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# Business Information

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# LETTER FROM THE EDITOR-IN-CHIEF

*"No, I'm not an American. I'm one of 22 million black people who are victims of Americanism. One of 22 million black people who are the victims of democracy, nothing but disguised hypocrisy. So, I'm not standing here speaking to you as an American, or a patriot, or a flag-saluter, or flag-waver. No, not I. I am speaking as a victim of this American system. And I see America through the eyes of the victim. I don't see any American dream; I see an American nightmare."*

—Malcolm X*

Dear Reader:

Immigration, education, "incidents and badges of slavery," and the death penalty. In your American Dream, what would each of these controversial areas of law look like? Being an immigration attorney would require mastering convoluted federal legislation and the federal case law that has interpreted it. Recent decisions, like *Trump v. Hawaii* and *Jennings v. Rodriguez*, might frustrate your endeavor. Meanwhile, education law is primarily molded by the States. One State's constitutional right to an efficient or equitable education could be thwarted depending on whether its highest court views education issues as political questions. Both immigration and education illuminate the significance of effective lawmaking—at the federal and state levels of our democratic republic.

Another concern is this Nation's failure to effectuate the promises of the Thirteenth Amendment: "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[1] As one of the few U.S. Constitution provisions the Court authorized to reach private conduct, our expectations solely rest with Congress. That is rare. Yet, black safety is still a fallacy. Similarly, the fight to abolish the death penalty (arguably a badge of slavery) continues as several States— like Alabama, Florida, Louisiana, and South Carolina— resume executions. Living in a time where crime statistics are murky, we beg jurists, political executives, legislators, and constituents to avoid fear-induced decisions. If history is any indicator, the harsh crime-fighting bills of today will only lead to discriminatory effects tomorrow. And, considering our Fourteenth Amendment's Equal Protection Clause jurisprudence, black and brown bodies will be caught within the nets of inescapably broad laws.

As this Volume unfolds, I challenge the Reader to sculpt their American Dream. Rethink, redesign, and reimagine America. It is okay if your America does not come to fruition later today, tomorrow, next week, or even next month—Virginia took 400 years to abolish its death penalty. Instead, focus on legacy. Although today is an era of conservative judicial retrenchment, we control our destiny. Remain consistent, promote creativity, and train composure. And, lastly, be relentless. Those are the

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* Malcolm X, The Ballot or the Bullet (Apr. 12, 1964).

1. Civil Rights Cases, 109 U.S. 3, 20 (1883).

qualities of a lawyer with a conscience chasing their American Dream as the second quarter of the 21st century awaits.

To that end, we, the *Howard Human & Civil Rights Law Review*, realize the privilege of amplifying marginalized voices. Thus, with every volume published, we aim to honor our mission of remaining at the forefront of legal scholarship pertaining to civil rights. In this Volume, we are proud to offer writings that will encourage readers to critically examine issues in the status quo. As social engineers, we intend to continue shaping conversations around human and civil rights and encourage meaningful reflections on the most relevant causes of injustice through the law.

Our Volume begins with "Pauli Murray and the Thirteenth Amendment," carefully crafted by Brence Pernell, an Adjunct Professor of Law at New York University School of Law and Columbia Law School, and Kelley Akhiemokhali, a graduate student at City University of New York Graduate Center. In their article, Pernell and Akhiemokhali shine a light on Reverend Pauli Murray's invaluable contributions to Thirteenth Amendment jurisprudence and scholarship. Next, this Volume showcases Sanite Ermat Pierre's "Class Sizes, School Choice, & *Bush v. Holmes* Case Study." Sanite, an Assistant Public Defender in South Florida and an Adjunct Professor at Broward College, reveals the motivations behind the Class Size Initiative movement and the movement's legal implications. This Volume then displays Brendan Williams's work, "Patriot Games: Title 42 and the Failure of U.S. Immigration Policy." Here, Williams, a New Hampshire-based civil rights attorney, centers on the federal government's shortcomings in addressing immigration issues, the downfall of Title 42, and the immorality and economic inefficiency of America's immigration system.

To supplement the above articles, we are gratified to publish three student notes, providing a platform for tomorrow's budding attorneys. The first note is authored by Pauli Murray Prize-winner Chiara D. Phillips, Senior Solicitations and Submissions Editor of the *Howard Human & Civil Rights Law Review*'s Volume VII. Phillips's writing, titled "Dangerous Discretion: Making Asylum Relief Mandatory Considering External Effects on Judges," examines the effect of compassion fatigue on judicial decision-making in asylum cases and ultimately proposes that refugees should be automatically granted asylum relief. Our second note is penned by this Volume's Senior Articles Editor, Kimberly Hope Vega Cioffi, titled "Remedies for Executioners: The Machinery of Death's Overlooked Victims." Cioffi's piece brilliantly illuminates the third-party impact of capital punishment on executioners' mental health, examines the impracticability of obtaining relief for mental injuries stemming from executions, and finally suggests jettisoning the death penalty completely. And, lastly, our third note is composed by this Volume's Senior Solicitations and Submissions Editor, Jasmine Marchbanks-Owens, titled "Don't Forget About Me: The Epidemic and Erasure of Violence Against Black Women and the Power of the Enforcement Clause of the Thirteenth Amendment." Marchbanks-Owens's masterpiece draws much-needed attention to an issue that has plagued the world for centuries—violence against black women—and contends that the Thirteenth Amendment's Enforcement Clause provides Congress the authority to enact legislation targeting this ill-treatment.

I express my utmost gratitude to Dean Lisa A. Crooms-Robinson, the Howard University School of Law faculty, our faculty advisors, Professor Jesse Bawa,

Professor Darin Johnson, and Professor Tuneen Chisolm, and our alumni advisor, Hayden A. Smith. Special acknowledgments are also warranted for LaShawn Reeder and Dean Frank King. Further, we thank the Howard University School of Law community for its continued support throughout the year.

And, to all the *Howard Human & Civil Rights Law Review* editors, I thank you for your resilience and commitment to this publication. This Volume faced unprecedented challenges and prevailed. Moreover, we maintained an impactful presence, with events ranging from community service at D.C. Central Kitchen to discussing diversity initiatives with Latham & Watkins partner Danielle Conley. As for our chief event, the ninth annual C. Clyde Ferguson Jr. Symposium, entitled *Voices Unchained: Exploring the Intersection Between Expression, Law, & Liberty*, we invoked a timely discussion on (i) the legality of banning books in prison, (ii) the use of art as a legal advocacy tool, (iii) the overlooked inherent right to joy, and (iv) the First Amendment chilling effect of using rap lyrics in criminal trials. Through this Symposium, the *Howard Human & Civil Rights Law Review* adequately equipped law students, attorneys, and the public on how to effectively combat these sensitive legal issues. As my service as Editor-in-Chief concludes, I find great pleasure in reminiscing about our accomplishments. Without you all, this would not be possible.

To our readers,
Xavier Richie
Editor-in-Chief
*Howard Human & Civil Rights Law Review*

# Pauli Murray and the Thirteenth Amendment

Brence Pernell* (&) Kelley Akhiemokhali**

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* Adjunct Professor of Law, Columbia Law School and New York University School of Law.
** Graduate Student, The Graduate Center, City University of New York, with research focus on access to cultural institutions and health inequities.

We would like to thank the Howard Human & Civil Rights Law Review for its editorial support, and we extend special gratitude to Sarah Hutcheon, Madeleine Murphy, and Haley Mercer at Harvard University's Schlesinger Library for their phenomenal assistance with Pauli Murray's archive. We are also grateful to Peggy Cooper Davis, Julie Suk, Sara McDougall, Donovan Hicks, Samantha Adei Kotey, and Kandice Purdy for their very helpful feedback on earlier drafts.

We are especially honored to publish this Article during what is the 80th anniversary year of Pauli Murray's graduation from the Howard University School of Law.

## INTRODUCTION

The Reverend Doctor Pauli Murray—civil rights lawyer,[1] poet,[2] professor,[3] Episcopal priest,[4] and saint[5]—among other titles of accomplishment has received increasing posthumous attention for her[6] visionary efforts towards a more just society.[7] Murray would eventually

1. PAULI MURRAY, SONG IN A WEARY THROAT 462–67 (2018).
2. PAULI MURRAY, DARK TESTAMENT AND OTHER POEMS (2018).
3. MURRAY, *supra* note 1, at 433–47.
4. MURRAY, *supra* note 1, at 567–69.
5. *See Pauli Murray*, EPISCOPAL DIOCESE N.C., https://www.episdionc.org/pauli-murray/ (last visited Nov. 3, 2023).
6. Scholarship over the past 23 years has considered Pauli Murray's various reflections on her gender identity. *See, e.g.*, Doreen M. Drury, *Love, Ambition, and "Invisible Footnotes" in the Life and Writing of Pauli Murray*, 11 SOULS: CRITICAL J. BLACK POL., CULTURE, & SOC'Y 225, 295 (2009); Doreen M. Drury, "Experimentation on the Male Side": Race, Class, Gender, and Sexuality in Pauli Murray's Quest for Love and Identity, 1910-1960 (Dec. 2020) (published Ph.D. dissertation, Boston College) (on file with ProQuest/UMI). In this Article, we join those scholars who have used "she/her/hers" pronouns when discussing Murray, which aligns with how she identified while writing much of her public-facing work. *See* ROSALIND ROSENBERG, JANE CROW: THE LIFE OF PAULI MURRAY, at xvii (2017). We recognize and respect scholars' rationales for using different pronouns to refer to Murray. We also acknowledge the argument that Murray herself may have utilized different pronouns if alive today, especially given that she referred to herself as having a " he/she personality" in personal correspondence. *See Pauli Murray*, PAULI MURRAY CTR. FOR HIST. & SOC. JUST., https://www.paulimurraycenter.com/pronouns-pauli-murray (last visited Jan. 14, 2024).
7. *See generally, e.g.*, ROSENBERG, *supra* note 6 (providing a comprehensive biographical account of Murray's personal life and career); PATRICIA BELL-SCOTT, THE FIREBRAND AND THE FIRST LADY: PORTRAIT OF A FRIENDSHIP: PAULI MURRAY, ELEANOR ROOSEVELT, AND THE STRUGGLE FOR SOCIAL JUSTICE (2017) (focusing on Murray and Eleanor Roosevelt's decades-long friendship and the impact of their relationship on various social justice campaigns); Lisa A. Crooms-Robinson, *Murdering Crows: Pauli Murray, Intersectionality, and Black Freedom*, 79 WASH. & LEE L. REV. 1093 (2022) (emphasizing Murray's intellectual contributions to the notion of an "intersectional" human rights quest for Black American women); Cooper, Brittany C., *Queering Jane Crow: Pauli Murray's Quest for an Unhyphenated Identity*, *in* BEYOND RESPECTABILITY: THE INTELLECTUAL THOUGHT OF RACE WOMEN (2017) (highlighting the sexism Murray faced as a law student); Michelle Goodwin, *Lessons in Race and Racism in the Legal Academy: Notes on Pauli Murray*, 73 RUTGERS L. REV. 913 (2021) (discussing the relatively low attention Murray has received in light of Murray's intellectual contributions to the legal field); Catherine Powell & Darin E. W. Johnson, *Symposium on Race, Racism, and International Law Pauli Murray: Human Rights Visionary and Trailblazer*, 117 AJIL UNBOUND 37 (2023) (positioning Murray's legal work within a "Black intellectual tradition concerning the human rights idea" and highlighting Murray's impact on transnational law); Serena Mayeri, *Pauli Murray and the Twentieth-Century Quest for Legal and Social Equality*, 2 IND. J. L. & SOC. EQUAL. 85 (2014) (chronicling Murray's thought leadership with respect to civil rights litigation and feminist legal strategizing around the Fourteenth Amendment); Florence Wagman Roisman, *Lessons for Advocacy from the Life and Legacy of the Reverend Doctor Pauli Murray*, 20 U. MD. L.J. RACE, RELIG., GENDER & CLASS 1 (2020) (explaining how Murray's life illuminates life lessons useful for social justice advocacy); Kathryn Schulz, *The Many Lives of Pauli Murray*, NEW

be dubbed an "architect of the civil rights struggle,"[8] as much of those efforts included her use of the law to challenge the race-based oppression of Black Americans.[9]

Murray developed an early awareness of the powerful ways that racism, both private and state-sanctioned, dictated poor life outcomes for Black Americans. Nine years after losing her mother at three years old to a cerebral hemorrhage,[10] Murray's father was murdered by a white guard working at the mental hospital where her father was receiving treatment.[11] Murray was convinced that racial animus fueled her father's brutal death.[12] Her maternal aunt and extended family continued raising Murray in the segregated South during the early 1900s,[13] a time during which it is commonly understood that the lines of racial division were violently stark.

Throughout her young life, Murray's awareness of racism gave rise to legal activism. Before entering law school, she had already formally challenged Virginia's laws mandating segregation in public transportation[14] and participated in a legal strategy to have poll taxes deemed unconstitutional.[15] And while a law student, Murray was a legal adviser for student-led sit-ins at Washington, D.C. restaurants.[16]

Murray was consistently "the only," "the first," and sometimes both throughout her life. She was the only woman in her Howard University School of Law's ("HUSL") 1944 graduating class, in which she also graduated first.[17] She was the first Black Deputy Attorney General in California,[18] the first Black American to earn a doctorate in Juridical

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Yorker (Apr. 4, 2017), https://www.newyorker.com/magazine/2017/04/17/the-many-lives-of-pauli-murray (explaining why Murray's forward-thinking social justice contributions has received little attention); Julie C. Suk, *A Dangerous Imbalance: Pauli Murray's Equal Rights Amendment and the Path to Equal Power*, 107 Va. L. Rev. Online 3 (2021) (discussing Black women's engagement in the Equal Rights Amendment's (ERA) post-2016 legislative debates and emphasizing Pauli Murray's leadership regarding the Fourteenth Amendment, the ERA, and the ERA's particular impact on Black women); Jessica Dixon Weaver, *The Ties that Bind: What Pauli Murray Teaches Us About Race, Family, Slavery, and Inequality*, 55 Fam. L. Q. 293 (2021) (using Murray's family history as a case study to highlight how race and slavery laws played crucial roles in the development of family law).

8. *See* Schulz, *supra* note 7.

9. We use the term "Black" and "Black American" interchangeably throughout this Article to refer to both Black individuals born in the United States and foreign-born Black individuals living within the United States.

10. Murray, *supra* note 1, at 15–16.

11. *Id.* at 71–74; Rosenberg, *supra* note 6, at 27.

12. Murray, *supra* note 1, at 72–74.

13. *Id.* at 18–35.

14. *Id.* at 178–93.

15. *Id.* at 217–28.

16. *Id.* at 265–70.

17. *Id.* at 237.

18. Rosenberg, *supra* note 6, at 161.

Science from Yale Law School,[19] and the first Black American Episcopal priest assigned female at birth.[20]

By the end of her life, Murray's work as a legal strategist influenced even the most powerful government figures. She was a friend to First Lady Eleanor Roosevelt and joined her efforts to expand civil rights and advance social change,[21] and her fresh Fourteenth Amendment arguments inspired the advocacy strategies of United States Supreme Court Justices Thurgood Marshall[22] and Ruth Bader Ginsburg.[23] Indeed, Murray has been praised for "articulat[ing] the intellectual foundations of two of the most important social justice movements of the twentieth century:" the overturning of *Plessy v. Ferguson* on Fourteenth Amendment grounds and the Supreme Court's recognition that the Fourteenth Amendment's Equal Protection Clause applies to women.[24] Murray also helped found the National Organization for Women[25] and played an instrumental role in ensuring that sex was added as a federally protected class to Title VII of the 1964 Civil Rights Act.[26]

While society is increasingly acknowledging Murray's role in shaping our current understanding of the protections provided by the Fourteenth Amendment,[27] less attention has been paid to Murray's visionary thought leadership with respect to the Thirteenth Amendment.[28] This Article adds to the scant scholarship that discusses Murray's Thirteenth Amendment interest and aims to ensure that her legacy includes her being remembered for her pioneering theoretical contributions to our evolving understanding of that crucial Amendment—especially as a tool for racial justice.

During Murray's life, it was hardly questionable that the Amendment's text outlawed chattel slavery. But as a mere law student, Murray argued that Jim Crow's infrastructure, including the policies and

19. *Id.* at 284.

20. *Pauli Murray*, EPISCOPAL DIOCESE N.C., https://www.episdionc.org/pauli-murray/ (last visited Nov. 3, 2023).

21. *See generally* BELL-SCOTT, *supra* note 7 (discussing the relationship between Murray and Roosevelt).

22. MURRAY, *supra* note 1, at 329–30.

23. Brief for Appellant at 15, 17, 19, Reed v. Reed, 404 U.S. 71 (1971) (No. 430); ROSENBERG, *supra* note 6, at 342–44.

24. Schulz, *supra* note 7.

25. MURRAY, *supra* note 1, at 468–80.

26. *Id.* at 461–67; Pauli Murray, Memorandum in Support of Retaining the Amendment to H.R. 7152. Title VII (Equal Employment Opportunity) to Prohibit Discrimination in Employment Because of Sex (Apr. 14, 1964) (Pauli Murray Papers, MC 412, Box 85, Folder 1485, on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

27. *See* discussion *infra* Section I (discussing Murray's contributions to contemporary understandings of the Fourteenth Amendment).

28. *See* ROSENBERG, *supra* note 6, at 132–33,145–50, 155–56, 160, 349. Historian Rosalind Rosenberg has provided arguably the most comprehensive overview of Murray's life and scholarship, including Murray's development of her Thirteenth Amendment argument. We rely heavily on Rosenberg's groundbreaking archival work therein for this Article's biographical discussion of Murray.

laws that glued the system of legal segregation together, also constituted one of slavery's major remnants.[29] Her relatively radical position for her time was that when the Thirteenth Amendment outlawed slavery, it also outlawed any laws or policies that were remnants of slavery, including private discrimination based on race.[30] This was because the Amendment, according to Murray, did not just eradicate the institution of physical slavery; it also conferred to Black Americans all rights endemic to living a fully free life, and it authorized Congress to legislate to that end.[31]

Murray began developing this pioneering theoretical argument as a HUSL student before many other civil rights attorneys or legal theorists dared to conceptualize the Thirteenth Amendment in this way. Most had accepted that the Thirteenth Amendment accomplished its main goal when institutional slavery was banned; very few lawyers or scholars seriously considered whether the Amendment was also meant to root out all the vestiges of slavery that continued to pervade society.[32] "Legal theory [had] remained almost entirely silent on the issue" before 1951, according to Thirteenth Amendment scholar George Rutherglen.[33]

Murray's intellectual leadership with respect to the Thirteenth Amendment is thus noteworthy. Supreme Court Justice John Marshall Harlan's understanding of the Thirteenth Amendment as a charter of full and universal human freedom heavily inspired Murray's thinking. Referencing the burgeoning social science research of her time, Murray aimed to reinforce Justice Harlan's position and by highlighting slavery's lingering social effects[34]—especially as those effects had manifested in the racially discriminatory laws and policies that proliferated during the Jim Crow era.[35] As early as the 1940s, Murray was arguing that the Thirteenth

29. Pauli Murray, Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?: A Re-examination of Constitutional Principles Applied to Civil Rights in Light of Recent American History 11–12 [hereinafter Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled] (May 1944) (Pauli Murray Papers, MC 412, Box 84, Fo1der 1467 on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

30. *See* discussion *infra* Section II.A–B (discussing Murray's Thirteenth Amendment arguments).

31. *Id.*

32. *See* George Rutherglen & John Barbee, *The Thirteenth Amendment in Legal Theory*, 104 Cornell L. Rev. Online (2019), https://www.cornelllawreview.org/2019/09/08/the-thirteenth-amendment-in-legal-theory/.

33. *Id.* (noting that it was not until Jacobus tenBroek published his article, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment* in the California Law Review that scholars began to engage the issue). Rutherglen explains that "both judicial interpretation of the Amendment and the absence of enforcement legislation effectively confined its scope, giving legal theory no innovations in legal doctrine that required innovations in legal reasoning." *Id.*

34. *See generally* Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29; *see also* Rosenberg, *supra* note 6, at 148.

35. *See* John Hope Franklin & Alfred A. Moss, Jr., From Slavery to Freedom: A History of African Americans 291, 326 (2000) (explaining how social and legal codes during the Jim Crow era had established the strict racial lines between whites and Black Americans in society).

Amendment had empowered Congress to nullify racially discriminatory laws and policies because they were legacies of slavery.[36] Many legal theorists and practitioners of that time understood that position as a "threat[] to transform the American political system."[37] Undeterred and committed, Murray, upon graduating from HUSL, continued developing her theory of antidiscrimination law under the Thirteenth Amendment as a post-law graduate student.[38]

Murray's instinct to understand the effects of slavery more broadly began to take shape well before her career as a lawyer. Murray described how she and her family were "close to the roots of [their] immediate past because of the many elderly people still alive who had been born in slavery."[39] Her lived experience in nearly all regions of the country was one of consistent, psychologically brutal confrontations with racial discrimination.[40] She was thus keenly aware of racism's multiple valences and had a particularly intimate understanding of the extent to which segregation and other forms of racial discrimination were stubborn relics of slavery.[41] And Murray's personal experience with intersectional discrimination as a working-class Black American woman in the Twentieth Century significantly informed her vision and advocacy under both the Thirteenth and Fourteenth Amendments.[42]

For a variety of reasons, including the Fourteenth Amendment's growing vulnerability,[43] more are weighing the Thirteenth Amendment's

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*See also generally, e.g.*, STATES' LAWS ON RACE & COLOR: STUDIES IN THE LEGAL HISTORY OF THE SOUTH (Pauli Murray ed.) (2016).

36. *See generally* Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29.

37. ROSENBERG, *supra* note 6, at 132.

38. *See generally* Pauli Murray, Congressional Debates on the Adoption of the 13th Amendment (1944) (Pauli Murray Papers, MC 412, Box 19, Folders 423-424, on file with the Schlesinger Library, Radcliffe Institute, Harvard University); Pauli Murray, Judicial Construction of the Thirteenth Amendment (1944) (Pauli Murray Papers, MC 412, Box 19, Folders 423-424, on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

39. MURRAY, *supra* note 1, at 40.

40. *See, e.g.*, Pauli Murray, *We Need a Blitzkrieg Upon Segregation*, AFRO AM. NEWSPAPERS, Mar. 16, 1946, at 14 ("Since my coming to California I have become friends with many young Jewish refugees who grew up under Hitler and the Nazis. In comparing notes of childhood experiences and discovering how similar they are, how tense, emotionally insecure, and jittery we have become, I know now how much legal segregation has contributed to this insecurity.").

41. MURRAY, *supra* note 1, at 3. Murray explained in her autobiography: "Because I was born into a family of 'colored' people, as we were then designated, it has also been of increasing significance to me that my life and development paralleled the existence of the two major continuous civil rights organizations in the United States, both of which were founded around the time of my own beginnings—the National Association for the Advancement of Colored People (NAACP) in 1909, and the National Urban League in 1910." *Id.*

42. ROSENBERG, *supra* note 6, at 349 ("Drawing on diverse anthropological, psychological, and sociological sources, as well as her own experience, she had declared in 1944 that racial segregation was per se unequal.").

43. *See* discussion *infra* Section II (discussing the decreasing utility of Fourteenth Amendment claims).

anti-discriminatory power for Black Americans, given its potential for redressing slavery's ongoing harms.[44] For example, Thirteenth Amendment scholars today understand slavery as a complex system of "domination and enforced social dependency" that persists in modern societies, the relationships of which "reappear in new guises, sometimes through public power, sometimes through private power, and sometimes through a combination of both."[45] Accordingly, these scholars continue to highlight the Thirteenth Amendment's full, original purpose of rooting out modern laws and policies that echo features of slavery's sprawling system.[46] This Article is to help formally acknowledge Murray's similar intellectual engagement with the Thirteenth Amendment decades before that of most other legal theorists.

To demonstrate how her repeated, acute exposure to racial discrimination informed Murray's understanding of the Thirteenth Amendment, this Article weaves in biographical first-hand accounts of Murray's educational experience and circumscribed access to basic social needs like transportation, housing, and opportunities for pleasure and leisure. We rely primarily on Murray's own published autobiographical account.[47]

Section I of this Article chronicles Murray's significant role in developing some of our major civil rights jurisprudence under the Fourteenth Amendment and notes some of the ways her work in that regard is being increasingly appreciated. This is in large part to introduce the biographical and scholarly context for much of Murray's focus on the Thirteenth Amendment, given that the occasions for her early Fourteenth Amendment thinking included simultaneous consideration of the Thirteenth Amendment. Section I also underscores the degree to which Murray's recognition has centered her Fourteenth Amendment work.

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44. We recognize that more recently, the most popular Thirteenth Amendment discourse has concerned criticism of its language that permits slavery or involuntary servitude "as a punishment for a crime." *See, e.g.*, 13th (Ava Duvernay, Netflix 2016) (commenting on the implications of the Thirteenth Amendment's criminal punishment exception for mass incarceration today); Shawna Mizelle, *Ahead of Juneteenth, Congressional Lawmakers Again Seek to Remove Exception for Slavery from US Constitution*, CNN (June 16, 2023), https://www.cnn.com/2023/06/16/politics/abolition-amendment-slavery-constitution/index.html. A discussion of these critiques is beyond this Article's scope, but we note here that those critiques do not conflict with Murray's understanding of the Thirteenth Amendment, generally, as a constitutional tool for redressing slavery's harms and advancing racial justice. As discussed in Section II.C.2, scholars continue to understand the Thirteenth Amendment in this way, notwithstanding any reasonable critiques of some of the Amendment's language.

45. Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1475 (2012) (characterizing the Thirteenth Amendment as "dangerous" due its potential for radically altering modern, race-based power systems).

46. *See* discussion *infra* Section II.C.2 (discussing more current considerations of the Thirteenth Amendment's utility).

47. *See generally* MURRAY, *supra* note 1 (chronicling Murray's personal and professional lives).

Section II then tracks the development of Murray's theory under the Thirteenth Amendment, which comprised a significant part of Murray's academic work as a law and graduate student. Beyond consideration of Murray's substantive Thirteenth Amendment argument itself, Section II reveals how bold it was for Murray to make such an innovative argument for her time. The Article then ends with Section III's discussion of how Murray's Thirteenth Amendment thinking was ultimately vindicated by the Supreme Court and how current Thirteenth Amendment scholarship continues to reinforce Murray's arguments.

## I. Murray's Early Experience with Segregation and Contributions to Contemporary Fourteenth Amendment Advocacy

Before discussing Murray's Thirteenth Amendment legacy, we first address her intellectual contributions to the Fourteenth Amendment. Our rationale for doing so is twofold: to highlight the substantive and temporal overlaps in Murray's theoretical explorations of the Thirteenth and Fourteenth Amendments and to underscore the degree to which Murray's contributions under the Thirteenth Amendment have received limited acknowledgment compared to her Fourteenth Amendment work.

Our discussion begins with the next Section, which describes the legal regime under which Murray lived all her young life—one that would especially ignite her interest in reinvigorating the Thirteenth and Fourteenth Amendments in pursuit of racial justice.

### *A.* Plessy v. Ferguson *and Murray's Jim Crow World*

By the time Murray began law school in 1941, racial segregation laws were common across the nation, in significant part due to the Supreme Court's decision in *Plessy v. Ferguson*[48] decades prior.[49] It is perhaps no surprise then that Murray's initial interest in the Thirteenth and Fourteenth Amendments as a young law student was wrapped in her motivation to secure *Plessy*'s overruling.[50]

48. Plessy v. Ferguson, 163 U.S. 537, 534, 548 (1896) (finding that neither the Thirteenth nor Fourteenth Amendment proscribes racial segregation).

49. *See* Franklin & Moss, *supra* note 35, at 291, 326 (noting the commonality of strict racial divides in society based on laws and custom after *Plessy*). *See also generally, e.g.*, States' Laws on Race & Color: Studies in the Legal History of the South, *supra* note 33.

50. *See generally* Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29.

*Plessy* involved a suit brought by a fair-skinned Homer Plessy, who was challenging Louisiana's Separate Car Law requiring that "white" and "colored" railroad passengers be separately accommodated.[51] Plessy's argument was that the Louisiana law violated both the Thirteenth and Fourteenth Amendments.

The Thirteenth Amendment states:

> Section 1.
>
> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2.
>
> Congress shall have power to enforce this article by appropriate legislation.[52]

The Fourteenth Amendment states, in relevant part:

> Section 1.
>
> . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> …
>
> Section 5.
>
> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.[53]

Plessy argued that both the Thirteenth and Fourteenth Amendments forbade the state from segregating its citizens.[54] More specifically, the Thirteenth Amendment prohibited assigning the label "colored" for purposes of segregation, as doing so would constitute a "badge of servitude."[55] And according to Plessy, the Fourteenth Amendment prohibited the railroad company's attempts at making racial classifications, given that there were no legal standards for

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51. *Plessy*, 163 U.S. at 540–41.

52. U.S. Const. amend. XIII.

53. U.S. Const. amend. XIV.

54. Brief for Plaintiff in Error, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 210), 1896 WL 13990 [hereinafter 1893 Brief for Plaintiff in Error], at *6–18 (arguing that deprivation of the liberty to travel poses a federal question); *id.* at *29–30, *38–39, *45–46 (discussing a property interest in reputation).

55. *See* Sheldon Novick, *Homer Plessy's Forgotten Plea for Inclusion: Seeing Color, Erasing Color-Lines*, 118 W. Va. L. Rev. 1181, 1200 (2016).

determining a person's race.[56] Such classifications would therefore be "arbitrary" and a denial of liberty or property without the due process of law under the Fourteenth Amendment.[57]

To the Thirteenth Amendment argument, the *Plessy* Court responded that a public transportation owner who excluded people of color imposed no "badge of slavery or servitude."[58] The Court concluded: "A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races or reestablish a state of involuntary servitude."[59] The Court added that "the enforced separation of the two races [does not] stamp[] the colored race with a badge of inferiority," unless "the colored race chooses to put that construction upon it."[60] As for the Fourteenth Amendment argument, the Court reasoned that "enforced separation . . . neither . . . deprives [Plessy] of his property without due process of law, nor denies him the equal protection of the laws . . . ."[61] The Court's decision ushered in the "separate-but-equal" Jim Crow era in the United States, with twenty-one states passing segregation laws thereafter under *Plessy*'s imprimatur.[62]

One of the most obvious ways Murray would feel the effect of Jim Crow in her young life and early professional career as a lawyer was, like the Plessy plaintiff, in the transportation context. Fifteen years before Claudette Colvin's and Rosa Parks' respective roles in challenging bus segregation in Montgomery, Alabama,[63] Murray was arrested and jailed for defying bus segregation in Petersburg, Virginia.[64] In fact, Murray's arrest introduced her to civil rights litigation because the NAACP represented her.[65]

The incident took place in 1940 when Murray was living in New York City with her housemate, Adelene McBean.[66] Murray wanted to

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56. *Id*; *see also id*. at 1193 ("Reputation was a form of property, and damage to reputation was a recognized harm under state law. Since Homer Plessy was not visibly a member of a particular race, he was free to choose to construct a reputation that he preferred. Boarding the whites-only car was a claim to a reputation as a white man, and he was entitled to make that claim.").

57. *Id*.

58. *Plessy*, 163 U.S. at 542 (citing Civil Rights Cases, 109 U.S. 3 (1883)).

59. *Id.* at 543.

60. *Id.* at 551.

61. *Id.* at 548.

62. THE ROAD TO BROWN (California Newsreel 1990).

63. Margot Adler, *Before Rosa Parks, There Was Claudette Colvin*, NPR (Mar. 15, 2009, 12:46 AM), https://www.npr.org/2009/03/15/101719889/before-rosa-parks-there-was-claudette-colvin.

64. MURRAY, *supra* note 1, at 180–83.

65. *Id.* at 191.

66. *Id.* at 178–79.

visit her family, but she had been reluctant to travel to North Carolina to do so because of how humiliating segregation had been for her in the past.[67] Murray, joined by McBean, ultimately proceeded with the trip.[68] At the Petersburg, Virginia stop, the pair changed seats so they would no longer sit above the bus wheel; the incessant jolting had been causing McBean's side to throb.[69] Although they were still seated behind the white passengers, the driver commanded them to return to their original seats.[70] Murray and McBean refused, and the conflict escalated.[71] Eventually, police charged the women with disorderly conduct and creating a public disturbance.[72] Murray and McBean spent three nights in a squalid prison cell before being released on bond.[73]

That incident fueled what would grow to be Murray's illustrious legal career; it ignited her interest in the law as an intellectual endeavor and exposed her to the potential power of the law in changing society.[74] Describing the NAACP legal defense team's exacting preparation, for example, Murray wrote about how thrilling it was to witness the NAACP's criminal law expert strategize around counterarguments for her case: "My excitement increased as I found myself able to follow the line of argument and even to anticipate points in rebuttal . . . I began to sense that our case was a small part of a team effort that envisioned the ultimate overthrow of all segregation laws. The thought was stupefying."[75] An attorney working on her case, Leon Ransom, encouraged Murray to attend law school and would go on to write one of her recommendation letters to HUSL.[76] Thurgood Marshall would write the other recommendation letter.[77]

Exposure to the law's inner workings helped Murray see how she could move beyond avoiding Jim Crow states and feel sufficiently empowered to directly confront the segregated system with its own means of oppression: the law.[78] Murray stated the following year that

67. *Id.* at 140–41.
68. *Id.* at 178–79.
69. *Id.*
70. *Id.*
71. *Id.* at 180–181.
72. *Id.*
73. *Id.* at 185.
74. *Id.* at 191.
75. *Id.*
76. *Id.* at 215.
77. *Id.* at 234.
78. *Id.* Other motivations Murray cited for her interest in law school included her assistance in a case involving a sharecropper charged with murder, an incident that had shed light on the sharecropping system's exploitation of Black American sharecroppers. *Id.* at 210–15. Murray had worked to, among other things, bring national attention to his case, including by regular correspondence with First Lady Eleanor Roosevelt. *Id.* Murray had also been working as a Workers Progress Administration (WPA) teacher and had cited as an "urge" to attend law school

she had "enter[ed] law school, with the single-minded intention of destroying Jim Crow."[79] The next Section discusses some of the ways Murray would go about doing so.

### *B. Murray's Efforts to Challenge* Plessy v. Ferguson *under the Fourteenth Amendment*

At the time that Murray was considering law school, most civil rights lawyers claiming racial discrimination and challenging *Plessy* formed arguments that primarily focused on the "equal" part of the "separate but equal" doctrine.[80] For example, notable civil rights attorney Charles Hamilton Houston invested in a cautious two-stage attack on *Plessy* and its sanctioned racial segregation.[81] Instead of directly challenging the "separate but equal" principle, Houston thought it prudent first to litigate cases demanding that Black American institutions be as well-resourced as white schools.[82] Only then did he think the principle of separateness itself would be ripe for challenge.[83]

Other civil rights attorneys were deftly avoiding the precise legal issue of racial classification altogether. For example, prominent civil rights attorney William Hastie argued before the Supreme Court in *Morgan v. Virginia*[84] that the Jim Crow seating on interstate transportation carriers violated the Constitution's Commerce Clause.[85] Hastie argued that those kinds of "disruptive local practices" contravened the Court's earlier decisions that interstate passengers not be impeded by "provincial notions of social policy."[86] At the oral argument, when the Supreme Court asked outright whether racial classification was itself unconstitutional, Hastie did his best to avoid answering and prematurely raising that issue before the Court.[87]

By the time she was prepared to finish law school, Murray, however, was advancing a direct response to the question the Supreme Court posed in *Morgan*.[88] As a student, she sourced a plethora of social

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an incident in which one of her students was evicted; the student had no legal counsel, while the student's landlord did. *Id.* at 215.

79. *Id.* at 235.

80. MURRAY, *supra* note 1, at 191; ROSENBERG, *supra* note 6, at 132.

81. THE ROAD TO BROWN, *supra* note 62.

82. *Id.*

83. *Id.*

84. Morgan v. Virginia, 328 U.S. 373, 386 (1946) (striking down racial segregation in the context of Virginia's interstate public conveyances).

85. John William Ward, *Chipping Away at Segregation,* N.Y. TIMES (Mar. 10, 1985), https://www.nytimes.com/1985/03/10/books/chipping-away-at-segregation.html.

86. *Id*.

87. *Id.*

88. MURRAY, *supra* note 1, at 284–86.

science research and her own experience to build the argument that separateness based on racial classification was inherently unequal under the Thirteenth Amendment's prohibition of slavery and the Fourteenth Amendment's equal protection guarantee.[89] In Murray's words:

> [A]s a senior student, I said one day, I think the time has come for us to make a frontal attack upon segregation per se. Up until that time, all the cases were, in this situation, separate, but they were unequal. And what we were doing in each of the cases [was] trying to prove that the segregation situation was unequal.[90]

Murray formalized her argument in her final law school paper, entitled, "*Should The Civil Rights Cases and Plessy v. Ferguson Be Overruled?: "A Re-examination of Constitutional Principles Applied to Civil Rights in Light of Recent American History.*"[91] *Civil Rights Cases*[92] predated *Plessy* by a little over a decade and was the Court's first restriction of the Thirteenth and Fourteenth Amendments' power.[93] Highlighting the fact that few law students read the two cases in full,[94] Murray focused her paper discussion on Justice Harlan's dissents in the two cases: a history of the Thirteenth and Fourteenth Amendments, and new social science findings that weakened *Civil Rights Cases* and *Plessy* majority opinions' underlying premises.[95]

In his *Plessy* dissent, Justice Harlan had maintained that state discrimination in public accommodations was illegal under the Fourteenth Amendment because the Constitution "is color-blind, and neither knows nor tolerates [lower] classes among citizens."[96] He, therefore, found it "regret[table]" that the majority had concluded that "a State . . . [could] regulate the enjoyment by citizens of their civil rights solely upon the basis of race."[97] Justice Harlan reiterated that the Amendments were supposed to "eradicate[]" the notion that Black Americans, solely because of their African heritage, were to be subjugated by a dominant, white race."[98] According to Harlan, the Fourteenth Amendment, in particular, "added greatly to the dignity and glory of American citizenship and to the security of personal liberty."[99]

89. Interview by Robert Martin with Pauli Murray 163 (Aug. 15 and 17, 1968) (Pauli Murray Papers, MC 412, Box 1, Folder 8, on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

90. *Id.*

91. Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29.

92. Civil Rights Cases, 109 U.S. 3, 20 (1883).

93. *See also* discussion *infra* Section II.B.2 (discussing *Civil Rights Cases* more thoroughly).

94. ROSENBERG, *supra* note 6, at 147.

95. *See generally* Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29.

96. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (J. Harlan, dissenting).

97. *Id.*

98. *Id.* at 560.

99. *Id.* at 555.

Murray was also especially influenced by Caroline Ware, a social historian who developed a reputation for emphasizing historical context and legislative history in order to promote civil rights.[100] Murray met Ware during Murray's second year of law school and stated that the "stimulating intellectual association that began when [she] audited [Ware's] course on constitutional history . . . developed into a community of interests spanning more than four decades."[101] As with Justice Harlan, one of Ware's mainstay academic arguments was that race was arbitrary and that laws that categorized by race were not faithful to the Thirteenth and Fourteenth Amendments' original intention: safeguarding newly freed Black Americans from a majority white population continuing to oppress Black Americans in other ways.[102]

Murray relied on the then-recent works of Swedish economist Gunnar Myrdal to convince a court of such a position.[103] Myrdal's book compilation of social science research, *An American Dilemma*, outlined in detail the glut of social barriers Black Americans had been facing due to abuse and ongoing discrimination from white Americans.[104] Citing Myrdal's work, Murray stated in her paper: "Not only is the doctrine of 'separate but equal' facilities a legal delusion but positively its effect is to do violence to the personality of the individual affected, whether he is white or black."[105]

Murray's classmates nevertheless dismissed her insistence that the Supreme Court "address . . . the core question of segregation itself."[106] Her idea was progressive for its time. However, according to her colleagues, it was an irresponsible move that would only result in the Supreme Court affirming *Plessy* and its "separate-but-equal" doctrine, a precedent civil rights lawyers had been working so hard to overturn.[107] Yet, Murray went so far as to wager a ten-dollar bet against her HUSL

100. MURRAY, *supra* note 1, at 256.

101. *Id.*; *see* ROSENBERG, *supra* note 6, at 145 ("It would be difficult to exaggerate the importance of Ware's social historical approach to civil rights on Murray's thinking.").

102. ROSENBERG, *supra* note 6, at 145.

103. *Id.* at 146–150; *see generally* Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29, at 27–29.

104. *See* discussion *infra* Section II.B.1 (discussing Myrdal's work and Murray's reliance on it more thoroughly).

105. ROSENBERG, *supra* note 6, at 149. Soon after she submitted her writing, Murray even tested her argument with then-Associate Justice Frank Murphy, a relatively new liberal addition to the Supreme Court. *Id.* at 150. In her capacity as a reporter for the *Sentinel*, a Black California news publication, Murray phoned Justice Murphy and asked his thoughts about an attack on Plessy based on the position that "'an arbitrary classification by color' was unconstitutional and not within the police power of the state." *Id.* She elaborated for Justice Murphy: "[W]ith other classifications, by change of status or circumstances one could remove himself from the classification affected, but . . . color [is] fixed and thus arbitrary." *Id.* Murphy told Murray that she was "perfectly right." *Id.*

106. Interview by Robert Martin with Pauli Murray, *supra* note 89, at 161.

107. Schultz, *supra* note 7.

professor, Spottswood Robinson, that *Plessy* would be overturned on that rationale within the next twenty-five years.[108]

In *Brown v. Board of Education*, Murray was proven right.[109] In *Brown*, the Supreme Court concluded that "[s]eparate educational facilities are inherently unequal" and therefore violated the Fourteenth Amendment's equal protection clause.[110] Demonstrating the prescience of her arguments, Murray's former professor would reveal years later that as a member of the *Brown* legal team, he had circulated the paper to Thurgood Marshall and his colleagues as they prepared a legal strategy to end Jim Crow.[111]

Murray has received even more attention for how her legal theories under the Fourteenth Amendment aided the national fight for gender discrimination, which the next Section discusses.

### *C. Murray's Legacy for Combatting Gender Discrimination under the Fourteenth Amendment*

Murray eventually would extend her same Fourteenth Amendment reasoning for overturning Jim Crow to gender discrimination.[112] Well before scholar Kimberlé Crenshaw coined the term "intersectionality,"[113] Murray discussed the double disadvantage she faced as a woman and a Black American person, including when applying to graduate programs.[114] For Murray, gender discrimination was analogous to the racial discrimination Black Americans had faced under Jim Crow and could be dismantled using the same legal strategy she was already formulating in law school.[115]

Murray drew parallels between racial discrimination and gender discrimination while at the historically black HUSL because it was there

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108. Murray, *supra* note 1, at 286.

109. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)).

110. *Id.* at 495. Significantly, the United States Supreme Court would cite the same Gunnar Myrdal work that Murray had found so influential. *Id.* at 494–95, n. 11. As did Murray, the Supreme Court characterized Myrdal's work as more "modern authority" since *Plessy* proved the harmful psychological effects racially segregated public schools could have on children. *Id.*

111. Murray, *supra* note 1, at 330.

112. *Id.* at 472; Suk, *supra* note 7; Mayeri, *supra* note 7, at 82–84; Mary Eastwood & Pauli Murray, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232, 232–33 (1965).

113. 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, 140–41 (1989).

