expeditiously as possible after the date of the conviction"), to name a few.

270. *See supra* note 150–52 and accompanying text.

Mbeti's competency hearing before the immigration judge and her subsequent *pro se* status before the BIA was a complete failure by our immigration court system. First, the immigration judge bungled the provision of "safeguards" by inappropriately supplanting Mbeti's testimony with that of a person who lacked personal knowledge her experiences.[271] In *Matter of M-A-M-* the Board recommended a non-exhaustive series of safeguards that might be appropriate given a particular respondent's needs, such as waiving a respondent's physical appearance, involving a family member or friend in the proceedings, or administratively closing proceedings altogether until such time that a respondent was restored to competence.[272] Such safeguards are mere suggestions, and are no appropriate for every respondent. The immigration judge's accommodations following Mbeti's incompetency determination did not match Mbeti's specific needs and limitations. She was never incompetent to relay her own experiences in Kenya. Had Mbeti been able to tell her own story she may have won her case.

Second, Mbeti should never have been without counsel during her many misfiled appeals, bond requests, and motions to reconsider before the Board. The BIA was aware that Mbeti had been adjudicated "incompetent to proceed without safeguards."[273] The Board could have appointed counsel but was not *required* to because Mbeti was outside the Ninth Circuit and therefore outside the ambit of the "Franco protections."[274] Had Mbeti been in the Ninth Circuit, the BIA would have had to, at a minimum, remand her case back to the IJ to determine whether additional safeguards (such as appointed counsel) were required, now that she was unrepresented.[275]

The two-tiered competency system for those detained in the three states in the Ninth Circuit versus those who are not results in wildly disparate treatment. This is a clear due process violation. Worse still, the voluntary arm of the appointed-counsel program (the Nationwide Policy) is susceptible to changes in executive power because EOIR falls under the executive branch. It would only take an unsympathetic EOIR Director, who is appointed by the Attorney General yet not subject to confirmation hearings, to decide that detained immigrants with mental health challenges are not worthy of appointed counsel. With a snap of the fingers, an already weak Nationwide Program comes to an end. Providing counsel to all sidesteps the need to reform or shore up the NQRP.

Providing counsel to all respondents serves EOIR in other ways as well, outside of addressing holes in the competency system. The ever-ballooning case backlog[276] needs a multi-pronged solution of which counsel can play an important

271. *See supra* notes 140–41.

272. Matter of M-A-M-, 25 I. & N. Dec. 474, 483 (BIA 2011).

273. *See supra* notes 140–45.

274. *See supra* notes 146–58.

275. Franco-Gonzalez Order, *supra* note 147, at *10 ("In the case of an unrepresented immigration detainee with an appeal pending before the Board who has not previously been determined to be a Class member, when *documentary, medical, or other evidence indicating that such individual falls under Section I.A.3.b comes to the Board's attention, the Board shall order a remand to the Immigration Judge* with instructions to apply the procedures set forth in Section III.B of this Order") (emphasis added).

276. *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche*

part. Providing counsel promotes judicial economy through the smooth administration of justice. There is wide consensus among judges that cases move more efficiently where counsel is present.[277] On average represented respondents seek fewer continuances,[278] create fewer delays through misfiling of evidence or applications, and understand what is expected of them in court.[279] Fewer continuances means swifter resolution which reduces costs for the courts and ICE.[280] It also would ensure a cleaner development of the record, as respondents like Mbeti would not be left alone to file a flurry of court documents and allegations that were unfounded in the law and which diverted court resources.

Regional universal representation programs like that in New York City have proven their economic feasibility.[281] Simply put, it is cheaper to provide immigrants with legal defense than it is to have them languish *pro se* before the courts. Professor Matthew Boaz provides a detailed analysis of court statistics and existing public-defender models that proves that appointed counsel for all immigrants could be funded handily by ending immigration detention.[282] If it costs $127 a day on average to detain one person and there are over 50,000 people detained on an average day in the U.S.,[283] ending detention would free up billions of dollars annually and could be redirected to providing counsel—in turn saving yet more federal dollars through the promotion of administrative economy.

Finally, providing counsel to all immigrants facing removal serves ICE's interests. If future court attendance is truly one of ICE's chief concerns,[284] the data unequivocally shows that the most effective means of ensuring court compliance is to provide counsel to each and every immigrant in removal proceedings.[285]

Reform advocates have for years called for an independent judiciary for immigration judges. Such reform would have direct benefits for respondents such as Mbeti who have mental health concerns. Immigration judges were previously

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of Cases, TRAC IMMIGR. (Jan. 18, 2022), https://trac.syr.edu/immigration/reports/675/ [https://perma.cc/2JKD-3L7Y].

277. *See* Dara Lind, *A New York Courtroom Gave Every Detained Immigrant A Lawyer. The Results Were Staggering*, VOX (Nov. 9, 2017, 9:10 AM), https://www.vox.com/policy-and-politics/2017/11/9/16623906/immigration-court-lawyer [https://perma.cc/C3D2-97WC] ("In 2007, Judge Robert Katzmann of the Second Circuit Court of Appeals — which at the time was getting about 2,000 immigration appeals per year — delivered a lecture explaining that without effective counsel in immigration court, he and his judges weren't getting a legal record they could rule on."); *see* LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 56, app. 3 at 56 (June 7, 2012), https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf [https://perma.cc/F8TK-DCN7].

278. *See generally* David Hausman & Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 FORDHAM L. REV. 1823, 1827 (2016).

279. Ingrid Eagly & Steven Shafer, *Measuring in Absentia Removal in Immigration Court*, 168 U. PA. L. REV. 817, 861 (2020).

280. Eagly & Shafer, *supra* note 27, at 9 ("When immigrants are detained, lengthy judicial processes are costly not just for the courts, but also for detention officials who must pay for the immigrants' housing costs during the pendency of the case.").

281. *See* STAVE ET AL., *supra* note 30, at 5–6.

282. *See* Boaz, *supra* note 118 at 17–19, 23–24.

283. DET. WATCH NETWORK, *supra* note 244.

284. *See supra* note 124 and accompanying text.

285. Eagly & Shafer, *supra* note 279, at 860–61(finding that people with legal representation received far fewer *in absentia* orders).

permitted to close a case against a respondent who had been adjudicated mentally incompetent and where the immigration judge felt that it was unfair to proceed until such time that the respondent was restored to competency.[286] It is unclear from the record of Mbeti's second removal hearing whether the immigration judge contemplated closing the proceedings against her. Even if the judge had considered closing her case, his authority to do so had just been revoked in a unilateral, political maneuver by then-Attorney General Jeff Sessions.[287] That same discretion would be restored two years later in another unilateral maneuver, this time by Attorney General Merrick Garland[288]—though too late to benefit Mbeti.

Immigration judges' decisions should not be cabined law, not political winds. Proposed legislation already exists to establish an Article I "United States Immigration Court" to replace EOIR as the principal adjudicatory forum, thereby severing it from the executive branch. The proposed legislation, championed by Representative Zoe Lofgren of California, is endorsed by the National Association of Immigration Judges, the American Bar Association, the Federal Bar Association, and the American Immigration Lawyers Association.[289] Among the many structural issues judicial independence would cure, it would return decisions like administrative-closure, termination, release, and other discretionary decisions firmly back in the hands of judges. This in turn would empower immigration judges to provide safeguards to respondents with serious mental health issues appearing before them.

Congress must pass the proposed legislation to inoculate the immigration courts from politics, and bring the immigration court system to a status that reflects our firmly held principles of justice.

C. The Moral, Legal, and Fiscal Imperative to Abolish Immigration Detention

Mbeti's story affirms the urgent necessity of ending ICE's inhumane and illegitimate policy of detaining immigrants. The policy's issues and ill effects abound. Detention is illegitimate because it does not support its stated purposes, inflicts suffering, and is legally indefensible. The threat of detention does not act as a deterrent for those coming to the United States, as the number of migrants—especially asylum seekers—has continued to rise;[290] communities are less safe;[291] U.S. citizens suffer multi-generational effects where one or both caregiver is

286. *See* Amelia Wilson, Natalie H. Prokop & Stephanie Robins, *Addressing All Heads of the Hydra: Reframing Safeguards for Mentally Impaired Detainees in Immigration Removal Proceedings*, 39 N.Y.U. REV. L. & SOC. CHANGE 313, 358–63 (2015).

287. *See, e.g., In re* Castro-Tum, 27 I. & N. Dec. 271, 271 (A.G. 2018) (revoking IJs' authority to administratively close cases in a decision by Attorney General Jeff Sessions).

288. *In re* Cruz-Valdez, 28 I. & N. Dec. 326, 329 (A.G. 2021).

289. Letter from Robert Carlson, Pres., Am. Bar Ass'n, et al. to U.S. House of Reps. & U.S. Sen. (July 11, 2019), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/update-final-organizational-letter-independent-immigration-court-7-11-19.pdf [https://perma.cc/PG4D-V55P].

290. *Supra* note 126 and accompanying text.

291. *Supra* notes 129–30.

removed from the home;[292] the federal government has lost control and oversight the nation's sprawling network of detention centers, and those inspections that do occur reveal substandard conditions and care;[293] immigrants do not need detention to attend their hearings, as the vast majority, especially those with representation, present themselves to the immigration court;[294] immigrant detention is deeply rooted in racism.[295] We see its illegitimacy on full display at ICDC, but also in detention centers all throughout the U.S. And yet we seem to accept detention as an endemic part of the immigration ecosystem.

Ending detention would address one of the major due process issues exposed through Mbeti's experience as she interacted with the immigration courts as a person with serious mental health concerns. When I managed the NQRP nationwide as an Attorney Advisor with EOIR from 2016–2018, one of the greatest challenges in implementing the program throughout the United States was identifying attorneys and legal service providers who had the capacity, proximity, and expertise to accept NQRP contracts in the remote, rural areas where most detention centers are located.[296] Detention centers' remoteness severs individuals from counsel,[297] in turn rendering it nearly impossible for EOIR to fulfil its obligation under the Rehabilitation Act[298] and its own stated policy. The state of Georgia perfectly illustrates the limitations of the Nationwide Policy. Georgia has nine ICE detention contracts (including ICDC)[299] and three immigration courts,[300] but only one NQRP legal service provider.[301] The imbalanced reach of the Nationwide Policy militates toward the abolition of immigration detention.

Calls to end detention are not new, though seldom is there a clear proposal as to how exactly that abolition could be achieved. Ending detention does not have to be a herculean feat, and it would not need Congressional support. The Biden administration has the ability to cancel all ICE contracts immediately. Canceling these contracts would dispossess ICE of its discretionary power to detain any noncitizen who does not have legal status in the United States,[302] and instead forces the agency to employ less harmful alternatives. On the campaign trail, President Biden promised to defund ICE detention, and to completely terminate contracts with for-profit corporations.[303] And yet, he is expanding both.[304] We

292. *Supra* notes 118–23.
293. *Supra* note 134 and accompanying text.
294. *Supra* notes 127–28.
295. *Supra* notes 86–89.
296. *See* NAT'L IMMIGRANT JUSTICE CTR., *supra* note 84.
297. *See id.*
298. *See supra* note 262 and accompanying text.
299. *Mapping U.S. Immigration Detention, supra* note 84.
300. *Operational Map,* EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir-operational-status/operational-status-map?f%5B0%5D=field_location_address%253Aadministrative_area%3AGA [https://perma.cc/Q65Y-LS2P] (last visited Oct. 5, 2022).
301. Corradini, *supra* note 160.
302. 8 U.S.C. § 1226(a) ("On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States").
303. *See The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN HARRIS, https://joebiden.com/immigration/ [https://perma.cc/NQ7A-2NN2] (last visited Oct. 4, 2022).
304. Press Release, Detention Watch Network, The Biden Administration is Expanding Private

must call upon the Biden Administration to reverse this decision and honor his pledge to his constituents.

The Biden administration should defund ICE detention because it is expensive. Again and again studies show that community-based programs, alternatives to detention, family case management programs, and even paying for an attorney for each immigrant in removal proceedings is cheaper and more effective at meeting detention's purported goals.[305] Detention is punitive, injurious, expensive, and unjustifiable by all standards. Some might argue that the INA's provision that created "mandatory custody" of certain noncitizens as a major roadblock to abolishing detention, as detention is a requirement.[306] Congress can repeal Section 236(c) of the INA—but such a move is not actually necessary to end immigration detention. The term "mandatory detention" is often used interchangeably with mandatory custody,[307] despite that "detention" does not appear in the language of the statute.[308] Custody assumes many forms—of which actual detention is merely the most restrictive. In 2015 the United States Commission on Civil Rights recommended that DHS reduce family immigration detention in favor of community based support case management, which it promoted as not only more humane than detention, but cost-efficient.[309]Alternatives to detention such as supervision check-ins or anklet monitoring devices not only exist, but ICE employs them regularly.[310] ICE chooses to detain certain persons who fall under 236(c) but does not in fact have to.

Immigration detention is unjustifiable when viewed from all angles. Every day the brutality of ICE detention grinds down families, communities, and people.

Immigration Detention (Sept. 29, 2021), https://www.detentionwatchnetwork.org/pressroom/releases/2021/biden-administration-expanding-private-immigration-detention [https://perma.cc/6QSY-CSRZ].

305. *See* Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2148 (2017); Boaz, *supra* note 118; *see Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-up*, ACLU, https://www.aclu.org/sites/default/files/assets/aclu_atd_fact_sheet_final_v.2.pdf [https://perma.cc/ZM3W-9NP4] (last visited Oct. 4, 2022).

306. *See* CONG. RSCH. SERV., IF11343, THE LAW OF IMMIGRATION DETENTION: A BRIEF INTRODUCTION (2022), https://crsreports.congress.gov/product/pdf/IF/IF11343#:~:text=While%20immigration%20officials%20generally%20have,criminal%20or%20terrorism%2D%20related%20grounds [https://perma.cc/AM5W-U396] ("While immigration officials generally have broad discretion to decide whether to detain aliens during the pendency of removal proceedings, INA § 236(c) *requires the detention of aliens removable on specified criminal or terrorism related grounds*.") (emphasis added).

307. *See id.*

308. *See* 8 U.S.C. § 1226(c)(1)(C); Katie Mullins, *"Mandatory Detention"? Why the Colloquial Name for INA § 236(c) is a Misnomer and How Alternatives to Detention Programs Can Fulfill its Custody Requirement*, 72 NAT'L LAW. GUILD REV. 34, 37–39 (2015).

309. U.S. COMM'N ON CIV. RTS., WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES 141 (2015), https://reliefweb.int/sites/reliefweb.int/files/resources/Statutory_Enforcement_Report2015.pdf [https://perma.cc/PSM2-3FWS].

310. U.S. IMMIGR. & CUSTOMS ENF'T., *Detention Oversight*, https://www.ice.gov/detain/detention-oversight [https://perma.cc/J5C9-AY75] (last visited Oct. 6, 2022).

Advocacy surrounding ICDC resulted in its closure, but also showed us how it can be done elsewhere.

D. Meaningful and Accessible Mental Health Care

At the outset of her mental health conditions, Mbeti needed meaningful and affordable psychiatric care. A full analysis of the complex field of health care reform is beyond the scope of this article. But what is clear is that Mbeti's access to that care was curtailed at multiple points, and as a result of different sources of exclusion. Immigrants are insured at lower rates than U.S. citizens.[311] Black people, especially Black women, are also disproportionally uninsured.[312] When Mbeti went from documented to undocumented, her access was all but extinguished.[313] Her lack of care then intersected with three major areas of her life: education, arrest history, and immigration status.

Mbeti is a calm, linear, and introspective person when correctly and consistently medicated. Her parents were well educated and wanted her to go far in the United States. Mbeti firmly believes that but for her untreated conditions she would have completed her education. She is probably correct, as she is ambitious, creative, and hardworking. There are ways that we can imagine that having a degree would have benefited Mbeti: a steady income, access to areas of the job market that provide stability and private health insurance should she have chosen it, opportunities to leave rural Georgia for a metropolitan region with robust treatment options. Instead, her mental health disrupted her educational pursuits, ultimately ending them.

Mbeti may not have been able to avoid her initial encounter with local law enforcement in 2007. She was Black and driving in the south, where implicit bias and racial profiling make her an automatic target. Police pretextually use labels such as "uncooperative," "erratic" and "resistant" to justify the arrest of people of color, and we cannot know what transpired during the traffic stop itself. Had she been medicated, though, Mbeti firmly believes that she would not have damaged the jailhouse phone which gave rise to her first felony conviction. What can probably be said with greater certainty is that Mbeti, if properly treated, would not have damaged an unoccupied police vehicle with a shovel that gave rise to her second felony conviction. By her own rendition of events she was feeling anxious and hopeless, and believed that the only way to save herself was to be incarcerated.

Immigrants should not be excluded from benefits because they lack permanent resident status—a status that already has many carve-outs and exclusions based on a person's criminal history, manner of entry into the U.S., or immigration history. Black women should not be disproportionally uninsured because they are in occupations that do not provide insurance, or are less able to afford private insurance. Undocumented persons should not be *de facto* denied coverage because their state laws diminish their income-earning ability through restrictive documentation laws. The asymmetry of our health care system that

311. *See supra* notes 48–51, 54–56.
312. *See supra* note 52 and accompanying text.
313. *See supra* notes 100–01.

privileges those with perfectly aligned characteristics (citizen, employed, wealthy, etc.) is indefensible and must be dismantled.

We need a robust mental health care infrastructure supported by federal funding that ensures that all persons—documented or undocumented, insured or uninsured, and regardless of employment status, color, or economic ability—can receive long-term care. Congress has the power to repeal laws that exclude immigrants from receiving federal health benefits such as SSI. Medicaid, which only covers undocumented noncitizens for emergency care, should be expanded to include all individuals regardless of immigration status. Finding state-level alternatives to federal action on health care might be more effective. States have begun to be innovative in developing ACA analogues that extend marketplaces to undocumented residents within their state. California is inching closer to passing legislation that would create a universal health care system through single-payer public financing,[314] which would use state funds to expand its Medicaid and ACA program to cover Californians who would be eligible, but for their immigration status.[315]

Investing in mental health will pay for itself, as fewer individuals in crisis will need expensive emergency care that strains hospitals and governments. Most of the nation's uncompensated emergency healthcare costs are generated by uninsured, undocumented immigrants.[316] Providing healthcare for all constitutes not only a humanitarian obligation but a financial one. State lawmakers concerned about the costs associated with an ACA analogue can, at a minimum, grant immigrants' ability to access basic tools like drivers' licenses so that they can pursue a greater range of employment—and possibly achieve insured status on their own.

Decriminalization of mental health disabilities is a reform measure that can take place through disciplined, careful rethinking of intervention priorities. An increasing number of states now allow a criminal defendant's mental, developmental and intellectual disabilities to be viewed as a mitigating factor during sentencing,[317] while pretrial services and alternative programs help divert individuals from incarceration altogether.[318] Sustained support in the form of medication compliance, housing assistance, money management, counseling, rehabilitation, and job training will go a long way in preventing the decompensation of many individuals. If a distressed person needs emergency intervention, a social worker or mental health professional should engage the individual rather than law enforcement. ACT involvement in Mbeti's life was working and would have continued to work had it been given the chance. Mbeti

314. Emily Hoeven, *Single-Payer Health Care Clears Big Hurdle in California*, CAL MATTERS (Jan. 21, 2022), https://calmatters.org/newsletters/whatmatters/2022/01/california-single-payer-health-care-vote/ [https://perma.cc/4L7Y-XN2Y].

315. *What Is Single-Payer?*, HEALTHCARE FOR ALL CAL., https://healthcareforall.org/ [https://perma.cc/69DD-B5WK] (last visited Oct. 6, 2022).

316. Vinita Andrapalliyal, *"Healthcare for All"? The Gap Between Rhetoric and Reality in the Affordable Care Act*, 61 UCLA L. REV. DISCOURSE 58, 66–67 (2013).

317. *See e.g.,* S. 1315, 2021 Gen Assemb., 2021 Sess. (Va. 2021) and H. 2047, 2021 Gen Assemb., 2021 Sess. (Va. 2021).

318. *See e.g., Alternative to Incarceration (ATI) Programs*, N.Y. STATE, https://www.criminaljustice.ny.gov/opca/ati_description.htm [https://perma.cc/9Y3J-D9DE] (last visited Oct. 6, 2022).

firmly believes that her life was on the right course during the times she was connected to ACT.

These alterations will not only save local police resources, but will divert many individuals from the criminal justice system and into treatment and care. The cost of policing, arresting, detaining, and deporting noncitizens[319] like Mbeti far exceeds the cost of providing early intervention and care to impacted individuals.[320] Investing in preventative, sustained support offers a path to keep communities safer while safeguarding the human rights and dignity of those with serious mental health concerns.

CONCLUSION

Mbeti's story lays bare how oppressive systems interconnect and reinforce one another. It also provides a unique vehicle to envision interconnecting solutions.

As for Mbeti herself, she needs immediate, concrete relief. That relief is possible. Mbeti and the women of ICDC are owed damages; settling the Oldaker and Federal Torts Claims Act litigation could bring them that financial stability. Second, Mbeti meets the qualifications for a visa based on her having been the victim of a crime; investigators into ICDC and Dr. Amin could sign this certification and put Mbeti on the path to regaining status.

ICE has boasted of a "force multiplier" effect that benefits its mission. At the time this term was used, it referred to improvements in technology, cross-agency information and resource sharing, and coordinated enforcement efforts coming together to supercharge the deportation machine. But ICE's force is multiplied by much more than that. It is multiplied by racial animus, corporate greed, willful disregard, and cruelty.

We have force too. Uniting our purposes across racial justice, immigrant justice, criminal justice reform, gender justice, and health justice multiplies that force—and makes it indomitable.

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319. *See* Rafael Carranza, *How Much Does it Cost to Deport One Migrant? It Depends*, THE REPUBLIC (May 1, 2017, 9:08 AM), https://www.azcentral.com/story/news/politics/immigration/2017/04/28/deportation-costs-illegal-immigration/99541736/ [https://perma.cc/5QFN-BMJF] ("ICE spent an average of $10,854 per deportee during the fiscal year that ended in September, according to ICE spokeswoman Yasmeen Pitts O'Keefe. 'This includes all costs necessary to identify, apprehend, detain, process through immigration court, and remove an alien,' she said in an interview.").

320. *See generally* Paul Gionfriddo, Theresa Nguyen & Nathaniel Counts, *Reducing Health Care Costs Through Early Intervention On Mental Illnesses*, HEALTH AFFAIRS (Jan. 25, 2016), https://www.healthaffairs.org/do/10.1377/forefront.20160125.052822 [https://perma.cc/D7CP-EJ84].

A Critical Race Feminism Critique of Immigration Laws That Exclude Sex Workers: Moving from Theory to Praxis

Monika Batra Kashyap†

ABSTRACT

This Article is the first to apply a critical race feminism (CRF) critique to the current immigration law in the United States, Immigration and Nationality Act (INA) § 212(a)(2)(D)(i), which excludes immigrants for engaging in sex work.[1] *This Article will use critical historical methodology to center the role of women of color as the primary targets of not only the first federal law to criminalize sex workers, but also the first explicitly racist immigration law in United States history. The Article will also employ theories of anti-essentialism and intersectionality to show how INA § 212(a)(2)(D)(i) both silences the voices and experiences of women of color sex workers and refuses to recognize the impacts of multiple intersecting systems of oppression. Finally, the Article will connect the critique of INA § 212(a)(2)(D)(i) to the anti-carceral feminist movement to decriminalize sex work in order to move from theory to praxis, and to inspire advocacy strategies and law reform efforts that point to a broader project of transformation. The ultimate goal of this Article is to strengthen links between critical race and immigration law scholarship so that scholars can continue to use*

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1. This Article uses the term "sex work/er" in solidarity with the sex workers' rights movement that embraces the term as a political signifier of their fight for economic justice and rejection of the stigmatized and criminalized designations of "prostitution"/"prostitute." The terms "prostitution"/"prostitute" will be used only when quoting or referring to statutes, legislation, or the text from other authors. In particular, the Article will use "prostitution" when referring to the INA's "prostitution exclusion"—namely, section 212(a)(2)(D)(i) of the Immigration and Nationality Act (INA) of 1952.

CRF as an exploratory analytical tool to examine the intersections of race, class, and gender within immigration law.

INTRODUCTION

Immigration law is built upon a framework of exclusion. From its inception as a nation state, the United States established exclusionary immigration laws.[2] From 1776 to 1875, states erected immigration laws with the sole intent of reifying "otherness" and excluding people from participating socially, politically, and economically in society, based on classifications of criminality, poverty, disability, contagious disease, race, slavery, and ideological grounds.[3] In 1875, Congress passed the Page Act of 1875, which was the first federal law to exclude immigrants from entering the country.[4] The Act did so by explicitly defining two distinct categories of immigrants: "persons who are undergoing a sentence for conviction in their own country of felonious crimes" and "women imported for

2. *See generally* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993) (outlining early state and federal regulation of immigration during the period of 1776-1885); KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS (2004) (tracing the history of exclusions in U.S. immigration law).
3. Neuman, *supra* note 2, at 1841 (discussing the five major categories of immigration policy implemented by state regulation, including the movement of criminals, public health regulation, regulation of the movement of the poor, regulation of slavery, and other policies of racial subordination).
4. Page Act of 1875, ch. 141, § 5, 18 Stat. 477, 477 (repealed 1943).

the purposes of prostitution."[5] These two targets of the Page Act of 1875—felons and sex workers—have been consistently and continuously excluded under U.S. immigration law through the present day.

Moreover, since 1875, the federal government has expanded exclusionary immigration laws extensively and codified nearly forty distinct categories of exclusion,[6] now referred to as "inadmissibility grounds."[7] The Immigration and Nationality Act of 1952 (INA)[8]—the foundation of present immigration law—sets forth the current grounds of inadmissibility, organized into ten categories: health,[9] criminal activity,[10] national security,[11] poverty,[12] labor protection,[13] fraud and immigration violations,[14] inadequate documents,[15] military service in the U.S.,[16] polygamy,[17] unlawful voting,[18] and other miscellaneous grounds.[19] The inadmissibility ground excluding immigrant sex workers that is the subject of this Article, INA § 212(a)(2)(D)(i), is categorized under the INA's crime-related grounds of inadmissibility category.[20] This exclusionary ground bars any immigrant who is coming to the U.S. "solely, principally, or incidentally" to engage in sex work—or who has engaged in sex work within the past ten years.[21]

All grounds of inadmissibility control whether an immigrant can live within the boundaries of the United States.[22] All immigrants seeking to live permanently

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5. *Id.*
6. The nearly forty grounds of inadmissibility are listed in Section 212 of the INA.
7. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) replaced the term "exclusion grounds" with the term "inadmissibility grounds." *See* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 428 (5th ed. 2003). This Article will refer to the prostitution-related ground of inadmissibility as Section 212(a)(2)(D)(i) of the INA and "the prostitution exclusion" interchangeably.
8. INA, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).
9. *See* INA § 212(a)(1), 8 U.S.C. § 1182(a)(1).
10. *See id.* § 212(a)(2)(A)(i)(I) (crimes involving moral turpitude); § 212(a)(2)(D) (prostitution); § 212(a)(2)(A)(i)(II) (drug related crimes); § 212(a)(2)(B) (multiple criminal convictions); § 212(a)(2)(C) (drug trafficking); § 212(a)(2)(E) (involvement in "serious criminal activity"); § 212(a)(2)(G) (foreign government officials who have committed particularly severe violations of religious freedom); § 212(a)(2)(H) (significant trafficking in persons); and § 212(a)(2)(I) (money laundering).
11. *See id.* § 212(a)(3).
12. *See id.* § 212(a)(4)(A).
13. *See id.* § 212(a)(5).
14. *See id*. § 212(a)(6).
15. *See id.* § 212(a)(7).
16. *Id.* § 212(a)(8) renders inadmissible any immigrant who is "permanently ineligible to citizenship" and any person who departed from or remained outside the United States in order to avoid military training or service during a period of war.
17. *See id.* § 212(a)(10)(A).
18. *See id.* § 212(a)(10)(D).
19. "Other miscellaneous grounds" include guardians required to accompany excluded immigrants, international child abductors, and former citizens who renounced their citizenship in order to avoid taxation. *See id.* § 212(a)(10)(B); § 212(a)(10)(C); and § 212(a)(10)(E).
20. *See id.* § 212(a)(2)(D).
21. *Id.* § 212(a)(2)(D)(i).
22. Although the process of "being admitted" does apply to an immigrant who is outside the

in the U.S. are subject to these grounds of inadmissibility[23] and any immigrant who is deemed to be "inadmissible" based on these grounds may also be subject to deportation.[24]

Critical immigration scholars have critiqued many of these grounds of inadmissibility for their inhumanity, racially disparate impacts, racist motivations, and outdated underpinnings. For example, the public charge inadmissibility ground[25] has been criticized for its racially discriminatory application,[26] its devastating effects on public health,[27] and for impeding public welfare goals to provide for those in need.[28] The "drug abuser or addict"[29] health-related ground of inadmissibility has been criticized for failing to align with the contemporary understanding of substance addiction as a medical condition,[30] while also serving as an excuse for excluding persons based on racial profiling.[31] The health-related

country and seeking to enter the U.S., a majority of immigrants gain permanent "legal status" through petitions for "adjustment of status" while they are already in the United States. Those seeking to adjust their status include refugees, asylum-seekers, certain temporary workers, foreign students, family members of U.S. citizens and green card holders, and those immigrants who have not attained "legal status." When these immigrants file an application for permanent residence while in the U.S., all grounds of inadmissibility apply to them as well.

23. INA § 212(a), 8 U.S.C. § 1182(a). Even some immigrants who are *not* seeking to live permanently in the U.S. are subject to these grounds including applicants for certain VAWA-related provisions such as U-Visas and T-Visas.
24. Section 237(a) of the INA sets out the categories of deportable immigrants including those who are deemed inadmissible. *See* INA § 237 (current version at 8 U.S.C. § 1227(a)).
25. INA § 212(a)(4)(A).
26. *See, e.g.*, Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1134 (1998) (arguing that the public charge exclusion has a disproportionate effect on immigrants of color from developing nations); *see also* Cori Alonso-Yoder, *Publicly Charged: A Critical Examination of Immigrant Public Benefit Restrictions,* 97 DENVER U. L. REV. 1, 6-8, 33 (2019) (arguing that the public charge exclusion must be understood "as a discriminatory, racially motivated policy"); Lisa Sun-Hee Park, *Perpetuation of Poverty Through "Public Charge,"* 78 DENVER U. L. REV. 1161, 1171-72 (2001) (describing the discriminatory effects of the public charge exclusion in the 1990s on immigrant communities); Anna Shifrin Faber, Note, *A Vessel for Discrimination: The Public Charge Standard of Inadmissibility and Deportation*, 108 GEO. L.J. 1363, 1369-80 (2020) (discussing the discriminatory history of public charge over the three phases of immigration law).
27. Medha D. Makhlouf, *The Public Charge Rule as Public Health Policy*, 16 IND. HEALTH L. REV. 177, 198-208 (2019) (describing the predicted adverse impact of the proposed changes to public charge on public benefits enrollment and how the proposed rules represented a harmful departure from the current policy).
28. *See* Joseph Daval, Note, *The Problem with Public Charge*, 130 YALE L. J. 998, 1007 (2021) (arguing public charge exclusion impedes public welfare aims by deterring noncitizens from receiving public benefits).
29. *See* INA § 212(a)(1)(A)(iv) (excluding an immigrant who is determined to be a drug abuser or addict).
30. *See* Rebecca Sharpless, *Addiction-Informed Immigration Reform*, 94 WASH. L. REV. 1891, 1893 (2019) (discussing immigration law's exclusionary treatment of noncitizens with substance use disorder); *see also* Wilber A. Barillas, *Collateral Damage: Drug Enforcement & Its Impact on the Deportation of Legal Permanent Residents*, 34 B.C. J. L. & SOC. JUST. 1, 11, 25 (2014) ("[M]any Americans have begun to adopt a more tolerant view of drugs... This more accepting attitude has manifested itself in recent state laws.")
31. *See* Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM & MARY L. REV. 163, 186

inadmissibility ground that concerns mental-health[32] has been critiqued for retraumatizing immigrant survivors of violence,[33] while also reinforcing white supremacist beliefs about race and ability.[34] Crime-related grounds of inadmissibility in general have been critiqued for their racist motivations and racially disparate impacts.[35] Finally, the prostitution-related inadmissibility ground has been criticized for being rooted in archaic notions of morality, failing to penalize immigrant solicitors of sex, and unfairly impacting transgender immigrants.[36] This Article adds a new dimension to the rich work of critical immigration scholarship by directing attention to the prostitution-related ground of inadmissibility through the distinct lens of critical race feminism.

To advance this critique, this Article proceeds in four parts. Part I foregrounds the central analytical tools and approaches of critical race feminism to provide immigration scholars with an unexamined framework through which to understand the INA's prostitution exclusion, INA § 212(a)(2)(D)(i). Part II follows by deploying a critical historical methodology to expose the roots of INA § 212(a)(2)(D)(i) as racist and white supremacist legislation borne from, and inspired by, the racialized and sexualized targeting of women of color. Using anti-essentialism theory, Part III (A) exposes how INA § 212(a)(2)(D)(i) reflects white supremacy and reifies patriarchy by essentializing all sex workers, all sex work, and all women—thereby silencing the voices and experiences of sex workers themselves, especially women of color sex workers. Using intersectionality

(2008) (stating immigrant officials' harsh interrogation approaches are troubling because immigration enforcement has a history of racially profiling noncitizens).

32. *See* INA § 212(a)(1)(A)(iii) (excluding an immigrant who has been determined *to have or have had* a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others).

33. *See* Monika Batra Kashyap, *Heartless Immigration Law: Rubbing Salt into the Wound of Immigrant Survivors of Domestic Violence*, 95 TUL. L. REV. 51, 54 (2020) (arguing the enforcement of INA § 212(a)(1)(A)(iii) retraumatizes immigrant survivors of interpersonal violence).

34. *See* Monika Batra Kashyap, *Toward a Race Conscious Critique of Mental Health-Related Exclusionary Immigration Laws*, 26 MICH. J. RACE & L. 87, 89 (2021) (discussing how INA § 212(a)(1)(A)(iii) reinforces white supremacist, racist, and ableist ideologies that influence concepts of citizenship and belonging).

35. *See, e.g.*, César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1461–67 (2013) (reviewing the history of discrimination noncitizens experienced from the United States' political and cultural institutions that led to the enmeshment of criminal law and immigration law); *see also* Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 994 (2016) (discussing how immigrants of color have been subjected to abuse by law enforcement); *see* Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 194 (2018) (critiquing the merger of the immigration and criminal legal systems for the disparate impacts on people of color).

36. *See* Pooja R. Dadhania, *Deporting Undesirable Women*, 9 UC IRVINE LAW REV. 53, 53, 76 (2018) (critiquing the INA's prostitution exclusion for contravening societal views on sex work, for failing to punish solicitors of sex workers, and for giving rise to administrative inconsistencies in enforcement); Luis Medina, *Immigrating While Trans: The Disproportionate Impact of the Prostitution Ground of Inadmissibility and other provisions of the Immigration and Nationality Act on Transgendered Women*, 19 THE SCHOLAR 253, 281 (2017) (arguing that the INA's prostitution exclusion disproportionately impacts transgender women).

theory, Part III (B) exposes the ways in which INA § 212(a)(2)(D)(i) refuses to recognize that multiple systems of oppression intersect with each other to produce overlapping and reinforcing harms for sex workers. Part IV moves theoretical critiques into praxis by explicitly connecting the critique of INA § 212(a)(2)(D)(i) to the emerging anti-carceral feminist movement to decriminalize sex work. The Article concludes by challenging immigration and critical race scholars alike to further explore the utility of critical race feminism as an analytical tool to examine the intersections of gender, race, and class in immigration law and, importantly, as a source of inspiration for transformative legal reform.

I. INTRODUCING CRITICAL RACE FEMINISM

Critical Race Feminism (CRF) is an analytical framework that emerged within the legal academy at the end of the twentieth century to emphasize and center the legal concerns of poor women[37] of color.[38] As a critical modality within the larger Crit movement, CRF theorizes specifically and directly about the multiplicity of ways in which existing legal paradigms have allowed women of color to fall between the cracks.[39] As the name reflects, CRF draws from both Critical Race Theory (CRT) and feminist legal theory.[40] From CRT, CRF adopts the understanding that racism is normal and ordinary in American society and in particular, that "racism has been an integral part of the American legal system from its founding."[41] And from feminist jurisprudence, CRF embraces an "emphasis on gender oppression within a system of patriarchy"[42] and that there is a social and legal construction of the power of gender.[43] However, CRF not only draws from CRT and feminist legal theory, but also identifies and responds to their shortcomings with unique theoretical and practical contributions.[44] These

37. For the purposes of this article, "women" refers to anyone who identifies as a woman or is subject to discrimination based on being perceived as a woman--whether the individual is cisgender, transgender, or nonbinary.

38. *See* ADRIEN KATHERINE WING, INTRODUCTION TO CRITICAL RACE FEMINISM: A READER 1 (Adrien K. Wing ed., New York University Press 2d ed. 2003) (discussing the emergence of CRF) [hereinafter WING, *CRF*]; *see also* Adrien K. Wing & Christine A. Willis, *From Theory to Praxis: Black Women, Gangs, and Critical Race Feminism*, 11 LA RAZA L.J. 1, 2 n.9 (1999) (explaining that critical race feminists are predominantly scholarly women of color focusing their writing on topics relevant to race and gender) [hereinafter Wing, *Praxis*].

39. WING, *CRF*, *supra* note 38 at 2.

40. *Id*. at 4.

41. Adrien Katherine Wing, *Violence and State Accountability: Critical Race Feminism*, 1 GEO. J. GENDER & L. 95, 96 (1999) ("[CRF] believe[s] that racism has been an integral part of the American legal system from its founding, rather than an aberrational spot on the pristine white body politic.").

42. *Id*. at 98.

43. *See* Wing, *Praxis*, *supra* note 38 at 3.

44. *See* Angela Onwuachi-Willig, *This Bridge Called Our Backs: An Introduction to "The Future of Critical Race Feminism,"* 39 U.C. DAVIS L. REV. 733, 736 (2006) (describing how critical race feminists amplify the voices of people excluded from the dominant legal theory); WING, CRF, *supra* note 38 at 7 (noting that CRF has made analytical contributions that have greatly enhanced CRT and feminist legal theory).

contributions include the use of critical historical methodology, theoretical frameworks of anti-essentialism and intersectionality, and a commitment to action—or praxis.[45] This Part of the Article will discuss each of these contributions.

A. Critical Historical Methodology

As a multidisciplinary approach, CRF draws from a wide array of legal and non-legal disciplinary traditions such as history, sociology, political science, economics, anthropology, African American studies, and women's studies.[46] Critical race feminist scholar Adrien K. Wing explains that the significance of CRF—like CRT—is a crystalline recognition that the law alone is not a "sufficient basis to formulate solutions to our racial dilemmas."[47] Moreover, as Wing explains, synthesizing multidisciplinary bodies of knowledge into a theoretical framework of CRF can help "create comprehensive and practical strategies which address the needs of our communities."[48] Therefore, CRF endorses a multidisciplinary approach that helps to make the understanding of CRF's "distinctive" voice more accessible to those "who do not understand hyper-technical legal language."[49] In particular, CRF specifically believes in using "critical historical methodology" in order to "demarginalize" the roles people of color have played in history—roles that have evaded the interests of traditional historians.[50] It is this method that will be utilized to begin the CRF critique that is the focus of this Article.

B. Anti-Essentialism and Intersectionality Theory

Anti-essentialism and intersectionality theories represent the heart of a CRF framework. Critical race feminism rejects the ways in which CRT "essentializes" all people of color by failing to recognize that the experiences of men of color may differ significantly from those of women of color.[51] Critical race feminism also rejects the ways in which mainstream feminism "essentializes" all women by "subsuming the variable experiences of women of color within the experience of white, middle class women"—while also paying "insufficient attention to the central role of white supremacy's subordination of women of color" effectuated

45. Paulo Freire has defined praxis as the interrelationship between action and reflection. *See* PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 51 (Myra Bergman Ramos trans., Continuum International Publishing Group 2005) (1970).
46. WING, *CRF*, *supra* note 38 at 6.
47. Wing, *supra* note 41 at 97.
48. Wing, *Praxis*, *supra* note 38 at 4.
49. Wing, *supra* note 41 at 97.
50. Wing, *CRF*, *supra* note 38 at 6.
51. WING, *supra* note 41 at 98; *see also* Adrien K. Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALB. L. REV. 943, 947 (1997) (discussing the genesis of CRF and noting that "much of CRT seemed to present the essentialist term "minority," when it really meant African-American men").

by both white men and white women.[52]

In her seminal article, *Race and Essentialism in Feminist Legal Theory*, critical race feminist scholar Angela Harris exposes the limitations of feminist legal theory by arguing that it relies on "gender essentialism." [53] Harris describes gender essentialism as the notion that "that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience."[54] Harris offers the example of the experience of rape for black women—which she points out is "radically different" from that of white women.[55] Harris explains that the experience of rape for black women is "deeply rooted in color" and includes a unique vulnerability to rape, a unique lack of legal protection—and also a unique ambivalence that recognizes the victimization of black men by a criminal justice system that has "consistently ignored violence against women while perpetrating it against men."[56]

Therefore, Harris argues that "gender essentialism" not only silences women of color who have traditionally been kept from speaking,[57] but also represents a "broken promise—the promise to listen to women's stories, the promise of feminist method."[58] Thus, Harris encourages the adoption of a "multiple consciousness" approach to feminism—an approach that recognizes the "multiplicitousness" of the self.[59] Such an approach calls into question the notion of a unitary "women's experience" by recognizing that people are oppressed not only on the single basis of gender but also on the bases of multiple "inextricable" categories including race, class, and sexual orientation.[60] Harris argues that the

52. Wing, *supra* note 41 at 98.

53. *See* Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

54. *Id.* at 585; *see also* Berta Esperanza Hernandez-Truyol, *Latindia II — Latinas/os, Natives, and Mestizajes — Latcrit Navigation of Nuevos Mundos, Nuevas Fronteras and Nuevas Teorias*, 33 U.C. DAVIS L. REV. 851, 862 n.26 (2000) (noting that an essentialist outlook assumes that there is "one legitimate, genuine universal voice that speaks for all members of a group, thus assuming a monolithic experience for all within the particular group — be it women, Blacks, Latinas/os, Asians, etc."); Tina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 19 (1995) (noting that the concept of essentialism "assumes that the experience of being a member of the group under discussion is a stable one, one with a clear meaning, a meaning constant through time, space, and different historical, social, political, and personal contexts."). For an exploration of the ways in which gender essentialism impacts trans individuals, *see* EITHNE LUIBHEID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 153 (2002) (explaining that because gender protection laws are implicitly based on notions of immutable, binary gender categories, courts often decide that these laws are inapplicable to trans people); *see also* Paisley Currah and Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People,* 7 WM. & MARY J. WOMEN & L. 37, 57 (2000).

55. Harris, *supra* note 53 at 601.

56. *Id.* at 598–601.

57. *Id.* at 585.

58. *Id.* at 601.

59. *Id.* at 608 (discussing the importance of offering post-essentialist feminist theory, the recognition of a "self that is multiplicitous, not unitary.")

60. *Id.* at 587 (discussing the notion of multiple consciousness as appropriate to describe a world

adoption of this multiple consciousness approach is how feminist legal theory can avoid creating an essentialist world where the experience of women of color will always be "forcibly fragmented" before being analyzed.[61]

In her pivotal article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, critical race feminist scholar, Kimberlé Crenshaw introduced the concept of intersectionality as a theoretical framework that not only considers the intersections of multiple identities such as race, class, and gender—but also recognizes that multiple systems of oppression intersect with each other to produce overlapping and reinforcing harms.[62] For example, in the context of the criminalization of women of color—where systems of racial and gender oppression intersect—Crenshaw argues that intersectionality theory is more "analytically attentive" to the dynamics that contribute to the vulnerability of women of color to profiling, arrest, conviction, and ultimately, incarceration by the criminal justice system.[63]

Therefore, while CRF has proven particularly useful in analyzing the racialized and gendered aspects of violence against women of color including rape, domestic violence, and sexual harassment,[64] it has also inspired a broader conception of "gender violence" that centers a critique of the criminal justice system and recognizes the role the state plays in perpetrating violence against communities of color.[65] In other words, CRF offers a distinctive framework for

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in which "people are not oppressed only or primarily on the basis of gender, but on the bases of race, class, sexual orientation, and other categories in inextricable webs.")

61. *Id.* at 589.

62. *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 (1989) (using the concept of intersectionality to denote the various ways in which race and gender interact to shape the multiple dimensions of Black women's employment experiences); *see also* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (using intersectionality to describe the location of women of color within overlapping systems of subordination) [hereinafter, Crenshaw, *Mapping*].

63. Kimberlé Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA LAW REV. 1418, 1422–24 (2012).

64. Harris, *supra* note 53 at 598 (1990) (applying a CRF analysis to rape and noting that "for [B]lack women, rape is a far more complex experience, and an experience as deeply rooted in color as in gender."); Crenshaw, *Mapping*, *supra* note 62 at 1241 (discussing the intersections of race and gender in the context of violence against women of color); *see also* Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 234 (1994) (acknowledging that "[r]acial and cultural differences are critical considerations in analyzing and responding to the crisis of domestic violence"); Tanya Kateri Hernandez, *Sexual Harassment and Racial Disparity: The Mutual Construction of Race and Gender*, 4 J. GENDER RACE & JUST. 183, 196 (2001) (noting that "race has everything to do with sexual harassment generally.")

65. *See* Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 780 (2000) (arguing that "traditional practices of law enforcement incorporate or facilitate gender violence, whether it is directed at women, sexual minorities, or racial-ethnic minorities."); *see also* Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J. L & POL'Y 13, 15 (2011) (arguing that the violence perpetrated by "the men who investigate, arrest, and incarcerate the criminals" can be

analyzing multiple forms of violence against women without deemphasizing or privileging one form over another.[66] As a result, CRF has helped to mobilize theoretical interrogations and on-the-ground interventions to gender violence that support struggles against private violence without ignoring struggles against state-sponsored gender violence.[67]

Indeed, CRF is not only useful for understanding the unique experiences of women of color who experience both racial and gender oppression, but also of those who sit at the intersections of additional systems of oppression including class, sexuality, age, color, nation, ethnicity, and ability.[68] As professor Johonna Turner explains, CRF seeks to "increasingly focus on the experiences of those on the margins, which may include the poor and working-class, transgender people, involvement or participation in the sex trade, migrant and refugee status, and experiences of incarceration and confinement.[69]

C. Commitment to Praxis

The centrality of praxis—as a co-influence of theory and practice—underpins the work of critical race feminists.[70] As Wing explains, the role of CRF is not to simply theorize about the ways in which existing legal paradigms have allowed women of color to fall through the cracks, but to intentionally contribute to the creative process of developing solutions to problems that impact those subordinated in society.[71] In this way, CRF wholeheartedly embraces critical race praxis—the commitment to combining "critical, pragmatic, socio-legal analysis with political lawyering and community organizing to practice justice by and for

described as "gender violence.") [hereinafter Harris, *Heteropatriarchy*]; Annette Ruth Appell & Adrienne D. Davis, *Access to Justice: Mass Incarceration and Masculinity Through a Black Feminist Lens*, 37 WASH. U. J. L. & POL'Y 1, 4 (2011) (applying a CRF framework to approach the phenomenon of mass incarceration because CRF "is particularly adept at prosecuting the gendered dimensions of power and state violence.").

66. *See* Harris, *Heteropatriarchy*, *supra* note 65 at 17 (offering a CRF-inspired approach of transformative justice as a way to support the struggles against private violence without ignoring struggles against state-sponsored gender violence).

67. *Id.*

68. *See* Crenshaw, *Mapping*, *supra* note 62 at 1244-45 n.9 ("While the primary intersections that I explore here are between race and gender, the concept can and should be expanded by factoring in issues such as class, sexual orientation, age, and color."); *see also* Patricia Hill Collins, *Intersectionality's Definitional Dilemmas*, 41 ANN. REV. SOC. 1, 11-13 (2015) (explaining the deepening of intersectional theory by "expand[ing] the focus on race, class, and gender to incorporate sexuality, nation, ethnicity, age, and ability as similar categories of analysis.")

69. Johonna Turner, *Race, Gender and Restorative Justice: Ten Gifts of a Critical Race Feminist Approach*, 23 RICH. PUB. INT. L. REV. 267, 273 (2019).