114. Murray, *supra* note 1, at 310. Additionally, while lobbying to include "sex" in Title VII, Murray noted: "As a Negro woman, I knew that in many instances it was difficult to determine whether I was being discriminated against because of race or sex." *Id.*

115. *Id.* at 472; *see* Rosenberg, *supra* note 6, at 150–51 ("Murray believed that the approach she advocated for killing Jim Crow could work for killing Jane Crow."). *See also generally* Suk, *supra* note 7; Mayeri, *supra* note 7; Murray & Eastwood, *supra* note 110.

that she repeatedly confronted gender discrimination despite excelling academically.[116] Murray's application to Harvard Law School for further graduate school was rejected because of her sex.[117] As discussed later, Murray had previously been rejected from the University of North Carolina because she was Black American.[118] She would describe her rejections from UNC and Harvard as "equally unjust," noting that she had developed coping mechanisms for race-based rejections but not sex-based ones.[119] What was clear for Murray was that she was "a minority within a minority, with all the built-in disadvantages such status entailed."[120]

In a satirical essay published in the Sentinel, a Black California news publication, Murray directly linked Jim Crow to the harms women faced, what she cleverly dubbed "Jane Crow."[121] Murray's early thought leadership regarding ways to challenge gender discrimination would become especially influential over the next several years due to the close relationships she would develop with prominent political leaders.[122]

Murray consistently touted the "'very close parallel between the status of women and their struggle for equal opportunity and the status of Negroes for the same objective.'"[123] She believed that the answer to guaranteeing the equality of women was in the Fourteenth

116. MURRAY, *supra* note 1, at 236–38. On her first day at HUSL, for example, Murray recalled a professor saying in his opening remarks that "he really didn't know why women came to law school, but that since we were there the men would have to put up with us." *Id*. at 237. And despite being the strongest student, her law school class initially refused to hold elections where she would be Chief Justice of the Court of Peers because her "classmates were not prepared to recognize a woman as the acknowledged leader of the student body." *Id.* at 281. One of her professors and mentors dismissed Murray's concerns that a legal fraternity's refusal to accept women limited her professional networking opportunities. *Id.* at 238.

117. *Id.* at 310–16. (Despite repeated appeals, including a letter in support of Murray from Harvard alum President Franklin D. Roosevelt, Harvard's rejection stood.).

118. *See* discussion *infra* Section II.B (discussing Murray's rejection from the University of North Carolina).

119. MURRAY, *supra* note 1, at 310. (Murray stated: "The fact that Harvard's rejection was a source of mild amusement rather than outrage to many of my male colleagues who were ardent civil rights advocates made it all the more bitter to swallow.").

120. *Id.* Unable to attend her top choices for graduate school, Murray moved to California to attend the University of California Berkeley's law school to obtain her LL.M. *Id.* at 318–20; ROSENBERG, *supra* note 6, at 160. She was its sole graduate student. MURRAY, *supra* note 1, at 338. While in California, it became evident to Murray how the same Myrdal she had relied on for her argument for overturning *Plessy* provided fodder for arguments against gender discrimination as well. *See* ROSENBERG, *supra* note 6, at 150–151. Myrdal, for example, had written at length about the "striking similarities" between the history of oppression and status of Black Americans and those of women. *Id.* at 150. Murray similarly relied on that social scientific reasoning to challenge what she deemed "prejudice against sex." *Id.* at 151 (citation omitted).

121. *Id.* The culmination of her graduate studies at Berkeley was a published law review article, wherein she outlined the federal government's constitutional role in securing equal opportunity for minorities and women. *See generally* Pauli Murray, *The Right to Equal Opportunity in Employment*, 33 CALIF. L. REV. 388 (1945).

122. *See* ROSENBERG, *supra* note 6, at 241–309. For example, Murray's close relationship with First Lady Eleanor Roosevelt and work with Roosevelt on women's rights have been well-documented. *See generally* BELL-SCOTT, *supra* note 7.

123. ROSENBERG, *supra* note 6, at 250.

Amendment.[124] Murray specifically argued that that the Amendment's equal protection clause protected women from discrimination,[125] an argument that has, perhaps, been the most significant part of her legacy as a lawyer and legal strategist. The late Supreme Court Justice Ruth Bader Ginsburg regularly credited Murray's work as inspiration for the civil rights work Ginsburg undertook as an early attorney litigating gender discrimination claims.[126] When the Supreme Court finally acknowledged that classification based on sex violates the Fourteenth Amendment, Ginsburg emphasized that this legal reasoning was to be attributed to Murray: "Pauli [Murray] had the idea that we should interpret the text literally; it said 'any person,' not any *male* person. We knew when we were writing that brief that we were standing on her shoulders . . . [w]e owe so much to her courage, to her willingness to speak out when society was not prepared to listen."[127]

Notwithstanding the increasing recognition of Murray's Fourteenth Amendment legacy, her thought leadership and scholarship regarding the Thirteenth Amendment, which the next Section begins to discuss, also stand to benefit from more recognition and appreciation.

## II. Murray and the Thirteenth Amendment

One of the major reasons Murray's intellectual explorations of the Thirteenth Amendment are significant is because of its increasing importance as an underdeveloped source of antidiscrimination law. While the Fourteenth Amendment has historically been one of the most important constitutional sources for discrimination claims, its power in this regard has arguably waned. Leading constitutional scholar Erwin Chemerinsky, for instance, remarked in 1992 that "notwithstanding the rights that the Fourteenth Amendment has protected, its guarantee of 'equal protection under the law'" has suffered due to "tragic mistakes" the Supreme Court has made as part of its jurisprudence.[128] "The

124. *See generally* Murray & Eastwood, *supra* note 112; Rosenberg, *supra* note 6, at 250–51.

125. The Supreme Court's concession in Brown v. Board of Education that race was an unreasonable basis for classification under the Equal Protection Clause, Brown v. Board of Education, 347 U.S. 483 (1954), arguably paved the way for an understanding of "sex" as a similarly unreasonable basis for classification. Murray would go on to co-author another groundbreaking law review article in 1965 that would lay out her arguments that gender discrimination was unconstitutional under the Fourteenth Amendment. *See generally* Murray & Eastwood, *supra* note 112.

126. *See, e.g.*, My Name is Pauli Murray (Prime Video 2021). Ginsburg listed Murray as an honorary writer on an amicus brief Ginsburg wrote for the Supreme Court's Reed v. Reed, 404 U.S. 71, 76–77 (1971). In *Reed*, the Supreme Court recognized women as victims of sex discrimination, ruling unconstitutional a legal classification on the basis of sex under the Fourteenth Amendment. *Id.*

127. My Name is Pauli Murray, *supra* note 126.

128. Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 Loy. L.A. L. Rev. 1143, 1144 (1992).

Fourteenth Amendment's notable successes pale in comparison to the promise it originally offered," Chemerinsky concluded.[129] Chemerinsky more recently concluded that the Supreme Court has essentially "created a framework for equal protection analysis [under the Fourteenth Amendment] that all but ensures only a narrow group of discrimination claims will be actionable or succeed."[130] Indeed, conservative groups, no doubt emboldened by a conservative-majority Supreme Court, have successfully argued under the Fourteenth Amendment for the elimination of race-conscious affirmative action programs,[131] school desegregation efforts,[132] and abortion as a federal constitutional right.[133] Such efforts, according to some, have equated to the Court's "turn[ing] a blind eye to the[] central precepts at the [Fourteenth Amendment's] heart."[134]

In response to the Dobbs majority declaration that abortion access was not a federal constitutional right under the Fourteenth Amendment, the dissent in that case warned that the Constitution would now decreasingly protect those seeking access to abortions under the Fourteenth Amendment "despite its guarantees of liberty and equality for all."[135] More relevant here is the dissent's caution that "no one . . . be confident that this majority is done with its work," warning of the erosion of other Fourteenth Amendment rights: "Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat."[136] Shoring up the dissent's warning was Justice Clarence Thomas's explicit declaration in his concurrence that a host of rights formerly granted under the Fourteenth Amendment should be "reconsider[ed]," asserting that the Court had a "duty to 'correct the error' established in those precedents."[137]

It is perhaps unsurprising then that scholars, practitioners, and even courts are increasingly considering another Reconstruction Amendment passed after the Civil War: the Thirteenth Amendment.[138] To the extent that any modern-day forms of discrimination constitute

129. *Id.*

130. Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1066 (2011).

131. *See, e.g.,* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

132. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

133. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

134. Jordan Smith, *In Overturning Roe, Radical Supreme Court Declares War on the Fourteenth Amendment,* INTERCEPT (June 24, 2022), https://theintercept.com/2022/06/24/roe-wade-overturned-supreme-court-14th-amendment/.

135. *Dobbs*, 142 S. Ct. at 2319.

136. *Id.*

137. *Id.* at 2301–02.

138. *See* discussion *infra* Section II.C.2 (discussing more current Thirteenth Amendment scholarship and pointing out the Fifteenth Amendment, with its specific focus on voting rights, has historically received less of this kind of attention).

"residual forms of slavery," scholars have emphasized that the "[t]he reach of the Thirteenth Amendment makes it the most likely source of federal law" to apply to potential antidiscrimination claims and other kinds of rights.[139] As with her bold vision for expanding civil rights under the Fourteenth Amendment, Murray similarly understood the Thirteenth Amendment's utility long ago, as discussed *infra* Section II.B. The next Section first provides a foundational overview of the Thirteenth Amendment to contextualize more fully Murray's prescient understanding of that Amendment.

### *A. Background on the Thirteenth Amendment*

The Thirteenth Amendment, quoted in full, *supra*, is the first time that the Constitution mentions the word "slavery." Importantly, unlike the Fourteenth Amendment, the Thirteenth Amendment does not textually suggest that a government action be required to prove discrimination; the Thirteenth Amendment outlaws private discrimination as well. The Thirteenth Amendment's Section 2, moreover, enshrines Congress with the power to enforce this anti-slavery Amendment; it was the first time an amendment explicitly expanded the federal government's power and established a precedent of federal power to ensure civil rights.[140] These features contribute to why scholars continue to understand the Amendment as one under which a host of civil rights and antidiscrimination work for Black Americans and others might be accomplished.[141]

The common throughline in more modern Thirteenth Amendment scholarship has been this premise: In abolishing slavery as an institution, the Amendment also abolished that institution's remnant laws, policies, or other practices.[142] In other words, the Amendment conferred freedom not just from chattel slavery but also from the discriminatory practices that slavery had required for it to be maintained as an institution. Thus, to the extent that modern-day discriminatory practices interfere with one's ability to conduct life affairs—e.g., family planning, education, and leisure—and in ways that constitute a legacy of slavery, those practices run afoul of the Thirteenth Amendment. Some have emphasized Congress's role in enforcing the Amendment via its Section 2 legislative power,

139. Rutherglen & Barbee, *supra* note 32.

140. Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution 31–32 (2019).

141. *See, e.g.,* Rutherglen & Barbee, *supra* note 32 (noting, for example, that "[t]he Fourteenth Amendment prohibits only state action in violation of individual rights and the Commerce Clause still retains some limits, however haphazard, requiring an effect on economic activity").

142. *See* discussion *infra* Section II.C.2.

while others have argued the Amendment's self-executing force.[143] Regardless, the general acceptance of the Thirteenth Amendment is that it remains a viable constitutional tool for eradicating practices that prove to be barriers to enactments of freedom insofar as those practices constitute vestiges of slavery.[144]

Murray's legacy must include room for the fact that she was one of the few civil rights attorneys arguing this point for Black Americans.[145] As historian Rosalind Rosenberg explains, "Murray's ambition to expand the power of the Fourteenth Amendment showed a certain audacity, but her desire to extend the reach of the Thirteenth Amendment exceeded what even the most far-sighted attorneys then contemplated."[146] Rosenberg goes on to note that civil rights lawyers' "boldest" Thirteenth Amendment claim before 1944 concerned how the exploitation of sharecroppers constituted another iteration of slavery.[147] But Murray was intellectually resolute enough to go further, presaging what the Supreme Court and other legal theorists would have to say about the Thirteenth Amendment many years later.

The next Section discusses how Murray's Thirteenth Amendment argument began to take shape for her as a student at HUSL.

### *B. Murray's Theoretical Development of the Thirteenth Amendment*

It was as a student at HUSL that Murray first explicitly began formulating her ideas about the Thirteenth Amendment—specifically, how the Amendment might be seized to dismantle segregation laws. HUSL's pivotal role in the civil rights movement no doubt contributed to Murray's comfort with making bold and innovative legal arguments.[148]

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143. *See, e.g.*, James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 432–33 (2018) (arguing that "badges and incidents are directly prohibited by Section 1" of the Thirteenth Amendment and highlighting the fact that judicial development of the Thirteenth Amendment's self-executing power has been "thwart[ed"). In City of Memphis v. Greene, 451 U.S. 100, 125 (1981), the Supreme Court articulated that Congress's power to eliminate the badges and incidents of slavery "is not inconsistent with the view that the Amendment has self-executing force," but the Court did not confirm its view of the Amendment's scope and decided "to leave . . . open" the question of the degree to which Section 1 was self-executing, *id*. at 126.

144. *See* discussion *infra* Section II.C.2.

145. This is not to suggest that Murray would have rejected a broader reading of the Thirteenth Amendment that other scholars have since advanced. *See, e.g.*, PEGGY COOPER DAVIS, *Women, Bondage, and the Reconstructed Constitution, in* WOMEN AND THE UNITED STATES CONSTITUTION 53, 53–54 (Siby Schwarzenbach & Patricia Smith ed., 2003) (arguing that the Thirteenth, Fourteenth, and Fifteenth Amendments established a "Reconstructed Constitution" that is now based on "antislavery principles" and that should therefore be "understood to encompass opposition to subordination in many forms and on many grounds," including on grounds like gender).

146. ROSENBERG, *supra* note 6, at 132.

147. *Id.*

148. *See* Interview by Robert Martin with Pauli Murray, *supra* note 89, at 159–161.

But Murray's educational journey to HUSL itself is worth discussing, as it informed the strong conviction Murray had about segregation. It also shaped the kinds of legal arguments Murray would eventually make in an effort to dismantle racial apartheid in the United States, including those under the Thirteenth Amendment.

Murray's entire education, from primary school through high school, was segregated.[149] And though she excelled in her Durham, North Carolina schools, where her teachers nurtured her, Murray keenly recounted the grave differences between "what we had and [what] white children [had]."[150] "You sense those things, you feel them," she expressed.[151]

Despite her teachers organizing a scholarship fund for her to attend Wilberforce University, Murray refused because Wilberforce was a segregated school; she described this refusal as her "first overt stand against racial segregation."[152] After high school graduation, Murray moved in with a distant cousin living in New York City to escape the South's oppressive regime of racial segregation.[153] Murray eventually graduated from Hunter College and entered the economic constraints of the Great Depression.[154]

Even after college, school continued to be a place where Murray was repeatedly reminded of segregation's humiliating force in her life.[155] The University of North Carolina, for example, refused to admit Murray to its graduate-level sociology program in 1938: "Under the laws of North Carolina, and under the resolutions of the Board of Trustees of the University of North Carolina, members of your race are not admitted to the University," the graduate school dean wrote to Murray.[156] Earlier that year, the Supreme Court had ruled that a state's failure to provide Black American students with equal access to graduate-level education violated the Fourteenth Amendment.[157] The fact that there was no North Carolina graduate-level sociology program for Black Americans suggested that UNC's rejection of Murray on account of her race was unconstitutional.[158] Though Murray wrote multiple letters

149. Interview by Genna Rae McNeil with Pauli Murray, Univ. N.C. Southern Oral History Program Collection (Feb. 13, 1976); MURRAY, *supra* note 1, at 76–84.

150. Interview by Genna Rae McNeil with Pauli Murray, *supra* note 149.

151. *Id.*

152. MURRAY, *supra* note 1, at 83.

153. *Id.* at 82–83.

154. *Id.* at 86–92.

155. *Id.* at 147–67.

156. *Id.* at 148.

157. *See* State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351 (1938).

158. ROSENBERG, *supra* note 6, at 70.

to UNC's president explaining this, her arguments went unheeded. The university's decision to reject Murray on account of her race stood.[159]

With these obstacle-ridden educational experiences, Murray arrived at HUSL, a place she characterized as a "training ground for the civil rights lawyers who were attacking segregation and discrimination."[160] She explained that as early as the 1920s, HUSL classes served as a "dress rehearsal" for preeminent civil rights lawyers who would argue the major civil rights cases of the 1940s and 1950s in the Supreme Court.[161] To challenge and help refine these lawyers' arguments, HUSL students like Murray were encouraged to ask difficult questions and develop new strategies to pursue racial justice in the courts.[162] She explained, "We were constantly looking for arguments to attack discrimination. The students and lawyers, we were lawyers-to-be, get divided sometimes into the practicing, practical type-pragmatic lawyer, and the policy-oriented, theoretical lawyer, and I tended to fall into the latter class."[163] Murray's theoretical leanings no doubt informed her proposal for relying on the Thirteenth Amendment to challenge racial discrimination, the specific arguments of which are discussed in the next Section.

### *1. Identifying Slavery's Vestiges and Overturning* Plessy *Based on the Thirteenth Amendment*

Murray has remarked that her academic work at HUSL reflected an "intense desire" to "find a legal basis for overruling" the Supreme Court's segregation jurisprudence.[164] It was in her HUSL seminar paper, discussed *supra*, that Murray appeared to first formally outline her Thirteenth Amendment argument that the premises of *Plessy* and its precedential antecedents could be challenged. This was because certain vestiges of slavery—like her discrimination-laden educational experience—lingered in direct contravention of the Thirteenth Amendment's guarantee of freedom.[165] And Murray was particularly attracted to the Amendment's potential for protecting "the civil rights of Negroes from invasion by individuals as well as by states," given that it does not contain a state-action requirement like the Fourteenth Amendment.[166] Murray thus believed

159. *Id.* at 70–77; MURRAY, *supra* note 1, at 147–67.
160. Interview by Robert Martin with Pauli Murray, *supra* note 89, at 161.
161. *Id.*
162. *Id.*
163. *Id.*
164. Interview by Genna Rae McNeil with Pauli Murray, *supra* note 149.
165. *See* Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29, at 5–6.
166. Pauli Murray, Letter from Pauli Murray to Dean of Howard University School of Law 35 (Jun. 12, 1945) (Pauli Murray Papers, MC 412, Box 96, Folder 1698, on file with Schlesinger Library, Radcliffe Institute, Harvard University).

that reviving the Thirteenth Amendment's power could "plug up the hole" the Fourteenth Amendment had left: challenging the infringement of civil rights by a private entity.[167] Murray also focused particularly on the Amendment's Section 2 power of the federal government to enforce the Amendment with appropriate legislation.[168]

The problem for the Thirteenth Amendment's theoretical development, more generally, was that "[b]oth innovative and established approaches to constitutional law at that time had little capacity to address the material conditions of Jim Crow, and in particular, how the cumulative effects of discrimination could amount to the effective equivalent of slavery."[169] To address this issue and advance her argument for why *Plessy*, in particular, should be overturned on Thirteenth Amendment grounds, Murray relied on scholar Gunnar Myrdal, as discussed *supra*.[170] Murray specifically consulted Myrdal's vast interdisciplinary research compendium in *An American Dilemma*, which was the first academic research study of its kind on the nation's racial political economy.[171] With academic contributions and counsel from noteworthy experts on race relations, Myrdal compiled his research studying the Black American experience into this book.[172] His work documented in detail how invisible systems had contributed to Black Americans' consistent deprival of rights,[173] and his findings solidified the sociological arguments that many civil rights advocates and Black American scholars had been arguing all along[174] —that the socioeconomic and political plight of Black Americans was really a "white man's problem."[175] Myrdal's compilation of academic studies on education, employment, housing, and other social spaces detailed—and with now presumed academic objectivity[176]—how the United States'

167. *Id.*

168. *See* Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?*, supra* note 29, at 15, 19.

169. Rutherglen & Barbee, *supra* note 32.

170. Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29, at 27–28.

171. Rosenberg, *supra* note 6, at 146; *see also generally* Gunnar Myrdal et al., An American Dilemma: The Negro Problem and Modern Democracy (1944).

172. *See generally* Rosenberg, *supra* note 6, at 146–47.

173. *See generally* Myrdal, *supra* note 171.

174. Rosenberg explains that in many ways, Myrdal served as a "sponsor" for accomplished Black American scholars whose research objectivity had been regularly questioned. Rosenberg, *supra* note 6, at 146. Many of these Black American scholars also had ties to Howard: "Murray's interest in the Myrdal project intensified in her years at Howard, because Myrdal tapped so many of the school's faculty to contribute monographs in their areas of expertise: Ralph Bunche in political science, E. Franklin Frazier in sociology, and Sterling Brown in literature. Myrdal also hired Howard [University] graduate Kenneth Clark, who was completing his doctorate in psychology at Columbia, to investigate the psychological consequences of racism." *Id.*

175. *Id.*

176. *Id*.

racial caste system was built and maintained.[177] For the first time, racial justice advocates like Murray had strong evidence they could use to persuade others of slavery's ongoing, cumulative harm to Black Americans.[178]

Murray also relied heavily on Justice Harlan's *Plessy* dissent to support her Thirteenth Amendment position.[179] Justice Harlan had clarified that the Thirteenth Amendment had "decreed universal civil freedom."[180] Accordingly, discrimination in public accommodations "is a badge of servitude wholly inconsistent with th[at] civil freedom and the equality before the law. . . . It cannot be justified upon any legal grounds."[181] Because, for Justice Harlan, the act of discrimination in public accommodations was a badge and incident of slavery, it violated the Thirteenth Amendment.[182]

Murray built on Justice Harlan's notion of slavery's lingering "badges." She termed them "vestiges"[183] in her paper and discussed them as the deprival of "personal rights," those that would "secure" the status of Black Americans as free "in the larger community on the basis of equality of opportunity with all other persons."[184] These personal rights Murray outlined for Black Americans included:

> (1) his freedom of movement, (2) the right of association with friends of his choice, (3) the right to be accepted as an equal with all other members of a free citizenry where he has met the impartial standards for such acceptance, (4) the right not to be set aside or marked with a badge of inferiority, (5) right to enjoy all public privileges on a basis of equality with other citizens without distinction or discrimination, (6) the right to live in peace, (7) to work productively, (8) to worship and think freely, and (9) the right to die secure in the knowledge that his children and their children, shall have the same opportunities.[185]

Murray argued that a denial of any of these rights constituted a mark of inferiority reminiscent of those that the enslaved had endured.[186]

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177. *See generally* MYRDAL, *supra* note 171; ROSENBERG, *supra* note 6, at 146–47 (detailing the process behind writing *An American Dilemma* and previewing his research, observations, and findings regarding race in the United States).

178. ROSENBERG, *supra* note 6, at 146–47 (stating that Murray was "delighted to find that" Myrdal's book "fit so well the argument she wanted to make").

179. Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29, at 15–16, 19.

180. Plessy v. Ferguson, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

181. *Id.* at 562.

182. *Id.*

183. Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29, at 38.

184. *Id.* at 5.

185. *Id.* at 1.

186. *Id.* at 32.

Murray explained that the system of slavery required "enforced social separation" that was maintained by an apparatus of "many patterns and regulations of conduct" and "stringent laws" to manage "in detail the behavior of the slaves."[187] Such laws had obviously deprived enslaved Black Americans of the "personal rights" Murray had described, and under the Jim Crow regime, they were rights that Black Americans were still unable to fully enjoy. Murray especially relied on Myrdal to make the link between the social status and conditions of Black Americans in the mid-20th century and the social relationships endemic to the system of slavery.[188] Myrdal summarized his work: "What we are studying is in reality the survivals in modern American society of the slavery institution,"[189] a position central to Murray's Thirteenth Amendment argument. Because courts and legislative bodies had ignored that reality, Black Americans continued to struggle in their legal quest to gain the kind of personal rights for which Murray was arguing.

Murray offered the Thirteenth Amendment as a solution. She had asked: "Where, in our body of organic law/judicial decisions shall we find these 'personal rights' protected? . . . [A]re they so important to the well-being of the individual they are protected by the Constitution itself and are therefore within the sphere of Congressional legislation?"[190] Murray thought so, as the Amendment "did more than merely abolish the master-slave relationship" and was instead "declaratory of a state of freedom which placed the Negro on an equal status with white citizens."[191] Murray thus argued that "[o]nly by complete abolition of all laws and customs designed to enslave the Negro, to force him into an inferior category, to restrict his movements and his privileges as a human being endowed with inalienable rights could the institution of slavery be destroyed."[192] And Congress, under its Section 2 powers under the Thirteenth Amendment, had the authority to legislate for this kind of abolition.[193]

It bears discussing how Murray's conviction about the persistent legacy of slavery in the then-modern society informs the debates that formerly enslaved Black Americans themselves were having about what "freedom" would mean after the Thirteenth Amendment's ratification. In line with Murray's arguments as to what the Thirteenth

187. *Id.* at 31.
188. *Id.* at 8.
189. MYRDAL, *supra* note 171, at 577.
190. Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29, at 4–5.
191. Letter from Pauli Murray to Dean of Howard University School of Law, *supra* note 166, at 35–36.
192. *Id.* at 31.
193. Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29, at 15–16, 55–56.

Amendment's granting of freedom was supposed to practically accomplish, Black American political leaders contended in the 1860s during the Amendment's debates that slavery's abolition by way of the Thirteenth Amendment would include the elimination of all other elements of the slave system.[194] Even before the Civil War, Black Americans had their own understanding of freedom as a legal and constitutional status that meant more than just the absence of forced physical servitude.[195] What formerly enslaved Black Americans did after the abolition of slavery underscores what, for them, freedom actually meant: rejoining families, building homes, and seeking educational opportunities, for example. It was through such conduct that Black Americans sought to "throw off the badge of servitude" and claim, as citizens, "the blessings of equal liberty."[196] And again, as Pauli Murray began to argue at HUSL, the Thirteenth Amendment was the constitutional vehicle by which Congress could still ensure as much.

Whether Murray was aware or not, her position was also reinforced by the fact that the Amendment's chief architects were strongly influenced by abolitionist philosophy and believed that abolitionists' "broader purposes of reconceptualizing [their] Constitution to guarantee equality . . . must guide Thirteenth Amendment jurisprudence."[197] The Amendment's House floor leader, Representative James Ashley, explained that the Amendment was to provide "a constitutional guarantee of the government to protect the rights of all and secure the liberty and equality of its people."[198] And the Amendment's legislative history demonstrates that most of the Amendment's congressional proponents indirectly or outright affirmed the Amendment's guarantee of rights that went beyond freedom from just the physical coercion of labor.[199]

A significant number of legislators suggested that the Amendment would, or should, grant a substantial number of rights to Black

194. *Equal Suffrage: Address from the Colored Citizens of Norfolk, Va., to the People of the United States* (June 5, 1865), *reprinted in*, PROCEEDINGS OF THE BLACK NATIONAL AND STATE CONVENTIONS 1865-1900, at 83, 87 (Philip S. Foner & George E. Walker eds., 1986).

195. William M. Wiecek, *Emancipation and Civic Status: The American Experience, 1865–1915*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 78–79 (Alexander Tsesis ed., 2010).

196. FONER, *supra* note 140, at 51.

197. William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1333 (2007).

198. REBECCA ZIETLOW, THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION 125 (2018) (quoting Hon. James Ashley of Ohio, Address at the U.S. House of Representatives (May 29, 1860)).

199. *See* Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 174–79 (1951).

Americans that slavery precluded.[200] Senator James Harlan of Iowa, for example, listed a number of "necessary incidents" and other peculiar characteristics of slavery that would need to be addressed; the list included things like freedoms of speech and press, as well as Black Americans' access to education and right to testify.[201] Senator Lyman Trumbull concluded outright that there was "no doubt" that under the Amendment, "we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing."[202] In sum, Murray's instinctive and legal conceptualization of the rights of the Thirteenth Amendment was aligned with the intentions of the Amendment's original supporters and drafters—namely, that the Amendment embodies vigorous legal power for ending discrimination against Black Americans.

What would prove difficult for Murray's arguments was the Supreme Court's resistance to Congress's early attempts to act under its Thirteenth Amendment power to enact legislation eradicating slavery in all its forms. The Supreme Court had emphatically done so in *Civil Rights Cases*[203] years before further narrowing the Thirteenth Amendment's power in *Plessy v. Ferguson*, as already discussed. The next Section discusses early legislation Congress passed under its new Thirteenth Amendment power, the Supreme Court's response to that legislation, and how Murray would try to contend with that response.

### 2. *The Civil Rights Act of 1866, the 1875 Civil Rights Act, and* Civil Rights Cases

In *Civil Rights Cases*, the Supreme Court weighed Congress's legislative authority under the Thirteenth and Fourteenth Amendments to grant Black Americans civil rights.[204] The case was arguably the Supreme Court's first major exploration of the Thirteenth Amendment and, significantly, introduced the phrase "badges and incidents" into the Supreme Court's vernacular.[205] Accordingly, Murray expressed that she wanted her Thirteenth Amendment argument at HUSL to first "straighten[] out" *Civil Rights Cases* before turning to *Plessy*.[206] This was because, according to Murray, it was in *Civil Rights Cases* that the

200. Rebecca Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. Rev. 255, 269, 275 (2010); *see also* tenBroek, *supra* note 199, at 175.

201. Cong. Globe, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. James Harlan).

202. Cong. Globe, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Trumbull).

203. Civil Rights Cases, 109 U.S. 3, 20 (1883).

204. *Id.* at 10–25.

205. *Id.* at 20.

206. Interview by Genna Rae McNeil with Pauli Murray, *supra* note 149.

Supreme Court's "error [was] first [] committed" regarding the Court's limitations of the Thirteenth Amendment's powers for racial justice.[207]

As context, Congress's first legislative act under the Thirteenth Amendment had been the enactment of the Civil Rights Act of 1866, the nation's initial civil rights law and one that specifically entitled Black Americans to equal rights with respect to contract, property, and security of the person.[208] Under that Act, Black Americans could no longer be denied "the same right . . . as is enjoyed by white citizens" to contract, participate in court proceedings, own property, and take advantage of the "full and equal benefit of all laws and proceedings for the security of person and property."[209]

A relatively short time thereafter, Congress enacted what was originally conceived of as the Supplementary Civil Rights Act, or the 1875 Civil Rights Act. The 1875 Civil Rights Act was to supplement the Civil Rights Act of 1866 with even more affirmative rights that enslaved Black Americans had been denied. The 1875 Civil Rights Act specifically conferred "full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement."[210] In doing so, the 1875 Civil Rights Act codified what historian Amy Dru Stanley has described as a "radical right to happiness" for Black Americans in the Act's formal extension of "pleasurable liberties" to them.[211]

Congress passed the Civil Rights Act of 1866 under its Thirteenth Amendment legislative power[212] and the 1875 Civil Rights Act under its respective Thirteenth Amendment and Fourteenth Amendment powers.[213] In line with Murray's argument, the Acts were an implicit

207. Interview by Robert Martin with Pauli Murray, *supra* note 89, at 165.

208. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 18 U.S.C. § 242 (2018) and 42 U.S.C. §§ 1981–1982 (2018)). Before even the Civil Rights Act of 1866, one of Congress's more informal legislative acts was to pass the oft overlooked Second Freedmen's Bureau Bill to avoid the formerly enslaved "falling into a permanent state of destitution inconsistent with the independence necessary for full citizenship in a democratic republic." THE AMERICAN NATION: PRIMARY SOURCES 92–94 (Bruce P. Frohnen ed., 2008). This legislation also comports with the notion that Congress was legislating under its Thirteenth Amendment power with a sumptuous understanding of the kind of freedom the Thirteenth Amendment was intended to secure, as discussed in Section II.B.

209. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982).

210. Civil Rights Act of 1875, ch. 114, 18 Stat. 335, (invalidated by Civil Rights Cases, 109 U.S. 2 (1883)).

211. Amy Dru Stanley, *A Radical Right to Happiness*, SLATE (Dec. 21, 2017), https://slate.com/human-interest/2017/12/radically-reinterpreting-fundamental-human-rights-during-reconstruction.html (suggesting that the 1875 Civil Rights Act represented Congress's recognition that the "[e]mancipation [of Black American slaves] would bring a fundamental right to be an amusement seeker," a "concept[] of freedom that was . . . sensuous" and that confirmed Black Americans' "inherent right to . . . experience rapture in public").

212. Jones v. Mayer Co., 392 U.S. 409, 437–38 (1968).

213. Civil Rights Cases, 109 U.S. 3, 10–11 (1883).

recognition by Congress of the fact that the system of slavery was not a single institutional unit that the Thirteenth Amendment prohibited—instead, slavery consisted of a "bundle of disabilities, bound together by conventions"[214] that the Thirteenth Amendment's prohibition of slavery would have to address.[215] In short, Congress's notion of freedom in the wake of slavery was comprehensive and not limited to just the absence of forced physical subjugation.

Unlike the Civil Rights Act of 1866, the 1875 Civil Rights Act did not survive its constitutional challenge and was ultimately overturned in *Civil Rights Cases*.[216] *Civil Rights Cases* was a consolidation of five cases, all involving Black American plaintiffs suing either theaters, hotels, or transportation companies.[217] All of the plaintiffs alleged denials of access to public accommodations because of their race, in violation of the 1875 Civil Rights Act.[218] The defendant business owners maintained in response that the 1875 Civil Rights Act was, itself, unconstitutional.[219] As discussed *infra* Section II.B.3, the Supreme Court in *Civil Rights Cases* agreed with the defendants that it was.

Murray's grappling with anti-civil rights precedents like *Civil Rights Cases* was not just intellectual; the commonality between her personal experiences and the plaintiffs' experiences had to have loomed significantly in her quest for civil rights. For example, Murray's childhood—a period not long after the 1875 Civil Rights Act was ruled unconstitutional—was one in which access to entertainment venues, like theaters, was fraught with racial tension for Black American families and individuals.[220]

Murray's childhood experience attending movie theaters with her siblings illustrates this point clearly. Murray explained how color differences "also operated within a family," with four of the siblings being able to sit wherever they would like to in the theater because they could pass for white.[221] Two others, including Murray, could not pass as white and were therefore relegated to the back of the theater.[222] "[A]nd that says something to you about why I would become a crusader for civil rights," Murray would remark.[223] Murray described that as her

214. Darrell A.H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 COLUM. L. REV. 1811, 1848 (2012); Scott v. Sandford, 60 U.S. 393, 407 (1857).

215. Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1943 (2012).

216. *Civil Rights Cases*, 109 U.S. at 25.

217. *Id*. at 5.

218. *See id.*

219. *Id.*

220. *See* Interview by Genna Rae McNeil with Pauli Murray, *supra* note 149.

221. *Id.*

222. *Id.*

223. *Id.* Murray's description of her experience is powerful in that it also highlights how segregation could seep into the most intimate of spaces: the family. She explains: "[S]ometimes even

understanding of Jim Crow deepened with her maturity, she "carried on [her] own private protest."[224] "I walked almost everywhere to stay off the Jim Crow streetcars and I would not go downtown to the theaters because that meant climbing the back stairs to the colored 'peanut gallery.'"[225]

Even when she moved to New York City as a late teenager, Murray described how despite the "cosmopolitan atmosphere of New York City [being] freer than anything [she] had known in the South," there were still consistent "sharp reminders of [her] inferior status" as a Black woman, including in entertainment venues like theaters.[226] Because, according to Murray, "service to Negroes in places of public accommodation was always uncertain," she "regularly sat tense with apprehension, never assured that [she] would be served" in public spaces.[227] Indeed, another common form of what Murray described as "racial humiliation[]" included working as a dinner waitress in a restaurant staffed primarily by Black Americans that nonetheless refused Black American patrons. The restaurant gave Black American staff "tasteless" leftovers "on bare tables in the basement."[228] White employees had access to the dining room and the restaurant's full menu.[229]

Reflecting on such experiences, Murray concluded that "[i]n those days [she] accepted the burden of race as something to be endured because there seemed little one could do about it."[230] Murray made clear that she either could not or would not pursue particular forms of leisure, pleasure, and entertainment because of the indignities such pursuits in a segregated society would bring.[231] Again, the 1875 Civil Rights Act concerned Black Americans' equal access to some of these very kinds of leisure—namely, places like hotels, theaters, and railroads.[232]

It is arguably no coincidence, then, that by the time of her last year at HUSL, Murray wanted to find a legal basis for challenging the Supreme Court's decision in *Civil Rights Cases* to overturn the 1875 Civil Rights Act. While the Court in that case had concluded that the

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family solidarity fell victim to the color bar. Once, when a fair-skinned relative from the North came to visit and took me to town one day for company, she made me stand outside while she went into the stores on Main Street. She said they would give her better service if they did not know she was colored. Aunt Pauline was furious when she heard about this and would not let me go anywhere with that relative again." MURRAY, *supra* note 1, at 41.

224. *Id.*

225. *Id.*

226. *Id.* at 109–10.

227. *Id.* at 110.

228. *Id.* at 98.

229. *Id.*

230. *Id.* at 109–10.

231. *Id.* at 41.

232. *See generally* Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (invalidated by Civil Rights Cases, 109 U.S. 2 (1883)).

Thirteenth Amendment did, in fact, authorize Congress to "pass all laws necessary and proper for abolishing all badges and incidents of slavery" under Section 2 of the Amendment, the Court had interpreted Congress's power as one limited to ensuring only "those fundamental rights which are the essence of civil freedom."[233] The Court described such rights as those "free" Black Americans had already enjoyed and that the formerly enslaved did not.[234] Accordingly, Congress had acted beyond its Thirteenth Amendment power by enacting the 1875 Civil Rights Act because the Amendment, according to the Court, was to protect only such "political rights" and not the "social rights" for Black Americans the 1875 Civil Rights Act granted.[235] It was this social-rights rationale that distinguished the Civil Rights Act of 1866, which the Court found did not address social rights and was, therefore, constitutional.[236]

The Court's restriction of the Thirteenth Amendment's power in *Civil Rights Cases* flouted not only the understanding of the Amendment by Black Americans of the time, discussed *supra*, but also Republican legislators' understanding of the Amendment when they enacted it.[237] Murray picked up on the fact that in the *Civil Rights Cases*, the Court "by its own language . . . admitted [] that the 13th Amendment did more than abolish slavery;" it also "established positive civil political freedom throughout the United States."[238] It was then much clearer to Murray that "the 13th Amendment clothes Congress with power to pass laws which will abolish such badges and incidents of slavery,"—which, again, essentially tracked what the Court in *Civil Rights Cases* stated—and "that there were certain incidents and disabilities of slavery other than the mere property relationship."[239]

What would qualify as those "incidents" and "disabilities" was where Murray would have to focus her arguments, which, to underscore an earlier point, was why Gunnar Myrdal's social science findings were so critical for her project. Given the Court's conclusion in *Civil Rights Cases*, Murray argued that both *Civil Rights Cases* and the *Plessy* decisions "distorted and defeated the major purposes for which [the Thirteenth Amendment] [was] adopted."[240] She wrote explicitly:

233. *Civil Rights Cases*, 109 U.S. at 20 (1883). As already discussed, the Court had also ruled that the Act was unconstitutional under the Fourteenth Amendment.

234. *Id.* at 22.

235. *Id.*

236. Jack Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1854 (2010).

237. Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29, at 11–12.

238. *Id.* at 15.

239. *Id.* at 19.

240. *Id.* at 16.

> Whatever may have been the facts placed before the Court at the time . . . historical and social changes within the American body politic clearly manifest the conclusions reached [in those cases] . . . have had catastrophic social effects, have hampered the operation of constitutional principles in the legal and social relations of free men, and should be overruled.[241]

It was with that belief that Murray set out to salvage the Thirteenth Amendment's power in a way to challenge that precedent, as the next Section discusses.

### *3. Reversing* Civil Rights Cases *under the Thirteenth Amendment*

Murray argued that *Plessy* and *Civil Rights Cases* rested on a misunderstanding of the Thirteenth Amendment's power and original purpose.[242] As support for her argument, Murray relied especially on Justice Harlan's dissent in *Civil Rights Cases*, as she did with *Plessy.* Murray found it "significant that no case book reporting these decisions has included [Justice Harlan's] dissent, so that his arguments remain unrevealed to most students of Constitutional law today."[243] Again, the majority for *Civil Rights Cases* restricted the Thirteenth Amendment's power to protecting a relatively limited set of rights, to which Justice Harlan had rebuffed in his dissent: "[D]id the freedom thus established [by the Thirteenth Amendment] involve nothing more than exemption from actual slavery?"[244]

Justice Harlan explained that Congress's Thirteenth Amendment power was not limited just to "legislation against slavery as an institution" but also to legislate against all of the ways laws continued to secure the inferior status of Black Americans, as such laws had during slavery.[245] The Amendment was to "protect[] the liberated race against discrimination, in respect of legal rights belonging to freemen, where such discrimination is based upon race."[246] Such rights inhering to freedom generally included what Justice Harlan described as an individual's "personal liberty" to do something as simple as "remov[e] [themselves] to whatever place [their] inclination may direct."[247] Thus, for Justice Harlan, a right to public accommodations—the right in question for *Civil Rights Cases*—was not a "social right," as the majority had

241. *Id.* at 12.
242. *See id.*
243. *Id.*
244. Civil Rights Cases, 109 U.S. 3, 34 (1883).
245. *Id.* at 37.
246. *Id.* at 39.
247. *Id.* (quotations omitted).

suggested.[248] It was clearly a "legal right," which meant that Congress had more than enough power under the Thirteenth Amendment to enact the 1875 Civil Rights Act that protected such a right.[249]

Murray obviously agreed with Justice Harlan and found that his position could be reinforced by Myrdal's findings, discussed *supra*. Myrdal's social science research provided what Murray termed a "reexamination" of slavery and its lingering effects such that the 1875 Civil Rights Act should have been upheld in *Civil Rights Cases*.[250] Murray argued that the Court's majority "failed to explore the full implications of the slavery institution" and that history and social science revealed rather clearly that "social restrictions and denials were interrelated with and necessary to the property ownership of the slave as a chattel."[251] Channeling Justice Harlan's rationale and backed with Myrdal's findings, Murray thus argued the Thirteenth Amendment's purpose and ongoing utility: "To abolish slavery meant to abolish all the incidents and rights of slavery, both in social and property relationships. Since these rights were protected in detail by numerous and varied laws in the various slaveholding states, only by . . . federal law could any uniform protection of the freedmen be guaranteed."[252] According to Murray, civil rights laws like the 1875 Civil Rights Act could, therefore, be enforced under the Thirteenth Amendment, despite what the Court concluded, as it could only be through such legislation that the freedom the Thirteenth Amendment was intended to confer could be actualized for Black Americans.

Later, in *Plessy v. Ferguson*, discussed *supra*, the Supreme Court limited the Thirteenth Amendment's power again by further narrowing what could count as a "badge and incident" of slavery such that the Thirteenth Amendment was implicated.[253] As already mentioned, in deciding the plaintiff's Thirteenth Amendment argument in *Plessy*, the Court narrowly applied the standard in *Civil Rights Cases* to find that the public conveyance's exclusion of people of color imposed no "badge of slavery or servitude" that fell under the Thirteenth Amendment's purview.[254]

Murray noted in her paper that Justice Harlan, in both *Civil Rights Cases* and *Plessy*, "took a broader view" of the Thirteenth Amendment's

248. *Id.* at 55.
249. *Id.*
250. Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29, at 31–32.
251. *Id.* at 30.
252. *Id.* at 31.
253. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).
254. *Id.* at 542–43.

power based on the views he expressed in each case's single dissent that he authored.[255] She relied on Myrdal's findings and her own reasoning to reinforce Justice Harlan's conclusion that the freedom from which Black Americans were to benefit under the Thirteenth Amendment was expansive.

Ironically, Pauli Murray believed that she "couldn't complete [the paper] the way [she] wanted to" at HUSL because of interruptions throughout the semester of events like the Washington, D.C. sit-in protests against racial discrimination.[256] Undeterred, Murray would continue her Thirteenth Amendment project as a graduate student at Berkeley the year following her graduation from HUSL. The next Section discusses Murray's continued work.