70. Wing, *Praxis*, *supra* note 38 at 4.

71. Adrien K. Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 815–24 (2001) (discussing the goals and genesis of CRF); Wing, *Praxis*, *supra* note 38 at 3.

racialized communities."[72]

As Wing further explains, critical race feminists "cannot afford to adopt the classic detached, ivory tower model of scholarship when so many are suffering," and instead, they feel compelled to be involved in the "development of solutions to our people's problems."[73] According to Wing, praxis can take many forms—racial justice lawyering and community organizing, "[c]oalition building, political activism, board memberships, speeches, and even writing."[74] Wing clarifies that CRF does not believe in praxis "instead of theory," but rather, CRF believes that *both* are essential to "our people's literal and figurative future."[75]

The theoretical and practical contributions offered by CRF and described above—critical historical methodology, anti-essentialism and intersectionality theory, and a commitment to praxis—can serve as tools for "challenging subordination at its core" and for "setting the stage for truly transformative change in our society."[76] In turning these tools specifically to the INA's prostitution exclusion, § 212(a)(2)(D)(i), this Article demonstrates how these CRF contributions can provide immigration and critical race scholars with a further framework through which to understand and address immigration laws' modality of exclusion.

II. INA § 212(A)(2)(D)(I) AND CRITICAL HISTORICAL METHODOLOGY

This Part of this Article will begin the CRF critique of INA § 212(a)(2)(D)(i) by employing the multidisciplinary tool of critical historical methodology to center the role that women of color—as racialized and sexualized targets—played in spurring the enactment of both the first federal immigration law and the first federal anti-prostitution law in U.S. history. The roots of the INA's prostitution exclusion emerged from the Page Act of 1875,[77] which until relatively recently[78] has been largely under-recognized and even rendered invisible by legal scholars and historians.[79] This is an oversight in the academic discourse as the Page Act was not only the very first federal immigration law to be enacted in the United

72. Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 829–30 (1997) (noting that critical race praxis understands that "[i]n addition to ideas and ideals, justice is something experienced through practice.")

73. WING, *CRF*, *supra* note 38 at 6.

74. ADRIEN K. WING, GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER 6 (Adrien K. Wing ed., 2000) ("There are many forms that praxis can take.")

75. WING, *CRF*, *supra* note 38 at 6.

76. Onwuachi-Willig, *supra* note 44 at 736.

77. Immigration Act, ch. 141, § 3, 18 Stat. 477, 477 (1875) (repealed 1943).

78. *See generally* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005) (discussing the Page Act of 1875 and emphasizing its significance as the first racially restrictive federal immigration law in U.S. history).

79. *Id.* at 645 ("The Page Law itself is surprisingly understudied. Legal scholars and historians interested in immigration often ignore the Page Law altogether.")

States, but it also the first federal anti-prostitution law in the United States.[80] As the first section sets forth, the Page Act criminalized Asian women from "China, Japan, or any Oriental country" by denying them entry into the United States if they were suspected of being sex workers who entered into a contract for "lewd and immoral purposes."[81] A subsequent section makes it a felony to "import, or cause any importation of . . . [or] knowingly or willfully hold, or attempt to hold . . . to such purposes" any woman for prostitution.[82] Yet another section criminalized sex work by barring "women imported for the purposes of prostitution" from entering the United States;[83] by declaring void all contracts made in the service of prostitution;[84] and by including criminal penalties of up to five years imprisonment or $5000 in fines for the importation of prostitutes.[85]

By specifically targeting Asian women, the Page Act served as the first racially restrictive federal immigration law, *i.e.,* explicitly singling out one race for invidious treatment.[86] This Part of the Article will locate the roots of the INA's prostitution exclusion in the racist, sexist, and white supremacist ideologies aimed at women of color that fueled the passage the Page Act of 1875. Doing so will not only provide an important foundation for a CRF-based critique of INA § 212(a)(2)(D)(i), but it will also help demarginalize the role immigrant women of color played as racialized and sexualized targets in the formation of restrictive immigration laws and anti-prostitution legislation.

A. The Racist and White Supremacist Origins of INA § 212(a)(2)(D)(i)

The racist belief that all Chinese women were innately prostitutes was bolstered by nineteenth century theories of race promoted by the nativism, scientific racism, and eugenic movements.[87] Common to these movements was

80. *See* Ann Wagner & Rachel McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 17, 36 (2017) ("The Page Act was an unprecedented move by the federal government to regulate immigration, which throughout the 19th century had been controlled by states. It was also the first federal law to regulate the commercial sex industry.")

81. Immigration Act, ch. 141, § 1, 18 Stat. 477, 477 (1875) (repealed 1943); *see also* Abrams, *supra* note 78 at 695–96 (explaining that American consuls in foreign ports were required to screen Asian women "before they even left their home countries, and refuse to grant them an immigration certificate if they suspected them of prostitution, a hurdle not imposed on immigrants from other ports, such as those in Europe.")

82. Immigration Act, ch. 141, § 3, 18 Stat. 477, 477 (1875) (repealed 1943).

83. Immigration Act, ch. 141, § 5, 18 Stat. 477, 477 (1875) (repealed 1943).

84. *Id.*

85. *Id.*

86. Abrams, *supra* note 78 at 702 (noting that the Page Act was "the first restrictive immigration law passed in direct response to the desire to exclude a particular group of people").

87. *Id.* at 662 (noting that "nineteenth-century theories of race posited several distinct races, each with innate characteristics"); JESSICA PLILEY, POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI 16–17 (2014) (noting that the "pseudo-scientific rationale of modern racism" informed beliefs about Chinese sex worker[s], who were considered the "embodiment of immorality through their natural lasciviousness"); *see also* ROBERT WALD SUSSMAN, THE

the presumed superiority of the white Anglo-Saxon race and the concomitant fear of the degeneration of the white race through the threat of supposedly racially inferior, unassimilable, undesirable immigrants.[88] Also common to these movements was the belief that mixing the superior white race with inferior races would result in the degeneration of the superior white race.[89] Therefore, these movements magnified concerns about prostitution,[90] and in particular about Chinese prostitutes who were viewed as "vector[s] of disease"[91] equipped with the "polluting power" to degenerate the white population.[92] As Abrams frames it, "Chinese women were threatening not only because they might reproduce with Chinese men but also because they could infect the white population by producing weak, hybrid progeny."[93] Not surprisingly, in 1875, the American Medical Association identified Chinese prostitutes as a "source of contamination" on the "nation's bloodstream."[94]

While the Page Act targeted women from "any Oriental country," immigration legal scholar Stuart Chang explains that the Act was "discriminatorily applied and aimed to exclude all Chinese women based on a constructed stereotype that Chinese women had a cultural inclination toward prostitution."[95] Similarly, immigration legal scholar Kerry Abrams explains that the Page Act was fueled by deeply racist presumptions about the "Chinese race" having a "servile disposition" from "ages of benumbing despotism."[96] Therefore, Congress

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MYTH OF RACE: THE TROUBLING PERSISTENCE OF AN UNSCIENTIFIC IDEA 43-64 (2014) (discussing eugenics and other nineteenth-century theories of race); *see generally* REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM (1981) (providing a history of scientific racism in the United States).

88. *See e.g.*, Megumi Dick Osumi, *Asians and California's Anti-Miscegenation Laws, in* ASIAN AND PACIFIC AMERICAN EXPERIENCES: WOMEN'S PERSPECTIVES 1, 7 (Nobuya Tsuchida ed., 1982) (explaining that nineteenth-century social scientists believed that American governmental institutions were "designed by and for Teutonic people" and would be weakened by "commingling" with Asians).

89. Abrams, *supra* note 78 at 662 (noting that nineteenth-century theories of race held that mixing races would result in "the degeneration of the superior race.")

90. *See* Ann M. Lucas, *Race, Class, Gender and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN'S L. J. 47, 58 (1995) ("Fears of racial degeneration, common in connection with the era's [E]ugenics movement, magnified concerns about prostitution.")

91. PLILEY, *supra* note 87 at 16–17 (noting that the "pseudo-scientific rationale of modern racism" informed beliefs about the Chinese sex worker as a "vector of disease").

92. Abrams, *supra* note 78 at 662 (discussing the impact of "[n]ineteenth century theories of race" in fueling anti-Chinese animosity rooted in the fear of the "polluting power" of Chinese women to degenerate the white population).

93. *Id.* at 663.

94. *Id.* at 693 n.330 (citing LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 10–11 (1995)).

95. Stewart Chang, *Feminism in Yellowface*, 38 HARV. J.L. & GENDER 235, 242 (2015); *see also* Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, *in* ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943, at 94-95, 97 (Sucheng Chan ed., 1991) (discussing the effect of stereotyping in the late nineteenth century that led to the assumption that *all* Chinese women on the Pacific Coast were prostitutes).

96. Abrams, *supra* note 78 at 659 (quoting Report of the Joint Special Committee to Investigate Chinese Immigration, S. Rep. No. 44-689, at vi (1876), reprinted in U.S. Congress, Report of the Committees of the Senate of the United States for the Second Session of the Forty-Fourth Congress (Washington, Gov't Printing Office 1877)).

believed that *all* Chinese women were "innately prostitutes" who were "willing to indenture themselves into servitude."[97] Moreover, this innate "slave-like mentality" of Chinese women was viewed to be a characteristic that was "fundamentally at odds with citizenship in a participatory democracy."[98]

Accordingly, when Congressman Horace Page[99] introduced the Page Act, he argued that China was sending to the United States women who were "none but the lowest and most depraved of her subjects"—and that America was becoming "her cess-pool."[100] He argued that White Americans were "stout-hearted people" who were now threatened by carriers of disease and a "deadly blight."[101] Page argued that the exclusion of Chinese women was intended to "place a dividing line between vice and virtue" and "send the brazen harlot who openly flaunts her wickedness in the faces of our wives and daughters back to her native country."[102]

Thus, the INA's prostitution exclusion is a lasting legacy of a racist and sexist immigration law that targeted women of color with the racist and white supremacist logic that Asian women were innately servile vectors of disease that threatened the purity of the white race. INA § 212(a)(2)(D)(i) is also a legacy of a law that targeted women of color in order to "shape the racial and cultural population" of the United States.[103] As Abrams explains, the impact of the Page Act led to the "virtually complete exclusion of Chinese women" from the United States,[104] which "prevented the birth of Chinese American children and stunted the growth of Chinese American communities."[105]

B. The Evolution of INA § 212(a)(2)(D)(i)

The racism and white supremacist ideologies that fueled the Page Act of

97. *Id.* at 658 (discussing that Congress' belief that all Chinese women were prostitutes was due to their "perceived docility" which made them "innately prostitutes" ... "willing to indenture themselves into servitude."); *see also* Chang, *supra* note 95, at 241 n.46 (2015) (stating that "[p]roponents of federal action also held the view that the Chinese were culturally conditioned to condone slavery and sexual debasement.")

98. Abrams, *supra* note 78 at 643; *see also* Cong. Globe, 39th Cong., at 1056 (1st Sess. 1866) (statement of Rep. Higby) (stating that "[The Chinese] buy and sell their women like cattle, and the trade is mostly for the purpose of prostitution. That is their character. *You cannot make citizens of them*.") (emphasis added).

99. *See* Abrams, *supra* note 78 at 690—91 (explaining that Representative Horace Page "made a career out of drafting and advocating anti-Chinese legislation" and that, between 1873 and 1875, he sponsored seven pieces of legislation aimed at restricting Chinese immigration).

100. 3 Cong. Rec. app'x. at 44 (1875).

101. *Id.*

102. *Id.*

103. Abrams, *supra* note 78 at 647; *see also* Chang, *supra* note 95 at 242, 266 (2015) (describing how the Page Act resulted in skewed gender ratios between Chinese men and women, the inability to form families, and a decrease in the size of the Chinese population in the United States).

104. Abrams, *supra* note 78 at 698.

105. *Id.* at 641; *see also THE CHINESE EXCLUSION ACT: A SPECIAL PRESENTATION OF AMERICAN EXPERIENCE* (PBS 2018), https://www.pbs.org/wgbh/americanexperience/films/chinese-exclusion-act/ [https://perma.cc/SGQ9-NRFF] (noting that the Congressional intent of the Page Act was to effectuate the "ethnic cleansing" of the Chinese race).

1875 continued to influence subsequent anti-prostitution immigration legislation.[106] From 1875 to 1990, the bulk of anti-prostitution immigration legislation expanded the scope of the criminalization of sex workers. The remainder of this Part will set forth the significant pieces of immigration legislation following the Page Act that sought to expand the criminalization of sex work by broadening the scope of—and increasing the penalties associated with—the exclusions put in place by the Page Act.

The Immigration Act of 1907 was "a law deeply intertwined with concerns about Asian immigration" and in particular with concerns "about the entry into the United States of Chinese women to be prostitutes."[107] Indeed, the 1907 Act was intended to "extend the scope" of the criminalization of immigrant sex workers[108] and "strengthen" laws that related to the importation of sex workers.[109] First, the 1907 Act created a deportation provision subjecting sex workers to deportation if they engaged in prostitution within three years of entering the United States.[110] While the Page Act focused on excluding sex workers at the border, the 1907 Act criminalized immigrant women for conduct committed after entry, albeit limiting the scope of criminalization to three years of entry.[111] Through a 1910 amendment[112] to the 1907 Act, the temporal limitation of "three years after entry" was removed so that an immigrant could be deported for engaging in sex work *at any point* after entering the United States.[113]

Second, the 1907 Act included new blanket language ("for any other

106. Moreover, the racism and white supremacist ideologies that fueled the Page Act of 1875 also "helped to pave the way for the criminalization of prostitution itself." *See* Das, *supra* note 35 at 185. Indeed, before the Page Act, sex work was not a crime in the United States. *See* Lucas, *supra* note 90 at 47. By 1925 every state had passed some form of anti-prostitution law. *See* Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 243 (2000).

107. *See* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 770 (2006); *see also* Todd Stevens, *Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases*, *1882-1924*, 27 LAW & SOC. INQUIRY 271, 291-93 (2002) (noting that the 1907 Act was a response to immigration officials who "had been clamoring for help in stopping the immigration of Chinese prostitutes specifically.")

108. *See* H.R. REP. NO. 59-3021, at 19 (1906) (stating the purpose of Section 3 is "to extend the scope of the law, so far as it relates to the immigration of prostitutes, in order effectively to prohibit undesirable practices alleged to have grown up.")

109. *See* H.R. REP. NO. 59-4558, at 2 (1906) (stating the purpose of Section 3 to strengthen "the provisions with regard to the importation of prostitutes.")

110. § 3, 34 Stat. 898. This section of the 1907 Act also included new "for any other immoral purpose" language that expanded the reach of criminalization to cover "undesirable practices alleged to have grown up in relation to the immigration of prostitutes." U.S. v. Bitty, 155 F. 938, 939 (C.C.S.D. N.Y. 1907).

111. Dadhania, *supra* note 36 at 62.

112. *See* Act of March 26, 1910, ch. 128, § 2, 36 Stat. 263 (amending an act entitled "An Act to regulate the immigration of aliens into the United States").

113. *See id*. § 3 (mandating the deportation of an immigrant "who shall be found an inmate . . . of a house of prostitution or practicing prostitution after such alien shall have entered the United States"); *see also* Dadhania, *supra* note 36 at 64 (noting that the 1910 amendments made the deportation provision significantly harsher for immigrant sex workers than for many other immigrants subjected to deportation). The 1910 amendments created new deportation provisions for those who managed houses of prostitution, received any part of the earnings of a prostitute, and protected prostitutes from arrest. *See* § 2, 36 Stat. 263.

immoral purpose")[114] that expanded the reach of criminalization to cover "undesirable practices alleged to have grown up in relation to the immigration of prostitutes."[115] This new language was integrated throughout the 1907 Act to criminalize the importation of woman for the purpose of prostitution or "any other immoral purpose"[116]—as well as the harboring of an immigrant woman for the purpose of prostitution or "any other immoral purpose" within three years of her entry into the United States.[117]

Like the Page Act and the Immigration Act of 1907, the Immigration Act of 1917[118] was a law deeply steeped in racism and white supremacy that continued expansion of the criminalization of sex work.[119] For example, the Act added criminal penalties (imprisonment up to two years) for immigrants who attempted to return to the United States after being deported for prostitution.[120] It also rendered deportable an immigrant who had previously been barred from entry or deported for any prostitution-related activity.[121] Further, the 1917 Act denied citizenship to "a female of the sexually immoral classes" if she was to found to ever have engaged in prostitution.[122]

Left unchallenged in the prior iterations, the racist and white supremacist provisions of the Immigration Act of 1917 were codified into the Immigration and Nationality Act of 1952, which further expanded the criminalization of prostitution.[123] Significantly, the 1952 Act created a new bar that deported and excluded sex workers for engaging in prostitution at any time in the past—whereas

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114. The "any other immoral purpose" language would later be adopted by the White-Slave Traffic Act (WTSA) of 1910 and used to criminalize prostitutes. *See* Jennifer Chacón, *Misery and Miopya: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3015 (explaining that while the stated intent of the WSTA was to protect women from interstate and international trafficking, the enforcement of the law revealed another unstated intent of the law—namely to abolish prostitution by criminalizing sex workers).

115. *See Bitty*, 155 F. at 939 (C.C.S.D. N.Y. 1907) (interpreting the words "or for any other immoral purpose" to have been added to the word "prostitution," to prevent undesirable practices alleged "to have grown up in relation to the immigration of prostitutes").

116. 34 Stat. 898 § 3.

117. 34 Stat. 898 § 3.

118. Law of Feb. 5, 1917 (Immigration Act of 1917), Pub. L. No. 47-301, ch. 29, 39 Stat. 874 § 3, 875–76 (1917).

119. The 1917 Act was also known as the "Asiatic Barred Zone Act" because it excluded immigrants from most of Asia and countries adjacent to Asia. *See* Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE L. J. & HUMAN. 51 (2016) (discussing the congressionally invented "Asiatic Barred Zone" and noting that barred countries included India, Burma, Siam, the Malay States, Arabia, Afghanistan, part of Russia, and most of the Polynesian Islands); *id.* at 57, 77, 77 n.131.

120. *Id*. at § 4. The 1917 Act provided for a term of imprisonment of not more than two years.

121. *See id*. § 19. The 1917 Act also rendered deportable immigrants for committing a "crime involving moral turpitude"; *see also* S. REP. NO. 352 (1916).

122. 39 Stat. 874 § 19; *see also* Dadhania, *supra* note 36 at 67 (noting that such "harsher treatment" did not apply to immigrants who committed other violent crimes).

123. *See* Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, § 201(a), 66 Stat. 163163, 175 (later codified as 8 U.S.C.) (repealed 1965); *see also* S. REP. NO. 80-1515, at 335 (1950) ("The excludable classes were assembled in the act of February 5, 1917, which is presently in effect" (citation omitted).)

prior legislation focused on present or future prostitution.[124] Specifically, the Act barred immigrants who "have engaged in prostitution"—without any time limit.[125] It was not until 1990 that a 10-year time limit was placed on the prostitution exclusion through the Immigration Act of 1990.[126] This change gave rise to the current prostitution exclusion, INA § 212(a)(2)(D)(i), which is currently codified under the "criminal and related grounds" of the INA. This law renders inadmissible any immigrant who:

> "is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status."[127]

While convictions are not required for a finding of inadmissibility under INA § 212(a)(2)(D)(i),[128] convictions are often used as evidence to indicate a "pattern of behavior"[129] of engaging in prostitution under INA § 212(a)(2)(D)(i).[130] In fact, even one conviction alone can be used to establish a "pattern" of prostitution-related behavior and may be used as the basis for an inadmissibility finding under INA § 212(a)(2)(D)(i).[131] Moreover, an arrest for prostitution—even without a conviction—can signal a "pattern of behavior" to adjudicators, resulting in an inadmissibility finding under INA § 212(a)(2)(D)(i).[132]

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124. *See supra* notes 113-114 and accompanying text (discussing the 1910 amendment to the 1907 Act which allowed for deportation for engaging in sex work *at any point after* entering the United States).
125. Immigration and Nationality Act (McCarran-Walter Act), Pub. L. 82-414, ch. 477, 66 Stat. 163, 182 (1952).
126. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).
127. INA, 8 U.S.C.A. § 1182(a)(2)(D)(i) (2012).
128. *See id*. § (a)(2)(D); *see also* U.S. Dep't of Justice, OFFICE OF IMMIGR. LITIG., IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: PADILLA V. KENTUCKY, 13 (Nov. 2010).
129. 22 C.F.R. § 40.24(b). Agency regulations provide that a finding that an immigrant "has 'engaged' in prostitution" must be based on "a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value." *Id.*
130. *See* Kepilino v. Gonzales, 454 F.3d 1057, 1060 (9th Cir. 2006) (using records of conviction as evidence to determine whether immigrant engaged in a regular pattern of prostitution); *see also* Matter of Oscar Gonzalez-Zoquiapan, 24 I. & N. Dec. 549, 550-51 (B.I.A. 2008) (relying on the immigrant's conviction documents as evidence while acknowledging that "section 212(a)(2)(D)(ii) of the Act does not require a conviction"); *see also § N.10 Sex Offenses*, IMMIGRANT LEGAL RESOURCE CENTER, 16 (March 2016), https://www.ilrc.org/sites/default/files/resources/n.10_sex_offenses_2014_final.pdf (noting that while no conviction is required for an inadmissibility finding based on engaging in prostitution, a conviction "will serve as evidence.")
131. *See* In re: Salvador Arcos-Valencia, No. AXX XX0 433 - LOS, 2005 WL 952477, at *1 (BIA Apr. 13, 2005) (per curiam) (allowing a single conviction for prostitution to trigger inadmissibility).
132. *See* Nivonram v. Gonzales, 192 F.App'x. 285, 286-87 (5th Cir. 2006) (the approving finding that an immigrant had engaged in prostitution based on arrests alone); *see also* Dadhania, *supra* note 36 at 57 (noting that such a policy is especially problematic in the context of sex work, where immigrant sex workers can "be arrested and charged, but later have their charges dropped.") Dadhania adds that an arrest "for prostitution can arouse the suspicion of immigration officials and adjudicators" leading to an inadmissibility finding under INA § 212(a)(2)(D)(i). *Id*. at n.12.

Immigrants who have worked in localities where sex work is legal are still rendered inadmissible under INA § 212(a)(2)(D)(i).[133] The prostitution exclusion is also a statutory bar to a finding of good moral character[134]—and is considered a crime of moral turpitude (CIMT)[135]—both of which can be used to render an immigrant inadmissible or deportable.[136] Notably, INA § 212(a)(2)(D) does not exclude solicitors of sex.[137] However, solicitation is considered a CIMT and can be used to render an immigrant inadmissible or deportable.[138]

The INA's prostitution exclusion originated from a racist and white supremacist immigration law—the Page Act of 1875—borne from and inspired by the racialized and sexualized targeting of women of color as "pernicious weapon[s]" who were "infusing a poison into the Anglo-Saxon blood" and imperiling the "future of the American nation."[139] Indeed, the Page Act paved the way for the Chinese Exclusion Act of 1882 which explicitly prohibited the entry of Chinese laborers into the United States.[140] As Abrams explains, the Page Act "provided anti-Chinese forces with a foothold that paved the way for the Chinese Exclusion Act."[141]

III. INA § 212(A)(2)(D)(I) AND ANTI-ESSENTIALISM AND INTERSECTIONALITY THEORY

With roots in the Page Act of 1875—a deeply racist, white supremacist, and sexist law—the INA's prostitution exclusion, INA § 212(a)(2)(D)(i), is ripe for

133. 22 CFR § 40.24(c); *see also* Matter of G, 5 I&N Dec. 559 (B.I.A. 1953).

134. INA § 101(f), 8 U.S.C. § 1101(f) (2008) (rendering ineligible for consideration as persons of good moral character habitual drunkards, persons practicing polygamy, smugglers, gamblers, persons convicted of or admitting to CIMTs, persons convicted of aggravated felonies, and persons engaged in prostitution).

135. The term "crime involving moral turpitude" first appeared in immigration law in 1891. *See* Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.

136. In almost every situation in which immigrants apply for a U.S. immigration benefit, whether avoiding deportation or applying for citizenship, an immigrant must show their "good moral character." It is long-standing precedent that prostitution is a crime of moral turpitude. *See* In re W-, 4 I. & N. Dec. 401, 402 (B.I.A 1951).

137. While subsection (ii) of INA § 212(a)(2)(D) does criminalize procurers of prostitution, procurers are not considered solicitors. *See* Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549, 551 (B.I.A. 2008) (explaining that the word "procure" in INA § 212(a)(2)(D)(ii) does not refer to solicitation, but rather means "[t]o obtain [a prostitute] for another").

138. *See* In re: Sehmi, 2014 WL 4407689, at *6-7 (BIA Aug. 19, 2014); *see also* Rohit v. Holder, 670 F.3d 1085, 1089 (9th Cir. 2012); Reyes v. Lynch, 835 F.3d 556, 560 (6th Cir. 2016); Gomez-Gutierrez v. Lynch, 811 F.3d 1053, 1058-59 (8th Cir. 2016); Perez v. Lynch, 630 F.App'x. 870, 873 (10th Cir. 2015); Florentino-Francisco v. Lynch, 611 F.App'x. 936, 938 (10th Cir. 2015).

139. *See* NAYAN SHAH, CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO'S CHINATOWN 107 (2001) (quoting Dr. Mary Sawtelle).

140. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943). Abrams adds that most legal scholars and historians point to the Chinese Exclusion Act of 1882 as the first racially restrictive federal immigration law. *See* Abrams, *supra* note 78 at 645. Congressman Horace Page, who authored the Page Act, later sponsored the Chinese Exclusion Act of 1882. *Id.* at 691.

141. Abrams, *supra* note 78 at 702.

further critique through the lens of critical race feminism (CRF). This Part of the Article will apply such an analysis using CRF theories of anti-essentialism and intersectionality.

A. INA § 212(a)(2)(D)(i) is Essentialist

As Harris explains, essentialism is the notion that a "unitary" or "essential" experience can be isolated and described independently of gender, race, class, sexual orientation, and other realities of experience.[142] Laws that criminalize sex work—such as INA § 212(a)(2)(D)(i)—are essentializing in three ways. First, these laws essentialize *all sex workers* as victims who are in need of saving by laws that criminalize sex work; second, these laws essentialize *all sex work* as a form of violence that can never be a source of economic empowerment; and third, these laws essentialize *all women* by presuming that all women face the same barriers and have the same options for achieving financial independence.[143]

Critical race feminist scholar I. India Thusi provides a foundation for highlighting the essentializing aspects of INA § 212(a)(2)(D)(i). For example, Thusi argues that a common rationale for the continued criminalization of sex work in the United States has been expressed in terms of protecting "the community"—including sex workers themselves—from "the dangers of commercialized sex and sex trafficking."[144] As a result, *all sex workers* are perceived only as "victims" in the crime of prostitution—a crime that must be abolished through criminalization.[145] By supporting the criminalization of sex work, INA § 212(a)(2)(D)(i) reinforces the essentialist view that *all* women experience sex work in the same way—as a form of violence in which all sex workers are "victims" in a system of male subordination who cannot exhibit agency.[146]

Further, Thusi argues that the essentialist framing of *all sex work* as only a form of violence is itself a reproduction of patriarchy and white supremacy by silencing the voices and experiences of sex workers themselves—especially sex workers with intersectional identities.[147] Such an essentialist view of sex work fails to consider that sex work can be a tool for female economic empowerment for immigrant women of color[148]—both inside and outside the United States.[149]

142. *See infra* Part II B (discussing essentialism in the context of "gender essentialism").
143. I. India Thusi, *Radical Feminist Harms on Sex Workers,* 22 LEWIS & CLARK L. REV. 185 (2018)).
144. I. India Thusi, *Harm Sex and Consequences*, 2019 UTAH L. REV. 159, 184 (2019) (explaining that in the United States, prostitution has been conflated with human trafficking, and anti-prostitution laws are based on a narrative of sex workers as victims and victims of trafficking rings.).
145. *Id.* at 203.
146. *Id.* at 196.
147. *Id.* at 214.
148. Thusi, *supra* note 143 at 213 (noting that there is a critical need to consider different contexts and how sex work can "become a tool for female empowerment" for women of color).
149. *See* Kamala Kempadoo, *Women of Color and the Global Sex Trade: Transnational Feminist*

Therefore, laws that criminalize sex work—like INA § 212(a)(2)(D)(i)—similarly reify white supremacy and patriarchy by failing to recognize circumstances where women are able to exploit the desires of men in order to greater economic freedom from male patriarchal structures.[150]

Relatedly, Thusi argues that laws that criminalize sex work essentialize *all women* by failing to consider the experiences of women of color who often face constrained choices and systemic barriers.[151] For example, because women of color face overlapping systems of oppression, they must often choose the least harmful option and balance the risks with the real harms of "being unable to feed a child, or living in a country with high unemployment."[152] Thusi points out that because women of color often have more limited economic options[153] and often face employment discrimination,[154] sex work not only provides them with higher economic opportunities[155]—but also gives them a way to mitigate against the other real harms they face.[156] Therefore, laws that criminalize sex work—like INA § 212(a)(2)(D)(i)—essentialize women by failing to recognize the "complicated reality" in which women of color live.[157]

B. INA § 212(a)(2)(D)(i) is Anti-Intersectional

As Crenshaw explains, intersectionality theory recognizes that multiple systems of oppression intersect with each other to produce overlapping and reinforcing harms.[158] Laws that criminalize sex workers—such as INA § 212(a)(2)(D)(i)—are anti-intersectional in three principal ways. First, such laws fail to acknowledge the multiple systems of oppression that make certain sex workers—namely, women of color—disproportionately vulnerable to

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Perspectives, 1 MERIDIANS 28, 43 (2001) (emphasizing that sex work can be a tool of empowerment for women of color in the Global South).

150. Thusi, *supra* note 143 at 221.

151. *Id.* at 214 (adding that "[a]dopting an intersectional lens makes it clear that one could almost always argue that women, particularly women with multiple identities, are making choices in a paradigm of structural disadvantage.")

152. *Id*. at 227–28.

153. *Id*. at 222.

154. *Id*. at 213; *see also* Cheryl N. Butler, *A Critical Race Feminist Perspective on Prostitution and Sex Trafficking in America*, 27 YALE J. L. & FEMINISM, 95, 134-39 (2015) (arguing that several "structural state sanctioned factors" including racism, poverty, unequal educational opportunities, unequal employment opportunities, and inadequate health care drive many women of color into sex work as a means of economic survival).

155. Thusi, *supra* note 144 at 206, 212-13 (noting that the "prevalence of sex work amongst women is suggestive of the limited economic opportunities women generally face" and that sex workers "often turn to their work because of limited economic potential in other forms of labor.")

156. Thusi, *supra* note 143 at 228. Thusi clarifies that while sex workers may in fact sometimes be "victims" – they have "developed mechanisms for managing these risks and have perhaps chosen to face the risks associated with sex work over those associated with abject poverty." *Id.* at 215.

157. *Id.* at 215.

158. *See supra* Part I B (discussing intersectionality theory).

criminalization.[159] For example, there are historical and institutional biases within society and the criminal legal system based on race, gender, sexuality, and gender identity that render women of color sex workers as "highly sexualized and sexually available"[160]—and, as a result, innately "blameworthy."[161] As a result of these biases, women of color are not only over-represented in the modern U.S. sex work industry,[162] but they are also disproportionately subjected to profiling, arrest, and prosecution by the criminal legal system.[163] By using arrests and convictions as a basis for inadmissibility and deportation, INA § 212(a)(2)(D)(i) fails to take into account how systems of oppression intersect and result in women of color sex workers being disproportionately vulnerable to criminalization.[164]

Second, by relying upon and legitimizing the enforcement mechanisms of the criminal legal system, INA § 212(a)(2)(D)(i) fails to recognize the role the criminal legal system—as a system of oppression—plays in perpetrating violence against communities of color.[165] As Thusi reminds us, an intersectional approach to questions of criminalization places "suspicion of the criminal legal system to

159. *See generally* Crenshaw, Mapping, *supra* note 62.

160. Krishna de la Cruz, Comment, *Exploring the Conflicts Within Carceral Feminism: A Call to Revocalize the Women Who Continue to Suffer*, 19 SCHOLAR: ST. MARY'S L. REV. RACE & SOC. JUST. 79, 90 (2017) (noting that police officers perceive sex workers of color as "highly sexualized and sexually available" and thus target them for detention and arrest).

161. Thusi, *supra* note 144 at 162 (discussing the need for an intersectional approach to criminal legal theory). Thusi further argues that a retributivist approach to criminal law that criminalizes sex work "provides a theoretical tool for assigning blame and using popular morality as a sword against sexual deviants." *Id.* at 188; *see also* Butler, *supra* note 154 at 125–28 (arguing that modern-day racialized sexual stereotypes of women of color are enduring legacies of stereotypes used to enforce Black slavery and colonialization).

162. *See* Butler at 127 (arguing that racialized sexual stereotypes of women of color as "sexually loose" and "naturally sexual" has created a culture of "racialized sexual objectification" that drives supply and demand in America's modern sex work industry and has resulted in the "modern disproportionality" of women of color sex workers today).

163. *See* Jasmine Sankofa, *From Margin to Center: Sex Work Decriminalization is a Racial Justice Issue*, AMNESTY INT'L USA (Dec. 12, 2016), https://www.amnestyusa.org/from-margin-to-center-sex-work-decriminalization-is-a-racial-justice-issue/ [https://perma.cc/XT6C-LCB8] (arguing that women of color sex workers are the primary subjects of violence and prosecution against individuals perceived as sex workers); *see also* Lucas, *supra* note 90 at 49 (noting that women of color "disproportionately suffer police harassment and arrest, while their sisters who are often white, more financially stable, less publicly visible, and less 'offensive' to the public, are treated more leniently."); Danielle Augustson & Alyssa George, *Prostitution and Sex Work*, 16 GEO. J. GENDER & L. 229, 231 (2015) ("Often police do not consistently enforce prostitution laws except against the most visible sex workers--street sex workers, women of color, transgender workers, and immigrants."); Chelsea Breakstone, *"I Don't Really Sleep": Street-Based Sex Work, Public Housing Rights, and Harm Reduction*, 18 CUNY L. REV. 337, 350 (2015) (describing how Black and Latinx sex workers are "more likely to be arrested and prosecuted for prostitution-related offenses."); Sex Workers Project, *Revolving Door: An Analysis of Street-Based Prostitution in New York City*, URBAN JUSTICE CTR. 35 (2003), http:// sexworkersproject.org/downloads/RevolvingDoor.pdf (noting that women of color received more harassment from police than white women).

164. *See supra* notes 129-133 and accompanying text (discussing impact of prostitution-related arrests and convictions under INA § 212(a)(2)(D)(i)).

165. *See supra* notes 62-68 and accompanying text (discussing the analytical benefits of intersectionality theory). For a discussion of how the criminal legal system disproportionately harms trans people of color, *see generally* Medina, *supra* note 35.

the forefront"[166] and presumes that the criminal legal system is "likely illegitimate with a negative influence that must be minimized and mitigated."[167] By giving the criminal legal system the power to determine the inadmissibility and deportability of immigrant sex workers, INA § 212(a)(2)(D)(i) fails to acknowledge "the enormity and inhumanity of our criminal justice system, as well as its flawed premises."[168]

Finally, INA § 212(a)(2)(D)(i) fails to recognize the ways in which the system of criminalization itself produces additional harms for sex workers. Thusi argues that an intersectional approach to the criminalization of sex work recognizes the harms that criminalization itself inflicts on sex workers.[169] For example, because criminalization creates a fear of arrest, sex workers are less likely to turn to the criminal legal system as a source of protection and are less protected from violent encounters as a result.[170] Moreover, the fear of arrest forces sex workers "underground" where they are less likely to seek social services or medical treatment.[171] The fear of arrest also results in stigma, social marginalization, and isolation that prevents sex workers from seeking redress against exploitation or poor work conditions.[172] And for sex workers who are also immigrants, the fear of arrest is compounded by the fear of deportation.[173] By refusing to recognize the impacts of multiple and overlapping systems of oppression—including the ways in which the system of criminalization harms sex workers—INA § 212(a)(2)(D)(i) is unapologetically anti-intersectional.

IV. INA § 212(A)(2)(D)(I) AND MOVING TOWARD PRAXIS

The United States is one of the only industrialized nations in the world that totally criminalizes sex work.[174] Total criminalization is a legal approach to sex work that criminalizes all aspects of sex work including the sale, purchase, and all sex work-related activities such as solicitation, living off the earnings of sex work,

166. Thusi, *supra* note 144 at 194.
167. *Id.* at 195.
168. *See* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 587—95 (2009) (arguing that feminists ought to be consistent in critiquing "the enormity and inhumanity of our criminal justice system," as well as its flawed premises).
169. Thusi*, supra* note 144 at 195.
170. *Id.* at 207 (noting that criminalization forces sex workers "to hesitate when considering whether to inform police officers about a violent encounter").
171. *Id.* at 206–11.
172. *Id*. at 208.
173. *Id.* at 183–34 (giving the example of an immigrant sex worker who faces immigration proceedings as a result of any criminal legal intervention because "she is also an immigrant.")
174. *See* Melinda Chateauvert, *Sex Workers Unite: A History of the Movement From Stonewall to Slutwalk* 5 (2013) ("Sex work is legal in fifty nations, including Canada, Mexico, Brazil, Macau, the Netherlands, Austria, New Zealand, Israel, Germany, France, and England; it is legal with limitations in another eleven nations, including Australia, India, Norway, Japan, and Spain.")

and brothel-keeping.[175] This is the dominant approach taken in all fifty U.S. states.[176] While penalties for sex workers differ from state to state, sixteen states impose fines and incarceration that can exceed six months for the first prostitution offense.[177]

In contrast to the total criminalization approach, the total decriminalization approach to sex work opposes all forms of criminalization and other forms of legal oppression that address sex work.[178] Decriminalization applies not only to sex workers but also to clients, third parties, families, partners, and friends.[179] Supporters of decriminalization include sex worker rights groups,[180] sex-positive feminists,[181] international human rights organizations,[182] and public health

175. Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy,* 158 U. PA. L. REV. 1655, 1668 (2010).

176. *See* ProCon.org, *US Federal and State Prostitution Laws and Related Punishments,* PROCON.ORG (May 4, 2018), https://prostitution.procon.org/us-federal-and-state-prostitution-laws-and-related-punishments/. The only exception is in ten rural counties in Nevada which allow for prostitution based in brothels. *See* NEV. REV. STAT. § 201.354 (2017) (making prostitution based in brothels legal in Nevada).

177. These states include Alabama, ALA. CODE §§ 13A-12-122, 13A-5-7 (2018); Arizona, ARIZ. REV. STAT. ANN. §§ 13-3214, 13-707 (2014); Connecticut, CONN. GEN. STAT. §§ 53a-82, 53a-26 (2016); Georgia, GA. CODE ANN. §§ 16-6-9, 16-6-13(a)(2), 17-10-3 (2019); Illinois, 720 ILL. COMP. STAT. 5/11-14, 730 ILL. COMP. STAT. 5/5-4.5-55 (2019); Indiana, IND. CODE §§ 35-45-4-2, 35-50-3-2 (2018); Iowa, IOWA CODE §§ 725.1, 903.1 (2015); Massachusetts, MASS. GEN. LAWS ch. 272 § 53A (2011); Michigan, – MICH. COMP. LAWS §§ 750.448-449, 750.451 (2017); Minnesota, MINN. STAT. §§ 609.324, 609.0341 (2020); Oregon, OR. REV. STAT. §§ 167.007, 161.615(1) (2018); Pennsylvania, 18 PA. CONS. STAT. §§ 5902, 1104(3) (2011); South Dakota, S.D. CODIFIED LAWS §§ 22-23-1, 22-23-9, 22-6-2 (2019); Vermont, VT. STAT. ANN. tit. 13 § 2631 (2011); Virginia, VA. CODE ANN. §§ 18.2-346, 18.2-11(a) (2020); Wisconsin, WIS. STAT. §§ 944.30, 939.51(3)(a) (2013).

178. Chuang, *supra* note 175 at 1668.

179. *Who we are*, GLOB. NETWORK OF SEX WORK PROJECTS, https://www.nswp.org/who-we-are [https://perma.cc/7AF5-8ESK] (defining "third parties" as "managers, brothel keepers, receptionists, maids, drivers, landlords, hotels who rent rooms to sex workers and anyone else who is seen as facilitating sex work."); *see also id.* at 1669.)

180. *See* Priscilla Alexander, *Why This Book? in* SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 14–15 (Frederique Delacoste & Priscilla Alexander eds., 1987) (noting that the sex workers' rights movement has advocated for decriminalization of sex work since the late 1970s).

181. Aziz Ahmed, *Feminism, Power, and Sex Work in the Context of HIV/AIDS: Consequences for Women's Health*, 34 HARV. J. L. & GENDER 225, 230-31 (2011) (discussing the evolution of "sex-positive" feminists who "grew tired of the dominance feminist framing of sex" and instead regarded sex as a place of potential agency for women, rather than inevitable subordination.)

182. Human Rights Watch, Amnesty International, and the Platform for International Cooperation on Undocumented Migrants (PICUM) have all called for the decriminalization of sex work on human rights grounds. *See, e.g., Why Sex Work Should Be Decriminalized*, HUMAN RIGHTS WATCH, https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized [https://perma.cc/DY97-9962]; *Policy on State Obligations to Respect, Protect and Fulfill the Human Rights of Sex Workers,* AMNESTY INT'L 3 (May 26, 2016), https://www.amnesty.org/en/documents/pol30/4062/2016/en/ [https://perma.cc/UTU7-WD8P]; Safeguarding the Human Rights and Dignity of Undocumented Migrant Sex Workers, PICUM (2019), https://static1.squarespace.com/static/5e4835857fcd934d19bd9673/t/5e7fdd5ee8e5be5d58b9a7eb/1585438046970/Safeguarding-the-human-rights-and-dignity-of-undocumented-migrant-sex-workers+PICUM.pdf.

scholars[183]—all of whom argue that decriminalization makes sex work safer by allowing sex workers to "collectivize, mobilize, and change an often-unsafe work environment under the leadership and direction of sex workers."[184]

Importantly, the call for the decriminalization of sex work has also been championed by an emergent intersectional anti-carceral feminist movement grounded in principles of critical race feminism. This Part of the Article will link the critique of INA § 212(a)(2)(D)(i) to the platforms and strategies of this movement to inspire immigration law reform efforts that are in alignment with principles of critical race feminism and to move from theory toward praxis.

A. The Anti-Carceral Feminist Movement

The anti-carceral feminist movement is an on-the-ground intervention to gender violence mobilized by the theoretical principles of critical race feminism. In her discussion of the emergence of anti-carceralism within the feminist movement, anti-violence scholar Mimi E. Kim explains that by the turn of the millennium, a "growing chorus of critics" led by women of color mobilized a new response to gender violence that centered a critique of "the criminal justice system and of the mainstream anti-violence movement's embrace of that system."[185] These women of color critics were "increasingly disenchanted" with the criminal justice system and increasingly aware of "its insidious role in the decimation of poor black and brown communities."[186] They recognized that feminism was in "desperate need" of a "trenchant critique" of gender violence without simultaneously "collaborating with the incarceral state and its war on communities of color."[187] And they insisted that feminists "should not be channeling their efforts into helping the government find new, better, and easier ways to incarcerate people."[188] The result was a "strident new social movement"—often called "anti-carceral feminism."[189]

Kim locates the catalyzing moment of the anti-carceral feminist movement at a "Color of Violence" conference held in 2000 by INCITE! Women of Color Against Violence, now called INCITE! Women and Trans People of Color Against Violence (INCITE!).[190] Importantly, this movement articulated an

183. Ahmed, *supra* note 181 at 232.
184. *Id.*
185. Mimi Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC. & CULTURAL DIVERSITY IN SOC. WORK, 219, 224-25 (2018).
186. Harris, *Heteropatriarchy, supra* note 65 at 17 ("[In the past decade], scholars and activists committed to ending domestic violence and violence against sexual minorities have become increasingly disenchanted with the criminal justice system, and increasingly aware of its insidious role in the decimation of poor black and brown communities.")
187. Appell and Davis, *supra* note 65 at 6.
188. Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 824 (2007).
189. Mimi Kim, *Anti-Carceral Feminism: The Contradictions of Progress and the Possibilities of Counter-Hegemonic Struggle*, 35 J. WOMEN & SOC. WORK 309, 310 (2020).
190. Kim, *supra* note 185 at 225.

explicitly "anti-criminalization stance" within the anti-violence movement, and a turn away from an "unquestioned reliance on law enforcement."[191] For example, in her keynote address at the INCITE! conference, Angela Davis explained the need for an approach to address violence against poor women of color that does not further "the conservative project of sequestering millions of men of color in accordance with the contemporary dictates of globalized capital and its prison industrial complex."[192]

In line with its anti-criminalization stance, anti-carceral feminism promotes responses to community harms and interpersonal violence that fall under the general rubric of "transformative justice."[193] Kim describes transformative justice as a "flexible set of politics and practices committed to collective and community-based mobilization, nonpunitive practices of accountability, and a theory and practice of violence prevention and intervention that addresses the context of historic and systemic oppression."[194] Transformative justice proposes responses to gender violence that are nonpunitive, noncarceral, collective interventions that do not rely upon a direct service program or the state.[195] These practices include responses such as base building, mutual aid, and community accountability to protect their communities.[196]

B. The Anti-Carceral Feminist Movement to Decriminalize Sex Work and the Abolishment of INA § 212(a)(2)(D)(i)

The anti-carceral feminist movement represented a powerful shift in the feminist movement and opened the door for multi-dimensional responses to questions of criminalization, including the criminalization of sex work. INCITE! is one example of a visionary anti-carceral feminist organization that embodies principles of critical race feminism and integrates principles of critical race

191. *Id.*; Kim, *supra* note 189 at 313.

192. Angela Davis, *The Color of Violence Against Women*, COLORLINES (Oct. 10, 2000), http://csf.colorado.edu/soc/m-fem/2000/msg01004.htm [https://perma.cc/7882-EGLK].

193. Kim, *supra* note 185 at 226; *cf.* Kim, *supra* note 190, at 314 (noting that while transformative justice finds its "contemporary lineage" in anti-carceral feminism and abolitionist social movements, transformative justice is a "continuation of [I]ndigenous practices left unwritten, unrecognized, and largely erased by colonial and neocolonial histories.")

194. Kim, *supra* note 189 at 319.

195. *See id*. at 320 (describing a pilot intervention and documentation program grounded in principles of transformative justice launched by Creative Interventions); *see also* Kim, *supra* note 183 at 227 (noting that "because transformative justice solutions tend to lie within marginalized communities and more radical social movement spaces outside of institutions, these processes have been informal, decentralized, and largely undocumented."); I. India Thusi, *Feminist Scripts for Punishment*, 134 HARV. L. REV. 2449, 2479-2481 (2020) (detailing the community accountability strategies advanced by Creative Interventions, Critical Resistance, and INCITE!).

196. *See, e.g.,* Chanelle Gallant, *When Your Money Counts On It: Sex Work and Transformative Justice*, in BEYOND SURVIVAL: STRATEGIES AND STORIES FROM THE TRANSFORMATIVE JUSTICE MOVEMENT 192–96 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020) (describing strategies such as collecting and sharing information about aggressive clients, conducting self-defense trainings, organizing neighborhood sex-worker protection networks, and providing health care and mental health support).

feminism into its call for the decriminalization of sex work.[197] For example, INCITE!'s call for the decriminalization of sex work centers the experiences of sex workers with intersectional identities who experience multiple systems of oppression, including oppression by the criminal legal system. INCITE! recognizes that women of color sex workers—and particularly transgender women of color sex workers—are disproportionately profiled, harassed, detained, and arrested by the criminal legal system due to police officers' "internalization and perpetuation" of racialized and gendered stereotypes framing women of color as "highly sexualized and sexually available."[198] Further, INCITE! recognizes that as a result of such stereotypes, sex workers of color are rendered wholly unprotected by the police in incidents involving domestic or sexual violence.[199] By centering the stories of state violence committed against women of color, INCITE! calls for the decriminalization of sex work and for community-based responses that do not rely on the criminal justice system.

The Movement for Black Lives (MBL)[200] is another anti-carceral feminist organization[201] that integrates principles of critical race feminism into their call for the decriminalization of sex work.[202] First and foremost, MBL understands how women of color—namely, Black women—are uniquely impacted by intersecting systems of oppression:

> "Black women have historically and continue to experience some of the highest rates of violence, including lethal, physical, and sexual violence; highest rates of maternal mortality and stress-related medical conditions; and some of the highest rates of poverty and unemployment, of any group in the United States. Black women also have the highest rates of stops, police violence, arrests, incarceration, and carceral control among women, and represent the fastest growing prison and jail populations in the country. Black women also bear the brunt of the financial impacts of mass incarceration."[203]

Significantly, MBL recognizes that the policing of sex work has consistently

197. *See Analysis*, INCITE! https://incite-national.org/analysis/ (stating that INCITE! organizes from the framework that locates women of color as living in the dangerous intersections of sexism and racism, as well as other oppressions—and places women, gender-nonconforming, and trans people of color at the center of the analysis) [https://perma.cc/H55C-ZX5Z].

198. *Policing Sex Work*, INCITE!, 26 (2015), http://www.incite-national.org/page/policing-sex-work [http://perma.cc/5AFCVUW8].

199. *Id.* at 27.

200. *About Us*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/about-us/ [https://perma.cc/3YLM-V5YZ].

201. *See* Thusi, *supra* note 195 at 2481–82 (describing the Movement for Black Lives as part of "a burgeoning millennial, feminist movement that is intersectional, noncarceral, and committed to social justice.")

202. *See End the War on Black Women*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/end-the-war-black-women [https://perma.cc/2MZ6-WU88] (calling for the "end of the war on Black women" including the decriminalization of "involvement in the sex trades").

203. *Id.*

been used to criminalize women of color and deny them protection from sexual and other forms of violence.[204] Moreover, MBL understands that because women of color sex workers are disproportionately policed and "saddled" with prostitution convictions, they are further driven into poverty by losing access to "housing, employment, health care, reproductive rights, family and community."[205] MBL also acknowledges that the criminalization of sex work serves as a basis for exclusion and deportation from the U.S. for immigrant sex workers and calls for the abolishment of the "ban on entry and immigration for individuals who have engaged in prostitution."[206] As a result, MBL "prioritizes, promotes, and protect the safety, agency, and self-determination" of those impacted by intersecting systems of oppression within their call for the decriminalization of sex work.[207] Moreover, MBL calls for "non-criminalizing and non-coercive, voluntary, accessible, harm reduction-based and trauma-informed responses" to their involvement in the sex work.[208]

A number of transnational migrant sex worker organizations similarly integrate principles of critical race feminism into their calls for the decriminalization of sex work. For example, Red Canary Song (Red Canary)—a grassroots collective of Asian and migrant sex workers based in New York City—advocates for the decriminalization of sex work as part of its investment in migrant sex workers "who experience the most surveillance and policing and don't have legal protections."[209] Red Canary recognizes how migrant sex workers are uniquely harmed and made vulnerable by anti-trafficking initiatives that, while claiming to speak for migrant sex workers, promote increased criminalization of sex work through increased policing and immigration control.[210] Therefore, Red Canary believes that full decriminalization of sex work is necessary, calls for an end to police raids and deportations, and centers transformative strategies of base building and mutual aid.[211]

Finally, the Canada-based Butterfly Asian and Migrant Sex Workers Support Network (Butterfly)[212] is yet another anti-carceral feminist organization that integrates principles of critical race feminism into their call for the decriminalization of sex work.[213] Butterfly is an organization built upon anti-

204. *A Vision for Black Lives*, MOVEMENT FOR BLACK LIVES, 1 (2020), https://m4bl.org/wp-content/uploads/2020/05/Decrim-Drugs-Sex-Work-with-reparations-Policy-Brief.pdf [https://perma.cc/2KDS-CBFM].
205. *Id.*
206. *Id.*
207. *End the War on Black Women*, *supra* note 202.
208. *Id.*
209. *Our Work*, RED CANARY SONG, https://www.redcanarysong.net/ourwork [https://perma.cc/36EX-PP6F].
210. *About Us*, RED CANARY SONG, https://www.redcanarysong.net/about-us [https://perma.cc/BG9N-UC39].
211. RED CANARY SONG, https://www.redcanarysong.net/ [https://perma.cc/L94A-3H2M].
212. BUTTERFLY ASIAN AND MIGRANT SEX WORKERS SUPPORT NETWORK, https://www.butterflysw.org/home [https://perma.cc/JY5G-L9PH].
213. Elene Lam, *Understanding Migrant Sex Workers*, BUTTERFLY ASIAN AND MIGRANT SEX

essentialism and intersectionality by recognizing the "unique and diverse" systems of oppression that affect the living and working conditions of migrant sex workers including lack of immigration status, language barriers, social isolation, racism, racial profiling, over-policing, discrimination, stigmatization, and the "widespread climate of hatred towards migrant sex workers."[214] Butterfly also recognizes that these systems of oppression intersect with globalization, patriarchy, racism, and imperialist constructions of borders and citizenship.[215] Similar to MBL, Butterfly realizes that migrant sex workers are disproportionately targeted by surveillance and raids which obstruct migrant sex workers' access to safety, protection, and support, increasing their vulnerability to violence and exploitation.[216] Accordingly, Butterfly advocates for the decriminalization of sex work and the abolishment of the immigration prohibition of sex work.[217]

By connecting the critique of INA § 212(a)(2)(D)(i) to the platforms and strategies of these anti-carceral feminist organizations, this Article seeks to inspire immigration and critical race scholars to move theory to practice by advancing strategies for law reform that are in alignment with principles of critical race feminism. Immigration and critical race scholars can draw inspiration from this movement to call for the abolishment of INA § 212(a)(2)(D)(i) on the distinct grounds that it disproportionately impacts women of color sex workers who experience multiple intersecting systems of oppression.

CONCLUSION

Angela Harris explains that "the centrality of transformation" means that every incident of personal violence must be understood in a "larger context of structural violence."[218] Similarly, Andrea Smith argues that gender violence cannot be addressed without dealing with larger structures of violence, such as "militarism, attacks on immigrants and Indian treaty rights, police brutality, the proliferation of prisons, economic neo-colonialism, and institutional racism."[219] And in the immigration context, Sherally Munshi argues that to critique the violence of the U.S. border regime, we must confront the ways in which settler colonialism and "hemispheric domination" have both shaped and obscured the ongoing violence of "contemporary racial geographies and legal institutions" that

WORKERS SUPPORT NETWORK, 7 (2018), https://www.butterflysw.org/_files/ugd/5bd754_5826c5ca074f408988ee248d5f614219.pdf [https://perma.cc/R9HA-PYUN].

214. *Id.* at 2.

215. *Id.* at 3.

216. *Id.* at 4.

217. *Id.* at 7.

218. Harris, *Heteropatriarchy*, *supra* note 65 at 58.

219. Andrea Smith, *Colors of Violence*, COLORLINES (Dec. 15, 2000) [https://perma.cc/7RRP-FHBP].

serve to naturalize and legitimate the border.[220]

Therefore, to bring the call for the abolishment of INA § 212(a)(2)(D)(i) into alignment with a transformative justice approach, we must move beyond abolishing individual exclusionary immigration laws and move towards a more "revolutionary project" of expanded abolishment of a system of immigration laws built upon racism and white supremacy.[221] Doing so can open up pathways to alternative forms of coexistence built upon a respect for human life and a commitment to collective survival, to forms of citizenship not reducible to legal status or entitlement, and to a refusal to be confined by illegitimate borders.[222] Doing so can help us move from theory to praxis.

220. Sherally Munshi, *Unsettling the Border*, 67 UCLA L. REV. 1720, 1720, 1724 (2021).

221. Harris, *Heteropatriarchy*, *supra* note 65 at 64-65 (discussing the liberatory potential of a transformative justice approach to gender violence).

222. *See* Munshi, *supra* note 220 at 1761–63 (discussing the 2018 caravan "movement" in the U.S. as an example of "collective acts of waymaking" among Indigenous and immigrant activists "who recognize in their shared experience a common grievance against settler colonialism and the potential to reimagine the terms of coexistence.")

Asking the Muslim Woman Question:

Understanding the Social and Legal Construction of Muslim Women

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INTRODUCTION

I have worn the hijab[1] since the age of nine. I still recall the tremendous

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1. The hijab, also known as headscarf or veil, is a practice that Muslim women carry out worldwide. It is an expression of their faith involving covering the body in loose, modest apparel, and covering the hair with a scarf. There are many reasons why women choose to wear the hijab. Saba Safdar & Rascelle V. H. Litchmore, *Meanings of the Hijab: Views of*

excitement I felt on the eve of my ninth birthday as I thought of donning the hijab full-time. To me, the world of hijabis[2] was special—exclusive, even, in a manner of great distinction. In public, hijabis, often complete strangers, nodded and waved to one another with familiar smiles. They shared tips for finding clothing that was long sleeved and modest and had a peculiarly impressive knack of holding a safety pin in their mouth while pinning their scarves closed (a trick I was overjoyed to learn from my mother after sufficient practice). It was not just these commonalities, but also a collective understanding of identity, a bond between them I longed to share.

Although the door to hijab revealed all that I had hoped for and more, there was a dark underbelly I had not anticipated. Detailed searches on airport premises, extra scrutiny about my country of origin, and Islamophobia follow me like a shadow. As I grow, become educated, and enter the workforce, microaggressions abound – questions about how long I am obligated to keep my hair, whether I choose to wear the scarf full-time, whether I can choose what color to wear that day, and the most curious seekers' favorite: whether I will have an arranged marriage. Every question is grounded in an assumption that my choices are not my own, but instead enforced by a patriarchal religious system.

Although they may not sound explicitly racist to the untrained ear, these comments and exclusionary stereotypes cut deeply.[3] They are rooted in entrenched

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Canadian Muslim Women, 19 ASIAN J. OF SOC. PSYCH., 198, 199-200 (2016). However, theologically, hijab represents ungendering the body and removing "appearance…from the realm of what can legitimately be discussed." Naheed Mustafa, My Body is My Own Business, (Apr. 2016), https://cpb-ca-c1.wpmucdn.com/myriverside.sd43.bc.ca/dist/6/1809/files/2016/05/My-Body-Is-My-Own-Business-Uniform-of-Oppression-text-2eew4um.pdf [https://perma.cc/8WEP-KCAP]. Though the practice appears physical, it holds a distinctly spiritual dimension. *Id.* Islamic theorists explain that the soul was created by God as the form nearest to Him, a genderless spirit placed within the body to be raised to its highest potential. Ali Afzali & Fatemeh Ghasempour, *Gendering the Human's Soul in Islamic Philosophy: An Analytical Reading on Mulla Sadra,* 3 INT'L J. WOMEN'S RSCH. 1, 10 (2014). The body itself is simply a vessel to carry the soul while it is on its corporeal journey, a journey which is intended to return the soul to its original form near to God. *Id.* at 13. The hijab acts to put the soul in a similar state as it was when created: ungendered and free from otherwise corporeal conceptions of physicality. SACHIKO MURATA, THE TAO OF ISLAM 318 (1st ed. 1992). To be in such a state represents true liberty for an individual, for their physical body is most similar to the state it would be in "the spiritual realm." *Id.*

2. A term for an individual who wears the hijab.

3. In a study performed on Muslim women in Victoria, Australia, data indicated a higher prevalence of racism experienced by Muslim women compared to other ethnic minority groups. Tahira Yeasmeen, Margaret Kelaher & Julia M.L. Brotherton, *Understanding the Types of Racism and its Effect on Mental Health Among Muslim Women in Victoria*, ETHNICITY & HEALTH 1 (2022). These types of racism included internalized racism (internal possession of racist attitudes or behaviors), interpersonal racism (interactions between individuals), and systemic racism (expressed in policies, practices, and control of resources). *Id.* Muslim women experienced all three and fell victim to physical attacks, violence, name-calling, humiliation, or other forms of racism— such as being left out, avoided, treated as inferior, less intelligent, or with suspicion. *Id.* This increased discrimination leads to higher cortisol levels, higher heart rates, paranoia, and psychological distress. *Id.*; see also Memoona Tariq & Jawad Syed, *Intersectionality at Work: South Asian Muslim Women's Experiences of Employment and Leadership in the United Kingdom*, 77 SEX ROLES 510 (2017); Sahar Aziz,

conceptions of Islam and of hijab-wearing Muslim women: the idea that we are "other," inclined to terrorism, deserving of thorough searches in airports, and oppressed by controlling religious systems and men in our lives.[4]

As I work towards my J.D., these hindrances still manage to find me. No matter how assimilated, educated, or professional I attempt to be, there is always the lingering trace of my veil upon my work, a silent damper during interviews and in the classroom. There is a strange absence of scholarship on this topic, both by and about women like me, who observe the hijab within the legal field.

This paper will explore why and how that came to be——beginning with the forces which act upon Muslim women to exclude them from roles within the law, obstacles they face once they have made it, and resistance to such pressure. Though I am not the first to note the gendered treatment to which veiled Muslim women have been subjected, I will examine this intersection through a historical lens, looking at the manner in which Orientalist conceptions, against the backdrop of imperialism, created dichotomous categories which have caught veiled Muslim women in their fold. I hold that a very purposeful, gendered account of Islam, rooted in Orientalism and exemplified by 9/11, affects the way Muslim women are treated in the legal sphere at large, keeping their voice outside of the cultural norm.

Finally, I will briefly touch upon how the legal profession's notion of "bleach[ed-]out"[5] professionalism is a misguided notion, and rather than assuming that a lawyer's neutrality should be grounded in mitigating their identity, the profession can discover a more distinct form of justice by engaging with Muslim women, listening to their voices, and allowing them into the profession as they are.

As Simone de Beauvoir wrote, "being a woman is not a natural fact, it's the

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From the Oppressed to the Terrorist: Muslim-American Women in the Crosshairs of Intersectionality, 9 HASTINGS RACE & POVERTY L. J. 191 (2012).

4. The issue of choice and autonomy is one that is of central importance to the discussion to follow, and though I cannot speak to the reason every woman who wears a scarf chooses to put one on her head, I can emphasize that Islam is a religion which gives utmost importance to intention (niyah). Intention is a mental state that "represents a commitment to carrying out an action" and is considered the "essence of worship" by Islamic scholars. Hajj Muhammad Legenhausen, *Intention, Faith and Virtue in Shi'i Moral Philosophy*, AL-ISLAM.ORG, https://www.al-islam.org/intention-faith-and-virtue-shii-moral-philosophy-muhammad-legenhausen/intention-faith-and-virtue#allamah-tabatabai [https://perma.cc/4G2T-2YGA] (last visited Apr. 27, 2022). Using a Platonic framework of the soul, Islam requires an individual to orient themselves by use of knowledge and individual devotion to God before embarking upon any act of worship. *Id.* To make an intention is to choose an "action for its own sake." *Id*. It therefore becomes clear that autonomous decision-making is a central tenet of the Islamic faith, and to perform an action of worship, such as wearing the hijab, it is important to form such an intention on an individual level. Though I do not mean to minimize very real issues faced by Muslim women who may be forced into situations of discomfort and lack autonomy, I am instead critiquing the underlying assumption that *all* Muslim women face those issues and lack autonomy when the religion itself emphasizes the need for such autonomy.

5. Russel G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2083 (2005).

result of a certain history."[6] I hope this analysis can serve as a map of the social and legal construction of veiled Muslim women to fully understand the intersection at which they stand within the legal profession today.

I. THE ORIENTALIST'S IMAGINATION

A. Overview

To fully trace the origin of the veiled Muslim woman as we know her today, the account must begin with an analysis of Orientalism. First coined by Edward Said, the term Orientalism means three things:

> 1. An academic tradition or field;
> 2. A worldview, representation, and style of thought based upon an ontological and epistemological distinction made between the 'Orient' and the 'Occident'[7]; and
> 3. A powerful political instrument of domination.[8]

The third point is essential to understanding Orientalism. The project of Orientalism was "nothing natural."[9] Rather, it served the power and domination of a complex hegemony[10] by which the West was able to justify their "superiority" and colonization of the Eastern world.[11] The central teleology of Orientalism was creating a dichotomy of "us" Westerners versus "them" Easterners, which in turn distorted perceptions of non-Europeans to the point of imperialism, both physical and psychological.[12]

This dichotomy remains widespread in popular culture, reinforced in art and

6. *Simone de Beauvoir Explains "Why I'm a Feminist" in a Rare TV Interview* (1975), OPEN CULTURE (May 23, 2013), https://www.openculture.com/2013/05/simone_de_beauvoir_explains_why_im_a_feminist_in_a_rare_tv_interview_1975.html [https://perma.cc/FYR3-AQ33] ("It's history that has constructed her, firstly, the history of civilization that has led to her current status."). The physical aspects of a woman, which Beauvoir spoke of as her ability to be pregnant or to have children (which I will analogize in the case of hijab-wearing Muslim women as their physical identifier, the hijab) garnered a second meaning based on "the social context" in which the women were situated. *Id.* Though hijab has meaning in and of itself—both individually, spiritually, and socially—the trait of wearing the hijab is not what creates "a difference in status" or treatment for Muslim women, but rather the historical context which provides that meaning. *Id.*
7. Loosely, the 'Orient' encompasses the global East, including Asia and most parts of Africa. EDWARD SAID, ORIENTALISM 1 (1978). The 'Occident' is the global West, largely defined by Said as Western Europe and the Americas. *Id*.
8. *Id.* at 2-3.
9. *Id.* at 19.
10. "It is hegemony, or rather the result of cultural hegemony at work, that gives Orientalism the durability and the strength." *Id*. at 7.
11. *Id.* at 8.
12. *Id.* at 14.

media for centuries.[13] Orientalist discourse promotes the tenet that the Orient is "the opposite of the Occident."[14] What the Occident has, the Orient lacks. If the Occident is the picture of rationality and reason, the Orient is a land of the insane, of delinquents, of everything alien. If the Occident is a land of peace, the East is a land of "vengeance…strife, not peace."[15]

B. Gendered Conceptions

Islam occupies a unique place in the Orientalist imagination. Though Islam is practiced in many geographic regions,[16] Orientalist perceptions of Islam typically amalgamate Arabs, South Asians, and other Middle Eastern countries into one indistinguishable Islamic mass.[17] Arab societies, and therefore Muslims as a whole, are portrayed as "tribal societies," "devoid of energy and initiative,"

13. Evidence of this abounds—even children's' movies, like Aladdin, strongly feature Orientalist stereotypes and reduce the entire Middle East to a monolithic town featuring an amalgamation of Indian, Arab, and Persian clothing, architecture, and language. See REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE (Media Education Foundation 2006). Paintings, particularly those from the mid-1800s, featured Arabs and Muslims in a particular Orientalist dreamscape out of touch with reality, initiating fictions about the Middle East. Julia Tugwell, *An Introduction to Orientalist Painting,* THE BRITISH MUSEUM (Oct. 9, 2019) https://blog.britishmuseum.org/an-introduction-to-orientalist-painting/ [https://perma.cc/6U5U-TYBB]. Artists who never stepped foot in the Middle East "looked to the Middle and Far East for inspiration." Dmitry Lebedev, *Edmund Dulac's Book Graphics and the Problem of Orientalism in British Illustration of Edwardian Era and the Second Decade of XXth Century*, 368 ADVANCES IN SOC. SCI, EDUC. AND HUMANITIES RSCH. 801, 802 (2019). They approached the East "from the outside looking in." *One of the Greatest Collections of Orientalist Paintings Ever Assembled*, SOTHEBY'S, https://www.sothebys.com/en/articles/one-of-the-greatest-collections-of-orientalist-paintings-ever-assembled [https://perma.cc/Y6T9-C9G4] (last visited Apr. 27, 2022). Poets and writers translated Persian and Arabic texts without having any understanding or prior knowledge of the languages, taking control of the narrative of the East itself, altering it to fit their expectations. COLEMAN BARKS, THE ESSENTIAL RUMI: NEW EXPANDED EDITION (HARPER COLLINS PUBLISHERS, 2004). Much of this art was intended as propaganda to support imperialism, "depicting the East as a place of backwardness, lawlessness, or barbarism enlightened and tamed by" Occidental rule. Jennifer Meagher, *Orientalism in Nineteenth-Century Art*, THE METROPOLITAN MUSEUM OF ART (Oct. 2004) https://www.metmuseum.org/toah/hd/euor/hd_euor.htm [https://perma.cc/8MRD-6UCK]. For many of these artists, "ethnographic accuracy" was never the goal. Instead, they "indulge[d] their exotic fantasies" in the depictions. *Collecting Guide: Orientalist Art*, CHRISTIE'S (Jun. 27, 2021) https://www.christies.com/features/Orientalist-Art-Collecting-guide-8426-1.aspx [https://perma.cc/HX53-RXGN]. Such fascination with the East "cannot be fully divorced from its colonial context," as it reinforced the "superior mindset of colonialists." Nicolas Pelham, *The Blurred History of Orientalist Art*, THE ECONOMIST (Nov. 15, 2019) https://www.economist.com/1843/2019/11/15/the-blurred-history-of-orientalist-art [https://perma.cc/HCH7-TTMT].
14. Khaled Beydoun, Nina Moseihem & Samuel Bagenstos, *Interview with Khaled Beydoun*, 52 U. MICH. J. L. REFORM 903, 905 (2019).
15. SAID, *supra* note 7, at 49, n.6.
16. The Muslim World, WORLD ATLAS, https://www.worldatlas.com/articles/islamic-countries-in-the-world.html [https://perma.cc/Y5QW-MZ3M] (last visited Apr. 27, 2022).
17. *See* Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29, 37 (2014) (discussing contemporary constructions of Arab and Muslim American identities as non-white and inassimilable).

unkind to the natural world, violent, and extreme.[18] In Muslim societies, authorities cut "off…hands and heads, massive crowds [pray] in unison [and]…public morality" is imposed in legal texts.[19]

The Orientalist framing of Islam has a gendered dimension. Muslim men are portrayed as having a violent and intolerant hatred of the west.[20] These men hold "barbaric ignorance…[and] murderous cruelty" towards the world around them in the name of Islam.[21] In contrast, Muslim women are viewed through a patriarchal lens, fashioned as "creatures of a male power-fantasy."[22] These gendered conceptions promote the idea that Muslim men terrorize and overpower all aspects of their society——even the women.[23]

Because of the imposition of such a gendered frame, much written and conceived about the Muslim woman creates and reinforces stereotypes about her, isolating her from understanding. The Orientalist's lens concocts narratives about Muslim women but never features their voices. Instead of listening to accounts of Muslim women with any real understanding of their own voices, the Orientalist's lens places and keeps Muslim women in the shadow of men. They are thus considered "more or less stupid…willing…static, frozen, fixed eternally."[24] The Orietalist conception of the Muslim woman denies her the very possibility of development, transformation, [or] human movement in the deepest sense of the word. [25]

Veiled Muslim women are consistently stereotyped as meek individuals, covered up and exposed to "the exploitation of [Muslim] men and the slavery of the harem."[26] In colonial history, the Orientalist could not enter the harem, and instead created within it a fantasy of subjugated women, powerless against their

18. SAID, *supra* note 7, at 39-40.
19. Charles Hirschkind & Saba Mahmood, *Feminism, The Taliban, and Politics of Counter-Insurgency,* 75 ANTHROPOLOGICAL Q. 339, 348 (2002).
20. Eero Janson, *Stereotypes that Define "Us": the Case of Muslim Women*, 14 ENDC PROCEEDINGS 181 (2011).
21. ZIAUDDIN SARDAR, ORIENTALISM 44 (1999) (internal quotation marks omitted).
22. *Id*.
23. SAID, *supra* note 7, at 207.
24. *Id*.
25. *Id*. at 208.
26. *See* ALEX LYTLE CROUTIER, HAREM: THE WORLD BEHIND THE VEIL 173 (1991); *see also* KATHERINE BULLOCK, RETHINKING MUSLIM WOMEN AND THE VEIL: CHALLENGING HISTORICAL & MODERN STEREOTYPES 5-6 (2002) (noting that the manner in which the veiled woman was unseen reversed "the expected relationship between superior and inferior," making veiled women "mysterious beings who refused to offer themselves up" and leading to the orientalist "attack[ing] the veil…try[ing] to rip it off…try[ing] everything they could to see the women"). This phenomenon was portrayed in art as well. The Harem was a particular fixation of the patriarchal orientalist's imagination, viewed with "sexual intrigue and subjugation," where men were admitted and women existed in private space. Tugwell, *supra* note 13. The western patriarchal lens investigated the harem with "invasive attention," with artists resorting "to their imaginations, using the backdrop of the harem as an excuse to paint nude women." *Id*. This provides a great metaphor to the entire orientalist approach to Muslim women in the region. *Id*.

male oppressors.[27] The idea that a woman could exist beyond their reach "frustrate[d] the colonizer,"[28] and instead, they "relied largely on hearsay and imagination" to create a Muslim woman who fit their fiction.[29]

Hijab was a key factor in this fiction. The veil was considered a metaphor for the entire Muslim world and was the root of all shortcomings that Muslim women faced due to their religion.[30] It represented the harem even when a woman was outside of the physical harem. It was this lack of access to their body that colonizers interpreted to mean "only accessible by oppressive Muslim males."[31] Since they could not access her beyond the veil, they eliminated her from the equation all together, preferring to imagine her as a victim rather than an individual in her own right.[32] The veiled woman, therefore, was not in control of her own body, but rather, covered up for her dominating male's benefit. Her hidden body, they assumed, did not exist as an extension of her autonomy but was necessarily linked with male subjugation.

Hence, these gendered conceptions reinforced the notion that Muslim women were oppressed and subject to the whim of their male masters, unable to make choices in their own life. Two, that Muslim men were controlling, violent, and ravaging toward the world and the Muslim female. Such a perception leads to the Orientalist's natural conclusion: Muslim women needed to be "saved" from the degraded morals and customs that men enforced to oppress them. They needed to be saved from villainizing Muslim men "through imperialist interventions."[33]

C. In Modern Day

This gendered dimension of Orientalism played right into the hands of the media in post-9/11 America. The extremist attack on American soil shook the core of the country. The United States Government acted quickly in response, creating the Department of Homeland Security and 9/11 Commission to investigate the

27. There are many theories on the emergence of the so-called harem fantasy. One such theory notes that the medieval West conceived the East as the "location of the Garden of Eden," and the women they encountered within, often held in private spaces, were considered a vision of Eve, tempting them with "forbidden knowledge," depicting the male-centric conception of the entire region. Croutier, *supra* note 26.
28. FRANTZ FANON, A DYING COLONIALISM 44 (1965) ("The woman who sees without being seen frustrates the colonizer. There is no reciprocity. She does not yield herself, does not give herself, does not offer herself.").
29. Meagher, *supra* note 13 ("Some of the most popular Orientalist genre scenes—and the ones most influential in shaping Western aesthetics—depict harems. Probably denied entrance to authentic seraglios, male artists relied largely on hearsay and imagination, populating opulently decorated interiors with luxuriant odalisques, or female slaves or concubines (many with Western features), reclining in the nude or in Oriental dress."); *see also Collecting Guide: Orientalist Art,* supra note 13 ("The harem was common subject matter, even though males weren't allowed to enter one, and so the artists could never have witnessed such scenes at first hand.").
30. Bullock, *supra* note 26, at 7.
31. *Id*. at 19.
32. *See* Janson, *supra* note 20.
33. *See* Bullock, *supra* note 26.

events and to prevent future similar attacks.[34] Yet the responses to the events often carved out Muslims and Muslim-looking populations as suspect communities, although the extremist faction that conducted the attack was not representative of Muslims as a whole. A suspect community is not "simply one that is targeted…but also one that is 'imagined,'" or socially constructed by members of the non-suspect group not only to reinforce their image as suspect, but also to direct cultural, political, and ideological outcomes surrounding them.[35] On both the personal and political level, Muslims were cast as suspect. Cultural and political measures after the attack strengthened this idea, and Muslims became victims of "backlash discrimination," or an influx of anti-Arab or anti-Muslim discrimination due to extreme feelings incited by the attacks.[36] Attacks and harassment directed towards Muslims increased substantially.[37] Government retaliatory measures post-9/11 imposed particular harms on Muslims and Arabs, including the Patriot Act.[38] The Act resulted in government actors profiling and targeting Muslims, South Asians, and others with Muslim names and the detention of around 1,182 people, 750 of whom were arrested on immigration charges.[39]

These detention policies, which led to the disproportionate capture and imprisonment of Muslim men, overwhelmingly characterized the mass of Muslim men as violent terrorists, subjecting them to harsh interrogation and torture by

34. *September 11 Attacks*, HISTORY.COM (Sep. 1, 2022) https://www.history.com/topics/21st-century/9-11-attacks#section_8 [https://perma.cc/WY5Y-NQ3C].

35. Adrian Cherney & Kristina Murphy, *Being a 'Suspect Community' in a Post 9/11 World – The Impact of the War on Terror on Muslim Communities in Australia*, 4 J. OF CRIMINOLOGY 480, 481 (2015).

36. *Muslims in America After 9/11, Part II,* 9/11 MEMORIAL & MUSEUM, https://www.911memorial.org/learn/students-and-teachers/lesson-plans/muslims-america-after-911-part-ii [https://perma.cc/C66L-9DX9] (last visited May 25, 2022). FBI Hate Crime Statistics note that anti-Muslim hate crimes increased from less than 50 reported incidents per year in 2000 to more than 450 reported incidents in 2001. *Id*.; *see also* Jack Lyon Jones, *When is Patriotism Illegal? EEOC Focuses on September 11 "Backlash Discrimination,"* 8 No. 7 Ark. Emp. L. Letter 7 (2003).

37. *Id*.

38. Sally Wesley Bonet, *Educating Muslim American Youth in a Post-9/11 Era: A Critical Review of Policy and Practice*, 95 THE HIGH SCHOOL J. 46, 46-47 (2011). The Patriot Act, which initiated the issuance of 192,499 National Security Letters for FBI agents to obtain personal information of largely Muslim communities, led only to one terror-related conviction between 2003 and 2006. *Surveillance Under the Patriot Act,* AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/issues/national-security/privacy-and-surveillance/surveillance-under-patriot-act [https://perma.cc/SBS3-EN2Y] (last visited May 25, 2022). Critics have stated that though the Patriot Act was intended to apply to all citizens to locate terrorists, it was "written with Muslims in mind and in practice denies them their civil liberties by empowering law enforcement authorities to raid their homes, offices, and mosques in the name of the war on terrorism." Kam C. Wong, *The USA Patriot Act: A Policy of Alienation,* 12 MICH. J. OF RACE & L. 161, 180 (2006).

39. Arshad Ahmed & Farid Senzai, *The USA Patriot Act: Impact on the Arab and Muslim American Community Analysis and Recommendations*, INST. FOR SOC. POL'Y & UNDERSTANDING (2004); *see also Naming the Detainees*, (PBS television broadcast Aug. 5, 2002) https://www.pbs.org/newshour/show/naming-the-detainees [https://perma.cc/GZ9Z-5FCF].

United States government officials.[40] These ideas did not disappear in the years after 9/11. Instead, through the present day, Muslims have openly been considered "evil, totalitarian, and terroristic."[41] In 2016, then-president Trump claimed on CNN that "Islam hates us. There's something there that – there's a tremendous hatred there."[42] Movies, TV shows, and video games portray Arab men as cloaked, masked, and violent.[43] The National Counterterrorism Center published guidance about indicators of violent extremism, which featured graphics depicting bearded men wearing kufis (a traditional hat worn by Muslim men),[44] seeming to imply that the Arab male is the icon of an extremist threat. There is a strong association between these prevalent modern stereotypes and Said's original formulations of the angry Arab, a concept that underscores the throughline that Muslim men are a threat to what is American.[45]

Simultaneously, the urge to liberate the oppressed Muslim woman by freeing her of all that they assumed men in her culture imposed upon her caught Muslim women between traditional Islamophobic tropes and Orientalist conceptions.[46] Muslim women were cast as victims of their circumstances, who needed to be saved from their headscarves.[47] When war broke out in Afghanistan, Oprah Winfrey appeared on national television and lifted the burqa[48] off of an Afghani woman as a demonstration of the woman's newfound empowerment, insinuating that freedom from terrorism meant no longer being forced to wear the veil.[49] Laura Bush stated that "the fight against terrorism is also a fight for the rights and dignity of women," drawing a stark divide between Afghani men (depicted as terrorists) and Afghani women (depicted as victims who needed liberation), reinforcing the

40. Gary Fields & Noreen Nasir, *Muslims Recall Questionable Detentions that Followed 9/11*, ASSOCIATED PRESS (Oct. 4, 2021) https://apnews.com/article/immigration-africa-canada-religion-asia-bf725e0016e88eef2abc73bedd0c5718 [https://perma.cc/G675-LA45]; *see also* Letta Tayler & Elisa Epstein, *Legacy of the "Dark Side": the Costs of Unlawful US Detentions and Interrogations Post 9/11*, HUMAN RIGHTS WATCH (Jan. 9, 2022) https://www.hrw.org/news/2022/01/09/legacy-dark-side [https://perma.cc/7CR7-NBE3].

41. SAID, *supra* note 7, at 27.

42. *See*. Kiara Alfonseca, *20 years after 9/11, Islamophobia continues to haunt Muslims*, ABC NEWS (Sept. 11, 2021) https://abcnews.go.com/US/20-years-911-islamophobia-continues-haunt-muslims/story?id=79732049 [https://perma.cc/Y24E-97TB].

43. REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE, *supra* note 13.

44. NAT'L COUNTERTERRORISM CTR., HOMEGROWN VIOLENT EXTREMIST MOBILIZATION INDICATORS (2019), https://www.dni.gov/files/NCTC/documents/news_documents/NCTC-FBI-DHS-HVE-Mobilization-Indicators-Booklet-2019.pdf.

45. SAID, *supra* note 7, at 27.

46. Aziz, *supra* note 3, at 196.

47. Leti Volpp, *The Citizen and the Terrorist*, *in* SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT (Mary L. Dudziak ed., 2003).

48. The burqa is one form of veiling, which typically requires covering the entire body and face. It is distinct from the hijab in that hijab does not necessitate covering the face, hands, or feet. However, both are equally symbolic of Islam. *What's the Difference Between a Hijab, Niqab and Burka?,* BBC (Aug. 7, 2018) https://www.bbc.co.uk/newsround/24118241 [https://perma.cc/2PZB-EGBX].

49. GILIAN WHITLOCK, SOFT WEAPONS: AUTOBIOGRAPHY IN TRANSIT 52 (Univ. of Chicago Press 2007).

idea that "saving" Muslim women was a major purpose of the War.[50] When leadership changed in Saudi Arabia in 2009, American magazines published pictures of women in short skirts next to veiled women, writing that the latter had "more rights and greater freedom,"[51] equating western wear with freedom and traditional religious gear with oppressive, backwards cultural practices. Notably, in subsequent wars or interventions in non-Muslim countries, political actors have eschewed gendered rhetoric. When President Biden speaks of intervention in Ukraine, he discusses "The Ukrainian people" as a mass of ungendered people.[52] When then-president Obama spoke of intervention in Venezuela, he again spoke of "Venezuelan citizens" without focusing on particular groups or genders.[53] No other war seems to have taken such a particular interest in the women of a country and their clothing.

Taken together, these acts take away the voice of the veiled Muslim woman, eliminating the Muslim woman herself in favor of her dramatized portrayal. In the above examples, outside voices impose gendered and Orientalist perceptions of Muslim women's needs. Mainstream media discourse is *about* Muslim women, but fails to capture their perspectives or insights *from* them. The dominant rhetoric obscures the reality of veiled women's experiences; scholars have argued that forcing removal of the veil actually decreased women's participation in the public sphere,[54] and others have pointed out that Afghani women faced increased violence because of long-standing US involvement in their region.[55] Instead, the voices in power explained what they believed a Muslim woman should have, without any regard for her voice or desire. This skewed narrative creates a confirmation bias whereby veiled Muslim women are consistently portrayed as oppressed and devoid of any rights and are, in effect, treated with the underlying

50. Lila Abu-Lughod, *Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and its Others*, 104 AM. ANTHROPOLOGIST 783, 784 (2002).

51. Andrew Lee Butters, *Saudi Women's Quiet Revolution: More rights and greater freedom. But too slowly for some*, TIME (Oct. 19, 2009), http://content.time.com/time/covers/europe/0,16641,20091019,00.html [https://perma.cc/MN9E-AR3T].

52. *President Biden to Announce Uniting for Ukraine, a New Streamlined Process to Welcome Ukrainians Fleeing Russia's Invasion of Ukraine,* DEP'T OF HOMELAND SEC'Y (Apr. 21, 2022) https://www.dhs.gov/news/2022/04/21/president-biden-announce-uniting-ukraine-new-streamlined-process-welcome-ukrainians [https://perma.cc/YYE8-FKQJ].

53. *Obama Declares Venezuela a National Security Threat*, AL JAZEERA (Mar. 10, 2015) https://www.aljazeera.com/news/2015/3/10/obama-declares-venezuela-a-national-security-threat [https://perma.cc/9SMR-JQZY].

54. Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf,* 5 HASTINGS RACE & POVERTY L. J. 441, 452-53 (2008); *see also* Camron Michael Amin, *Selling and Saving "Mother Iran": Gender and the Iranian Press in the 1940s,* 33 INT'L J. OF MIDDLE EAST STUD. 335, 349 (2001) (describing the effects of forced veil removal under Iranian ruler Reza Shah on women in Iranian public space and finding that when Reza Shah sought to Westernize his country, officers took to the streets with scissors to snip off women's veils, believing that the hijab was something that needed to be removed to become modern).

55. *See* Volpp, *supra* note 47, at 153-54.

belief that they need to be saved.[56] It is an indicator of a gendered Orientalism, a "selective concern about the plight of…women that focuse[s] on the veil as a sign of oppression" but gives no weight to women's desires.[57] This gendered Orientalism creates a strange irony: though it asserts concern for the woman's choice, it refuses to see the hijab as a valid choice, instead assuming that Muslim women only don the veil under pressure. These portrayals "other"[58] those who wear hijab,[59] casting them "in simplistic and limiting ways as part of an undifferentiated and homogenized 'Muslim woman' who cannot be thoughtful, independent, and progressive if she identifies with her religious community."[60]

In the day-to-day world, women in hijab make reports of discrimination that echo these gendered Orientalist tropes. One hijabi woman reported being told that she wore the hijab because she was "scared of [her] parents" and did it just for her parents.[61] Other women say that people assume they are "forced into seclusion" because of the hijab.[62] Many face outright vitriol, usually statements that other and stereotype them, such as "I hate you," "Go home," "America is for Americans," and "Death to Muslims."[63] After 9/11, many hijabis removed or considered

56. *See* Rochelle Terman, *Islamophobia and Media Portrayals of Muslim Women: a Computational Text Analysis of U.S. News Coverage*, 61 INT'L STUD. Q. 489, 489-90 (2017) ("Muslim women (defined as women from Muslim-majority or Middle Eastern societies) are more likely to appear in the US press if they live in societies with poor records of women's rights[,]" and "[n]on-Muslim women, on the other hand, are more likely to appear in the media in contexts where their rights are respected."). Terman posited that her findings "suggest[] a kind of confirmation bias, whereby Muslim women are associated with countries that violate women's rights, whereas non-Muslim women are associated with countries that respect their rights." *Id.* at 489-90.
57. Abu-Lughod, *supra* note 50.
58. *See* Ahmed Ajil & Kwan-Lamar Blount-Hill, *"Writing the Other as Other": Exploring the Othered Lens in Academia Using Collaborative Autoethnography,* 2 DECOLONIZATION OF CRIMINOLOGY & JUST. 83, 93 (2020) ("Physical and cultural markers of ethno-racial difference, which comprise the major source of othering explored here, are not determined by individuals but rather imposed onto and into them, provoking processes of othering and reactions thereto ubiquitous and recurrent enough to be considered a social phenomenon having an existence of its own.").
59. *See* SAHAR AZIZ, THE RACIAL MUSLIM: WHEN RACISM QUASHES RELIGIOUS FREEDOM, 31 (Univ. of Cal. Press 2022).
60. Sahar Aziz, *Coercive Assimilationism: The Perils of Muslim Women's Identity Performance in the Workplace,* 20 MICH. J. RACE & L. 1, 39 n.239 (2014) (citing SHAHNAZ KHAN, MUSLIM WOMEN: CRAFTING A NORTH AMERICAN IDENTITY XII (2000)) (arguing that "Muslim women are often viewed in simplistic and limiting ways as part of an undifferentiated and homogenized 'Muslim woman' who cannot be thoughtful, independent, and progressive if she identifies with her religious community").
61. Tabassum F. Ruby, *Listening to the Voices of Hijab*, 29 WOMEN'S STUD. INT'L F., 54, 63 (2006).
62. Yvonne Y. Haddad, *The Post-9/11 Hijab as Icon*, 68 SOCIOLOGY OF RELIGION 253, 259 (2007) ("Although the stereotypes shifted every decade, they were always negative and the Muslim woman is always 'the other.' During one of her talks, someone in the audience lamented, 'Oh, yes, isn't it sad that those women are suffering under illiteracy (1960s), that they are subject to polygamy and divorce (1970s), that they are forced into seclusion (1980s), that they cannot drive (1990s), that they are stoned and beaten in the streets (2000).'").
63. *Id*. at 263.

removing their hijab because of the influx of such negative stereotyping.[64]

D. Statistical Impacts in the Workforce

Likely due to the stereotypes Muslim women often face, Muslim women who wear the hijab experience animus in hiring practices across almost all fields. Studies focusing on the legal field often fail to account for religious demographics.[65] Yet what we do know seems grim. Research has indicated that women who wear the hijab not only experience more overt discrimination, but also have lower job satisfaction, the latter of which may correlate with their experiences of discrimination. In Europe, studies report that Muslim women who wear the hijab face unique difficulty "accessing job opportunities" in addition to experiencing "lower incomes, longer periods of unemployment, lower performance of their qualifications, and slower job advancement."[66] Studies also have shown that donning the hijab leads to higher rejection rates for professional positions across all levels of academic achievement, implicating biases in hiring bodies.[67] In one study, where hijabi applicants and non-hijabi applicants sent out equivalent applications, hiring groups took longer to accept "excellent" applicants who wore the hijab (i.e., applicants with the highest grades and excellent resumes) than it did to accept non-hijabi women with similar applications.[68] Women who wore hijab and had mediocre applications were rejected more quickly than non-hijabi women with mediocre applications.[69] Participating hiring bodies felt more confident and made quicker decisions when women did not wear headscarves, in contrast to the time and deliberation they took when women did wear headscarves.[70] Researchers who conducted these studies postulated that hiring bodies may have judged hijabi women in a number of ways, largely embedded in negative stereotypes about Muslims.[71] They also suggested that hiring bodies

64. Barbara Perry, *Gendered Islamophobia: Hate Crime Against Muslim Women*, 20 J. FOR THE STUDY OF RACE, NATION, & CULTURE 74, 85 (2013) (stating that "[r]ecognizing the visibility presented by the hijab, many women have come to question their choice to be covered").

65. *See e.g.,* NAT'L ASS'N FOR LAW PLACEMENT, INC., 2021 REPORT ON DIVERSITY IN U.S. LAW FIRMS, (2022) https://www.nalp.org/uploads/2021NALPReportonDiversity.pdf [https://perma.cc/H5VN-QWVG]. The reason NALP lacks information on religious data and therefore Muslim lawyers is not apparent. However, it is sufficient to note that the lack of information on the subject makes it difficult to think of ways to solve any presumed disparities.

66. Carme Garcia-Yeste, Lena de Botton, Pilar Alvarez, & Roger Campdepadros, *Actions to Promote the Employment and Social Inclusion of Muslim Women Who Wear the Hijab in Catalonia (Spain),* 13 SUSTAINABILITY (2021).

67. Christian Unkelbach, Hella Schneider, Kai Gode, & Miriam Senft, *A Turban Effect, Too: Selection Biases Against Women Wearing Muslim Headscarves,* 4 SOC. PSYCH. AND PERSONALITY SCI. 378 (2010) ("Although factual information about academic achievements had the largest effect on participants' decisions, decisions on all achievement levels were biased against women wearing hijabs. This pattern was substantiated by participants' response latencies; women wearing hijabs were more quickly rejected and more slowly accepted compared to women not wearing hijabs.").

68. *Id*. at 381.

69. *Id.*

70. *Id*.

71. *Id*.

feared the growth of Islam in their workspace, and that hijabis in particular activated negative stereotypes such as the aggressive nature of Islam and the submissive role of women.[72]

Furthermore, one study found that job applicants who wore more fitted and properly tailored clothes received more positive perceptions than those who did not.[73] Though this study did not distinctly mention Muslim women or hijab, it does indicate expectations from employers and cultural norms regarding the "good" applicant. These expectations and cultural norms are likely to harm Muslim women, since women who wear headscarves also often wear loose, non-formfitting clothing. Another study reported that the texture and color of a woman's dress could help others perceive her as more attractive or confident.[74] Hijab, which instead triggers thoughts of Islam and gendered Orientalism, creates perceptions of unattractiveness and lower intelligence.[75] Therefore, perceptions of the hijab serve to disadvantage Muslim women in professional spaces.

Although these studies do not directly connect to the legal field, they demonstrate the culture of implicit and explicit discrimination against Muslim women. It is not a large jump to assume that the hiring trends outlined above extend to the legal system. Such strong stereotypes harm Muslim women's ability to gain professional experience and systemically keep them out of positions of power, which slows or prevents any changing of their circumstances. One possible solution to undo the harm done to Muslim women within the legal profession is to increase the presence of hijab-wearing Muslim women. However, when such implicit and explicit bias works against them, that increase is gradual. Women of color make up less than five percent of partners in major law firms and only six percent of general counsels.[76] From 2006 to 2021, the number of women of color partners only increased 2.6 percent.[77] This comes out to a rate of .158 increase for women of color, where the rate of women in general has increased by .508, almost three times as much as women of color.[78] Though law firm statistics are only one aspect of the entire profession, and such statistics do not specifically account for Muslim women, assuming Muslim women to be within this group allows us to see the disparity for their group.[79] It is easy to imagine that the numbers for Muslim

72. *Id*. at 381-2.
73. Sandra Forsythe, *Effect of Applicant's Clothing on Interviewer's Decision to Hire*, 20 J. OF APPLIED SOC. PSYCH. 1579, 1585 (1990).
74. *Id.*; *see also* Shahzeen Aslam, *Stereotyping Muslim Women in Australia: Perceptions of the Veil* (2018) (B.A. thesis, University of Adelaide) ("The garments worn by both genders influenced the probability that they would get hired at a job interview.").
75. *See* Yusr Mahmud and Viren Swami, *The Influence of the Hijab (Islamic Head-cover) on Perceptions of Women's Attractiveness and Intelligence*, 7 BODY IMAGE 90, 92 (2010) ("Specifically, women wearing the hijab were rated as significantly lower on attractiveness and intelligence than women not wearing the hijab.").
76. NAT'L ASS'N FOR LAW PLACEMENT, INC., *supra* note 64, at 4.
77. *Id*. at 14.
78. *Id*.
79. *See generally* Ajil & Blount-Hill, *supra* note 57 (discussing otherness in the field of criminology); Hilary Sommerlad, *Minorities, Merit, and Misrecognition in the Globalized*

women are far lower, though they are not recorded. In the next section, I will expand on the reasons this may be, adding to existing scholarship about Muslims within the legal profession and focusing on how popular conceptions of Muslim women in hijab have impacted the understandings of Muslims as a whole.

II. IN THE LEGAL IMAGINATION

A. The Muslim Man as a Violent Oppressor

Courts in the United States have long shown insensitivity to claims involving Muslims, a trend dating back to the Naturalization Era from 1790 - 1952.[80] In many naturalization cases from this period, courts demonstrated hostility towards Arab Muslims, preventing them from naturalizing because of their faith, while simultaneously allowing Arab Christians to enter the country.[81] In present-day criminal cases, many judges explicitly mention the religion of Muslim defendants in a possible effort to inflame juries by deploying preexisting gendered stereotypes about violence and oppression against women.[82] Scholars have noted that state courts often mention religion when dealing with Muslim criminal defendants, regardless of whether religion is relevant to the case.[83] For example, in *Trammell v. State*, the appellate court highlighted the fact that defendants in an armed robbery case were purchasing literature from a member of an organization known as the Black Muslims, even though the group's substantive religious beliefs were not relevant to the robbery.[84] Similarly, in *Commonwealth v. Adams*, the appellate court mentioned twice that the defendant was Muslim, even though it did not use this information in any significant way.[85] In *People v. Howk*, the Supreme Court of California drew a direct link between the defendant's Islamic faith and the murder of his girlfriend, reading out passages of his journal which noted his rage

Profession, 80 FORDHAM L. REV. 2481 (2012) (exploring the impact of globalization on "social inequalities within large corporate professional firms").

80. *See* Maryam Saleh, *U.S. Courts Have Been Treating Muslims Differently for a Very Long Time*, THE INTERCEPT (Dec. 7, 2017) https://theintercept.com/2017/12/07/trump-travel-ban-supreme-court-muslims-national-security/ [https://perma.cc/X67V-H48L].

81. *See* Beydoun, supra note 16, at 68-70 (citing Ex Parte Mohriez, 54 F. Supp. 941 (D. Mass. 1944); In re Ahmed Hassan, 48 F. Supp. 843, 845 (E.D. Mich. 1942)).

82. *See id.* at 64 (stating that as early as 1942, the disorientation of Arab identity due to Orientalist construction of Arab identity "blinded judges.") (citing *Hassan*, 48 F. Supp. at 845); *see also* Marie A. Failinger, *Islam in the Mind of American State Courts: 1960 to 2001*, 28 S. Cal. Rev. L. & Soc. Just. 22, 28 (2019) (citing Trammell v. State, 283 So.2d 620, 621 (Ala. Crim. App. 1973)); *see also* State v. Aqu-Simmons. No. 70035, 1997 WL 209166 at *1; Hayes v. State 449 S.E.2d 663, 665 (Ga. Ct. App. 1994); State v. Pratt 544 A.2d 392, 394 (N.J. Super. Ct. App. Div. 1988), *abrogated by State v. Comer* 266 A.3d 374 (N.J. 2022); Parris v. State 421S.E.2d 137, 138 (Ga. Ct. A. 2p. 1992), *abrogated by* Gary v. State 422 S.E.2d 426 (Ga. 1922).