### *4. The Roles of Legislative History and Congressional Intent for Murray's Thirteenth Amendment Argument*

Murray set out at Berkeley to "once and for all . . . lay the ghost of [the] Harlan dissents in *Civil Rights Cases* and the *Plessy v. Ferguson* decision."[257] Murray wanted to do so by continuing her effort at "show[ing] that the Thirteenth Amendment was intended to strike down, not only the legal relationship of slavery, but also the badges of servitude."[258] The Berkeley professor with whom she would primarily work also believed that the *Plessy* decision was unconstitutional, but he stopped short of arguing that the Thirteenth Amendment outlawed private discrimination—at least any private discrimination that did not amount to literal enslavement or involuntary servitude.[259]

Murray's professor had actually thought any argument like hers was borderline 'frivolous,' especially given that the Supreme Court had, so far, regularly rejected the notion that the Thirteenth Amendment barred anything other than physical enslavement or involuntary servitude.[260] Close to a decade after *Plessy*, for example, the Supreme Court decided *Hodges v. United States*, a case in which a group of armed white individuals physically impeded eight Black American laborers from the Arkansas sawmill that employed them.[261] At trial, a jury convicted the white group members of preventing the Black American employees from exercising their rights "to make and enforce contracts" as whites

255. Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29, at 15.
256. Interview by Robert Martin with Pauli Murray, *supra* note 89, at 163.
257. Letter from Pauli Murray to Dean of Howard University School of Law, *supra* note 166, at 35.
258. Interview by Genna Rae McNeil with Pauli Murray, *supra* note 149, at 76.
259. ROSENBERG, *supra* note 6, at 155.
260. *Id.*
261. Hodges v. United States, 203 U.S. 1, 2–4 (1906).

could, a right guaranteed to Black Americans under the Civil Rights Act of 1866,[262] discussed *supra*. On appeal, the Supreme Court disagreed, explaining that since the Black American laborers had no "master," they could not be in a condition of slavery or involuntary servitude under the Thirteenth Amendment.[263] The Amendment, therefore, could not support the white group's prosecution because Congress could not reach the group's activity via the Civil Rights Act of 1866, which was enacted under its Thirteenth Amendment Section 2 legislative power.[264] After this decision, the Supreme Court's jurisprudence on race and the Thirteenth Amendment was severely stunted for several decades.[265]

Murray's professor, McGovney, pointed her to other research avenues she had not explored that might pay off for her Thirteenth Amendment argument.[266] He cautioned against too heavily relying on Justice Harlan's dissents in *Plessy* and *Civil Rights Cases*.[267] To better understand the framers' intended scope, McGovney advised her to review the congressional debates surrounding the passage of the Thirteenth Amendment.[268] Murray stated that the examination of this legislative history would be in service of determining whether "the Negro gained no constitutional rights . . . from th[e] [Thirteenth Amendment] except termination of enslavement."[269]

Murray ended up researching the history of legislation passed under the Thirteenth Amendment, and she concluded that Congress clearly "intended to accomplish something more than the exemption from bondage."[270] This intent was evinced by the legislative debates, which Murray noted had "related the objectives of the amendment to the purposes of the Declaration of Independence and the Preamble to the Constitution."[271] Based on her review of these legislative histories, Murray concluded that "the institution of slavery was antagonistic

262. *Id.*

263. *Id.* at 17–20.

264. *Id.*

265. *See* Pope, *supra* note 143. Contrastingly, after *Plessy*'s "equal but separate" standard, civil rights advocacy began to heavily rely on the Fourteenth Amendment. *Id.* After *Hodges*, just one Thirteenth Amendment race case, Corrigan v. Buckley, 271 U.S. 323 (1926), reached the Supreme Court. In *Corrigan*, the Court found that a racially restrictive real property covenant did not violate the Thirteenth Amendment because, under *Hodges*, the Amendment prohibits only "slavery and involuntary servitude" and "does not in other matters protect the individual rights of persons of the negro race." *Id.* at 333.

266. Congressional Debates on the Adoption of the Thirteenth Amendment, *supra* note 38, at 4.

267. ROSENBERG, *supra* note 6, at 156.

268. *Id.* at 156; Congressional Debates on the Adoption of the Thirteenth Amendment, *supra* note 38, at 4–5.

269. Congressional Debates on the Adoption of the Thirteenth Amendment, *supra* note 38, at 13.

270. *Id.* at 41.

271. *Id.*

to the principles enunciated in these documents, and the elimination of this institution would harmonize the declaration of freedom and equality contained therein."[272]

For her research, Murray was considering the kind of legislation that would "be necessary to extend protection" to the "bundle of rights recognized as inhering" to the kind of freedom she believed the Thirteenth Amendment guaranteed.[273] As described, *supra*, the Civil Rights Act of 1866 was the first major piece of legislation in this vein, as it "began to flesh out the specific meaning of freedom and its necessarily concomitant right, equality"[274] for free persons and citizens, especially after slavery's then-recent abolition.[275]

As Murray's research findings would reveal, the debates over the Civil Rights Act of 1866 demonstrate that its proponents understood the Thirteenth Amendment to guarantee a right to the "full and equal benefit of all laws."[276] Senator John Sherman of Ohio, for example, had explicitly demanded Congress protect free citizens' rights to do things like raising a family and traveling.[277] Senator Charles Sumner of Massachusetts, that Act's author, explained during the legislative debates that although emancipation and the Civil Rights Act of 1866 had codified rights like access to courtrooms, such rights were "not enough."[278] Sumner noted that "[t]he new-made citizen is called to travel for business, for health, or for pleasure" and "longs . . . for respite and relaxation, at some place of amusement . . . . The denial of any right is wrong."[279] Again, the 1875 Civil Rights Act was therefore enacted soon thereafter.

The Civil Rights Act of 1866 and the 1875 Civil Rights Act, themselves, and the congressional statements in the Acts' legislative histories thus confirmed Murray's understanding of what the Thirteenth at least intended to accomplish as it pertains to Black Americans' liberation. In protecting Black American citizens from the same kind of social discrimination on which slavery relied, Congress ostensibly wanted to ensure that Black Americans were free citizens in

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272. *Id.*

273. Congressional Debates on the Adoption of the Thirteenth Amendment, *supra* note 38, at 42.

274. WIECEK, *supra* note 195, at 86–87.

275. FONER, *supra* note 140, at 243–44.

276. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982).

277. Alexander Tsesis, Introduction: The Thirteenth Amendment's Revolutionary Aims, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 10 (Alexander Tsesis ed., 2010).

278. CONG. GLOBE, 42nd Cong., 2nd sess. 381 (1872).

279. *Id.*

the truest sense under the Thirteenth Amendment and its subsequent legislation.

The problem, Murray deduced, was that "there was no clear-cut definition of the word 'freedom.'"[280] She noted that the Acts' respective legislative debates were "full of idealistic phrases about 'equality under the law,' 'equal protection under the law,' the 'natural and inalienable rights of all mankind' to personal freedom, and the declaration that 'all men are born free and equal.'"[281] Murray surmised, however, that though the Thirteenth Amendment's framers understood the "destruction of slavery" as the "destruction of an institution" that was "something more than the property relationship between master and slave," what exactly the framers aimed to confer in that institution's stead "[wa]s not entirely evident."[282] Again, notwithstanding this conclusion, the congressional record strengthened Murray's original position that the Thirteenth Amendment's abolition of slavery included a "positive corollary"—to "implement . . . freedom . . . and to extend the Congressional power to the protection of whatever bundle of rights inhered in a state of freedom."[283] And the discrimination against Black Americans that would need to be eradicated, outside of physical bondage, to ensure this kind of meaningful freedom existed in various forms.[284]

Murray's professor was not convinced. Murray described how he had given her 'holy hell' because he had wanted her work to be "unassailable."[285] But, in Murray's words: "After all of this work, charts and whatnot, he looked over the evidence and came to the conclusion that . . . we really could not say on the basis of this that the Thirteenth Amendment was directed against racial segregation or discrimination."[286] Murray knew otherwise and apparently wanted to continue her Thirteenth Amendment scholarship as a doctoral student at Berkeley, though she had already expressed that she had "no intention of spending so much time on [the Thirteenth] [A]mendment."[287]

Murray could not find adequate mentorship or financial support to continue developing her theory under the Thirteenth Amendment[288]

280. Congressional Debates on the Adoption of the Thirteenth Amendment, *supra* note 38, at 45–46.

281. *Id.* at 43.

282. *Id.*

283. *Id.*

284. *See generally id.*; Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?, *supra* note 29.

285. Letter from Pauli Murray to Dean of Howard University School of Law, *supra* note 166, at 35.

286. Interview by Genna Rae McNeil with Pauli Murray, *supra* note 149.

287. Letter from Pauli Murray to Dean of Howard University School of Law, *supra* note 166, at 35.

288. ROSENBERG, *supra* note 6, at 160.

and would, therefore, spend the next several decades primarily focused on other civil rights efforts.[289] However, as the next Section discusses, Murray's cutting-edge thought leadership regarding the Thirteenth Amendment's utility for racial justice claims would ultimately be vindicated, including by the Supreme Court and modern legal scholars.

### *C. The Vindication of Murray's Early Thirteenth Amendment Argument and Scholarship Since*

Murray's scholarly exploration of the Thirteenth Amendment as a viable constitutional tool for ensuring Black Americans' freedom was prematurely cut short, but the intellectual legacy of her work remains. Long after Murray's time as a graduate student, the Supreme Court would decide a case in a way that aligned closely with Murray's advancement of the Thirteenth Amendment. The next Section discusses that case and some of the current scholarly discourse on the Thirteenth Amendment that parallels Murray's theoretical understanding.

#### *1. Jones v. Mayer*

While at Berkeley, Murray had written to HUSL's dean that she "may be all off the beam on this entire idea" of the Thirteenth Amendment.[290] But she maintained that "[i]f the Constitution can yield such an expansive interpretation, we may be able in time to overturn segregation and to protect our civil rights."[291] "I don't know," she said, "but I'm willing to continue to search for evidence. It may be valuable 20 years from now."[292]

And just over twenty years after Murray wrote that letter to the dean, the Supreme Court decided what was its first major Thirteenth Amendment case in nearly 60 years, relying on many of the same arguments Murray had outlined as a graduate student.[293] In that case, *Jones v. Mayer*, discussed *infra*, the Court reestablished the Thirteenth Amendment as a potential source of civil rights protections after over one hundred years of the Amendment being functionally obsolete.[294] Significantly, the Court did so in the context of housing discrimination,

289. *See* discussion *supra* Section I.C (discussing Murray's development of civil rights arguments with respect to gender under the Fourteenth Amendment).

290. Letter from Pauli Murray to Dean of Howard University School of Law, *supra* note 166, at 35.

291. *Id*.

292. *Id*.

293. *See generally* Jones v. Mayer Co., 392 U.S. 409 (1968).

294. *See generally id.*

a phenomenon with which Murray, like many Black Americans, had much experience.[295]

Murray had been sounding the alarms on the extent to which de jure housing segregation deeply influenced housing instability and life outcomes for Black Americans. She had written, for example, that Black Americans had long been "haunted by restrictive [housing] covenants."[296] Legal codes dictating housing access and housing quality along racial lines directly influenced Murray's ability to obtain and maintain stable housing.[297] While living in New York, for example, Murray resided at the Harlem YWCA for as long as she could afford the rent because no other YWCA would admit Black American women.[298]

After her time at HUSL, Murray and her sister drove cross country from Washington, D.C., to California, where she was to pursue further graduate study in law.[299] The two sisters were flatly denied sleeping accommodations in Kansas because of their race, and when they arrived in California, the sisters "were soon reminded that Jim Crow had pursued them relentlessly to the West Coast."[300] After settling into a railroad flat in Los Angeles, Murray and her sister received a letter declaring that the flat was "restricted to the white or Caucasian race only" and were ordered to vacate the property within a week.[301]

Murray described how the letter "temporarily shattered [their] security,"[302] a fact that may have been informed by Murray's childhood experiences. The threat of racialized violence occurring at home was a hallmark of Murray's childhood, during which the Ku Klux Klan would repeatedly use "night riders, brandishing torches and yelling like banshees" to scare Black American farmers off their land in North Carolina.[303] Murray's grandmother's "isolated cabin in the woods was an easy target,"[304] and so she would barricade herself and Murray in an upstairs room with dinner and a variety of weapons.[305] Further demonstrating the traumatic aftermath of the Ku Klux Klan's repeated intimidation campaign, at night Murray's grandmother would regularly scream and pound an ax against the floor, believing someone was

295. *See id.* at 412.
296. Pauli Murray, *Pauli Murray Will Not Move*, The Afro-American (Sept. 2, 1944) (on file with author).
297. *See*, *e.g.*, Rosenberg *supra* note 6, at 35, 152–54, 241.
298. *Id.* at 37.
299. Murray, *supra* note 1, at 321.
300. *Id.* at 325.
301. *Id*. at 327.
302. *Id.* at 328.
303. *Id.* at 59.
304. *Id.*
305. *Id.* at 60.

breaking into the home.[306] Having endured these childhood experiences, Murray requested police protection in California for her and her sister.[307]

Like impediments to equal educational and recreational opportunities, barriers to housing on account of Murray's race "fueled [her] determination to find the key to a successful legal attack upon racial segregation."[308] Murray concluded that "[s]o long as the courts continue to enforce . . . outlandish restrictive covenants," Black Americans "[could] not get justice before the law."[309] "[S]ooner or later the American people have got to realize no self-respecting human being will tolerate this 'white supremacy' twaddle so long as there's breath in his body," she wrote.[310] Murray discussed that racial barriers to quality housing inspired her to "spend[d] every spare moment in the Los Angeles County Law Library, researching and revising" her Thirteenth and Fourteenth Amendments scholarship that she had begun at HUSL.[311] Again, her approach in such work "was to enumerate the rights that affect the individual's personal status in the community, one of which is 'the right not to be set aside or marked with a badge of inferiority'"[312] that was redolent of the ways enslaved Black Americans had been so marked.

It is perhaps a poetic coincidence, then, that the case in which the Supreme Court would finally catch up to Murray's understanding of the Thirteenth Amendment was in the context of housing discrimination. In *Jones*, the defendant had refused to sell the property to an interracial couple because the husband was Black American.[313] The plaintiff couple argued that such a refusal violated 42 U.S.C. § 1982, formerly the Civil Rights Act of 1866, which prohibited racial discrimination in the sale or rental of property and was passed under Congress's Thirteenth Amendment Power.[314] The Court had to decide whether purely private discrimination, like an individual's refusal to sell property, implicated § 1982, and, if so, whether Congress's exercise of power under § 1982 was constitutional.[315]

The *Jones* Court found that a refusal to sell property to Black Americans was exactly the kind of "badge" of slavery under the Thirteenth Amendment that Murray had spent her graduate school

306. *Id.* at 61.
307. *Id.* at 328.
308. Murray, *supra* note 296.
309. *Id.*
310. *Id.*
311. MURRAY, *supra* note 1, at 328–29.
312. *Id.* at 329.
313. *Id*. at 412.
314. Section 1982 was originally enacted as part of the Civil Rights Act of 1866 and states: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982).
315. Jones v. Mayer Co., 392 U.S. 409, 419 (1968).

career attempting to describe.[316] Relying on the same language it had in *Civil Rights Cases* to frame the Amendment as prohibitory of "the badges of continued racial discrimination,"[317] the *Jones* Court found that "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."[318]

Accordingly, the Court concluded that Congress was within its Thirteenth Amendment power to enact 42 U.S.C. § 1982, even in its application to purely private discrimination,[319] as Congress was authorized "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States" under the Thirteenth Amendment.[320] The *Jones* Court acknowledged that it had already recognized such congressional authority in *Civil Rights Cases*[321] and went on to state:

> By its own unaided force and effect [the Amendment] abolished slavery, and established universal freedom. . . . [I]t is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.[322]

*Jones* ushered in a "very different spirit" of the phrase "badges and incidents."[323] With its decision, the Court had finally joined the legislators, abolitionists, and Black Americans who long had a capacious understanding of the freedom the Thirteenth Amendment was supposed to accomplish for Black Americans when it was enacted. This understanding was that the Amendment conferred all kinds of rights, including ones like housing access, that were explicitly denied to the enslaved.

Murray passionately held this position as a law student and was surprised to learn decades later that "in anonymous form [her] little argument was going up to the Supreme Court."[324] She would keep newspaper clippings detailing the *Jones* couple's trial and win[325] and would emphasize her indirect relationship to the *Jones* case in public

316. *Id.* at 441–43.
317. George A. Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, *in* The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment 175 (Alexander Tsesis ed., 2010).
318. *Jones*, 392 U.S. at 442–43 (emphasis added).
319. *Id.* at 436.
320. *Id.* at 439.
321. *Id.* at 439–42 (citing Civil Rights Cases, 109 U.S. 3, 20, 22 (1883)).
322. *Id.* at 439 (internal quotations omitted).
323. Rutherglen, *supra* note 317, at 176.
324. Interview by Robert Martin with Pauli Murray, *supra* note 89, at 167.
325. Interview by Genna Rae McNeil with Pauli Murray, *supra* note 149.

remarks, noting on at least one occasion that the *Jones* Court had finally formalized her "thesis that [she] had in mind originally."[326]

*Jones*, the precedential value of which has still not been significantly interrupted, ushered in new theoretical terrain for the Thirteenth Amendment that scholars and practitioners would have to navigate. The next Section discusses some of the ways they would do so, particularly in ways that harken back to Murray's earliest conceptualizations of the Amendment's utility for racial justice.

### *2. Thirteenth Amendment Discourse Today*

*Jones* was arguably the last instance of the Supreme Court's consideration of the Thirteenth Amendment's scope in this way, but *Jones* remains available as viable precedent. *Jones* still minimally ensures that Congress would be well within its Section 2 power to enact legislation prohibiting the badges and incidents of slavery that are not limited to just physical subjugation. Thus, despite the Amendment's relative underdevelopment in courts, scholars continue to argue for the Thirteenth Amendment's post-*Jones* utility in redressing slavery's effects in a variety of contexts—education,[327] prisons,[328] and more,[329] especially for Black Americans. Similar to Murray's arguments, this scholarship has generally highlighted various forms of social inequality Black Americans endure that should qualify as a vestige of slavery and could, therefore, be remedied under the Thirteenth Amendment, given the Amendment's theoretical mandate that no such vestiges exist.

Other scholars are advancing an understanding of the Thirteenth Amendment wherein its guarantee of freedom, as one of the Reconstruction Amendments, extends beyond Black Americans to anyone subjected to a deprivation of rights that enslaved persons had not enjoyed on account of their enslaved status.[330] For example, because one of the core features of slavery had been the deprivation of enslaved

326. *Id.*

327. *See generally*, *e.g.*, Brence Pernell, *The Thirteenth Amendment and Equal Educational Opportunity*, 39 YALE L. & POL'Y REV. 420 (May 2021) (arguing that a deprival of education opportunities for Black Americans is unconstitutional because it constitutes a badge and incident of slavery under the Thirteenth Amendment).

328. *See generally*, *e.g.*, Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108 (2020) (arguing the unconstitutionality of racist policing because it constitutes a badge and incident of slavery under the Thirteenth Amendment).

329. *See, e.g.*, Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1733–34 (2012) (discussing what various scholars have suggested the Thirteenth Amendment prohibits).

330. Peggy Cooper Davis, *The Reconstruction Amendments Matter when Considering Abortion Rights*, WASH. POST (May 3, 2022), https://www.washingtonpost.com/outlook/2022/05/03/reconstruction-amendments-matter-when-considering-abortion-rights/ ("The Reconstruction amendments were inspired by antislavery beliefs, and they were designed to extend to all people the right to have autonomous life choices of the kind that slavery had so cruelly restricted.").

peoples' sexual autonomy and reproductive rights, similar infringements on reproductive rights today qualify as a vestige of slavery that the Thirteenth Amendment was intended to eradicate.[331]

Even modern courts might be increasingly open to such Thirteenth Amendment arguments, especially in the wake of the Fourteenth Amendment's troubles, discussed *supra*. As recently as February 2023, for example, one federal district court judge noted that the Supreme Court had yet to foreclose whether a right to reproductive services, like abortion, remained available under the Thirteenth Amendment, notwithstanding the Supreme Court's decision that the right to abortion did not exist under the Fourteenth Amendment.[332] Making national news headlines, that case's judge noted the "substantial attention" scholars had been devoting to these potential rights under the Thirteenth Amendment.[333]

The point here is that the intellectual seeds of these more expansive understandings of the Thirteenth Amendment's reach can be traced back to Murray's oft-overlooked thought leadership on this issue. Scholarly exploration of the Thirteenth Amendment since Murray's analysis nods toward a growing recognition of the Amendment as "a timeless reminder of the incomplete project of achieving equal citizenship" and the Amendment's potential of "making progress towards that goal."[334] In linking society's remnants of slavery to unequal citizenship, Murray was one of the earliest legal thinkers to appreciate the Amendment's power in this way.

## Conclusion

Reflecting generally on the landmark civil rights cases of her time, Murray bridged major court victories like *Brown's* dismantling of segregation to *Jones's* Thirteenth Amendment prohibition of slavery and its badges, to overall conclude: "I think I can now understand for the first time how my great-grandfather felt when he, a former slave, read the Emancipation Proclamation."[335] Murray began her legal career with

331. *See generally, e.g.*, Pamela D. Bridgewater, Breeding a Nation: Reproductive Slavery, The Thirteenth Amendment, and the Pursuit of Freedom (South End Press, 2014) (arguing that the deprivation of reproductive rights is unconstitutional under the Thirteenth Amendment's prohibition of slavery).

332. United States v. Handy, No. 22-096, 2023 WL 1777534, at *2 (D.D.C. Feb. 6, 2023).

333. *Id*. at *3. As of the date of this Article, the judge asked the parties in that case to submit additional briefing addressing whether this right could be found in any other constitutional provision like the Thirteenth Amendment. *Id.*

334. Rutherglen & Barbee, *supra* note 32 (emphasizing the Amendment's "distinctive contribution to the persistent problems at the intersection of freedom, race, and labor" and concluding that "[i]t is worth identifying what the different features of that contribution are, now as much as in the aftermath of the Civil War").

335. Interview by Genna Rae McNeil with Pauli Murray, *supra* note 149.

the primary goal of finding a way to end racial segregation, a system that had informed nearly every aspect of her life. Those experiences, in turn, informed what were new, radical legal theories for how to use the law in service of racial justice. Murray acknowledged herself "that in not a single one of [her] little campaigns was [she] victorious."[336] "[I]n each case, I personally failed," she explained, but with ultimate court victories like *Brown* and *Jones*, she emphasized: "I have lived to see the thesis upon which I was operating vindicated and what I very often say is that I've lived to see my lost causes found."[337]

One of Murray's causes was to convince courts that the Thirteenth Amendment is—and was designed to be—a constitutional tool for addressing all the ways the system of slavery continued hampering Black Americans' life outcomes. While she was a Berkeley graduate student, Supreme Court Justice Murphy had advised her that "[j]ustice is the thing you want to hammer at—don't mind the precedents."[338] And mind them, Murray did not. Armed instead with her intellect, conviction, personal life experiences, and audacity, Murray challenged traditional and dominant modes of interpreting and employing the law, including the Thirteenth Amendment, on behalf of racial justice. She did so even when she had few allies and even when her constitutional causes had little chance of immediate practical success.

But in so many ways, Murray and her work have been vindicated. While major frameworks we currently have for litigating civil rights claims have recently been attributed to Murray and her bold legal thinking, our hope is that her contributions to our evolving understanding of the Thirteenth Amendment also become ensconced as part of her legacy. For the early part of her career, Murray relentlessly pursued an understanding of the Thirteenth Amendment that the Supreme Court would finally accept many years later: that the Amendment was to eradicate not just slavery and its dynamic legal infrastructure, but also any law, policy, or practice endemic to slavery as an institution to the extent that they subordinated Black Americans' rights. Since the *Jones* Court's acceptance of the argument Murray had long advanced, scholarly appreciation for the Thirteenth Amendment's reparative power for Black Americans and other social groups persists. Murray was imaginative and brave enough to chart new constitutional paths to Black American liberation. Those paths still guide us today.

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336. *Id.*

337. *Id.*

338. PAULI MURRAY, PAULI MURRAY AND CAROLINE WARE: FORTY YEARS OF LETTERS IN BLACK AND WHITE 33 (Anne Frior Scott eds., 2006).

# Class Sizes, School Choice & *Bush v. Holmes* Case Study

Sanite Ermat Pierre*

*Abstract*

*The purpose of this case study is to investigate the implementation of the "Class Size Initiative" and to understand the conversation surrounding school choice. The goal of this article is to understand the role that the judiciary, private citizens, attorneys, elected officials, and community organizations play in shaping social justice issues like education.*

*The methods used to collect data for this case study include data collection by examining the case of Bush v. Holmes; referencing information from the National Education Association, EdChoice, National Conference of State Legislatures, Law Review articles, and newspaper articles; conducting interviews with attorneys, elected officials, and social justice organization leaders; and conducting a peer survey.*

*The case study will begin by providing the reader with a brief synopsis of the Class Size Initiative and the influence that the actors had on the outcome of the Class Size Initiative movement. Further, the case study will discuss the conversation surrounding school choice. To fully understand the conversation concerning school choice, we must also examine the history of school vouchers in Florida, their social implications, and why the controversy exists.*

*This case study engages in research about Bush to understand the legal implications of the Class Size Initiative and school voucher programs. The Author conducted interviews with attorneys involved in the Bush case to understand the legalities of the case and spoke with elected officials and social justice organization leaders to understand how the issue arose, the social implications, and how the issue could be resolved. Finally, the Author conducted a peer review to understand where millennials stood on the issue.*

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## I. Introduction

The social justice issue considered in this case study is the implementation of the Class Size Initiative and school choice program, which concerns the allocation of resources to students by the state legislature. Social justice considers the allocation of good and bad in society and is concerned with allocating resources to individuals in society by social institutions.[1]

A recent U.S. News report ranked Florida number one in education.[2] Prior to this ranking by the U.S. News Report, Floridians were concerned with the education system in the state. Proponents of the Class Size Initiative and the school choice program argue that both of these programs are methods that would work to improve the education system in Florida. Class size and school choice have been at the forefront of the education debate in Florida, and it is important to look at how the discussion has been shaped thus far.

The Class Size Initiative was essentially the Floridians' movement to reduce the teacher-to-student ratio in the classrooms. Whereas the School Choice program was created to provide parents the option of sending their students to schools outside of their district boundaries. The first section of this case study engages in a historical discussion of the Class Size Initiative, including what the initiative was, how it was implemented, the outcome of the implementation, and those who supported it. Next, this case study engages in a general discussion of the school choice program, including what school vouchers are and the stance of those who support and those who oppose the initiation.

Next, this case study discusses *Bush v. Holmes* at all three levels of the federal court system. Following the discussion of *Bush* is a look into the perspective before the judgment of *Bush* from proponents and opponents of the school choice program. This case study also examines the Florida Tax Credit Scholarship, the case of *McCall v. Scott*, and the efforts to sustain *Bush* and its societal implications. Finally, this case study concludes by debriefing *Bush* and its issues from the Author's perspective. The debriefing section of this case study includes consideration of

1. Matthew Robinson, *What is Social Justice?*, Appalachian State Univ. Dep't of Gov't & Just. Stud. (June 15, 2016), https://www.coursehero.com/file/42591267/What-is-Social-Justicepdf/.

2. *Education*, U.S. News, https://www.usnews.com/news/best-states/rankings/education (last visited Sept. 26, 2023).

individual access to justice, the role of the lawyers, the roles of the client and other actors, lawyer-client relations, the use of the media, the result of the case, and its effects.

## II. Class Size Initiative in General

Of the fifty states, Florida has the third largest population.[3] Miami-Dade County is the seventh largest county in the country.[4] Around 19% of the population are children under eighteen years of age, meaning there are approximately 422,716 school-age children living in Florida.[5] This large population created overcrowding in schools, especially in highly populated counties such as Miami-Dade, Broward, Palm Beach, and Hillsborough.[6] Classrooms were being crammed with forty to sixty students.[7]

In the late 1990s and early 2000s, Florida Senator Kendrick Meek pressured legislators to implement legislation mandating smaller class sizes.[8] But the legislation never passed.[9] When the legislation failed to pass, Senator Meek decided to launch a campaign where the legislation would instead be passed as a constitutional amendment.[10] Thus, Senator Meek created the "Coalition to Reduce Class Size" (Coalition).[11] The Coalition had only a communications employee and campaign manager.[12] From a dining room table, these individuals sent press releases on their daily efforts with the Class Size Initiatives.[13] Carol Shields (Former President of the People for the American Way) and Monica Russo (President of SEIU) were pivotal in helping the Class Size Initiative pass.[14] The Coalition included advocates from groups like People for the American Way, Service Employees International Union Florida, the Urban League, the National Association for the Advancement of

3. *U.S. and World Population Clock*, U.S. Census Bureau, https://www.census.gov/popclock/ (last visited May 19, 2023).

4. *Id.* (follow "Counties" hyperlink under "Most Populous").

5. *QuickFacts Florida*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/FL/PST045222 (last visited Aug. 31, 2023).

6. *Florida Counties by Population*, Fla. Demographics, https://www.florida-demographics.com/counties_by_population (last visited Aug. 31, 2023).

7. Interview with Kendrick B. Meek, Former U.S. Representative for Fla.'s 17th Cong. Dist. (Nov. 9, 2016) [hereinafter Meek Interview].

8. Diane Rado, *Class Size Limits Sought*, Tampa Bay Times (Sept. 9, 2005), https://www.tampabay.com/archive/2001/02/14/class-size-limits-sought/.

9. Jeffery S. Solochek & Kathleen McGrory, *After a Dozen Years, Florida Class-Size Foes May Finally Prevail*, Tampa Bay Times (Apr. 3, 2015), https://www.tampabay.com/news/education/k12/after-a-dozen-years-class-size-foes-may-finally-prevail/2224068/.

10. *Id.*

11. Meek Interview, *supra* note 7.

12. *Id.*

13. *Id.*

14. *Id.*

Colored People (NAACP), Florida PTA, AFL-CIO, American Teachers Federation, and The Florida Democratic Party.[15]

For a constitutional amendment to be placed on the ballot via Citizen Initiative, the petition must have been signed by 683,149 registered voters from at least fourteen of Florida's twenty-seven congressional districts.[16] In 2002, with the help of the Coalition, the Class Size Initiative garnered the necessary votes and was placed on the 2002 ballot as a Florida constitutional amendment.[17] The amendment, which limits the number of students in core classes in Florida public schools, was approved by citizens as a new part of Article IX Section 1(a) of the Constitution.[18] Specifically, the amendment provided that the number of students in pre-kindergarten to third grade shall not exceed eighteen students; Grades 4 to 8 shall not exceed twenty-two; Grades 9 through 12 shall not exceed twenty-five students.[19]

After the initiative passed, the Florida legislature appropriated millions of dollars toward operational expenses.[20] In 2015, the legislature proposed a new amendment that would make the class size not based on individual classes but on the average in the school.[21] The legislation failed.[22]

### *A. Supporters of the Class Size Initiative*

From the beginning, the Class Size Initiative was a movement for the people, and it would later become part of the Constitution because of the people.[23] Senator Meek talks about the efforts by the Coalition being orchestrated at a dining room table where press releases were sent to the free press.[24] Through these efforts, the petition was signed by people across the state.[25]

To further this case study, the Author gathered information via interviews with state legislators such as Senator Kendrick Meek and former Florida Senator Dwight Bullard. Likewise, the Author spoke to Monica Russo, who was instrumental in the passage of the constitutional amendment, and Fedrick Ingram, former President of the Miami-Dade

15. Meek Interview, *supra* note 7.

16. 2015–2016 Initiative Petition Handbook, Fla. Div. of Elections (last updated Mar. 20, 2015), https://files.floridados.gov/media/694213/initiative-petition-handbook.pdf.

17. Meek Interview, *supra* note 7.

18. Fla. Const. art. IX, §1 (2016).

19. *Id.*

20. *Florida's Class Size Reduction Amendment History*, Fla. Dep't of Educ., https://www.fldoe.org/finance/budget/class-size/ (last visited Aug. 31, 2023).

21. Solochek & McGrory, *supra* note 9.

22. *Id.*

23. Meek Interview, *supra* note 7.

24. *Id.*

25. *Id.*

teachers union. Finally, the Author also spoke with the Vice President of the Florida Education Association.

### *1. Senator Kendrick Meek*[26]

When Senator Meek sought to pass the Class Size Initiative as a constitutional amendment, he believed there was a major problem in Florida with overcrowded classes.[27] Senator Meek explained that third graders were being crammed into classrooms with forty to sixty students in some cases.[28] Major counties such as Miami-Dade and Broward County schools suffered the most.[29] However, there was a big push by Governor Jeb Bush to promote charter schools instead of smaller class sizes.[30] Senator Meek held the belief that the charter school proposal did not have the financial capabilities to support charter schools in certain neighborhoods.[31] This encouraged Senator Meek to push for the Class Size Initiative.[32] Senator Meek argues that studies showed that teachers would have a better chance of providing a high-quality education to students with smaller numbers in the classroom.[33]

When asked about the money to fund the project, Senator Meek said the government "always [had] enough money to build new prisons, pet projects by lawmakers and other initiatives that were projects of the executive branch of Florida government."[34] From this statement, it can be inferred that Senator Meek felt that the state had the funds to support the initiative.

Senator Meek decided to seek a constitutional amendment instead of a law because when he attempted to pass the Class Size Initiative as a law, the legislature was not supportive of the law.[35] The same year that the initiative went on the ballot, there was a bill to cap the number of class sizes that went up for consideration in the legislature.[36] The bill failed along party lines.[37] Republican party members voted against the bill, while Democratic members voted for it.[38] To Senator Meek, the

26. Meek Interview, *supra* note 7.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*

failure of the bill was indicative of the fact that the legislature had no intentions of changing the law to create smaller class sizes.[39]

The idea for the constitutional amendment was Senator Meek's idea, but who drafted the legislation, and what was the thought process behind the legislation?[40] When asked how the language of the bill was created, Senator Meek stated that members of his personal legislative staff and the legislative staff in the Florida Senate Education Appropriation Committee were instrumental in creating the language for the bill.[41]

At the time that the amendment would reach the ballot via a citizen initiative, Senator Meek and the supporters of the initiative exceeded expectations when they garnered 581,368 valid signatures despite only needing 488,722.[42] Senator Meek stated that there were many methods employed to acquire the signatures necessary to place the initiative on the ballot.[43] He also stated that people were able to download the petition from the website, where some people chose to make copies for others.[44] Members of organized community groups, along with people in their local communities, signed the petition.[45] However, Senator Meek stated that the large variety of signatures was obtained by professional signature gatherers.[46] The signature gatherers charged a fee for every petition signed by a Florida voter.[47] After meeting the qualification to be on the ballot as a constitutional amendment, the initiative needed 50%[48] of voters to vote yes on the issue to become part of the constitution.[49]

### *2. Senator Dwight Bullard[50]*

Senator Dwight Bullard is a politician and former schoolteacher.[51] He spent eight years in the Florida Legislature—four years in the Florida House of Representatives and four years in the Florida Senate.[52] Although not in

39. Meek Interview, *supra* note 7.
40. *Id.*
41. *Id*.
42. *Florida Reduce Class Size, Amendment 9 (2002)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Reduce_Class_Size,_Amendment_9_(2002) (last visited Dec. 12, 2016).
43. Meek Interview, *supra* note 7.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *See* FLA. CONST. art. XI, §5 (Since the passage of the Initiative, the law to pass a constitutional amendment has changed from 50% to 60%).
49. *Id.*
50. Telephone Interview with Dwight Bullard, Former Fla. State Senator for District 39 2012–2016 (Nov. 2, 2016) [hereinafter Bullard Interview].
51. *Dwight M. Bullard*, FLA. HOUSE OF REPRESENTATIVES, https://www.myfloridahouse.gov/Sections/Representatives/details.aspx?MemberId=4429 (last visited Sept. 23, 2023).
52. *Id.*; *Dwight Bullard*, BALLOTPEDIA, https://ballotpedia.org/Dwight_Bullard (last visited Sept. 23, 2023).

the legislature when the Class Size Initiative became a constitutional amendment, Senator Bullard discussed the aftermath of the Initiative being passed.[53]

During the consideration of the Class Size Initiative, as a schoolteacher in Miami-Dade County, Senator Bullard reiterated a major problem in the Dade County school system.[54] The classrooms were averaging forty-one students per classroom.[55] For example, at the school where Senator Bullard taught, there was one class with 230 students and only three teachers.[56] One teacher attempted to teach while the other two essentially served as monitors.[57] There were numerous problems in the classroom prior to the class size amendment.[58] From the standpoint of a teacher, the decrease in class sizes allowed the teacher to pay individual attention to the students.[59]

Senator Bullard stated that when he arrived in the House as a representative, his colleagues spoke about the Class Size Initiative as if it were a negative thing.[60] Specifically, the Republican members of the House spoke about how much of a burden the Initiative was because of the cost it took to implement.[61] District representatives were complaining that the law did not provide enough flexibility to allow the district to manage the class size appropriately.[62] For example, district representatives argued that the law required kindergarten to third-grade classes not to exceed eighteen children, but what would happen if the nineteenth child showed up to enroll in the middle of the school year?[63] Senator Bullard stated that this hypothetical was frequently used—the myth of the nineteenth child—but in most circumstances, that did not happen.[64] The Districts talked about the maximum number of eighteen children, skirting the true reality that eighteen was the maximum and that classes may have less than eighteen, which would allow for the additional child to enter in the middle of the school year and cause no interruptions.[65]

Senator Bullard stated that he questioned the commitment of the legislature to do what needed to be done for the children.[66] After Senator Bullard was elected to public office, the legislature implemented a

53. Bullard Interview, *supra* note 50.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*

statutory change that redefined what core classes meant.[67] The redefinition of core classes allowed room to, again, overcrowd classes.[68] For example, in an Advanced Placement course, the District could place forty kids, and the district would still be in line with the constitutional amendment.[69] Senator Bullard saw the legislation as a way to circumvent and decrease the power of the class size initiative.[70]

### *3. Monica Russo*[71]

Monica Russo is the current President of the Service Employee International Union.[72] In the interview with Senator Meek, he stated that Monica Russo was one of the individuals who was instrumental in the passage of the Class Size Initiative.[73]

In an interview with Monica Russo, Ms. Russo stated that her drive to join the movement came from the clear problem she saw with overcrowded classrooms in Miami-Dade.[74] Her daughter and Senator Meek's daughter, who are about the same age, were in Miami-Dade public schools.[75] According to Ms. Russo, the newspapers depicted Miami-Dade County public schools accurately when they released graphics in the newspaper of children in Sardine cans to show how overpopulated the schools were in the area.[76] Being a very close friend of Senator Meek, Ms. Russo saw merit in the movement to reduce class sizes, so she joined the movement.[77]

To Ms. Russo, the movement was necessary because teachers were unable to teach due to classrooms having too many children.[78] Senator Meek did not have the numbers to pass the Initiative as a law that would ensure the longevity of reduced class sizes.[79] Conservative members of the legislature would, little by little, tweak the proposed law, which

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67. *See* Lilly Rockwell, *Class-Size Limits Lifted on Numerous Courses as Lawmakers Redefine Meaning of "Core"*, FLAGLERLIVE (May 7, 2011), https://flaglerlive.com/classs-size-limits-lifted/ (In 2011, the Florida Legislature redefined "core classes" exempted Advance Placement, Foreign Language and Some Social Study classes as part of core class. This decreased the number of classes that need to meet the class size require from 849 to 304).

68. Bullard Interview, *supra* note 50.

69. *Id.*

70. *Id.*

71. Telephone Interview with Monica Russo, President of SEIU, Fla. Exec. Vice President (Dec. 7, 2016) [hereinafter Russo Interview].

72. *Monica Russo*, LINKEDIN, https://www.linkedin.com/in/monica-russo-99b44039 (last visited Sept. 23, 2023).

73. Meek Interview, *supra* note 7.

74. Russo Interview, *supra* note 71.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

essentially led to gutting the law as proposed by Senator Meek.[80] Regardless of the efforts of the members of the legislature, it seemed that Senator Meek had strong support from parents and other members of the community.[81] So, it made sense to attempt to move forward in gaining a constitutional amendment.[82] In the words of Ms. Russo, the Class Size Initiative was "a grassroots issue that caught on fire."[83] There was no intellectual appeal; the issue was just a hard issue to fight, considering that the intention behind the law was to better schools.[84] Thus, with an issue that resonated with families and that would make an impact on people's lives, they pressed forward in the fight to get the Initiative passed.[85]

### *4. Fedrick Ingram*[86]

Fedrick Ingram is a former Miami-Dade County Public School Teacher, the former President of Miami-Dade Teachers Union, and the former Vice President of the Florida Education Association.[87]

At the time of the passage of the Class Size Initiative, Mr. Ingram was a teacher.[88] From his perspective, class sizes were increasing, and politicians did nothing to manage the increasing sizes.[89] Larger classes would always be a problem because teachers cannot turn their attention to students who need more help because of overcrowding.[90] In Florida, the classes would only get larger because of the influx of people moving to the state and the immigration boom in South Florida.[91] Teachers went to the Teacher's Union and the Florida Education Association to complain about the large class sizes.[92] The initial piece of legislation to decrease the class sizes was proposed by Florida Senator Anthony "Tony" Hill and Senator Meek.[93] The bill was intended to cap class sizes and provide schools with the funds to solve the overpopulation problem,

80. Russo Interview, *supra* note 71.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. Interview with Fedrick Ingram, Sec'y-Treasurer of the Am. Fed'n of Tchrs. [hereinafter Ingram Interview].
87. *Fedrick C. Ingram: AFT Secretary-Treasurer*, AM. FED'N OF TCHRS., https://www.aft.org/about/leadership/fedrick-c-ingram (last visited Aug 31, 2023).
88. Ingram Interview, *supra* note 86.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*

but the bill failed.[94] Hence, Mr. Ingram believed it was important to support the Class Size Initiative as a constitutional amendment.[95]

Regarding the Class Size Initiative, Mr. Ingram stated that the implementation of the constitutional amendment demanded a group of individuals with the skills and will to pass the amendment.[96] Although implementing the Initiative would cost the state money, Mr. Ingram felt that there was a lot to be said about a government that did not support public education.[97] The legislature wanted to fund charter schools rather than use funds to improve the operation of public schools.[98] The public education system is about *all* children learning.[99]

### *B. Opposition to the Class Size Initiative*

When the Author spoke to Monica Russo, Ms. Russo mentioned that former Florida Governor Jeb Bush was strongly opposed to the Class Size Initiative as a constitutional amendment.[100] According to Ms. Russo, the Governor mounted a campaign to stop the passage of the constitutional amendment.[101] Although the Author did not interview former Florida Governor Jeb Bush for the case study, his opposition to the Class Size Initiative was well documented by the media.

In October of 2002, the Sun-Sentinel published a news article detailing Governor Bush's meeting with a group of constituents where he assured them he had "devious plans" to undo the Class Size Initiative if it were to pass.[102] According to the article, Bush later tried to state that the statement was taken out of context, which is not what he meant.[103] He was only poking fun at a previous statement by the Democratic party.[104]

Even after the passage of the class size amendment, Governor Bush continued to speak out against the amendment. In December 2003, the St. Petersburg Times published an article where he continued to voice his opposition to the class size amendment.[105] The Governor stated that the money being used to accommodate more classes in the school

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. Russo Interview, *supra* note 71.
101. *Id.*
102. Linda Kleindienst, *Governor Tells of 'Devious Plans' to Undo Class Size Vote*, Sun-Sentinel (Oct. 5, 2002, 4:00 AM), https://www.sun-sentinel.com/2002/10/05/governor-tells-of-devious-plans-to-undo-class-size-vote/.
103. *Id.*
104. *Id.*
105. Steve Bousquet, *Bush Reiterates Class Size Problem*, Tampa Bay Times (Dec. 18, 2003), https://www.tampabay.com/archive/2003/12/18/bush-reiterates-class-size-problems/.

districts could have been used for other purposes, such as increasing teachers' pay.[106] During a press conference, Governor Bush expressed his support for repealing the class size amendment.

In February 2015, after becoming a candidate for the Republican Presidential Nomination, former Florida Governor Jeb Bush again voiced his opposition to the Class Size Amendment.[107] He reiterated that the funds being used to comply with the amendment could be used to increase teacher pay and improve the public school system in other ways.[108]

## III. Implementation of the Class Size Amendment

In the face of opposition, the people managed to pass the class size amendment. The implementation came at a cost to the state (illustrated in Chart 1 below).

**CHART 1: CLASS SIZE IMPLEMENTATION BUDGET[109]**

| Year | Operating Funds | Facilities Funds | Total Funds |
|---|---|---|---|
| 2003-04 | $ 468,198,634 | $ 600,000,000 | $ 1,068,198,634 |
| 2004-05 | $ 972,191,216 | $ 100,000,000 | $ 1,072,191,216 |
| 2005-06 | $ 1,507,199,696 | $ 83,400,000 | $ 1,590,599,696 |
| 2006-07 | $ 2,108,529,344 | $1,100,000,000 | $ 3,208,529,344 |
| 2007-08 | $ 2,640,719,730 | $ 650,000,000 | $ 3,290,719,730 |
| 2008-09 | $ 2,729,491,033 | $ 0 | $ 2,729,491,033 |
| 2009-10 | $ 2,845,578,849 | $ 0 | $ 2,845,578,849 |
| 2010-11 | $ 2,913,825,383 | $ 0 | $ 2,913,825,383 |
| 2011-12 | $ 2,927,464,879 | $ 0 | $ 2,927,464,879 |
| 2012-13 | $ 2,974,748,257 | $ 0 | $ 2,974,748,257 |
| 2013-14 | $ 2,974,766,164 | $ 0 | $ 2,974,766,174 |
| 2014-15 | $ 3,013,103,776 | $ 0 | $ 3,013,103,776 |
| 2015-16 | $ 3,040,910,760 | $ 0 | $ 3,040,910,760 |

106. *Id.*

107. Joe Follick & Lloyd Dunkelberger, *Bush Again Takes on Limits on Class Size*, Herald-Tribune (Feb. 13, 2015, 11:01 PM), https://www.heraldtribune.com/story/news/2015/02/14/bush-again-takes-on-limits-on-class-size/29298653007/.

108. *Id.*

109. *Florida's Class Size Reduction Amendment History*, *supra* note 20.

## IV. A General Discussion of School Choice

School choice "allows public education funds to follow students to the schools or services that best fit their needs, whether that is to a public school, private school, charter school, home school, or any other learning environment families choose."[110] School vouchers are typically created to allow parents to use public funds to pay for some or all of their child's private school tuition.[111] Vouchers come in the form of a scholarship and are issued by the state government.[112] Wisconsin became the first state in the country to provide vouchers to low-income students to attend private schools.[113] In 2016, thirteen states plus the District of Columbia offered school vouchers to low-income families.[114] As of 2024, twenty-five states, the District of Columbia, and Puerto Rico have school choice programs.[115]

As with most things, depending on one's source, the information gathered on school vouchers may present the vouchers in a positive or negative light. The National Education Association is anti-school voucher, and EdChoice is pro-school voucher. The two opposing views are discussed next.

The National Education Association ("NEA") filed a report entitled "School Vouchers: The Emerging Track Record."[116] The record states that proponents of school vouchers are falsifying the number of benefits that they say parents obtain from voucher programs.[117] The voucher programs do not do what they claim to, such as "spur public improvement, reduce the cost of education, and provide dramatic improvements in students' achievement."[118] The NEA report included a Gallup Poll done by Phi Delta Kappa magazine, which found that 71% of parents would prefer improving public schools while 27% of parents would opt for the voucher program.[119] The NEA also reported

110. *What is School Choice?*, EdChoice, https://www.edchoice.org/school-choice/what-is-school-choice/ (last visited Sept. 26, 2023).

111. Becky Vevea, *What is a School Voucher?*, GreatSchools (last updated June 12, 2023), https://www.greatschools.org/gk/articles/school-vouchers/.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Programs & Eligibility*, Am. Fed'n for Child., https://www.federationforchildren.org/school-choice-in-america/programs-and-eligibility/ (last visited Jan. 12, 2024).

116. Michael Pons, *School Vouchers: The Emerging Track Record.*, Nat'l Educ. Ass'n (Apr. 2002), https://web.archive.org/web/20130304095505/http://www.nea.org/home/16970.htm#.

117. *Id.*

118. *Id.*

119. *Id.*

that in Florida, 93% of the schools announced that they do not accept the voucher.[120]

EdChoice, formerly the Friedman Foundation, is a pro-school vouchers organization.[121] One of the most notable pieces of literature from the organization is Milton Friedman's 1955 paper "The Role of Government in Education," which "launched modern efforts to use public dollars to pay private school tuition in hopes that competition among schools [would] lead to increased student achievement and decreased education costs."[122] The organization uses in-house researchers to gather the effects of school vouchers on the education system.[123] EdChoice states that research shows that school vouchers have a positive effect on participating students' academic performance over time.[124] School vouchers create a competitive environment between public schools and private schools; thereby, school vouchers drive improvement in public school students' academic performance.[125] Likewise, EdChoice maintains that the idea that the school vouchers program drains money from public schools is a misconception.[126] The report states that when students leave a public school, the school is no longer responsible for educating the students, and thus, the financial burden is no longer on the school.[127] The Friedman Foundation conducted surveys in twenty-five states.[128] The survey showed that a majority of people favored school vouchers, education saving accounts (ESAs), and tax-credit scholarships.[129] Depending on the state, support for school vouchers ranged from the low fifty to mid-seventy percentiles.[130]

The National Education Association and EdChoice provided support for two contradicting stances on the same issue. Depending on one's stance on the issue, it is possible to find support for whichever

120. Pons, *supra* note 116.

121. *Our Legacy*, EDCHOICE, https://www.edchoice.org/who-we-are/our-legacy/ (last visited Nov. 6, 2023).

122. National Conference of State Legislatures, *School Vouchers Have Long History*, HERALD TIMES REP. (Sept. 26, 2014, 4:00 PM), https://www.htrnews.com/story/opinion/2014/09/26/school-vouchers-long-history/16233433/.

123. Pons, *supra* note 116.

124. *See How Does School Choice Affect Students' Academic Performance?*, EDCHOICE, https://www.edchoice.org/school-choice/faqs/how-does-school-choice-affect-students-academic-performance/ (last visited Sept. 28, 2023).

125. Pons, *supra* note 116.

126. Katie Brooks, *Study Finds America's School Voucher Programs Have Saved Billions*, EDCHOICE (Sept. 20, 2018), https://www.edchoice.org/engage/new-study-finds-americas-school-voucher-programs-have-saved-billions/.

127. Pons, *supra* note 116.

128. Pons, *supra* note 116.

129. Pons, *supra* note 116.

130. Pons, *supra* note 116.

argument one wishes to make. So, the only true question is whether school vouchers are constitutional under Florida law.

School vouchers have a long history in Florida. Statutorily, Florida has four active school voucher programs: The Gardiner Scholarship, the John M. McKay Scholarship for Students with Disabilities, the Auditory-Oral Education Programs, and the Florida Tax Credit Scholarship Program.[131]

In 2006, the Florida Supreme Court ruled one of the Florida school voucher programs unconstitutional.[132] The next sections of the case study will examine the road to that decision, those who supported the decision, those who opposed the decision, and the social implications of the decision.

## V. *BUSH V. HOLMES*

### *A. Bush A-Plus Plan: Opportunity Scholarship Program*

In 2000, Governor Jeb Bush signed the A-Plus Plan for education, which included the Opportunity Scholarship Program.[133] The Opportunity Scholarship Program is a school voucher program that would provide low-income families with a state-sponsored scholarship to send their children to a private school.[134] Per Statute 1002.38 of the Florida Statutes, the Opportunity Scholarship Program is to administer scholarships to parents if: (1) the student's assigned school has received a grade of "F" or three consecutive "D" during the years that the student attended and (2) the student is assigned to the failing school for following school year.[135]

After the Opportunity Scholarship Program became law in early 2000, parents and an array of special interest groups, including the Florida Education Association, the National Education Association, Florida's National Teachers Union, the American Civil Liberties Union (ACLU), the National Association for the Advancement of Colored People (NAACP), Coalition for Public Schools, and AFL-CIO, challenged the scholarship in court.[136] The organizations claimed that the program violated the religious establishment provision of the state and

131. FLA. STAT. ANN. §§1002.385 (2020), 1002.39 (2016), 1002.391 (2023), 1002.395 (2020).
132. *See* Bush v. Holmes, 919 So. 2d 392 (Fla. 2006).
133. *Id.*
134. *Id.*
135. FLA. STAT. ANN. § 1002.38 (2021).
136. *See* Holmes v. Bush, No. CV 99-3370, 2000 WL 526364, at *3 (Fla. Cir. Ct. Mar. 14, 2000).

federal constitutions, as well as state constitutional provisions concerning the funding and delivery of public education services.[137]

### *B. Lower Court Decision*

#### *1. Trial Court: Holmes v. Bush, 2000 WL 526364*

The Florida Education Association, as the lead in this case, alleged that the Opportunity Scholarship (OSP) was unconstitutional under Article IX, Section 1 of the Florida Constitution. The attorney for Governor Bush argued that under *Taylor v. Dorsey*, So. 2d 876 (Fla. 1944), the "constitution does not clearly prohibit the legislature from providing an education through private school but rather provides a 'floor' for legislative action."[138] In *Scavella v. School Board of Dade County*, the Supreme Court approved state payment to private education for students with disabilities.[139] Likewise, if the court were to agree with the Florida Education Association's interpretation of Section 1, other scholarships, such as Bright Futures and Special Education for Disabled Children, would be unconstitutional.[140] Finally, they argued that OSP is within Section 1's provision for establishing other education programs that may be required to meet the needs of the people.[141]

Judge Louie Ralph Smith from the Florida Circuit Court of Leon County determined that the Florida Opportunity Scholarship Program violated the constitutional provision that provided for public education.[142] Judge Smith wrote that OSP would inhibit the state from adequately funding a free public education system, which is constitutionally mandated.[143]

#### *2. Appeal to 1st District Court of Appeal: Bush v. Holmes, 767 So. 2d 668 (Fla. 1st Dist. Ct. App. 2000)*

On appeal, the First District Court of Appeals determined that the trial court's decision constituted a harmless error. Still, the Opportunity Scholarship Program, which pays for students to attend private schools, did not, on its face, violate the constitution and the section of the constitution that provided for public education.[144]

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137. *Id.*
138. *Id.*
139. *See* Scavella v. Sch. Bd. of Dade Cnty., 363 So. 2d 1095 (Fla. 1978).
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at *1.
144. Bush v. Holmes, 767 So. 2d 668, 677 (Fla. Dist. Ct. App. 2000).

As the chief litigant in the case, The Florida Education Association argued that the Opportunity Scholarship Program violated Article 1, Section 3 of the Florida Constitution; Article IX, section 1 of the Florida Constitution; Article IX, Section 6 of the Florida Constitution; and the Establishment Clause of the First Amendment of the U.S. Constitution.[145]

The First District Court of Appeal held that the trial court erred in its decision that the Opportunity Scholarship Program violated Article IX, Section 1. The court states that there is no constitutional provision that directly limits the authority of the legislature to establish the Opportunity Scholarship Program.[146] Citing *Taylor v. Dorsey*, 19 So. 2d 876 (1944), the court states that "[the Florida] state constitution is a limitation upon power and unless legislation duly passed be clearly contrary to some express or implied prohibition contain therein, the courts have no authority to pronounce it invalid."[147] The case was reversed and remanded to the trial court.[148]

### *3. Remand to the Trial Court:* Bush v. Holmes*, No. CV 99-3370, 2002 WL 1809079 (Fla. Cir. Ct. Aug. 5, 2002)*

August 5, 2002, the Florida Circuit Court in Leon County issued summary judgment in favor of Holmes. The court held that the statute violates the state constitution's prohibition on taking revenue "from the public treasury in indirect aid of sectarian institution."[149] In the decision, the court cites Article I, Section 3 of the Florida Constitution, which states that "no revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."[150]

### *4. 1st District Court of Appeal En Banc Decision:* Bush v. Holmes*, 886 So.2d 340 (Fla. Dist. Ct. App. 2004).*

In the majority opinion, Judge Nortwick wrote, "the no-aid provision of State Constitution prohibited indirect benefit to sectarian schools resulting from receipt of funds by such institutions through voucher program, no-aid provision did not violate Free Exercise Clause

145. *Id.* at 671.
146. *Id.* at 673.
147. *Id.*
148. *Id*.
149. Holmes v. Bush, No. CV 99-3370, 2002 WL 1809079, at *3 (Fla. Cir. Ct. Aug. 5, 2002).
150. *Id.* at *1.

of First Amendment, and no-aid provision did not violate Free Exercise Clause of State Constitution."[151]

The District Court affirmed the decision of the lower court and certified the question.

### *C. The Supreme Court Decision:* Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006)*

The Florida Supreme Court issued a 5-2 decision ruling that the Opportunity Scholarship Program was unconstitutional.[152] The Court held,

> The Opportunity Scholarship Program (OSP) violated the requirements of the state constitution's education clause that free education be provided through a system of free public schools. The court further held that the OSP statute violated the requirements of the state constitution's education clause that education be provided through a 'uniform' system of public schools. Finally, the court held that OSP did not fall within exception to constitutional mandates for other public education programs.[153]

The opinion states that OSP violates the plain language of Article IX, Section 1. The creation of OSP reduces money available to free public schools and funds private schools that are not "uniform" when compared with other private schools as well as the public school system.[154] Since the court determined that the statute was unconstitutional under Article IX, Section 1(a), there was no need to consider whether it was constitutional under the no aid provision in Article I, Section 3.[155]

## VI. POST *BUSH V. HOLMES*

After the court issued its decision in *Bush v. Holmes*, some agreed while others vehemently disagreed. The next section of the case study reveals information gathered from proponents and opponents of school vouchers.

### *A. Clark Neily: Proponent of School Vouchers*[156]

Clark Neily is a former senior attorney with the Institute for Justice.[157] Mr. Neily served on behalf of the Institute for Justice in the

151. *See* Bush v. Holmes, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004).
152. *See* Bush v. Holmes, 919 So. 2d 392, 398 (Fla. 2006).
153. *Id.*
154. *Id.* at 398.
155. *Id.*
156. Interview with Clark Neily, Senior Vice President for Legal Studies, Cato Institute (November 4, 2016) [hereinafter Neily Interview].
157. *Clark Neily*, ONE AMERICA MOVEMENT, https://oneamericamovement.org/author/clark-neily/ (last visited Aug 31, 2023).

*Bush v. Holmes* case. Mr. Neily worked alongside the Governor's team (at the time, Jeb Bush was governor of the state) and a team from the Attorney General's office (Bob Butterworth was Attorney General at the time).[158]

Mr. Neily vehemently disagreed with the Florida Supreme Court's decision in *Bush v. Holmes*.[159] Mr. Neily wrote a law review article for the Texas University Law Review entitled "The Florida Supreme Court vs. School Choice: A 'Uniformly' Horrid Decision."[160] Mr. Neily argues that "in rejecting vouchers, the court departed from logic, precedent, and principle and acted more like a third branch of the Florida legislature than the court of law."[161] Mr. Neily states that school choice means nothing more than the idea that all parents should enjoy a reasonable measure of choice about what schools their children attend, regardless of their financial means.[162] School choice means government programs such as school vouchers and tax-credit-funded scholarships that enable parents to choose among a full range of public and private school options, regardless of whether they can afford those options themselves.[163] Mr. Neily makes an argument against the Supreme Court decision and another argument in favor of school vouchers.[164]

In the interview with Mr. Neily, he maintained strong support for school vouchers.[165] He argues that school choice provides broader school options for parents.[166] In his opinion, the government should not dictate where children go to school.[167] Mr. Neily stated that the public education system is mediocre at best; therefore, parents deserve better options.[168] He explained that people should take the same approach to K-12 education as they take to college education.[169] He suggested giving the parents the money and letting them decide what schools to send their children to. Mr. Neily believes the decision in *Bush v. Holmes* was wrong and was a reach.[170]

The idea that the Florida Constitution is so precise that it limits the state from giving scholarships to private schools when there are other

158. Neily Interview, *supra* note 156.
159. *Id.*
160. Clark Neily, *The Florida Supreme Court vs. School Choice: A "Uniformly" Horrid Decision*, 10 Tex. Rev. L. & Pol'y 401 (2006).
161. *Id.* at 402.
162. *Id.*
163. *Id.*
164. Neily Interview, *supra* note 156.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*

scholarships, like the McKay Scholarship, is unfounded.[171] The suggestion that "uniform" meant that the Opportunity Scholarship Program was restricted by the Constitution is implausible.[172] The opinion is unpersuasive, and it is a policy-oriented decision.[173] In the words of Mr. Neily, "It is black-letter law in Florida that if a given subject is properly within the legislature's purview—as education surely is—then the legislature has broad discretion in deciding what policies to adopt in that area."[174] Accordingly, unless the state constitution clearly prohibits a given policy (such as school vouchers), the courts should not interfere.[175] Again, that is black-letter law, and whatever else one might say about the "uniformity" provision of Florida's Constitution, the idea that it clearly prohibits voucher programs is, in my mind, preposterous.[176] Mr. Neily maintains his support for school vouchers.[177] When asked about the post-*Bush v. Holmes* implementation of the Florida Tax Credit Scholarship, Mr. Neily stated that he believes in the constitutionality and the legitimacy of the Florida Tax Credit Scholarship.[178] He cites the United States Supreme Court decision in *Zelman v. Simmons-Harris* (considering the constitutionality of School Vouchers under the Establishment Clause).[179]

### *B. Opponents of School Vouchers*

#### *1. Les Miller*[180]

Les Miller served in the Florida House of Representatives from 1992-2000[181] and the Florida Senate from 2000-2006.[182] Les Miller is a former Commissioner in Hillsborough County.[183]

171. Neily Interview, *supra* note 156.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
180. Interview with Les Miller, Hillsborough County Commissioner (2016) [hereinafter Miller Interview].
181. *Lesley "Les" Miller Jr.*, FLA. HOUSE OF REPRESENTATIVES, https://www.myfloridahouse.gov/Sections/Representatives/details.aspx?MemberId=4008&LegislativeTermId=78 (last visited Aug. 31, 2023).
182. *Senator Miller - The Fla. Senate*, FLA. SENATE https://www.flsenate.gov/Senators/2002-2004/S18/4462 (last visited Aug. 31, 2023).
183. *Board Honors Lesley "Les" Miller, Jr. as 25th Good Government Award Winner*, HILLSBOROUGH CNTY. (June 4, 2021, 12:53 PM), https://www.hillsboroughcounty.org/en/newsroom/2021/06/04/board-honors-les-miller-as-25th-good-government-award-winner.

Commissioner Miller maintains that the passage of the school vouchers program was a very real possibility with Republican control of the House of Representatives, Senate, and Governorship.[184] The Democratic Party's goal was to amend the bill as much as possible to get the inequalities out of the public schools.[185] The passage of a school voucher bill placed the public school in jeopardy.[186] Private schools would gain all the children, and it holds the potential to destroy the public school system.[187]

### *2. Ronald Meyer*[188]

Ronald Meyer is an attorney representing the Florida Education Association since 1972.[189] He represented the Florida Education Association in *Bush v. Holmes*. During litigation, Mr. Meyer stated that he was joined by counsel from the National Education Association and NEA's outside counsel, Randall Marshal, counsel for the American Civil Liberties Union, and counsel from the NAACP.[190]

Mr. Meyer stated that the goal of the litigation was to get the court to rule that the Opportunity Scholarship was unconstitutional.[191] The Florida Education Association wanted to preserve the strength of the public school system.[192] The Opportunity Scholarship Program was an effort to take money from the public school system, which was damaging to students who were dependent on public schools.[193] The litigation was a concerted effort to preserve the integrity of Florida public schools.[194]

Mr. Meyer stated that the key factor in the case's success was the people of Florida, making it plain in the constitution that the state should maintain high-quality public schools.[195] The Supreme Court used the Constitution to check the legislature and ruled the Opportunity Scholarship unconstitutional.[196] To Mr. Meyer, the decision demonstrated the wisdom of the founding fathers to create three branches of government.[197] Even in the face of a governor and legislature, the Court

184. Miller Interview, *supra* note 181.
185. *Id.*
186. *Id.*
187. *Id.*
188. Telephone Interview with Ronald Meyers, Partner, Meyer, Blohm and Powell (2016) [hereinafter Meyers Interview].
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*

was able to uphold the Constitution.[198] In 2019, Mr. Meyer was quoted by the Tampa Bay Times stating, "I believe the independence of the judiciary transcends politics."[199]

In Mr. Meyer's purview, after the *Bush v. Holmes* Supreme Court decisions, voucher proponents began to think of alternatives to the Opportunity Scholarship.[200] The first one that came immediately after was the Florida Tax Credit Scholarship, which the Florida Tax Credit Scholarship business owners would receive tax credit by donating to the Florida scholarship fund. The argument is that this would not be taxpayer dollars. Ronald Meyer views this new initiative as "distinction without a difference."[201] The Florida Education Association and others brought a suit challenging the constitutionality of the Florida Tax Credit Scholarship (*McCall v. Scott*).[202] As the attorney for the Florida Education Association, Mr. Meyer expressed that though the First District Court of Appeals has held that the case has no standing, they do plan on bringing the case again before the court.[203]

Mr. Meyer states that he disapproves of school vouchers such as the Opportunity Scholarship Program.[204] He believes that voucher programs have the potential to create racial inequalities.[205] They would produce a school system that is in violation of *Brown v. Board of Education.*[206] The vouchers would create schools that are separate but not equal.[207]

### *3. Senator Dwight Bullard[208]*

Senator Bullard states that the *Bush v. Holmes* decision was the appropriate decision.[209] The voucher program would allow taxpayer dollars to be used for religious institutions, which is not okay.[210] Taking the money to send to private schools, when private schools do not have to adhere to a standard like the public schools, is sending the message that they do not have to play by the same rules as everyone else.[211] Passing

198. Meyers Interview, *supra* note 188.
199. Jeffrey S. Solochek, *Vouchers 'Fertile Ground' for Florida Education Lawyers, Noted Attorney Says*, TAMPA BAY TIMES (May 10, 2019), https://www.tampabay.com/blogs/gradebook/2019/05/10/vouchers-fertile-ground-for-florida-education-lawyers-noted-attorney-says/.
200. Meyers Interview, *supra* note 189.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. Bullard Interview, *supra* note 50.
209. *Id.*
210. *Id.*
211. *Id.*

legislation to create school vouchers is a *de jure* creation of inequalities.[212] School vouchers have the ability to re-segregate schools, not by race, but by socio-economic status.[213] Transforming the public school into the dumping ground for low- performing students.[214]

Although the Opportunity Scholarship was struck down, the state still has the Florida Tax Credit Scholarship. These scholarships are short-changing the state on tax dollars that can be used to improve schools and build roads. The Florida Tax Credit Scholarship increased the income required to qualify. The increase in income expanded the scholarship to include accessibility for students from the middle economic class.

Senator Bullard proposes that instead of using tax dollars to fund school vouchers, the funds should be distributed to the public schools and make it better for parents to appreciate.[215] For Senator Bullard, if the state does not take the initiative to improve the public schools, they will pay for it in another way.[216] The state currently spends $7,100 per student but $24,800 per prisoner in the state prison.[217] The responsible thing to do is to put the money into education, counseling, and food.[218]

### *C. Florida Tax Credit Scholarship: McCall v. Scott, 199 So.3d 359 (Fla. 1st DCA 2016)*

Post the Opportunity Scholarship Program, the Florida legislature passed the Florida Tax Credit Scholarship. [219] The Florida Tax Credit Scholarship allows taxpayers to make contributions to the state's scholarship fund.[220] A student would be eligible for the Florida Tax Credit Scholarship if the student qualifies for free or reduced-price lunch or is in foster care. The student will continue to receive the scholarship as long as the household income does not exceed 230%.[221] Joanne McCall (a parent), Senator Geraldine Thompson, the Florida Education Association, Florida Congress of Parents and Teachers, Inc., League of Women Voters of Florida Inc., and the Florida State Conference of Branches of NAACP filed a suit alleging that the scholarship was unconstitutional.[222]

212. Bullard Interview, *supra* note 50.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id*.
219. Fla. Stat. Ann. 1002.395 (2016).
220. *Id*.
221. *Id.*
222. *See* McCall v. Scott, 199 So. 3d 359, 361–62 (Fla. Dist. Ct. App. 2016).

The District Court of Appeal held that the plaintiffs lacked standing for many reasons, including standing as 'taxpayers who suffered a special injury [nor] as taxpayers who challenged a legislative exercise of the taxing and spending power in violation of specific constitutional provision...to allege a violation of the State Constitution's provision prohibiting state revenue to aid any church. Plaintiffs [also] lacked standing to allege a violation of the State Constitution's provision requiring a system of free and uniform public schools.'[223] The Court essentially held that the plaintiffs had no standing.[224]

### *D. Sustaining Bush v. Holmes*

The passage of the Class Size Amendment was taking a step in the right direction to maintain the intention of the *Bush v. Holmes* decision: bettering public education across the state. The legislature's attempt to circumvent the *Bush v. Holmes* decision came with the passage of the Florida Tax Credit Scholarship.[225] As Ronald Meyer states, there is no difference between the Florida Tax Credit Scholarship and the Opportunity Scholarship Program.[226] *Bush v. Holmes* has only been sustained to the extent that the Opportunity Scholarship is no longer in existence by name.[227]

### *E. School Choice in the Florida 2023 Legislative Session*

For this section, the Author conducted an interview with State Representative Patricia Hawkins-Williams as well as reviewed House Bill 1 proposed in the 2023 legislative sessions.[228] Representative Hawkins-Williams stated that House Bill 1, as passed, will "[g]ut the public school system."[229] As explained by Representative Hawkins-Williams, the bill provides an $8,000 voucher for each school-aged child.[230] The parents may use their voucher to send the child to any school.[231] The voucher will be provided to all children regardless of socio-economic status.[232] Representative Hawkins-Williams argues that this bill will potentially create "the haves and the have nots," almost like segregation.[233] The bill

223. *Id.*
224. *Id.*
225. *See* 1002 FLA. STAT. § 395 (2023)
226. Meyers Interview, *supra* note 189.
227. *Id.*
228. *Patricia H. Williams*, FLA. HOUSE OF REPRESENTATIVES, https://www.myfloridahouse.gov/Sections/Representatives/details.aspx?MemberId=4629 (last visited Aug. 31, 2023).
229. Interview with Patricia Hawkins Williams, State Rep., Fl. H. of Rep. (May 2023) [hereinafter Williams Interview].
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*

is essentially a method of circumventing the ruling in *Bush v. Holmes* concerning the Opportunity Scholarship.[234]

Representative Hawkins-Williams maintains that the bill is unjust to the operation of public schools because public schools operate under stricter regulatory requirements than private schools.[235] Therefore, by using the voucher system, funds are being taken away from public schools to operate effectively.[236] Especially when public schools are asked to have certified teachers, abide by building code regulations, provide EIPs for students, and so forth.[237] Private schools are not held to the same standards as public schools; therefore, the funding set aside for public schools should not be chipped away to be allocated to other non-public institutions.[238]

The only positive aspect to negotiating this bill is the legislature's agreement to have a reserve in case this is a complete catastrophe and begins to derail the public school system.[239]

## VII. Peer Survey: Lay Opinion on Class Size and School Vouchers

In an interview with Monica Russo, president of the Service Employee International Union, she stated that from this effort, law students should know that social change is possible when the issue resonates with the people.[240] So, the Author's thought was, "Where do people stand on the Class Size Amendment and School Vouchers in 2016?" The Author conducted a simple survey that included three questions: (1) Do you agree with caps on class sizes? (2) Do you agree with school vouchers like the opportunity scholarship program? (3) Please state any general thoughts you may have about class sizes and/or school vouchers.

When the survey was extracted from the website, a total of seventy-five people completed the survey. Chart 2 displays the results for question one. 85% of people agree that there should be a cap on class sizes. 13% of people did not agree with the idea of capping class sizes. Chart 3 displays the results for question two. 73% of people agree that we should have school vouchers like the opportunity scholarship. 17% of people did not agree that we should have school vouchers like the opportunity scholarship.

234. Williams Interview, *supra* note 229.
235. *Id.*
236. *Id*.
237. *Id*.
238. *Id.*
239. *Id.*
240. Russo Interview, *supra* note 71.

**CHART 2: CLASS SIZES**

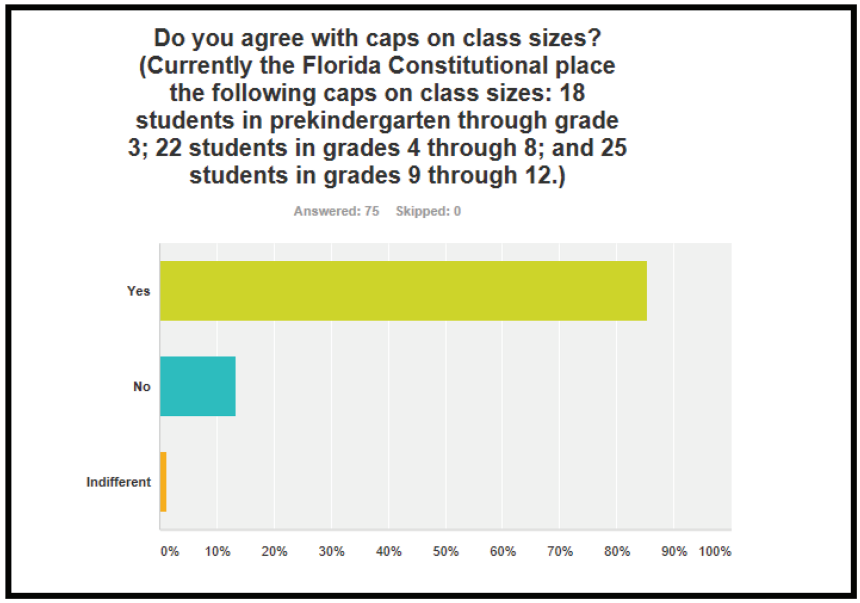
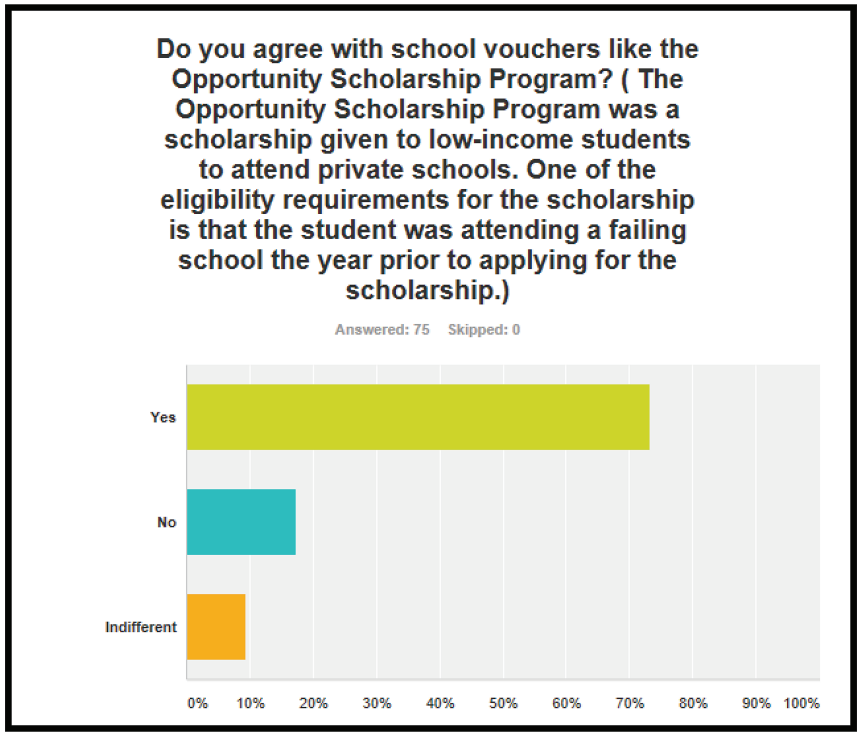



**CHART 3: SCHOOL VOUCHER**



The third question was meant to get a sense of what people felt about the issue. Forty-four people provided written responses on their take on class sizes and school vouchers. There was overwhelming support in favor of smaller class sizes. One respondent stated, "More student-to-teacher ratio means less attention to students because of the number of students a teacher must attend to and teach. Often, in large classrooms (ex., lecture halls, etc., most commonly seen in colleges), students are more distracted, unable to access the teacher as much for questions, and are left often teaching themselves. For young, non-mature audiences, that is particularly difficult and perhaps more detrimental." That quote reflected the general belief about class sizes.

The respondents had some strong opinions about the school vouchers. Most respondents agree with having school vouchers like the opportunity scholarship. However, a few respondents believed that school vouchers are not a proper resolution to help students. One respondent called school vouchers "a band-aid." Another respondent stated that "the resources should be given to failing schools to become better, and if private schools are to receive the funding like public schools, then they should conform to the same mandate that is placed on public schools." Most people stood by the idea that the vouchers provided better opportunities for students to get a better education.

## VIII. Conclusion: Social Justice Implications

This is an ever-evolving issue. In terms of the Class Size Initiative, the legislature has proposed changing the definition of what is considered a "core class." Senator Meek expressed that changing the definition would mean that the constitutional initiative is significantly weakened based on the new definition that the legislature is proposing.[241] The passage of the Florida Tax Credit Scholarship to Ronald Meyer implies that the mere thing that they opposed when they litigated against the Opportunity Scholarship Program came into existence.[242]

This case study revealed that the existence of public interest organizations such as the Florida Education Association,[243] the American Civil Liberties Union,[244] the Institute for Justice,[245] and the National Association for the Advancement of Colored People[246] provide access to justice for people within the society. During the interview, it was clear

241. Meek Interview, *supra* note 7.
242. Meyers Interview, *supra* note 189.
243. Fla. Educ. Ass'n, https://feaweb.org/ (last visited Aug. 28, 2023).
244. *About the ACLU*, ACLU, https://www.aclu.org/about-aclu (last visited Aug. 28, 2023).
245. The Inst. for Just., https://ij.org/ (last visited Aug. 28, 2023).
246. NAACP, https://naacp.org/ (last visited Aug. 28, 2023).

that everyone expressed that there were no barriers to access to justice because of the public interest organizations.

The final consideration is, what does the result of this case study mean for law students? Senator Dwight Bullard states that this should urge law students to make a commitment to their communities. As pupils of the law, there is an inherent duty to give back to their communities. Senator Meek states that it shows that law students should never give up on achieving good public policy.[247] To change the system, there must be consistency, organization, and tough perseverance. Clark Neily states that he hopes that law students will critically evaluate arguments on both sides of the school voucher issue and approach the issue with a high level of intellectual consistency. Law students who will graduate in the next decade must deal with this issue. For law students, this case study reveals an issue that will be at the forefront of educational issues for the education lawyer.

## IX. DEBRIEF

After considering major issues like the Class Size Initiative and School Vouchers, it's important to debrief. To debrief, this section briefly considers the individual's access to justice, the role of the lawyers, the roles of the client and other actors, the lawyer-client relations, the use of the media in the issue, the result in the case, and the changes brought about because of the outcomes in the case.

### *A. Access to Justice*

The interviews the Author conducted with organization leaders and elected officials proved that in the two issues considered in this case study, there was no question of access to justice. The Class Size Initiative was led by one of the prominent legislators in the Florida Senate. There were no barriers to accessing the people, the legislature, or the courts. In terms of the school vouchers, when the Author spoke to the Lead Attorney in *Bush v. Holmes*, Ronald Meyer, as well as the Senior Attorney for the Institute for Justice, Clark Neily, they believed that because of the presence of public interest organization, the people had adequate representation and adequate access to the courts.

Class sizes and school vouchers were on the radar of public interest organizations. When the class size failed to become law through the legislature, Senator Meek quickly moved to have the Initiative considered as a constitutional amendment. Likewise, immediately after the

247. Meek Interview, *supra* note 7.

opportunity scholarship became law, the Florida Education Association filed a suit in the courts challenging the constitutionality of the law.

In the interview with Ronald Meyer, Meyer revealed that the Florida Education Association (FEA) had one goal in the case of *Bush v. Holmes*. The goal was to get the court to rule that using taxpayer money to send children to private schools was unconstitutional. Meyer stated that the goal of the FEA did not change through the course of litigation. From the District Court to the Court of Appeals to the final Supreme Court decision, the goals remain the same. The goal was to rule the Opportunity Scholarship Program unconstitutional.

### *B. Role of the Lawyers*

During the Class Size Initiative, the lawyers were not the key actors, but in *Bush v. Holmes*, the lawyers were key. The lawyers became involved in *Bush v. Holmes* when the Florida Education Association asked their long-term attorney, Ronald Meyer,[248] to bring the case. Meyer stated that the goal was to get the courts to rule the Opportunity Scholarship Program was unconstitutional, and his intent was to get that result.[249]

Ronald Meyer has been the attorney for the Florida Education Association for more than four decades, and Meyer stated that he had a clear understanding of the goals of the Florida Education Association in bringing the suit against the state. The decisions on how to pursue the claim in the case were primarily made by Meyer. Other attorneys, such as Randall Marshall (Attorney for the ACLU of Florida), gave input on the strategies, but Meyer made the decisions in the case. Meyer stated that the goals of the litigation did not change during the litigation[250] Until today, Meyer remains the attorney representing the FEA as they seek to fight school vouchers again by challenging the Florida Tax Credit Scholarship. Meyer and the FEA were successful in their litigation efforts against the state.[251]

The social justice issue in *Bush v. Holmes* was defined by the Florida Education Association (FEA). FEA saw it as an injustice to the children in public schools for taxpayer dollars to be taken from the state budget to be used for public schools instead of providing more funding for them.[252]

248. *Lawyer Directory*, Fla. Bar, https://www.floridabar.org/directories/find-mbr/profile/?num=148248 (last visited Aug 28, 2023).

249. Meyers Interview, *supra* note 189.

250. Meyers Interview, *supra* note 189.

251. *Id.*

252. *Id.*

### C. Roles of the "Client" and Other Actors

Ultimately, the people were the clients in the Class Size Initiative and the case of *Bush v. Holmes*. Significant actors in the naming and claiming of the social justice issue include a host of public interest organizations, including the Florida Education Association, the National Association for the Advancement of Colored People, The American Civil Liberties Union, the National School Boards of Association, People for the American Way Foundation and more. The challenge to school vouchers, as Ronald Meyer stated, could only be fought in the courts. Community members did not get involved, but the public interest organizations were the voice of the people.

The Class Size Initiative, at its core, was a community-led movement. Monica Russo mentioned that people in the community were extremely supportive of the Class Size Initiative. The Initiative was an issue that resonated with the people.

### D. Lawyer-Client Relations

The FEA expressed their desired outcome to Attorney Meyer, who then worked to obtain the desired result. Ronald Meyer, as well as Randall Marshall, stated that Meyer came up with the legal strategy for the litigation to move forward.[253]

### E. Use of the Media

The media was a very important aspect of passing the Class Size Initiative. Senator Meek spoke of the two leaders of the Coalition to Reduce Class Size sitting at a dining room table and contacting the media to get the word out about the Initiative. Reporters were and are still interested in the Class Size Initiative as an issue. The Tampa Bay Times published a story detailing the current state of the class size initiative and what the legislature and those who opposed the class size initiative are doing to weaken the constitutional amendment.[254] The media was helpful in bringing awareness across the state about the Initiative and how people can access the petition to sign the petition.

School vouchers have always been a controversial issue. When *Bush v. Holmes* came before the courts, it was well covered by the media.

253. Meyers Interview, *supra* note 189.

254. Jeffrey S. Solochek, *Florida's School Class Size Limits Reviewed*, TAMPA BAY TIMES (Nov. 16, 2015), https://www.tampabay.com/news/education/k12/almost-two-thirds-of-florida-school-districts-avoiding-strict-class-size/2254234/.

The reports that I could locate were neutral. The article was helpful in discovering who supported which side of the argument and why. Media coverage would have impacted public opinion on the issue.

### *F. Result*

Senator Meek and his supporters wanted to pass the Class Size Initiative as a constitutional amendment. They achieved that goal.

Likewise, the Florida Education Association's goal was to make the Opportunity Scholarship Program rule unconstitutional. They achieved that goal. The key factor to the success of the victory in *Bush v. Holmes* was persistence and innovation. Ronald Meyer and his team were dedicated to getting a favorable ruling; after six years of litigation, the case was ruled in their favor by the Supreme Court. Likewise, Ronald Meyer and his team were willing to learn from prior rulings that they received prior to getting to the Florida Supreme Court to make their argument stronger. For example, when the Supreme Court ruled in *Zelman v. Simmons-Harris* that school vouchers do not violate the establishment clause of the United States Constitution, the team decided to remove the argument that the school vouchers violate the establishment clause.

### *G. Change*

The Class Size Initiative was resolved by the passage of the Initiative as an amendment to Article IX Section 5 of the Florida State Constitution.[255] Senator Meek obtained the necessary signatures to place the Initiative on the 2002 ballot. The Initiative then received more than 50% of the votes. Thus, making it possible to amend the constitution to provide for caps on class sizes.

The Florida Education Association was victorious in *Bush v. Holmes*, which led to the opportunity scholarship program being ruled unconstitutional. However, soon after that decision, the legislature passed the Florida Tax Credit Scholarship, making the victory in *Bush v. Holmes* short-lived. Nonetheless, this Author believes that the conversation surrounding the Class Size Initiative and School Choice will continue for years to come.

255. FLA. CONST. art. IX § 5 (2016).

# Patriot Games: Title 42 and the Failure of U.S. Immigration Policy

Brendan Williams*

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## Introduction

In his final speech as president, Ronald Reagan extolled immigration, stating that with "each wave of new arrivals to this land of opportunity, we're a nation forever young, forever bursting with energy and new ideas," and warned that "[i]f we ever closed the door to new Americans, our leadership in the world would soon be lost."[1]

Much has changed.

* Brendan Williams is an attorney and longtime advocate for civil rights who runs a long-term care association in New Hampshire. The author thanks the diligent staff of this law review and dedicates this article to those dreaming of becoming U.S. citizens.

1. *Remarks at the Presentation Ceremony for the Presidential Medal of Freedom*, Ronald Reagan Presidential Library & Museum (Jan. 19, 1989), https://www.reaganlibrary.gov/archives/speech/remarks-presentation-ceremony-presidential-medal-freedom-5.

In 2015, Donald Trump began his campaign for the presidency by referring to Mexican immigrants as "rapists."[2] During that campaign, he attacked a U.S.-born judge overseeing litigation against him, identifying him as a "Mexican."[3] He claimed that he would force Mexico to pay for a new 1,000-mile wall on the U.S.-Mexico border.[4] As president, he derided immigrants from "shithole countries,"[5] talked about trading the U.S. territory Puerto Rico for Greenland;[6] ran a 2018 anti-immigration campaign ad so shockingly racist even Fox News refused to air it;[7] and suggested deporting four progressive women of color serving in the U.S. House to "the totally broken and crime infested places from which they came" – despite three being born in the United States.[8]

Trump took his lead on immigration from a key advisor, Stephen Miller. In 2019, senior policy adviser Stephen Miller goaded Trump in his threats to close the border, warned him of the dangers of looking weak, and encouraged the president's sudden purge of his homeland security team.[9] Miller — a fiery ideologue — has repeatedly advocated

2. Colby Itkowitz, *NBC Dumps Trump After Incendiary Remarks on Mexicans*, WASH. POST (June 29, 2015, 2:37 PM), https://www.washingtonpost.com/news/post-politics/wp/2015/06/29/nbc-dumps-trump-after-incendiary-remarks-on-mexicans/.

3. Jose A. DelReal & Katie Zezima, *Trump's Personal, Racially Tinged Attacks on Federal Judge Alarm Legal Experts*, WASH. POST (June 1, 2016, 8:19 PM), https://www.washingtonpost.com/politics/2016/06/01/437ccae6-280b-11e6-a3c4-0724e8e24f3f_story.html.

4. *See* Bob Woodward & Robert Costa, *Trump Reveals How He Would Force Mexico to Pay for Border Wall*, WASH. POST (Apr. 5, 2016, 3:45 AM), https://www.washingtonpost.com/politics/trump-would-seek-to-block-money-transfers-to-force-mexico-to-fund-border-wall/2016/04/05/c0196314-fa7c-11e5-80e4-c381214de1a3_story.html/.

5. Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*; WASH. POST (Jan. 12, 2018, 7:52 AM), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html.

6. *See* Nicole Acevedo, *Trump Was Serious About Trading Hurricane-stricken Puerto Rico for Greenland, ex-DHS Official Says*, NBCNews (Aug. 19, 2020, 6:56 PM), https://www.nbcnews.com/news/latino/trump-was-serious-about-trading-hurricane-stricken-puerto-rico-greenland-n1237336.

7. *See* Michael M. Grynbaum & Niraj Chokshi, *Even Fox News Stops Running Trump Caravan Ad Criticized as Racist*, N.Y. TIMES (Nov. 5, 2018), https://www.nytimes.com/2018/11/05/us/politics/nbc-caravan-advertisement.html; Stephen Collinson, *Trump Shocks With Racist New Ad Days Before Midterms*, CNN (Nov. 1, 2018, 8:53 AM), https://www.cnn.com/2018/10/31/politics/donald-trump-immigration-paul-ryan-midterms/index.html; *see also* Philip Rucker, *Chilling Trump Video Attacks Bush for Calling Illegal Immigration 'Act of Love'*, WASH. POST (Aug. 31, 2015, 3:02 PM), https://www.washingtonpost.com/news/post-politics/wp/2015/08/31/chilling-trump-video-attacks-bush-for-calling-illegal-immigration-act-of-love/ (Trump ran a similarly racist ad in his 2016 Republican presidential primary campaign).