83. *See* Failinger, *supra* note 82, at 30.

84. *See* 283 So.2d at 621.

85. *See* 753 N.E.2d 105, 108 (Mass. 2001). In this case, the state pointed out the defendant converted to Islam and changed his name to a Muslim one. Id. "The court…repeated Adams'…Muslim name, but said that it was nonetheless going to use his original name because 'as is our custom we recite the defendant's name as it first appears on the indictments." Failinger, *supra* note 81, at 62 (citing Adams, 753 N.E. at 107 n.1).

against "enemies of Islam."[86] Although these journal entries did not mention the death of his girlfriend, and there were many other potentially relevant statements about his objective urge to kill without any mention of religion, the court seemed to give preference to the statements involving Islam.

These cases show a potential selective bias on behalf of courts in that they chose to enter otherwise irrelevant evidence that plays into preexisting stereotypes of Muslim men, or supplement evidence in a violent case with the defendant's religion. Marie Failinger considered this to be an "ambiguity" by which it is unclear "whether the court was simply trying to tell a full story, or whether…judges believed" that the defendants' actions were "particularly devious or threatening" because they were done in association with Islam.[87] This ambiguity plays into stereotypes of Muslim men's rage, violence, and terror: somehow it may be more believable for a Muslim man to commit violent crimes, particularly if the crime is against a woman, as it was in *Howk*.[88] *Commonwealth v. Riggins* solidifies this conception and is a paradigm of the manner in which courts have employed gendered orientalist stereotypes. The Pennsylvania Superior Court admitted evidence regarding the defendant's Muslim religion just because a plaintiff accused her assailants of being Muslims. The court notes that "the appellant's being a Muslim was a relevant fact in view of the victim's dying declaration," yet the statement did not contribute to the analysis or fact finding much or at all.[89] Such gendered orientalism potentially taints the justice system for Muslim male defendants, as it is unclear whether such statements will influence jurors if they hold animus or bias towards Muslims.

This gendered orientalist framing parallels the experiences of Muslim women in immigration cases. Cases about Muslim women reinforce negative stereotypes about hijab and Muslim women, enforcing a binary contrasting the "liberated Western woman and the oppressed Muslim woman."[90] Immigration and asylum cases favor Muslim women who do not wear hijab, perhaps to indicating a belief that the hijab is un-American.[91] In general, asylum cases are made by demonstrating an individual has been persecuted "on account of" their race,

86. *See* 56 Cal. 2d 687, 695 (1961).
87. Failinger, *supra* note 82, at 62.
88. *See id.*
89. *See* 542 A. 2d 1004, 1007 (Pa. Super. Ct. 1988).
90. Taylor Markey, *Westernized Women?: The Construction of Muslim Women's Dissent in U.S. Asylum Law*, 64 UCLA L. REV. 1302, 1320 (2017).
91. *Id.* at 1318. "Westernized women" are often given preference when looking at the facts emphasized by U.S. immigration lawyers. We see women described as "not a devout Muslim," a nonpracticing Muslim, or one who "did not have the mentality of a Moslem," or wearing "small veils" or "could not wear this veil as it symbolizes to her oppression, submission and lack of freedom." *Id.* Just as Malala Yousafzai was highly mediatized in the West partly because she was the "only girl with [her] face not covered" at her school, the "Westernized women" in these cases are described as wearing "small veil[s]," or as women who have "never worn a veil," who "did not wear a veil," who "could not wear this veil as it symbolizes to her oppression, submission and lack of freedom," who "refuse[d] to" veil, who were "forced to" veil, or who have "never worn a veil and consider the concept offensive and demeaning." *Id.* at 1318-19.

nationality, political opinion, or particular social group.[92] Gender is not sufficient to constitute a particular social group but it is often paired with another characteristic group, such as race, to sufficiently form a claim.[93] Muslim women have pled that they were persecuted on account of their gender as well as their "Westernized" traits in their country of origin.[94] For example, in *Sharif v. INS*, one refugee woman spoke of herself as holding "pro-western" beliefs in her country of origin.[95] She stated that she held "longing" for "the freedoms enjoyed by American women" in order to successfully plead her case.[96] In a similar case, *Kane v. Gonzales*, the Third Circuit considered a Malian woman as "westernized" because she would not "accept the traditional, oppressed role of a Muslim woman in a Muslim society" and thus granted her asylum. Again, in *Moosa v. Holder*, the female applicant was compared to Western women, with the court assessing how Western women believed in "broad personal choice" and "equal treatment with men."[97] In these cases, the courts reinforced boundaries between Muslim and non-Muslim women, playing into a dichotomy of westernized or non-westernized, oppressed or modern. It thereby pushes the narrative that freedom, liberation, and democracy are non-Muslim concepts, and things that Muslim women's faith and countries of origin do not grant them. This dichotomy reinforces the notion that, due to their societal and religious status, Muslim women are naturally oppressed and not granted the freedoms Western women are, and therefore are the antonym of the liberated Western woman. These courts assume that "gender discrimination or persecution is required by" and organic to Islam, making Islam into a monolithic entity that oppresses women and pandering to the culturally accepted narratives of Muslim women as oppressed.[98]

With respect to hijab, asylum courts advance the assumptions that Muslim religion and culture oppress those in hijab and that they are in need of saving.[99] In *Fatin v. INS*,[100] the Third Circuit allowed a broad generalization about hijab— that an applicant fleeing the Iranian veil mandate would be "'subject to the same restrictions and requirements' as the rest of the population" if she stayed in her home country.[101] This lack of specificity about Muslim countries' treatment of women shows an underlying assumption that Muslim women are treated with restriction and discrimination in their countries and culture. This assumption once again causes the erasure of the individual Muslim woman's experience in favor of her stereotypical ideal. In *Moosa v. Holder*, the court looked at gender-discriminatory practices of the Taliban—a particularly extremist group not

92. G.A. Res. 429 (V), Convention relating to the Status of Refugees at 33 (Jul. 28, 1951).
93. *See id*.
94. *See* Markey, *supra* note 89, at 1317.
95. 87 F.3d 932 (7th Cir. 1996); *see* Markey, *supra* note 89, at 1319.
96. 87 F.3d at 934, 936.
97. *Moosa v. Holder*, 644 F.3d 380, 383 (7th Cir. 2011).
98. Markey, *supra* note 90, at 1323 (citing Susan Musarrat Akram, *Orientalism Revisited in Asylum and Refugee Claims*, 12 INT'L J. REFUGEE L. 7 (2000)).
99. *See id*.
100. Fatin v. INS, 12 F.3d 1233, 1237 (3d Cir. 1993).
101. *Id.*

representative of the broad Muslim population—as "broad social strife," generalizing the discriminatory practice of one particular group to the woman's society without any justification.[102] Rather than acknowledging the Taliban's behavior as a unique instance of extremism, the court considered the behavior a broad social issue within her country of origin. Finally, in *In re S-A-*, the court looked at a father's controlling behavior over his daughter as a tenet of "Muslim law."[103] These generalizations cement stereotypes and Orientalist misunderstandings of Muslim women within the court system and reveal the courts' entrenchment within stereotypical confines. The courts' behavior also represents a possible hijacking of the authentic Muslim woman experience. By holding such requirements for Muslim women seeking asylum, the courts either force women to plead in such Orientalist ways or restrict from entry those women who do not fit the stereotypes.

Furthermore, when politics were involved, the Supreme Court repeatedly refused to restrain the executive in issues involving Muslims, in effect upholding government surveillance programs that targeted people from Muslim majority countries.[104] Even cases with such grievous human rights and constitutional violations such as the Guantanamo cases, the Supreme Court "rarely gave an acknowledgement that these individuals have substantive rights" and made it difficult to bring claims for even the most basic issues, such as the exercise of religious rights or freedom from torture.[105] In *Ziglar v. Abbasi*, where men primarily from South Asian and Middle Eastern countries were mass detained, often after anonymous tips of their "suspicious" behavior were reported, the Supreme Court held that the detainees could not assert Bivens claims to obtain damages.[106] The detainees were "indiscriminately labeled, and treated…as terrorism suspects, rather than as ordinary immigration detainees." They asserted that this treatment, including harsh conditions, physical abuse, excessive strip searches, and denial of access to basic hygiene, was due to their racial and religious identities.[107] However, the court considered the context of this case "different in a meaningful way" from earlier cases because the case occurred after 9/11 and implicated national security concerns.[108] Justice Kennedy ignored that *Bivens*, along with earlier cases, "generously implied a cause of action to vindicate individual rights" and instead disfavored such remedies, making them presumptively unavailable.[109] Such differentiation from precedent seems to imply that Justice Kennedy "regards constitutional liberty as limited for certain classes

102. *Holder*, 644 F.3d at 373, 387.
103. *In re* S-A-, 22 I. & N. Dec. 1328, 1330 (B.I.A. 2000).
104. *See* Saleh, *supra* note 79; Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).
105. *Id*.
106. *Ziglar*, 137 S. Ct. 1843.
107. Shirin Sinnar, *The Ziglar v. Abbasi Decision: Unsurprising and Devastating*, STANFORD LAW SCHOOL (Jun. 20, 2017) https://law.stanford.edu/2017/06/20/the-ziglar-v-abbasi-decision-unsurprising-and-devastating/ [https://perma.cc/9FNK-A8HF].
108. *Id*.
109. Russell K. Robinson, *Justice Kennedy's White Nationalism*, 53 UNIV. CAL. DAVIS L. REV. 1027, 1061 (2019).

of people," particularly Muslims.[110] Moreover, "although the Court has often cited wartime contexts as a special reason for judicial intervention," in this instance, they saw it as "grounds for judicial abdication."[111] The creation of a new rule in the face of established precedent when considering Muslim plaintiffs appears to have occurred due to Islamophobia or selective reasoning towards Muslims.

Ashcroft v. Iqbal is another depiction of such analysis.[112] The Court easily paints Muslims as an "out-group," which is homogenous and undifferentiated.[113] Because some Muslims were terrorists, the Court could easily intrude upon the lives of many Muslims under the assumption that all Muslims are the same.[114] The majority opinion called mass arrests of Muslims or Muslim-seeming individuals "likely lawful and justified" because the September 11 attacks were "perpetrated by 19 Arab Muslim hijackers" who belonged to a group "headed by another Arab Muslim . . . and composed in large part of his Arab Muslim disciples"—all of which, the Court said, made it unsurprising that law enforcement actions should disproportionately impact "Arab Muslims."[115] The Court did not differentiate between "Arab" and "Muslim" and treated the categories as interchangeable, assuming that those who were detained were suspect simply because they shared a religion or ethnicity with the 9/11 hijackers.[116] Such a thought process reflects the Orientalist assumption that Arab or Muslim men, who made up the majority of those detained, are inherently violent and an obvious threat to America. However, even a basic understanding of probability would make it clear to someone thinking without Orientalist heuristics that the fact that one Muslim committed a terrorist attack does not make it more likely that another would, just as landing heads in a coin toss does not make it more likely for the next toss to be tails. Again in *Trump v. Hawaii*,[117] the Court upheld Trump's Muslim ban, which rested on the underlying assumption that Muslims, who are inherently violent, can be regulated from entering the country.[118] Though the case was framed in terms of presidential authority,[119] the majority ignored, as Justice Breyer pointed out, the religious animus that played a significant role in the Proclamation itself.[120] By stating that a reasonable observer would not view the government action as enacted for the purpose of disfavoring a religion, the majority assumes that the

110. *Id*. at 1064.
111. *Id*.
112. *See* Shirin Sinnar, *The Lost Story of* Iqbal, 105 GEO. L. J. 379 (2017).
113. *Id*. at 412.
114. *See id*. at 388-99.
115. *Id*. at 388.
116. *See id*.
117. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2403, 2415 (2018) (upholding the Muslim ban, which "vest[ed] the President with authority to restrict the entry of aliens whenever he [found] that their entry 'would be detrimental to the interests of the United States'") (citing 8 U.S.C. § 1182(f)). This conclusion, that entrance of Muslims to the U.S. would be detrimental to the country, speaks clearly to the paradox with which Orientalists viewed the Orient: that its interests were opposite the Occident.
118. *See id*. at 2415.
119. *Id.*
120. *Id*. at 2429 (Breyer, J., dissenting).

regulation of immigrants from eight Muslim-majority countries was based on a true detriment from those countries, regardless of the fact that all individuals, –including infants and children, –were blocked by the Proclamation. We have seen this reasoning before: willful ignorance to authentic facts, in favor of stereotypical Orientalist beliefs, to the detriment of Muslims seeking relief in the courts. It also makes achieving justice more difficult for all Muslims because of the actions of a few, –a schema that the Court refuses to see as religious animus.

Finally, the majority made a weak attempt at deflecting the argument that the Proclamation was religiously-motivated, stating that "the Federal Government and the Presidents who have carried its laws into effect have—from the Nation's earliest days—performed unevenly in living up to" the ideal of religious plurality in America.[121] In doing so, the Court acknowledged the possibility of religious animosity within the Proclamation, yet dismissed it under the excuse that such discrimination has always been present. Citing to *Ziglar*, the majority stated that the president needs to have the ability to "respond to changing world conditions," which, by implication, may include using religious animus.[122] This reasoning not only solidifies religious animus as a potential tool for the executive, but it also hints at excusing its presence within the Proclamation. These cases blemish the justice system, accepting the use of Islam as a proxy for suspicion and aggression. In turn, these cases potentially accept the underlying contentions that Muslims are inherently suspicious and violent, that Muslims are less deserving of justice, and that Islam itself is an amalgamated threat to America.

Noting the law's treatment of Muslims is impactful both for the legal community and the country at large. Not only did the majority opinion reflect biases within decision-making, but it also sends ripples throughout the legal world. The underlying acceptance of this reasoning, and the unquestioned racism written into the law, raise the question: how many others thought the same? How many others swallowed the Orientalist implication that Muslims are inherently suspect?

B. An Exclusive Neutrality

The Another crucial lesson to pull from this analysis is that the law, and most legal officers, who are meant to be neutral enforcers of laws enacted on an objective basis, may not be as neutral as they originally appear. Though the rule of law is considered to function as a set of norms that "does not take sides on factitious moral issues" to facilitate democratic equality,[123] neutrality does not always mean value-neutral, but rather neutrality in pursuit of a goal considered valuable to the case at issue.[124] On the one hand, this false neutrality is present in the court system's understanding of its own role: as a neutral decisionmaker, the

121. *Id*. at 2418.

122. *Id.* at 2420.

123. Tara Smith, *Neutrality Isn't Neutral: on the Value-Neutrality of the Rule of Law*, 4 WASH. UNIV. JURIS. REV., 49, 63 (2011).

124. *See id.* at 67 ("[P]olicy neutrality has a purpose…and it is that value that determines the contours of the neutrality that is adopted.").

court system upholds itself as free from bias. The American justice system asserts its ability to make decisions in a neutral and objective manner. Yet the judicial system is just as affected by day-to-day biases, prejudices, and implicit predispositions as the rest of us. For women in hijab, this means that implicit or explicit expressions of Islamophobia or Orientalism may worm their way into opinions involving them.

In another vein, in cases where courts are required to assess neutrality within a law or policy,[125] courts seem to ignore the version of the Muslim's story in favor of an exclusive neutrality. For example, the majority in *Trump v. Hawaii* failed to see the Proclamation as motivated by religious animus, regardless of the sufficient evidence in the dissent.[126] These rulings—in which the court gets to determines what is and is not neutral—prove to be more detrimental to Muslim women because courts fail to understand the nuances of the hijab itself. Therefore, both larger, culturally-entrenched biases against Muslim women in hijab and the fact that hijabis have not yet made it into positions of power within the judiciary or the legal system may disparately impact them.

In many cases, these two forces act in tandem, to detrimental effects for Muslim women. For example, in *Webb v. City of Philadelphia*,[127] the Third Circuit had an opportunity to determine whether the hijab was or was not neutral for the sake of a policy banning religious symbols. A police officer who wore the hijab was forced to remove it due to concerns her department had for her safety and for the uniform look of officers.[128] The court upheld this policy, opining that concerns dictated by "maintaining the appearance of neutrality" weighed the facts in favor of the City.[129] The City cited the need to support "public confidence in the neutrality of its protectors" as the rationale for prohibiting its officers from wearing religious symbols.[130] Contrast this result with *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, a parallel case in which Muslim male police officers brought suit against their employer for a policy that prevented them from growing beards, as was required by their faith. In that case, the plaintiffs prevailed on their claim that the policy in question violated the free exercise clause.[131]

What separated these two claims? The court in *Webb* suggested that the department had a need to articulate "the police department's religious neutrality (or the appearance of neutrality)"[132] to deal with the public and to promote the image of a "disciplined, identifiable and impartial police force"[133] free from

125. *See, e.g.,* 138 S. Ct. 2417-18 (involving the question of religious animus in President Trump's Proclamation).
126. *Id.* at 2429 (Breyer, J., dissenting).
127. 562 F. 3d 256 (3d Cir. 2009).
128. *Id*. at 258.
129. *Id*. at 261.
130. *Id*.
131. 170 F. 3d 359, 360-67 (3d Cir. 1999).
132. *Webb*, 562 F. 3d at 261.
133. *Id*.

expressions of religion, bent, or bias. The court distinguished the cases because the department in *Fraternal Order of Police* had already given exceptions for beards to those who had medical reasons, and therefore was able to grant the exception for religious reasons, noting that failing to provide a religious exemption to the no-beards policy while granting medical exemptions suggested discriminatory intent. Yet in *Webb*, when the plaintiff pointed out that other officers wore cross pins or other religious symbols, and nonetheless she was denied the opportunity to wear her hijab, the court turned a blind eye and considered her evidence "unpersuasive."[134] The Third Circuit stated that because there were no specifics about who or when these symbols were worn, and because there was no evidence that the police department was aware of these other symbols, their existence could not be brought into evidence.[135] This showcases a unique issue that Muslim women face—the visibility of their religious symbol creates a type of disenfranchisement others seeking to express their religion may not encounter. Instead of being sympathetic to this concern, the court in *Webb* upheld an employment policy that prevented the plaintiff from wearing her hijab. This shows a strange imbalance: where the court claims to hold all religions to the same standard, some are more disadvantaged than others due to their inherent hypervisibility. The court's premise of neutral decision-making harms those with beliefs outside of the norm, as the court remains blind to the impact otherwise neutral policies may have upon Muslim women specifically.

These cases make it plausible to consider that some religious symbols portray appearance of that which is "other" (further from the court's defined "neutral") more than others. Whereas a beard may be viewed as a stylistic choice by the outside public and therefore is less "othered," the hijab is unmistakably Muslim and thus unmistakably not neutral. Where a cross pin may be ignored because of its size and inconspicuousness, a woman in hijab does not have the option of making her hijab less noticeable. She cannot pass off her headscarf as anything other than religious, nor can she shrink the size of the scarf to make it invisible to the casual observer. Thus, those people and things which invariably seem Muslim, like the hijab, are subject to different treatment than those which can pass as unaffiliated. Additionally, the hijab ranks highly in the hierarchy of symbols which are considered "other" due to its necessary link to Islam and its rigid appearance.

This exclusionary treatment of Muslim women's religious symbols is repeated in *EEOC v. GEO Group Incorporated*.[136] There, the Third Circuit ruled that three Muslim women, who sought to wear religious headscarves within a prison, did not have a right to wear their religious garb within the workplace due to a zero-tolerance headgear policy.[137] The court stated that there could be no religious accommodation for the women, even though male employees who wore

134. *Id*. at 262.
135. *Id*.
136. *See* 616 F.3d 265, 277-80 (3d Cir. 2010) (Tashima, J., dissenting).
137. *Id.* at 274-75 (majority opinion).

beards for religious reasons were permitted to have beards regardless of the management's clean-shaven policy.[138] The no headgear policy, which was supposed to prevent employees from wearing unauthorized hats or caps to differentiate them from prisoners and to preserve their safety, was not linked to preventing any accidents or attacks from prisoners. In fact, staff from the prison kitchen were permitted to wear headgear, even though they frequently interacted with prisoners.[139] Management appeared to exclude the hijab from the workplace, regardless of the fact that employees in different positions were permitted to display their religion or cover their head.[140] When women in hijab were at the forefront, the court favored the employer's "neutral" approach, ignoring that such neutrality was at the cost of a marginalized group.[141]

Finally, *Webb* and *GEO Group* display the court's willingness to police and presume control over women in hijab, possibly based on the Occidental urge to liberate Muslim women. Other cases involving women protesting forceful removal of their hijabs also seem to permit the disenfranchisement of women who wear veils.[142] Though it is not explicitly stated in these rulings, there is a sense that the court polices something as personal as headgear more easily when the target is the veiled Muslim woman.[143] In other words, the court feels less hesitation asking Muslim women to remove their veils because of the unique historical and social background in which veiled Muslim women are created, and because they favor a "normal" that does not include hijab.

Court decisions that favor removing hijabs functionally constrain self-expression for veiled Muslim women. Greene analogized such policing to the manner in which courts prohibit natural hairstyles on African American women, "[divesting] Black women of complete autonomy over deeply personal, political, as well as pragmatic grooming choices and bespeak[ing] a unique sense of identity informed by broader race and sex dynamics."[144] She claimed that "arming employers with unlimited control over whether and the manner in which a Black woman can wear a natural hairstyle deprives Black women power and privilege over how they adorn their heads and limits employment opportunities for which

138. *Id.* at 282 (Tashima, J., dissenting).
139. *Id*. at 286.
140. *See id.* at 286-87.
141. *See id.* at 290.
142. *See* D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FLORIDA INT'L UNIV. L. REV. 331, 334 (2013). Notably, "religious observance [is] in accordance with its 'neutral' or universal policy of prohibiting hair or head coverings in the workplace, rather than a targeted employment policy ridden with negative racial, gender, and/or religious stereotypes, bias, or animus." *Id.* (citing EEOC v. GEO Group, Inc., 616 F.3d 265, 277-92 (3d Cir. 2010)). Greene explained that "[u]nequivocally, *Geo Group*… demonstrate[s] the high level of deference that courts accord to employers in their enactment and enforcement of grooming codes regulating the manner in which women of color can adorn their hair in the workplace." *Id.* at 351. Green also notes, "however, recent Title VII cases that challenge private employers' bans are generally denominated as an employer's failure to accommodate." *Id*. at 343.
143. *See id*. at 351.
144. *Id*. at 350.

they are qualified."[145] Similarly, this pattern creates and continues a practice of othering and gatekeeping hijabi Muslim women from their own identities by casting them as outside of the "normal" neutral. It represents a way that workplaces may deprive Muslim women in hijab of the power to choose how they dress, giving the law an intrusive control over hijabis that is both rare and disenfranchising and limiting hijabis' ability to express and form their identity.[146]

III. FROM THE LEGAL IMAGINATION TO THE LEGAL INSTITUTION

It is worthwhile to note how legal institutions that uphold our democracy may affect legal actors all the way down. Just as the legal system prides itself for and accepts neutrality, legal actors are placed in a system which requires the "lawyers [who] interpret and implement" law to be "unaffected by issues of race."[147] Due to normative values in the legal profession, lawyers are not supposed to allow "their nonprofessional commitments to interfere with their professional obligation[s]."[148] This central tenet has led to the conception of bleached out professionalism, rooted in the idea that the "legal rules and procedures that lawyers interpret and implement" should be "unaffected by issues of race."[149] The application of these ideals, when placed upon Muslim women existing at the intersection of their gender and Islamophobia, create an exceptional weight.[150] Because hijab can never be fully negated, barring removal of the scarf itself, women in hijab can never fully pass as part of the majority group. In turn, the hijab is related to the wearer facing discrimination at all avenues of their legal careers. This discrimination begins during the bar exam, where women in hijab have reported harassment when they wear their headscarves, even if they fill out the necessary paperwork,[151] all the way until they make court appearances.[152]

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145. *Id*. at 350-51.
146. *See id.* at 351 (referring to "the lack of understanding, respect, autonomy, and dignity the employers conferred to the Black and Muslim female employees who donned natural hairstyles and hijabs in the workplace").
147. David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV., 1502, 1514 (1998).
148. *Id*. at 1505.
149. *Id*. at 1514.
150. *See* Aziz, *supra* note 59 (stating that "[i]f she is Muslim, then her behavior triggers stereotypes of Muslims as terrorists, disloyal, foreign, and suspect.").
151. Staci Zaretsky, *Muslim Woman Harassed Over Religious Headwear While Taking Bar Exam*, ABOVE THE Law (Aug. 2, 2013) https://abovethelaw.com/2013/08/muslim-woman-harassed-over-religious-headwear-while-taking-bar-exam/ [https://perma.cc/H2LA-R5AK].
152. *See Prejudice is Alive and Well in the Legal Profession*, THE AGE (Jun. 23, 2003), https://www.theage.com.au/national/prejudice-is-alive-and-well-in-the-legal-profession-20030623-gdvx6t.html [https://perma.cc/DJ9D-KU7Z]; *see also* Kristin Choo, *Muslim women lawyers aim to reconcile traditional beliefs with secular society,* ABA JOURNAL (Feb. 1, 2013), https://www.abajournal.com/magazine/article/walking_the_tightrope_muslim_women [https://perma.cc/2VM7-TDGH] (detailing the experience of Amina Saeed, co-founder and president of the Muslim Bar Association of Chicago, who says she wore a hijab from the time she started practicing law in 1996. But as she walked into the court, people often mistook her for a translator—sometimes even after she identified herself. "It made it more nerve-wracking because I felt I had to perform better than anyone else just to be considered an equal," she says. "But I honestly believe that that experience made me a better lawyer.").

A. Deprivation of Cultural Capital

Women in hijab are required to create a neutral workplace identity that may conflict with or erase their personal, religious, and social identity. Wilkins described neutrality in the professional world as the "professional self"—a version of self that is created through self-selection, professional education, discipline, and the unique norms and practices of the craft.[153] Scholars also have noted that the legal workplace, particularly the law firm, has an "up-or-out" structure, which "suggests the kind of identity an employee would want to negotiate" to advance in the rank.[154] To move up, employees need to not only be the most productive but must also project a "workplace identity" that conforms with the desired characteristics and criteria of the firm.[155] It is thus unsurprising that outsiders "subject to negative stereotypes" feel incentivized to put effort into constructing a workplace identity at the cost of their stereotyped identity.[156]

As feminist scholars have suggested, such bleached out professionalism led women, who do not fall within the neutral ideal, to take on traits of the dominant group to adapt when they were first joining the profession. As Carrie Menkel-Meadow proposed, "[s]ince our knowledge of how lawyers behave and of how the legal system functions is based almost exclusively on male subjects of study, our understanding of what it means to be and act like a lawyer may be misleadingly based on a male norm."[157] When women began entering the workplace, they had to learn to "speak male as a second language" to become expert lawyers.[158] From the outset, women were treated as "other" compared to the norms of the field.

Azizah al-Hibri, a Muslim corporate lawyer in the early 1990s, noted a similar concept applied to her religious identity. She stated, "legal culture…presses the religiously faithful to be other than themselves, to act publicly, and sometimes privately as well, as though their faith does not matter to them."[159] This creates a very unique choice pushing Muslims to either be lawyers or their Muslim selves.[160] In the same manner in which women initially found themselves hiding and covering their identity, Muslim lawyers felt the need to

153. Wilkins, *supra* note 146, at 1503.

154. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV., 1259, 1273 (1999) (explaining that "[a]n up-or-out structure is an incentive mechanism. The 'up' is the carrot and the 'out,' the stick…[inducing] employees to exert high amounts of efforts without the employer having to constantly supervise the employees…The specific nature of the up-or-out structure suggests the kind of identity an employee would want to negotiate.").

155. *Id*. at 1276.

156. *Id*.

157. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L. J. 39, 40 (1985).

158. Erika Rackley, *From Arachne to Charlotte: An Imaginative Revisiting of Gilligan's in a Different Voice*, 13 WM. & MARY J. WOMEN & L. 751, 759 (2007); *see also* SIMONE DE BEAUVOIR, THE SECOND SEX 77 (Vintage Books 2011) (stating, "man is defined as a human being and a woman as a female...whenever she behaves as a human being she is said to imitate the male.").

159. Azizah al-Hibri, *On Being a Muslim Corporate Lawyer*, 27 TEX. TECH. L. REV. 947, 948 (1996).

160. *See id*.

compartmentalize their faith to enter the workplace. The fact that veiled Muslim women exist at the intersection of both religious and gendered identities implicates concern.[161]

Because the hijab is an obvious religious signal, on many occasions, the mere appearance of women in hijab can trigger a barrage of harassment, implicit or explicit,[162] resulting in women feeling excluded or targeted.[163] If women choose to don the hijab at any point throughout their employment, they may be the victim of intrusive questioning, echoing the traditional Orientalist stereotypes regarding women in hijab.[164] They also may face the hard choice of picking between their religious identity or advancing their career.[165] Because women in hijab, by virtue of their headscarves, visibly display characteristics outside of the norm of the profession, they feel the heavy weight of negotiating and performing their identity to signal to the group that they are neutral.[166] Women in hijab are forced to perform the extra work of overcoming Orientalist stereotypes, and their bargaining power to lay claim to their identity weakens.[167] The weaker their bargaining power, the more they may have to compromise their identity and engage in the extra work.[168]

This depicts the bind Sahar Aziz spoke of—while members of the dominant group are able to live and work with minimal pressure to compromise their cultural values and norms, those deemed outsiders are coerced to relinquish, or, at the very least, hide their foreign languages, clothing, cultural practices, hairstyles, and associations to obtain gainful employment.[169] When veiled Muslim women refuse these pressures by existing in their veils, they are deprived of necessary cultural capital that would allow them to advance on the same plane as others who have the benefit of this capital. As studies regarding women and minorities have shown,

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161. *See* Greene, *supra* note 141, at 340, 354-55 (stating that a "multi-dimensional" analysis of hijabis reveals they are subject to "grooming codes that are the products of racial and gender stereotypes and bias" that they bear).

162. *See Types of Workplace Discrimination Experienced by Muslim Women Wearing Hijab*, http://atwork.settlement.org/downloads/atwork/Accommodating_Hijab_Types_Discrimination.pdf [https://perma.cc/WDM4-BTFY] (last accessed Apr. 28, 2022).

163. *See* Garcia-Yeste, Botton, Alvarez, & Campdepadros, *supra* note 65, at 8 (describing the experience of Noura, a Muslim woman who studied law and stated the discrimination she suffered from her classmates due to wearing a hijab came in many different types: "it could be that there was a section of the class who did not like (me) too much[]…we were in a group and talking to others and me, although I wanted to participate, I did not exist.").

164. *See Prejudice is Alive and Well in the Legal Profession, supra* note 151 (describing a situation in which a female partner noted her managing partner quizzed her after she chose to don the hijab asking, "How will the scarf sit on your head? Can any of your hair show? Will there be any problems with you representing male clients? Is this your husband's choice? Is this your final decision?").

165. *See id*. Numerous law school graduates stated they had been told if they removed their headscarf, the job would be theirs. *Id.* "It doesn't fit in," they were told. *Id.* The legal profession is "unfortunately brutal" and they would "stand out." *Id.* Though the firms stated they had "nothing against Muslims… [they were] concern[ed] about how clients would react to a woman wearing a headscarf handling their case." *Id.*

166. *See* Carbado & Gulati, *supra* note 153, at 1277 (discussing how minority women must perform identity to combat stereotypes in the workplace).

167. *See id*.

168. *Id*.

169. Aziz, *supra* note 59, at 36-38.

groups deprived of valuable cultural capital, including disposition to share firm values, social networks and relationships, and affinity with firm culture, tend to have lower rates of attaining high-ranking legal positions, regardless of law school performance.[170] Judgments of cultural capital are based on the dominant group's traits, which are considered the "ideal type" of worker.[171] Women who wear the hijab, by the very condition of their appearance, do not fit into the typical matrix of cultural capital that is required to advance in law firms and the profession in general.[172] These implicit pressures to be a different "type" of worker systemically disparage and exclude them and create psychological costs from negating an inherent part of their identity.[173]

It is important to note that there is an intersection between deprivation of identity at the hands of expected neutrality and the imposition of outside stereotypes, which doubly harms Muslim women in hijabs. Though the pressure to conform to "neutral" itself is a heavy burden, veiled women simultaneously face the typical, traditional stereotypes about their appearance. Even within the law, and perhaps more so because of the profession's norms, Muslim women in hijabs indicate that people think they are "weak and not able to express opinions…hidden behind the veil" and are "surprised [that they are] competent."[174] Muslim women in hijab are confronted with outright comments and thoughts that they are "prohibited from getting an education and being engaged in society."[175] It is this pairing that creates the unique nexus at which they stand, between the pressures of neutrality and archaic gendered Orientalism.[176]

CONCLUSION: THE MUSLIM WOMAN QUESTION, OR, SOLUTIONS

Ahmed Ajil and Kwan-Lamar Blount-Hill suggested that, to discover "the lived realities of the colonized subject inside the global north, knowledge should be produced by researchers who have an intimate understanding of these lived

170. *See* Fiona Kay & Elizabeth Gorman, *Women in the Legal Profession*, 4 ANN. REV. OF L. & SOC. SCI. 299 (2008), *in* THE LEGAL PROFESSION: ETHICS IN CONTEMPORARY PRACTICE (Ann Southworth & Catherine Fisk, eds. 2019).

171. Ruth Woodfield, *Gender and the Achievement of Skilled Status in the Workplace: the Case of Women Leaders in the UK Fire and Rescue Services*, 30 WORK, EMPLOYMENT AND SOCIETY 237, 239 (2015).

172. *See* Monique R. Payne-Pikus, John Hagan, & Robert L. Nelson, *Experiencing Discrimination: Race and Retention in America's Largest Law Firms*, 44 L. & SOC'Y REV. 553 (2010), *in* THE LEGAL PROFESSION: ETHICS IN CONTEMPORARY PRACTICE (Ann Southworth & Catherine Fisk, eds. 2019) "African American associates are less likely to be mentored because of their differences in human capital… one would expect mentoring and training to matter less in explaining disparities in retention outcomes once "merit" is controlled for…and…one would expect mentoring to continue to impact attrition even when 'merit' is controlled for.").

173. Carbado & Gulati, *supra* note 153, at 1277.

174. Chicago Tribune, *Muslim women's law firm breaks down stereotypes*, EAST BAY TIMES (Aug. 15, 2016) https://www.eastbaytimes.com/2008/09/03/muslim-womens-law-firm-breaks-down-stereotypes/ [https://perma.cc/E8KK-5EC4].

175. *Id*.

176. *See generally* Aziz, *supra* note 59, at 42-43 (discussing how even after she has negotiated the pressures of coercive assimilationism, "she is often assumed to lack agency by the dominant social group" due to traditional Orientalist stereotypes.).

realities."[177] I hold that this applies in the case of Muslim women, not only for purposes of producing academic knowledge, but also for purposes of producing cultural awareness and capital. Rather than allowing a world in which the male, non-Muslim is the yardstick of maturity, autonomy, and rationality, there is much we can gain if we accept a world where our ethnic, religious self is not judged by the archaic majority's rules, but rather by a human perspective, inclusive of all voices.

Here, I see a parallel with early feminist writers who explored the various values women brought to the workplace and world stage. As Carol Gilligan posited, we lose something when we neglect to ask the woman question and exclude women from thought.[178] Similarly, there is much we lose out on when we neglect Muslim women from our perception of "normal" and from our discourse as a whole. To ask the Muslim woman question, to ask what her version of the story is, and how will she tell it,[179] is revolutionary: it finally unveils the Orientalist narrative and the exclusion of Muslim women. It finally increases opportunities otherwise denied to Muslim women by breaking down the stereotypes she otherwise would be confronted with every time she enters a room. When we refuse to bring the veiled Muslim woman into the picture, we are not only making an oversight but maintaining a longstanding worldview that denies veiled Muslim women autonomy. We are allowing structures which alienate Muslim women, and thereby alienate all of us from Muslim women, to dominate.

We should encourage law firms and legal institutions to engage in implicit bias testing so that individuals may be made aware of the version of Muslim women they have been falsely taught about. Furthermore, diversity and inclusion training should include cultural information about Muslim women, the stereotypes they face, and the ways to counteract negative thought processes the public may hold. Re-education about Muslim women is necessary to ensure their freedom to exist in the future. On a structural level, legislation, such as that which has been brought to protect the right to wear natural hair at work, should be expanded to include wearing hijab in workplaces.

It is possible to create a world that is not distinctly colonial and rife with stereotyping, but balances various perspectives, blending identities beyond our created perceptions of one another.[180] Where the veil does not signify a tired narrative but individuals in themselves. Where various voices, ways of dress, and

177. *See* Ajil & Blount-Hill, *supra* note 57, at 88.

178. *See generally* CAROL GILLIGAN, REVISITING IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT xv (Harvard Univ. Press 1982) (discussing "psychological theory and women's development").

179. *See generally* Carol Gilligan, *Revisiting "In a Different Voice*,*"* 39 HARBINGER 19 (2015) (discussing a range of topics, including gender and reproductive rights in a keynote address).

180. *See* BELL HOOKS, FEMINISM IS FOR EVERYBODY: PASSIONATE POLITICS X (South End Press 2000). ("Imagine living in a world where there is no domination, where females and males are not alike or even always equal, but where a vision of mutuality is the ethos shaping our interaction. Imagine living in a world where we can all be who we are, a world of peace and possibility…for…fully self-actualized females and males able to create beloved community, to live together, realizing our dreams of freedom and justice, living the truth that we are all 'created equal.'").

true selves are naturally embraced. Welcoming veiled Muslim women to speak about their own gender, religion, and stature without preconceived notions not only makes it possible to see opinion and autonomy where there previously was only the assumption of oppression, but also makes room for Muslim women—and thereby Muslims as a group—to define their own neutral, to enter professional and traditionally closed-off spaces with ease, and to be a part of the conversation.

The Law of Assisted Reproductive Technologies for LGBTQ+ Parents:

A Recognition Regime of Family Law Built in Opposition to the Regulatory Regime

Rose Holden Vacanti Gilroy†

INTRODUCTION

On August 22, 1996, President Bill Clinton signed the Personal

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Responsibility and Work Opportunity Reconciliation Act (PRWORA) into law, "the most sweeping crackdown on dead-beat parents in history."[1] The legislation included the following threat to parents court-ordered to pay child support:

> With this bill we say, if you don't pay the child support you owe, we'll garnish your wages, take away your driver's license, track you across State lines, if necessary, make you work off…what you owe. It is a good thing, and it will help dramatically to reduce welfare, increase independence, and reinforce parental responsibility.[2]

PRWORA drastically reimagined the United States' welfare regime to align with the Clinton administration's neoliberal mission. The legislation shifted responsibility from the welfare state to impoverished individuals, and perhaps surprisingly, reconfigured the legal regulation of parentage. Although the requirement that a mother disclose her children's paternity to receive government benefits predates PRWORA, the legislation strongly reinforced this invasive practice by reducing benefits for those unwilling to disclose paternity.[3] It streamlined the path to legal parentage for fathers—fathers who mothers did not necessarily intend, or want, to be part of their child's life—in order to hold them responsible for child support payments.[4]

PRWORA, bearing a title that exudes neoliberalism,[5] should be understood as a *responsibilization* project that works to create worthy and unworthy parental subjects based on their ability and willingness to financially support their

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1. Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters, 1996 PUB. PAPERS 1325 (Aug. 22, 1996).
2. *Id.*
3. Omarr Rambert, *The Absent Black Father: Race, The Welfare-Child Support System, and the Cyclical Nature of Fatherlessness*, 68 UCLA L. REV. 324, 343 (2021).
4. MELINDA COOPER, FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM 102 (2017). Professor Melinda Cooper also explains what makes parentage through welfare reform unique, writing:

> In what marks a radical departure from standard family law, welfare law derives legal fatherhood from the mere fact of a biological relationship and proceeds to enforce the resulting obligations on this basis alone. Yet, even as this legal sleight of hand imposes obligations on men, it also authorizes them to claim certain exceptional rights. Once he has been named a legal father, a man can legitimately claim visitation and custody rights to his children, even if he previously had no relationship with them…Family law in general refuses to grant legal paternity to men on the simple basis of biological kinship, insisting that some more solid and long-lasting emotional relationship must be established before a man can be considered a father.

Id. at 104.

5. While neoliberalism is a commonly employed term, this Paper centers Professor Wendy Brown's definition of neoliberalism as "[A] normative order of reason developed over three decades into a widely and deeply disseminated governing rationality" that "transmogrifies every human domain and endeavor, along with humans themselves, according to a specific image of the economic." WENDY BROWN, UNDOING THE DEMOS, NEOLIBERALISM'S STEALTH REVOLUTION 9 (2015).

families.[6] A term developed by social scientists in the 1990s, *responsibilization* refers to a process "whereby subjects are rendered individually responsible for a task which previously would have been the duty of another—usually a state agency—or would not have been recognized as a responsibility at all."[7] Like many social programs in the United States today, PRWORA stigmatizes those who turn to the government for support as a means of encouraging self-reliance.

In 1993, three years prior to President Clinton's remarks, the high courts in Vermont and Massachusetts, respectively, allowed non-birth mothers to establish legal parentage of children that their same-gender partners conceived using assisted reproductive technologies (ART), a milestone for LBGTQ+ parents in the United States.[8] In 2000, four years after PRWORA's enactment, Massachusetts became the first state to allow two women to be listed on the birth certificate of a child born through reciprocal in-vitro fertilization (IVF).[9] These monumental state court decisions became crucial precedent for LGBTQ+ parents attempting to establish legal parentage after using ART to conceive. The state court decisions also reflect the era's nearly universal support for family responsibilization—which stemmed from a "convergence" of neoliberal and social conservative thought.[10] They also demonstrate the state's willingness to extend legal protections to LGBTQ+ families whose use of ART was thought to prove both their economic independence and their willingness to conform to nuclear family norms.[11]

Writing in 1964, Jacobus tenBroek posited the existence of "dual system[s] of family law" in the United States: a family law that governs "those with means and another for the poor."[12] It is now widely understood that the latter regime is tied to, and upheld by, criminal law, and exists primarily to regulate, surveil, and police Black families and incarcerate Black individuals.[13] In contrast, the former

6. This paper uses the term "responsibilization" to mean the process by which individuals are held personally responsible to support themselves on account of the government's refusal to provide social services.
7. *See* KIRSI JUHILA, SUVI RAITAKARI & CECILIA HANSEN LÖFSTRAND, RESPONSIBILISATION IN GOVERNMENTALITY LITERATURE, 1–2 (2017). The term responsibilization can be traced to the writings of Peter Miller and Nikolas Rose, with obvious influences from Michel Foucault. *Id.*
8. SUSAN L. CROCKIN & HOWARD W. JONES, LEGAL CONCEPTIONS: THE EVOLVING LAW AND POLICY OF ASSISTED REPRODUCTIVE TECHNOLOGIES, 17 (2010). Reciprocal IVF is the process by which one partners' eggs are used to create an embryo carried by the other partner.
9. *Id.*
10. Professor Wendy Brown notes that the family is where seemingly oppositional ideologies intersect, and quotes Professor Melinda Cooper writing, "Cooper studies the convergence between neoliberalism and social conservatism at the site of the traditional family: 'Despite their differences on virtually all other issues, neoliberals and social conservatives were in agreement that the bonds of family need to be encouraged—and at the limit enforced.'" WENDY BROWN, IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST 92 (2019).
11. *Id.*
12. Janet Halley, *What is Family Law: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189, 291 (2011) (quoting Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status,* 16 STAN. L. REV. 257 (1964)).
13. *See generally* Andrea L. Dennis, *Criminal Law as Family Law*, 33 GA. ST. U. L. REV. 285

is a civil law system unconnected to the carceral state. Considering its ties to surveillance and invasive, legalistic control of families, the system of family law that governs families experiencing economic precarity can be understood as family law's *regulatory regime*.[14] Due to PRWORA's systemization of legal mechanisms that are directly tied to the carceral state, such as child support enforcement, it is part of this regulatory regime. However, this Paper argues that LGBTQ+ families using ART are not regulated by either of the two preexisting family law systems. Instead, with the rise of legal recognition for LGBTQ+ families using ART, a third system of family law is born. This third system can be understood as family law's *recognition regime*, since it systematizes legal recognition for LGBTQ+ parents using ART. Unlike family law's regulatory regime, the recognition regime does not regulate and discipline families without their consent, but instead gives LGBTQ+ parents with economic means, the majority of whom are white, access to systems through which they can achieve legal parentage. Unlike the first regime of family law (the civil regime), what unites the regulatory and recognition regimes is that both systems seek to establish legal parentage, albeit through very different means and for distinct reasons. Due to their economic self-sufficiency, heteronormativity, and often whiteness, the parental status of the civil regime's subjects typically goes unquestioned.[15] Despite their differences, the three separate regimes of family law should be considered as parts of a whole, united and upheld by the state's goal of creating self-sufficient family units. Professor Janet Halley describes family law as a "legally regulated private welfare system,"[16] meaning that family law exists to establish responsibilized nuclear families, so that the state can avoid providing social services and support. However, family law should also be understood as designed to create worthy and unworthy parental subjects—those who deserve *regulation*, and those who deserve *recognition*.

Therefore, building off of tenBroek's scholarship, this Paper will discuss three distinct family law regimes, focusing on the latter two: 1) the civil regime, which governs heterosexual families with economic means for whom parentage is

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(2017). Andrea L. Dennis further explains that,

> The expansion of criminal justice has not only placed more individuals under criminal justice control, but also has inserted itself into virtually every aspect of family life. The modern criminal justice system regulates intrafamilial behavior that society deems wrongful as well as many facets of family life that are considered socially desirable. Legislatures have enacted new criminal laws targeting behavior between family members. Law enforcement and prosecutors directly and indirectly punish family members for the behavior of other family members. Courts can obtain jurisdiction over families who are the subject or target of criminal and quasi-criminal court proceedings.

Id. at 286.

14. *See infra* Part I(A).
15. This Paper refers to the first regime of family law as that which governs traditionally structured families, with at least some financial means, whose family law matters are merely civil and not intertwined with criminal law.
16. Janet Halley, *What is Family Law: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 6 (2011).

not a legal question; 2) the regulatory regime, which governs families facing economic precarity—and Black families in particular—and uses tactics from surveillance to incarceration to impose parentage on individuals; and 3) the recognition regime, which governs LGBTQ+ families with the economic means to access ART, and systemizes the path to legal parentage for this specific group of LGBTQ+ parents.

Although many families governed by the regulatory regime of family law exist outside of a nuclear family paradigm, the state forces parents to create quasi nuclear family structures in an attempt to ensure a child has two adults providing financial support.[17] This manifests as the state conditioning a mother's ability to receive social benefits, such as Temporary Assistance to Needy Families

17. The nuclear family, and the parent-child relationships central to its formation, is at least in part a racialized outgrowth post-Civil War America. Prior to the Emancipation Proclamation, white men who owned enslaved persons acted as the patriarchs and masters of households that included not only their wives and children as dependents, but also the enslaved men, women, and children they owned. After emancipation, within the family context, white men only wielded their patriarchal power over their wives and children. COOPER, *supra* note 4, at 79.

Furthermore, enslaved Black Americans were denied the right to a nuclear family because the family as a unit based on biology and kinship is antithetical to the practice of slavery. Professor Hortense Spillers explains that "if 'kinship' were possible [for enslaved people], the property relations would be undermined, since the offspring would then 'belong' to a mother and a father." Hortense Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17 DIACRITICS 64, 75 (1987). Spillers also writes that,

> It seems clear, however, that 'Family,' as we practice and understand it 'in the West'—the vertical transfer of a bloodline, of a patronymic, of titles and entitlements, of real estate and the prerogatives of 'cold cash,' from fathers to sons and in the supposedly free exchange of affectional ties between a male and a female of his choice-becomes the mythically revered privilege of a free and freed community.

Id. at 74.

Essentially, enslaved individuals were denied the right to marry and have legal parentage rights, since such rights and families would threaten the "absolute" right of the white male masters. COOPER, *supra* note 4, at 79. Spillers explains that just like for enslaved fathers, enslaved mothers had no rights over their children. Spillers writes, "In effect, under conditions of captivity, the offspring of the female does not 'belong' to the Mother, nor is s/he 'related' to the 'owner,' though the latter 'possesses' it, and in the African-American instance, often fathered it, and, as often, without whatever benefit of patrimony." Spillers, *supra* note 17, at 74. However, immediately after the abolition of slavery, the federal government established the Freedmen's Bureau to ensure that Black men knew that "freedom in the labor market came with the right to marry and the responsibility to support a wife and children." It should not go unnoticed that the federal government established the Freedmen's Bureau, which some consider the United States' "first federal welfare agency," in order to responsibilize Black men as husbands and fathers, and ensure that the state did not have to step in and support recently emancipated Black Americans. For this reason, Freedmen's Bureau agents were allowed and encouraged to officiate marriages between formerly enslaved individuals, and to track down spouses that were separated by their masters during slavery. Furthermore, states created apparatuses, with regulatory and putative intent, to ensure that formerly enslaved people living with a partner to whom they were not married were subject to prosecution for adultery and fornication. Clearly, the state has used the nuclear family to responsibilize, and create a "private welfare system" for Black Americans since the abolishment of slavery—PRWORA follows in this tradition. COOPER, *supra* note 4, at 78–80; Halley, *supra* note 12, at 6.

(TANF)—a program that PRWORA established to replace Aid to Families with Dependent Children[18]—on her willingness to disclose her child's paternity.[19] This process allows the state to transfer responsibility to the father through court-ordered child support payments, which are used to reimburse the state for TANF payments, so that the government is not responsible for supporting a family in need of assistance.[20] As Professor Melinda Cooper explains, PRWORA's focus on tracking down fathers, especially Black fathers, to provide child support, "served to remind women that an individual man, not the state, was ultimately responsible for their economic security. Unless a woman could assume 'personal responsibility' for her economic fate, she would have to accept her condition of economic dependence on an absent father or substitute husband."[21] Therefore, even in the process of providing support to single mothers, PRWORA reinforces the importance of the nuclear family (a unit traditionally comprised of two married parents of opposite genders and their biological children) and attempts to create a "private welfare system"—proving that the legislation is an apparatus of the regulatory regime.

Although family law's recognition regime is not forced onto LGBTQ+ parents using ART, interaction with the system is necessary to establish legal parentage. This Paper argues that obtaining legal parentage is easier for LGBTQ+ parents who conform to signifiers of the nuclear family structure, such as marriage, monogamy, and well-paid employment—statuses that are in many circumstances prerequisites for legal parentage through ART.[22] Seemingly, the state is willing to grant legal parentage to LGBTQ+ parents not out of a newfound acceptance of LGBTQ+ individuals, but rather on account of some LBGTQ+ families' willingness and ability to exist as "private welfare systems," which uphold nuclear family structures. For LGBTQ+ families who adhere to less respectable kinship structures, or do not have the economic power to participate in the recognition regime, there are few legal protections available.

Contrasting family law's regulatory and recognition regimes aids this Paper in revealing that the state's interest in family building and the establishment of legal parentage is motivated by a desire to create the "private welfare system[s]" Halley describes, in order to avoid providing government support, and shift care responsibilities to the family.[23] Considering the concurrent rise of the contemporary welfare state with its reinvigorated interest in paternity, and the

18. *See generally* GENE FALK, CONG. RSCH SERV., R44668, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: A LEGISLATIVE HISTORY (October 6, 2021).
19. Rambert, *supra* note 3, at 343.
20. *Id.* at 344.
21. COOPER, *supra* note 4, at 68.
22. As will be discussed in Part I (B), the second-parent adoption process, which is often necessary to establish legal parentage for LGBTQ+ parents using ART, can include home studies, background checks, and scrutiny from the court. It is also an expensive process, requiring parents to have a not insignificant amount of financial power. *"Confirmatory" or Second-Parent Adoption: What You Need to Know*, FAMILY EQUALITY COUNCIL (last visited Nov. 17, 2021), https://perma.cc/26KY-EMBQ.
23. Halley, *supra* note 12, at 6.

recognition regime of family law with its acceptance of respectable LGBTQ+ families, it should not come as a surprise that the two systems are mutually constitutive. In Part I, this Paper argues that the recognition regime of family law deems parental subjects as worthy on account of their situational opposition to parents governed by the regulatory family law regime—a difference that is rooted in racism and exemplifies family law's intent to uphold capitalism through the creation of "private welfare systems"—by examining the parental binaries created by racism, financial status, apparent success, and marriage. Due to its past and present impact, and focus on establishing legal parentage, this Paper uses PRWORA as the primary example of welfare legislation that falls under the regulatory regime of family law. In Part II, this Paper uses intent-based parentage as a case-study exemplifying how the regulatory and recognition regimes of family law are deeply interconnected even as they create divergent parental subjects—in borrowing voluntary acknowledgements of parentage (VAPs) from the regulatory regime of family law, the recognition regime further entrenches the second system's weaponization of parentage as a means of responsibilization.

I. PARENTAGE IN OPPOSITION

The recognition regime of family law creates worthy parental subjects by forcing them to prove their opposition to those governed by the regulatory regime. Uncovering these constructive binaries illuminates what attributes make a parent valuable in the United States—the overarching theme is that a valuable parent is one who monetarily provides for their family so that the state does not have to do so. This Paper will focus on the following four differentiating factors that position families regulated by the regulatory and recognition regimes of family law in opposition to one another: 1) race and racism; 2) wealth and poverty; 3) parentage perceived as success and parentage perceived as failure; and 4) marital status.

A. Race, Racism, and Parentage

Unsurprisingly, there is a racial divide between parents who are governed by the regulatory and recognition regimes of family law. President Clinton chose to employ highly racialized language when he referred to "dead-beat parents" in his remarks on PRWORA.[24] Professor Ann Cammett explains that the figure of the "deadbeat dad" arose as the gendered counterpart to the "welfare queen," writing, "[t]he image of the Deadbeat Dad also slowly emerged as a racialized trope: an uncaring Black father unwilling to pull his weight, often with multiple families, who expects taxpayers to carry his burden."[25] The groundwork for this racist stereotype long predates PRWORA, and was perhaps first given outward political sanction by Assistant Labor Secretary Daniel Patrick Moynihan's 1965 report, *The*

24. Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters, *supra* note 1, at 1326.

25. Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233, 238 (2014).

Negro Family: The Case for National Action (the Moynihan Report).[26] Just as President Clinton would do via PRWORA half a century later, the Moynihan Report pathologized Black fatherlessness and single-mother families, blaming Black individuals for poverty, rather than systemic racism—and laying the groundwork for the creation of the "deadbeat dad" and the "Welfare Queen."[27] PRWORA stands as an example of regulatory regime legislation that embodies these racist tropes laid out in the Moynihan Report.

Antithetically, PRWORA established a system in which states, as well as custodial parents, financially benefit if a child's parents do not live together.[28] This fact further demonstrates that while President Clinton may have referred to "family" as a "fundamental" value in his PRWORA remarks, under capitalism, the state's interest is always in lowering its bottom line rather than supporting families for reasons of morality.[29] PRWORA does not prioritize enforcing child support payments merely to benefit custodial parents and their children; instead, states collect child support benefits on behalf of parents receiving welfare as a way of reimbursing themselves for state-sponsored welfare programs. Omarr Rambert explains that welfare legislation associates "the amount of child support a custodial parent—usually the mother—receives to the amount of time the mother has with the child," and continues, stating that a "decrease in the time a father spends with his child (or overall fatherlessness) corresponds with an increase in child support that a mother is awarded and in turn, an increase in the amount the state government will receive from the federal government."[30] Therefore, the state stigmatizes single-parent families on welfare, while also disincentivizing parents from creating the nuclear families and "private welfare systems" it purports to value. The state's willingness to disincentivize nuclear family structures for its own financial benefit exemplifies how its interest in families is primarily economic.

Furthermore, PRWORA's child support enforcement apparatus works to incarcerate more Black men, the most disproportionately incarcerated group in the United States.[31] All fifty states have laws that allow a parent to be incarcerated for nonpayment of child support[32]—in South Carolina, one in every eight inmates is jailed for failure to pay child support.[33] Furthermore, enforcement of child support payments is racialized: a recent study in Indiana found that "unmarried, Black fathers had child support enforced against them in court at a rate of 57 percent, compared to 45 percent of white unmarried fathers and 38 percent of Hispanic

26. *See generally* DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR OFFICE OF POLICY PLANNING AND RESEARCH, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965).
27. Rambert, *supra* note 3, at 335.
28. *Id.* at 343.
29. Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters, *supra* note 1, at 1328.
30. Rambert, *supra* note 3, at 343.
31. *See* Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (Oct. 13, 2021), https://perma.cc/UL2V-YDE7.
32. Rambert, *supra* note 3, at 350.
33. *Id.*

unmarried fathers."[34] Therefore, PRWORA's child support enforcement mandate disproportionately impacts Black families and perpetuates the mass incarceration of Black men, which leads to increased precarity for the families PRWORA purports to aid through child support enforcement.

On the other hand, the laws that establish parentage for LGBTQ+ parents using ART primarily regulate white parents. Race is a determinative factor in who uses ART. A survey by the Society for Assisted Reproductive Technology reports that white women account for 85.5 percent of ART cycles, whereas Black women only account for 4.6 percent[35]—statistics that do not align with the racial breakdown of the United States.[36] Therefore, the laws that regulate parents using ART primarily regulate white parents. While these laws are often unaccommodating for LBGTQ+ parents, unlike the regulatory regime of family law, which often targets Black parents, the laws regulating ART are not putative and are not tied to the carceral state.

A lack of access to ART partially explains the racial breakdown of individuals using ART since Black women are twice as likely as white women to rely on Medicaid rather than private health insurance plans[37]—and Medicaid does not cover most fertility treatments.[38] However, the United States' medical system has a history of inflicting reproductive violence on people of color, and Black and Indigenous women in particular.[39] The subsequent, and understandable, mistrust of the medical system could also explain some of the racial disparity in ART use since ART can be a highly medicalized means of family building. Further, it is important to note that legislation such as PRWORA creates invasive and complex barriers to social supports, which exist at least in part to dissuade Black individuals from having children. Professor Dorothy Roberts explains, "Politicians, policy makers, sociologists, demographers, public-health experts, and the media, all cast black women's childbearing as an urgent social problem because black women have too many babies and transmit their innate depravity to their children—genetically, chemically, or culturally."[40] Therefore, it is not surprising that the ART industry does not target a population that is already disincentivized by the state, and by systemic racism, from family building. All of these factors contribute to the writing of laws regulating ART with white parents in mind.

The recognition regime's focus on the reproduction of whiteness, as well as

34. *Id.* at 350–51.
35. Ada C. Dieke et al., *Disparities in Assisted Reproductive Technology Utilization by Race and Ethnicity, United States, 2014: A Commentary*, 26 J. WOMEN'S HEALTH (LARCHMT) 605, 606 (2017).
36. *See Quick Facts,* U. S. CENSUS BUREAU (July 1, 2019), https://perma.cc/C8QD-ZGEH.
37. *See* Dieke, *supra* note 35, at 606; *see also* Gabriela Weigel et al., *Coverage and Use of Fertility Services in the U.S.*, KAISER FAMILY FOUNDATION (Sept. 15, 2020), https://perma.cc/3MWG-8XX6.
38. Jenna Walls et al., *Medicaid Coverage of Family Planning Benefits: Results from a State Survey,* KAISER FAMILY FOUNDATION (2016), https://perma.cc/P823-KREH.
39. LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION, 14, 54–57 (2017).
40. Dorothy E. Roberts, *Why Baby Markets Aren't Free*, 7 UC IRVINE L. REV. 611, 615 (2017).

its economic barriers to entry, leaves many LGBTQ+ families of color (and to a lesser extent white LGBTQ+ families facing economic precarity) without the privileges the recognition regime gives to its white subjects. Without being the intended subjects of the recognition regime, LGBTQ+ families of color are not only deprived of its subjectivity, but likely further marked as deviant, both for their sexuality and race, and for their inability to fit within a family law regime. Existing outside of a family law regime inevitably places already stigmatized families in further legal precarity.

Not only do the laws regulating the establishment of legal parentage for parents using ART intend to regulate white parents, but also, the ART industry and its related laws "reflect and promote a racist hierarchy that values white babies as the most cherished products of reproductive transactions."[41] Perhaps no case in the United States better exemplifies this than *Cramblett v. Midwest Sperm Bank*.[42] Jennifer Cramblett, a white mother, sued a sperm bank for wrongful birth after she was inseminated with a Black donor's sperm, even though she had specifically chosen a white donor.[43] The basis for Cramblett's claim was her daughter's mixed-race status—Cramblett and her white partner, Amanda Zinkon, paid for a white donor's sperm and wanted damages amounting to $150,000 to make up for the "personal injuries, medical expense, pain, suffering, emotional distress, and other economic and non-economic losses" they apparently suffered from having a daughter who is not white.[44] While Cramblett did not prevail on her claim, the case demonstrates how many parents turn to the ART industry and its related laws to reproduce whiteness.

However, Professor Ulrika Dahl explains that it is not only white parents, but also the state, that is invested in ART's ties to reproducing white babies. Dahl writes that the reproduction of whiteness is a "project of racial and national reproduction."[45] Essentially, the state is incentivized to uphold ART's reproduction of whiteness in the name of nation building, since white babies become worthy white citizens—which further explains why the state upholds the recognition regime of family law for LGBTQ+ parents using ART. Considering that anti-Black racism is endemic to the United States, it is not surprising that legislation stemming from the regulatory regime of family law, such as PRWORA—a law that works to establish Black parentage in order to penalize Black fathers—is entirely different in intent from the recognition regime of family law which regulates ART, an industry that at least partially exists to reproduce whiteness.

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41. *Id.* at 616.
42. *See generally* Cramblett v. Midwest Sperm Bank, LLC, 230 F. Supp. 3d 865 (N.D. Ill. 2017).
43. M. Annie Houghton-Larsen, *I Paid for a White Baby: How Assisted Reproductive Technologies Preproduce White Supremacy*, 11 GEO. J. L. & MOD. CRIT. RACE PERSP. 161, 161–62 (2019).
44. *Id.* at 169.
45. Ulrika Dahl, *Not Gay as in Happy, but Queer as in Fuck You: Notes on Love and Failure in Queer(ing) Kinship,* 19 LAMBDA NORDICA 143, 162 (2015) (quoting JUANA MARÍA RODRÍGUEZ, SEXUAL FUTURES, QUEER GESTURES, AND OTHER LATINA LONGINGS 44 (2014)).

B. Wealthy Parents vs. Impoverished Parents

Financial status may play the most substantial role in determining which regime of family law governs a particular parent. Professor Dorothy Roberts writes, "[T]he ability of potential parents to engage in market transactions involving children enhances parents' autonomy over their family lives. The free market seems to liberate us from the constraints of biology and state control."[46] Expanding on Roberts' theory, it seems that the recognition regime of family law grants "worthy" parents—those who can prove their ability to provide a "private welfare regime" for their families—autonomy as a reward for their self-sufficiency, placing them in opposition to parents who depend on the state for some level of support. Having a child through ART is a medically and legally expensive process—especially for LGBTQ+ parents. Therefore, participation in this form of family building legitimizes a family's economic self-sufficiency. This autonomy manifests in a regime of family law that does not force participation; rather families choose to interact with the recognition regime of family law to establish legal parentage. Although in many cases LGBTQ+ parents must use the recognition regime of family law to establish legal parentage, and therefore sometimes face intrusive legal processes while doing so, the laws regulating LGBTQ+ parents are not nearly as conditional or intrusive as the regulatory regime of family law.[47] Essentially, the state rewards those who prove their self-sufficiency with fiscal autonomy, and punishes those who are dependent by undermining their autonomy through state intervention.

ART is expensive—especially for LGBTQ+ families who, in most circumstances, will need to purchase eggs or sperm on top of the cost of the ART procedures.[48] In vitro fertilization (IVF), one common form of ART used by LGBTQ+ families, costs between $12,000 and $15,000, which does not include the $1,500 to $6,000 dollars in additional costs for medication.[49] If the first round fails, the following frozen embryo transfers (FET) cost anywhere from $4,000 to $7,000 per cycle.[50] Many LGBTQ+ families must use surrogacy to conceive a genetically related child, and gestational surrogacy can cost $60,000 to $150,000.[51] In the United States, purchasing donor eggs can cost approximately $25,000 to $30,000, and purchasing donor sperm can cost $300 to $1,500 per vial.[52] Only seventeen states statutorily require private health insurance plans to cover some form of fertility treatment, and many of those seventeen states do not

46. Roberts, *supra* note 40, at 611–12.
47. The second-parent adoption process, which will be discussed below, can be costly and invasive for LGBTQ+ parents. In fact, some states require home studies and FBI background checks for parents partaking in the second-parent adoption process. *"Confirmatory" or Second-Parent Adoption: What You Need to Know*, *supra* note 22.
48. *Building LGBTQ+ Families: The Price of Parenthood,* FAMILY EQUALITY COUNCIL (2019), https://perma.cc/26KY-EMBQ.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

even stipulate that IVF must be one of the covered procedures.[53] In addition, Medicaid does not cover IVF or other costly forms of ART.[54] Therefore, most families must be able to pay out-of-pocket in order to use ART for family building.

While the legal fees associated with ART family building for LGBTQ+ families are far less substantial than the associated medical costs, in order to establish legally sound parentage, LGBTQ+ families must endure legal procedures that straight families using ART do not. For example, although many states have adopted legislation aimed at making legal parentage for families using ART less costly, most practitioners agree that LGBTQ+ parents should go through the second-parent adoption process or petition for a similar judgment in order to protect their parental status.[55] A second-parent adoption is the process by which a non-birth parent adopts the child their partner birthed.[56] In some states, when the non-birth parent petitions for adoption, they are forced to undergo an FBI background check, home studies, and hearings in front of a family law court.[57] Some states even force parents to provide affidavits from doctors or cryobanks that substantiate the facts of the child's birth.[58] Second-parent adoptions may cost up to $3,000 in legal fees.[59] Although states that have adopted the 2017 Uniform Parentage Act (UPA) and other similar legislation may have eliminated the second-parent adoption requirement, Professor Courtney Joslin explains why second-parent adoptions are still necessary: "The Full Faith and Credit Clause of the Constitution only ensures that a person's parental status will be recognized and respected by the courts of other states if that status is established by virtue of a court adjudication."[60] Therefore, if legal parentage is only established as a "matter of state law," other states are not constitutionally required to recognize that parentage.[61] LGBTQ+ parents that cannot afford to carry out the second-parent adoption process are placed in a legally precarious situation, exemplifying that the recognition system of family law also penalizes families lacking in economic means. Considering the high cost of building a family using ART, market power is nearly a requirement to partake in this form of family building, as well as for legitimization of LGBTQ+ parents.

While wealth is a form of parental legitimization under the recognition regime of family law, a lack thereof marks parents as unworthy and instead subjects them to the *regulatory* regime of family law. The regulatory regime is just as intertwined with poverty as the recognition regime is with wealth. This parental

53. Chanel Dubofsky, *Your Guide to Fertility Insurance Coverage by State*, A MODERN FERTILITY BLOG (Dec. 3, 2019), https://perma.cc/YTD8-RKRW.
54. Walls, *supra* note 38.
55. *"Confirmatory" or Second-Parent Adoption: What You Need to Know, supra* note 22.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Average Adoption Costs in the United States*, FAMILY EQUALITY COUNCIL (last visited Nov. 17, 2021), https://perma.cc/GE4Q-U54F.
60. Courtney Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL'Y REV. 31, 39 (2010).
61. *Id.*

unworthiness stems from the fact that programs like PRWORA stigmatize their own recipients—President Clinton did not speak highly of the parents who would be impacted by PRWORA's enactment in his remarks on the legislation.[62] Parents governed by the recognition regime of family law participate in this family law regime because they want to establish parenthood. While the regime's unique burdens for LGBTQ+ families should not be ignored, the system is not forced on parents. However, many parents do not interact with the regulatory regime by choice. Rather, a mother in need of TANF benefits is forced to interact due to the stipulation that to receive TANF, a mother must disclose the identity of her child's father.[63] Therefore, many fathers are forced to interact with the regulatory regime of family law once the state tracks them down for child support payments. This process exemplifies Roberts' statement that a lack of market power robs parents of agency in the eyes of the state.[64]

The inherent ties of the recognition regime of family law to market power further proves its differentiation from the other two regimes of family law. Professor Wendy Brown writes, "Enthusiasm for the market is typically animated by its promise of innovation, freedom, novelty, and wealth, while a politics centered in family, religion, and patriotism is authorized by tradition, authority, and restraint. The former innovates and disrupts; the latter secures and sustains."[65] LGBTQ+ families using ART disrupt this paradigm. While the processes that enable LGBTQ+ families to establish legal parentage incentivize conformity to traditional family structures, as the above discussion of the costs of ART demonstrates, this form of family building is deeply intertwined with the market. In fact, it nearly conditions legal recognition for parents on market power. In addition, ART is a relatively new, and science-based, form of conception, further aligning it with Brown's description of the market as innovative, and not with the traditional family.

What is the impact of the recognition regime of family law having more in common with "enthusiasm for the market" than with a "politics centered in family"?[66] Perhaps it indicates that the family law system regulating ART for LGBTQ+ parents is more blatantly concerned with market power than with "family values." This raises the question: is the state's willingness to create paths to parentage for LGBTQ+ parents based on an acceptance of LGBTQ+ individuals, or does it exemplify that enthusiasm for the market triumphs over anti-LGBTQ+ sentiment? Considering that neoliberal ideologies infiltrate all aspects of contemporary political and private life, it is likely that the interconnectedness of ART and the market have led to an increased acceptance of parentage rights for LGBTQ+ parents using ART.[67] No matter what, the recognition regime's outward

62. *See* Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters, *supra* note 1.
63. *See generally* Rambert, *supra* note 3.
64. Roberts, *supra* note 40, at 611–12.
65. BROWN, *supra* note 10, at 89–90.
66. *Id.*
67. *See generally* BROWN, *supra* note 5.

interconnectedness with the market further establishes its existence within family law as a whole, as well as its differentiation from the two preexisting regimes of family law.

C. Children as Success vs. Children as Failure

In certain circumstances, parents governed by the recognition regime of family law are celebrated as successful merely for having a child through ART, whereas parents governed by the regulatory regime are marked as failures for having a child.[68] Undoubtably, in a country that valorizes financial success, the market power inherent to ART marks almost any parent using the process as somewhat successful. However, intentionality is also inherent to family building for LGBTQ+ parents using ART. Under neoliberalism, worthy subjects are those who demonstrate personal responsibility, so the clear intent and choice to assume legal parentage that LGBTQ+ parents exhibit further substantiates their worthiness. Furthermore, LGBTQ+ parents using ART are deemed worthy and successful when they demonstrate their intention to conform to the norms of respectability, which they can demonstrate through nuclear family formation. Dahl explains that "[I]deals of queer family-making and reproduction often reflect, require, or lead to, middle class integration."[69] Through intentional family building, LGBTQ+ families prove their willingness to create a "private welfare system," thus becoming self-reliant and proving themselves worthy parental subjects.

President Clinton's PRWORA remarks further underscore that individual responsibility is key to parental worthiness.[70] Those that share President Clinton's beliefs argue that certain paths to parenthood do not demonstrate responsibilization. For example, the preamble to PRWORA stigmatizes young parents, stating, "Children of teenage single parents have lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves."[71] Essentially, the legislation faults young parents for having children that it claims will perpetuate the same parental failure. Similarly, single mothers are stigmatized for their existence outside the nuclear family—as if they are an affront to the "private welfare system." Professor Martha Fineman explains that "…in political and professional discourses, single-Mother status is defined as one of the primary predictors of poverty—predictor often being translated into cause."[72] Instead of the state addressing the systemic issues that make it difficult for parents to succeed financially outside of the nuclear family structure, single

68. *See* Clara Moskowitz, *An L.G.B.T.Q. Pregnancy, From D.I.Y. to I.V.F.,* N.Y. TIMES (April 15, 2020), https://perma.cc/3QFB-UNLB.

69. Dahl, *supra* note 45, at 157.

70. *See* Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters, *supra* note 1.

71. Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C.A. § 1305 (1996).

72. MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 106 (1995).

mothers are blamed for the very poverty they experience—as if they chose or caused their own impoverishment.

Absurdly, in the United States, parents experiencing economic precarity face stigmatization for having children they cannot financially support, and are simultaneously accused of having children in order to leech off of the government.[73] These are of course ridiculous accusations since economic status should not determine whether or not an individual can have a child, and government support for additional children is extremely minimal because of "family caps" targeting this stereotype.[74] President Ronald Reagan once stated, "intact, self-reliant families are the best anti-poverty insurance ever devised."[75] For those that share Reagan's view that the point of a family is insurance against poverty, a poor family relying on welfare has inherently failed in its lack of self-reliance. This "failure" marks poor parents as unworthy, not only because of their economic status, but also because they have a child *despite* their economic status.

The racist pathologizing of poor mothers—especially poor Black mothers—as overly sexual[76] also creates a parental worthiness binary with LGBTQ+ parents using ART because for the latter parents, sex is removed from procreation.[77] In a country obsessed with policing sexual morality, which often punishes women for having nonmarital sex, and stigmatizes queer individuals for having sex at all, removing sex from procreation eliminates the opportunity for children to exemplify a parent's sexual immorality.[78] On the other hand, American policymakers and the public alike have latched onto the idea that "poor women approach reproductive sex in a purely entrepreneurial manner," and that "they engage in unprotected heterosexual intercourse in the hope that should they become pregnant and bear a newborn child, they would profit handsomely in the form of either public assistance eligibility or . . . increased cash payments and relief."[79] Of course, these payments are "miniscule," and in no way incentivize a person to have more children.[80] The "welfare queen" is the most common stereotype within this category of mothers procreating to take advantage of welfare, and it plays off of centuries-old racist stereotypes of Black women as overly lascivious.[81] Therefore, for parents subject to the regulatory regime of

73. Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 136 (2002).

74. Many states have implemented "family caps" to ensure that families do not see an increase in welfare benefits after having another child. Smith, *supra* note 73, at 124.

75. COOPER, *supra* note 4, at 69 (quoting President Ronald Reagan speaking about the importance of the family for poverty prevention).

76. Smith, *supra* note 73, at 137; Cammett, *supra* note 25, at 237.

77. Moskowitz, *supra* note 68.

78. LGBTQ+ individuals face scrutiny for their sexuality, just not in the same way as stigmatized groups of straight parents when it comes to procreation.

79. Smith, *supra* note 73, at 136.

80. *Id.*

81. Cammett, *supra* note 25, at 237. Professor Jennifer L. Morgan explains the explicit ties between slavery and racist stereotypes about Black women's sexuality, writing,

family law, children represent immorality and failure, whereas for parents governed by the recognition regime, children represent respectability and fiscal success.

D. Married Parents vs. Unmarried Parents

The consummate "private welfare system" consists of two heterosexual married parents. It follows that many key statutory aspects of family law—for example, marital presumptions, which state that any child born to a mother during a marriage is her husband's legal child—exist to ensure that children are not born out of wedlock.[82] Therefore, if family law's goal is to promote "private welfare systems," unmarried parents are less worthy subjects due to their failure to partake in a traditionally structured nuclear family. PRWORA makes this clear with its opening statement: "The Congress makes the following findings: (1) Marriage is the foundation of a successful society. (2) Marriage is an essential institution of a successful society which promotes the interests of children."[83] This excerpt exemplifies that PRWORA acknowledges its bias against unmarried parents, so it is not surprising that the act is outwardly hostile to parents who are unwed. Over 85 percent of TANF recipients are women, the vast majority of whom are unmarried.[84] Unmarried women receiving TANF are by definition not married to the fathers that the regulatory regime of family law tracks down for child support payments; PRWORA's child support enforcement provision subjects unmarried men to state interactions that can even lead to incarceration, all on account of their having a child out of wedlock.[85] Therefore, both mothers and fathers governed by the regulatory regime of family law are stigmatized for, and face material detriments on account of, their nonmarital status.

On the other hand, the rates at which LGBTQ+ individuals plan to have a

> Ideas about black sexuality and misconceptions about black female sexual behavior formed the cornerstone of Europeans' and Euro-Americans' general attitudes toward slavery. Images of black women's reproductive potential, as well as images of their voracious sexuality, were crucial to slaveowners faced with female laborers… [T]hey utilized both outrageous images and callously indifferent strategies to ultimately inscribe enslaved women as racially and culturally different while creating an economic and moral environment in which the appropriation of a woman's children as well as her childbearing potential became rational and, indeed, natural.

This passage illustrates that white Europeans and Americans did not respect enslaved Black women's parental status, which suggests that the legal system's contemporary hostility toward Black motherhood is an aspect of slavery's legacy in the United States. JENNIFER L. MORGAN, LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY 7 (2011).

82. Paula Roberts, *Truth and Consequences: Part II: Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55, 55 (2003).

83. Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C.A. § 1305 (1996).

84. CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF TANF RECIPIENTS, FISCAL YEAR 2020, U.S. DEP'T OF HEALTH AND HUMAN SERVICES OFFICE OF FAMILY ASSISTANCE (2021).

85. Rambert, *supra* note 3, at 350.

child through ART are on the rise,[86] and while data on the percentage of married versus unmarried LGBTQ+ families using ART does not exist, it is likely that the rise in LGBTQ+ individuals planning to have children is tied to *Obergefell v. Hodges* and its federal legalization of same-sex marriage.[87] In fact, many ART procedures, such as surrogacy, incentivize marriage for LGBTQ+ individuals.[88] Until the last couple of years, in some states, access to IVF and surrogacy was tied to marital status.[89] The Supreme Court's decision in *Pavan v. Smith*, which extends marital presumptions to some same-sex couples, is not a panacea for LGBTQ+ families. However, for women in same-gender relationships, and in some states for gay men, too, martial presumptions serve as another incentive for LGBTQ+ parents using ART to legally legitimize their families through marriage. [90] It follows that in a country that has only recently socially accepted (to some extent), and begun to legally protect LGBTQ+ parents,[91] conformity to heteronormative family structures can lead to further acceptance and legal protection.

However, the state's extension of marriage to same-gender couples must also be understood as the state's attempt to quash queer possibility and the reimagining of family structures.[92] Professor Melissa Murray, in writing about the Supreme Court's "jurisprudence of non-marriage" preceding *Obergefell*, explains that the Court could have "radically" read *Lawrence v. Texas* "as a catalyst for greater constitutional protection for nonmarriage. On this interpretation, *Lawrence* need not serve only as a way station on the road to same-sex marriage but as the impetus for a more pluralistic regime of relationship recognition in which marriage exists alongside a range of nonmarital alternatives."[93] However, such "alternatives" might have chipped away at the nuclear family's dominance, which could have shifted responsibility back to the state. Therefore, by marrying, same-gender couples prove their worthiness to the state through their conformity to nuclear family structures, rather than to alternative forms of kinship.

Obergefell is a manifestation of American valorization of marriage.[94] Justice Anthony Kennedy's opinion about the "dignity" marriage confers, as well as its

86. *LGBTQ+ Family Building Survey,* FAMILY EQUALITY COUNSEL (2019), https://perma.cc/XJ6H-JCLZ.

87. Julie Compton, *LGBTQ Families Poised for 'Dramatic Growth,' National Survey Finds*, NBC (Feb. 7, 2019, 9:53 a.m.), https://perma.cc/3LGW-7C8K.

88. *See, e.g., The United States Surrogacy Law Map,* CREATIVE FAMILY CONNECTIONS (last visited Nov. 17, 2021), https://perma.cc/884H-X75R.

89. *Shady Grove Fertility (SGF) Celebrates Maryland's Revised Fertility Insurance Laws that Increase Access to Care for More Families*, SHADY GROVE FERTILITY (last visited Nov. 23, 2022), https://perma.cc/X8XL-M2XY.

90. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2315–2316 (2017).

91. Pavan v. Smith, 582 U.S. ___ (2017).

92. Nontraditional family structures are historically, and presently, integral to queer communities. For LGBTQ+ individuals who may face ostracization from their biological families on account of their sexuality, families based on other forms of kinship provide vital support. KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP 29 (1991).

93. Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1211 (2016).

94. Obergefell v. Hodges, 576 U.S. 644, 646 (2015).

"sacred" nature and "transcendent importance" further valorize married LGBTQ+ families who choose to avail themselves of the "constellation of benefits that the States have linked to marriage."[95] Essentially, *Obergefell* availed married LGBTQ+ parents of the moral superiority marriage provides—superiority that unmarried parents, such as those forced to pay child support in connection to their child's other parent receiving TANF benefits, do not possess. When the recognition regime establishes legal parentage for married LGBTQ+ parents, it continues this process of conferring "dignity," since parents living within the confines of a nuclear family are automatically more respectable than those who are unmarried, and through marrying and having children, LGBTQ+ parents demonstrate a willingness to live within the pinnacle of nuclear family norms.[96] Arguably, children conceived using ART also take the focus away from LGBTQ+ individuals' sexuality, which was historically considered deviant, and represent respectable reproduction, removed from the act of sex.

II. INTENDED PARENTS AND THE WEAPONIZATION OF PARENTAGE

In Part II, this Paper examines the ways in which a comparison of the racist weaponization of parenthood and intent-based parenthood illuminates that all systems of family law exist to maintain a private welfare regime. It argues that by utilizing a governmental system created by PRWORA, and incorporating it into the Uniform Parentage Act (UPA), the LGBTQ+ movement is upholding a racist regime of parentage establishment. Part II will 1) explain the establishment of intent-based parentage through VAPs, 2) explore the connection between VAPs and PRWORA, and 3) examine the unequal distribution of intent-based parentage.

A. Intent-Based Parentage Through Voluntary Acknowledgements of Parentage

Establishing legal apparatuses to legitimatize intent-based parentage, rather than genetic parentage or functional parentage, allows LGBTQ+ parents to establish legal parentage before or concurrently with the child's birth, instead of after.[97] This is important because processes such as second-parent adoptions can take up to six months to complete, depending on the jurisdiction, and leave non-birth parents without parentage rights over their children.[98] Furthermore, functional parentage concepts, such as *de facto* parenthood, confer legal parentage based on parenting that has already occurred and therefore cannot be granted before or concurrent with birth.[99] For these reasons, Section 703 of the UPA—a

95. *Id.* at 656–57, 670.
96. Expanding on the significance of LGBTQ+ parents conforming to nuclear family norms, Dahl writes, "[S]ame-sex love is, in some nations and contexts, recognized and assimilated into the ever-expanding 'norm' of reproducing the species and the nation." Dahl, *supra* note 45, at 143.
97. Dara Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 222 (2012).
98. NeJaime, *supra* note 90, at 2317.
99. Purvis, *supra* note 97, at 222.

model legislation heralded for its LGBTQ+ friendly reforms—enshrines intent-based paths to parenthood, stating, "An individual who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child."[100] A simple way to display intent and establish intent-based parenthood under the UPA is a voluntary acknowledgement of parentage (VAP),[101] a document that the birth parent, and traditionally, the genetic father, sign at the time of a child's birth, establishing the father's legal parentage without relying on marriage.[102] However, only eleven states have extended VAPs to LGBTQ+ parents[103] and less than half of those states have adopted the UPA.[104] Yet, the UPA drafters enshrined VAPs into the model legislation with section 301, which states, "A woman who gave birth to a child and an alleged genetic father of the child, intended parent under [Article] 7, or presumed parent may sign an acknowledgment of parentage to establish the parentage of the child."[105] Therefore, as more and more states adopt the UPA, more LGBTQ+ parents using ART will have the opportunity to establish legal parentage through VAPs.

B. Voluntary Acknowledgements of Parentage and the Personal Responsibility and Work Opportunity Reconciliation Act

Although VAPs can streamline the path to legal parentage for LGBTQ+ parents using ART, it is important to understand where the procedure derives from, as well as why legislators created VAPs in the first place. PRWORA established the VAP procedure, making it a vital tool in the legislation's effort to force parentage onto fathers and violate mothers' privacy in the name of creating "private welfare systems."[106] PRWORA's Section 331 directs states to establish a "simple civil process" for acknowledging paternity and states that "Such procedures must include a hospital-based program for the voluntary acknowledgment of paternity focusing on the period immediately before or after

100. UNIF. PARENTAGE ACT § 703 (UNIF. L. COMM'N 2017).

101. The UPA states, "A woman who gave birth to a child and an alleged genetic father of the child, intended parent under [Article] 7, or presumed parent may sign an acknowledgment of parentage to establish the parentage of the child." UNIF. PARENTAGE ACT § 703 (UNIF. L. COMM'N 2017).

102. *FAQ: Voluntary Acknowledgement of Parentage (VAP), A Simple Way for Your Family to Be Recognized and Respected Through Legal Parentage*, GLAD, (last visited Sept. 7, 2022), https://perma.cc/9AL9-JAHT.

103. As of 2022, Nevada, Massachusetts, Vermont, California, Washington, Maryland, Rhode Island, New York, Connecticut, and Colorado have updated their VAP procedures to no longer be based on biology, therefore allowing LGBTQ+ parents to establish parentage using VAPs. Of those states, only Vermont, California, Washington, Connecticut, Colorado, and Rhode Island have adopted the UPA; therefore, VAPs as an easy means of establishing intent under the UPA are only available to LGBTQ+ parents in those states. Id.; *Parentage Act*, UNIFORM LAW COMMISSION (last visited September 7, 2022), https://perma.cc/R9RD-KP35.

104. *Parentage Act, supra* note 103.

105. UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM'N 2017).

106. Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C.A. § 1305 (1996).

the birth of a child."[107] This ensures that from the time of the child's birth a father is on the hook for child support—which enables the state's weaponization of parentage, primarily against Black fathers.[108] PRWORA even gives VAPs full faith and credit, a legal status that is vitally important for LGBTQ+ parents.[109] Clearly, the Clinton administration and bipartisan legislators who lobbied for PRWORA's passage intended to create a sure proof means by which to hold fathers responsible for child support. Are LGBTQ+ parents who partake in VAPs complicit in PRWORA's racialized responsibilization project? While LGBTQ+ families availing themselves of the legal protections VAPs provide should not be blamed for using the legal procedure, the LGBTQ+ movement should consider other options before tying legal reforms for LGBTQ+ parents to VAPs and thus upholding a racialized system created to responsibilize parents facing precarity.

C. The Unequal Distribution of Intent-Based Parentage

PRWORA's establishment of VAPs should not be confused with state support for intent-based parentage for *all* parents. Professor Katharine Baker explains intent-based parentage and its downfall in the eyes of the state:

> The law grants parental rights and responsibilities to those who caused a child to come into being with the intent of parenting that child once it was born. The problem, of course, is that the system is wholly inconsistent with bionormativity and paternity doctrine, the purposes of which are and always have been to make men who did not intend to parent, parents.[110]

Professor Baker continues by explaining that the state may be willing to allow intent-based parentage for LGBTQ+ parents using ART because it is likely that LGBTQ+ parents using the procedures are not in need of state support due to the cost of assisted reproduction: "If the state does not need the biological parent's money, it may care less about biological connection" and allow intent-based parentage.[111] This fact exemplifies that for the state, establishing privatized "welfare systems" so that it can avoid providing support is the main goal. However, this acceptance of intent-based parentage for some parents and not for others further enshrines separate regimes of family law, rather than ensuring that all parents are governed by a family law regime that has the best interests of parents and children in mind. Essentially, VAPs manifest that a family law apparatus can impact differently situated families in vastly different ways—VAPs have entirely divergent intents when employed by the regulatory and recognition

107. *Id.*
108. *Id.*
109. *Id.*
110. Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 701 (2008).
111. *Id.* at 702.

regimes of family law.

The fact that LGBTQ+ families using ART are at work convincing the state to recognize intent-based parentage through any means necessary, while many parents, and disproportionately Black fathers, cannot escape burdensome parentage obligations for children they did not intend to parent, exemplifies the vast differences between the regulatory and recognition systems of family law. However, it is unsurprising that the state is hesitant to adopt intent-based parentage for all parents; this is because the consistent argument against intent-based parentage is that if it becomes the norm for all parents, then the state cannot force parents who did not intend to parent to pay child support.[112] This is also likely why states are hesitant to extend VAPs to LGBTQ+ parents: intent-based parentage may find legitimization through VAPs, which could undermine the original, and in most circumstances current, responsibilization intent of the legal apparatus. This potential for undermining will likely continue to hold back the LGBTQ+ movement's attempts to expand intent-based parentage. However, it is also possible that this conflict over expanding intent-based parentage will further solidify the different regimes of family law, and lead to further disparity in family law's creation of worthy and unworthy parental subjects.

CONCLUSION

More than twenty-five years have passed since PRWORA's enactment and since courts began to legally recognize LGBTQ+ parents using ART. It is now apparent that the laws regulating ART for LGBTQ+ parents constitute a new regime of family law, one that legitimizes LGBTQ+ parents by situating them in opposition to families regulated by family law's regulatory regime. Each regime plays a part in family law's overarching goal of family responsibilization, and their differences can be explained by perceptions about the economic and racial characteristics of the populations each system governs. Over the past quarter century, LGBTQ+ parents in the United States who have the means to conform to the norms of respectability have become "recognized and assimilated into the ever-expanding 'norm' of reproducing the species and the nation,"[113] whereas parents governed by the regulatory regime of family law continue to be blamed and punished for the "intergenerational transmission of poverty."[114]

Both the regulatory and recognition regimes of family law regulate reproduction, and in so doing, not only create worthy and unworthy parental subjects, but also mark children as worthy or unworthy in the process. PRWORA's preamble reads, "Children born into families receiving welfare assistance are 3 times more likely to be on welfare when they reach adulthood than children not born into families receiving welfare."[115] Evidently, the regulatory regime of

112. *See generally id.*
113. Dahl, *supra* note 45, at 143.
114. FINEMAN, *supra* note 72, at 108.
115. Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C.A. § 1305 (1996).

family law stigmatizes the parents it exists to govern, and this statement demonstrates that it also preemptively subjects stigmatized parents' children to its governance. Rather than creating a system that could help parents and children flourish, it dooms both to precarious lives.

Separate family law regimes allow for differential treatment and valuation of families. Therefore, to minimize disparity in the legal treatment of American families, a uniform system of family law is needed—a regime that can apply to all families. Family law must be detached from the carceral state, decenter historically heterosexual institutions such as marriage, and make room for a regime of family recognition that does not require adherence to normative family structures. This will require disentanglement from laws such as PRWORA, which tether family law to racist carceral regimes and ideas of family worthiness.

As of now, the birth of family law's regime specifically regulating assisted reproduction—the recognition regime—has led to the further reproduction of disparity. Until the parental subjects governed by the recognition regime no longer derive their worthiness and respectability from their positionality in opposition to parents governed by the regulatory regime, and until the creation of a uniform regime that accepts all types of families, family law will continue to produce worthy and unworthy parents and reproduce inequality.

Willful Disregard: How Ignoring Structural Racism in Maternal Mortality Has Led Black Women to Become Invisible in Their Own Crisis

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> *Indeed, in important respects, if the general discourse that surrounds racial disparities in maternal mortality is impoverished, then we should expect that the solutions that observers propose to this problem will be impoverished as well.*[1]

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1. Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1235 (2020).

INTRODUCTION

The tragedy of maternal mortality in the United States is not a novel issue. Efforts to collect data on pregnancy-related deaths started in the early twentieth century.[2] What was true then still holds today—maternal mortality rates in the United States are significantly worse than in similar countries in the developed world.[3] Today, approximately 700 women in the United States die annually from pregnancy-related causes.[4] Moreover, there are racial disparities in maternal mortality.[5] The maternal mortality rate for Black women[6] in the United States is

2. Eugene Declercq & Laurie Zephyrin, *Maternal Mortality in the United States: A Primer*, Commonwealth Fund, (Dec. 16, 2020), https://www.commonwealthfund.org/publications/issue-brief-report/2020/dec/maternal-mortality-united-states-primer [https://perma.cc/Y5HE-QP4D].
3. Jamila K. Taylor, Cristina Novoa, Katie Hamm, and Shilpa Phadke, *Eliminating Racial Disparities in Maternal and Infant Mortality*, Center for American Progress (May 2, 2019), https://www.americanprogress.org/article/eliminating-racial-disparities-maternal-infant-mortality/ [https://perma.cc/4KUT-62RD].
4. Centers for Disease Control and Prevention (CDC), Maternal Mortality (last updated Aug. 13, 2020), https://www.cdc.gov/reproductivehealth/maternal-mortality/index.html [https://perma.cc/9MTC-UGLJ].
5. Declercq et al., *supra* note 2, at 5 (reporting findings that "black mothers have been more likely to die than white mothers for the last 100 years."); *see also* Bridges, *supra* note 1, at 1231. ("Black women in the United States have *always* died during pregnancy, childbirth, or shortly thereafter at higher rates than white women.")
6. This article focuses on Black women and their unique experiences of racism in maternal health care and willful disregard by United States institutions and the mainstream Reproductive Rights movement. However, people other than women can become pregnant, including trans men and nonbinary people. Therefore, this article will use gendered language such as "women" or "mothers" when referring specifically to women's experiences or data about women in particular and will otherwise use gender-inclusive language such as "pregnant people."

significantly higher than rates for white and Hispanic women.[7] Strikingly, Black women are nearly three times more likely to suffer a pregnancy-related death compared to white women.[8] It is no secret that the issue of maternal mortality in the United States is a profoundly racial one.[9] So, why have some of the solutions to an issue of racial inequity ignored the impact of race?

As Professor Khiara M. Bridges has emphasized, the United States' maternal health crisis will never be fully resolved if the discourse surrounding the issue is not one of race. Although the United States government knows that Black women have disproportionately suffered poor maternal health outcomes for over a century, these disparities persist because of the willful disregard of structural racism in health care and its impact on Black women's reproductive health outcomes. This willful disregard has been on display throughout history: from the time of slavery, where enslavers exploited and diminished Black women's reproductive autonomy, up to the present day, when the United States government has the power to protect Black pregnant people's reproductive health but willfully fails to do so.[10]

This article begins with a brief introduction to the issue of racial disparities in maternal mortality in the United States. The remainder of the analysis proceeds in five parts. Part I discusses the historical legacy of slavery on Black women's reproductive health and autonomy. Part II then transitions into a critique of the mainstream Reproductive Rights framework in the United States, discussing how Black women and feminists of color birthed a framework that brought their reproductive health needs and freedoms to the forefront. Part III reviews maternal mortality rates in the United States, specifically for Black women, and surveys multiple factors contributing to racial disparities in maternal health outcomes in the United States. Of these factors, access to affordable, reliable, and quality health care is a significant determinant of Black maternal health outcomes.[11] Thus, we would expect that our legal institutions' responses and solutions to maternal mortality would include closing the gaps in access to such health care. However, this expectation is largely unmet. Part IV assesses how federal and state institutions' (in)action has impacted the United States' maternal health crisis, or,

7. CDC – National Center for Health Statistics, *Maternal Mortality Rates in the United States, 2020* (last updated Feb. 23, 2022), https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/maternal-mortality-rates-2020.htm#anchor_1559670094897 [https://perma.cc/2TSS-UPP6].
8. *Id.* ("In 2020, the maternal mortality rate for non-Hispanic Black women was . . . 2.9 times the rate for non-Hispanic White women.").
9. Bridges, *supra* note 1, at 1294. ("The United States is a deadly place for women to give birth in large part because it is a dangerous place for *black women* to give birth.")
10. Building U.S. Capacity to Review and Prevent Maternal Deaths, *Report From Nine Maternal Mortality Review Committees*, CDC Foundation, (2018), https://www.cdcfoundation.org/sites/default/files/files/ReportfromNineMMRCs.pdf [https://perma.cc/8LXU-ETAR].
11. Kaiser Family Foundation (KFF), *Racial Disparities in Maternal and Infant Health: An Overview* (November 10, 2020), https://www.kff.org/report-section/racial-disparities-in-maternal-and-infant-health-an-overview-issue-brief/ (Reporting findings that "[d]isparities in maternal and infant health, in part, reflect increased barriers to care for people of color.") [https://perma.cc/E2NP-SVVK].

rather, its Black maternal health crisis. Part V concludes the article with recommended solutions to the Black maternal health crisis—solutions that are not only attainable on an individual and institutional level, but also crucial to the survival of Black pregnant people in the United States.[12]

I. THE HISTORICAL LEGACY OF SLAVERY ON BLACK WOMEN'S REPRODUCTIVE HEALTH AND AUTONOMY

To fully understand how the United States has willfully disregarded race and thus the critical needs of Black pregnant people in its solutions to the maternal health crisis, a historical overview of the reproductive oppression of Black women in the United States is necessary.