8. Bianca Quilantan & David Cohen, *Trump Tells Dem Congresswomen: Go Back Where You Came From*, POLITICO (Dec. 14, 2019, 9:03 PM), https://www.politico.com/story/2019/07/14/trump-congress-go-back-where-they-came-from-1415692. Trump has even used racist terms to describe the woman who served him as his secretary of the U.S. Department of Transportation. *See* Meridith McGraw, *The Private Angst Over Donald Trump's Racist Attacks on Elaine Chao Goes Public*, POLITICO (Jan. 25, 2023, 2:43 PM), https://www.politico.com/news/2023/01/25/elaine-chao-donald-trump-racist-attacks-00079478.

9. *See* Ashley Parker, Josh Dawsey & Robert Costa, *Miller and Kushner on a Potential Collision Course in Trump's Border Crisis*, WASH. POST (Apr. 10, 2019, 10:30 AM), https://www.

cutting legal immigration, rethinking the country's asylum policies, and implementing harsh measures to secure the southern border.[10] Even Homeland Security Secretary Kirstjen Nielsen – the public face of Trump's policy of separating migrant children from their parents at the U.S.-Mexico border – was deemed insufficiently tough on immigration and forced to resign.[11]

Miller's hostility to multiculturalism dates back to his youth. As a young conservative in liberal Santa Monica, Calif., Stephen Miller frequently clashed with his high school, often calling into a radio show to lambaste administrators for promoting multiculturalism, allowing Spanish-language morning announcements, and failing to require recitation of the Pledge of Allegiance.[12] Early in the Trump Administration, he played the "central role crafting the order imposing a 90-day ban on citizens of Iraq, Syria, Iran, Libya, Somalia, Sudan and Yemen from entering the United States[.]"[13] He has been described as obsessed with boosting deportations.[14]

COVID-19,[15] which Trump characterized as the "Chinese virus"[16] or "kung flu,"[17] became a pretextual reason for Miller to achieve his aims of blocking immigration, as he sought to use communicable diseases as an excuse to block immigration even before the COVID-19 pandemic.[18] In 2020, it was reported that Miller "long wanted" to use

washingtonpost.com/politics/miller-and-kushner-on-a-potential-collision-course-as-trumps-border-crisis-builds/2019/04/10/81f91530-5a45-11e9-a00e-050dc7b82693_story.html.

10. *See id.*

11. *See* Felicia Sonmez, *As Trump Pushes Kirstjen Nielsen Out the Door, Liberal Groups Try to Prevent a Soft Landing*, Wash. Post (Apr. 10, 2019, 6:36 PM), https://www.washingtonpost.com/politics/as-trump-pushes-kirstjen-nielsen-out-the-door-liberal-groups-try-to-prevent-a-soft-landing/2019/04/10/cc2fafce-5a54-11e9-9625-01d48d50ef75_story.html.

12. *See* Rosalin S. Helderman, *Stephen Miller: A Key Engineer for Trump's 'America First' Agenda*, Wash. Post (Feb. 11, 2017, 10:25 AM), https://www.washingtonpost.com/politics/stephen-miller-a-key-engineer-for-trumps-america-first-agenda/2017/02/11/a70cb3f0-e809-11e6-bf6f-301b6b443624_story.html.

13. *Id*.

14. *See* Nick Miroff & Josh Dawsey, *The Adviser Who Scripts Trump's Immigration Policy*, Wash. Post (Aug. 17, 2019), https://www.washingtonpost.com/graphics/2019/politics/stephen-miller-trump-immigration/.

15. *See, e.g.*, Bonnie Berkowitz et al., *What the Structure of the Coronavirus Can Tell Us*, Wash. Post (Mar. 23, 2020), https://www.washingtonpost.com/graphics/2020/health/coronavirus-sars-cov-2-structure/. The term COVID-19 is used in this article for the novel respiratory coronavirus that is often referred to in the media simply as a "coronavirus" but more technically is SARS-CoV-2.

16. Allyson Chiu, *Trump Has No Qualms About Calling Coronavirus the 'Chinese Virus.' That's a Dangerous Attitude, Experts Say.*, Wash. Post (Mar. 20, 2020, 7:22 AM), https://www.washingtonpost.com/nation/2020/03/20/coronavirus-trump-chinese-virus/.

17. David Nakamura, *With 'Kung Flu,' Trump Sparks Backlash over Racist Language—and a Rallying Cry for Supporters*, Wash. Post (June 24, 2020, 7:13 PM), https://www.washingtonpost.com/politics/with-kung-flu-trump-sparks-backlash-over-racist-language--and-a-rallying-cry-for-supporters/2020/06/24/485d151e-b620-11ea-aca5-ebb63d27e1ff_story.html.

18. Caitlin Dickerson & Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, N.Y. Times (May 3, 2020), https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html?smid=url-share.

the federal law that grants power to the surgeon general and president to block people from entering the United States when it is necessary to avert a "serious danger" posed by the presence of a communicable disease in foreign countries.[19] This law is referred to as Title 42.[20]

There can be no doubt that the U.S. has a problem with unauthorized entry on its southern border. In 2022, for example, the U.S. reported 2.2 million apprehensions of migrants entering the country compared with almost 1.7 million the year before, the previous record.[21] The burden of unlawful border crossings has been crushing for border communities like El Paso, Texas – a city that is welcoming to immigrants.[22] New York City, which has taken in undocumented immigrants, reportedly spent $366 million in 2022.[23] Indeed, by June 2023, New York City had spent $1.2 billion on migrants since the prior summer, a bill projected to reach $4.3 billion in a year, and was "housing more than 48,000 migrants across an array of hotels, dormitories, and makeshift shelters that now span 169 emergency sites."[24]

Yet our legal system must not be circumvented, and as the *Washington Post* editorialized, Title 42 was "a border-control tool masquerading as a public health order."[25] Congressional inertia on immigration reform cannot excuse such artifice.

This article examines Title 42 against the current immigration landscape in the U.S. It begins by outlining the history of Title 42 and explaining the efforts to end its usage under President Biden, which were, paradoxically, accompanied by efforts to expand it. It then details the

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19. *Id.*

20. 42 U.S.C. § 265 (2021). The law confers upon the Surgeon General the power to prohibit "the introduction of persons and property . . . for such period of time as he may deem necessary" into the United States if "the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country[.]" *Id.*

21. Jordan Fabian, *How Title 42 Is Complicating Biden's Border Policy*, BLOOMBERG (Nov. 16, 2022, 5:56 PM), https://www.bloomberg.com/news/articles/2022-11-16/how-a-border-surge-tests-biden-s-immigration-approach-quicktake.

22. *See* Simon Romero et. al., *El Paso, Long an Immigrant Haven, Is Tested by Spike in Arrivals*, N.Y. TIMES (Dec. 14, 2022), https://www.nytimes.com/2022/12/14/us/el-paso-migrants-title-42.html.

23. *See* Joe Anuta, *From Texas Border, New York Mayor Vows to Pressure U.S. Government over Migrants*, POLITICO (Jan. 15, 2023, 10:13 PM), https://www.politico.com/news/2023/01/15/eric-adams-new-york-migrants-conference-of-mayors-00078007; Joe Anuta, *New York Mayor: Cost of Asylum Seekers Could Hit $2B as Shelters Reach Capacity*, POLITICO (Jan. 13, 2023, 7:12 PM), https://www.politico.com/news/2023/01/13/nyc-cost-asylum-seekers-2b-00077885.

24. Nick Miroff & Joanna Slater, *New York City's Shelter System Stressed by Thousands of Migrants*, WASH. POST (June 20, 2023, 2:55 PM), https://www.washingtonpost.com/nation/2023/06/19/new-york-migrants-venezuelans-adams/.

25. Editorial, *Title 42 Is Indefensible. So Is Congress's Failure to Pass Immigration Reform.*, WASH. POST (May 2, 2022, 5:08 PM), https://www.washingtonpost.com/opinions/2022/05/02/title-42-congress-failure-pass-immigration-reform-indefensible/.

decades-long failure of Congress to substantively address immigration in contrast to its successes in the now-distant past. It assesses how politically toxic immigration demagoguery has become, with the invocation of Title 42 being but the latest symptom. Finally, it discusses how our immigration blockade is both immoral and economically self-defeating.

## I. The Pretextual Semi-Permanency Of Title 42

### *A. A Law Born During Wartime*

What we now know as Title 42 was part of a broad public health measure first enacted in 1944 during World War II to bolster the Public Health Service.[26] Its passage was uncontroversial, with Senator Thomas of Utah reporting during floor debate that "[t]here was not a single person who appeared against it in the hearings held in the House of Representatives or the hearing held in the Senate."[27] Thomas noted that "our boys are coming home from all parts of the world" and addressed the risk of tuberculosis from returning servicemen as well as those who contracted malaria and other sicknesses.[28] Similarly, in the House floor debate Representative Brown of Ohio anticipated "a greater health problem" requiring help from local health boards and communities as millions of servicemen, many carrying malaria and other tropical diseases, returned to civilian life.[29]

Based on this record, what we see in Title 42 does not appear to have been devised as the language of exclusionary *immigration* legislation. Instead, it was language largely aimed, through quarantine, to facilitate the safe *reintegration* of U.S. military returning from foreign service.[30]

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26. *See* Public Health Service Act of 1944, Pub. L. No. 78-410; Deepa Shivaram, *What to Know About Title 42, the Trump-era Policy Now Central to the Border Debate*, NPR (Apr. 24, 2022, 5:00 AM), https://www.npr.org/2022/04/24/1094070784/title-42-policy-meaning.

27. 90 Cong. Rec. 6486 (1944).

28. *Id.*

29. *Id.* at 4796.

30. This is not to suggest that the plain language of 42 U.S. Code §265 could not serve legitimate aims to protect the U.S. from contagions that might be prevalent elsewhere, though the transmissibility of COVID-19 might speak to the futility of that. For example, President Trump issued travel bans aimed at preventing COVID-19 spread, but the one for China was "riddled with exemptions that allowed tens of thousands of people who had been in China to enter the United States in the weeks after the ban." Michael D. Shear, *Trump Orders Lifting of Virus Travel Ban, but Biden Aides Vow to Block Move*, N.Y. Times (Jan. 18, 2021), https://www.nytimes.com/2021/01/18/us/politics/travel-ban-coronavirus-usa.html?searchResultPosition=3. And the ban on "travel from Europe did not go into effect until . . . the virus was well established in the United States." *See id.* The Biden Administration's implementation of a pre-departure negative test for travelers from China, amidst an explosion of cases in that country that began in December 2022, drew concern that it would be both stigmatizing and potentially ineffectual too – as there would be instances where "travelers who have visited China end up going to other countries and infecting others

To the extent exclusion was provided for, an assistant general counsel for what was then called the Federal Security Agency focused on venereal disease:

> In addition to the traditional authority to detain infected persons at points of entry into the United States, it gives a similar power, the existence of which had previously been in doubt, to apprehend, detain, and examine certain infected persons who are peculiarly likely to cause the interstate spread of disease or, in time of war, to infect the military forces or war workers. This power, which is similar to the familiar quarantine authority of State and local health officers, will not at present be exercised with respect to diseases other than the venereal diseases; but it furnishes a potentially important weapon against new infections which may be brought into the United States in the post-war period.[31]

Thus, at the time of the law's enactment, the regulatory agency in charge of its implementation does not appear to have contemplated that people no more or less at risk for a regrettably common respiratory illness could be *presumed* to be infected with it to a degree that might cause their immediate expulsion from the country.[32]

### *B. The COVID-19 Pandemic Didn't Fit Within Ambit of Title 42*

COVID-19 is materially different than contagions that might have served as a bar to U.S. entry under policies that predated Title 42, such

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there," then returned to the U.S. without needing to be tested. Kimmy Yam, *With New China Travel Restriction in Place, Asian Americans Urge Nuanced Caution*, NBC NEWS (Jan. 9, 2023, 6:17 PM), https://www.nbcnews.com/news/asian-america/new-china-travel-restriction-place-asian-americans-urge-nuanced-cautio-rcna64917. Yet, one could ask why Chinese immigrants were not flatly excluded by Title 42, given the fact that, as one editorial board described it, "Dishonesty about the true breadth of the pandemic in China constitutes a threat to public health worldwide." Editorial, *The World Needs China to Come Clean About its Covid Deaths*, WASH. POST (Jan. 16, 2023, 9:00 AM), https://www.washingtonpost.com/opinions/2023/01/16/china-covid-death-toll/. What made them less risky than, say, Haitians? The wholly arbitrary nature of exclusions was revealed by the fact that in November 2022, only "29 percent of all border crossers were expelled under Title 42, while the vast majority came from a long list of countries — including Colombia, Cuba, India, Nicaragua and Russia, among others — for which Title 42 does not apply." James Dobbins & Miriam Jordan, *Will Lifting Title 42 Cause a Border Crisis? It's Already Here*., N.Y. TIMES (Dec. 29, 2022), https://www.nytimes.com/2022/12/29/us/title-42-border-el-paso.html.

31. Alanson W. Wilcox, *The Public Health Service Act,* 1944 Soc. Sec. Bull. 15, 17 (Aug. 1944), https://www.ssa.gov/policy/docs/ssb/v7n8/v7n8p15.pdf (emphasis added); Pierre Bienaimé, *The Cure for Syphilis Was Developed as Part of the US Effort to Win World War II*, BUS. INSIDER (Dec. 8, 2014, 5:40 PM), https://www.businessinsider.com/the-cure-to-syphilis-was-discovered-as-part-of-the-us-effort-to-win-world-war-ii-2014-12. The cure for syphilis was not found until toward the end of WW II, and, quite apart from the risk of acquiring it, or other venereal diseases, while abroad, "[n]early five percent of draftees in 1942 had syphilis[.]" *Id.*

32. *See* Knvul Sheikh, *How Long Do Symptoms Last? When Should You Test? A Covid Timeline.*, N.Y. TIMES (May 17, 2022), https://www.nytimes.com/2022/04/08/well/covid-timeline-ba2.html?searchResultPosition=4. Even a person sick with COVID-19 is only presumed to be contagious for five days. *Id.*

as an 1891 law that provided for the exclusion of all "persons suffering from a loathsome or dangerous contagious disease," in order to prevent the ingress of immigrants potentially carrying yellow fever, cholera, and the plague.[33] Indeed, many anti-immigration Republicans have downplayed the seriousness of COVID-19, a popular position in the Republican base,[34] and engaged in misinformation about the virus, like Georgia Representative Marjorie Taylor Greene, who also "has introduced legislation to suspend all immigration into the United States for the next four years[.]"[35]

As Professor Ilya Somin notes when reading 42 U.S. Code § 265 literally:

> The text covers *'any* communicable disease' (emphasis added), which includes even such relatively minor dangers as the flu or the common cold. On this view, the CDC could order the expulsion of entrants into the United States from any country where the flu is prevalent during flu season, even though that disease is already present in the United States.[36]

This is a breathtakingly expansive view of the Centers for Disease Control and Prevention (CDC) authority and, in Professor Somin's view, an unlawful delegation of Congress's power over immigration policy, as it effectively "amounts to a claim of near-total control over both immigration policy and entry into the United States more generally."[37] It is hard to imagine how such a position of administrative absolutism is reconcilable with traditional conservatism. Indeed, Somin authored the amicus brief challenging Title 42 for the libertarian Cato Institute.[38] As he wrote of the federal government's exercise of power during the COVID-19 pandemic, "Republicans who might have trusted Donald

33. Sarah Rosen, "*Trump Got His Wall, it Is Called Title 42"; The Evolution and Illegality of Title 42's Implementation and its Impact on Immigrants Seeking Entry into the United States*, 14 Ne. U. L. Rev. 229, 237 (2022).

34. *See* Yasmeen Abutaleb et al., *For GOP Base, Battles over Coronavirus Vaccines, Closures are Still Fiery*, Wash. Post (Jan. 31, 2023, 7:39 PM), https://www.washingtonpost.com/politics/2023/01/31/gop-base-covid-mandate-battles/.

35. *See* Robert Draper, *The Problem of Marjorie Taylor Greene*, N.Y. Times (Oct. 24, 2022), https://www.nytimes.com/2022/10/17/magazine/marjorie-taylor-greene.html; Brittany Shamas, *Twitter Permanently Suspends Rep. Marjorie Taylor Greene's Personal Account over Covid-19 Misinformation*, Wash. Post (Jan. 22, 2022, 3:22 PM), https://www.washingtonpost.com/nation/2022/01/02/marjorie-taylor-greene-twitter-suspension/.

36. Ilya Somin, *Nondelegation Limits on COVID Emergency Powers: Lessons from the Eviction Moratorium and Title 42 Cases*, 15 N.Y.U. J. L. & Liberty, 658, 676 (2022).

37. *Id.* at 677.

38. *See* Brief *Amicus Curiae* of the Cato Institute in Support of Appellees, Huisha-Huisha v. Mayorkas, No. 21-5200 (D.C. Cir. filed Nov. 19, 2021).

Trump with such authority surely have good reason to fear how it might be used in the hands of a Democratic president — and vice versa."[39]

Yet, as 2022 ended, a bipartisan weaponization of Title 42 had occurred, as the *New York Times* reported, with the law used by "both the Trump and Biden administrations . . . as a tool to limit record numbers of migrants — often fleeing persecution and violence — from crossing into the country."[40]

What began as Stephen Miller's pretextual progeny, which he wanted to invoke to prevent the mumps and even the flu — before being "talked down by cabinet secretaries and lawyers" — had become supersized by the excuse of COVID-19.[41] Even Democrats, critical of it during the Trump Administration, used it "as a shield against accusations of being weak on border security[.]"[42]

When President Biden, in August 2021, announced he was keeping the order ostensibly because of a COVID-19 surge, critics of former President Trump said it was a transparent move to shut down virtually all immigration to the United States, an opportunity that before the pandemic, he and immigration hard-liners in his administration, like Stephen Miller, could only dream about.[43] Now, it had become President Biden's policy, too.

Biden's special envoy to Haiti resigned the next month over what he viewed as inhumane expulsions of Haitians under Title 42,[44] including a grotesque event in Del Rio, Texas, where U.S. Border Patrol "agents, wearing chaps and cowboy hats, maneuvered their horses to forcibly block and move the migrants, almost seeming to herd them. In at least one instance, they were heard taunting the migrants."[45]

Well over a year into his presidency, Biden had made no move to rescind the order despite pressure to do so.[46] Finally, in April 2022, the

39. Somin, *supra* note 36, at 696.

40. Zolan Kanno-Youngs, *'This Is Not About the Pandemic Anymore': Public Health Law Is Embraced as Border Band-Aid*, N.Y. TIMES (Dec. 28, 2022), https://www.nytimes.com/2022/12/28/us/politics/covid-title-42-border-migrants-biden.html?searchResultPosition=1.

41. *Id*.

42. *Id*.

43. *See* Clay Risen, *Biden's Challenge at the Border*, N.Y. TIMES (Aug. 10, 2021), https://www.nytimes.com/2021/08/10/us/politics/biden-border-challenge.html?searchResultPosition=6.

44. *See* Joshua Goodman et al., *US Special Envoy to Haiti Resigns over Migrant Expulsions*, ASSOCIATED PRESS (Sept. 24, 2021, 6:49 AM), https://apnews.com/article/haiti-envoy-resigns-migrants-border-texas8bdf813465adc48856eea352bd3bd6b5.

45. Alexandra Jaffe et. al., *White House Faces Bipartisan Backlash on Haitian Migrants*, ASSOCIATED PRESS (Sept. 22, 2021, 12:09 AM), https://apnews.com/article/donald-trump-immigration-united-states-health-coronavirus-pandemic-083b5ac02cc17a1ce06b6ac0048e99ec.

46. *See* Editorial, *It's Time to End the Pandemic Emergency at the Border*, N.Y. TIMES (Nov. 13, 2021), https://www.nytimes.com/2021/11/13/opinion/immigration-trump-biden-covid.html (noting the Biden Administration's "continued defense of the policy has horrified activists, international agencies and even some officials serving in the administration"); Myah Ward, *Biden Administration*

CDC announced it would be ending the order, for which no concrete substantiation had ever existed — "unlike with other public health measures put in place during the pandemic, the CDC never publicly disclosed scientific data that showed that undocumented migrants crossing the border were a major vector for the coronavirus."[47] Indeed, one of the pretexts stated in the regulatory invocation of Title 42 by the Trump Administration was long since not true: "Unfortunately, at this time, there is no vaccine that can prevent infection with COVID-19, nor are there therapeutics for those who become infected."[48]

Some states immediately filed suit to block the rescission of Title 42 enforcement, earning an early restraining order from a Trump-appointed U.S. District Court judge.[49] Another ruling from the judge maintaining Title 42 came the next month, with 24 states now party to the suit seeking to maintain it.[50] The ruling reportedly left "some Biden aides breathing a sigh of relief."[51]

As a *New York Times* editorial noted in October 2022, invocation of Title 42 was erratic: "After allowing tens of thousands of migrants

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*Resumes Fast-Track Deportation Flights*, Politico (July 30, 2021, 6:33 PM), https://www.politico.com/news/2021/07/30/biden-resumes-deportation-flights-501881 ("The Biden administration has continued to use the public health order, known as Title 42, which was invoked by former President Donald Trump at the start of the pandemic to expel migrants without allowing them to seek asylum.").

47. Eileen Sullivan, *C.D.C. Confirms It Will Lift Public Health Order Restricting Immigration*, N.Y. Times (Apr. 1, 2022), https://www.nytimes.com/2022/04/01/us/politics/cdc-immigration-title-42.html.

48. Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559, 16561 (Mar. 24, 2020) (codified at 42 C.F.R. pt. 71). *See* Katie Thomas et al., *With F.D.A. Approval, Pfizer Will Ship Millions of Vaccine Doses Immediately.*, N.Y. Times (Dec. 11, 2020), https://www.nytimes.com/2020/12/11/world/millions-of-pfizer-vaccine-doses-to-be-shipped-immediately-after-fda-approval.html?searchResultPosition=8. COVID-19 vaccines were approved for use in the U.S. beginning in December 2020. *See* Michael Levenson, *F.D.A. Approves Remdesivir as First Drug to Treat Covid-19*, N.Y. Times (Oct. 22, 2020), https://www.nytimes.com/2020/10/22/us/remdesivir-fda-approved.html?searchResultPosition=4. The first therapeutic to treat the virus was fully approved for use in the U.S. two months prior. *Id.* Far from COVID-19 spread being attributable to immigration, the U.S. has done such a terrible job controlling COVID-19 that "[w]e just seemed to declare that when it comes to Covid mortality, we're number one, and that's a title that we're not going to relinquish to any other country." Melody Schreiber, *'People Aren't Taking This Seriously': Experts Say US Covid Surge Is Big Risk*, Guardian (Jan. 15, 2023, 5:00 AM), https://www.theguardian.com/world/2023/jan/15/covid-19-coronavirus-us-surge-complacency. It was not helpful that President Biden prematurely stated the pandemic was over in September 2022. *See* Adam Cancryn & Krista Mahr, *Biden Declared the Pandemic 'Over.' His Covid Team Says It's More Complicated.*, Politico (Sept. 19, 2022, 8:12 PM), https://www.politico.com/news/2022/09/19/biden-pandemic-over-covid-team-response-00057649.

49. *See* Miriam Jordan & Eileen Sullivan, *Judge Says Migrants Must Still Be Denied Entry for Health Reasons*, N.Y. Times (Apr. 25, 2022), https://www.nytimes.com/2022/04/25/us/title-42-migrants-biden-border.html?searchResultPosition=4.

50. *See generally* Louisiana v. Ctrs. for Disease Control & Prevention, 603 F. Supp. 3d 406 (W.D. La. 2022).

51. Myah Ward & Jonathan Lemire, *Judge Blocks Biden Administration from Lifting Title 42 Border Policy*, Politico (May 20, 2022, 6:05 PM), https://www.politico.com/news/2022/05/20/judge-blocks-biden-administration-from-lifting-title-42-border-policy-00034195.

from Venezuela to enter the country in recent years, the Biden administration added Venezuela to the list of Title 42 countries, effectively barring new claims."[52]

However, in November 2022, a Clinton-appointed U.S. District Court judge declared the application of Title 42 illegal and a violation of administrative procedure, noting the policy was not "updated to align with the present state of the pandemic, which includes widely available vaccines, treatments and an increase in travel in the United States."[53]

With a political—not public health—argument, Republican states sought to get the U.S. Supreme Court to maintain Title 42. This was illustrated by a statement from Arizona Attorney General Mark Brnovich (R) announcing an emergency request to the Supreme Court: "Getting rid of Title 42 will recklessly and needlessly endanger more Americans and migrants by exacerbating the catastrophe that is occurring at our southern border."[54]

In December 2022, the Supreme Court, in a 5-4 decision on a "shadow docket,"[55] maintained Title 42 at least temporarily.[56] As the *Washington Post* editorialized, "Republicans made no attempt to justify Title 42, a public health measure, on public health grounds. Yet in keeping it in place while the GOP officials continue to press their appeal, the Supreme Court ignored all that, acting more as lawmakers than as judges."[57]

In dissent, Justice Gorsuch, joined by Justice Jackson, wrote that "the current border crisis is not a COVID crisis. And courts should not be in the business of perpetuating administrative edicts designed for one emergency only because elected officials have failed to address

52. Editorial, *A Compromise on Immigration Is Possible. This Bill Could Make It Happen.*, N.Y. TIMES (Oct. 28, 2022), https://www.nytimes.com/2022/10/28/opinion/asylum-immigration-biden.html?searchResultPosition=4.

53. Myah Ward & Josh Gerstein, *Judge Blocks Title 42 Limits at Border*, POLITICO, https://www.politico.com/news/2022/11/15/immigration-judge-blocks-title-42-limits-00067083 (last updated Nov. 15, 2022, 10:22 PM); *see also* Huisha-Huisha v. Mayorkas, 642 F. Supp. 3d 1, 28 (D.D.C. 2022) (finding "the Title 42 policy to be arbitrary and capricious in violation of the Administrative Procedure Act").

54. Ann E. Marimow & Maria Sacchetti, *Chief Justice Temporarily Keeps Pandemic-era Title 42 Border Policy in Place*, WASH. POST (Dec. 19, 2022, 2:30 PM) https://www.washingtonpost.com/politics/2022/12/19/title-42-supreme-court-border-el-paso/.

55. Editorial, *Supreme Court (Dis)order: Title 42 Order Preserves Bad Policy and Creates Chaos*, N.Y. DAILY NEWS (Dec. 20, 2022, 4:00 AM), https://www.nydailynews.com/2022/12/20/supreme-court-disorder-title-42-order-preserves-bad-policy-and-creates-chaos/ ("The shadow docket strikes again, as the Supreme Court, with a one-page order devoid of any legal reasoning, has blocked the expected termination of the disastrous Title 42 COVID public health exclusion policy slated to happen at midnight tonight.").

56. *See generally* Arizona v. Mayorkas, 143 S. Ct. 1312 (2022).

57. Editorial, *With Latest Title 42 Ruling, Supreme Court Majority Makes a Mockery of the Law*, WASH. POST (Dec. 28, 2022, 4:35 PM), https://www.washingtonpost.com/opinions/2022/12/28/title-42-supreme-court-saga/.

a different emergency. We are a court of law, not policymakers of last resort."[58]

As columnist Catherine Rampell wrote in the *Washington Post*, "Biden officials seem to have seized the opportunity to make yet more immigrant groups subject to automatic expulsions."[59] Even while contesting the legality of Title 42's continued usage,[60] the Biden Administration sought to broaden its reach for reasons of pure expediency, as one article noted: "Deportation, under a statute known as Title 8, is a more formal and drawn out process that can lead to long bars on U.S. re-entry as compared to expulsions that can take just hours under Title 42."[61]

Indeed, prior to his first trip as president to the southern border, Biden borrowed another Trump policy. One automatically denying asylum to "migrants who have traveled through Mexico without seeking refuge in that country first" — an idea condemned by immigration advocates and Mexico alike.[62]

Biden's vacillating position on Title 42 drew heat from a key Senate Democrat. Sen. Robert Menendez, D-N.J., who had led efforts to reform the U.S. immigration system, said in a statement he was "deeply

58. *Mayorkas*, 143 S. Ct. at 1314 (Gorsuch, J., concurring). Adding to the point made by Justice Gorsuch, it is worth noting that, although invocation of Title 42 is ostensibly based on COVID-19 risk, policymakers in both parties have not shown any sustained urgency in substantively combating this disease that has killed over 1 million in the U.S. *See* Editorial, *Congress Has Not Stepped Up to Fight Covid-19—or the Next Pandemic*, Wash. Post (Jan. 8, 2023, 7:00 AM), https://www.washingtonpost.com/opinions/2023/01/08/covid-19-pandemic-congress-funding/.

59. Catherine Rampell, *Biden Says He Wants to Dismantle Title 42. So Why Has He Expanded It?*, Wash. Post (Dec. 29, 2022, 6:33 PM), https://www.washingtonpost.com/opinions/2022/12/29/title42-migrant-asylum-biden-solutions/.

60. Rebecca Santana & Elliot Spagat, *US Supreme Court Keeps Asylum Limits in Place for Now*, Associated Press (Dec. 27, 2022, 9:06 PM), https://apnews.com/article/title-42-immigration-limits-supreme-court-updates-0494c30834fad66ce9c6057ea1605d89.

61. Ted Hesson & Mica Rosenberg, *U.S. Plans to Expand Border Expulsions for Cubans, Nicaraguans and Haitians*, Reuters (Dec. 28, 2022, 4:17 PM), https://www.reuters.com/world/us/us-plans-expand-border-expulsions-cubans-nicaraguans-haitians-sources-2022-12-28/. President Biden's enthusiasm for deportations doesn't extend to all nationalities. *See* Phelim Kine, *Biden Grants Hong Kongers in the U.S. a 2-year Deportation Reprieve*, Politico (Jan. 26, 2023, 8:31 AM), https://www.politico.com/news/2023/01/26/biden-hong-kong-deportation-reprieve-00079585.

62. Michael D. Shear & Edgar Sandoval, *Biden Visits Southern Border Amid Fresh Crackdown on Migrants*, N.Y. Times (Feb. 9, 2023, 1:09 PM), https://www.nytimes.com/2023/01/08/us/politics/biden-southern-border-immigration.html. Homeland Security Secretary Alejandro Mayorkas unsuccessfully strained to differentiate the Biden and Trump policies: "Mayorkas . . . looked to draw a distinction between a new regulation proposed by the Department of Justice last week and a similar, Trump-era rule known as a 'transit ban.' 'It's not a ban at all,' Mayorkas said of the proposal, which—similar to the Trump-era policy—would require migrants to first be turned away from safe harbor in another country before applying for asylum in the United States." Olivia Olander, *Biden Tours El Paso Border Sites*, Politico (Jan. 8, 2022, 6:53 PM), https://www.politico.com/news/2023/01/08/biden-tours-el-paso-border-00076935/. This distinction without a difference, embracing a policy Biden condemned as a candidate, was not persuasive to many congressional Democrats, including those identifying as Hispanic or Latino. *See* Eileen Sullivan, *Some Congressional Democrats Push Back on Biden's Immigration Policies*, N.Y. Times (Jan. 26, 2023), https://www.nytimes.com/2023/01/26/us/politics/democrats-biden-border-immigration.html.

disturbed" by the policy, calling it "a disastrous and inhumane relic of the Trump administration's racist immigration agenda[.]"[63]

It is evident how incomprehensible Biden's position on Title 42 had become because, when he announced that the declaration of a national public health emergency due to COVID-19 would end on May 11, 2023, his administration walked back its statement that this would stop utilization of Title 42 as well.[64] It then attacked *Republicans* for two bills "attempting to end the COVID emergencies immediately. The administration decried such an abrupt end, proclaiming that enacting both bills 'would lift Title 42 immediately, and result in a substantial additional inflow of migrants at the Southwest.'"[65]

## II. Congressional Failure To Address Immigration

The last time a comprehensive immigration deal seemed within reach in Congress was in 2013 when the bipartisan so-called "Gang of Eight senators" unveiled a proposal that, according to reports, sought "to overhaul the legal immigration system as well as create a pathway to citizenship for the nation's roughly 11 million illegal immigrants" – an accommodation to be accompanied by "stricter border enforcement measures and new rules ensuring immigrants have left the country in compliance with their visas."[66]

The proposal marked the first real chance at reform since a proposal from President George W. Bush failed in 2007.[67] Prior to that, one

63. Julia Ainsley & Peter Nicholas, *Biden Admin Will Block More Nicaraguans, Cubans, Venezuelans, and Haitians at Border but Also Open More Legal Pathways*, NBC News (Jan. 5, 2023, 1:16 PM), https://www.nbcnews.com/politics/immigration/title-42-block-nicaraguans-cubans-haitians-rcna64418. Following the 2022 election Menendez had some new company in his advocacy for humane immigration policy. *See* Silvia Foster-Frau, *New Liberal Latino Lawmakers Are Preparing to Challenge Status Quo*, Wash. Post (Jan. 2, 2023, 6 AM), https://www.washingtonpost.com/nation/2023/01/02/record-latino-congress/. However, Menendez, as Senate Foreign Relations Committee chair, refused to consider easing hardline economic sanctions imposed under President Trump against Cuba and Venezuela, which contributed to the mass exodus of migrants from those countries. *See* John Hudson, *To Lessen Border Surge, Democrats Urge Biden to End Trump's Venezuela Policy*, Wash. Post (May 10, 2023, 5:00 AM), https://www.washingtonpost.com/national-security/2023/05/10/biden-border-venezuela-sanctions/.

64. *See* Maya Ward, *White House Struggles to Explain the Fate of Title 42*, Politico (Feb. 6, 2023, 3:09 PM), https://www.politico.com/news/2023/02/06/public-health-emerdency-title-42-00081390.

65. *See id*.

66. Manu Raju, *Senate Group Reaches Immigration Deal*, Politico (Jan. 28, 2013, 12:01 AM), https://www.politico.com/story/2013/01/senate-group-reaches-immigration-deal-086793.

67. *See* Robert Pear & Carl Hulse, *Immigrant Bill Dies in Senate; Defeat for Bush*, N.Y. Times (June 29, 2007), https://www.nytimes.com/2007/06/29/washington/29immig.html?searchResultPosition=9. It was reported that "Nearly one-third of Senate Democrats voted, in effect, to block action on the bill" and, despite the fact that "Bush placed telephone calls to lawmakers throughout the morning" of the vote, "members of his party abandoned him in droves, with just 12 of the 49 Senate Republicans sticking by him on the important procedural vote that determined the fate of the bill." *Id.* Within six weeks of this setback, Bush had moved on to ramp up efforts to deter undocumented immigration. *See* Robert Pear, *Bush Plans Immigration*

must look to the 1990 Immigration Act signed by his father,[68] which passed overwhelmingly. The House approved the immigration bill in the House by a vote of 264 to 118, and the Senate vote passed 89 to 8.[69] It was reported that "[t]he most notable feature of the bill is that it requires the State Department to admit more immigrants with job skills needed in the United States, a step long favored by free-market economists."[70] And "total immigration to the United States would initially increase forty percent, to 700,000 from the current level of about 500,000. The ceiling would drop to 675,000 in 1995."[71] The 1990 Immigration Act, authored by Massachusetts Senator Ted Kennedy, a Democrat, has been described as "the broadest revision of U.S. immigration laws in more than a half-century."[72]

Kennedy was building on some momentum. Just four years prior, the Immigration Reform and Control Act of 1986,[73] signed into law by President Reagan in November 1986, granted amnesty to undocumented immigrants who had continuously resided in the U.S. since January 1, 1982, in a continual "unlawful status."[74] A pathway to citizenship was then laid out:

> [Beginning in May 1987], illegal aliens will have one year in which to seek legal status. They would first become lawful temporary residents. After 18 months in that status, they could become permanent residents if they demonstrated a "minimal understanding" of the English language and some knowledge of the history and government of the United States.
>
> After five years as permanent residents, aliens may apply for United States citizenship.[75]

The Immigration Reform and Control Act of 1986's chief Senate sponsor was a Republican, Wyoming Senator Alan K. Simpson.[76] Reagan's role was not without controversy, as his administration took a

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*Crackdown*, N.Y. Times (Aug. 10, 2007), https://www.nytimes.com/2007/08/10/washington/10immig.html?searchResultPosition=6.

68. *See* Immigration Act of 1990, Pub. L. No. 101-649.

69. *See* Robert Pear, *Major Immigration Bill is Sent to Bush*, N.Y. Times (Oct. 29, 1990), https://www.nytimes.com/1990/10/29/us/major-immigration-bill-is-sent-to-bush.html.

70. *Id*.

71. *Id*.

72. Andrew Glass, *Bush Signs Immigration Reform Statute into Law, Nov. 29, 1990*, Politico (Nov. 29, 2018, 12:03 AM), https://www.politico.com/story/2018/11/29/bush-immigration-reform-1990-1014141.

73. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603.

74. *See* Robert Pear, *President Signs Landmark Bill on Immigration*, N.Y. Times (Nov. 7, 1986), https://www.nytimes.com/1986/11/07/us/president-signs-landmark-bill-on-immigration.html.

75. *Id*.

76. *See id.*

different view than the bill's sponsors of the new law's job protections for legal immigrants, based upon a "new practice of issuing detailed policy statements when the President signs a bill."[77] Yet the administrative implementation was generally lenient for those undocumented immigrants seeking legal status.[78]

No such success occurred in 2013. After the Gang of Eight effort failed, receiving sixty-eight votes in the Senate before being killed by House Republican hardliners,[79] its Republican proponents began to disavow it, including Republican Florida Senator Marco Rubio, about whom it was reported, in 2016, that "since the reform effort ultimately failed due to heavy conservative backlash, Rubio has made every effort to wash his hands of the bill."[80]

By 2021, Rubio was joined in opposition to comprehensive immigration reform by another Republican Gang of Eight member, South Carolina Senator Lindsey Graham.[81] It was doubted that a single Senate Republican would vote for a plan put forth by President Biden, and the message from their leadership was hostile: "Senate Minority Leader Mitch McConnell, R-Ky., tore into Biden's plan . . . calling it 'a massive proposal for blanket amnesty that would gut enforcement of American laws while creating huge new incentives for people to rush here illegally at the same time.'"[82]

At the close of 2022, it was reported that "Democrats will once again relinquish a House majority without delivering on immigration reform" as the final year for the 117th Congress had featured "Democrats running from the immigration and border issue."[83] Instead, Democrats drew ire from their base for the perception that they were

77. Robert Pear, *Immigration Law Set Off Dispute over Job Rights for Legal Aliens*, N.Y. TIMES (Nov. 23, 1986), https://www.nytimes.com/1986/11/23/us/immigration-law-set-off-dispute-over-job-rights-for-legal-aliens.html. Under the law, employers began being required to verify citizenship. *See* Robert Pear, *Immigration Rules to Ask New Proof from Job Seekers*, N.Y. TIMES (Jan. 20, 1987), https://www.nytimes.com/1987/01/20/world/immigration-rules-to-ask-new-proof-from-job-seekers.html.

78. *See* Robert Pear, *U.S. Issues Rules Making It Easier for Aliens to Obtain Legal Status*, N.Y. TIMES (May 1, 1987), https://www.nytimes.com/1987/05/01/us/us-issues-rules-making-it-easier-for-aliens-to-obtain-legal-status.html ("Linda J. Wong, a lawyer with the Mexican American Legal Defense and Educational Fund, welcomed the change in policy, saying, 'It represents a significant step forward for the I.N.S.'").

79. *See* Dean DeChiaro, *On Immigration, McCain Leaves a Roadmap*, CQ ROLL CALL (Aug. 27, 2018, 2:46 PM), https://rollcall.com/2018/08/27/on-immigration-mccain-leaves-a-roadmap/.

80. *Rubio: Gang of 8 Bill Never Intended to Become Law*, NBC NEWS (Feb. 15, 2016, 1:20 PM), https://www.nbcnews.com/politics/2016-election/rubio-gang-8-bill-never-intended-become-law-n518936.

81. *See* Sahil Kapur, *Senate Republicans Throw Cold Water on Biden's Immigration Proposal*, NBC NEWS (Jan. 21, 2021, 7:12 PM), https://www.nbcnews.com/politics/immigration/senate-republicans-throw-cold-water-biden-s-immigration-proposal-n1255232.

82. *Id*.

83. Rafael Bernal, *Democratic Congress Was Disappointment for Immigration Activists*, THE HILL (Dec. 30, 2022, 6:00 AM), https://thehill.com/latino/3786946-democratic-congress-was-disappointment-for-immigration-activists/.

playing into Republican messaging on border security.[84] In fact, eight Democratic senators, along with Independent Arizona Senator Kyrsten Sinema, voted in December 2022 to try to continue Title 42 expulsions.[85]

Even a rare House-passed immigration bill that "would have protected immigrants who served in the U.S. military from deportation and made it easier for those who were deported to return" was killed in the Senate.[86] Given the Senate filibuster threat – a framework advanced by two senators, North Carolina Senator Thom Tillis (R) and Senator Sinema – failed even to make it into bill form to "put roughly 2 million undocumented immigrants brought to the country as children, known as Dreamers, on a path to citizenship in exchange for heightened border security measures."[87]

The only small immigration accomplishment in the first two years of the Biden Administration came when it sought "to reverse a Trump-era initiative that requires asylum seekers to remain in Mexico while their cases are reviewed in U.S. courts"—a policy known as "Remain in Mexico."[88] This rescission drew litigation from conservative states, which enjoyed success until a five-to-four decision from the U.S. Supreme Court upheld the administration's position.[89]

The Court's majority found that blocking the rescission of the policy would, among other things, interfere with foreign policy and impose "a significant burden upon the Executive's ability to conduct diplomatic

84. Sabrina Rodriguez, *Border Visit Backfires on Vulnerable Senate Dem*, Politico (Apr. 24, 2022, 7:30 AM), https://www.politico.com/news/2022/04/24/swing-state-senate-dems-border-visit-enrages-left-00027355.

85. *See* Aris Folley, *Democrats Try to Find Cover on Title 42*, The Hill (Dec. 22, 2022, 12:41 PM), https://thehill.com/policy/finance/3785278-democrats-try-to-find-cover-on-title-42/. Republicans risk alienating a significant Democratic voting bloc. *See, e.g.*, Natasha Korecki, *Republicans Struggle in the Southwest as Latino Voters Stick with Democrats*, NBC News (Dec. 11, 2022, 7:00 AM), https://www.nbcnews.com/politics/2022-election/latino-voters-stuck-democrats-southwest-2022-rcna58260.

86. Andrea Castillo, *Immigration Reformers' Hopes Dashed as Senate Fails to Act*, L.A. Times (Dec. 22, 2022, 12:18 PM), https://www.latimes.com/politics/story/2022-12-22/immigration-reform-hopes-all-but-dashed-as-congress-nears-end-of-session.

87. Caroline Coudriet & Suzanne Monyak, *Immigration Deal for 'Dreamers' Appears to Run out of Time*, Roll Call (Dec. 15, 2022, 5:52 PM), https://rollcall.com/2022/12/15/immigration-deal-for-dreamers-appears-to-run-out-of-time/. In June 2012, President Barack Obama's Deferred Action for Childhood Arrivals program "was intended as a stopgap measure to protect some of the nation's most vulnerable immigrants—young people who were brought to the country as children and have grown up essentially as Americans—until Congress could agree on a comprehensive immigration overhaul or, at the least, pass a bill to offer them a path to citizenship." Miriam Jordan, *A Decade After DACA, the Rise of a New Generation of Undocumented Students*, N.Y. Times (June 16, 2022), https://www.nytimes.com/2022/06/15/us/daca-dreamers-immigrationreform. html. DACA no longer accepts applications as it "has remained mired in legal battles since President Donald J. Trump tried to quash the program in 2017." *Id*.

88. Robert Barnes, *Supreme Court Clears Biden to end Trump's 'Remain in Mexico' Policy*, Wash. Post (June 30, 2022, 6:37 PM), https://www.washingtonpost.com/politics/2022/06/30/supreme-court-remain-in-mexico/.

89. *See id.*

relations with Mexico."[90] The Court also found that the secretary of the U.S. Department of Homeland Security was not required to return illegal border-crossers because the law states that he "*may*" return them, which confers "a *discretionary* authority."[91]

It was a rare success for those supporting rational immigration policy, as Fernando García, executive director of the Border Network for Human Rights based in El Paso, noted: "This decision was long overdue, and it is shocking that the Supreme Court waited until today to determine the danger that migrants have been subjected to since Trump enacted this deadly policy."[92]

However, despite the majority opinion, on remand the Trump-appointed U.S. District Court judge stonewalled even the achievement of this minor victory for discretionary immigration authority.[93]

Vacillating presidential leadership has not helped Congress move forward. By early 2022, it was reported that turmoil over immigration policies had resulted in an exodus of aides to President Biden frustrated by repeated fights with some of the president's most senior advisers over whether to lift Trump-era policies.[94]

In early 2023—in what the *New York Times* described as "a stark reversal" – President Biden, with the 2024 election approaching, reportedly considered reviving migrant family detentions despite having "campaigned against the Trump administration's use of family detention."[95] The calculation appeared to show that pro-immigration Democrats would support him anyway, despite a joint statement of disapproval from the Congressional Progressive Caucus, the Congressional Asian Pacific American Caucus, and the Congressional Hispanic Caucus.[96]

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90. Biden v. Texas, 142 S. Ct. 2528, 2543 (2022).

91. *Id*. at 2541 (quoting 8 U.S.C. § 1225(b)(2)(C)).

92. Uriel J. García, *Supreme Court Rules Biden Administration Can End "Remain in Mexico" Policy, Sending Case back to a Texas Court*, TEX. TRIB. (June 30, 2022, 6:00 PM), https://www.texastribune.org/2022/06/29/supreme-court-migrant-protection-protocols-remain-mexico-biden/.

93. *See* Kelsey Ables, *U.S. Judge Halts Biden Attempt to End 'Remain in Mexico' Policy*, WASH. POST (Dec. 16, 2022, 3:43 AM), https://www.washingtonpost.com/nation/2022/12/15/remain-in-mexico-policy-immigration-texas-judge/. The judge has been a favorite for forum-shopping conservatives, as he handles ninety-five percent of all civil cases brought in Amarillo, Texas. *See* Tierney Sneed, *Why Texas Is a Legal Graveyard for Biden Policies*, CNN (Mar. 3, 2022, 5:01 AM), https://www.cnn.com/2022/03/03/politics/texas-biden-court-losses-paxton-bush/index.html.

94. *See* Zolan Kanno-Youngs, Michael D. Shear & Eileen Sullivan, *Disagreement and Delay: How Infighting Over the Border Divided the White House*, N.Y. TIMES (Apr. 9, 2022), https://www.nytimes.com/2022/04/09/us/politics/biden-border-immigration.html.

95. Eileen Sullivan & Zolan Kanno-Youngs, *U.S. Is Said to Consider Reinstating Detention of Migrant Families*, N.Y. TIMES (Mar. 6, 2023), https://www.nytimes.com/2023/03/06/us/politics/biden-immigration-family-detention.html.

96. *See* Jonathan Lemire & Daniella Diaz, *Here Dems Are, Stuck in the Middle with Biden*, POLITICO (Mar. 17, 2023, 5:30 AM), https://www.politico.com/news/2023/03/17/biden-republicans-2024-election-strategy-00087562.

Democrats were reportedly frustrated that Biden, by unilaterally shifting the conversation to the right, was removing any room to negotiate with Republicans.[97] Even the four Hispanic Senate Democrats felt shut out of the administration's maneuvering.[98]

But this was the same as it ever was.[99] Lest all blame for the political impasse on immigration falls upon Republicans, it must be noted that Senate Democrats were key to killing the 2007 immigration bill supported by President Bush, which had as its "chief Democratic architect" the late Senator Ted Kennedy.[100] Under President Obama, a massive family detention facility in Texas drew censure from immigration advocates: "'It is inhumane to house young mothers with children in restrictive detention facilities as if they are criminals,' Bishop Eusebio Elizondo of Seattle, the chairman of the United States Conference of Catholic Bishops' Committee on Migration, said[.]"[101]

Under President Biden, bureaucratic hurdles were making it very challenging for legitimate asylum seekers.[102] In the opinion of Aaron Reichlin-Melnick of the American Immigration Council, Biden's policies had "created essentially an asylum Ticketmaster because there are far more people seeking appointments than there are appointments."[103] In fact, the end of Title 42 did not bring the flood of migrants feared by lawmakers of both parties that had supported the policy, in part because

97. *See* Courtney Subramanian & Hamed Aleaziz, *Top Democrats Warn Biden: Don't Restart Family Detentions*, L.A. TIMES (Mar. 26, 2023, 2:37 PM), https://www.latimes.com/politics/story/2023-03-26/top-democrats-warn-biden-dont-restart-family-detentions.

98. *See* Suzanne Monyak, *Biden Immigration Discussions ile Hispanic Democratic Lawmakers*, ROLL CALL (Mar. 8, 2023, 8:48 AM), https://rollcall.com/2023/03/08/biden-immigration-discussions-rile-hispanic-democratic-lawmakers/.

99. Will Weissert & Adriana Gomez Licon, *Immigration Reform Stalled Decade After Gang of 8's Big Push*, ASSOCIATED PRESS (Apr. 3, 2023, 8:09 AM), https://apnews.com/article/immigration-asylum-trump-biden-gang-of-eight-3d8007e72928665b66d8648be0e3e31f ("Democrats have spent the last decade vacillating between stiffer border restrictions and efforts to soften and humanize immigration policy — exposing deep rifts on how best to address broader problems."). Polling has found that "[b]oth parties get low marks for how they are handling immigration, but Democrats face greater criticism because voters don't know where the party falls on the issue." Myah Ward, *Biden Is Ignoring Immigration Issues, Voters Say in Poll*, POLITICO (Apr. 19, 2023, 10:12 AM), https://www.politico.com/news/2023/04/19/immigration-poll-title-42-biden-00092684.

100. *See* Pear & Hulse, *supra* note 67 (reporting that "[n]early one-third of Senate Democrats voted, in effect, to block action on the bill.").

101. Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html. Obama's immigration policies haunted his former vice president in his own 2020 presidential bid. *See* Laura Barrón-López & Alex Thompson, *Biden Under Fire for Mass Deportations Under Obama*, POLITICO (July 12, 2019, 5:03 AM), https://www.politico.com/story/2019/07/12/biden-immigration-2020-1411691.

102. *See* Eileen Sullivan & Steve Fisher, *At the End of a Hard Journey, Migrants Face Another: Navigating Bureaucracy*, N.Y. TIMES (Mar. 10, 2023), https://www.nytimes.com/2023/03/10/us/politics/migrants-asylum-biden-mexico.html.

103. Isaac Chotiner, *Are Biden's Immigration Policies Stuck in the Trump Era?*, NEW YORKER (Mar. 2, 2023), https://www.newyorker.com/news/q-and-a/are-bidens-immigration-policies-stuck-in-the-trump-era.

the Biden Administration had made it almost impossible to seek asylum through a glitchy U.S. Customs and Border Patrol mobile phone application:

> Migrants must vie for the 1,000 daily appointments available through CBP's new app — a difficult feat for many without smartphones or strong internet connections. And at the U.S. border, asylum seekers must demonstrate that they sought protection somewhere else if they passed through other countries on their way to the United States.[104]

Moreover, as the *Washington Post* reported, with Title 42 ending, "the consequences for entering illegally are stiffer."[105] Under Title 42, those returned to Mexico could try to reenter the U.S. without criminal penalty, but "[n]ow, as before the pandemic, migrants deported after crossing the border face a five-year ban from entering the U.S. again, with the possibility of jail time if they are caught doing so."[106] To put it plainly, as did another article: "Immigration experts, former administration officials, and lawyers working with migrants on the ground, note that the Biden administration's policies are more punitive than Title 42."[107]

A former top immigration adviser to Biden accused the president of "resurrecting a policy that 'normalizes the white nationalist belief that asylum seekers from certain countries are less deserving of humanitarian protections.'"[108] It is worth pointing out that the Biden Administration very quickly admitted 100,000 refugees from Ukraine following Russia's war against Ukraine,[109] with it reported that by March 2023,

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104. Arelis R. Hernández & Danielle Villasana, *End of Title 42 Changes Calculus of Migrants at U.S.-Mexico Border*, WASH. POST (June 1, 2023, 1:46 PM), https://www.washingtonpost.com/nation/2023/06/01/immigration-border-title-42-asylum-seekers/. The mobile phone application created for asylum-seekers to use relied upon them finding a WiFi signal in border encampments, often impossible, and the Biden Administration refused to let families apply, instead "enforcing a rule requiring each child to register individually." Arelis R. Hernández, *Desperate Migrants Seeking Asylum Face a New Hurdle: Technology*, WASH. POST (Mar. 11, 2023, 6:00 AM), https://www.washingtonpost.com/nation/2023/03/11/asylum-seekers-mexico-border-app/.

105. Hernández & Villasana, *supra* note 104.

106. *Id*.

107. Myah Ward, *Biden Officials Are Publicly Touting the Lack of a Migrant Surge. Privately, They're Scared.*, POLITICO (June 12, 2023, 2:12 PM), https://www.politico.com/news/2023/06/12/biden-officials-fear-migrant-surge-after-title-42-00101549.

108. Myah Ward, *Biden to Replace Trump Migration Policy with Trump-esque Asylum Policy*, POLITICO (Feb. 21, 2023, 6:39 PM), https://www.politico.com/news/2023/02/21/biden-trump-migration-policy-asylum-00083873. By embracing Trump's policies, Biden—who had not even enacted promised protections for "those fleeing gang or domestic violence"—clearly decided his past promises were less politically salable with the electorate. Aaron Blake, *Biden's Big Shift on Asylum*, WASH. POST (Feb. 23, 2023, 4:07 PM), https://www.washingtonpost.com/politics/2023/02/23/biden-immigration-asylum/.

109. *See* Editorial, *The U.S. Has Admitted 100,000 Ukrainian Migrants. It Must Keep Going.*, WASH. POST (July 30, 2022, 7:00 AM), https://www.washingtonpost.com/opinions/2022/07/30/us-has-admitted-100000-ukrainian-migrants-it-must-keep-going/.

"[n]early 300,000 Ukrainians and their families have entered the country since the start of the war under humanitarian parole, with a visa or as a refugee."[110] In contrast, from our own hemisphere, only 24,000 Venezuelan applicants were permitted, under very exacting standards, to find refuge in the U.S. from terror in their homeland.[111]

Given the overheated politics surrounding the southern border,[112] there seemed little hope that a Biden Administration that was still separating migrant families would lead the way on more humane immigration policies,[113] and Republican control of the U.S. House portended more empty posturing.[114]

## III. Political Demagoguery Thwarts Immigration Reform

No longer do Republicans think of the U.S. as President Reagan described it, "a beacon, still a magnet for all who must have freedom, for all the Pilgrims from all the lost places who are hurtling through the darkness, toward home."[115] Reagan described the "shining city" he

110. Eileen Sullivan, *Biden Extends Stay for Thousands of Ukrainians*, N.Y. Times (Mar. 13, 2023), https://www.nytimes.com/2023/03/13/us/politics/ukraine-war-refugees.html.

111. *See* Albinson Linares & Noticias Telemundo, *Venezuelans Describe Dangers and Desperation Amid U.S. Asylum Changes*, NBC News (Jan. 18, 2023, 3:56 PM), https://www.nbcnews.com/news/latino/venezuelan-migrants-talk-dangers-desperation-us-asylum-changes-rcna66149. Those seeking refuge in the U.S. from our own hemisphere were lumped together in a projection that "[b]y the end of 2023, about 360,000 Venezuelans, Cubans, Nicaraguans and Haitians" would be admitted entry. Miriam Jordan, *Biden Opens a New Back Door on Immigration*, N.Y. Times (Apr. 23, 2023), https://www.nytimes.com/2023/04/23/us/biden-immigration-humanitarian-parole.html.

112. Even New York City's Democratic mayor echoed Republican talking points. Julia Marsh & Joe Anuta, *Democratic Mayor Becomes Unlikely GOP Ally in Battle over Southern Border*, Politico (Apr. 29, 2023, 7:00 AM), https://www.politico.com/news/2023/04/29/eric-adams-new-york-immigration-00094491 ("Both Republican and Democratic strategists say Adams' decision to amplify the right's messaging around immigration could be a gift to the GOP.").

113. *See* Anna-Catherine Brigida & John Washington, *Biden is Still Separating Immigrant Kids from Their Families*, Tex. Observer (Nov. 21, 2022, 8:00 AM), https://www.texasobserver.org/the-biden-administration-is-still-separating-kids-from-their-families/; Kate Morrisey, *Family Separations at the Border Continue Under Biden*, San Diego Union-Trib. (Aug. 16, 2022, 9:29 AM), https://www.sandiegouniontribune.com/news/immigration/story/2022-08-16/family-separations-at-the-border-continue-under-biden/; Eileen Sullivan & Zolan Kanno-Youngs, *Caught in G.O.P.'s Cross Hairs, Mayorkas Faces Political Showdown Over Border Crisis*, N.Y. Times (Feb. 7, 2023), https://www.nytimes.com/2023/02/07/us/politics/mayorkas-republicans-border.html ("The southern border is one of Mr. Biden's least favorite agenda items, according to a former senior White House official who spoke on the condition of anonymity to talk candidly.").

114. *See* Suzanne Monyak, *House Republicans United on Border Policy Focus*, Roll Call (Jan. 13, 2023, 5:30 AM), https://rollcall.com/2023/01/13/house-republicans-united-on-border-policy-focus/; Lisa Mascaro, *GOP's McCarthy Threatens to Impeach Mayorkas over Border*, Associated Press (Nov. 22, 2022, 9:41 PM), https://apnews.com/article/biden-kevin-mccarthy-impeachments-alejandro-mayorkas-border-security-5b2a8fa00a8cc724922b89c328fe6609.

115. *Transcript of Reagan's Farewell Address to American People*, N.Y. Times (Jan. 12, 1989), https://www.nytimes.com/1989/01/12/news/transcript-of-reagan-s-farewell-address-to-american-people.html.

envisioned: "If there had to be city walls, the walls had doors, and the doors were open to anyone with the will and the heart to get here."[116]

Today, his party has ensured those doors are barricaded. Gone are Republican dealmakers like former Wyoming Senator Simpson, who approached the immigration issue with compassion, having once been a young lawyer who "saw Hispanic workers flow into Park County, Wyoming to pick sugar beets. They were called braceros, and in the early '60s, 'Operation Wetback' came in and cleared them out. 'I helped a lot of them when they were screwed by car dealers, things like that.'"[117]

Instead, most Republican voices tell us that immigration is inherently insidious,[118] as the former Fox television personality, Tucker Carlson, described it: "[I]mmigration destabilizes your society. It makes it far less cohesive. That's always true. It doesn't matter where they're coming from. If you have a ton of new people, you're less cohesive. So why are they coming? There's only one reason. Because the Democratic Party wants new voters, period."[119]

Carlson, who had gone so far as to declare that immigrants pollute the Potomac River,[120] in keeping with his argument that they make the

116. *Id*.

117. Eleanor Clift, *The Anguish of Alan Simpson, Tragic Hero of Immigration Reform*, DAILY BEAST (Apr. 7, 2016, 1:06 PM), https://www.thedailybeast.com/the-anguish-of-alan-simpson-tragic-hero-of-immigration-reform. In a sign of changes within the Republican Party, Simpson has referred to Trump as a "vicious animal." John L. Dorman, *Ex-GOP Senator Says the Party has Become a 'Cult,' Believes Trump has 'Poisoned Our Democracy': Book*, BUS. INSIDER (July 17, 2022, 8:45 AM), https://www.businessinsider.com/alan-simpson-trump-gop-cult-democracy-book-2022-7.

118. *See* Marianna Sotomayor & Theodoric Meyer, *Early Rift Over Immigration Exposes House GOP's Tough Path to Consensus*, WASH. POST (Jan. 23, 2023, 5:00 AM), https://www.washingtonpost.com/politics/2023/01/23/house-republicans-immigration-legislation/. There are some exceptions, and they stymied quick action in 2023 on a draconian immigration bill that former House Speaker Kevin McCarthy (a California Republican) had promised a vote on as one of his many concessions to win far-right votes for his speakership. *Id.* "[T]he scope of the three-page bill has rattled dozens of House Republicans, many of whom worry it would prevent migrants and unaccompanied children fleeing violence from seeking asylum in the United States—a traditionally protected tenet of the country's immigration laws." Theodoric Meyer & Leigh Ann Caldwell, *House Republicans Spar over Border Bill*, WASH. POST (Jan. 23, 2023, 6:06 AM), https://www.washingtonpost.com/politics/2023/01/23/house-republicans-spar-over-border-bill/. Representative Tony Gonzales (a Texas Republican), who represents a swing-district on the Mexican border, was especially vocal in "crusading against a draconian immigration bill from fellow Texas GOP Rep. Chip Roy." Sarah Ferris & Olivia Beavers, *He's a Texas Border-District Republican. And He Says the Right's New Immigration Bill is a 'Bad Idea.'*, POLITICO (Feb. 3, 2023, 4:30 AM), https://www.politico.com/news/2023/02/03/ctony-gonzales-texas-republicans-immigration-00080972. Another House Republican attempted to forge common cause on immigration with a fellow Hispanic House member, a Democrat. *See* Marianna Sotomayor & Theodoric Meyer, *Hispanic Women to Introduce Bipartisan Immigration Bill in House*, WASH. POST (May 23, 2023, 8:35 AM), https://www.washingtonpost.com/politics/2023/05/23/congress-immigration-legislation/.

119. Tucker Carlson, *Republicans are Colluding to Allow Border Crisis to Continue*, FOX NEWS (Dec. 6, 2022, 11:34 PM), https://www.foxnews.com/opinion/tucker-carlson-republicans-colluding-allow-border-crisis-continue.

120. *See* Bill McCarthy, *Tucker Carlson Falsely Claims Immigrants Are Dirtying the Potomac River*, POLITIFACT (Dec. 18, 2019), https://www.politifact.com/factchecks/2019/dec/18/tucker-carlson/carlson-falsely-claims-immigrants-are-dirtying-pot/.

U.S. "dirtier,"[121] maintains that immigration is a conspiracy to replace white people,[122] and he found a very receptive audience: "Ambitious Republican lawmakers now echo his embrace of the 'great replacement' conspiracy theory, once relegated to the far-right fringe, that Western elites are importing immigrants to disempower the native-born."[123] Among the racist theory's adherents is New York Representative Elise Stefanik, the fourth-ranking U.S. House Republican, who "ran a series of Facebook ads warning that Mr. Biden would 'grant amnesty to *11 million* illegal immigrants' to 'overthrow our current electorate and create a permanent liberal majority in Washington.'"[124]

Indeed, the incredible notion that had started to take hold in Republican circles that undocumented immigrants were illegally voting in significant numbers for Democrats[125] is a conspiracy theory traceable to Trump's baseless claims about the 2016 election.[126] It had become supersized to the point where a viral claim circulated that *22 million* undocumented immigrants were voting in the United States.[127] Such deranged rhetoric acts as a dog whistle to those inclined to violence like the man who killed twenty-three people in an El Paso Walmart in 2019, targeting those he wrote were part of a "Hispanic invasion."[128]

Arizona's Republican Governor Doug Ducey spent $82 million dollars stacking shipping containers along the state's border with Mexico in the Coronado National Forest—in a porous makeshift wall "nearly four miles long"—with "no environmental reviews or public

121. Alex Horton, *Tucker Carlson Suggested Immigrants Make the U.S. 'Dirtier'—and it Cost Fox News an Advertiser*, Wash. Post (Dec. 15, 2018, 3:54 PM), https://www.washingtonpost.com/business/2018/12/15/tucker-carlson-suggested-immigrants-make-us-dirtier-it-cost-fox-news-an-advertiser/.

122. Dominick Mastrangelo, *Critics Blast Tucker Carlson's Immigration Remarks Amid Border Surge*, The Hill (Sept. 23, 2021, 3:47 PM), https://thehill.com/homenews/media/573690-critics-blast-tucker-carlson-over-immigration-remarks/.

123. Nicolas Confessore, *How Tucker Carlson Reshaped Fox News—and Became Trump's Heir*, N.Y. Times (May 18, 2022), https://www.nytimes.com/2022/04/30/us/tucker-carlson-fox-news.html.

124. Nicolas Confessore, *The Invention of Elise Stefanik*, N.Y. Times (Dec. 31, 2022), https://www.nytimes.com/2022/12/31/us/politics/elise-stefanik.html.

125. *See* Jazmine Ulloa, *G.O.P. Concocts Fake Threat: Voter Fraud by Undocumented Immigrants*, N.Y. Times (Apr. 28, 2022), https://www.nytimes.com/2022/04/28/us/politics/gop-vote-fraud-immigrants.html.

126. *See* Phillip Bump, *Yet Again, Trump Falsely Blames Illegal Voting for Getting Walloped in California*, Wash. Post (July 23, 2019, 2:01 PM), https://www.washingtonpost.com/politics/2019/07/23/yet-again-trump-falsely-blames-illegal-voting-getting-walloped-california/.

127. *See* Bill McCarthy, *No Evidence for Viral Claim that '22 Million Illegal Aliens' are 'Voting Illegally'*, PolitiFact (July 27, 2021), https://www.politifact.com/factchecks/2021/jul/27/facebook-posts/no-evidence-viral-claim-22-million-illegal-aliens-/.

128. *See* Alex Hinojosa & David Nakamura, *Walmart Shooter Pleads Guilty to Federal Charges in 2019 El Paso Attack*, Wash. Post (Feb. 9, 2023, 9:48 PM), https://www.washingtonpost.com/national-security/2023/02/08/walmart-el-paso-mass-shooting/; *see also* Peter Baker & Michael D. Shear, *El Paso Shooting Suspect's Manifesto Echoes Trump's Language*, N.Y. Times (Aug. 4, 2019), https://www.nytimes.com/2019/08/04/us/politics/trump-mass-shootings.html.

hearings before work crews began widening roads and tearing down oaks and junipers."[129] Ducey's Democratic successor, Katie Hobbs, faced the decision of whether to "remove the wall, maintain it, or let it slowly fall prey to rusting or toppling during Arizona's monsoon storms and lacerating summer heat."[130] The wall was inspired by an earlier effort along the Rio Grande by Republican Governor Greg Abbott of Texas.[131] Prior to Governor-elect Hobbs taking office, however, Ducey agreed to remove the wall in response to the Biden Administration suit over the fact that it was erected on federal land.[132]

Abbott had also paralyzed international commerce at the border with vehicle inspections to send a message to the Biden Administration,[133] mobilized National Guard troops to sit at border posts,[134] threatened to withhold education from children of undocumented immigrants,[135] and shipped undocumented immigrants to Democratic areas, including busloads of migrants that arrived, "after a 36-hour journey, some with little more than a T-shirt or a light blanket," outside the home of Vice President Kamala Harris on a cold Christmas Eve.[136]

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129. Jack Healy, *One Governor's Border Wall Is Another Governor's Headache*, N.Y. TIMES (Dec. 19, 2022), https://www.nytimes.com/2022/12/19/us/arizona-border-shipping-containers.html.

130. *Id*.

131. *Id.* Abbott's barrier-building suffered a setback, perhaps only temporarily, when the U.S. Supreme Court vacated an injunction Texas was granted to "to prevent the United States Border Patrol from cutting, destroying, or otherwise interfering with concertina wire ('c-wire') Texas has constructed along more than 29 miles of municipal and private land in the Eagle Pass sector of our southern border." State v. U.S. Dep't of Homeland Sec., 88 F.4th 1127.1130 (2023), *vacated*, U.S. Dep't of Homeland Sec. v. Texas, No. 23A607, 2024 WL 222180 (U.S. Jan. 22, 2024). In response, prominent Republicans suggested ignoring the Court. *See* Aaron Blake, *Republicans now say it might be okay to ignore the Supreme Court*, WASH. POST (Jan. 29, 2024, 3:56 PM), https://www.washingtonpost.com/politics/2024/01/29/republicans-now-say-it-might-be-okay-ignore-supreme-court/.

132. Jack Healy, *Arizona Agrees to Dismantle Border Wall Made from Cargo Containers*, N.Y. TIMES (Dec. 21, 2022), https://www.nytimes.com/2022/12/21/us/arizona-border-shipping-containers.html. ("It was unclear when crews would begin dismantling Mr. Ducey's container wall, or how much it would cost to remove the 9,000-pound boxes and repair environmental damage done after bulldozers cut roads, blocked streams and uprooted oaks and junipers.").

133. *See* Aaron Nelsen, J. David Goodman & Edgar Sandoval, *As Texas Snarls Traffic at Border, Mexican Truckers Form Blockade*, N.Y. TIMES (Apr. 12, 2022), https://www.nytimes.com/2022/04/12/us/texas-mexico-border-inspections-abbott.html.

134. *See* J. David Goodman & Edgar Sandoval, *Abbott Threatens to Declare an 'Invasion' as Migrant Numbers Climb*, N.Y. TIMES (Apr. 30, 2022), https://www.nytimes.com/2022/04/30/us/texas-border-abbott.html. Abbott had the National Guard physically repulse migrants, and place concertina wire along Rio Grande. *See* Alexandra Hinojosa, Nick Miroff & Ann E. Marimow, *Texas National Guard Blocks Migrant Flow Across Border in El Paso*, WASH. POST (Dec. 20, 2022, 7:28 PM), https://www.washingtonpost.com/immigration/2022/12/20/el-paso-abbott-national-guard-border-title-42.

135. *See* J. David Goodman, *Texas Governor Ready to Challenge Schooling of Migrant Children*, N.Y. TIMES (May 5, 2022), https://www.nytimes.com/2022/05/05/us/texas-schools-undocumented-immigrants-supreme-court.html.

136. Stephanie Lai, *Buses of Migrants Arrive at Kamala Harris's Home on Christmas Eve*, N.Y. TIMES (Dec. 25, 2022), https://www.nytimes.com/2022/12/25/us/politics/migrants-kamala-harris-christmas-eve.html.

There is no reason to believe state-built border barriers would be any more successful than the easily breached barrier Trump championed.[137]

Florida Governor, Republican Ron DeSantis, who successfully sought to repeal immigrant protections enacted by Florida's past Republican leaders,[138] engaged in his own nativist posturing by "rounding up Venezuelan asylum seekers on the streets of San Antonio and shipping them on private planes to Massachusetts."[139] The immigrants were approached and given an "apparently fake," official-looking Massachusetts brochure that assured them there were jobs in Massachusetts and they would receive help there.[140] The former military counterintelligence agent acting on Florida's behalf "provided the mostly destitute migrants with free meals at McDonald's and a place to stay at a nearby La Quinta Inn before the flight."[141]

Upon the immigrants' arrival in Martha's Vineyard on a plane chartered through a company with political ties to DeSantis, "they were taken in vans that had been waiting for them and deposited near a community center, where they were told to knock on the door. The woman who answered had no idea who they were and did not speak Spanish."[142] As the *New York Times* reported, one migrant, for whom a call home to Venezuela was arranged, said, appearing broken: "'My love, we were tricked,' he told his wife, weeping uncontrollably. 'This woman lied to us. She lied.'"[143]

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137. *See* Nick Miroff, *Trump's Border Wall Has Been Breached More Than 3,000 Times by Smugglers, CBP Records Show*, Wash. Post (Mar. 2, 2022, 2:32 PM), https://www.washingtonpost.com/national-security/2022/03/02/trump-border-wall-breached/; *see also* Thomas Colson, *People are Climbing Over Trump's $15 Billion Border Wall with $5 Ladders*, Bus. Insider (Apr. 22, 2021, 8:41 AM), https://www.businessinsider.com/donald-trump-border-wall-people-climbing-with-5-dollar-ladders-2021-4. A three-mile-long wall in Texas built by Trump supporters fared no better. *See* J. David Goodman, *They Built the Wall. Now Some in Texas Fear It May Fall Down.*, N.Y. Times (Jan. 5, 2023), https://www.nytimes.com/2023/01/05/us/texas-private-border-wall.html/. The building of the wall was part of an alleged fraud perpetuated by Trump associate Steve Bannon. *See* Jonah E. Bromwich, *Bannon's Lawyer Claims Communication Breakdown in Border Wall Case*, N.Y. Times (Jan. 12, 2023), https://www.nytimes.com/2023/01/12/nyregion/bannon-lawyer-communication-breakdown.html.

138. *See* Gary Fineout, *Florida GOP Passes Sweeping Anti-immigration Bill that Gives DeSantis $12 Million for Migrant Transports*, Politico (May 2, 2023, 9:25 PM), https://www.politico.com/news/2023/05/02/desantis-anti-immigration-florida-00095012; Matt Dixon, *DeSantis Blasts Immigration Laws Once Popular with Florida Republicans*, Politico (Feb. 23, 2023, 6:21 PM), https://www.politico.com/news/2023/02/23/desantis-immigration-laws-florida-republicans-00084188.

139. Edgar Sandoval et al., *The Story Behind DeSantis's Migrant Flights to Martha's Vineyard*, N.Y. Times (Oct. 4, 2022), https://www.nytimes.com/2022/10/02/us/migrants-marthas-vineyard-desantis-texas.html.

140. *See id.*

141. *Id.*

142. *Id.*

143. *Id.*; Matt Dixon, *Newly Released Records Show Top DeSantis Adviser Used Private Email and Alias to Coordinate Migrant Flights*, Politico (Dec. 28, 2022, 5:50 PM), https://www.politico.com/news/2022/12/28/records-desantis-adviser-used-private-email-to-coordinate-

In June 2023, a hardly contrite DeSantis, by then a presidential candidate,[144] had more immigrants rounded up in Texas, flown to California, and left in front of a Sacramento church.[145]

## IV. Immigration Inertia Is A Moral And Economic Failure

Using undocumented immigrants as political pawns treats them as little more than chattel. Beyond the moral implications,[146] our failure to embrace immigration is self-defeating economically.[147] The *Washington Post* reported in December 2022 that "more than 10 million jobs remain unfilled, particularly in low-paying and physically demanding industries such as hospitality, agriculture, construction and health care."[148] It was estimated that "the United States is shy of about 1.7 million legal immigrants based on pre-pandemic migration trends[.]"[149] This helps explain why the nation's median age is hitting record highs each year.[150]

Although the U.S. is roughly ten times more populous than Canada, Canada, recognizing the need for immigrants, is accepting as

migrant-flights-00075677 (It appeared considerable, and bizarre, effort was made to conceal the arrangement from open government laws, as the "top safety official" for DeSantis "used encrypted messaging apps and a private email address from 'Clarice Starling' when communicating with James Montgomerie, CEO of Vertol Systems, a Destin, Fl[orida]-based company the administration paid at least $1.5 million to coordinate the migrant flights." *Id.* And yet, even though it was clear, upon being pressed that they didn't fully understand exactly *what* they were authorizing, Florida's Republican legislators conferred the authority in a special five-day 2023 session for DeSantis to continue this program: "During a Wednesday news conference, Senate President Kathleen Passidomo (R-Naples) said it was 'above my pay grade, or a different pay grade I guess I should say' when asked about specifics of the program.'" *See* Matt Dixon, *Florida GOP Hands DeSantis Wins on Disney, Migrants Ahead of Likely '24 Bid*, Politico (Feb. 10, 2023, 4:24 PM), https://www.politico.com/news/2023/02/10/florida-gop-desantis-wins-2024-00082377.

144. *See* Maria Sacchetti, *These Latino Conservatives Like DeSantis but Loathe Florida's Immigration Law*, Wash. Post (June 14, 2023, 6:00 AM), https://www.washingtonpost.com/nation/2023/06/09/florida-migrants-desantis-presidential-supporters/ ("DeSantis, a Republican who is running for president and seeking to outflank former president Donald Trump and other rivals for the GOP nomination, has signed a law considered one of the nation's strictest state-level immigration crackdowns.").

145. *See* Christopher Cadelago, *Florida Officials Could Still Face Charges over Migrant Flights, Gavin Newsom Says*, Politico (June 6, 2023, 7:28 PM), https://www.politico.com/news/2023/06/06/florida-migrant-flights-gavin-newsom-00100644.

146. *See* Catherine E. Shoichet, *A Luxury Cruise Took Passengers Somewhere They Never Expected to Be: Face to Face with the Migrant Crisis*, CNN (Jan. 14, 2023, 12:11 PM), https://www.cnn.com/2023/01/14/us/cruise-ship-migrant-rescues-cec/index.html. There is a symbolic juxtaposition to the fact that luxury cruise ships off our shores have rescued Cuban migrants on makeshift craft who are then returned to the country they fled. *Id.*

147. *See* Abha Bhattarai & Lauren Kaori Gurley, *Trump, Covid Slowed Down Immigration. Now Employers Can't Find Workers.*, Wash. Post (Dec. 15, 2022, 1:31 PM), https://www.washingtonpost.com/business/2022/12/15/immigration-reform-congress-worker-shortage.

148. *See id.*

149. *Id.*

150. *See* Dana Goldstein, *The U.S. Population is Older Than it Has Ever Been*, N.Y. Times (June 22, 2023), https://www.nytimes.com/2023/06/22/us/census-median-age.html.

many immigrants annually as the U.S. did in fiscal year 2022.[151] In fact, Canada's population in 2022 increased by over one million for the first time, largely due to immigrants brought in to help with labor shortages.[152]

As the columnist George Will has written: "The Declaration of Independence's list of complaints against King George III included his attempt to keep the colonies weak by obstructing immigration. Today, this is an injury many Americans advocate self-inflicting."[153] As Will noted, "[i]mmigration, 'the sincerest form of flattery,' is an entrepreneurial act: Families who risk everything by walking from Guatemala to Texas will probably enhance American industriousness."[154]

Ambivalence in the U.S. about immigration is reflected by the fact that during 2020, the first year of the COVID-19 pandemic, undocumented farmworkers were declared "essential" by the Trump Administration, and it was reported that "[f]or many workers, the fact that they are now considered both illegal and essential is an irony that is not lost on them, nor is it for employers who have long had to navigate a legal thicket to maintain a workforce in the fields."[155]

As one account in 2020 noted: "Trump has continued his policy of 'the more immigrants, the merrier' this year: bringing in immigrant farmworkers. In 2019, his administration approved a quarter-million temporary agricultural visas, known as H-2A or 'guest worker' visas — a 55 percent increase from President Barack Obama's final year in office."[156]

A measure negotiated in the Senate in 2022 would have granted citizenship to some undocumented farmworkers but failed to advance even though "[h]alf a dozen Republican members have privately expressed the need for farmworkers to fill jobs in their rural communities, but they know that even that bipartisan measure will probably face

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151. Julia Ainsley, Joel Seidman & Didi Martinez, *Canada and The U.S. Both Face Labor Shortages. One Country is Increasing Immigration.*, NBC NEWS (Jan. 7, 2023, 6:00 AM), https://www.nbcnews.com/politics/immigration/canada-us-increasing-immigration-labor-shortage-rcna64691.

152. Vjosa Isai, *Canada Grew by a Record 1 Million People From Immigration*, N.Y. TIMES (Mar. 23, 2023), https://www.nytimes.com/2023/03/23/world/canada/canada-record-population-growth.html.

153. George Will, *This South Dakotan Wants to End Congress's Chronic Immigration Failure*, WASH. POST (June 23, 2023, 12:29 p.m.), https://www.washingtonpost.com/opinions/2023/06/23/mike-rounds-senate-immigration-reform/.

154. *Id.*

155. Miriam Jordan, *Farmworkers, Mostly Undocumented, Become 'Essential' During Pandemic*, N.Y. TIMES (Apr. 10, 2020), https://www.nytimes.com/2020/04/02/us/coronavirus-undocumented-immigrant-farmworkers-agriculture.html.

156. Julie M. Weise, *Trump's Latest Immigration Restriction Exposes A Key Contradiction In Policy*, WASH. POST (June 23, 2020, 11:41 AM), https://www.washingtonpost.com/outlook/2020/06/23/trumps-latest-immigration-restriction-exposes-key-contradiction-policy/; David A. Farenthold, *Trump's Mar-a-Lago Club in Florida Seeks to Hire 78 Foreign Workers*, WASH. POST (July 10, 2018, 12:23 PM), https://www.washingtonpost.com/politics/trumps-mar-a-lago-club-in-florida-seeks-to-hire-40-foreign-workers/2018/07/05/5ef094b8-8099-11e8-bb6b-c1cb691f1402_story.html (demonstrating how hypocrisy was always at the heat of Trump's immigration views.).

a blockade by staunch conservatives.[157] Senate Republican ideology trumped entreaties from farm groups and even the interests of consumers despite food cost inflation and support from House Republicans for a House-passed version.[158]

American hypocrisy on immigration is further revealed by evidence of migrant *children* being put to work every day in some of the most grueling jobs in the country. For instance, children in Grand Rapids, Michigan, were reported to be "tending giant ovens to make Chewy and Nature Valley granola bars" and packing bags of major brands like Lucky Charms and Cheetos.[159] As a *New York Times* investigation found: "This shadow workforce extends across industries in every state, flouting child labor laws that have been in place for nearly a century."[160]

Relatively little sanction exists for the employers who violate these child labor laws, demonstrating our inhumane perspective toward migrant workers. In Nebraska, the family of a thirteen-year-old migrant girl, one of twenty-seven minors cleaning a slaughterhouse, faced deportation following a federal raid uncovering the child labor, while the employer was only fined and suffered no criminal penalty.[161] How is this cruel underground economy a substitute for rational immigration policy?

One of Biden's key initiatives, creating "green jobs" in the U.S., was in jeopardy because of the lack of immigrants to effectuate his policies, though, as one account noted, "calling for foreign-born workers would appear at odds with Biden's blue-collar, American-made green revolution."[162] Yet, with over one-quarter of workers "currently in the electrical and electronics engineering field," as well as over one-third of construction laborers (most undocumented) being foreign-born, the

157. Marianna Sotomayor et al., *Congress Working to Strike Last-Minute Immigration Deals*, WASH. POST (Dec. 5, 2022, 5:52 PM), https://www.washingtonpost.com/politics/2022/12/05/congress-working-strike-last-minute-immigration-deals/.

158. *See* Garrett Downs, *The Clock Ticks Down on Immigration Deal that Could Help Rein in Food Inflation*, POLITICO (July 25, 2022, 11:00 AM), https://www.politico.com/news/2022/07/25/migrant-farm-labor-food-inflation-00047538.

159. Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. TIMES (Feb. 28, 2023), https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html.

160. *Id.* A conservative group has bankrolled nationwide efforts to loosen child labor laws, with especially concerning implications for the exploitation of migrant children. *See* Jacob Bogage & María Luisa Paúl, *The Conservative Campaign to Rewrite Child Labor Laws*, WASH. POST (Apr. 23, 2023, 7:00 AM), https://www.washingtonpost.com/business/2023/04/23/child-labor-lobbying-fga/.

161. *See* Maria Sacchetti & Lauren Kaori Gurley, *A Cleaning Company Illegally Employed a 13-Year-Old. Her Family is Paying the Price.*, WASH. POST (Mar. 3, 2023, 1:58 PM), https://www.washingtonpost.com/business/2023/03/03/child-labor-workers-fallout-migrants/.

162. Zack Colman, Myah Ward & Eli Stokols, *No Avoiding It Now: Immigration Issues Threaten Biden's Climate Program*, POLITICO (Mar. 6, 2023, 12:42 PM), https://www.politico.com/news/2023/03/06/biden-climate-program-immigration-00085663.

"inertia" that a senior Biden official described as characterizing the administration's approach to immigration is self-defeating.[163]

Some of our most vulnerable citizens also stand to suffer unduly because of the impasse on immigration reform. For example, there were over 100,000 fewer child-care workers in 2022 than there had been prior to the COVID-19 pandemic, and immigrants comprise roughly one-fifth of that workforce.[164] The lure of better-paying jobs in an economy with low unemployment was too great for many child-care workers, as even "stocking shelves at Target, ringing up groceries at Trader Joe's, and packing and loading boxes at Amazon warehouses now often pay more than jobs in child-care programs in many parts of the country."[165]

A similar phenomenon beset the long-term care workforce, such as home care, where "because of the tight labor market, the low-paid workers have quit for less taxing jobs in Amazon warehouses and as Uber drivers."[166] As the *Washington Post* reported: "The median pay for personal care aides was just $14.27 an hour in 2021, according to PHI, a nonprofit that publishes annual reports on the national home-care workforce. Workers can earn equal or higher wages at Home Depot or McDonald's[.]"[167]

Indeed, in Texas, even as Gov. Abbott has so publicly sought to deter immigration, it was reported that "[l]awmakers have failed to meaningfully raise the current $8.11 reimbursement rate to home caregivers for a decade, at a time when fast food jobs offer several dollars more an hour, luring the workforce away."[168]

Data shows that 32% of home care workers are immigrants,[169] as are 26% of residential care aides in settings such as assisted living facilities[170] and 21% of nursing assistants in nursing homes.[171] By the summer of 2022, it was reported that "[s]ince January 2020, 400,000

163. *Id.*

164. *See* Dana Goldstein, *Why You Can't Find Child Care: 100,000 Workers Are Missing*, N.Y. Times (Oct. 13, 2022), https://www.nytimes.com/2022/10/13/us/child-care-worker-shortage.html.

165. *Id.*

166. Christopher Rowland, *Seniors Are Stuck Home Alone as Health Aides Flee for Higher-Paying Jobs*, Wash. Post (Sept. 25, 2022, 8:00 AM), https://www.washingtonpost.com/business/2022/09/25/seniors-home-health-care/.

167. *Id.*

168. Tony Plohetski, *'The Worst Compensated Job in Texas' | Texas is Facing a Worsening Home Caregiver Shortage*, KVUE (Oct. 28, 2022, 10:22 PM), https://www.kvue.com/amp/article/news/investigations/defenders/texas-home-health-caregiver-shortage/269-24f9c4ce-2f71-4947-a7b2-ce8cacc81a6a.

169. Paraprofessional Healthcare Institute, Direct Care Workers in the United States: Key Facts 7 (Dec. 11, 2023), https://www.phinational.org/resource/direct-care-workers-in-the-united-states-key-facts-2023//.

170. *Id.* at 14.

171. *Id.* at 21.

nursing home and assisted living staff had quit, citing pandemic exhaustion as well as the low pay and lack of advancement opportunities typical of the field."[172] Immigration – "with native-born Americans apparently reluctant to take elder care jobs" – would appear to be the only solution to grow, or simply rebuild, the workforce necessary to care for an aging U.S. population.[173] In fact, reporting noted that "even if native-born workers took the jobs, we'd still have a shortage, say economists," given how fast our population is getting older.[174]

To quote David Grabowski, a professor of health care policy at Harvard Medical School whose research focuses on the economics of aging and long-term care: "Immigration policy is long-term care policy. If we really want to encourage a strong workforce, we need to make immigration more accessible for individuals."[175]

## V. Conclusion

In conclusion, as one legal scholar wrote, "criminalization and exploitation of immigrants did not start nor end with the Trump administration. The United States has a long history of rendering immigrants exploitable and expendable, perpetuated and sustained through decades of racist and xenophobic policies[.]"[176] Today's immigration politics, including the fraud that was Title 42's deployment, are but a part of that continuum. If Title 42 had not existed, another fig leaf would have been invented to excuse exclusion. Our U.S. immigration status quo can only be viewed as unsustainable, whether one's perspective on it is secularly economic, aligned with business

172. Alexandra Moe, *The Crisis Facing Nursing Homes, Assisted Living and Home Care for America's Elderly*, Politico (July 28, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/07/28/elder-care-worker-shortage-immigration-crisis-00047454.

173. *Id.*

174. *Id.*; *see also* Brendan Williams, *Collateral Damage? U.S. Long Term Care and the War on Immigration*, 12 Alb. Gov't L. Rev. 124, 124 (2019) ("If long-term care in the United States is to have a future, it will come through immigration.").

175. Michelle Andrews, *As Long-Term Care Staffing Crisis Worsens, Immigrants Can Bridge the Gaps*, Kaiser Health News (Feb. 3, 2023), https://khn.org/news/article/as-long-term-care-staffing-crisis-worsens-immigrants-can-bridge-the-gaps/.