A. The Black Woman's Role on the Plantation

Enslavers exploited and diminished Black women and their reproductive autonomy at the outset of slavery.[13] Black women's experiences on the plantation were distinct from those of enslaved men. U.S. law failed to recognize the rights of Black people as well as Black women's autonomy over their reproductive capacities, which resulted in Black enslaved women struggling to control their own bodies."[14] Black women were considered vital to the growth of the slave population. Congress abolished slave trade between the nations in 1808, which particularly devalued Black women's reproductive capacities.[15] Enslavers, concerned that the cotton-growing industry would suffer, were "forced to rely on natural reproduction as the surest method of replenishing and increasing the domestic slave population."[16] However, enslavers' need for Black enslaved women's reproduction did not affect the degree of respect these women received

12. The solutions to the Black maternal health crisis go beyond purely institutional responses, as discussed in further detail throughout this paper. However, the government's willful failure to protect Black pregnant people significantly contributes to this public health crisis.
13. ANGELA Y. DAVIS, WOMEN, RACE & CLASS 6 (Random House-New York 1981). ("Expediency governed the slaveholders' posture toward female slaves: when it was profitable to exploit them as if they were men, they were regarded, in effect, as genderless, but when they could be exploited, punished and repressed in ways suited only for women, they were locked into their exclusively female roles.")
14. Jamila K. Taylor, *Structural Racism and Maternal Health Among Black Women*, 48 JOURNAL OF LAW, MEDICINE & ETHICS 506, 507 (2020).
15. Act Prohibiting the Importation of Slaves, Pub. L. No. 9-22, 2 Stat. 426 (1808); Taylor, *supra* note 14. It is important to note that the ban did not abolish the internal slave trade or even slavery, but rather the very lucrative international slave trade for human rights concerns. The Act was promoted by then President of the United States, Thomas Jefferson. Ironically, many of those who opposed the slave trade were themselves plantation owners, like Jefferson. These people believed in the right to own property and thus legitimized slave ownership, but also believed that it was immoral to capture people from their native land and ship them across the seas; *see also* Michel Martin & Eric Foner, *End of Slave Trade Meant New Normal for America*, NPR (Jan. 10, 2008, 12:00 PM ET), https://www.npr.org/templates/story/story.php?storyId=17988106 [https://perma.cc/89VZ-JVDH].
16. Davis, *supra* note 13, at 7. "[S]he who was potentially the mother of ten, twelve, fourteen or more became a coveted treasure indeed.")

as mothers. Black enslaved women were not considered mothers but rather "'breeders'—animals, whose monetary value could be precisely calculated in terms of their ability to multiply their numbers."[17] Accordingly, just as Black enslaved women were classified as the property of their enslavers, so were their children.[18] Black enslaved women had no legal rights to their children, as "children could be sold away from their mothers at any age because 'the young slaves…stand on the same footing as other animals.'"[19]

Furthermore, Black enslaved women were expected to maintain their role as both field workers and caregivers, enduring long hours of physical labor.[20] Black enslaved women were considered to be "robust," a racist conception embodied in enslavers' exploitation of Black women's labor and subjugation of Black women to medical experimentation. The idea of "robustness" is the false belief that Black people are biologically stronger than and more capable of enduring pain than their white counterparts.[21] This belief developed primarily during the time of slavery, when advancements in medicine were made through dehumanizing experimentation on enslaved Black people. The belief in Black people's robustness persists in the quality of health care Black people receive today. The notion that Black women are robust has resulted in Black women receiving misdiagnoses and lower-quality health care, contributing to the public health crisis Black women endure to this day.[22]

B. The Medical Exploitation of Enslaved Black Women

For the most part, enslavers exploited and controlled Black enslaved women's physical and reproductive capabilities. However, the desire to sustain the fertility of Black enslaved women also compelled enslavers to seek out the assistance of physicians, whose contributions to the medical profession left an

17. *Id*. at 7; *see also* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 24 (Vintage Books-New York 1997) ("With owners expecting natural multiplication to generate as much as 5 to 6 percent of their profit, they had a strong incentive to maximize their slaves' fertility. An anonymous planter's calculations made the point: I own a woman who cost me $400 . . . Admit she made me nothing—only worth her victuals and clothing. She now has three children, worth over $3000.").

18. *Id.* ("One year after the importation of Africans was halted, a South Carolina court ruled that female slaves had no legal claims whatever on their children.")

19. *Id.,* citing Barbara Wertheimer, *We Were There: The Story of Working Women in America* 109 (Pantheon Books-New York 1977).

20. Taylor, *supra* note 14, at 508. It is also important to note that although they were expected to be caregivers to both their own children and the children of their enslavers, Black enslaved women had no legal rights to their children. "In fact, the law granted to whites a devisable, *in futuro* interest in the potential children of their slaves." ROBERTS, *supra* note 17, at 33. Black enslaved women's motherhood was thus both lucrative and exploited, as enslaved women were systemically denied the right to be mothers at all.

21. *See* Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 Proc. Nat'l Acad. Sci. U.S. 4296 (2016) (discussing a study that examines the disproportionate quality of care Black people receive due to the racially biased belief that Black people have "thicker skin" and thus feel less pain).

22. *Id.*

oppressive legacy that continues to impact Black women's reproductive care and autonomy.[23]

James Marion Sims was a nineteenth-century physician known as the "Father of Gynecology" for his pioneering work in the field.[24] Sims perfected the surgical repair of vesicovaginal fistula, a tearing between the bladder and the wall of the vagina that women may suffer during childbirth.[25] However, Sims improved his technique on enslaved Black women whose enslavers brought them to Sims.[26] Sims and his surgeons never asked these enslaved Black women suffering from vesicovaginal fistula "if they would agree to [Sims' operation], as they were totally without any claims to decision-making about their bodies or any other aspect of their lives."[27] Sims conducted his experiments on a total of seven enslaved Black women, including three women named Betsey, Lucy, and Anarcha.[28] Sims used no form of anesthesia when operating on these women, even when anesthesia was standard practice.[29] The procedures were extremely painful, details of which Sims recounted in his autobiography. After Sims performed his inaugural operation on Lucy, Sims recounted: 'I thought she was going to die…it took Lucy two or three months to recover entirely from the effects of the operation.'[30] Sims reported that it was not until after he performed twenty-nine unsuccessful surgeries on Anarcha that he performed his first successful one.[31] This procedure was not performed on white women until it was mastered, and even then, "none of them, due to the pain, were able to endure a single operation."[32] Sims' experimentations humiliated and further debilitated enslaved Black women.[33] Nevertheless, Sims and other physicians during the era of slavery "had specific orders to ensure that reproductive conditions did not negatively impact an enslaved woman's ability to bear children on the plantation."[34]

The historical legacies of coercion, oppression, and exploitation have laid a foundation for racial inequalities in reproductive health care today. Even after Black people obtained legal rights, the legacy of slavery left a lasting impression in every facet of their lives. Passing a law alone could not change perceptions of

23. Taylor, *supra* note 14, at 508. ("The use of a 'scientific approach' to plantation management ushered in a new era of slave breeding, coercion, medical experimentation, and the neglect for reproductive freedom.")
24. Dineo Khabele, Kevin Holcomb, Ngina K. Connors, and Linda Bradley, *A Perspective on James Marion Sims, MD, and Antiblack Racism in Obstetrics and Gynecology*, 28 J. MINIMALLY INVASIVE GYNECOLOGY 153 (Feb. 2021).
25. Durrenda Ojanuga, *The Medical Ethics of the 'Father of Gynaecology,' Dr. J Marion Sims*, 19 J. MED. ETHICS 28, 29 (1993).
26. *Id.*
27. *Id.*
28. *Id.*; Khabele, *supra* note 24, at 153.
29. Ojanuga, *supra* note 25; Khabele, *supra* note 24, at 153.
30. Ojanuga, *supra* note 25, at 29.
31. Khabele, *supra* note 24, at 153.
32. Ojanuga, *supra* note 25, at 30.
33. *Id.* at 29.
34. Taylor, *supra* note 14, at 508.

Black women as "robust"[35] with superhuman bodies that could withstand any pain. Enslavers continued to exploit Black as "breeders"[36] but denied them rights as mothers. This racist reproductive oppression[37] persists in the substandard health care that Black women receive today. The exploitation and devaluation of Black women's reproduction also carried into government policy and activism around reproductive rights, where Black women were denied a seat at the table. Therefore, both society at large and the mainstream Reproductive Rights movement decentered and devalued Black women's reproductive health and rights.

II. A CRITIQUE OF THE REPRODUCTIVE RIGHTS FRAMEWORK—AND WHY BLACK WOMEN NEEDED THE REPRODUCTIVE JUSTICE FRAMEWORK

A. A Critique of the Reproductive Rights Framework

Just as Black women struggled to maintain their reproductive freedom during slavery, Black women face that same struggle in the mainstream feminist movement, which has failed to center Black women's unique experiences of structural racism. The Supreme Court failed to acknowledge Black women's experiences and further excluded Black women from the conversation on reproductive rights. Prior to *Roe v. Wade*, a landmark Supreme Court case in reproductive rights which recognized a constitutional right to abortion, "the discourse surrounding abortion rights was diverse and multifaceted, reflecting concerns about the environment, the breadth of criminal regulation, sex equality, racial and class injustice, and intersectional claims that implicated both race and sex discrimination."[38] Yet, the Court's decision in *Roe* reflected none of these intersectional approaches to reproductive rights. Rather, the Court's reasoning reflected a much narrower interpretation, rooted in the constitutional right to "privacy."[39]

The constitutional right to "privacy" discussed in *Roe*, where people with the capacity for pregnancy were now afforded the "choice" to make decisions regarding their reproductive health with their physicians, disregarded the fact that Black women have been systemically robbed of that "privacy" and the "choice"

35. Hoffman, *supra* note 21.

36. Davis, *supra* note 13, at 7.

37. Women's Leadership and Resource Center, *Reproductive Oppression Against Black Women*, UNIVERSITY OF ILLINOIS CHICAGO, https://wlrc.uic.edu/reproductive-oppression-against-black-women/ [https://perma.cc/98LR-U944] (last visited Apr. 8, 2022). ("Reproductive oppression refers to the regulation and exploitation of individuals' bodies, sexuality, labor, and procreative capacities as a strategy to control individuals and entire communities. Reproductive oppression against Black women is rooted in the US history of commodification of Black women's bodies, sexuality, and reproductive lives.")

38. *Roe v. Wade*, 410 U.S. 113 (1973); Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2048 (2021) (explaining that it was acknowledged in the movement that Black women "experienced motherhood differently based on their race and class…").

39. *Id.* at 2049 (noting that the attorneys in *Roe* chose to "root their claims in the privacy logic that had undergirded the Court's earlier contraception decisions.").

to birth and raise a child.[40] *Roe* did not consider that, for Black women, "what happened to [their] bodies derived from their circumstances, whether poverty, racism, [or] injustice."[41] Although *Roe* purported to preclude the government from interfering with the right to abortion, the Court upheld many restrictions on abortion access that disproportionately harmed people of color, especially Black women. [42] The Court's decision in *Dobbs v. Jackson Women's Health Organization,* and the fallout from the end of *Roe*, further demonstrated Roe's shortcomings and the disproportionate harm that restrictions on access to reproductive health care have on Black women.[43]

The government has impeded Black women's access to reproductive health beyond abortion and contraceptives. [44] While barriers to abortion and contraception access disproportionately impact Black women, these rights are not the only issues concerning reproductive health. In fact, "access to abortion services, forced and coercive sterilization, reproductive tract infections (RTIs) and infant and maternal mortality and morbidity" are all issues concerning reproductive rights and "impact women of color, especially Black women, most severely."[45] However, Black women have often felt silenced, ignored, and further oppressed in the mainstream Reproductive Rights framework. This framework has emphasized "choice" and focused narrowly on the legal right to abortion and contraceptives rather than recognizing the full spectrum of Black women's reproductive health needs and the impact of structural racism on Black women's health and rights.[46]

B. The Birth of the Reproductive Justice Framework

Within the mainstream Reproductive Rights movement, which should have been a space where all women could find liberation, "Black women have been and

40. *See id.* at 2050; *see also* Taylor, *supra* note 14, at 510. ("The narrow focus on abortion effectively neglected the intersecting oppressions of race, class, and gender. Touting this focus as 'choice' implied that all women had the right to make determinations about their bodies, hence deeming their bodies legally protected. 'Choice' in these terms ignored the fact that economic and institutional barriers restricted the 'choices' of Black women.")

41. Mamie E. Locke, *Encyclopedia of Race & Racism—Reproductive Rights* 495 (John Hartwell Moore ed., 2008). ("For women of color, economic and institutional constraints restricted their choices.")

42. Jamila Taylor, "Women of Color Will Lose the Most if *Roe v. Wade* Is Overturned," *Center for American Progress* (Aug. 23, 2018), https://www.americanprogress.org/article/women-color-will-lose-roe-v-wade-overturned/ [https://perma.cc/GQT3-XXSA].

43. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___ (2022); Samantha Artiga, Latoya Hill, Usha Ranji, and Ivette Gomez, What are the Implications of the Overturning of Roe v. Wade for Racial Disparities?*"*, KAISER FAMILY FOUNDATION (July 15, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-are-the-implications-of-the-overturning-of-roe-v-wade-for-racial-disparities/ [https://perma.cc/7WY6-BTHE].

44. Toni M. Bond, *Barriers Between Black Women & the Reproductive Rights Movement*, 8 POL. ENV'TS 2, 3 (2001).

45. *Id.*

46. *Id.* at 4. ("The voice of women color in the mainstream "pro-choice movement are drowned out by other seemingly more important aspects of the fight for reproductive rights, leaving them with the arduous challenge of trying to be activists operating on the fringes of the movement.")

still are treated as 'invited guests.'"[47] Realizing that the mainstream Reproductive Rights framework could no longer sustain and adequately address the unique needs of Black and brown women, "feminists of color began to articulate a new, intersectional approach to reproductive rights that explicitly centered concerns about race, class, and discrimination."[48] This need enabled the birth of the Reproductive Justice framework.[49] According to Loretta Ross, co-founder of SisterSong Women of Color and Reproductive Health Collective and "founding mother of Reproductive Justice,"[50]

> Reproductive Justice is the complete physical, mental, spiritual, political, social, and economic well-being of women and girls, based on the full achievement and protection of women's human rights…[t]he Reproductive Justice framework analyzes how the ability of any woman to determine her own reproductive destiny is linked directly to the conditions in her community—and these conditions are not just a matter of individual choice and access. Reproductive Justice addresses the social reality of inequality, specifically, the inequality of opportunities that we have to control our reproductive destiny.[51]

The Reproductive Justice framework situates abortion within broader "social justice issues that concern communities of color" that "directly affect an individual woman's decision-making process."[52] This framework acknowledges that "a narrow focus on protecting the legal right to abortion" fails to account for the legacy of reproductive oppression that has hindered the reproductive freedoms of marginalized groups in our society, encompassing not only the right to not have children, but also to have children and to parent with dignity in safe, sustainable communities.[53] Instead of focusing on the sole legal right to abortion and contraceptives, Reproductive Justice advocates combat reproductive oppression using three frameworks: (1) Reproductive Health, which promotes greater access to health care for historically disadvantaged communities;[54] (2) Reproductive Rights, which addresses the legal right to abortion and contraceptives;[55] and (3) Reproductive Justice, which raises awareness "to the social, political, and economic systemic inequalities that impact women's reproductive health and their ability to control their reproductive lives."[56]

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47. Bond, *supra* note 44, at 3.
48. Murray, *supra* note 38, at 2053.
49. *Id.* (explaining that "reproductive justice" is the combination of the terms "reproductive rights" and "social justice.").
50. Taylor, *supra* note 14, at 509.
51. Loretta Ross, *What is Reproductive Justice?,* Reproductive Justice Briefing Book, 4 (2007).
52. *Id.*; *What is Reproductive Justice?*, SISTERSONG (last visited Dec. 22, 2022), https://www.sistersong.net/reproductive-justice [https://perma.cc/BPE4-JPAN].
53. Ross, *supra* note 51, at 4.
54. Murray, *supra* note 38, at 2053; *see also* Ross, *supra* note 51, at 4.
55. Murray, *supra* note 38, at 2053.
56. *Id.*

Organizations like SisterSong have since organized to use the Reproductive Justice framework to specifically address the intersectional and unique reproductive concerns of Black, brown, and other women that have been excluded from the mainstream Reproductive Rights movement.[57] These organizations not only strive to empower people to advocate for reproductive freedoms, but also work to dismantle the systemic barriers that contribute to historical inequalities in reproductive health.[58] However, dismantling structural inequalities in health care will require more than just the efforts of grassroots organizations; it will also require the will of our legal institutions, which have always had the power to provide Black women with the resources they need to obtain their reproductive freedom in the United States.

III. MATERNAL MORTALITY RATES AND FACTORS MOTIVATING RACIAL DISPARITIES IN MATERNAL HEALTH OUTCOMES IN THE UNITED STATES

A. Maternal Mortality in the United States

Experts define maternal health as "the health of women during pregnancy, childbirth and the postnatal period."[59] Countries with failing maternal health generally have high maternal mortality ratios. According to the World Health Organization (WHO), "[t]he maternal mortality ratio (MMR) is defined as the number of maternal deaths during a given time period per 100,000 live births."[60] Reported in February 2022, the most recent U.S. MMR was 23.8 deaths per 100,000 live births, representing approximately 861 maternal deaths in 2020.[61] These figures are "remarkable," considering the significant amount of money spent on pregnancy and childbirth every year.[62] Moreover, these figures are even more astonishing considering that "[m]ost of these deaths are preventable."[63]

57. *See* Ross, *supra* note 51, at 5.
58. *Id.*
59. WORLD HEALTH ORG. (WHO), *Maternal health*, https://www.who.int/health-topics/maternal-health [https://perma.cc/7E8J-QCCQ] (last visited Apr. 10, 2022).
60. WORLD HEALTH ORG, (WHO), *Maternal mortality ratio (per 100 000 live births*), https://www.who.int/data/gho/indicator-metadata-registry/imr-details/26 [https://perma.cc/L9VE-9MUD] (last visited Apr. 10, 2022). Experts have measured and defined maternal mortality in various ways. The CDC defines a "pregnancy-related death" as a "death of a woman during pregnancy or within one year of the end of pregnancy from a pregnancy complication, a chain of events initiated by pregnancy, or the aggravation of an unrelated condition by the physiologic effects of pregnancy." CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC), *Reproductive Health—Preventing Pregnancy-Related Deaths* (Apr. 13, 2022), https://www.cdc.gov/reproductivehealth/maternal-mortality/preventing-pregnancy-related-deaths.html [https://perma.cc/A3LV-9JPA]. Some experts define a "pregnancy-associated mortality" as a "[d]eath while pregnant or within one year of the end of the pregnancy, irrespective of cause." Declercq & Zephyrin, *supra* note 2, at 2. The WHO limits that time frame to "within 42 days of the end of pregnancy," or six weeks. *Id.*
61. CDC – MMRs in the U.S., 2020, *supra* note 7.
62. Bridges, *supra* note 1, at 1240.
63. Taylor, *supra* note 14, at 510.

Severe maternal morbidity (SMM)—which is also preventable—occurs when "a pregnant or recently postpartum woman faces a life-threatening diagnosis or must undergo a life-saving medical procedure."[64] SMM affects nearly 60,000 women in the United States every year, and the numbers are on the rise.[65] For every woman who suffers a maternal death, approximately one-hundred women experience SMM during their labor and delivery hospitalization.[66]

Multiple factors contribute to the United States' high MMR. A maternal death can "vary considerably and depend on when mothers die."[67] Looking narrowly, maternal deaths could result from the preexisting medical conditions an individual brings into pregnancy.[68] On a broad scale, maternal deaths could be attributed to the quality of the United States' healthcare system or the lack of access to healthcare, such as postpartum care.[69] Although the causes of the United States' high MMR are difficult to isolate, the fact that "[b]oth maternal mortality and morbidity disproportionately impact Black women" is not.[70]

B. Factors Motivating Racial Disparities in Maternal Health Outcomes

In 2020, the National Center for Health Statistics reported that the MMR for Black women was 55.3 deaths per 100,000 live births, while the MMR for white women was 19.1 deaths.[71] While maternal mortality in the United States is of serious concern across all racial groups, we cannot disregard that "the path to motherhood is significantly deadlier for [B]lack women than it is for their white counterparts,"[72] and that structural racism plays a central role in the disparities for

64. Bridges, *supra* note 1, at 1242-43. ("For every maternal death in the country, there are close to one hundred cases of severe maternal morbidity.")

65. BLACK MAMAS MATTER ALLIANCE AND CENTER FOR REPRODUCTIVE RIGHTS, BLACK MAMAS MATTER: ADVANCING THE HUMAN RIGHT TO SAFE AND RESPECTFUL MATERNAL CARE, 20 (2018), http://blackmamasmatter.org/wp-content/uploads/2018/05/USPA_BMMA_Toolkit_Booklet-Final-Update_Web-Pages-1.pdf [https://perma.cc/77ES-YWA7].

66. *Id.*

67. Declercq & Zephyrin, *supra* note 2, at 9.

68. Bridges, *supra* note 1, at 1243.

69. *Id.* at 1246. (As I discuss later in the article, "[m]any maternal deaths—especially those that are caused by infection, blood clots, and hemorrhage—occur some period of time after the woman has delivered her baby. In order to avoid these deaths, recently postpartum women must be monitored, and they must have access to healthcare after their infant has been born." *Id.* However, many low-income and women of color are unable to afford health insurance that provides coverage beyond a single visit after the end of their pregnancy.)

70. Taylor, *supra* note 14, at 511.

71. CDC – MMRs in the U.S., 2020, *supra* note 7.

72. Bridges, *supra* note 1, at 1248.

Black women.[73] Six factors "acting in concert"[74] help explain the alarming disparities in maternal health outcomes for Black women: structural racism in health care, a lack of culturally competent healthcare providers, socioeconomic status and poverty, underlying chronic conditions, chronic stress and weathering, and a lack of access to quality and affordable health care.

1. Structural Racism in Health Care

We cannot adequately address the maternal health crisis in the United States "without taking account of how racism and bias manifest in the health care system, and in turn contribute to the high rates of maternal mortality and morbidity among Black women."[75] The Aspen Institute defines structural racism as a system where public policies, institutional practices, and cultural representations work to reinforce and perpetuate racism and racial inequities.[76] Said differently, structural racism is the concept that racism is so embedded into the laws, regulations, and very fabric of society that it seems like the natural order. Applied to maternal mortality, Black women are more likely to suffer poor maternal health outcomes because "harmful institutional practices and negative cultural representations of Black women" have infiltrated the healthcare system.[77] These practices are rooted in the historical reproductive oppression of Black women during slavery and now manifest as structural racism.

Structural racism in health care perpetuates disparities in the quality of care Black women receive compared to white women on their pathway to motherhood. According to the 2021 National Healthcare Disparities Report, Black people received worse quality of care than white people on 43 percent of quality measures.[78] Although standards of care and best practices exist in handling obstetric emergencies, discretion in how healthcare providers treat certain people has caused "some women [to] receive appropriate, high quality care while others

73. While not the central focus of this article, it is important to note that Native American women also have some of the highest rates of maternal mortality in the country, driven by their unique experiences of structural racism and reproductive oppression in the United States. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, *Infographic: Racial/Ethnic Disparities in Pregnancy-Related Deaths – United States, 2007-2016*, https://www.cdc.gov/reproductivehealth/maternal-mortality/disparities-pregnancy-related-deaths/infographic.html [https://perma.cc/J9ZV-TTBC] (last accessed Dec. 22, 2022).

74. Bridges, *supra* note 1, at 1253.

75. Taylor, *supra* note 14, at 511.

76. THE ASPEN INSTITUTE, *11 Terms You Should Know to Better Understand Structural Racism* (Jul. 11, 2016), https://www.aspeninstitute.org/blog-posts/structural-racism-definition/ [https://perma.cc/KDN9-GP68].

77. Taylor, *supra* note 14, at 511.

78. AGENCY FOR HEALTHCARE RESEARCH AND QUALITY (AHRQ), 2021 NATIONAL HEALTHCARE QUALITY AND DISPARITIES REPORT 1, D-24 (Dec. 2021), https://www.ahrq.gov/sites/default/files/wysiwyg/research/findings/nhqrdr/2021qdr.pdf [https://perma.cc/KK6U-RGHQ]. Notably, the measures with the largest disparities for Black people included new cases of HIV, deaths as a result of HIV infection, and admissions to the hospital due to hypertension. *Id.* HIV/AIDs and hypertension are just some of the many chronic conditions and diseases Black people have historically suffered from at heightened rates.

do not."[79] The location where a pregnant person delivers their baby can have a significant impact on the quality of care they receive.[80] Markedly, 75 percent of Black women in the United States deliver their babies in only one-quarter of the nation's hospitals.[81] A recent study examining these "high [B]lack-serving hospitals" found that their MMR was higher than the MMR in "low [B]lack-serving hospitals."[82] Even more disturbing was that the high-Black serving hospitals provided low-quality care to all women, regardless of race, and the women served at these hospitals had an increased risk of suffering poor maternal health outcomes.[83] These findings suggest that improving the quality of care at hospitals that serve primarily Black and brown women may reduce racial disparities in maternal health outcomes.[84]

Addressing structural racism can remedy the United States' maternal health crisis. Structural racism lies at the foundation of each of the remaining factors contributing to racial disparities in maternal mortality.

2. Lack of Culturally Competent Healthcare Providers

Although access to care during pregnancy and postpartum improves maternal health outcomes, the ways that pregnant people interact with the healthcare system and healthcare providers are also significant.[85] Historically, people of color have had poor interactions with their healthcare providers, often reporting racial discrimination and disrespect.[86] In *Listening to Mothers*, a 2018 research survey studying women's birthing experiences in California hospitals, Black women and women of color reported that they were spoken to disrespectfully, handled roughly, and felt as if their healthcare providers ignored their concerns more often than white women.[87] Notably, among the women that indicated that they had experienced unfair treatment because of their race, the majority of women were Black.[88] In comparison, less than 1 percent of white women reported that they felt as if they were being treated unfairly because of their race or ethnicity.[89] The survey also asked women of various races and ethnicities questions about differences in treatment practices, specifically the use

79. BLACK MAMAS MATTER ALLIANCE, *supra* note 65, at 25.
80. *Id.*
81. Bridges, *supra* note 1, at 1265 (citing Elizabeth A. Howell, Natalia Egorova, Amy Balbierz, Jennifer Zeitlin & Paul L. Hebert, *Black-White Differences in Severe Maternal Morbidity and Site of Care,* 214 Am. J. Obstet. Gynecol. 122.e1, 122.e1 (2016)) [hereinafter Howell].
82. *Id*. (citing Howell, *supra* note 81, at 122.e3.).
83. *Id.*
84. BLACK MAMAS MATTER ALLIANCE, *supra* note 65, at 25.
85. Taylor, *supra* note 14, at 511.
86. *See* BLACK MAMAS MATTER ALLIANCE, *supra* note 65, at 26.
87. Taylor, *supra* note 14, at 511 (citing CAROL Sakala, EUGENE R. Declercq, JESSICA M. TURON & MAUREEN P. CORRY, *Listening to Mothers in California, A Population-Based Survey of Women's Childbearing Experiences* (National Partnership for Women's Families, 2019) [https://perma.cc/TZ8N-MBR9]).
88. *Id.* at 64.
89. *Id.* It is also significant to note that among this 1 percent, "[w]hite women had a clear advantage with none reporting that they were treated unfairly 'usually' or 'always.'"

of caesarean sections as a mode of birth.[90] Among all racial and ethnic groups, Black women exceedingly received cesarean sections, at a rate of 42 percent whereas white women received the procedure at a rate of 29 percent.[91] According to WHO, healthcare providers perform caesarean sections excessively, and in the absence of a medical necessity, they can put pregnant people and their babies at risk of suffering short- and long-term complications.[92] WHO emphasizes the importance of doctors focusing on each person's individual needs, rather than needlessly performing caesarean sections that could result in disabilities or even death.[93]

The needless use of dangerous procedures on Black women's bodies echoes the practices of James Marion Sims and other physicians during the era of slavery. Some healthcare providers exhibit little to no respect for the reproductive autonomy of Black women due to implicit biases they hold about Black women.[94] Implicit biases occur when we unconsciously associate people with attitudes or stereotypes, and these stereotypes influence our decision making.[95] Healthcare providers invoke implicit biases when caring for Black women when they see their race first and provide substandard care compared to their white patients. Health care providers justify their differential treatment of Black women with racial stereotypes; for example, Khiara M. Bridges suggested that health care providers often view Black women under a lens of "obstetrical and gynecological hardiness," a racist and explicitly false belief that Black women do not feel pain.[96] From the most painful experiences like childbirth, to mentions of discomfort during a routine visit, the belief that Black people have "robust" bodies has led healthcare providers to inadequately treat Black women in the healthcare system. This erasure of Black women causes healthcare providers to ignore their expressions of pain and overlook their treatment preferences, contributing to maternal mortalities and morbidities.[97]

90. *Id.* at 54.
91. *Id.* at 56.
92. World Health Organization (WHO), *Caesarean sections should only be performed when medically necessary*, (Apr. 10, 2015), https://apps.who.int/mediacentre/news/releases/2015/caesarean-sections/en/index.html [https://perma.cc/XJ5Q-BGV6].
93. *Id.*; *see also* Taylor, *supra* note 14, at 512 (citing Taylor et al., *supra* note 3). ("The rates for maternal mortality and severe maternal morbidity are about three times higher for women who had C-sections versus vaginal deliveries.")
94. *See* Taylor, *supra* note 14, at 512.
95. *See Understanding Implicit Bias*, Kirwan Inst., (May 29, 2012), https://kirwaninstitute.osu.edu/article/understanding-implicit-bias [https://perma.cc/664E-UG5N].
96. Taylor, *supra* note 14, at 512 (citing Khiara M. Bridges, *Reproducing Race: An Ethnography of Pregnancy as a Site of Racialization* 16-17 (Berkeley: University of California Press, 2011)).
97. Taylor, *supra* note 14, at 512.

3. Socioeconomic Status and Poverty

Poverty has a negative impact on Black women's maternal health outcomes.[98] Although the rising rates of poverty and economic inequalities in the United States may cause higher rates of maternal mortality for all birthing people in the country, "Black women are more than twice as likely to live in poverty as [w]hite women are."[99] Moreover, the ramifications that poverty has on health are well-established.[100] Those who live in poverty are often exposed to unhealthy living conditions, live in food deserts where they cannot access affordable and healthy food options, and are unable to access quality health care.[101] All of these challenges contribute to those in poverty suffering poorer health outcomes and shorter life expectancies. For Black people, who "disproportionately bear the burdens of poverty in the United States, greater proportions of them have the poor health that is the known and expected consequence of poverty."[102]

While the income, education, and class inequalities that Black people have historically endured are contributors to racial disparities in maternal mortality,[103] these health disparities "cannot and should not be understood as a problem primarily of socioeconomic status."[104] In reality, Black women across varying socioeconomic statuses suffer poor maternal health outcomes.[105] Indeed, having a higher degree of income and education does not protect Black women from disproportionately suffering maternal deaths.[106] A college-educated Black woman is still more likely to suffer a pregnancy-related death than a white woman with less than a high school education.[107] Structural racism shapes poverty rates, but the impact of racism on maternal health outcomes reaches beyond socioeconomic status.

4. Underlying Chronic Conditions

Black women enter pregnancy with "poverty-related chronic conditions," such as hypertension, cardiovascular disease, diabetes, and obesity.[108] Specifically, "[h]eart disease is the number-one killer of Black women,"[109] and

98. Bridges, *supra* note 1, at 1258.
99. BLACK MAMAS MATTER ALLIANCE, *supra* note 65, at 22. ("Unemployment is twice as high for Black women compared to White women, and fully employed Black women earn an average of 63 cents for every dollar paid to White men. . .").
100. Bridges, *supra* note 1, at 1258.
101. *Id.*
102. *Id.* at 1259.
103. *Id*. at 1251.
104. *Id*. at 1258.
105. *Id*. 1257-58.
106. *Id*. at 1251.
107. *Id*.; *see also* Taylor, *supra* note 14, at 511 ("Black women, regardless of social or economic status, are more likely to die of pregnancy-related causes. This is even true when compared with white women who never finished high school.").
108. *Id.* at 1259*; see also* Black Women's Health Imperative, *Black Women Vote: National Health Policy Agenda 2020-2021*, 6 (2020) [https://perma.cc/JW98-88SZ].
109. Black Women's Health Imperative, *supra* note 1058, at 29.

Black women "are two to four times more likely than white women" to have type 2 diabetes.[110] These conditions go unmanaged in Black women because they lack access to quality health care, which causes them to suffer poor maternal health outcomes.[111] Preventative care would properly treat these health issues well in advance,[112] but they instead have persisted as chronic conditions.

Before continuing with the analysis, it is necessary to make a distinction regarding chronic conditions among Black women. Although Black women suffer poorer maternal health outcomes than their white counterparts, biology and genetics do not explain these health disparities.[113] To say that Black people are genetically unhealthier and thus are to blame for their poor health outcomes is inherently racist. Statements like this disregard that race is a social construct and not biologically predisposed.[114] Despite this, some scholars have still maintained that race is a biological construct and may be used to explain racial disparities in health, such as maternal mortality rates.[115] However, to allow the myth of biological race to persist would be to allow "society to throw up its hands at the problem of racial disparities in maternal mortality and claim that" the healthcare system cannot improve these racial disparities because they exist due to differences in Black women's genes.[116]

Furthermore, it also is problematic to outright blame Black women for entering their pregnancies with these chronic conditions and causing the United States' high MMR. The narrative that Black women are not taking care of themselves well enough to prevent these chronic conditions shifts the responsibility for their deaths back onto them.[117] This narrative ignores that there are a host of structural forces contributing to the disparities in health that Black women suffer.[118] "If preexisting conditions are not situated within structural and

110. *Id.* at 30.

111. Bridges, *supra* note 1, at 1259.

112. Black Women's Health Imperative, *supra* note 108, at 6.

113. Bridges, *supra* note 1, at 1255. ("It bears repeating, time and again, that no credible theory of population genetics can support the idea that black people's genes are responsible for the poor states of health that they disproportionately inhabit.").

114. *Id.* at 1256 (citing Alexis Gadson, Eloho Akpovi & Pooja K. Mehta, *Exploring the Social Determinants of Racial/Ethnic Disparities in Prenatal Care Utilization and Maternal Outcome,* 41(5) SEMINARS PERINATOLOGY 308, 308-09 (2017)). In their study on racial disparities in maternal health, these researchers began by clearly asserting that "categories of race and ethnicity do not represent individual behaviors or biology, but rather acknowledge historic inequities implicated in health outcomes…we assume race and ethnicity to be social constructs closely related to the social determinants of health, rather than biological or genetic categories, as well as constructs that may intersect with health care utilization, social determinants, and medical risk to generate observable differences in maternal health outcome." *Id.*

115. *Id*. at 1255-56. ("Unfortunately, even the American College of Obstetricians and Gynecologists has failed to clearly and definitively reject the idea that race has a biological or genetic essence.").

116. *Id.* at 1257.

117. *Id.* at 1279.

118. *Id.* at 1280. For Black women, social and environmental factors have not been conducive to leading healthy lives. In the context of maternal mortality, "Black women are

historical context, it may function to absolve society of responsibility for the poor state of health that Black women disproportionately inhabit."[119]

5. Chronic Stress and Weathering

Dealing with stress is a part of life. However, chronic stress may be one of the reasons Black women experience worse maternal health outcomes. That is what public health researcher Dr. Arline Geronimus was determined to uncover in 1992 when she began investigating why, as Black mothers aged, their maternal health declined.[120] Geronimus found that Black mothers had better maternal health outcomes in their late teens, while white mothers had better maternal health outcomes between their twenties and thirties.[121] Before her study, Geronimus was a student at Princeton University, where she worked with Black teen mothers as a research assistant.[122] Geronimus witnessed these young Black mothers experience life circumstances that her white classmates seldom experienced, which manifested as chronic conditions.[123] Geronimus coupled her 1992 findings with the observations she made as a research assistant to conclude "that the health of African-American women may begin to deteriorate in early adulthood as a physical consequence" of the constant stresses of racism, sexism, and classism.[124] This finding is known as the "weathering hypothesis"— Geronimus' theory that bodies prematurely age due to repeated exposure to social and economic inequity.[125]

As Black public health journalist Patia Braithwaite recognized, "[t]he term is meant to capture the positive connotation of weathering (making it through a difficult experience) along with the negative implication (being damaged in the process)."[126] Our bodies are naturally equipped to respond to stress, but in small doses.[127] According to the American Psychological Association, our body's response to persistent or chronic stress can have serious consequences.[128] In this

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disproportionately impacted by risk factors related to pregnancy, such as hypertension or gestational diabetes, but these factors are made worse by the compounded stress of racial discrimination, lower quality health care, climate change, and COVID-19." Black Women's Health Imperative, *supra* note 108, at 12.

119. Bridges, *supra* note 1, at 1280.

120. Arline T. Geronimus, *The Weathering Hypothesis and the Health of African-American Women and Infants: Evidence and Speculations,* 2 Ethnicity & Disease 207 (1992).

121. *Id.*

122. Patia Braithwaite, *Biological Weathering and Its Deadly Effect on Black Mothers,* SELF, (Sept. 30, 2019), https://www.self.com/story/weathering-and-its-deadly-effect-on-black-mothers [https://perma.cc/4RXW-QR9Q].

123. Gene Demby, *Making the Case that Discrimination Is Bad for Your Health*, NPR: Code Switch, (Jan. 14, 2018, 7:00 AM), https://www.npr.org/sections/codeswitch/2018/01/14/577664626/making-the-case-that-discrimination-is-bad-for-your-health [https://perma.cc/Y5EA-DZY2].

124. Geronimus, *supra* note 120.

125. Braithwaite, *supra note* 122.

126. *Id.*

127. American Psychological Association, *Stress Effects on the Body,* (Nov. 01, 2018), https://www.apa.org/topics/stress/body [https://perma.cc/A5NY-XZVL].

128. *Id.*

sense, "if racism is a source of chronic stress for [B]lack people, and if chronic stress has negative physiological impacts, then racism could explain the higher rates of morbidity and mortality among [B]lack women."[129]

6. Lack of Access to Quality and Affordable Health Care

Lack of access to health care for people of color, especially Black women, perpetuates racial disparities in maternal health outcomes in the United States. Here, we begin to see how structural racism permeates not only our health care institutions but also our legal institutions. Legal institutions can enact policy change to provide everyone with the capacity for pregnancy equitable care and to ensure successful maternal health outcomes. However, these institutions have made it difficult for marginalized communities to access such necessary care.

People with low incomes are often unable to afford private health insurance, a significant barrier to accessing health care. The Patient Protection and Affordable Care Act (ACA), enacted under the administration of President Barack Obama on March 23, 2010, is a United States health reform law.[130] One of the primary goals of the ACA was to eliminate racial disparities in the number of uninsured individuals in the country.[131] "Before the passage of the ACA, people of color accounted for 54 percent of those uninsured in the United States."[132] Black women and other women of color, already burdened by the numerous structural barriers to accessing health care, suffered greatly from this lack of coverage.[133] After the passage of the ACA, racial and ethnic gaps in access to health care narrowed, with the uninsured rate for Black people dropping from 24.4 percent in 2013 to 14.4 percent in 2018.[134] The ACA has played a significant role in improving access to health care for Black women, but has not been a cure-all, in part due to some states' failure to adopt the law's Medicaid expansion provisions.

Structural racism is the connecting thread at the heart of the aforementioned factors that contribute to racial disparities in maternal mortality. Moreover, Black pregnant people often contend with multiple barriers to quality reproductive care at a time, compounding the impacts of structural racism. Thus, to ignore structural racism in maternal mortality is to ignore Black birthing people as a whole. Systemic racism has had a harrowing impact on Black people's health for centuries, pervading their experiences of pregnancy and childbirth. Structural racism exists in the fabric of the United States' institutions, and legal institutions have the power and responsibility to address these issues through policy reform.

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129. Bridges, *supra* note 1, at 1261.
130. Patient Protection and Affordable Care Act, 42 U.S.C. §18001 (2010).
131. BLACK MAMAS MATTER ALLIANCE, *supra* note 65, at 22.
132. Black Women's Health Imperative, *supra* note 108, at 9.
133. *Id.*
134. *Id*., citing J. Baumgartner, *How the Affordable Care Act Has Narrowed Racial and Ethnic Disparities in Access to Health Care*, Commonwealth Fund, (Jan. 16, 2020), https://www.commonwealthfund.org/press-release/2020/new-report-affordable-care-act-has-narrowed-racial-and-ethnic-gaps-access-health [https://perma.cc/7Q8V-TFB8].

However, by failing to center Black women and racism in its attempts to respond to the maternal health crisis, the government has willingly failed to do so.

IV. INSTITUTIONAL RESPONSES TO RACIAL DISPARITIES IN MATERNAL HEALTH OUTCOMES

Federal and state institutions have failed to adequately center Black women and address structural racism in their responses to the maternal health crisis. Although the passage of the ACA has made way for great progress in addressing racial disparities in maternal health outcomes and health care overall, public policy initiatives have created even more barriers to Black women's access to care. The following are examples of how our federal and state institutions have impacted the United States' maternal health crisis, or rather its Black maternal health crisis, by way of action or inaction.

A. The Affordable Care Act, Medicaid Expansion, and the Biden-Harris Administration

The passage of the ACA has been essential in ensuring access to care for Black women of reproductive age (fifteen to forty-four), who face the greatest disparities in health care coverage.[135] People of reproductive age must have health care coverage to participate in routine exams and other medical procedures to maintain their reproductive health.[136] The Essential Health Benefits requirement is a feature of the ACA that guarantees that people of reproductive age will receive this care.[137] This requirement comprises ten categories of services that health insurance plans must cover under the ACA, including prenatal, childbirth, and newborn care, which protects the health and safety of Black mothers and their babies.[138]

Pursuant to the ACA, this coverage is provided through Medicaid, a government program that provides health coverage to eligible low-income individuals who cannot afford or do not have access to quality health care.[139] When enacted, the ACA required states to expand Medicaid eligibility to individuals with incomes below 138 percent of the federal poverty level.[140] This

135. *Id.*
136. *Id.*
137. *Id.*; *see also* U.S. Centers for Medicare and Medicaid Services, *Essential Health Benefits,* (last visited April 14, 2022)., https://www.healthcare.gov/glossary/essential-health-benefits/ [https://perma.cc/TE4A-TYJ2].
138. Black Women's Health Imperative, *supra* note 108, at 9.
139. *See* U.S. Centers for Medicare and Medicaid Services, *Medicaid*, (last visited April 14, 2022), https://www.healthcare.gov/glossary/medicaid/ [https://perma.cc/5LGF-LYCM].
140. Judith Solomon, *Closing the Coverage Gap Would Improve Black Maternal Health,* Center on Budget and Policy Priorities, (Jul. 26, 2021). https://www.cbpp.org/research/health/closing-the-coverage-gap-would-improve-black-maternal-health [https://perma.cc/FR3Q-2K5D]. 138 percent below the federal poverty line is about $17,800 annually for a single adult with two children.

change was remarkable, considering that "Medicaid [now] pays for more than 40% of U.S. births and 65% of births to Black mothers."[141] Moreover, "nearly one-third (31 percent) of Black women of reproductive age are enrolled in the Medicaid program." [142] Medicaid is essential to improving Black women's reproductive health outcomes, as the program covers "family planning; sexually transmitted infection testing and treatment; and pregnancy-related care, including prenatal services, childbirth, and [limited] postpartum care."[143] The expansion of Medicaid under the ACA has improved the accessibility of comprehensive care to Black women, bettering their pathway to motherhood.[144]

Many of the ACA's opponents campaigned for it to be repealed.[145] The Supreme Court ruled on the ACA for the first time in *National Federation of Independent Business v. Sebelius*.[146] In *Sebelius*, the Court held that "Medicaid expansion is unduly coercive on the states," effectively rendering Medicaid expansion optional in each state.[147] Since that ruling, all but twelve states have adopted the Medicaid expansion.[148] In the average non-expansion state, Medicaid eligibility is capped at about 40 percent of the federal poverty level, "or just $8,800 in annual income for a single parent with two children."[149] In 2019, over 800,000 women of reproductive age were uninsured because they fell into what has become known as the "coverage gap"— where low-income individuals who live in one of the twelve non-expansion states have no access to affordable health care coverage because they make "too much" above the income threshold.[150] Of the 800,000 women of reproductive age in the coverage gap, two-thirds were women of color.[151] Moreover, many of the twelve non-expansion states are concentrated in the South, where Black women face some of the highest risks for poor maternal health outcomes and access to care.[152] Although these women could become

141. *Id.*
142. Black Women's Health Imperative, *supra* note 108, at 10.
143. *Id.*
144. Solomon, *supra* note 140.
145. Jane Perkins, *Fact Sheet: The Supreme Court's ACA Decision and Its Implications for Medicaid*, (April 15, 2013)., https://healthlaw.org/resource/fact-sheet-the-supreme-courts-aca-decision-its-implications-for-medicaid/ [https://perma.cc/PT5M-Q4VH] (stating that "[s]ince it was signed into law in March 2010, the ACA has been subjected to relentless litigation…").
146. *National Federal of Independent Business v. Sebelius*, 567 U.S. 519 (2012).
147. Perkins, *supra* note 145.
148. Kaiser Family Foundation (KFF), *Status of State Medicaid Expansion Decisions: Interactive Map,* (last updated Apr. 26, 2022), https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/ [https://perma.cc/3NB6-6ZCZ]. Notably, the 12 non-expansion states are Alabama, Florida, Georgia, Kansas, Mississippi, North Carolina, South Carolina, South Dakota, Tennessee, Texas, Wisconsin, and Wyoming.
149. Perkins, *supra* note 145. Perkins notes that "[t]he exception is Wisconsin, which extends Medicaid eligibility to adults with incomes up to 100 percent of the poverty line."
150. *Id.*
151. *Id.* (29 percent were Black; 33 percent were Latina; 1 percent were American Indian/Alaska Native; 1 percent were Asian; 2 percent were Other)..
152. *Id.*; *see also* BLACK MAMAS MATTER ALLIANCE, *supra* note 65, at 6. ("Nine out of ten people who fall into the coverage gap live in the South, and Black adults are more likely than any other racial group to be affected by it." *Id.* at 24.).

eligible for Medicaid once they become pregnant, that does not ensure adequate maternal health. Preconception and prenatal care are vital to successful maternal health outcomes; without them, Black women are left "without access to care that could identify and address their health risks before pregnancy."[153] Lack of access to perinatal and comprehensive reproductive care causes issues like chronic stress and weathering, chronic health conditions, and other factors contributing to racial disparities in maternal mortality to persist unchecked. Access to necessary health care should not be conditioned on pregnancy; health care should not be a privilege, but a right to which every person is entitled regardless of their background.

Maternal mortality rates have improved in states that have participated in Medicaid expansion.[154] "This is largely due to increased access to preventive care and the continuum of comprehensive health care and support . . . in turn reducing" poor maternal health outcomes.[155] However, there are caveats to this improvement. Postpartum care under Medicaid lasts for only sixty days after the end of a pregnancy.[156] The lack of care after these sixty days results in "churning": a disruption of health care during a high-risk time, which contributes to Black women's lack of access to health care.[157] In response to churning during the COVID-19 global pandemic, President Joseph Biden enacted the American Rescue Plan Act of 2021 to address some of the pandemic's harms.[158] Among other features, the law gives states the option of expanding postpartum coverage under Medicaid to a full year, commencing on April 1, 2022.[159] As of December 2022, twenty-seven states have implemented the twelve-month-extension of Medicaid postpartum coverage, with seven states planning to implement the extension in the future.[160]

President Biden and Vice President Kamala Harris, the first Black female Vice President of the United States, have also made efforts to address racial disparities in maternal health outcomes outside the realm of Medicaid.[161] On April

153. Perkins, *supra* note 145.
154. *See* Taylor, *supra* note 14, at 513.
155. *Id.*
156. Perkins, *supra* note 145.
157. Jamie R. Daw et al., *Women in the United States Experience High Rates of Coverage "Churn" In Months Before and After Childbirth*, Harvard School of Public Health: Health Affairs, (April 2017), https://www.hsph.harvard.edu/news/press-releases/women-childbirth-health-coverage/ [https://perma.cc/E537-7CBW].
158. American Rescue Plan Act, H.R. 1319, 117th Cong. (2021); *see also The American Rescue Plan*, The White House (last visited February 8, 2022), https://www.whitehouse.gov/american-rescue-plan/ [https://perma.cc/B3FV-QDYR]. This law is also called the "COVID-19 Stimulus Package."
159. Perkins, *supra* note 145.
160. Medicaid Postpartum Coverage Extension Tracker, Kaiser Family Foundation (KFF), (Last updated December 8, 2022), https://www.kff.org/medicaid/issue-brief/medicaid-postpartum-coverage-extension-tracker/ [https://perma.cc/C2HA-YLXD].
161. *FACT SHEET: Biden-Harris Administration Announces Initial Actions to Address the Black Maternal Health Crisis*, The White House (April 13, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/13/fact-sheet-biden-harris-administration-announces-initial-actions-to-address-the-black-maternal-health-crisis/ [https://perma.cc/SX7Q-USB3].