176. Prashasti Bhatnagar, Deportable Until Essential: How the Neoliberal U.S. Immigration System Furthers Racial Capitalism and Operates as a Negative Social Determinant of Health, 36 Geo. Immigr. L.J. 1017, 1018 (2022).

groups calling for immigration reform,[177] or moral.[178] And yet, there is no end in sight.[179]

177. *See* Shannon Pettypiece & Scott Wong, *Business Groups Optimistic Congress May Finally Strike Immigration Deal*, NBC News (Dec. 10, 2022, 8:00 AM), https://www.nbcnews.com/politics/economics/business-groups-optimistic-congress-may-finally-strike-immigration-dea-rcna60760.

178. *See* Claire Giangravé, *Pope Francis Wants to Make 'Father of Migrants' a Saint*, Wash. Post (Oct. 7, 2022, 1:34 PM), https://www.washingtonpost.com/religion/2022/10/07/pope-francis-wants-make-father-migrants-saint/. The Pope is not alone among religious leaders in his advocacy for immigrants. *See also* Jeff Brumley, *165 Religious Leaders Plead with White House to Abandon Immigrant Travel Ban*, Baptist News Glob. (Jan. 25, 2023), https://baptistnews.com/article/165-religious-leaders-plead-with-white-house-to-abandon-immigrant-travel-ban/.

179. In October 2023 the Biden Administration resumed building the Mexico border wall President Trump had started, waiving "more than two dozen laws, including the Clean Air Act, the Endangered Species Act and the National Historic Preservation Act" – despite President Biden having campaigned on the promise "he would not build 'another foot of wall.'" Nick Miroff & Maria Sacchetti, *Biden Officials Will Resume Venezuela Deportations, Extend Border Wall*, Wash. Post (Oct. 5, 2023, 6:52 PM), https://www.washingtonpost.com/immigration/2023/10/05/border-wall-buoys-biden/. As the *New York Times* editorialized in response: "Neither party has come up with a solution that is both practical and compassionate." Editorial, *The Cost of Inaction on Immigration*, N.Y. Times (Oct. 7, 2023), https://www.nytimes.com/2023/10/07/opinion/new-york-migrant-crisis.html. And in running for president again in 2024, former President Trump had taken to describing immigrants in terms that echoed Adolf Hitler. *See* Jill Colvin, *Trump Says He Didn't Know His Immigration Rhetoric Echoes Hitler. That's Part of a Broader Pattern*, Associated Press (Dec. 27, 2023, 2:01 PM), https://apnews.com/article/trump-hitler-poison-blood-history-f8c3ff512edd120252596a4743324352. At Trump's insistence, Senate Republicans even rejected the willingness of President Biden and Senate Democrats to offer "substantial — almost unheard-of — concessions on immigration policy without insisting on much in return." Carl Hulse, *On the Border, Republicans Set a Trap, Then Fell into It*, N.Y. Times (Feb. 6, 2024), https://www.nytimes.com/2024/02/06/us/politics/border-republicans-ukraine-bill.html.

# Dangerous Discretion: Making Asylum Relief Mandatory Considering External Effects on Judges

Chiara Phillips*

*Abstract*

*This Note intends to critique the discretionary standard in asylum cases. As part of that critique, this Note will also explore the impact that compassion fatigue can have on judges' decisions, considering their consistent exposure to asylum seekers' traumatic and emotional stories. This Note will also examine the varied denial rates of asylum applications across the circuits, a factor that may be influenced by compassion fatigue. Section 208(a) of the Immigration and Nationality Act provides that asylum may be granted to an applicant who meets the definition of a refugee. A refugee is someone who was persecuted or has a well-founded fear of future persecution in her own country on account of race, religion, nationality, political opinion, or membership in a particular social group. Compassion fatigue is the cumulation of physical, emotional, and psychological stressors resulting in feelings of depletion, disengagement, and disinterest. Individuals experiencing compassion fatigue can also feel helpless and overwhelmed. This Note will ultimately suggest that considering the emotional and psychological impact of compassion fatigue on judicial decisions, coupled with factors like the considerable variation in denial rates of asylum applications across circuits, the asylum standard should be mandatory instead of discretionary.*

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## INTRODUCTION

When non-citizens come to the United States seeking asylum, their decision to do so is likely not an easy one. While fleeing persecution from their home country, where family and friends often remain, asylum seekers face detainment in an immigration detention center and have to live in a country without the ability to work for months. However, it is a journey asylum seekers embark on because the persecution they face in their home countries leaves them with no other option. Because of this reality, non-citizens who establish they are "refugees" within the meaning of the Immigration and Nationality Act should be granted asylum as a mandatory, not a discretionary, form of relief. The Supreme Court explained that discretion in political asylum cases extends beyond determining statutory eligibility.[1] Instead, it signifies that merely "meeting the definition of a 'refugee' does not automatically entitle the alien to asylum; the decision to grant a specific application lies within the discretion of the Attorney General under §208(a)."[2]

In one asylum case, an Eritrean man whom we will call Abraham was imprisoned for twelve years in Eritrea for refusing to complete his military service.[3] During his imprisonment, Abraham was not only tortured but also sexually assaulted.[4] Abraham sought asylum within the United States and was asked before an Immigration Judge to give further details of his assault.[5] Abraham explained how two Eritrean prison

1. Immigr. & Naturalization Serv. v. Stevic, 467 U.S. 407, 423 n.18 (1984).
2. *Id.*
3. Noah Lanard, *Inside the Courtroom Where Every Asylum Seeker Gets Rejected*, MOTHER JONES, https://www.motherjones.com/crime-justice/2019/07/inside-the-courtroom-where-every-asylum-seeker-gets-rejected/ (last visited Apr. 12, 2022).
4. *Id.*
5. *Id.*

guards covered his nose with plastic before at least one of them put their penis in Abraham's mouth, at which point Abraham passed out.[6] Abraham further testified that "they also inserted a stick in my bottom" at least three times in a bloodstained room 'intended for suffering.'[7]

Despite these horrific accounts, the Immigration Judge rejected Abraham's application, accusing him of lying during his interview with an American asylum officer.[8] The Immigration Judge claimed Abraham lied during his interview because he did not previously mention his sexual assault.[9] Furthermore, the Judge rejected Abraham's application, stating he did not provide documentation that the Eritrean government effectively controlled the state church.[10] Nevertheless, questions arise as to whether this documentation would have made a difference, considering the Immigration Judge had denied every single one of the two hundred immigration cases before her from 2011 to 2018.[11]

In another case, *Shahandeh-Pey v. Immigration & Naturalization Service*, the petitioner, Shahandeh, was an Iranian citizen born into a wealthy and prominent Iranian family.[12] After finishing high school, Shahandeh's family, worrying about the stability of the Shah's regime then, thought it best for him to leave the country.[13] The petitioner then applied for and received a student visa authorizing him to stay in the United States until August 1979.[14] However, Shahandeh overstayed his visa when he met and married an American woman and had two children with her.[15] The Immigration Naturalization Service began deportation proceedings against the petitioner in 1983.[16]

In response, Shahandeh was allowed to apply for asylum.[17] But his United States criminal convictions were of issue in determining his eligibility for asylum.[18] Shahandeh sought asylum because he feared he would be executed if forced to return to Iran.[19] In his application, he stated that his father, a colonel in the Shah's Ministry of War, was executed despite his cooperation with the Khomeini forces after the Shah's

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Shahandeh-Pey v. Immigr. & Naturalization Serv., 831 F.2d 1384, 1385 (7th Cir. 1987).
13. *Id.*
14. *Id.* at 1386.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

downfall.[20] He also explained how Khomeini's soldiers raided his family home in Iran and jailed and interrogated mother, a politician during the Shah's reign.[21] After her imprisonment, Shahandeh's mother fled to Austria to live with his sister.[22]

Shahandeh's asylum application included three letters written by his mother and a State Department report describing the Khomeini regime as having one of the worst human rights records in the world.[23] But nonetheless, the petitioner's application was denied. The Seventh Circuit remanded the case to the Board of Immigration Appeals ("BIA") because it abused its discretion in denying the petitioner's application for asylum.[24] This was because instead of weighing the favorable and negative factors against the petitioner, the BIA refused to allow the petitioner to present further evidence of his well-founded fear of future persecution.[25]

Cases like that of Shahandeh and Abraham, where the petitioner faces deportation while having a wife and two children in the United States or suffered torture and sexual abuse, are not uncommon in immigration court. Cases with traumatic testimony may be particularly difficult for judges to adjudicate. The traumatic nature of these cases is where the issue of compassion fatigue comes into play. Compassion fatigue is the cumulation of physical, emotional, and psychological stressors.[26] Compassion fatigue can result in feelings of depletion, disengagement, and disinterest.[27] A person experiencing compassion fatigue may also feel helpless and overwhelmed.[28]

This Note intends to critique the discretionary standard in asylum cases. As part of that critique, this Note will also explore the impact that compassion fatigue can have on judges' decisions, considering their consistent exposure to asylum seekers' traumatic and emotional stories. This Note will argue that the asylum standard should no longer be discretionary but mandatory because of compassion fatigue's effects on judicial decisions and other factors, such as the considerable variation in denial rates of asylum applications across circuits. Currently, the asylum legal standard *may* allow individuals with a well-founded fear of persecution in their home country due to their race, religion, nationality,

20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 1389.
25. *Id.* at 1387–88.
26. *See generally* Maryt L. Fredrickson, *Compassion Fatigue: From Caring to Collapse and Back Again*, 41 WYO. LAW. 56 (2018).
27. *Id.*
28. *Id.*

political opinion, or membership in a particular social group to be eligible for asylum and protection in the United States.[29]

Part I of this Note will delve into the development of the current asylum standard and its practical application. Then, in Part II, I will explore the concept of compassion fatigue and its impact. The connection between the application of the law and the role compassion fatigue plays will be discussed in Part III. There, I will examine how compassion fatigue affects the discretionary standard in asylum cases. Similarly, Part IV will propose asylum as a mandatory form of relief, while Part V will offer a conclusion and recap of the key points discussed in this Note.

## I. What is the Current Asylum Standard, and How is it Applied?

### *A. Origins of International Refugee Protection*

Article Fourteen of the 1948 Universal Declaration of Human Rights firmly establishes that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."[30] This critical declaration set the stage for the United Nations Convention of 1951, which introduced the Status of Refugees—a pivotal cornerstone in today's international refugee protection framework.[31] The purpose of the United Nations Convention was to "define the term 'refugee' and outlin[e] the rights of refugees, as well as the legal obligations of States to protect them."[32] At its core, this legal framework embodies the principle of 'non-refoulement,' asserting that "a refugee should not be returned to a country where they face serious threats to their life or freedom."[33] The 1951 Convention consolidated previous international policies and laws relating to refugees and provides the most extensive codification of refugees at the international level.[34] The United States and representatives from twenty-six other countries actively participated in the Conference of Plenipotentiaries, contributing to drafting and signing the Convention relating to the Status of Refugees.[35]

29. 8 U.S.C. § 1158.

30. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14(1) (Dec. 10, 1948).

31. *See* G.A. Res. A/RES/429 (Dec. 14, 1950); *see also* The 1951 Refugee Convention, U.N. High Comm'r for Refugees, https://www.unhcr.org/en-us/1951-refugee-convention.html (last visited Apr. 13, 2022).

32. *See* The 1951 Refugee Convention, *supra* note 31.

33. *Id.*

34. Convention and Protocol Relating to the Status of Refugees, U.N. High Comm'r for Refugees at 1, 3, https://www.unhcr.org/us/media/convention-and-protocol-relating-status-refugees (last visited Jan. 12, 2024).

35. *Id.* at 6.

The participation of the United States and other nations in drafting and signing the Convention is significant because it represents a global commitment to addressing the needs and rights of refugees and has set enduring standards in international law for refugee protection.[36] The Convention defines a refugee as "someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion . . . ."[37] The Convention further explains that subject to certain exceptions, refugees should not be punished for their illegal entry or stay because the Convention recognized that seeking asylum can require refugees to break certain immigration laws.[38]

### *B. The United States' Asylum Law*

The Immigration and Nationality Act (INA), passed in 1952, played a pivotal role in collecting and reorganizing provisions within the structure of immigration law.[39] Under the INA and United States Code, asylum seekers can apply for asylum with the condition that they must be physically present in the United States.[40] However, an asylum seeker who is physically present in the United States may nonetheless be unable to apply for asylum if:

> The Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality, or in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life of freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.[41]

Additionally, only an asylum seeker who can demonstrate by clear and convincing evidence that they filed their application within one year of entering the United States can apply for asylum.[42] Furthermore, a non-citizen cannot reapply for asylum after their application is denied unless they can demonstrate the existence of changed circumstances that materially affect their eligibility or extraordinary circumstances

36. *See id.*
37. *Id.* at 3.
38. *Id.*
39. *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act (last updated July 10, 2019).
40. 8 U.S.C. § 1158(a)(1).
41. *Id.* § 1158(a)(2)(A).
42. *Id.* § 1158(a)(2)(B).

relating to the delay in filing an application within one year of arriving in the United States.[43]

### *C. Asylum as a Discretionary Form of Relief*

In the United States, asylum is a discretionary form of relief.[44] "The Secretary of Homeland Security or Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established [and if the] alien is a refugee within the meaning of section 1101(a)(42)(A)."[45] The use of the word "may" in the statute demonstrates that asylum is granted based on discretion. This is further evidenced by the fact that just because an asylum application meets the definition of "refugee," this does *not* entitle the alien to asylum—the decision to grant an asylum application rests in the discretion of the Attorney General under § 208(a) of the INA.[46]

> The term "refugee" means . . . any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided and who is unable or unwilling to return to and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[47]

Non-citizens bear the burden of proof in asylum proceedings.[48] Therefore, a non-citizen must establish that they are a refugee within the meaning of section 1101(a)(42)(a). To be considered a refugee under section 1101(a)(42)(a), the non-citizen applicant "must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."[49] To determine whether the non-citizen has met this burden, the trier of fact may weigh the non-citizen's credible testimony with other evidence of record.[50] The trier of fact will assess the non-citizen's credibility by considering the totality of the circumstances, their demeanor, candor, responsiveness, and the inherent plausibility of

43. *Id.* § 1158(a)(2)(C)–(D).
44. *Id.* § 1158(b)(1)(A).
45. *Id.*
46. Immigr. & Naturalization Serv. v. Stevic, 467 U.S. 407, 430 n.18 (1984).
47. 8 U.S.C. § 1101(a)(42)(A). This is the same definition included in the Convention.
48. *Id.* § 1158(b)(1)(B)(i).
49. *Id.*
50. *Id.* § 1158(b)(1)(B)(ii).

the applicant's or witness's account.[51] Additionally, the trier of fact will look at the consistency between written and oral statements, the internal consistency of such statements, the consistency of such statements with other evidence of record, and any inaccuracies or falsehoods.[52]

A non-citizen may qualify as a refugee because they suffered past persecution or have a well-founded fear of future persecution.[53] A non-citizen can demonstrate this by showing (1) they would be individually singled out for persecution or (2) that there is a pattern or practice of persecution on account of one of the protected grounds against a group or category of people similarly situated to the person, and that they belong to or can be identified with the persecuted group.[54] Further, even a one-in-ten chance of future persecution is sufficient to meet this standard.[55] However, the non-citizen must show they cannot avoid persecution in their country through internal relocation.[56]

To establish a well-founded fear of persecution, the person must demonstrate both a subjective component, "genuine fear of persecution,"[57] and an objective component—evidence that a "reasonable person under his circumstances would fear persecution."[58] The INA does not explicitly define persecution; instead, according to court precedent, the term encompasses threats to life, confinement, torture, and severe economic restrictions that pose a threat to life or freedom.[59] Persecution also involves the infliction or threat of death, torture, or injury to one's person or freedom based on one of the enumerated grounds in the refugee definition.[60] Persecution encompasses both physical violence and non-physical forms of harm.[61] However, it is important to note that "persecution is an 'extreme concept' and 'does not include every sort of treatment our society regards as offensive.'"[62]

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51. *Id.* § 1158(b)(1)(B)(iii).

52. *Id.*

53. 8 C.F.R. § 208.13(b)(2)(iii)(A)-(B); *see also* U.S. CITIZENSHIP & IMMIGR. SERVS., RAIO COMBINED TRAINING PROGRAM: WELL-FOUNDED FEAR TRAINING MODULE 11 (July 24, 2023), https://www.uscis.gov/sites/default/files/document/lesson-plans/Well_Founded_Fear_LP_RAIO.pdf.

54. *Id.*

55. Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).

56. 8 C.F.R. § 208.13(b)(2)(ii).

57. Marynenka v. Holder, 592 F.3d 594, 600 (4th Cir. 2010) (quoting Chen v. Immigr. & Naturalization Serv., 195 F.3d 198, 201 (4th Cir. 1999)).

58. *In re* Mogharrabi, 19 I. & N. Dec. 439, 445 (B.I.A. 1987); *see also* Jorgji v. Mukasey, 514 F.3d 53, 58 (1st Cir. 2008).

59. *In re* Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (stating that mental suffering or even severe economic deprivation may rise to the level of persecution).

60. Li v. Gonzales, 405 F.3d 171, 177 (4th Cir. 2005).

61. *See* Mirisawo v. Holder, 599 F.3d 391, 396 (4th Cir. 2010) (quoting H.R. Rep. No 95-1452, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 4700, 4704)); *see also* Jahed v. Immigr. & Naturalization Serv., 356 F.3d 991, 998–99 (9th Cir. 2004).

62. Lozano v. Garland, 856 F. App'x 678, 679 (9th Cir. 2021) (quoting Gu v. Gonzales, 454 F.3d 1014, 1019 (9th Cir. 2006)).

In *Vladimirova v. Aschroft*, the Seventh Circuit found that the Respondent, a Bulgarian woman, who suffered a beating so severe that it caused a miscarriage, suffered past persecution.[63] The Respondent fled Bulgaria to escape the persecution she faced for practicing an unsanctioned religion, the Word of Life religion, in Bulgaria.[64] In Bulgaria, all religious groups were required to be registered with the government; however, Word of Life's registration was denied.[65] Therefore, practicing the Word of Life religion, at the time, was illegal.[66] When the police found out about their church meetings, they confiscated the worshipers' Bible and Word of Life pamphlets.[67] The police also called the worshipers "filthy sectarians" and imprisoned the Respondent and her husband for two days.[68]

During the Respondent's initial detention, the authorities not only interrogated her but also subjected her to physical assault before eventually releasing her.[69] In a subsequent encounter arising from attending another church meeting, the police escalated their abuse by slapping the Respondent in the face, calling her vile names, and threatening to sexually assault her.[70] During the Respondent's final encounter with the police, the police arrived at her apartment and beat her to the point of miscarriage.[71] This traumatic sequence of events left the Respondent with deep feelings of depression and a reluctance to continue living.[72] Still, despite the clear abuse and persecution the Respondent endured, the BIA denied asylum.[73] Fortunately, the Seventh Circuit determined that the Respondent's experience of severe physical violence, reaching the point of a miscarriage, went beyond mere harassment and qualified as proof of past persecution.[74]

Even when asylum seekers successfully present evidence of past persecution or a well-founded fear, they still face another hurdle: the nexus requirement. In asylum cases, the protected ground, which serves as the basis for the non-citizen's past or potential persecution, must play a central role in their persecution.[75] This means that the protected ground "cannot be incidental, tangential, superficial, or subordinate to

63. Vladimirova v. Ashcroft, 377 F.3d 690, 696 (7th Cir. 2004).
64. *Id.* at 692.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 695.
74. *Id.* at 696.
75. *In re* J-B-N- & S-M-, 24 I. & N. Dec. 208, 214 (B.I.A. 2007).

another reason for harm."[76] "Instead, the non-citizen must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* they suffered or will suffer persecution."[77]

Furthermore, in cases where a non-citizen suffered persecution because of membership or imputed membership in a particular social group, they must (1) identify a cognizable group, (2) prove membership or perceived membership in that group, and (3) establish that the feared persecution is based on membership or perceived membership in that group.[78] A particular social group is defined as a "group of persons all of whom share a common, immutable characteristic."[79] This common immutable characteristic generally refers to something that "the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences."[80] "The shared characteristic could be an innate characteristic such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as land ownership."[81] Furthermore, the social group must have specific and well-defined boundaries or be sufficiently distinct, making it recognizable as a discrete class of persons.[82] The particular social group must also have a "recognized level of social visibility."[83] However, "social visibility" does not necessarily require literal visibility but social distinction.[84]

In *In re A-R-C-G-*, the Respondent was a Guatemalan mother of three.[85] The Respondent married at seventeen years old and suffered continuous abuse by her husband.[86] This abuse from her husband included rape, weekly beatings, a broken nose, and burning her breast.[87] The Respondent sought the police's help multiple times, but they stated they would not interfere in a marital relationship.[88] When filing for asylum, the Respondent claimed persecution on account of a particular social group comprised of "married women in Guatemala who are

76. *Id.*
77. *See id.*
78. *See* Immigr. & Naturalization Serv. v. Elias-Zacarias, 502 U.S. 478, 482-83 (1992); *see also In re* W-G-R-, 26 I. & N. Dec. 208, 210 (B.I.A. 2014) (quoting *In re* S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008)).
79. *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).
80. Sauceda v. Garland, 23 F.4th 824, 833 (9th Cir 2022).
81. *Id.*
82. *Id.*; *In re* S-E-G-, 24 I. & N. Dec. at 582.
83. *In re* S-E-G-, 24 I. & N. Dec. at 582.
84. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 240 (B.I.A. 2014).
85. *In re* A-R-C-G-, 26 I. & N. Dec. 388, 389 (B.I.A. 2014).
86. *Id.*
87. *Id.*
88. *Id.*

unable to leave their relationship."[89] The court accepted this particular social group and explained that any claim regarding the existence of a particular social group in a country "must be evaluated in the context of the evidence presented regarding the particular circumstances in the country in question."[90] Further, the group members shared the common immutable characteristic of gender, as well as marital status, since the individual was unable to leave the relationship.[91]

### *D. The Role of the Attorney General and EOIR in Immigration Adjudications*

The Attorney General, through himself and the Executive Office for Immigration Review ("EOIR"), has authority over immigration adjudications.[92] Immigration Judges within the Department of Justice ("DOJ") adjudicate both defensive and affirmative asylum applications.[93] An application is defensive if filed in opposition to a removal proceeding.[94] A non-citizen can be placed in the defensive asylum process in various ways. For example, if, at the end of the affirmative asylum process, the non-citizen is determined to be ineligible for asylum, they can be referred to an Immigration Judge by U.S. Citizen and Immigration Services ("the USCIS").[95] Similarly, if a non-citizen is apprehended for being in the United States without proper documents and has a credible fear of persecution or torture, they can apply for asylum defensively.[96]

Asylum cases follow an adversarial approach, conducted in front of an Immigration Judge, where the non-citizen and an attorney from Immigration and Customs Enforcement ("ICE") present arguments and evidence.[97] After hearing the case, if the Immigration Judge determines that the non-citizen is eligible for asylum, asylum will be granted.[98] Otherwise, the Immigration Judge will evaluate the potential applicability of alternative relief options, such as withholding of removal or relief under the Convention Against Torture, to determine the non-citizen's

89. *Id.*
90. *Id.* at 392.
91. *Id.* at 392–93.
92. *See* 6 U.S.C. § 521; 8 U.S.C. § 1103(g).
93. Robert S. Meyers, Conducting Psychological Assessments for U.S. Immigration Cases 89–90 (1st ed. 2020).
94. *Id.* at 89.
95. *Id.*
96. *Id.*
97. *Id.* at 90.
98. *Id.*

eligibility.[99] If there are no other forms of relief, the Immigration Judge will order the non-citizen to be removed from the United States.[100]

For affirmative asylum applications, the non-citizen will be interviewed by a USCIS officer.[101] The non-citizen is permitted to have an attorney or approved representative present during the interview.[102] Unlike defensive asylum cases, affirmative asylum cases are non-adversarial.[103] The USCIS officer, in a non-adversarial interview, determines whether the applicant meets the definition of an asylee, is credible, and is not barred from obtaining asylum.[104] Based on the interview, the asylum officer can grant asylum as a matter of discretion.[105] Conversely, if the non-citizen is found to be ineligible for asylum and does not have legal immigration status, they will be served a Notice to Appear before an Immigration Judge at the EOIR.[106]

### *E. Alternatives to Asylum: Conventions Against Torture and Withholding of Removal*

Certain restrictions prevent the United States from deporting non-citizens to a country where their life or freedom is at risk.[107] The Attorney General cannot remove an alien if their life or freedom would be threatened in that country due to race, religion, nationality, membership in a particular social group, or political opinion—a provision known as "Withholding of Removal."[108] Notably, withholding of removal differs from asylum in that, for the former, the non-citizen must demonstrate that their life or freedom is more likely than not to be threatened in the proposed country of removal based on race, religion, nationality, membership in a particular group, or political opinion.[109] This standard is higher than in asylum cases, where only a one-in-ten chance of persecution is required to meet the burden for asylum.[110] An individual granted withholding is *ordered* removed.[111] However, physi-

99. *Id.*
100. *Id.*
101. *Id.* at 89.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. 8 U.S.C. § 1231(b)(3)(A).
108. *Id.*
109. *See* MEYERS, *supra* note 93, at 90–91; 8 U.S.C. § 1231(b)(3)(A).
110. Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).
111. Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J. L. REFORM 595, 601 n.15 (2012).

cal removal, or deportation, to the country where the individual fears persecution is withheld.[112]

Furthermore, there are fewer rights associated with the withholding of removal versus asylum.[113] However, unlike asylum, withholding of removal is a form of mandatory relief, meaning an individual who meets the elements must be granted withholding of removal.[114] A granting of withholding under the INA allows the non-citizen's eligible family members within the United States to join in their application.[115] However, the non-citizen cannot petition on behalf of their family members overseas to enter the United States.[116] The withholding of removal status also does not permit the non-citizen to apply for permanent residence or citizenship.[117]

An additional form of relief includes Convention Against Torture ("CAT") protection. CAT is provided for under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, to which the United States is a signatory.[118] CAT obligates the United States "not to expel, return, or extradite a foreign national 'where there are substantial grounds for believing that he would be in danger of being subjected to torture.'"[119] For CAT, torture is defined as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[120]

A CAT applicant must demonstrate to the Immigration Judge that they will more likely than not be tortured if they are forced to return

112. *Id*.
113. *See* Meyers, *supra* note 93, at 90.
114. Aschenbrenner, *supra* note 111, at 605 (citing Immigr. & Naturalization Serv. v. Stevic, 467 U.S. 407, 421 (1984)).
115. *See* Meyers, *supra* note 93, at 90.
116. *See id.*
117. *See id.*
118. *See id.*
119. *See id.* at 90.
120. G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Dec. 10, 1984).

to their country of origin.[121] Unlike relief under the withholding of removal or asylum, CAT protections may be granted to criminals, terrorists, and prosecutors.[122] Furthermore, unlike withholding of removal or asylum, CAT applicants do not need to establish that their torture is based on one of the five protected grounds.[123] However, like the withholding of removal grantees, CAT recipients cannot become lawful permanent residents or petition for their families to come to the United States.[124] Similarly, CAT is also a mandatory form of relief.[125]

## II. Compassion Fatigue

There are many definitions of compassion fatigue. One definition states compassion fatigue is "the cumulative physical, emotional, and psychological effects of continual exposure to traumatic or distressing stories or events of others when working in a helping capacity where demands outweigh resources."[126] Another definition defines compassion fatigue as "the experience of depersonalization and expression of dehumanization from distress when helping, caring for, or empathizing with someone else."[127] Terms such as vicarious trauma, secondary trauma syndrome, post-traumatic stress syndrome, and burnout are similarly used to characterize compassion fatigue.[128]

Compassion fatigue was first introduced as "a psychological construct to specify a type of burnout defined as part of a 'helper syndrome' experienced by emergency department nurses."[129] Since then, the term expanded throughout the caring professions.[130] The majority of literature on compassion fatigue focuses on its impact on the frontline employees who work directly with clients.[131] The majority of literature is also premised on the idea that "compassion fatigue is a result of professional burnout and secondary traumatic stress."[132] Secondary traumatic stress is "the sudden adverse reactions people can have to trauma

121. Meyers, *supra* note 93, at 91.
122. *Id.*; *see also* 8 U.S.C. § 1231(b)(3)(A); 8 U.S.C. § 1158(b)(1)(A).
123. Meyers, *supra* note 93, at 91.
124. *Id.* at 91–92.
125. *See id.* at 90.
126. Sarah Cearley, *Compassion Fatigue and the Toll it Takes in Life and Work,* Ark. Law., Aug. 18, 2014, at 46, 46.
127. Christian Vaccaro et al., *Sociological Conceptualizations of Compassion Fatigue: Expanding Our Understanding*, 15 Socio. Compass 1, 2 (2020).
128. Kathleen Ledoux, *Understanding Compassion Fatigue: Understanding Compassion*, 71 J. Advanced Nursing 2041, 2041 (2015) (citation omitted).
129. Vaccaro et al., *supra* note 127.
130. *Id.*
131. *Id.*
132. *Id.* at 4 (citation omitted).

survivors who they are helping or wanting to help."[133] Post-traumatic stress disorder and secondary traumatic stress symptoms are almost identical.[134] The main difference is that the traumatized person may develop post-traumatic stress disorder while the one hearing about the trauma may develop *secondary* traumatic disorder.[135]

Compassion fatigue often occurs in fields such as healthcare, social work, and law.[136] Compassion fatigue, in the legal context, can occur as a result of continued exposure to a client or victim's trauma.[137] This exposure can include personal interactions, testimony, 911 calls, and other evidence.[138] Individuals more likely to be affected by compassion fatigue include prosecutors, judges, or other lawyers who practice criminal defense, domestic violence, malpractice, family law, and the like.[139]

Individuals experiencing compassion fatigue experience symptoms paralleling those of Post-Traumatic Stress Disorder ("PTSD").[140] Those symptoms include avoidance, numbing, and persistent arousal.[141] The difference between compassion fatigue and PTSD is whether there is a primary or secondary stressor involved. A primary stressor, for example, is "experiencing a serious threat to self or sudden destruction of one's environs."[142] An example of a secondary stressor is "experiencing a serious threat to a traumatized person or sudden destruction of a traumatized person's environs."[143]

Compassion fatigue warning signs include intrusive thoughts, disturbing thoughts, being hyper-vigilant, easily startled, work exhaustion and getting too little "me time," difficulty sleeping, noticing increased pessimism, caring less about work, and losing faith in humanity.[144] In lawyers and judges, research points out professional characteristics that influence their vulnerability to compassion fatigue.[145] These characteristics include not showing weakness, denying, defending, and deflecting vulnerability, remaining emotionally detached, and being achievement-

133. Sharon Rae Jenkins & Stephanie Baird, *Secondary Traumatic Stress and Vicarious Trauma: A Validational Study*, 15 J. Traumatic Stress 423, 424 (2002).

134. *Id.*

135. *Id.*

136. *See* Lise Anne Slatten et al., *Compassion Fatigue and Burnout: What Managers Should Know*, 30 Health Care Manager 325, 325 (2011); *see generally* Richard E. Adams et al., *Compassion Fatigue and Psychological Distress Among Social Workers: A Validation Study*, 76 Am J. Orthopsychiatry 103 (2006); *see also* Cearley, *supra* note 126.

137. Cearley, *supra* note 126.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

oriented.[146] Compassion fatigue may arise suddenly, but it is more likely to arise when an individual is already beginning to experience burnout.[147] Therefore, work environments with high stress, heavy workloads, and stressful clients are likely to be breeding grounds for burnout and, in turn, compassion fatigue.

Frequently, immigrant clients experience various traumatic events before even seeking legal aid or representation. Therefore, it is unsurprising that many immigration attorneys—like public defenders, family law attorneys, or other professionals who help people—are regularly exposed to traumatic stories as part of their regular course of practice.[148] In particular, forms of relief such as asylum, CAT, and withholding of removal require "the lawyer to prepare the client to tell the story of their pain, to tell the story of the torture they have experienced. . . . Thus, the trauma becomes the centerpiece of the representation and [requires attorneys to] engage it as a critical mass of legal data and evidence."[149] Therefore, the trauma experienced by these clients becomes a central part of the attorney-client representation.[150] Furthermore, the evidence of the trauma that immigration attorneys must review and present to sustain a client's burden of proof is also central to attorney-client representation.[151] This wide range of evidence may include horrific photos, death certificates, police reports, newspaper articles documenting harm, and international reports on human rights abuses.[152]

Attorneys and other legal staff describe the effect of confronting these client narratives and documentary evidence in many ways.[153] This is in part because the legal profession has not adequately trained attorneys to recognize the range of negative effects that working with traumatized individuals may bring to the surface.[154]

Immigration Judges are particularly susceptible to compassion fatigue and burnout because "the refugees whose cases they adjudicate are often severely traumatized."[155] Further, Immigration Judges are

146. *Id.*

147. Fredrickson, *supra* note 26.

148. Hannah C. Cartwright et al., *Vicarious Trauma and Ethical Obligations for Attorneys Representing Immigrant Clients: A Call to Build Resilience Among the Immigration Bar*, 2 AILA L.J. 23, 24 (2020).

149. Marjorie A. Silver et al., *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship A Panel Discussion*, 19 TOURO L. REV. 847, 860 (2004).

150. Cartwright et al., *supra* note 148.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. STUART L. LUSTIG ET AL., *Burnout and Stress Among United States Immigration Judges*, 13 BENDER'S IMMIGR. BULLETIN at 24 (Jan. 1, 2008), https://www.naij-usa.org/images/uploads/publications/Burnout-and-Stress-Among-United-States-Immigration-Judges_01-01-08_1.pdf.

tasked with making decisions regarding who will receive the benefit of lawful status in the United States, a decision that brings on additional pressures.[156]

Immigration Judges are required to solicit sensitive accounts from likely vulnerable claimants while dispassionately and objectively assessing their accuracy and the correctness of their predicted risk of recurrence.[157] Moreover, they do this in a context where margins of discretion for evaluating credibility are wide, measures for predicting future risk are speculative, resources are limited, and political pressures are always present. Compassion fatigue can become especially problematic in the legal field when those suffering from compassion fatigue begin avoiding clients or tasks.[158] This is because the risk of an ethical violation of the duties of competence and diligence comes into play.

Moreover, the ABA Model Code of Judicial Conduct, like the Model Rules of Professional Responsibility, requires that judges perform their duties competently.[159] However, a judge experiencing compassion fatigue or vicarious trauma may not be able to perform competently if they are experiencing symptoms of feeling overwhelmed, dispassionate, or disoriented from compassion fatigue.[160] Furthermore, because some judges lack the requisite knowledge or skill to work with individuals who have survived trauma, they may inadvertently re-traumatize clients during proceedings or lack the attention and cultural competence to preside over a matter competently.

## III. The Effects of Compassion Fatigue on the Discretionary Standard in Asylum Cases

The Supreme Court stated that discretion in asylum cases allows for more than just the ability to decide whether an applicant is statutorily eligible for asylum.[161] Rather, the discretion means that "[m]eeting the definition of 'refugee' . . . does not entitle the alien to asylum—the decision to grant a particular application rests in the discretion of the Attorney General under §208(a)."[162] However, it is important to note that

156. *Id.*

157. Helen Baillot et al., *Second-hand Emotion? Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context*, 40 J. L. Soc'y 509, 510 (2013).

158. Fredrickson, *supra* note 26 (footnote omitted).

159. Model Code of Jud. Conduct, Canon 2 (Am. Bar Ass'n 2010); *See also* Model Rules of Pro. Conduct, r. 1.1 (Am. Bar Ass'n 2020).

160. *See* Cartwright et al., *supra* note 147, at 26.

161. Immigr. & Naturalization Serv. v. Stevic, 467 U.S. 407, 423 n.18 (1984).

162. *Id.*

although adjudicators have the discretion to deny asylum to individuals who meet the statutory requirements, they cannot grant asylum to an individual who is not statutorily eligible for whatever reason.

There are several justifications for the discretionary standard in asylum cases. One of those justifications is that when individuals receive asylum, they are invited to become permanent and vested members of the United States.[163] Therefore, the statutory or substantive requirements are insufficient to determine who should receive such privileges.

The discretionary determination involved in asylum cases is often treated as a balancing test, with adjudicators weighing the positive factors against any negative factors.[164] Discretionary determinations in asylum claims remain one of the few discretionary determinations that are reviewable at the circuit court level. As part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress removed jurisdiction from the federal courts to review:

> [A]ny judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this title to be in the discretion of the Attorney General or the Secretary of Homeland Security.[165]

### *A. Case Study*

In *Boer-Sedano v. Gonzales*, Jose Patricio Boer-Sedano ("Jose"), a native and citizen of Mexico, appealed the denial of his request for asylum, withholding of removal, and protection under CAT.[166] Jose entered the United States as a nonimmigrant visitor with authorization to stay in the United States for six months.[167] Jose applied for asylum defensively after being placed in removal proceedings for overstaying his visa.[168] Jose filed for asylum on the grounds that he faced persecution for being a homosexual man living with Acquired Immune Deficiency Syndrome (AIDS).[169]

Jose claimed that he could not live "a gay life openly in Mexico" because of the treatment he would receive on account of his sexuality.[170] Jose alleged being ostracized by his friends, family members, and

163. Aschenbrenner, *supra* note 111, at 597.
164. *Id.* at 612–15 n.100.
165. 8 C.F.R. § 242(a)(2)(B); 8 U.S.C. §1252(a)(2)(B).
166. Boer-Sedano v. Gonzales, 418 F.3d 1082, 1085 (9th Cir. 2005).
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*

coworkers on account of his sexuality.[171] Jose's asylum claim centered around his interactions with a "high-ranking police officer" who first stopped Jose and another man because he assumed they were going to engage in sexual activities together.[172] The officer arrested and detained the two men.[173] Then, over several months, the same police officer stopped Jose on nine separate occasions, each time ordering Jose into the police car.[174] The police officer would then drive to a dark location and force Jose to perform oral sex on him.[175] The police officer would tell Jose that he knew where he lived and worked and would tell others that Jose was gay if he resisted.[176] Furthermore, on one occasion, the officer pulled out his gun, put a bullet in the chamber, rolled the cylinder, and put the gun to Jose's head, stating, "If you're lucky, this is going to be your fate."[177] After this, Jose quit his job and fled to Monterrey, Mexico.[178]

Once Jose fled, his life remained difficult because he could not openly identify as a homosexual.[179] Jose decided to move to the United States once the Mexican underground gay discotheque he worked at was raided.[180] After this, Jose stated that he was "very, very much afraid" because he feared that the officers were going to assault him and that he would relive the same experiences as in his previous city.[181]

Despite these experiences, the Immigration Judge found Jose ineligible for asylum because he failed to establish past persecution on account of a protected ground.[182] The Immigration Judge reasoned that the sex acts that Jose was forced to perform by the police officer were a result of a "personal problem" Jose had with this officer.[183] Therefore, the judge believed Jose was not subject to the systematic persecution needed to establish a well-founded fear of future persecution.[184] The BIA later remanded the case for the Attorney General to exercise his discretion over Jose's asylum claim after finding Jose suffered past persecution.[185]

171. *Id.* at 1086.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 1087.
183. *Id.*
184. *Id.*
185. *Id.*

The issue in Jose's case, and those similarly situated, is that despite meeting the statutory requirements for asylum, the Attorney General still ultimately has the power to exercise discretion over these cases. However, a significant concern arises as this discretion may be susceptible to the impact of compassion fatigue commonly experienced by professionals in the immigration law field. For example, a study involving 88 trial judges found that judges experience several work-related stressors.[186] The work-related stressors identified in the study included exercising judicial discretion and authority in highly emotional cases.[187] The consequences of this stress can affect a judge's cognitive ability.[188] The impairment of their cognitive ability can influence how a judge assesses the evidence necessary to render a fair judgment.[189] Further, because high cognitive demands influence a judge's ability to recall facts and make impartial decisions, judges who experience stress for any reason may, as a result, make poor decisions.[190] Additionally, with the 2019 median caseload for Immigration Judges being 3,000 cases annually, this stress is likely affecting Immigration Judges and their decisions all over the country.[191]

The Immigration Judge who initially decided Jose's case may have been influenced by the distressing narratives heard from other asylum seekers. Alternatively, external pressures such as a high caseload or broader immigration law issues might have impacted the judge's decision-making. Regardless of the cause, there is a possibility that the judge unintentionally lacked compassion or experienced reduced cognitive ability when evaluating Jose's evidence. Furthermore, the judge might have appeared less compassionate due to a comparative assessment, deeming Jose's situation less severe than others who were granted asylum. Alternatively, the cynicism associated with compassion fatigue could have colored the adjudication of Jose's case. Nevertheless, this underscores a fundamental issue—someone else's more severe persecution should not diminish the legitimacy of another deserving person's claim for asylum. Moreover, the impact of stress and compassion fatigue on a judge's mental capacity can significantly influence case perceptions and decisions. Expanding judges' discretion beyond the already

186. Jared Chamberlain & Monica K. Miller, *Stress in the Courtroom: Call for Research*, 15 PSYCHIATRY, PSYCH., & L. 237, 239 (2008).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 238; *see generally* Van Knippenberg et al., *Judgment and Memory of a Criminal Act: The Effects of Stereotypes and Cognitive Load*, 21 EUROPEAN J. SOC. PSYCH 191 (1999).

191. Jasmine Aguilera, *A Record-Breaking 1.6 Million People Are Now Mired in U.S. Immigration Court Backlogs*, TIME (Jan. 20, 2022, 11:30 AM), https://time.com/6140280/immigration-court-backlog/.

existing latitude needed when evaluating whether an asylum seeker meets statutory requirements exacerbates the significant disparities in judicial outcomes. Adding to this challenge, most asylum seekers may be unaware that compassion fatigue influences their decisions, further exacerbating the problem.

In an article written by Judge Victor Reyes, a judge who presided over criminal, civil, probate, and family court matters, he shared his personal experiences with vicarious trauma or compassion fatigue.[192] Judge Reyes stated that:

> Experiencing horrific situations as a lawyer and then as a judge numbed me to the gross and subtle effects of what I was seeing and hearing. My mantra of "I have heard it all, nothing bothers me" demonstrated my ignorance as to the gross and subtle effects of the work on my well-being. It was not until these effects manifested in unhealthy ways did, I finally begin to seek the healing necessary to reconnect to my body, mind, and heart.[193]

Judge Reyes emphasized the importance of recognizing the personal and professional challenges inherent in a judge's role, emphasizing the need for honesty and self-awareness.[194] He also highlighted that by adopting tools for healing, judges can contribute to a judiciary with balanced professionals, thereby promoting more just and humane outcomes for the community and elevating the judiciary's integrity in the perception of those it serves.[195]

Without the honesty of judges like Judge Reyes, who openly acknowledge experiencing compassion fatigue, many of these decisions would go unchecked, perpetuating compassion fatigue and its effects in the immigration law context. Even more concerning is that asylum seekers seeking refuge from life-threatening circumstances might be unaware that a judge's compassion fatigue could have influenced their decisions. This is particularly problematic when many non-citizens may not have received work authorization or cannot continue paying for counsel to appeal their decisions.

The discretion granted to Immigration Judges exacerbates systemic issues. Despite potential cognitive effects resulting from compassion fatigue, Immigration Judges retain the authority to exercise discretion beyond what is inherently present in any case when deciding asylum cases.

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192. U.N. Off. on Drugs & Crime, *Vicarious Trauma Experienced by Judges and the Importance of Healing*, https://www.unodc.org/dohadeclaration/en/news/2021/26/vicarious-trauma-experienced-by-judges-and-the-importance-of-healing.html (last visited Jan. 8, 2024).

193. *Id.*

194. *Id.*

195. *Id.*

This is a critical issue because the decisions judges make in asylum cases can be a matter of life and death for individuals escaping persecution in their home country.

### *B. Varying Denial Rates Amongst Circuits*

Various organizations, including Syracuse University, support the Transactional Records Access Clearinghouse ("TRAC") Immigration Project.[196] This project includes a detailed report on the handling of asylum cases by over 200 Immigration Judges.[197]

In a 2007 study, documents from the Executive Office for Immigration Review were collected to analyze the disparities in how the nation's Immigration Judges decided thousands of asylum requests.[198] Part of the study suggested that the identity of the particular judge deciding the matter was more significant than the underlying facts of the case.[199] The study centered around fiscal years 2001 to 2006 in the four courts where most asylum cases are decided: New York, Miami, Los Angeles, and San Francisco.[200]

In New York, among the 36 judges, two denied asylum requests less than 10% of the time, and another denied requests *more than 90% of the time*.[201] In Miami, their 26 judges' denial rates ranged from 21.8% to 97.6%.[202] Setting aside the two judges with the lowest denial rates, the remaining judges' denial rates still varied between 63% and 98%. In Los Angeles, amongst their 31 judges, there was also considerable variability.[203] The lowest denial rate was 27.1%, while the highest was 86.7%.[204] Lastly, in San Francisco, the highest denial rate for one judge was 86.7%, while the lowest denial rate was 26.5%.[205] In other cities, most courts had vast judge-to-judge variations in asylum cases within the same area, with few exceptions.[206]

196. *Transactional Records Access Clearinghouse*, SYRACUSE UNIV., https://trac.syr.edu/aboutTRACgeneral.html (last visited Apr. 16, 2022).