13, 2021, the Biden-Harris Administration announced initial actions it would take to address the United States' maternal mortality crisis, emphasizing that

> Quality, equitable health care is a right, not a privilege. The actions announced today are initial steps in the critical work this Administration will do to address our maternal mortality crisis, close disparities in maternal care and outcomes for all birthing people and address the systemic racism that has allowed these inequities to exist.[162]

These initial actions included increasing investment in implicit bias training for health care providers, investing in necessary reproductive and preventative health services to promote gender and health equity, and prioritizing investments in programs that protect access to health care in rural areas of the country.[163] In committing to address the maternal health crisis, the Biden-Harris Administration did not willfully disregard the fact that the problem of maternal mortality in the United States is one of race, and that the only way to alleviate the disturbing rates of maternal deaths is to bring the realities of structural racism to the forefront of our conversations. While the actions of the Biden-Harris Administration were significant first steps towards addressing the maternal health crisis, the government must make greater strides to fully implement the Administration's stated goals. More specifically, Congress and other legal institutions must take action to remedy this public health crisis.

B. HR 1318: The Preventing Maternal Deaths Act of 2018

On December 21, 2018, former President Donald Trump signed into law the Preventing Maternal Deaths Act.[164] Viewed by experts as a landmark policy in addressing maternal mortality in the United States, the Act authorized federal funding dedicated to eliminating disparities in maternal health outcomes and maternal mortality.[165] Specifically, the Act sustained maternal mortality review committees (MMRCs), "multidisciplinary committees that convene at the state or local level to comprehensively review deaths of women during or within a year of pregnancy."[166] Prior to the passage of the Act, the U.S. surveilled maternal deaths by reviewing death certificates that listed the clinically-defined cause of death.[167]

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162. *Id.*
163. *Id.*
164. Preventing Maternal Deaths Act of 2018, Pub. L. No. 115-344, 132 Stat. 5047 (2018).
165. The American College of Obstetricians and Gynecologists (ACOG), U.S. House Passes Landmark Legislation to Prevent Maternal Deaths, (Dec. 11, 2018), https://www.acog.org/news/news-releases/2018/12/us-house-passes-landmark-legislation-to-prevent-maternal-deaths [https://perma.cc/TWS8-DKE8].
166. Centers for Disease Control and Prevention (CDC), Pregnancy-Related Deaths: Data from 14 U.S. Maternal Mortality Review Committees, 2008-2017, (last reviewed Apr. 13, 2022), https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/mmr-data-brief.html [https://perma.cc/4HDP-D5RG].
167. *Building U.S. Capacity to Review and Prevent Maternal Deaths: Report from Nine Maternal*

By contrast, MMRCs broadly review factors that may have led to a pregnant person's death to develop strategies for preventing such deaths in the future.[168] MMRCs collect both clinical and non-clinical data, such as a person's age, how many days postpartum they were at the time of death, their geographic location, their race and ethnicity, the manner of their death, and other social factors significant to determining the cause of death.[169]

The idea behind implementing MMRCs across the U.S. was that comprehensive, quality data on maternal mortality may enable us to better address and reduce deaths.[170] However, that has not been the case. This may in part be because the text of the Act itself makes no mention of race, racial disparities, or structural racism as the predominant cause of worsening maternal health outcomes in the United States. As Dr. Joia Crear-Perry, Founder and President of the National Birth Equity Collaborative, testified during the congressional hearings on H.R. 1318,

> Throughout the bill, there is no mention of race, racism, or racial disparities. The inability to name this as a key focus to reduce RACIAL disparities in maternal mortality and morbidity will continue to exacerbate the problem.[171]

How can solutions to an issue primarily of racial inequity ignore race? By failing to mention structural racism, the Act functions as a purported solution that willfully ignores the history of racism, which plays a pivotal role in one of the United States' greatest public health and social crises. Thus, the Act cannot serve as an adequate remedy to maternal health disparities.

The Act is also problematic because it merely funds the collection of data, not the implementation of concrete actions to resolve maternal mortality. Prior to the Act's passage, collected data on maternal mortality rates was deemed unreliable by critics.[172] Compiling reliable and comprehensive information

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Mortality Review Committees, 8, (2018), https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2413/2018/02/Report-from-Nine-MMRCs_1.pdf#:~:text=Report%20from%20Nine%20Maternal%20Mortality%20Review%20Committees5%20Executive,as%20a%20result%20of%20pregnancy%20or%20pregnancy-related%20complications [https://perma.cc/B6U6-9JQ6].

168. Data from 14 U.S. Maternal Mortality Review Committees, *supra* note 166.

169. Centers for Disease Control and Prevention (CDC), Pregnancy-Related Deaths: Data from 36 U.S. Maternal Mortality Review Committees, 2017-2019, (last reviewed Sep. 19, 2022), https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/data-mmrc.html#table1 [https://perma.cc/GD4Q-KJ8B].

170. Amnesty Int'l, *Deadly Delivery: The Maternal Health Care Crisis in the USA,* 85 (2010) [https://perma.cc/JEY5-E7L5] ("A lack of comprehensive data collection…is masking the full extent of maternal mortality and morbidity in the USA and is hampering efforts to analyze and address the problems...").

171. Better Data and Better Outcomes: Reducing Maternal Mortality In the U.S.: *Hearing Before the Subcomm. on Health of the Comm. on Energy & Commerce*, 115 Cong. 65 (2018) (Statement of Joia Crear-Perry, M.D., Founder and President of the National Birth Equity Collaborative).

172. Amnesty Int'l, *Deadly Delivery*, *supra* note 170.

regarding maternal deaths is an important component of addressing the issue. However, by creating and passing an Act dedicated only to data collection, with no further steps toward remedying maternal mortality rates and protecting Black people with the capacity for pregnancy, Congress has failed to implement solutions that advocates have long presented as crucial steps to effectively address maternal mortality.

C. HB 1381: Maternal Health Outcomes (2021)

Florida is one of the states in the Southern region of the United States that has chosen not to expand Medicaid eligibility. Although Florida policymakers have annually proposed bills to expand Medicaid coverage to close the gap, the state's Republican-dominated House and Senate have consistently blocked their passage. This leaves many people, including a significant number of Black mothers, without affordable and continuous access to proper health care to aid in safe pregnancies. Considering the degree of success expansion states have seen, one clear remedy to address the Black maternal crisis in non-expansion states is to reform state policy to fill coverage gaps and implement tailored solutions to maternal health disparities.

In 2021, Florida Democratic legislators successfully proposed House Bill 1381: "Maternal Health Outcomes."[173] Notably, nearly all of the bill's sponsors were Black women policymakers and consistent supporters of racial justice legislation in Florida.[174] The bill established pilot programs in predominantly Black and brown communities in Florida to improve maternal health outcomes for women of color.[175] Specifically, the bill adds maternal health care initiatives like telehealth home visits, education for pregnant people, and training for health care professionals to the state funded "Closing the Gap" grant.[176] Administered by the Department of Health, the grant supports community organizations that strive to reduce racial and ethnic health care disparities.[177] Further legislation codified that proposals for Closing the Gap grants must address priority areas such as "decreasing racial and ethnic disparities in maternal and infant mortality rates" and "decreasing racial and ethnic disparities in severe maternal morbidity rates

173. Fla. H.B. 1381 (2021) (codified as Fla. Stat. §381.7353 (2021)).

174. *See* Legiscan, *Florida House Bill 1381*, https://legiscan.com/FL/bill/H1381/2021 [https://perma.cc/ZH88-MUB6] (listing the names of each of the bill's sponsors in addition to the bill text).

175. News Service of Florida, *Florida Lawmakers Target Minority Maternal Health in Duval* County, News4Jax, (Apr. 21, 2021, 8:00PM), https://www.news4jax.com/news/local/2021/04/22/florida-lawmakers-target-minority-maternal-health-in-duval-county/ [https://perma.cc/7UBR-QHSV].

176. *See* Legiscan, *Florida House Bill 1381*, *supra* note 174.

177. Office of Minority Health and Health Equity, *Closing the Gap Grant,* Florida Health (last reviewed Feb. 1, 2022 4:28PM), https://www.floridahealth.gov/programs-and-services/minority-health/GrantFundingResources/closing-the-gap.html. [https://perma.cc/RX8M-DNRL]; *see also* Fla Stat. §381.7356 (2021).

and other maternal health outcomes."[178]

Although Florida successfully passed H.B. 1381, the fight for reproductive justice and access to care for Black women in Florida, the other eleven non-expansion states, and the United States more broadly is far from over. Until the Black maternal health crisis is resolved, our policymakers, healthcare providers, and advocates must stand up for reproductive justice, dismantle structural racism in health care, and make efforts to provide accessible and effective preconception, prenatal, and long-term postpartum care.

V. EFFECTIVE SOLUTIONS TO THE UNITED STATES' BLACK MATERNAL HEALTH CRISIS

To address racial disparities in maternal mortality in the United States, we must engage in more honest conversations about race, racism, and the impact of structural racism on our medical and legal institutions. Twelve states that have willingly chosen not to participate in Medicaid expansion are states in which Black pregnant people predominantly reside. For state governments to leave hundreds of thousands of Black women uninsured is to treat Black women as if they are invisible. Medicaid is an important source of health coverage for people of reproductive age and has been proven to remedy maternal mortality rates.[179] Information on the success of Medicaid is public knowledge. The twelve non-expansion states are fully aware of the benefits of Medicaid expansion and have still chosen not to afford this level of care to Black women. It is critical that all states fully expand Medicaid coverage to provide comprehensive care for all people.

Another solution for legal and policymaking institutions to implement is enacting legislation that contains concrete, attainable goals to remedy maternal mortality. Measures like the Preventing Maternal Deaths Act of 2018 were an acceptable first step but nowhere near a comprehensive solution. Our government has sufficient data on maternal mortality, structural racism in health care, and effective solutions backed by experts to enact laws that could mitigate centuries of health inequities for Black pregnant people. These solutions must directly address the many factors that contribute to racial disparities in maternal health outcomes and develop ways to protect Black pregnant people from further reproductive injustices.

If our institutions continue to willfully disregard solutions that address the root of the issue, we risk wasting time in saving the lives of Black pregnant people across the nation. By failing to take measures known to remedy racial disparities in maternal mortality, the United States government perpetuates the erosion of Black people's reproductive autonomy. However, given the current composition of the Supreme Court and Congress, it seems unlikely that the federal government

178. Fla. Stat. §§381.7355(2)(a)1, 381.7355(2)(a)2 (2022). There are several additional priority areas concerning maternal morbidity and mortality rates that grant proposals may satisfy.

179. *See* Taylor, *supra* note 14, at 515.

will address racial inequities in reproductive care in the immediate future. If the Court is willing to revoke the constitutional right to abortion, and Congress has failed to safeguard this right, will federal government institutions effectively address racial inequities in maternal mortality? Even in light of the efforts of the Biden-Harris Administration, they likely will not.

With direct policy change through our highest legal institutions being unlikely, it seems that more realistic approach to policy change, particularly in non-expansion states, will have to occur through activism. "As seen throughout history, activism is essential in sparking policy change and holding our systems and institutions accountable."[180] For instance, organizations like SisterSong have continued to advocate for the reproductive needs, justice, and social concerns of Black women. The concerns of Black women must be at the forefront of policy change regarding maternal health care, as demonstrated by the fact that they were the sponsors of H.B. 1381. Policymakers can give Black women the voice and platform that they are seldom given, especially when it comes to the quality of care they deserve and need.

"Interventions to combat bias and racism within the health care system can be effective, but it will take commitment and concerted effort at both the institutional and individual levels."[181] On an individual level, we need more culturally competent healthcare providers. We can achieve this in several ways. One way is requiring health care providers to receive "training on implicit bias, class and gender bias, anti-racism, and human rights in the practice of health care."[182] These should be part of healthcare providers' required curriculum or educational development.[183] Implicit bias training is necessary because implicit negative stereotypes prevent providers from building positive relationships with their Black patients, which can impact the quality of care provided.[184] We also need to diversify the healthcare workforce.[185] Although Black physicians have been found to provide a better quality of and access to care in marginalized communities, "only 4% of U.S. physicians are Black."[186] We should encourage more Black people, especially Black women, to pursue careers in obstetrics and gynecology. States could encourage and promote the diversification of the healthcare workforce through "recruitment, scholarships and grants, housing or childcare assistance during training, mentoring programs, and state loan forgiveness programs."[187]

Most importantly, Black women need to regain control over their bodily and reproductive autonomy.[188] When Roe recognized a right to abortion under the

180. *Id.*
181. *Id.*
182. BLACK MAMAS MATTER ALLIANCE, *supra* note 65, at 49.
183. *Id.*
184. *See id.* at 26.
185. *See id.*
186. *Id.*
187. *Id.* at 49.
188. *Id.*

constitutional concept of privacy, Black women felt left out of the conversation due to historical racism tracing back to slavery.[189] Enslavers deprived Black women of bodily and reproductive autonomy, and we witness that same oppression now with the excessive and disproportionate use of cesarean sections on Black women. However,

> The right to safe and respectful maternal care encompasses a woman's right to actively participate and make informed decisions about her care. To make an informed decision, a woman must be provided with information about her condition, her health care options, and the risks and benefits associated with each one. *Maternal health care providers can empower their patients to become engaged decision-makers by centering them, educating them, and listening to them*.[190]

For Black women to regain their reproductive autonomy, they must beat the center of their own healthcare plans. Additionally, healthcare providers must put issues affecting Black women at the core of their care. Policymakers and other decisionmakers in legal institutions at all levels must address Black women's concerns. To continue to make Black women feel voiceless, overlooked, and dismissed is one of the United States' greatest public health failures. Adopting a Reproductive Justice framework and placing Black people with the capacity for pregnancy at the core of reproductive care reform not only has the power to eliminate racial disparities in maternal mortality rates, but also can foster equity in care for all people with the capacity for pregnancy.

CONCLUSION

Although it may seem as if the Biden-Harris Administration has made significant progress towards rectifying the United States' maternal health crisis, there is still much progress to be made. Given the composition of the Supreme Court, it is more than likely that further challenges to the ACA will arise. The Court may decide to diminish or completely remove necessary healthcare coverage for many at-risk individuals, including Black birthing people. However, there are many other avenues to protect Black people with the capacity for pregnancy, their reproductive justice, and bodily autonomy. These efforts include educating those who directly provide reproductive care to Black people, ensuring that Black people are well-represented in the health care profession, and listening to Black pregnant people and their needs. However, every solution must begin with addressing the reality of structural racism and its impact on Black women's maternal health outcomes. Only then will the United States begin to see transformative results in protecting its most endangered pregnant people.

189. And with the *Dobbs* decision, even the inadequate protections of *Roe* have been stripped away, leaving Black women disproportionately harmed.

190. *Id.* (emphasis added).

How Anti-Sex Trafficking Efforts Should Align With Criminal Justice Reform

Kiricka Yarbough Smith & Maura Reinbrecht†

ABSTRACT

Current law enforcement practices—including efforts to address sex trafficking—disproportionately harm Black people. This Article proposes that front-end criminal justice reforms to reduce the criminalization of poverty, reform racially biased police practices, and increase police accountability could mitigate the disparate impact that policing has on Black individuals being sex trafficked. Aligning anti-sex trafficking efforts with criminal justice reform would prioritize the prevention of sex trafficking as well as the protection of people who experience trafficking, while seeking to prosecute traffickers with less collateral harm to Black individuals.

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INTRODUCTION

Sex trafficking occurs when a trafficker uses force, fraud, or coercion to induce another individual to perform a commercial sex act.[1] To obtain maximum profit with minimal effort, traffickers often seek out individuals who are most vulnerable to coercion. The same factors that make individuals susceptible to this coercion—being young, poor, Black or brown, female, LGBTQ, among other factors[2]—also make individuals more likely to encounter police intervention, criminalization, and in rare but egregious cases, sexual misconduct by officers. Police intervention increases the likelihood of an individual receiving a criminal record or being incarcerated, particularly for Black individuals,[3] which, in turn, increases an individual's likelihood of being trafficked.[4]

1. 18 U.S.C. § 1591 (2000). Sex trafficking also occurs when a minor performs a commercial sex act, regardless of whether they do so because of force, fraud, or coercion. *See id.*
2. *See* Human Rights Project for Girls, *Domestic Child Sex Trafficking and African American Girls*, RIGHTS4GIRLS (Feb. 2015), https://rights4girls.org/wp-content/uploads/r4g/2015/02/African-American-Girls-and-Trafficking.pdf [https://perma.cc/Z7XB-9P72].
3. *See e.g.*, Colleen Walsh, *Solving Racial Disparities in Policing*, THE HARVARD GAZETTE (Feb. 23, 2021), https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing [https://perma.cc/3RPF-WL64] ("Rooted in slavery, racial disparities in policing and police violence, they say, are sustained by systemic exclusion and discrimination, and fueled by implicit and explicit bias."). Importantly, policing has a disparate impact on all people of color—not just Black individuals. However, to recognize different demographics' unique experiences of sex trafficking and interacting with law enforcement, this Article focuses on Black individuals.
4. KYLEIGH FEEHS & ALYSSA CURRIER WHEELER, 2020 FEDERAL HUMAN TRAFFICKING REPORT, HUMAN TRAFFICKING INSTITUTE 28 (Lindsey Roberson, ed., 2021) https://www.traffickinginstitute.org/wp-content/uploads/2021/06/2020-Federal-Human-Trafficking-Report-Low-Res.pdf [https://perma.cc/EE9B-DJNG] (explaining that in 2020, prior incarceration was one of the most common vulnerabilities of trafficking victims); *see*

Despite this vicious cycle, policing is a central component of the United States' anti-sex trafficking[5] efforts.[6] Advocates have recognized the controversy of tasking law enforcement with the identification of individuals begin trafficked.[7] However, few scholars have recognized how criminal justice reform could mitigate the disparate impact that police-led anti-sex trafficking efforts have on Black individuals at risk of and being trafficked.[8] This Article does just that.

This Article first provides an overview of current anti-sex trafficking efforts and law enforcement operations, of related criminal justice reform, and of existing literature about the intersection of anti-sex trafficking efforts and criminal justice reform. Next, this Article discusses three front-end criminal justice reforms: reducing the criminalization of poverty, reforming racially biased police practices, and increasing police accountability. This Article explains how each of these reforms could reduce the disparate negative impact that police-led anti-trafficking efforts cause Black individuals, particularly women and girls. Ultimately, this Article concludes that aligning current anti-sex trafficking efforts with broader

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Sasha Hulsey, Kshitiz Karki, Olivia Reyes & Alyssa Scott, *Survivors Deserve a Clean Slate*, THE GENDER POLICY REPORT (Jan. 12, 2021), https://genderpolicyreport.umn.edu/survivors-deserve-a-clean-slate/ [https://perma.cc/RU78-7AG5] (arguing that without expungement, people who experienced trafficking with criminal records "may experience exploitation as the only source of security. The current system keeps people in poverty or engaging in other criminal activity as a means to survive"); *see also* Peter B. Edelman, *Criminalization of Poverty: Much More to Do*, 69 DUKE L.J. ONLINE 114, 120 (2020) (noting that collateral consequences of criminal records, such as employment, housing, and education restrictions, "further the cycle of the criminalization of poverty").

5. This Article focuses exclusively on anti-sex trafficking efforts, but anti-labor trafficking efforts are equally important and would also likely benefit from reforms to reduce collateral harm to people being trafficked.

6. *See* Amy Farrell, Jack McDevitt, & Stephanie Fahy, *Understanding and Improving Law Enforcement Responses to Human Trafficking: Final Report*, NORTHEASTERN UNIV. INST. OF RACE & J. (Dec. 2008), https://www.ojp.gov/pdffiles1/nij/grants/222752.pdf [https://perma.cc/TD7P-8VW6] (noting that the United States government "has prioritized human trafficking prosecutions and expects local law enforcement to become the 'eyes and ears for recognizing, uncovering and responding to circumstances that may…turn out to be a human trafficking case'"); *see also* U.S. Dep't of State, *3Ps: Prosecution, Protection and Prevention*, U.S. DEP'T OF STATE, https://www.state.gov/3ps-prosecution-protection-and-prevention (last visited Dec. 2, 2021) [https://perma.cc/N8C5-DSEE] (explaining that prosecution is part of "the fundamental framework used around the world to combat human trafficking").

7. *See e.g.*, Sabrina Balgamwalla, *Trafficking Rescue Initiatives as State Violence*, 122 PENN ST. L. REV. 174 (2017). (discussing the "unintentional harms of law enforcement anti-trafficking initiatives" and "the need for alternative policies that prioritize survivor agency and autonomy"); Kate D'Adamo, *Can Anti-Trafficking Be Rescued?* REFRAME HEALTH & JUSTICE (June 17, 2020), https://reframehealthandjustice.medium.com/can-anti-trafficking-be-rescued-5688c3221173 (recognizing that "[n]either healing from victimization nor fighting exploitation inherently involves law enforcement"); HANNAH GARRY & MAURA REINBRECHT, OVER-POLICING SEX TRAFFICKING: HOW U.S. LAW ENFORCEMENT SHOULD REFORM OPERATIONS, UNIV. OF SOUTHERN CAL. GOULD SCHOOL OF LAW INT'L HUMAN RIGHTS CLINIC, 52 (2021) (recommending that law enforcement "[d]rastically limit the use of operations to a few specific circumstances while supporting community and public health approaches to identify victims and traffickers outside of the criminal justice system".)

8. Abigail Swenstein and Kate Mogulescu are two scholars who have recognized that criminal justice reform should be incorporated into anti-sex trafficking efforts. Abigail Swenstein & Kate Mogulescu, *Resisting the Carceral: The Need to Align Anti-Trafficking Efforts with Movements for Criminal Justice Reform,* 6 ANTI TRAFFICKING REV. 118 (2016).

criminal justice reform could reduce this disparate negative impact.

I. BACKGROUND

A. Current Anti-Sex Trafficking Efforts: Law Enforcement Operations

In 2000, the Trafficking Victims Protection Act (TVPA) made both forced labor and sex trafficking a federal crime in the United States.[9] Consistent with the international community's anti-trafficking efforts,[10] the TVPA follows the "3P Paradigm" to protect people being trafficked,[11] prosecute traffickers, and prevent trafficking.[12] While state and federal government have recently invested in prevention efforts and enhanced protections for people who experience trafficking,[13] human rights advocates have long criticized the United States' anti-trafficking approach as focusing too heavily on "arrest[ing], prosecut[ing] and punish[ing] traffickers," sometimes at the expense of protecting people who have been trafficked[14] or preventing trafficking before it occurs.[15] For example, the

9. Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. §1589-91 (2000).

10. Namely, the TVPA's goals mirror those of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime ("Palermo Protocol"). *See* U.S. Dep't of State, *supra* note 6.

11. Individuals who are and were trafficked are often referred to as "victims" or "survivors," respectively. To recognize that the experience of sex trafficking is something that happens to individuals but does not constitute their entire identity, this Article refers to these demographics as "people being trafficked" and "people who experienced trafficking."

12. *Id.*

13. *See* U.S. Dep't of Justice, *Justice Department Awards Nearly $101 Million to Combat Human Trafficking*, U.S. DEP'T OF JUSTICE (Sept. 21, 2020), https://www.justice.gov/opa/pr/justice-department-awards-nearly-101-million-combat-human-trafficking [https://perma.cc/2DT3-5CMP] (outlining the funds dedicated to protection and prevention efforts). For example, the United States Department of Justice's (DOJ) Civil Rights Division created the Human Trafficking Prosecution Unit (HTPU), which both increased prosecution of sex trafficking and forced labor and enhanced efforts to identify adults—not just minors—who are being trafficked. Additionally, HTPU enumerates the rights of and provides resources—such as immigration relief—to people who experience trafficking as part of its efforts to protect this population while simultaneously prosecuting their traffickers. *See* U.S. Dep't of Justice, *Human Trafficking Prosecution* Unit (HTPU), U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/human-trafficking-prosecution-unit-htpu (last visited Dec. 27, 2022) [https://perma.cc/8Z83-6XTS] (noting that all victims of federal crimes, including human trafficking, have the right to be reasonably protected from the accused and the right to be treated with fairness and respect for their dignity and privacy.)

14. Mike Dottridge, *Introduction to Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World,* JUSTICE GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN 1 (2007) http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf [https://perma.cc/MZ9T-KVTB].

15. *See* Jonathan Todres, *Taking Prevention Seriously: Developing A Comprehensive Response to Child Trafficking and Sexual Exploitation*, 43 VAND. J. TRANSNAT'L L. 1, 4 (2010) ("Instead of choosing prevention as the starting point for developing an effective response to child

2000 TVPA only provided immigration protection to foreign individuals being trafficked if they cooperated with law enforcement to charge their trafficker.[16] This contingency failed to recognize many trafficked individuals' fear of both law enforcement and opposing their traffickers. While this contingency no longer exists, anti-sex trafficking efforts' emphasis on prosecution remains.

To illustrate, law enforcement "operations" —often known as "raids" or "stings"— are one of the government's primary tools for combating sex trafficking.[17] In theory, operations aim to identify not just traffickers, but also individuals being trafficked.[18] However, law enforcement participating in operations receive inconsistent training about how to identify individuals being trafficked and interview such individuals without exacerbating their trauma.[19]

Accordingly, some critics question the appropriateness of law enforcement's central role in identifying people being sex trafficked, in part due to its disparate harm to Black individuals.[20] Section III discusses these disparate impacts in more detail in conjunction with the following criminal justice reforms.

B. Front-End Criminal Justice Reforms

The United States' criminal justice system incarcerates people at a higher rate than any other country in the world.[21] Due to racial disparities in poverty,

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trafficking and commercial sexual exploitation, to date most governments have paid the least attention to what is actually the end goal. In fact, in many locales, prevention measures have been nonexistent.").

16. *See* Victims of Trafficking and Violence Protection Act of 2000 §1589-91, *supra* note 9. Individuals could also qualify for relief based on age, physical inability, or psychological trauma. *See id.*

17. *See* Melissa Ditmore & Juhu Thukral, *Accountability and the Use of Raids to Fight Trafficking,* 1 ANTI-TRAFFICKING REV. 134, 136 (2012) ("Law enforcement raids have served as the US government's primary means of identifying victims of trafficking in persons.").

18. Garry & Reinbrecht, *supra* note 7. Such federal operations include the Innocence Lost National Initiative and Operation Independence Day (formerly Operation Cross Country); *see also* U.S. Dep't of Justice, *Innocence Lost National Initiative and Operation Independence Day 2019,* THE U.S. DEP'T OF JUSTICE (Aug. 6, 2019) https://www.justice.gov/opa/pr/innocence-lost-national-initiative-and-operation-independence-day-2019 [https://perma.cc/6RXL-6LFY].

19. *See* Garry & Reinbrecht, *supra* note 7, at 13 ("[A] 2020 study that evaluated 541 incident reports in San Francisco that involved someone selling sex found that only 17% of those reports mentioned screening for human trafficking.")

20. *See e.g.*, Swenstein & Mogulescu, *supra* note 8, at 120 (explaining that individuals who experience sex trafficking "do not seek rescue at the hands of law enforcement," and how a law enforcement approach to the issue of human trafficking negatively impacts individual clients and larger anti-trafficking efforts); Annie Gilbertson, Aaron Mendelson, & Angela Caputo, *Collateral Damage: How LA's Fight Against Sex Trafficking is Hurting Vulnerable Women*, LAIST (Aug. 7, 2019), https://projects.laist.com/2019/collateral-damage/ [https://perma.cc/W6Z2-AFTT] (citing various critics of Los Angeles Police Department's (LAPD) anti-sex trafficking efforts, and noting "[w]hile black women make up around 9% of the city's female population, they account for nearly 65% of the LAPD's female prostitution arrests."); Garry & Reinbrecht, *supra* note 7, at 2 (critiquing law enforcement anti-sex trafficking efforts both for ineffectively identifying victims and traffickers and disproportionately arresting Black women and minors.)

21. *See e.g.*, *Criminal Justice Reform*, EQUAL JUSTICE INITIATIVE https://eji.org/criminal-justice-reform/ (last visited Nov. 16, 2021) [https://perma.cc/GD85-A84A]; Emily Widra & Tiana

policing, and arrests, among other aspects of the criminal justice system, mass incarceration in the United States disproportionately impacts Black individuals.[22]

Black individuals are more likely to experience poverty,[23] and people experiencing poverty are more likely to be "fined, arrested, and even incarcerated for minor offenses than other Americans." [24] Black individuals are also subject to "interventionist police practices" and targeted policing that results in a disproportionate number of arrests.[25] Moreover, lack of police accountability, in part due to the blue wall of silence,[26] exacerbates racially biased police practices.[27] For example, Black women are particularly vulnerable to police sexual violence

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Herring, *States of Incarceration: The Global Context*, PRISON POLICY INITIATIVE (Sept. 2021), https://www.prisonpolicy.org/global/2021.html [https://perma.cc/MZR6-ALT6]

22. *See Criminal Justice Reform, supra* note 21.
23. *See e.g.*, John Creamer, Poverty Rates for Blacks and Hispanics Reached Historic Lows in 2019, *Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups*, U.S. CENSUS BUREAU (Sept. 15, 2020), https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html [https://perma.cc/SBU6-2U9M] (Finding that, "[i]n 2019 . . . Blacks represented 13.2% of the total population in the United States, but 23.8% of the poverty population.").
24. *See e.g.*, Karen Dolan & Jodi L. Carr, *The Poor Get Prison: The Alarming Spread of the Criminalization of Poverty*, THE INST. FOR POL'Y STUD 6 (Mar. 18, 2015) https://ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf [https://perma.cc/7LQ9-Z7TK]; *Dispelling Myths About Poverty*, EQUAL JUSTICE UNDER LAW, https://equaljusticeunderlaw.org/poverty-myths (last visited Nov. 19, 2021) [https://perma.cc/N5C8-HU88]; Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POLICY INITIATIVE (Jul. 9, 2015), https://www.prisonpolicy.org/reports/income.html [https://perma.cc/BM7Q-MXBW] (Finding that, "in 2014 dollars, incarcerated people had a median annual income of $19,185 prior to their incarceration, which is forty-one percent less than non-incarcerated people of similar ages.").
25. *See e.g.*, RAM SUBRAMANIAN, LAUREN-BROOKE EISEN, TARYN MERKL, LEILY ARZY HERNANDEZ STROUD, TAYLOR KING, JACKIE FIELDING & ALIA NAHRIA, BRENNAN CENTER FOR JUSTICE, A FEDERAL AGENDA FOR CRIMINAL JUSTICE REFORM 6, (2020), https://www.brennancenter.org/our-work/policy-solutions/federal-agenda-criminal-justice-reform [https://perma.cc/2LHK-U9FM]; *Criminal Justice Reform*, SOUTHERN POVERTY LAW CENTER https://www.splcenter.org/issues/mass-incarceration (last visited Nov. 17, 2021) [https://perma.cc/X6CY-L58J].
26. The blue wall of silence is defined as an implicit agreement between law enforcement officers to keep quiet about each other's misconduct, to protect one another from disciplinary action, and to maintain a culture where "secrecy is promoted and rewarded." *The Blue Wall of Silence Perpetuates Racist Policing, Wrongful Convictions*, MONTANA INNOCENCE PROJECT https://mtinnocenceproject.org/the-blue-wall-of-silence-perpetuates-racist-policing-wrongful-convictions/ (last visited March 17, 2023). The blue wall of silence is discussed in more detail in Section III(c), Increasing Police Accountability.
27. *See, e.g.*, Anastasia Cassisi, *Sexual Misconduct by Law Enforcement: A New Meaning to Stop and Frisk?*, 33 J. CIV. RTS & ECON. DEV. 141, 155 (2019) (noting that "[t]he blue wall of silence further exacerbates the issue of sexual misconduct by officers…because [it] leads to cover-ups and cultivates a 'culture of American policing [that] does nothing to encourage the good apples from policing the bad ones'"). Sexual misconduct by officers is part of a larger trend of racially biased policing, and "has consistently been part of the arsenal of oppression and policing and repression against communities of color." *Id.* Because the blue wall of silence exacerbates the issue of sexual misconduct by police officers, and sexual misconduct is part of racially biased policing, it follows that the blue wall of silence exacerbates racially biased police practices.

due to inadequate legal protections,[28] increased contact with law enforcement due to over-policing,[29] and pejorative stereotypes that have endured from slavery.[30] Yet not all law enforcement departments clearly prohibit sexual misconduct, and departments often miscategorize[31] and minimize such misconduct.[32]

Accordingly, central goals of front-end criminal justice reform in the United States include reducing the criminalization of poverty, reforming racially biased police practices, and increasing police accountability.[33] In Section III, these reforms are discussed in more detail as remedial efforts to the shortcomings of current police-led anti-sex trafficking efforts.

C. Literature Review: The Intersection of Anti-Sex Trafficking and Criminal Justice Reform

Some scholars have argued the anti-trafficking movement should disentangle itself from law enforcement, as did the anti-intimate partner violence

28. Historically, sexual violence against Black women was not prohibited by law. Even after slavery was abolished, laws failed to adequately protect Black women from sexual violence and pejorative stereotypes about Black women persisted. Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM & MARY J. WOMEN & L. 39, 44-47 (2017).

29. Jasmine Sankofa, *Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform*, 59 HOW. L.J. 651(2016).

30. Jacobs, *supra* note 28, at 46-47 (explaining that stereotypes about Black women that developed during slavery include that Black women are promiscuous and immoral, and therefore responsible for the sexual violence against them; that Black women are not credible, and their accusations therefore not believable; and that Black women are aggressive, and therefore are mutual combatants rather than victims).

31. Nancy Phillips & Craig R. McCoy, *Extorting Sex with a Badge*, THE PHILADELPHIA INQUIRER (Mar. 29, 2007), https://www.inquirer.com/philly/news/special_packages/inquirer/Extorting_sex_with_a_badge.html [https://perma.cc/6CUR-3H2U] (explaining that law enforcement departments "often lump sex-abuse allegations into such categories as 'conduct unbecoming'"); Isodoro Rodriguez, *Predators Behind the Badge: Confronting Police Sexual Misconduct*, THE CRIME REPORT (Mar. 12, 2020), https://thecrimereport.org/2020/03/12/predators-behind-the-badge-confronting-hidden-police-sexual-misconduct/ [https://perma.cc/FWW8-965R] (noting that "police agencies . . . wrongly categoriz[e] reports of abuse as discourtesy, improper search, or unprofessional conduct in an attempt to diminish their severity and impact").

32. *See* Steven Yoder, *Officers Who Rape: The Police Brutality Chiefs Ignore*, ALJAZEERA AMERICA (Jan. 19, 2016), http://america.aljazeera.com/articles/2016/1/19/sexual-violence-the-brutality-that-police-chiefs-ignore.html [https://perma.cc/R9HW-A8EP] (quoting Andrea Ritchie on police internal affair bureau's partiality to their fellow officers, whereas investigators are tough on victims); *see also* Cassisi, *supra* note 27, at 154-55 (describing how Oakland Police Department minimized and improperly investigated allegations of police sexual misconduct ("PSM")).

33. *See Solutions*, ACLU, https://www.aclu.org/other/solutions (last visited Dec. 3, 2021) [https://perma.cc/H2BK-MCFV] (discussing front-end criminal law reforms such as "reducing the number of people who needlessly enter prison in the first place" and "[e]liminat[ing] incarceration as a penalty for certain classes of low-level, non-violent offenses - especially when these offenses are the result of mental illness, drug addiction or are first-time offenses"); *see also ACLU Criminal Law Reform Project*, ACLU, https://www.aclu.org/other/aclu-criminal-law-reform-project (last visited Dec. 3, 2021) [https://perma.cc/Q46P-SE5C] (discussing front-end criminal law reforms such as "reforming unconstitutional and racially biased police practice").

movement;[34] they have specifically discussed the value of special trafficking[35] and problem-solving courts.[36] However, only a few scholars have explicitly discussed aligning anti-sex trafficking efforts with criminal justice reform.

Abigail Swenstein and Kate Mogulescu, New York City attorneys representing people who experienced trafficking and people arrested for prostitution, advocate for aligning anti-trafficking efforts with criminal justice reform.[37] More specifically, they argue that arresting and prosecuting in the name of anti-trafficking is contrary to "efforts to challenge racially motivated policing, police violence, [and] mass incarceration."[38] Swentstein and Mogulescu critique the "prosecution-based model" of anti-trafficking efforts for ignoring what they have found trafficking survivors really want, which is not "rescue" by the criminal justice system, but instead access to affordable housing and economic and educational opportunities.[39]

Swenstein and Mogulescu analogize the "war on trafficking" to the war on drugs, claiming both focus on the arrest of low-level offenders: the war on drugs targeted low-level drug offenders, and the war on trafficking similarly targets individuals in the commercial sex industry, many of whom are trafficked into sex work.[40] Arrests of sex workers, like arrests of people possessing small amounts of controlled substances, results in a disproportionate number of Black people entering the criminal justice system.[41]

Moreover, Professor Sabrina Balgamwalla at the University of North Dakota critiques state intervention policies that deny people who experienced trafficking their autonomy and sometimes their safety.[42] She explains that state interventions that were intended to protect victims of intimate partner violence, such as mandatory arrest and prosecution of their abusers, "potentially alienat[e] women and men who wish to live free of violence, but on their own terms."[43] Like people experiencing intimate partner violence, Balgamwalla argues, people who experienced trafficking do not always desire a criminal justice response to their abuse, and state interventions that require them to cooperate with law enforcement officers or the court system denies these individuals their agency.[44]

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34. *See, e.g.,* Balgamwalla, *supra* note 7.
35. *See, e.g.*, Anette Sikka, *Trafficking in Persons: How America Exploited the Narrative of Exploitation*, 55 TEX. INT'L L.J. 1, 33 (2019) (Noting that "[s]pecial trafficking courts have further contributed to the creation of trafficking, generating victims and the numbers that will be counted as part of the anti-trafficking effort.").
36. *See* Julia Garrison, *Unfair and Ineffective Punishment: Using Problem-Solving Methodologies to Reduce the Incarceration of Juvenile Victims of Human Trafficking*, 24 GEO. J. ON POVERTY L. & POL'Y 441 (2017).
37. Swenstein & Mogulescu, *supra* note 8, at 122.
38. *Id.*
39. *Id.*
40. *Id.*
41. *See id.* at 120.
42. Balgamwalla, *supra* note 7, at 171.
43. *Id.* at 173.
44. *Id.* at 174.

Other scholars have written on problem-solving courts and special trafficking courts in the context of the anti-trafficking movement and criminal justice reform. For example, Julia Garrison argues that "the D.C. Superior Court should expand upon the problem-solving infrastructure to include a specialty court and program for juvenile victims of human trafficking."[45] Anette Sikka critiques the efficacy of special trafficking courts, noting that the existence of such courts does not prevent the initial arrest of people involved in commercial sex, and they "still engage victims in criminal justice systems, and problems inherent to those systems spill over onto individuals before that court."[46]

In sum, while the prevailing view in the anti-trafficking field domestically and abroad is that prosecution is one of the "3Ps" for combating trafficking, some anti-trafficking scholars advocate for disentangling anti-sex trafficking efforts from the criminal justice system. Yet there is limited literature about how doing so aligns with broader criminal justice reform, specifically in regard to reducing the criminalization of poverty, racialized policing and police accountability. This Article expands on these observations by offering specific recommendations about how criminal justice reform could improve current anti-trafficking efforts.

II. DISCUSSION: HOW ANTI-SEX TRAFFICKING EFFORTS SHOULD ALIGN WITH CRIMINAL JUSTICE REFORM

This section explains how criminal justice reform—specifically reducing the criminalization of poverty, reforming racially biased police practices, and increasing police accountability—should inform anti-sex trafficking prevention and protection efforts. Current anti-sex trafficking efforts, which rely heavily on law enforcement operations, have a disparate impact on Black individuals for the following three reasons. First, Black individuals are at greater risk of being criminalized for poverty, which further exacerbates their risk of being sex trafficked,[47] and police-led trafficking efforts address sex trafficking after it occurs, failing to invest in preventative measures to lower risks of sex trafficking. Second, Black individuals, especially girls, face a heightened likelihood of criminalization in the course of anti-sex trafficking efforts.[48] Third, Black individuals are more likely to be subject to police misconduct, especially sexual

45. Garrison, *supra* note 36, at 442.

46. Sikka, *supra* note 35, at 33.

47. *See* Hulsey, Karki, Reyes, & Scott, *supra* note 4 (arguing that without expungement, people who experience trafficking with criminal records "navigate the world with a harmful criminal record and may experience exploitation as the only source of security. The current system keeps people in poverty or engaging in other criminal activity as a means to survive"); *see also* Edelman, *supra* note 4, at 120 (noting that the collateral consequences of criminal records, such as employment, housing, and education restrictions, "further the cycle of the criminalization of poverty"); Feehs & Currier Wheeler, *supra* note 4, at 28 (explaining that in 2020, prior incarceration was one of the most common vulnerabilities of trafficking victims).

48. *See* Kelle Barrick, Meg Parnichelli, Barrot Lmabdin, Minh Dang, Alexandra Lutnick, *Law Enforcement Identification of Potential Trafficking Victims*, 44 J. CRIME & JUST. 1, 11 (2021).

misconduct, during anti-sex trafficking operations.[49] This section concludes that aligning criminal justice reform with anti-trafficking efforts could mitigate these disparate impacts.

A. Reducing the Criminalization of Poverty

1. The Criminalization of Poverty via the School-to-Prison Pipeline

In the United States, people experiencing poverty are more likely to come into contact with the criminal justice system.[50] Poverty is criminalized in a number of ways, such as vagrancy and loitering laws; the incarceration of individuals for the inability to pay fines and fees for traffic violations and misdemeanors;[51] post-incarceration barriers to employment; and excessive punishment of poor school children that funnels them into the school-to-prison pipeline.[52]

The school-to-prison pipeline illustrates how poverty puts individuals, particularly Black minors, at increased risk of coming in contact with the criminal justice system.[53] The school-to-prison pipeline is defined as harsh disciplinary practices and the presence of law enforcement officers in schools that result in subjective and severe punishments for minor infractions.[54] Harsh disciplinary practices mirror those of the "tough on crime" approach, and have similar disparate impacts on racial minorities—Black and other minority students are more likely to attend schools with high poverty rates, which are more likely to employ law enforcement officers that criminalize students and increase their

49. *See e.g.*, Melissa Ditmore, *The Use of Raids to Fight Trafficking in Person*, SEX WORKERS PROJECT (2009), http://sexworkersproject.org/downloads/swp-2009-raids-and-trafficking-report.pdf [https://perma.cc/AMC3-F5TL] ("Raids create circumstances facilitating police misconduct, including sexual misconduct, against trafficked persons."); *see also* Cara E. Trombadore, *Police Officer Sexual Misconduct: An Urgent Call to Action in a Context Disproportionately Threatening Women of Color*, 32 HARV. J. RACIAL & ETHNIC JUST. 153, 157 (2016) ("[W]omen of color are particularly vulnerable to sexual abuse at the hands of law enforcement, and other targeted populations include transgender and gender-nonconforming people"); Andrea J. Ritchie, *#SayHerName: Racial Profiling and Police Violence Against Black Women*, 41 HARBINGER 1187 (2016).

50. *See e.g.*, Dolan & Carr, *supra* note 24 ("Poor people, especially people of color, face a far greater risk of being fined, arrested, and even incarcerated for minor offenses than other Americans"); *Dispelling Myths About Poverty*, *supra* note 24; Rabuy & Kopf, *supra* note 24 ("[I]n 2014 dollars, incarcerated people had a median annual income of $19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages").

51. The Opportunity Agenda, *Eliminate the Criminalization of Poverty,* THE OPPORTUNITY AGENDAS, https://transformingthesystem.org/criminal-justice-policy-solutions/eliminating-the-criminalization-of-poverty/ (last visited Dec. 4, 2021) [https://perma.cc/3WJZ-6PHR].

52. Dolan & Carr, *supra* note 24, at 7.

53. *See* Edelman, *supra* note 4, at 117.

54. KAREN DOLAN & EBONY SLAUGHTER-JOHNSON, STUDENTS UNDER SIEGE: HOW THE SCHOOL-TO-PRISON PIPELINE, POVERTY AND RACISM ENDANGER OUR SCHOOL CHILDREN, INSTITUTE FOR POLICY STUDIES 5 (2018), https://ips-dc.org/wp-content/uploads/2018/08/KAREN-REPORT-2.pdf [https://perma.cc/C5MP-A65T].

likelihood of entering the juvenile justice system.[55] In this way, among others, the criminalization of poverty directly contributes to racial disparities in incarceration.[56]

2. Poverty and Disproportionate Risk of Being Sex Trafficked

Mitigating the criminalization of poverty would not only reduce mass incarceration and racial disparities in the United States' criminal justice system but would also reduce the vulnerabilities that increase an individual's risk of being sex trafficked. Some factors that make individuals vulnerable to sex trafficking, in addition to being young and non-male,[57] include poverty, family instability, being a runaway youth, experiencing houselessness, experiencing sexual or physical abuse, and involvement with child protective services (also known as the family policing system[58]) or foster care.[59]

Statistics on these vulnerability factors make clear why Black individuals, and especially minors, are disproportionately at risk of being sex trafficked. In 2019, thirty-one percent of Black children lived in poverty, compared to ten percent of white children.[60] Black people represent thirteen percent of the U.S. population, yet in 2020, thirty-nine percent of people experiencing houselessness in the United States were Black, and over fifty percent of houseless families with children were Black.[61] Nearly twenty-three percent of children in the foster care system in 2018 were Black.[62] In 2015, twenty-one percent of child abuse victims

55. *See id.* at 5-7.

56. *See* Bruce Western, *Race, Poverty, and Justice Reform*, 16 DU BOIS REV. 177, 178 (2019); Wendy Sawyer and Pete Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POLICY INITIATIVE (Mar. 14, 2023).

57. The trans population, and especially trans women, are at increased risk of being sex trafficked. *See Unique Obstacles Put Transgender People at Risk of Trafficking*, POLARIS PROJECT (Mar. 10, 2017), https://polarisproject.org/blog/2017/03/unique-obstacles-put-transgender-people-at-risk-of-trafficking/ [https://perma.cc/5C3Z-9NEJ].

58. *See generally* Tarek Z. Ismail, Family Policing and the Fourth Amendment*,* 111 CAL. L. REV. (forthcoming 2023), https://ssrn.com/abstract=4219985 [https://perma.cc/3YMV-BC2C].

59. Human Rights Project for Girls, *supra* note 2; *see also* Feehs & Currier Wheeler, *supra* note 4, at 28 ("In 2020, the top victim vulnerabilities in active cases were substance dependency (38%, 139), having run away from home (28%, 100), undocumented immigration status (17%, 63), houselessness (10%, 37), being in the foster care system (10%, 35), having been previously trafficked (8%, 28), limited English language skills (6%, 22), financial debt (4%, 15), intellectual disabilities (4%, 14), and prior incarceration (2%, 6)").

60. *Children in Poverty by Race and Ethnicity in the United States,* THE ANNIE E. CASEY FOUNDATION KIDS COUNT DATA CENTER, https://datacenter.kidscount.org/data/tables/44-children-in-poverty-by-race-and-ethnicity#detailed/1/any/false/1729,37,871,870,573,869,36,868,867,133/10,11,9,12,1,185,13/324,323 (last visited Nov. 17, 2021) [https://perma.cc/Z562-HWKU].

61. *Homelessness and Racial Disparities,* NATIONAL ALLIANCE TO END HOMELESSNESS (Oct. 2020), https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/inequality/ [https://perma.cc/Z562-HWKU].

62. *Black Children Continue to be Disproportionately Represented in Foster Care*, THE ANNIE E. CASEY FOUNDATION KIDS COUNT DATA CENTER (Apr. 13, 2020), https://datacenter.kidscount.org/data/tables/44-children-in-poverty-by-race-and-ethnicity#detailed/1/any/false/1729,37,871,870,573,869,36,868,867,133/10,11,9,12,1,185,13/324,323 (last visited Nov. 17, 2021) [https://perma.cc/W9TU-WGYF].

were Black,[63] and Black women, girls, and nonbinary individuals are hyper-vulnerable to abuse. [64]

Individuals vulnerable to sex trafficking frequently live at the intersection of multiple marginalized identities.[65] For example, members of the LGBTQ community are more likely to experience factors that make them vulnerable to sex trafficking, including economic instability,[66] lack of family support, and houselessness.[67] LGBTQ youth represent forty percent of houseless youth and are more than seven times more likely than their heterosexual and cisgender counterparts to experience sexual violence.[68] Traffickers, like other perpetrators of sexual violence, target vulnerable individuals, such as LGBTQ youth who lack adequate community support.[69] The inference follows that Black LGBTQ youth are at a greater risk of being sex trafficked than straight and cisgender Black youth.

The criminalization of poverty creates a vicious cycle.[70] Black individuals are more likely to experience risk factors such as poverty and houselessness and are also more likely to be criminalized due to these risk factors.[71] People being sex trafficked who are erroneously charged with prostitution may resort to premature guilty pleas and stigmatic criminal convictions to avoid jail time.[72] Moreover, individuals who are incarcerated for low-level offenses, such as prostitution, often spend more time in jail awaiting their court date than those with the resources to make bail or show stable housing that would qualify them for pre-trial release.[73]

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63. U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, CHILD MALTREATMENT 2015, http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/child-maltreatment (last visited Nov. 17, 2021) [https://perma.cc/R8MK-G65K].

64. Maya Finoh & Jasmine Sankofa, *The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence*, ACLU (Jan. 28, 2019), https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/legal-system-has-failed-black-girls-women-and-non [https://perma.cc/M6GA-WEU6] (stating that twenty-two percent of Black women in the United States have experienced rape, Black women are killed at a higher rate than any other group of women, fifty-three percent of Black trans and non-binary individuals have experienced sexual violence and fifty-six percent have experienced domestic violence).

65. Kimberle Crenshaw coined the term "intersectionality" to describe the interaction between different aspects of identity which creates a wholly unique experience within systems and institutions. Kimberle 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 (1989).

66. *Sex Trafficking and LGBTQ Youth,* POLARIS PROJECT (2019), https://polarisproject.org/wp-content/uploads/2019/09/LGBTQ-Sex-Trafficking.pdf [https://perma.cc/Y835-ULYV].

67. J. Leigh Oshiro-Brantly, Frances Steele, Melissa Sontag Broudo, Crystal DeBoise, & Sahnah Lim, *Continuum of Exploitation: The Role of Inclusive Sexual Health Education in Preventing Human Trafficking of Minors*, 15 CHARLESTON L. REV. 585, 611-15 (2021).

68. Polaris Project, *supra* note 66.

69. *See* Edelman, *supra* note 4, at 120 (noting that collateral consequences of criminal records, such as employment, housing, and education restrictions, "further the cycle of the criminalization of poverty").

70. *Id.*

71. Dolan & Carr, *supra* note 24, at 6.

72. *See id.*

73. *See* John Matthews II and Felipe Curiel, *Criminal Justice Debt Problems,* AMERICAN BAR ASSOCIATION (Nov. 30, 2019),

Criminal records and incarceration, in turn, exacerbate the vulnerabilities that put individuals at increased risk of being sex trafficked by restricting access to housing assistance, public benefits, and employment.[74] Additionally, some traffickers use criminal records to further coerce the individuals they are trafficking, for example by suggesting law enforcement officers are less likely to believe individuals with a criminal record.[75]

3. Recommendations

Reducing the criminalization of poverty would protect individuals who are already vulnerable to being sex trafficked from criminal records and, therefore, further marginalization. Accordingly, anti-sex trafficking advocates should invest in resources to assist houseless Black and LGBTQ individuals; lobby against legislation that disproportionately impacts houseless and poor individuals; reform disciplinary policies that fuel the school-to-prison pipeline; and minimize collateral consequences of criminal records.

Local and state governments should invest in affordable housing and public health services, rather than the police, to help houseless people off the streets. In the meantime, law enforcement should receive training about how to interact with houseless communities, and particularly houseless Black and LGBTQ youth, to prevent profiling, harassment, and criminalization.[76] For example, police officers should provide resources, such as information about homeless shelters, food pantries, and affordable housing, rather than arresting houseless individuals, especially for life-sustaining behavior like sleeping or cooking outside. Training should address the differences between sexual orientation and gender identity, how to ask someone about and use correct pronouns, and how to investigate anti-LGBTQ hate crimes.[77] While training is a first step to changing how law enforcement treat and perceive houseless Black and LGBTQ youth, there must also be comprehensive institutional reform to mitigate the decades of law enforcement's criminalization of such individuals.

Advocates should also lobby against loitering and vagrancy laws that put houseless individuals in contact with the criminal justice system, and engage in litigation and legislative efforts to ensure enforcement of the Supreme Court's 1983 ruling in *Bearden v. Georgia*.[78] In *Bearden*, the Court held that a defendant

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https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems/ [https://perma.cc/6XQU-QHKK].

74. *See* Hulsey, Karki, Reyes, & Scott, *supra* note 4.

75. K.B. White*, Impact of Arrest and Conviction Histories on Trafficking Survivors*, FREEDOM NETWORK USA (edited Dec. 6, 2021), https://freedomnetworkusa.org/2021/11/10/impact-of-arrest-and-conviction-histories-on-trafficking-survivors/.

76. *Eliminate the Criminalization of Poverty*, THE OPPORTUNITY AGENDA, https://transformingthesystem.org/criminal-justice-policy-solutions/eliminating-the-criminalization-of-poverty/ (last visited Dec. 17, 2021) [https://perma.cc/BM92-B2P2].

77. *See* Finbarr Toesland, *Police Departments Across U.S. are Mandating LGBTQ Training*, NBC NEWS (Sept. 25, 2021), https://www.nbcnews.com/nbc-out/out-news/police-departments-us-are-mandating-lgbtq-training-rcna2250 [https://perma.cc/UD3U-VMST].

78. Bearden v. Georgia, 461 U.S. 660, 674 (1983).

could not be incarcerated for failure to pay a fine, unless there was evidence the defendant "willfully" refused to pay, or if there were no alternative forms of punishment to adequately serve the State's interests.[79] The Court failed to define "willful refusal," however, and lower courts therefore informally and inconsistently assess defendants' ability to pay.[80] For example, some courts consider defendants' agreement to pay as part of a plea bargain an exception to *Bearden*.[81] Other courts blatantly fail to assess defendant's ability to pay.[82] To address this, constitutional challenges could be brought to clarify the meaning of "willful refusal," legislation could charge fees proportional to income, or fines and fees could be abolished all together.[83] At the very least, every state should eliminate fines and fees for minors, which have particularly devastating consequences, including bankruptcy and disqualification from student loans.[84]

Dismantling the school-to-prison pipeline requires replacing specific disciplinary policies. Harsh disciplinary measures, such as suspensions, expulsions, and referrals to law enforcement, should be a last resort and for only the most serious offenses.[85] Specifically, schools should not rely on police officers, known as school resource officers ("SROs"), to patrol school grounds, as the presence of SROs increases the chances that students are referred to law enforcement for low-level offenses.[86] Schools should also eliminate zero-tolerance policies, which require schools to apply predetermined consequences like suspension or expulsion to offenses without considering the circumstances of each offense.[87]

Harsh disciplinary measures should be replaced with evidence-based practices to maintain an appropriate learning environment.[88] Preventive measures against behavioral disruptions include training educators in classroom

79. *Id.*

80. Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtor's Prisons*, NPR (May 21, 2014) https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons [https://perma.cc/CN7D-YZKU].

81. Ann K. Wagner, *The Conflict over Bearden v Georgia in State Courts: Plea-Bargaining Probation Terms and the Specter of Debtors' Prison*, U. CHI. LEGAL F., 2010, at 386.

82. Olivia C. Jerjian, *The Debtors' Prison Scheme: Yet Another Bar in the Birdcage of Mass Incarceration of Communities of Color*, 41 N.Y.U. REV. L. & SOC. CHANGE 235, 251 (2017).

83. *See id.* at 266-67.

84. Michael Friedrich, A *Nationwide Campaign to End Juvenile Fines and Fees is Making Progress*, ARNOLD VENTURES, (Oct. 18, 2022), https://www.arnoldventures.org/stories/a-nationwide-campaign-to-end-juvenile-fines-and-fees-is-making-progress [https://perma.cc/5Y6C-SRTL] ("Five states — Delaware, Maryland, New Jersey, New Mexico, and Oregon — have abolished all fines and fees in the juvenile justice system. Another four — California, Colorado, Louisiana, and Nevada — have eliminated all juvenile court fees…Seven states — Indiana, New Hampshire, Oklahoma, Texas, Utah, Virginia, and Washington — have abolished or capped at least some fees for practices such as juvenile detention and diversion programs.").").

85. Jason Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L. J. 313, 344 (2016).

86. *Id.* at 340.

87. *Id.* at 341-42.

88. *Id*. at 345-46.

management and a varied-instructional approach to engage a wider range of students,[89] as well as implementing social and emotional learning, which helps students identify, discuss, and manage their emotions and appropriately handle challenging interpersonal situations.[90] When behavioral disruptions do occur, schools should apply a restorative justice approach to misbehavior rather than a punitive one. Applying a restorative justice approach to discipline means that rather than being excluded from the school community via suspension or expulsion, misbehaving students would be invited to explore the causes of their misbehavior, repair the harm their misbehavior caused, and establish a plan to avoid future misbehavior.[91] While there is evidence to support the restorative justice approach to discipline,[92] both the federal and state governments should continue to invest in research and data collection to evaluate alternative disciplinary policies.[93]

Moreover, people being trafficked sometimes acquire criminal records while they are being trafficked, and minimizing collateral consequences is therefore important to help them avoid re-victimization.[94] Therefore, anti-sex trafficking advocates should support the Trafficking Survivors Relief Act, which "provide[s] for the vacating of certain [federal] convictions and expungement of certain arrests of victims of human trafficking,"[95] as well as similar state laws. Advocates should also support programs that automatically vacate criminal records of individuals who do not reoffend within a certain time period, and "ban the box" legislation that prohibits employers from asking job applicants about their criminal history.[96]

B. Reforming Racially Biased Policing Practices

1. History and the Sexual Abuse-to-Prison Pipeline

In the 1700s and 1800s, "slave patrols" became the primary policing

89. *Id.* at 347.
90. *Id*. at 350-51.
91. *Id.* at 354-55.
92. *Id.* at 355-57.
93. *See* Dolan & Carr, *supra* note 24, at 22.
94. *See* Hulsey Karki, Reyes, & Scott, *supra* note 4 (arguing that without expungement, people who experience trafficking with criminal records "navigate the world with a harmful criminal record and may experience exploitation as the only source of security. The current system keeps people in poverty or engaging in other criminal activity as a means to survive*."); see also* Gilbertson, Mendelson, & Caputo, *supra* note 20 (explaining that the Coalition to Abolish Slavery and Trafficking (CAST) in Los Angeles "reports that half of its clients, who include sex and labor trafficking survivors, have criminal records for crimes committed while under the control of a trafficker. In one case, according to a CAST report, a client managed to escape her trafficker, only to be turned away by a housing program — because she had a criminal record.").
95. Trafficking Survivors Relief Act of 2022, H.R. 8672, 117th Cong. (2022).
96. MICHAEL D. TANNER, POVERTY AND CRIMINAL JUSTICE REFORM, CATO INSTITUTE (Oct. 21, 2021), https://www.cato.org/study/poverty-criminal-justice-reform.

institution in the South and were used to preserve the institution of slavery.[97] These organizations evolved into centralized police departments,[98] and their legacies are evident in a number of modern policing practices. Examples include the disproportionate patrolling of Black neighborhoods; stopping, arresting, and charging Black individuals with low-level offenses; and using lethal force against Black individuals.[99]

Enforcement of low-level offenses is one characteristic of the sexual abuse to prison pipeline.[100] The sexual abuse-to-prison pipeline describes the correlation between sexual abuse and entry into the criminal justice system,[101] or in other words, when individuals are arrested for their "behavioral reaction to sexual abuse."[102] The sexual abuse-to-prison pipeline is fueled by the criminalization of "non-serious offenses that are rooted in the experience of abuse and trauma," such as "misdemeanors, status offenses, outstanding warrants, and technical violations."[103] Arresting individuals for reacting to sexual abuse disproportionately criminalizes Black individuals, because these individuals experience sexual—and physical—abuse at higher rates than their white counterparts.[104] Consistent with this inference, in the District of Columbia, Black girls represent fourteen percent of the population, but account for thirty-three

97. Gary Potter, *The History of Policing in the United States, Part 1*, EASTERN KENTUCKY UNIVERSITY ONLINE (June 25, 2013) https://ekuonline.eku.edu/blog/police-studies/the-history-of-policing-in-the-united-states-part-1/ [https://perma.cc/6E2K-QWV3] ("The genesis of the modern police organization in the South is the 'Slave Patrol'… Following the Civil War, these vigilante-style organizations evolved in modern Southern police departments primarily as a means of controlling freed slaves who were now laborers working in an agricultural caste system, and enforcing 'Jim Crow' segregation laws, designed to deny freed slaves equal rights and access to the political system."); Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (updated May 18, 2017) https://time.com/4779112/police-history-origins/ [https://perma.cc/4NBT-Q4N9] ("In the South…the economics that drove the creation of police forces were centered not on the protection of shipping interests but on the preservation of the slavery system.")..."); Connie Hassett-Walker, *How You Start Is How You Finish? The Slave Patrol and Jim Crow Origins of U.S. Policing,* HUM. RTS., 2021, at 6 (noting that racism—and the history of slave patrols specifically—is officially acknowledged by the National Law Enforcement Officers Memorial Fund)).

98. *Id.*

99. *See* Walsh, *supra* note 3, at 5 (noting that "Black Americans are killed by police at twice the rate of white Americans, and Hispanic Americans are also killed by police at a disproportionate rate.").

100. Malika Saada Saar, Rebecca Epstein, Lindsay Rosenthal, & Yasmin Vafa, *The Sexual Abuse to Prison Pipeline: The Girls' Story*, GEORGETOWN LAW CENTER ON POVERTY AND INEQUALITY 19 (2015) (explaining that "the leading cause of arrest for girls are minor offenses such as misdemeanors, status offenses, outstanding warrants, and technical violations.").

101. Angela Myers, *What You Need to Know About the Sexual Abuse to Prison Pipeline*, NATIONAL ORGANIZATION FOR WOMEN (Jun. 22, 2016), https://now.org/blog/what-you-need-to-know-about-the-sexual-abuse-to-prison-pipeline/ [https://perma.cc/RAJ2-7VSE] (explaining that an "overwhelming majority of girls in the juvenile justice system have experienced sexual abuse.").

102. Emma Beavins, *The Link Between Systemic Racism and Human Trafficking*, DRESSEMBER, https://www.dressember.org/blog/systemicracismandtrafficking (last visited Dec. 18, 2021) [https://perma.cc/BV2V-CJMP].

103. Saar, Epstein, Rosenthal, & Vafa, *supra* note 100, at 7.

104. Finoh & Sankofa, *supra* note 64, at 1.

percent of girls in the juvenile justice system.[105]

2. Disproportionate Risk of Arrest During Anti-Sex Trafficking Operations

The arrest of individuals being trafficked is part of the abuse-to-prison pipeline. Law enforcement agencies reportedly measure the success of anti-sex trafficking operations by the number of arrests made.[106] This focus on statistics incentivizes officers to make as many arrests as possible,[107] but instead of focusing on the arrest of traffickers specifically, law enforcement arrest—sometimes wrongfully[108]—many sex workers and people being sex trafficked, a disproportionate number of whom are Black.[109]

Sex work, as distinguished from sex trafficking, is the commercial exchange of sex for something of value absent force, fraud, or coercion.[110] However, people being trafficked do not always know they are being trafficked, and if they do, they are often reluctant to disclose this information to law enforcement officers.[111] As

105. Erin Killeen, *The Increased Criminalization of African American Girls*, GEORGETOWN J. POV. LAW & P. BLOG (Apr. 17, 2019), https://www.law.georgetown.edu/poverty-journal/blog/the-increased-criminalization-of-african-american-girls/#_ftnref13 [https://perma.cc/T3QP-622G].

106. Swenstein & Mogulescu, *supra* note 8, at 2 ("We have observed wave after wave of policies, legislation, and media campaigns that prioritise a law enforcement approach to the issue of human trafficking and measure success only in the number of arrests made, regardless of the quality of the arrests, the sustainability of the ensuing prosecutions, or whether victims view the process as a good thing."); *see e.g.*, Joshua Kaplan & Joaquin Sapien, *NYPD Cops Cash In on Sex Trade Arrests With Little Evidence, While Black and Brown New Yorkers Pay the Price*, PROPUBLICA (Dec. 7, 2020), https://www.propublica.org/article/nypd-cops-cash-in-on-sex-trade-arrests-with-little-evidence-while-black-and-brown-new-yorkers-pay-the-price [https://perma.cc/NG4G-5CJ5] ("Eighteen current and former officers who policed the sale of sex in New York City said overtime has motivated them for years…'You arrest 10 girls, now the whole team's making eight hours of overtime, retired Sgt. Stephen Antiuk said.").

107. Kaplan & Sapien, *supra* note 106 (explaining that cops executing anti-sex trafficking operations "say they are incentivized to round up as many 'bodies' as they can").

108. *Id.* ("A former officer who worked undercover told ProPublica she participated in false arrests. Others acknowledged the system could let them slip through… Since 2014, the city has paid more than a million in taxpayer dollars to at least 20 people who claimed they were falsely arrested in prostitution or 'john' stings.").

109. Barrick, Panichelli, Lambdin, Dang, & Lutnick, *supra* note 48 ("Congruent with other studies, our findings reveal that those being under-identified, and instead arrested for selling sex, are mostly minors, people of color, and female."); Table 43B: Arrests by Race and Ethnicity Under 18, *Crime in the United States 2019*, FBI: Uniform Crime Reporting, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-43 (last visited Mar. 22, 2021) [https://perma.cc/44EY-BW8]; Gilbertson, Mendelson, & Caputo, *supra* note 20.

110. *See* Open Society Foundations, *Understanding Sex Work in an Open Society*, OPEN SOCIETY FOUNDATIONS, https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society (last updated Apr. 2019) [https://perma.cc/35UE-EZAL] ("Sex workers are adults who receive money or goods in exchange for consensual sexual services or erotic performances.").

111. Garry & Reinbrecht, *supra* note 7, at 13 ("[Sex] trafficking victims often do not self-identify as having been trafficked. Even when law enforcement asks questions designed to identify exploitation, trafficking victims are unlikely to disclose relevant information due to a myriad of factors, including distrust of or past negative experiences with law enforcement; fear of

a result, people being trafficked are often arrested as commercial sex workers.[112] A 2016 survey by the National Survivor Network found that of 130 survivors of human trafficking,[113] over ninety percent reported having been arrested, and more than fifty percent reported their arrests were "directly related to their trafficking experience."[114]

Law enforcement arrest many more sex workers—likely some of whom are actually trafficked individuals—than buyers or traffickers. To illustrate, according to data from the Los Angeles Police Department ("LAPD"), a statewide anti-sex trafficking law enforcement operation in 2020 resulted in the arrest of 190 commercial sex workers across California, compared to only 27 "pimps."[115] As part of this operation, the LAPD arrested 90 commercial sex workers, compared to only seven pimps.[116]

Not only does law enforcement arrest many sex workers during operations, but also a disproportionate number of Black individuals. According to data from 2010 to 2019, Black women account for nearly sixty-five percent of prostitution arrests in Los Angeles, where they make up only about nine percent of the city's female population.[117] Similarly, th FBI reports that in 2019, fifty percent of arrests of minors for "prostitution and commercialized vice" were Black.[118] Operations result in the disproportionate arrest of Black individuals, in part, because of over-policing of Black neighborhoods[119] and some law enforcement officers' implicit

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discipline by their trafficker; and the impacts of trauma."). Notably, "[t]he problem of under- and misidentifying victims also impacts individuals involved in sex work who entered the industry as minors—and therefore, *de facto* sex trafficking victims—and then continued in the industry after they turn 18." *Id.* Moreover, some individuals who were trafficked for sex at a young age later turn to sex work for financial reasons. *See* Gilbertson, Mendelson, & Caputo, *supra* note 20 (noting a case in which an individual went "from trafficking victim to willing sex worker").

112. *See* Garry & Reinbrecht, *supra* note 7, at 13 (explaining that law enforcement officers often rely on people being trafficked to self-identify, which they infrequently do).

113. Of the 130 survivors surveyed, "[t]he majority, 72 were sex trafficking victims, 6 were labor trafficking victims and 9 had experienced both." *Members Survey: Impact of Criminal Arrest and Detention on Survivors of Human Trafficking*, NAT'L SURVIVOR NETWORK (Aug. 2016), https://nationalsurvivornetwork.org/wp-content/uploads/2019/08/NSNVacate-Survey-2018.pdf (last visited Nov. 11, 2021).

114. *Id.*

115. *See id.* (noting how LAPD did not distinguish between "pimps" and "traffickers"); *see also* Cal. Penal Code § 266h (demonstrating how under California law, a "pimp" refers to an individual who profits from prostitution without using force, fraud, or coercion).

116. Gilbertson, Mendelson, & Caputo, *supra* note 20 (explaining that KPCC/LAist also "found that [Los Angeles-based] operations ensnared female sex workers far more often than any traffickers, and the women arrested rarely ended up in programs designed to get them out of the sex trade.").

117. *Id.*

118. Table 43B: Arrests by Race and Ethnicity Under 18, *supra* note 109.

119. *See* Jasmine Phillips, *Black Girls and the (Im)possibilities of a Victim Trope: The Intersectional Failures of Legal and Advocacy Interventions in the Commercial Sexual Exploitation of Minors in the United States*, 62 UCLA L. REV. 1642, 1656 (2015) (explaining that "[o]fficers sweep areas known for prostitution -- also called strolls or tracks," such as South Los Angeles, which also happen to be BIPOC neighborhoods). Census Reporter, *Los*

racial bias.[120]

a. Over-Policing of Black Neighborhoods

Black individuals are at an increased risk of arrest for buying or selling sex in part because there is evidence that law enforcement disproportionately execute anti-sex trafficking operations in Black neighborhoods.[121] In New York City, for example, anti-sex trafficking efforts purportedly focus on arresting commercial sex buyers while ensuring individuals selling sex are doing so consensually. However, such efforts involve "[t]eams of NYPD officers [descending] on minority neighborhoods, leaning into car windows and knocking on apartment doors, trying to get men and women to say the magic words: agreeing to exchange sex for money."[122] In New York City, eighty-nine percent of people charged for selling commercial sex are not white.[123] Additionally, while sixty-five percent of commercial sex buyers in New York City are white, individuals who are not white make up ninety-three percent of those accused of buying commercial sex.[124] Despite comparable complaints about sex work, police arrested over three times as many people for buying commercial sex in majority Black and Latino neighborhoods compared to white neighborhoods.[125]

While some of this data speaks to arrests for buying, not selling commercial sex, both are products of targeting neighborhoods of color.[126] Moreover, data about arrests for buying commercial sex is notable given that New York City has spent more than a million taxpayer dollars to individuals falsely arrested in 'john stings,' which target buyers of commercial sex.[127] Logically, Black individuals are at increased risk of false arrest due to the over-policing of their neighborhoods.

b. Implicit Racial Bias

The disproportionate arrest of Black individuals selling commercial sex is

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Angeles County, CENSUS REPORTER, https://censusreporter.org/profiles/79500US0603751-los-angeles-county-south-central-la-city-south-centralwatts-puma-ca/ (last visited Dec. 18, 2021) (explaining that in 2019, South Los Angeles was majority Hispanic (80%) and Black (18%) and less than 1% white).

120. Phillips, *supra* note 119 ("[R]ace informs vulnerabilities to criminalization…Black girls are more likely to be criminalized as prostitutes and Black men are more likely to be prosecuted as traffickers.").
121. *See id.*
122. *See* Kaplan & Sapien, *supra* note 106 (explaining that while such stings are described as Mayor Bill de Blasio's efforts to "combat human trafficking," they are clearly more interested in criminalizing consensual sex work, that inadvertently leads to the arrest of people being trafficked).
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*

also likely due, in part, to racial bias of some law enforcement officers.[128] Cheryl Nelson Butler explains:

> Minorities continue to be stigmatized and profiled as criminals generally and these biases undermine the ability of police and other stakeholders to properly recognize when minority youth have not consented to prostitution and thus have been trafficked. Judges, legislators, and others presume that girls from certain racial groups are "oversexed" and likely to consent to prostitution.[129]

Notably, individuals under the age of eighteen can never consent to commercial sex.[130] The TVPA defines sex trafficking as when an adult performs a commercial sex act because of force, fraud, or coercion, or when a minor performs a commercial sex act, regardless of whether they do so because of force, fraud, or coercion.[131] Yet law enforcement officers and other officials who come in contact with a Black youth being trafficked are more likely to view that minor as a criminal than as someone experiencing sex trafficking.[132]

This under-identification of Black youth as being trafficked results in their disproportionate arrest and criminalization.[133] For example, a 2020 study that evaluated 541 incidents of someone selling sex in San Francisco found:

> [Victims] being under-identified and instead arrested for selling sex, are mostly minors, people of color, and female...Racial bias due to the adultification of [B]lack girls within the criminal legal system has led to their incarceration as young as 13–14 when active in sex trade.[134]

Black minors who engage in commercial sex should be treated as legal victims under the TVPA, yet law enforcement officers often arrest youth being sex trafficked despite their inability to consent to sex.[135]

In sum, racially biased policing practices, such as patrolling neighborhoods of color and disproportionately arresting Black individuals for minor crimes, reinforce the abuse-to-prison pipeline which not only disproportionately harms Black individuals, but also people experiencing trafficking.

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128. Phillips, *supra* note 119, at 1656 ("[R]ace informs vulnerabilities to criminalization…Black girls are more likely to be criminalized as prostitutes and Black men are more likely to be prosecuted as traffickers.").
129. Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1498 (2015).
130. 18 U.S.C. § 1591 (2000).
131. *Id.*; Phillips, *supra* note 119, at 1642 (explaining that the TVPA "considers all youth less than eighteen years of age trafficking victims without a showing of force, fraud, or coercion. The presumption is that minors cannot legally consent to sex and thus are always victims.").
132. *See* Nelson Butler, *supra* note 129, at 1499.
133. *See id.* at 1495 ("[T]he proper identification of prostituted victims as people of color, and minors in particular, continues to be undermined by centuries old stereotypes about race.").
134. Barrick et al., *supra* note 48.
135. Table 43B: Arrests by Race and Ethnicity Under 18, *supra* note 109.

3. Recommendations

Consistent with the goal of front-end criminal justice reform—to reduce the number of individuals that go to jail—law enforcement should not arrest youth who are responding to sexual trauma or involved in commercial sex. As Jasmine Phillips explains, addressing sex-trafficking primarily with a law enforcement response, "reinforce[s] racial profiling and over surveillance in low-income communities of color."[136]

The recent attention to Black Lives Matter has highlighted the reality that "[p]olice officers are increasingly asked to deal with a myriad of issues,"[137]—including issues they are not necessarily trained or best suited to handle. Rather than having police officers respond to issues of wellness or mental illness, which may result in criminalizing survivors of sexual abuse or sex trafficking, communities should supplement law enforcement with a "community-based public safety program," where mental health, crisis resolution, and emergency medicine workers can respond to non-life-threatening situations.[138] For example, running away and truancy should not warrant a law enforcement response, and the social service system, not the juvenile justice system should support runaway youth.[139]

In the meantime, to the extent that anti-sex trafficking efforts continue to put law enforcement officers at the forefront of identifying people being trafficked, law enforcement leadership should disincentivize arresting as many people as possible[140] and instead promote more thorough investigatory work rather than patrolling neighborhoods predominantly composed of racially marginalized individuals.[141] Cases of coercion are undeniably hard to identify, which is why many people who experience trafficking are erroneously charged with

136. Phillips, *supra* note 119, at 1642.

137. Tanner, *supra* note 96.

138. *See* Walsh, *supra* note 3 (describing an existing program in Eugene, Oregon, where trained crisis resolution workers respond to some 911 calls); *see also* Tanner, *supra* note 96, at 10 (noting that in 2018, only twelve percent of Los Angeles Police Department dispatches were for violent crimes, whereas forty percent were for nonviolent complaints such as wellness checks and mental illness).

139. Dolan & Carr, *supra* note 24, at 26 (finding that these policy changes would improve the lives and opportunities of unaccompanied youth).

140. *See* Rashawn Ray & Clark Neily, *A Better Path Forward for Criminal Justice: Police Reform*, BROOKINGS Apr. 2021, at 12, https://www.brookings.edu/research/a-better-path-forward-for-criminal-justice-police-reform/ [https://perma.cc/YR2H-SKL4] (arguing for a "fundamental reconceptualization" of the mission of policing and the culture that "rewards citations and force").

141. *See* Garry & Reinbrecht, *supra* note 7, at 11 (explaining that "the genesis of a [law enforcement] operation is often a complaint or tip about sex work or patrolling an area known for sex work, rather than a thorough sex trafficking investigation").

prostitution.[142] Instead of casting a wide-net to arrest anyone involved in the commercial sex trade—which inevitably criminalizes some people being trafficked—law enforcement should focus their resources on specialized training about trafficking and how to identify people being trafficked in a victim-centered and trauma-informed way. Law enforcement officers should receive not only implicit bias training, but also gender bias and gender stereotyping training to reduce the incarceration of girls and women who have experienced sexual abuse.[143] Resources should also be focused on taskforce building to ensure service providers, rather than just law enforcement, are available to support people being trafficked.

C. Increasing Police Accountability

1. Lack of Police Accountability for Sexual Misconduct

Though popular narratives highlight police misconduct against Black men, such as excessive force or shootings,[144] Black women face the same realities:

> Black women's interaction with the state, through law enforcement, is marked by violence. Black women are murdered by the police. They are assaulted and injured by the police. They are arrested unlawfully by the police; and finally, they are tried, convicted and incarcerated for defending themselves against nonpolice violence.[145]

Police sexual misconduct is not often included in conversations about police misconduct.[146] Police sexual misconduct is when law enforcement officers engage in "sexual assault without consent (rape), sexual contact procured by force, threat of force or coercion, and unwanted or gratuitous sexual contact such as touching

142. *See* Ditmore, *supra* note 49, at 7-8, 54-55 (explaining that law enforcement officers often conflate trafficking and prostitution, which impedes anti-trafficking efforts and results in trafficking victims being arrested and charged).

143. Saar, Epstein, Rosenthal, & Vafa, *supra* note 100, at 23 (suggesting that law enforcement officers have training on implicit and structural gender and racial bias that results in girls being incarcerated).

144. *See* YWCA, *The Current State of Black Women, Police Violence, and What We Are Doing About It*, YWCA (Feb. 17, 2021), https://www.ywca.org/blog/2021/02/17/the-current-state-of-black-women-police-violence-and-what-we-are-doing-about-it/ [https://perma.cc/DTZ9-H5GR] ("Although the popular narrative highlights the plight of [B]lack men when interacting with the police, the long history of police violence against [B]lack women are often excluded from the conversation.").

145. Jacobs, *supra* note 28, at 41.

146. *See* Ritchie, *supra* note 49, at 13 ("Although sexual misconduct is the second most frequently reported form of police violence, it is certainly not the second most frequently talked about.").

or groping."[147] Black women,[148] transgender women[149] and women involved in commercial sex[150] disproportionately experience police sexual misconduct.

Police sexual misconduct against Black women gained a significant amount of national attention with the case of Daniel Holtzclaw, a White, former Oklahoma City police officer, who raped thirteen Black women during his tenure at the department.[151] Holtzclaw sought out Black women with criminal records or history of drug abuse, believing he could intimidate them into silence.[152] Although these women did speak up against him, and Holtzclaw was convicted of eighteen counts of rape and sexual battery,[153] police sexual misconduct remains vastly underreported, in part due to the power dynamic between the perpetrators and

147. The U.S. Dep't of Justice, *Law Enforcement Misconduct*, THE U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/law-enforcement-misconduct#sex (last visited Nov. 24, 2021) [https://perma.cc/9RQS-PCGW]. There exists dispute about the expansiveness of the definition of police sexual misconduct, and other behaviors, such as verbal harassment, inappropriate searches, and traffic stops are also often included in the definition. Trombadore, *supra* note 49, at 161 (noting that "some scholars and news reporters focus on more serious forms of police-led sexual abuse such as kidnapping, assault, and rape, others document the less serious forms, such as voyeurism and verbal harassment"); Cassisi, *supra* note 27, at 142-43 (explaining that "[s]exual misconduct by law enforcement includes a wide range of behaviors," not all of which are prohibited by law).

148. *See* Ritchie, *supra* note 49, at 17.

149. BREAKOUT! WE DESERVE BETTER, 10 (2014), https://issuu.com/youthbreakout/docs/we_deserve_better_report/1 [https://perma.cc/5XVX-DPP8] (reporting that a 2014 study in New Orleans found that fifty-nine percent of transgender respondents were extorted by law enforcement officers for sex, compared to only twelve percent of cisgender respondents).

150. Individuals working in the commercial sex industry and victims of sex trafficking are particularly vulnerable to police sexual misconduct, in part because they "are often targets of police stings involving sexually compromising situations." Jonathan Blanks, *The Police Who Prey on Victims,* THE CATO INSTITUTE (Nov. 1, 2017), https://www.cato.org/commentary/police-who-prey-victims [https://perma.cc/63SA-XAAT]. "[S]ex workers are at a particular risk for sex-related police violence due to the stigmas surrounding them and their general vulnerability to abuse." *Id. See* Howard Center for Investigative Journalism, *Arizona Homeland Security Agents Engaged in Sex Acts with Suspected Trafficking Victims*, MY HERALD REVIEW (May 12, 2020), https://www.myheraldreview.com/news/benson/arizona-homeland-security-agents-engaged-in-sex-acts-with- suspected-tracking-victims/article_b4b910e7-a3de-50d8-bc46-46547d38042a.html [https://perma.cc/7LVW-8GEV] (describing how the law enforcement community turns a blind eye to police sexual misconduct); Laura Wamsley, *Oakland To Pay 19-Year-Old Nearly $1 Million In Police Scandal Settlement*, NPR (Jun. 1, 2017), https://www.npr.org/sections/thetwo-way/2017/06/01/531056653/oakland-to-pay-19-year-old-nearly-1-million-in-police-scandal-settlement [https://perma.cc/7QH5-2Q6U] (reporting that a teenager claimed she had sex with more than a dozen Bay Area law enforcement officers in exchange for information about prostitution stings).

151. Jacobs, *supra* note 28, at 69-70.

152. Lilly Workneh, *Daniel Holtzclaw and The Reality of Police Brutality Against Black Women,* HUFFPOST VOICES, https://www.huffpost.com/entry/daniel-holtzclaw-and-the-reality-of-police-brutality-against-black-women_n_566b0b4ee4b080eddf580671 [https://perma.cc/3W8L-4QGV] (Dec. 12, 2015).

153. Matt Ford, *A Guilty Verdict for Daniel Holtzclaw,* THE ATLANTIC (Dec. 11, 2015) https://www.theatlantic.com/politics/archive/2015/12/daniel-holtzclaw-trial-guilty/420009/ [https://perma.cc/7FEN-R8MV].

victims of the abuse,[154] as well as the difficulty of reporting sexual abuse to the abuser's place of employment.[155] Even when it is reported, law enforcement departments are reluctant to investigate police misconduct in general,[156] and sexual misconduct is no exception.[157]

Law enforcement departments are also reticent to discipline those accused of sexual misconduct.[158] Police chiefs admit that their departments are incentivized to "stay quiet" about sexual misconduct to limit their liability.[159] As a result, officers who commit sexual misconduct are sometimes permitted to "quietly resign" rather than face decertification or other disciplinary action.[160] For example, even though the DOJ found that Baltimore Police Department officers "habitually" threaten individuals with prostitution charges to extort them for sex,[161] Maryland has only decertified four officers in the past decade.[162]

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154. THE INT'L ASS'N OF CHIEFS OF POLICE ADDRESSING SEXUAL OFFENSES AND MISCONDUCT BY LAW ENFORCEMENT 4 (June 23, 2011), https://www.theiacp.org/sites/default/files/all/a/AddressingSexualOffensesandMisconductbyLawEnforcementExecutiveGuide.pdf [https://perma.cc/LW4R-Q8X6] (explaining that the potential for police sexual misconduct increases when officers work independently, without direct supervision, and late at night outside of public scrutiny and when officers engage with "vulnerable" populations, such as "juveniles, crime victims, undocumented people, and those with addictions and mental illness." These conditions of the profession "inadvertently create opportunities for sexual misconduct.")

155. *See* Dara E. Purvis & Melissa Blanco, *Police Sexual Violence: Police Brutality, #MeToo, and Masculinities,* 108 CALIF. L. REV. 1487, 1495 (2020).

156. John Kelly & Mark Nichols, *We Found 85,000 Cops Who've Been Investigated for Misconduct. Now You Can Read Their Records,* USA TODAY, https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/ [https://perma.cc/45RR-E8FN] (June 11, 2020) (finding that "[l]ess than 10% of officers in most police forces get investigated for misconduct").

157. *See* Sukey Lewis & Sandhya Dirks, *Conduct Unbecoming*, NPR (May 27, 2021) https://www.npr.org/transcripts/1000175441 [https://perma.cc/CYW2-5BCP] (explaining that, of one hundred cases of PSM in California that they reviewed, about one in three perpetrators were not investigated until after they had engaged in sexual misconduct with various individuals.); Cassisi, *supra* note 27, at 154-55 (describing how the Oakland Police Department minimized and improperly investigated allegations of PSM).

158. *See* Sukey Lewis, Sandhya Dirks, & Alex Emslie, *Patterns of Sexual Abuse Show Gaps in Police Disciplinary System*, NPR (June 24, 2021), https://www.npr.org/2021/06/24/1009802477/patterns-of-sexual-abuse-show-gaps-in-police-disciplinary-system [https://perma.cc/2L2E-PU2Q]; *see also* Matt Sedensky & Nomaan Merchant, *Hundreds of Officers Lose Licenses Over Sex Misconduct*, AP NEWS (Oct. 31, 2015), https://apnews.com/article/Oklahoma-police-archive-oklahoma-city-fd1d4d05e561462a85abe50e7eaed4ec [https://perma.cc/4NME-T7SE] (reporting that "police chiefs told the AP that some departments also stay quiet about improprieties to limit liability, allowing bad officers to quietly resign, keep their certification and sometimes jump to other jobs.").

159. Sedensky & Merchant, *supra* note 158.

160. *Id.*

161. Isidoro Rodriguez, *Predators Behind the Badge: Confronting Police Sexual Misconduct,* THE CRIME REPORT (Mar. 12, 2020), https://thecrimereport.org/2020/03/12/predators-behind-the-badge-confronting-hidden-police-sexual-misconduct [https://perma.cc/FWW8-965R] (describing how "officers use their perceived 'savior status' to elicit sexual favors from women already traumatized by spousal abuse" and noting that "[an] officer claimed that dating domestic violence victims was 'like shooting fish in a barrel.'").

162. Kelly & Nichols, *supra* note 156.

Inadequate investigation and discipline of perpetrators of police sexual misconduct is due in part to the "blue wall of silence," a concept analyzed in depth by former police lieutenant Tom Nolan.[163] The blue wall of silence is an implicit agreement between law enforcement officers to keep quiet about each other's misconduct, to protect one another from disciplinary action, and to maintain a culture where "secrecy is promoted and rewarded."[164] Moreover, many law enforcement departments lack explicit prohibitions of sexual misconduct,[165] and most states do not permit the public to access records of police misconduct.[166]

2. Disproportionate Risk of Police Misconduct Against People Being Sex Trafficked

Anti-sex trafficking law enforcement operations are particularly conducive to officer sexual misconduct because they often involve officers posing as undercover commercial sex buyers.[167] In these situations, law enforcement officers are interacting with people being trafficked, who are especially vulnerable to officers' abuse.[168]

Various studies and media reports corroborate this claim. One study found that sixteen percent of sex workers and people who experienced trafficking reported having "been involved in sexual situations with the police."[169] In a recent study of trafficking survivors in Hawaii, a survey participant reported "hook[ing] up" with police officers "regularly" and even selling sex "to many of the officers doing the stings."[170] Another study of immigrant women who experienced sex trafficking, engaged in sex work, or endured both found that these individuals

163. Thomas Nolan, *Behind the Blue Wall of Silence*, 12 MEN AND MASCULINITIES 250, 251 (2009).

164. *The Blue Wall of Silence Perpetuates Racist Policing, Wrongful Convictions,* Montana Innocence Project, https://mtinnocenceproject.org/the-blue-wall-of-silence-perpetuates-racist-policing-wrongful-convictions/ [https://perma.cc/K4XV-3DH5] (last visited Mar. 28, 2023).

165. Purvis & Blanco, *supra* note 155, at 1507 ("[M]ost police departments do not have official policies regarding sexual activity with civilians.").

166. *Is Police Misconduct a Secret in Your State?,* WNYC, https://project.wnyc.org/disciplinary-records/ [https://perma.cc/5FNN-KLPQ] (last visited Mar. 28, 2023) (stating that police misconduct records are confidential in twenty-three states and limited in fifteen states); *see* Kelly & Nichols, *supra* note 156 ("Despite their role as public servants, the men and women who swear an oath to keep communities safe can generally avoid public scrutiny for their misdeeds.").

167. *See e.g.,* Ditmore, *supra* note 49, at 39 ("Raids create circumstances facilitating police misconduct, including sexual misconduct, against trafficked persons."); *102 Arrested in Multi-State Human Trafficking Operation*, HUTCH POST (Aug. 27, 2021), https://hutchpost.com/posts/f093dd11-ee46-4712-995a-7833a74d815e [https://perma.cc/6N3L-UDKB] ("Undercover law enforcement officers from federal, state and local agencies arranged meetings [to buy sex] with potential victims.").

168. Blanks, *supra* note 150.

169. Erin Bistricer, *"U" Stands for Underutilization: The U Visa's Vulnerability for Underuse in the Sex Trafficking Context*, 18 CARDOZO J.L. & GENDER 449, 474-75 (2012).

170. DOMINIQUE ROE-SEPOWITZ, ARIZ. STATE UNIV. OFFICE OF SEX TRAFFICKING INTERVENTION, & KHARA JABOLA-CAROLUS, HAW. STATE COMM'N ON THE STATUS OF WOMEN, SEX TRAFFICKING IN HAWAI'I: THE STORIES OF SURVIVORS 8 (2019).

were subjected to inappropriate behavior by law enforcement officers, ranging from sexual harassment to abuse.[171] According to a service provider interviewed for this study, law enforcement officers are "having sex," "getting blowjobs or hand jobs," and then "turn[ing] around and arrest[ing] the people."[172]

Notably, in 2018, undercover agents with Homeland Security Investigations (HSI), the enforcement unit of the Department of Homeland Security that frequently investigates human trafficking, "repeatedly paid for and engaged in sexual acts with the suspected victims as part of their investigation."[173] Over a five month period, HSI agents visited a number of massage parlors eighteen times and purchased sex on seventeen of those occasions.[174] After these visits, agents submitted reports to their supervisors that detailed the commercial sex exchanges and noted that "the females may be victims of human trafficking."[175] A leaked policy handbook from 2008 explains that, with supervisor approval, undercover agents can engage in "otherwise illegal" behavior.[176] Supervisors signed off on reports detailing the commercial sex exchanges, and a county judge approved a search warrant that noted the agents' undercover sexual activity.[177] The charges against the traffickers were largely dismissed due to the "unethical" behavior of the police investigating them.[178]

The HSI case identifies a scenario where people being trafficked are not only abused by their traffickers but also by law enforcement officers. The case also exposes a loophole in police policy that provides agents with a defense to engaging in sex with people suspected of being trafficked: supervisor approval. Moreover, the media has identified many cases in which this behavior occurs is occurring without supervisor approval. For example, a teenager claimed she had sex with more than a dozen Oakland law enforcement officers in exchange for information about prostitution stings.[179] Additionally, according to ProPublica's reporting on NYPD operations:

> An undocumented woman from China reported that the detective undressed her and touched her breasts and vagina at an informal massage parlor in Queens. She told investigators that when the backup team arrived, they handcuffed her and walked her through the massage parlor naked. She said she begged them to let her get dressed, but they refused. One took a photo of her.[180]

171. Ditmore, *supra* note 49, at 43.
172. *Id.* at 44.
173. Howard Center for Investigative Journalism, *supra* note 150.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. Wamsley, *supra* note 150.
180. Kaplan & Sapien, *supra* note 106.

Another NYPD officer who participated in anti-sex trafficking law enforcement operations faced complaints of sexual misconduct by seventeen women prior to their arrests:

> One [woman] said [the officer] penetrated her vagina with his finger, then washed his hands before officers arrived. Another said she performed oral sex on him and was arrested the next time she saw him. A third said she was in "only panties" as they danced and smoked marijuana for about 15 minutes and that he touched her vagina. A fourth…[said] he asked her to get completely naked and grabbed her buttocks.[181]

A retired NYPD sergeant explains: "The undercover can have a nice, cold beer and watch a girl take her clothes off — and he's getting paid for it."[182] Further, some officers have reported that their department does not prohibit them from sending sexually graphic photos to minors or being naked during operations.[183]

3. Recommendations

The blue wall of silence, lack of departmental prohibitions against sexual misconduct, and secrecy of police misconduct records all contribute to the lack of police accountability for sexual misconduct. Accordingly, all law enforcement departments should enact uniform and unequivocal prohibitions against law enforcement officers engaging in sexual contact while they are on duty, especially during anti-sex trafficking investigations.[184] Notably, a House Bill to reauthorize the TVPA would prohibit law enforcement officers from "engaging in any sexual act or in sexual contact with any witness or potential witness to such sex trafficking, or victim or person reasonably likely to be the victim of such sex trafficking over the course of the investigation."[185] Lawmakers should expand the provision to apply to all crimes, rather than just sex trafficking. Such actions would prevent situations like those in the HSI case discussed above.

Finally, states should increase transparency of police misconduct records. More states should participate in initiatives such like the National Decertification Index (NDI), which publicizes a national registry of officers who lose their certificates or licenses due to misconduct.[186] Currently, only eleven states submit

181. *Id.*
182. *Id.*
183. Garry & Reinbrecht, *supra* note 7, at 26.
184. *See* Purvis & Blanco, *supra* note 155, at 1524.
185. Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2021, H.R. 515089, 117th Cong. § 110 (2021).
186. International Association of Directors of Law Enforcement Standards and Training (IADLEST), *About NDI*, https://www.iadlest.org/our-services/ndi/about-ndi (last visited Nov. 24, 2021) [https://perma.cc/LX3K-QZFY].

records to the NDI,[187] and five of these states conceal the names of decertified officers.[188]

Dismantling the blue wall of silence requires a cultural shift within law enforcement departments. Scholars suggest that law enforcement departments should hire more female officers to help encourage this shift, because "diversifying the police force helps disrupt at least some of the dominant messages and implicit cultural norms among police officers."[189] Moreover, state legislatures should eliminate qualified immunity and "Law Enforcement Officer Bill of Rights" statutes. Qualified immunity protects state actors, including police officers, from liability for breaking the law, unless the law they violate is "clearly established."[190] In practice, this doctrine prevents accountability for all kinds of police misconduct. Qualified immunity is derived from the Supreme Court's interpretation of 42 U.S.C. § 1983, which does not provide for any immunities on its face.[191] Yet in 2020, the Supreme Court declined to hear several cases raising the problematic outcomes from and questionable legality of the doctrine.[192] Subsequently, Colorado passed a state-level civil rights law without qualified immunity.[193] Other states should follow suit.

Related to the qualified immunity doctrine, nearly all states have statutes that detail how law enforcement officers may be investigated and disciplined, sometimes referred to as Law Enforcement Officer Bill of Rights (LEOBRs). In practice, such statutes make it very difficult to successfully try and prosecute officers for excessive use of force.[194] In 2021, Maryland became the first state to repeal its LEOBR, which prohibited investigation of officer misconduct by anyone other than fellow officers.[195] All states should repeal such statutory protections of law enforcement.

187. *Id*. (noting that the states that report are Arizona, Connecticut, Florida, Indiana, Kansas, Minnesota, Montana, Oregon, Utah, Vermont, and Washington).

188. *Id*. (noting that the states that conceal officers name are Connecticut, Florida, Indiana, Montana, Vermont, and Washington).

189. Purvis & Blanco, *supra* note 155, at 1529.

190. Jay Schweikert, *Qualified Immunity,* INSIGHTS ON LAW AND SOCIETY (Dec. 17, 2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/ [https://perma.cc/R763-6G5X].

191. *Id.*

192. *Id.*

193. *Id.*

194. Toella Pliakas*, Law Enforcement Officers' Bill of Rights Should Be Repealed in All States*, TEEN VOGUE (May 13, 2021), https://www.teenvogue.com/story/law-enforcement-bill-of-rights-what-is [https://perma.cc/ESE7-7RRQ].

195. David Straughan, *Maryland Repeals Law Enforcement Officers Bill of Rights, A First*, INTERROGATING JUSTICE (May 3, 2021), https://interrogatingjustice.org/ending-mass-incarceration/maryland-law-enforcement-officers-bill-of-rights/ [https://perma.cc/56B3-8EP2]. In 2015, the investigation of Freddie Gray's death in Baltimore police custody was delayed due in part to Maryland's LEOBR. Pliakas, *supra* note 194.

CONCLUSION

The criminalization of poverty, racially biased police practices, and lack of police accountability result in mass incarceration and racial disparities in the U.S. criminal justice system. Police-led anti-sex trafficking efforts too often reinforce these disparities. Accordingly, anti-sex trafficking advocates, lawmakers, and criminal justice sector professionals should integrate front-end criminal justice reforms into their responses to sex trafficking. By working together to reduce the criminalization of poverty, reform racially biased police practices, and increase police accountability, the anti-sex trafficking and criminal justice reform movements can reduce the disparities that disproportionally impact Black individuals.