197. *Id.*

198. *Id.* The study also noted that whilst comparing asylum denial rates among judges in each Immigration Court, the difference was generally found to be highly "statistically significant," meaning that the natural variation of the specific circumstances presented in asylum requests does not account for the judge-to-judge disparity in decisions where cases are assigned at random among judges in a city.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

Furthermore, the data showed that for the same countries, which would necessarily have the same, if not similar, country conditions, depending on the region, the judge-to-judge asylum rate varied significantly.[207] For example, for Chinese asylum seekers, the denial rate ranged from 7% up to 95%.[208] This discrepancy is significant because it suggests that the varied asylum decisions are not because of differing circumstances in the asylum seekers' cases.

This is because asylum seekers submit evidence of their home country's conditions to demonstrate that the government is unwilling or unable to help them escape persecution. For example, a homosexual Chinese person seeking asylum based on their membership in a particular social group of homosexual men in China would likely submit evidence of similar country conditions as another member of that group seeking asylum. However, according to the current disparities in judicial decisions, these two individuals may receive different decisions depending on the court or judge they appear before. Additionally, the statistical tests run in this study rule out the likelihood that the judicial decisions in these cases were chance variations.[209]

The decisions in Haitian asylum seekers' cases are another example of discrepancies among judicial decisions.[210] Nationally, judge denial rates ranged between 16% to 99% for Haitian applicants.[211] The most comparable number of cases were in Orlando and Miami.[212] In Miami, depending on the judge a case was assigned to, denial rates ranged from 33% to 99%.[213] Then, in Orlando, with just four judges, the denial rate ranged from 16% to 89%.[214]

The varied denial rates could be a result of many different factors, all of which could be mitigated if the legislature disallowed a judge's use of discretion when deciding asylum cases. Asylum seekers' fate should not differ or be determined by the immigration court, judge, or compassion fatigue. This is contrary to the fundamental goal of American jurisprudence that all receive equal justice under the law. The current immigration court system does not allow for equal justice under the law when a non-citizen's fate differs greatly based on the specific perspective, emotional state, or experience an Immigration Judge uses when

207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* Furthermore, the findings from this 2007 study are still relevant today because the 2016 to 2021 fiscal year judge-by-judge asylum decisions in Immigration Courts continue to show varied denial rates in asylum cases.

evaluating a case. However, this is an avoidable outcome if there is less room for decision variations across the immigration courts in this country. The first step in eradicating this issue is limiting judicial discretion in asylum cases.

## IV. SOLUTION

To combat the issues judicial discretion raises in asylum cases, Congress can remove the language from the current INA statute that makes asylum a discretionary form of relief.[215] By doing so, the legislature would ensure that judges' decisions in asylum cases are insulated from the effects of compassion fatigue or other factors leading to varying denial rates among the circuits. This is crucial, particularly because practitioners, especially judges with extensive experience in immigration law, may not recognize they are undergoing compassion fatigue.

Currently, the INA statute describing asylum states that the Secretary of Homeland Security or Attorney General *may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established and if the alien is a refugee within the meaning of section 1101(a)(42)(A).[216] If asylum were mandated as a form of relief, judicial decisions would be better protected from the influence of compassion fatigue, resulting in fairer outcomes. Moreover, if asylum became mandatory, it could reduce the significant disparity in denial rates across circuits. This is because judges would have less flexibility in deciding cases for individuals who unequivocally meet the statutory standard.

Moreover, if the legislature were to make asylum a mandatory form of relief, asylum would mirror the elements of withholding of removal. As previously mentioned, withholding of removal is similar to asylum in that a noncitizen is required to prove the elements of persecution, nexus, and at least one of the five protected grounds.[217] One difference between the two forms of relief, however, is that withholding of removal has a higher standard of proof.[218] Still, in this Note's proposed solution, asylum would maintain its lesser standard but become a mandatory form of relief. Therefore, even a one-in-ten chance of persecution would remain sufficient to meet a non-citizen's burden in an asylum case. Furthermore, this Note does not propose that changing the

215. 8 U.S.C. § 1158(b)(1)(A).
216. *Id.*
217. *See* MEYERS, *supra* note 93, at 90; 8 U.S.C. § 1231(b)(3)(A).
218. *See* MEYERS, *supra* note 93, at 90.

asylum standard would affect the need for withholding of removal or CAT as separate forms of relief.

Furthermore, instead of the current legislation, a model provision outlining asylum as a mandatory form of relief could include the following:

> The Secretary of Homeland Security or the Attorney General *must* grant asylum to a non-citizen who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title. There are no exceptions to granting asylum where a non-citizen meets the definition of a refugee within the meaning of Section 1101(a)(42)(A).

## V. Conclusion

Asylum standards should no longer be discretionary but mandatory because of the effects compassion fatigue can have on judicial decisions as well as other factors, such as the considerable variation in denial rates of asylum applications across circuits. The existing standard has led to significant and unjustifiable disparities in asylum decisions, deviating from the intended policy objectives of asylum without adequate explanation. Furthermore, by removing a judge's discretion in asylum cases, compassion fatigue is less likely to contribute to the varied decisions of judges evidenced in this Note. However, if asylum were a mandatory form of relief, a judge's decision would be based solely on the statutory requirements; therefore, there would be no room for a judge to decide contrary to the statutory elements without overstepping the bounds of their authority. As it currently stands, if an asylum seeker meets all the statutory elements, a judge still has the *discretion* to deny their application for other reasons. Changing the standard from discretionary to mandatory would eliminate this power and be a step towards more just asylum decisions in this country.

# Remedies for Executioners: The Machinery of Death's Overlooked Victims

Kimberly Hope Vega Cioffi*

*Abstract*

*Capital punishment punishes more than just the person executed. Correctional officers working as executioners are negatively affected by the state-sanctioned murder they are ordered to facilitate. Many executioners will develop psychological and mental illnesses because of their work. Considering that these mental injuries "arise out of" executioners' employment, most may assume that workers' compensation or OSHA would provide executioners assistance in managing their psychological sufferings. But, unfortunately, this is currently not the case in most death penalty states. Workers' compensation laws, the workers' compensation exclusivity doctrine, and OSHA in most death penalty states do not allow executioners to recover for their "mental only" injuries arising out of their employment. This Note describes the sufferings experienced by executioners and specifically looks at two stories of former South Carolina executioners and their attempt to find a remedy for their suffering through South Carolina's state court system. This Note provides suggested amendments to death penalty state workers' compensation laws and OSHA's General Duty Clause to properly care for executioners' psychological traumas developed from committing state-sanctioned murder. Since the proposed solution may add costs to an already expensive system, this Note concludes by ultimately recommending eliminating the death penalty as a form of punishment.*

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## INTRODUCTION

In 1994, Texas scheduled Bruce Callins' execution.[1] The district and circuit courts had previously denied his writ of habeas corpus.[2] Then, the Supreme Court denied Mr. Callins' petition for a writ of certiorari, asking the Court to overturn the district and circuit courts' decisions. The Court also denied his application for a stay of execution.[3] Justice Blackmun issued a dissenting opinion in Mr. Callins' case, explaining why he believes the death penalty is now unconstitutional.[4] Justice Blackmun had the privilege to declare, "[f]rom this day forward, I no longer shall tinker with the machinery of death."[5] Meaning, he no longer wanted to be involved in the death penalty process. Unfortunately, whether Justice Blackmun tinkered with it or not, the

1. *See In re* Callins, 520 U.S. 1227, 1227 (1997).
2. *Id.*
3. *Id.*
4. Callins v. Collins, 510 U.S. 1141, 1143–59 (1994) (Blackmun, J., dissenting).
5. *Id.* at 1146.

machinery of death took Mr. Callins' life in 1994[6] and has taken more than 1,000 lives since then.[7]

And what about those whose livelihood requires them to be involved in the machinery of death's process? After an execution, there is "more than one casualty."[8] The death penalty has a "brutalizing effect . . . on everyone else in the system—the wardens, prison guards, chaplains, defense lawyers, and their families, as well as the families of the victims and the condemned."[9] Executioners become "the broken cogs and wheels in that deadly machinery."[10]

Researchers have generally overlooked the occupational stressors and psychological effects of working in a correctional institution.[11] Some may think applying general law enforcement research to correctional officers is appropriate, but the comparison is not so simple.[12] For example, correctional officers "have a suicide rate that is twice as high as the rate of police officers and the general population."[13] The specific trauma experienced by correctional officers working as executioners is like the trauma experienced by war veterans.[14] However, one main difference is that "[v]eterans have access to free, lifelong health care through the Department of Veterans Affairs. Execution workers have no comparable support system."[15]

What exactly do executioners experience in the workplace? Death penalty states usually have unwritten or confidential policies and procedures for carrying out executions;[16] however, Idaho has

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6. *Id.* at 1143.

7. *Executions by State and Year*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year (last visited Feb. 2, 2023).

8. Chiara Eisner, *Carrying Out Executions Took a Secret Toll on Workers—Then Changed Their Politics*, NPR (Nov. 16, 2022, 4:01 PM), https://www.npr.org/2022/11/16/1136796857/death-penalty-executions-prison (internal quotation marks omitted and citation omitted).

9. Stephen Rohde, *"Clemency:" Exposing the Machinery of Death*, ACLU (Jan. 9, 2020), https://www.aclu.org/news/capital-punishment/clemency-exposing-the-machinery-of-death.

10. *Id.*

11. Jaime Brower, Off. of Just. Programs Diagnostic Ctr., U.S. Dep't of Just., Correctional Officer Wellness and Safety Literature Review 12 (2013), https://s3.amazonaws.com/static.nicic.gov/Public/244831.pdf ("While the field of police psychology has grown over the last century, the notion of combining psychological principles and methods to corrections has not yet come to fruition. Not only is there no field of correctional psychology, but there are no established professional organizations to address the growing psychological needs of this specialty occupation.").

12. *Id.* at 5.

13. *Id.* at 11 (citing Report, New Jersey Police Suicide Task Force (2009), http://www.nj.gov/lps/library/NJPoliceSuicideTaskForceReport-January-30-2009-Final(r2.3.09).pdf).

14. Eisner, *supra* note 8.

15. *Id.*

16. *See* Savannah Kumar, *Documents Reveal Confusion and Lack of Training in Texas Execution*, ACLU (Apr. 21, 2022), https://www.aclu.org/news/capital-punishment/documents-reveal-confusion-and-lack-of-training-in-texas-execution.

made its procedures public.[17] Idaho's procedures reveal the trauma executioners experience and how the prison system insufficiently prepares these executioners for the psychological toll of their work. In Idaho, three teams are involved in the execution process: The Escort Team, the Medical Team, and the Administrative Team.[18] The Escort Team consists of correctional facility staff who volunteer to be involved in the execution process.[19] Correctional facility staff must meet certain criteria to volunteer for the Escort Team, but none speaks to being emotionally and mentally fit for the role.[20] Before an execution, multiple "rehearsals" are conducted where a member of the Escort Team pretends to be the condemned person, and the other members of the Escort Team practice the procedures for carrying out the execution.[21] In Idaho, lethal injection is the method of execution, so during these rehearsals, correctional officers who are part of the Escort Team and "playing" the condemned person have real IV catheters inserted in them, and an IV drip is established.[22] During an actual execution, two Escort Team members are in the execution chamber with the condemned person as they are dying.[23] Following the execution, Idaho's policies and procedures carefully explain how to safely dispose of used materials and clean the execution chamber.[24] However, nothing is mentioned regarding a psychological debrief or evaluation of staff involved in the execution.[25]

This Note spotlights the negative effect the capital punishment system has on executioners and how executioners are left largely without remedy because of workers' compensation statutes and the Occupational Safety and Health Administration's ("OSHA") failure to require employers to implement measures to prevent employees' "mental only" injuries; that is, emotional and psychological harms that are not accompanied by a physical injury. In this Note, the term "executioners" encompasses all those involved in facilitating an execution: wardens and other correctional officers, also known as "the death team."[26] Part I discusses the emotional and psychological harm

17. IDAHO DEP'T OF CORR., EXECUTION PROCEDURES (Mar. 30, 2021), http://forms.idoc.idaho.gov/WebLink/0/edoc/283090/Execution%20Procedures.pdf.

18. *Id.* at 6.

19. *Id.*

20. *Id.*

21. *Id.* at 8.

22. *Id.*

23. *Id.* at 13.

24. *Id.* at 31.

25. *Id.* at 31.

26. Jason Silverstein, *Ron McAndrew Is Done Killing People*, ESQUIRE (Jan. 14, 2014, 5:59 AM), https://www.esquire.com/news-politics/news/a26833/ron-mcandrew-is-done-killing-people/.

executioners experience because of their work. Then, Part I summarizes two cases where past executioners in South Carolina were unable to hold the South Carolina prison system liable for its negligence in causing them debilitating emotional and psychological harm. Part II focuses on describing workers' compensation laws and OSHA. Beginning with a general explanation of workers' compensation, Part II continues by introducing the workers' compensation exclusivity provision and how it limits executioners' abilities to recover for negligence from their employer. Part II also explains workers' compensation laws in capital punishment states and whether mental only injuries are recoverable. Then, Part II introduces OSHA and its role in preventing occupational hazards. Part II concludes by summarizing OSHA's status in death penalty states. Next, Part III proposes changes to workers' compensation laws and OSHA's General Duty Clause to address the current lack of remedies for executioners' emotional and psychological harm caused by their work. This Note's conclusion argues that, in the alternative, given the many other harmful effects of capital punishment, the best solution is to finally outlaw capital punishment in the United States.

## I. Executioners' Emotional and Psychological Harms

In discussions on the negative effects of the death penalty, society rarely mentions how the death penalty affects those whose job it is to carry out society's wish of executing someone. How would killing sixty-two people affect you? In Jerry Givens' role as a Virginia state executioner, he killed sixty-two people in seventeen years.[27] After retiring, Mr. Givens spent his life trying to put an end to the death penalty.[28] Mr. Givens claims that if he knew how his work as an executioner would affect him, he would not have done it.[29] There are many stories like Mr. Givens', and this section highlights those stories. This section concludes by summarizing two cases, *Baxley v. Ozmint* and *Bracey v. Ward*. Both cases are about former South Carolina executioners attempting to hold the South Carolina prison system accountable via civil and workers' compensation claims.[30] Mr. Baxley and Mr. Bracey both currently suffer from post-traumatic stress disorder

27. Selene Nelson, *"I Executed 62 People. I'm Sorry": An Executioner Turned Death-Penalty Opponent Tells All*, Salon (Oct. 8, 2015, 4:00 PM), https://www.salon.com/2015/10/08/i_executed_62_people_im_sorry_an_executioner_turned_death_penalty_opponent_tells_all/.

28. Robert T. Muller, *Prison Executioners Face Job-Related Trauma*, Psych. Today (Oct. 11, 2018), https://www.psychologytoday.com/us/blog/talking-about-trauma/201810/prison-executioners-face-job-related-trauma.

29. *Id.*

30. Bracey v. Ward, No. 3:07-4068-CMC, 2010 U.S. Dist. LEXIS 31518, at *25 (D.S.C. Mar. 30, 2010); Baxley v. Ozmint, No. 3:07-cv-04067-CMC, 2010 U.S. Dist. LEXIS 24423, at *36 (D.S.C. Mar. 16, 2010).

("PTSD") and other psychological illnesses because of their work in the South Carolina prison system as executioners.[31]

Correctional officers generally suffer from significant mental health issues caused by their profession.[32] While at work, correctional officers are negatively affected by the trauma and mental illness of the incarcerated people they oversee.[33] They are also threatened with physical harm when prisoners assault and even attempt to kill them.[34] Consequently, 34% of correctional officers will end up suffering from PTSD, and one-third of correctional officers eventually develop depression.[35] Additionally, married correctional officers are also "20% more likely to end up divorced than someone not working in corrections."[36] Correctional officers usually use sick leave to cope with work stress, and "studies in both New York State and California found that correctional personnel use more sick leave than other state workers."[37] Correctional officers are also more likely to die from suicide than they are likely to die on the job.[38]

Considering there is a general mental health crisis in the correctional officer profession,[39] how much more is this exacerbated for those correctional officers tasked with killing an incarcerated person? Capital punishment produces "one sure effect—to depreciate or to destroy all humanity and reason in those who take part in it directly."[40] The position has historically carried a negative, shameful stigma.[41] In the media, "executioners are painted as bloodthirsty men who swing axes and dress in chain mail."[42] Prison employees who are part of execution teams are forever "psychologically or morally defiled" because of their work.[43] To make matters worse, they usually suffer through the mental health consequences

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31. *Id.*

32. David Baker, *Correctional Officer Mental Health: A Call for Change*, CORDICO (May 18, 2022), https://www.cordico.com/2022/05/18/correctional-officer-mental-health-call-for-change/.

33. Natalie Goulette et al., *"Anything Can Happen at Any Time": Perceived Causes of Correctional Officer Injuries*, 47 CRIM. JUST. REV. 17, 17–33 (2022).

34. *Id.*

35. Baker, *supra* note 32.

36. *Id.* (internal quotation marks omitted) (quoting Gary Aumiller, Ph.D. ABPP, LINKEDIN (Dec. 2, 2016), https://www.linkedin.com/pulse/divorce-cops-corrections-gary-aumiller-ph-d-abpp/).

37. BROWER, *supra* note 11 (citing GARY CORNELIUS, STRESSED OUT: STRATEGIES FOR LIVING AND WORKING IN CORRECTIONS (1st ed. 1994)).

38. Baker, *supra* note 32.

39. *Id.*

40. ALBERT CAMUS, *Reflections on the Guillotine*, *in* RESISTANCE, REBELLION, AND DEATH 130, 149 (Justin O'Brien, trans., The Modern Library 1963).

41. Ellyde Roko, *Executioner Identities: Toward Recognizing a Right to Know Who Is Hiding Beneath the Hood*, 75 FORDHAM L. REV. 2791, 2796 (2007).

42. Chiara Eisner, *Secrets of the Death Chamber*, STATE (updated Jan. 4, 2022, 12:24 PM), https://www.thestate.com/news/local/crime/article254201328.html.

43. ROBERT J. LIFTON & GREG MITCHELL, WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS 83 (Perennial ed., 2002).

of their work alone.[44] After an execution, some executioners do not want to face their colleagues because they do not want their colleagues to see their suffering.[45] They are also more likely to suffer in silence because most of them do not disclose their job duties to their families due to shame and guilt.[46] Some executioners turn to alcohol immediately after an execution to numb those psychological effects.[47] Even worse, others become hopeless in their isolation: "10% of correctional officers have thought about killing themselves, but 73% haven't told anyone."[48]

"Those who champion the death penalty, the law enforcement officials who call for it, the juries who vote for it, the judges who uphold it, the pardon boards and the governors who sign off on it, are not the ones who walk into the death chamber and help end lives."[49] In 2011, retired wardens in Georgia begged the governor to grant condemned incarcerated person Troy Davis clemency because of the mental harm they knew the executioners would experience by killing Mr. Davis.[50] The consequences of the trauma an executioner experiences from performing an execution parallel the consequences of the trauma experienced by military service members who have experienced war.[51] When veterans return from being overseas, they are usually welcomed with celebrations and parades.[52] Executioners do not go home to a parade after an execution; they usually process the event alone, and "[t]hat isolation is just deadly in a lot of different kind of ways."[53] Another difference is that executioners are not acting in self-defense like soldiers are when at war.[54] Some executioners have even created a relationship with the incarcerated people they eventually kill.[55]

Ron McAndrew worked as warden of Florida State Prison—the location of Florida's execution chamber—from 1996 to 1998.[56] He "gave the signal to flip the switch on three executions."[57] When

44. Baker, *supra* note 32.

45. Lifton & Mitchell, *supra* note 43, at 86.

46. Walter C. Long & Oliver Robertson, *Prison Guards and the Death Penalty*, Penal Reform Int'l, at 3 (2015), https://cdn.penalreform.org/wp-content/uploads/2015/04/PRI-Prison-guards-briefing-paper.pdf.

47. Lifton & Mitchell, *supra* note 43, at 86.

48. Baker, *supra* note 32.

49. Sara Rimer, *In the Busiest Death Chamber, Duty Carries its Own Burdens*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/stories/in-the-busiest-death-chamber-duty-carries-its-own-burdens (last visited Nov. 20, 2022).

50. Rohde, *supra* note 9.

51. Trevor Pyle, *Reporting the Untold Tales of Executioners' Songs*, Nieman (Dec. 3, 2021), https://niemanstoryboard.org/stories/reporting-the-untold-tales-of-executioners-songs/.

52. *See* Eisner, *supra* note 42.

53. *Id.* (internal quotation marks and citation omitted).

54. Lifton & Mitchell, *supra* note 43, at 91.

55. *Id.*

56. Silverstein, *supra* note 26.

57. *Id.*

Mr. McAndrew was first offered the warden position at Florida State Prison, the Florida Department of Corrections simply asked him if he was willing to carry out death warrants.[58] At the time, he did not think he would have a problem carrying out death warrants because he supported the death penalty.[59] But what Mr. McAndrew did not realize is that when you are the warden, you form a close relationship with the death row incarcerated person in the days between their death warrant arriving and scheduled death.[60] The last execution he performed in Florida did not go as planned.[61] Mr. McAndrew and his team burned the condemned person to death instead of electrocuting him.[62] Afterward, Mr. McAndrew drank "a bottle of whiskey a day" and took an alarming amount of sleeping pills because the trauma from the execution would not let him sleep.[63] He also started having nightmares where he would see "the faces of the men [he] executed."[64] He asked to be transferred to a different prison to avoid facilitating more executions.[65]

Unfortunately, Mr. McAndrew's experience is common among correctional officers working on death row. An anonymous, eight-year veteran Texas death-row correctional officer recalls the morning of an execution where he was in charge of ensuring the condemned person took his last shower and got dressed to go to the death chamber.[66] The correctional officer could not even look the condemned person in the eyes.[67] Towards the end of his eight years as a correctional officer, he began having nightmares and started suffering from high blood pressure.[68] He attributes the high blood pressure to the work on death row because he began noticing that even the younger correctional officers began suffering from high blood pressure.[69] He also tells the story of one of his death row colleagues, during a shift, walking to his car in the prison parking lot and killing himself with a gun.[70] Conditions for

58. *Id.* A death warrant is "an official order authorizing the execution of the sentence of death." DICTIONARY.COM, https://www.dictionary.com/browse/death-warrant (last visited Dec. 13, 2023).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Alex Hannaford, *Inmates Aren't the Only Victims of the Prison-Industrial Complex*, NATION (Sept. 16, 2014), https://www.thenation.com/article/archive/inmates-arent-only-victims-prison-industrial-complex/.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

Texas death-row correctional officers got so bad that, in 2014, the Texas prison guards union asked for better conditions for the incarcerated people on death row because the terrible conditions were tangentially negatively affecting the correctional officers.[71]

Some may say that if the work is so traumatic, correctional officers should find other work. However, people fail to realize that in many death row prison towns, the prison is the main source of employment for those in that area.[72] Moreover, the job security of working at a prison is attractive; unfortunately, there will always be work at a prison, no matter how bad the economy is doing.[73] Working as an executioner typically comes with a promotion and pay increase.[74] Even when a death-row correctional officer no longer wants to be part of the execution team, they may be reluctant to ask to be removed from the execution team because they may face "ridicule, bullying, or demotion."[75] Like Mr. Baxley and Mr. Bracey[76], many death-row correctional officers need their jobs as executioners to support their families, and that is why they stay—even at the expense of their health and sometimes their lives.

### *A. Baxley v. Ozmint and Bracey v. Ward*

Craig Baxley[77] and Terry Bracey[78] were South Carolina Department of Corrections ("SCDC") employees. Mr. Baxley[79] and Mr. Bracey[80] both testified that they believed their promotions were based on whether they were willing to execute death-row incarcerated people. After Mr. Baxley's first execution, "[n]ightmares replaced his previously sound sleep. Painful knots invaded his stomach. Anytime he became nervous, his hands started to drip with sweat like they did in the death chamber."[81] People told him he had "changed completely."[82] He also started experiencing suicidal thoughts.[83] Mr. Bracey still remembers how the condemned man's body smelled after he pushed

71. Long & Robertson, *supra* note 46, at 1.

72. *See* Hannaford, *supra* note 66 (explaining that the prison is one of two main employers of Texas town).

73. *Id.* (explaining how prison work is "recession proof").

74. Lifton & Mitchell, *supra* note 43, at 83.

75. *Id.*

76. Eisner, *supra* note 42.

77. Am. Compl., Baxley v. Ozmint, No. 3:07-cv-04067-CMC, 2010 U.S. Dist. LEXIS 24423, at *1 (D.S.C. Mar. 16, 2010).

78. Bracey v. Ward, No. 3:07-4068-CMC, 2010 U.S. Dist. LEXIS 31518, at *1 (D.S.C. Mar. 30, 2010).

79. *Baxley*, 2010 U.S. Dist. LEXIS 24423, at *3.

80. *Bracey*, 2010 U.S. Dist. LEXIS 31518, at *3–4.

81. Eisner, *supra* note 42.

82. *Id.* (internal quotation marks and citation omitted)

83. *Id.*

the button to electrocute him.[84] Mr. Baxley "executed 10 people" during his time as an executioner.[85] During one execution, "the lethal syringe came out of the [condemned person's] arm," and Mr. Baxley "was exposed to poison [and] blood."[86] During another execution, the electric chair was used "after the electric chair had not been used for many years," and Mr. Baxley was not adequately prepared for the "shocking smell and scene of agony presented."[87]

SCDC did not mentally or emotionally prepare Mr. Baxley and Mr. Bracey for their work as executioners. They did not undergo mental health screening or mental health training in preparation for the work.[88] Nor were they told to proactively receive mental health counseling to discuss the trauma experienced because of their work, but they do admit that they independently utilized free therapy sessions offered by the agency.[89] SCDC has an Employee Assistance Program, offering three counseling sessions to employees each year.[90] While they utilized these sessions, Mr. Baxley and Mr. Bracey did not find the sessions helpful.[91] Also, in preparation for an execution, SCDC holds training to help correctional officers emotionally cope with assisting in the execution.[92] But Mr. Baxley and Mr. Bracey were never involved in these trainings; the actual people performing the execution do not get invited to those trainings.[93] Realizing their employer would not assist them, they did what they could on their own to cope with the mental stress.[94] Eventually, Mr. Baxley and Mr. Bracey asked the warden for "a break from execution work."[95] The warden told them "they could lose their leadership roles if they didn't do it . . . and could instead be demoted to work in a prison somewhere else."[96] Mr. Baxley and Mr. Bracey needed their jobs to "support their families," so they continued working as executioners until they "reached a breaking point."[97]

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84. *Id.*
85. Eisner, *supra* note 8.
86. Amended Complaint at ¶ 25, Baxley v. Ozmint, No. 3:07-cv-04067-CMC, 2010 U.S. Dist. LEXIS 24423 (D.S.C. Mar. 16, 2010), ECF No. 6.
87. *Id.*
88. Eisner, *supra* note 42.
89. *Id.*
90. Bracey v. Ward, No. 3:07-4068-CMC, 2010 U.S. Dist. LEXIS 31518, at *4–5 (D.S.C. Mar. 30, 2010).
91. Eisner, *supra* note 42.
92. *Baxley*, 2010 U.S. Dist. LEXIS 24423, at *4.
93. *Id.*
94. Eisner, *supra* note 42.
95. *Id.*
96. *Id.* (explaining how the warden denies these claims in legal documents).
97. *Id.*

After reaching this breaking point, Mr. Baxley and Mr. Bracey attempted to find legal remedies for their psychological harm. A few years after they quit working at the prison, Mr. Baxley and Mr. Bracey sued the warden, Mr. Ward, "and the then director of the Department of Corrections, Jon Ozmint," for intentional infliction of emotional distress.[98] They also tried to find a remedy via workers' compensation for "permanent disabilities [arising from] workplace stress and emotional damages."[99]

While Mr. Baxley and Mr. Bracey filed separate claims, the harms described in their respective court records were similar.[100] After leaving their careers as executioners, they were both "diagnosed with PTSD and depression."[101] Their poor mental health began affecting their sleep, so their doctors prescribed the men medication for assistance.[102] Mr. Bracey "has a heart condition," and Mr. Baxley "endures severe stomach pain his doctor linked to elevated stress levels at work."[103] These ailments did not begin until they became executioners, and they both believe their work as executioners caused these ailments.[104] Even now, their relationships with their families, friends, and faith "continue to suffer."[105]

Regarding the intentional infliction of emotional distress claim, the judge found that the actions of Mr. Ward and the prison were "not sufficiently outrageous" to support the former executioners' intentional infliction of emotional distress claims.[106] The judge also found that Mr. Baxley and Mr. Bracey had insufficient evidence to prove they were forced to perform the executions.[107] Moreover, the judge found that there was no evidence to prove the intent element required to succeed in an intentional infliction of emotional distress claim.[108] Meaning, there was insufficient evidence to show that the prison intentionally inflicted this emotional distress on them. Therefore, the court ruled in favor of the prison's motions for summary judgment in Mr. Baxley's and Mr. Bracey's cases.[109]

98. *Id.*
99. *Id.*
100. Eisner, *supra* note 42.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. Bracey v. Ward, No. 3:07-4068-CMC, 2010 U.S. Dist. LEXIS 31518, at *25 (D.S.C. Mar. 30, 2010); Baxley v. Ozmint, No. 3:07-cv-04067-CMC, 2010 U.S. Dist. LEXIS 24423, at *35–37 (D.S.C. Mar. 16, 2010).
107. *Baxley*, 2010 U.S. Dist. LEXIS 24423, at *38; *Bracey*, 2010 U.S. Dist. LEXIS 31518, at *26.
108. *Baxley*, 2010 U.S. Dist. LEXIS 24423, at *39.
109. *Id.*; *Bracey*, 2010 U.S. Dist. LEXIS 31518, at *27.

Mr. Baxley and Mr. Bracey lost their civil and workers' compensation claims.[110] If they suffered harm because of their employment, why could they not—at the very least—recover via the workers' compensation system? Part II discusses this lack of remedy.[111]

## II. Workers' Compensation Statutes and OSHA Leave Most Executioners Remedy-Less

Like Mr. Baxley and Mr. Bracey, most other executioners are unlikely to recover for their emotional and psychological harm through workers' compensation statutes or OSHA. Both workers' compensation statutes and OSHA were created to protect employees but fall short in protecting some of the most vulnerable employees: executioners. This is because most state workers' compensation claims do not allow recovery for mental injury that is unaccompanied by physical injury. State workers' compensation laws also generally do not allow employees to recover for tort claims against their employer because of workers' compensation exclusivity. Moreover, OSHA currently does not hold employers accountable for mental injuries. The sections that follow discuss each of these issues in depth.

### *A. Workers' Compensation*

Workers' compensation is a mechanism for employees to recover for workplace injuries without having to prove fault to the employer.[112] However, this comes at a cost to the employee. While workers' compensation creates a more accessible avenue for employees to recover from their employers, it also adds barriers. Workers' compensation places exclusivity rules on when an employee can seek damages from an employer for an injury and how much they can recover.[113] Essentially, "[t]he workers' compensation system represents a compromise."[114] Each state has its workers' compensation statute that determines what an employee can recover for and how

110. Eisner, *supra* note 42.

111. Other lawsuits re: executioners could not be found, but it is assumed that most executioners would hit the same roadblocks as Mr. Baxley and Mr. Bracey because of limited workers' compensation statutes and workers' compensation exclusivity in death penalty states.

112. Arthur Larson, *Nature and Origins of Workmen's Compensation*, 37 Cornell L. Rev. 206, 206 (1952).

113. Joseph H. King Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 Tenn. L. Rev. 405, 516 (1988).

114. *Id.*

to recover from a workplace injury.[115] Typically, a state's workers' compensation act has the following features:

- an employee is automatically entitled to certain benefits when they suffer a personal injury "arising out of and in the course of employment;"
- an employee's right to recover is not reduced by contributory negligence, and an "employer's complete freedom from fault does not lessen his liability;"
- only employees—not independent contractors—can recover under worker's compensation statutes;
- employees usually receive cash wage benefits, or when the injury results in death, the employee's dependents receive benefits; maximum and minimum limits for the amount of recovery are usually imposed;
- the exclusivity doctrine: employees and their dependents cannot bring tort claims against the employer for any injury covered by the worker's compensation statute;
- employees can still sue a third party for negligence when applicable;
- worker's compensation claims are processed by a state administrative agency and not adjudicated through the typical state court system;
- the employer is required to have insurance to "secure his liability."[116]

In its simplest form, workers' compensation is often compared to strict liability torts.[117] However, the social and philosophical purpose behind workers' compensation differs from the purpose behind strict liability torts.[118] The social philosophical reason behind strict liability torts can be put this way, "when a man carries on a hazardous undertaking which has sufficient social utility to prevent the law from forbidding it altogether, the law will permit him to carry it on only on condition that he assume liability without fault for any consequent injuries."[119] In contrast, "employment generally is not ultra-hazardous in the sense used in strict liability tort cases."[120] The philosophy behind workers' compensation, instead, is to provide "financial and medical benefits for the victims of work-connected injuries which an enlightened community

115. *See* 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation §2.07 (Matthew Bender ed., 2023).
116. Larson, *supra* note 112 (internal quotation marks omitted).
117. *Id.* at 211.
118. *Id.* at 209–12.
119. *Id.* at 211.
120. *Id.*

would feel obliged to provide" in the most efficient manner possible.[121] The alternatives would be to allow victims of work-connected injuries to suffer financial ruin because of their injuries or have society provide relief through a type of welfare program.[122] Workers' compensation is a better alternative because it "plac[es] the cost where it rightly belongs, on the consumers of the product whose production was the occasion for the injury."[123]

The threshold test in a workers' compensation claim is whether the event that caused the injury is related to the employment.[124] Under workers' compensation, "the only injuries compensated for are those which produce disability and thereby presumably affect earning power."[125] Some workers' compensation statutes only cover physical injuries, others extend coverage for "occupational diseases arising out of the employment relationship," and the most extensive allow recovery for mental injury.[126]

### 1. *Workers' Compensation Exclusivity*

Workers' compensation exclusivity rules determine when an employee can sue an employer for a personal injury in civil court as opposed to recovering for the injury under the state's workers' compensation procedures.[127] The exclusive remedy rule usually asks three main questions: "First, which injuries and diseases are subject to the exclusive remedy rule? Second, which persons and entities are protected or precluded by the rule? Third, what exceptions may render an otherwise protected person or entity subject to liability or a tort claim for an otherwise covered injury or disease?"[128]

Many criticize workers' compensation because of the exclusive remedy rule. Critics of workers' compensation exclusivity argue that the exclusivity doctrine limits the employee from recovering the full amount of damages they would be owed had the issue been adjudicated in civil court.[129] This is due to recovery limitations inherent in workers' compensation statutes.[130]

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121. *Id.* at 209.
122. *Id.*
123. *Id.* at 210.
124. *Id.* at 208.
125. *Id.* at 212–13.
126. James R. Martin, *A Proposal to Reform the North Carolina Workers' Compensation Act to Address Mental-Mental Claims*, 32 WAKE FOREST L. REV. 193, 194–96 (1997) (citing N.C. GEN. STAT. § 97-52 (1991)).
127. King Jr., *supra* note 113, at 416.
128. *Id.* at 417–18 (emphasis omitted).
129. *Id.* at 408.
130. *Id.* at 408.

Another criticism is that an employee may not be entitled to workers' compensation benefits even though "a personal injury does fall within the coverage formula of a workers' compensation act."[131] Workers' compensation benefits are usually denied when "the injury [does] not produce compensable disability or the need for medical care," even if the injury was covered.[132] The "key question" is: "Would [the injury] entitle the employee to benefits if it produced compensable disability or necessitated medical care[?]"[133]

An example of how workers' compensation exclusivity creates a complete lack of remedy in some instances is when employees cannot recover for emotional and psychological harms under workers' compensation statutes.[134] Since these employees cannot file negligence claims against the employer due to workers' compensation exclusivity clauses, the employee is limited in seeking a remedy for their injury.[135] Some states allow an employee to sue an employer for personal injury in civil court if the employee can prove the employer injured the employee intentionally.[136] But proving intent is difficult, especially when tasked with proving intent by an employer for a mental injury.[137]

### 2. *Current Workers' Compensation Laws in Capital Punishment States*

Currently, incarcerated people may be executed for their crimes in twenty-seven states: Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming.[138] Emotional and psychological harms not accompanied by physical injuries ("mental only injuries") are not covered under workers' compensation laws in Alabama, Arkansas, Georgia, Kansas, Montana, North Carolina, Ohio, Oklahoma, South Dakota, and Wyoming.[139] For example, in Georgia, an employee needs

131. *Id.* at 420.
132. *Id.* at 421.
133. *Id.* at 421–22 (emphasis omitted); *see also id.* at 411, 421.
134. *See* Dickert v. Metro. Life Ins. Co., 311 S.C. 218, 220 (1993), *modified on reh'g* (Apr. 7, 1993) (finding that the employee was barred from bringing a negligence claim against employer by the exclusivity provision of the South Carolina Worker's Compensation Act).
135. *See id.*
136. King Jr., *supra* note 113, at 441–42.
137. *See Baxley*, 2010 U.S. Dist. LEXIS 24423, at *39.
138. *State by State*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Nov. 19, 2022).
139. *Work-Related PTSD: A State-By-State Breakdown of Workers' Compensation Laws*, Gerber & Holder, https://www.gerberholderlaw.com/workers-comp-ptsd-by-state/ (last visited Nov. 19, 2022).

to suffer from a physical injury before they can recover for psychological harm under workers' compensation.[140] In other death penalty states, mental only injuries are covered only under specific circumstances.[141] In Florida, for example, an employee may recover from mental only injuries under very narrow circumstances.[142]

### 3. *South Carolina's Workers' Compensation Law*

South Carolina's Workers' Compensation Law, the law that would have covered Mr. Baxley and Mr. Bracey, was first codified in 1936.[143] The law established a Workers' Compensation Commission, which consists of a judicial and administrative department.[144] The exclusivity provision of South Carolina's workers' compensation law states:

> The rights and remedies granted by this title to an employee when he and his employer have accepted the provisions of this title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death. Provided, however, this limitation of actions shall not apply to injuries resulting from acts of a subcontractor of the employer or his employees or bar actions by an employee of one subcontractor against another subcontractor or his employees when both subcontractors are hired by a common employer.[145]

An employee cannot bring a negligence claim against their employer because of this exclusivity provision.[146] State employees are covered by the workers' compensation law.[147]

South Carolina's Workers' Compensation Law provides relief for an employee suffering from a mental injury but only under very narrow conditions.[148] If an employee suffers emotional or psychological harm "arising out of and in the course of employment unaccompanied by physical injury," then—to recover for this harm as a "personal injury"—the

140. *Id.*

141. *Id.*

142. FLA. STAT. ANN. § 112.1815 (2023) (explaining that first responders may recover for mental only injuries under eleven specific circumstances such as seeing a deceased minor).

143. S.C. CODE ANN. § 42-1-10 (2022).

144. *Id.* at § 42-3-10 (2022).

145. *Id.* at § 42-1-540 (2022).

146. *See* Dickert v. Metro. Life Ins. Co., 311 S.C. 218, 220 (1993) (finding that the employee was barred from bringing a negligence claim against employer by the exclusivity provision of the South Carolina Worker's Compensation Act), *modified on reh'g* (Apr. 7, 1993).

147. S.C. CODE ANN. § 42-1-320 (2022).

148. *Id.* at § 42-1-160(B)–(C) (2007).

employee must establish by a preponderance of the evidence: (1) "that the employee's employment conditions causing the stress, mental injury, or mental illness were extraordinary and unusual in comparison to the normal conditions of the particular employment"; and (2) "the medical causation between the stress, mental injury, or mental illness, and the stressful employment conditions by medical evidence."[149] An employee cannot recover for emotional or psychological harms "arising out of and in the course of employment unaccompanied by physical injury . . . if they result from any event or series of events which are incidental to normal employer/employee relations including, but not limited to, personnel actions by the employer."[150]

### *B. The Occupational Safety and Health Administration*

Congress created the Occupational Safety and Health Administration ("OSHA") via the passage of the Occupational Safety and Health Act ("OSH Act") in 1970.[151] Congress needed to find a solution to the "public outcry against rising [workplace] injury and death rates."[152] OSHA's focus is to "reduc[e] injuries, illnesses, and deaths in the workplace"[153] through remedial measures.[154] OSHA ensures occupational safety "by enforcing occupational safety and health standards promulgated by the Secretary" of the Department of Labor.[155] The Secretary must find that the standards are "reasonably necessary or appropriate to provide safe or healthful employment."[156] It is important that OSHA creates standards for new health issues as they arise so employees stay protected from all types of occupational hazards.[157]

While it is important for OSHA to create standards for known hazards, at the time OSHA was created, Congress recognized "that it would be impossible to develop specific standards for every possible employment hazard."[158] Thus, Congress created an

149. *Id.* at § 42-1-160(B).

150. *Id.* at § 42-1-160(C).

151. Susan Hall Fleming, *OSHA at 30: Three Decades of Progress in Occupational Safety and Health*, 12 Job Safety & Health Q. 23, 23–29 (Spring 2001).

152. *Id.*

153. *Id.*

154. *See* Robert D. Moran, *Occupational Safety and Health Standards as Federal Law: The Hazards of Haste*, 15 Wm. & Mary L. Rev. 777, 794 (1974).

155. Nat'l Fed. of Indep. Bus. v. Dep't of Labor, 595 U.S. 109, 114 (2022) (citing 29 U.S.C. § 655(b)).

156. *Id.* (emphasis omitted) (internal quotation marks omitted) (citing § 655(b)).

157. Fleming, *supra* note 151.

158. Jason R. Bent, *OSHA, the Opportunism Police*, 2019 BYU L. Rev. 365, 409 (2020) (citing S. Rep. 91-1282 (Oct. 6, 1970), *as reprinted in* 1970 U.S.C.C.A.N. 5177, 5186).

OSHA General Duty Clause to broadly require that employers provide a safe workplace.[159] The General Duty Clause says that "an employer must provide each of its employees with a workplace that's free from recognized hazards that are causing or are likely to cause death or serious physical harm."[160] Congress can sanction employers under the General Duty Clause only when "there's no standard that applies to the particular hazard, and the employer has its employees exposed to the alleged hazard."[161] To successfully find that an employer violated OSHA's General Duty Clause, OSHA must prove four elements:

1. The employer failed to render its workplace free of a hazard.
2. The hazard was recognized either by the cited employer or generally within the employer's industry.
3. The hazard was causing or was likely to cause death or serious physical harm.
4. There was a feasible means by which the employer could have eliminated or materially reduced the hazard.[162]

The hazard also must have been "reasonably foreseeable."[163] When evaluating General Duty Clause violations, courts ask themselves whether "a reasonably prudent employer in the industry would have known that the proposed method of abatement was required under the job conditions where the citation was issued." [164]

Currently, employers are not responsible for mitigating psychological or emotional harms under the General Duty Clause.[165] The employer is also not responsible for ensuring that the workplace is free from recognized hazards that may only cause or be likely to cause

159. Jane Flanagan, Terri Gerstein, & Patricia Smith, *How States and Localities Can Protect Workplace Safety and Health*, NAT'L EMP. LAW PROJECT, at 3 (May 2020), https://lwp.law.harvard.edu/files/lwp/files/state_local_workplace_protection_lwp_nelp.pdf.

160. Alan A. Ayers, *Does the OSHA General Duty Clause Encompass Psychological or Emotional Injury?*, J. OF URGENT CARE MED. (Sept. 1, 2020), https://www.jucm.com/does-the-osha-general-duty-clause-encompass-psychological-or-emotional-injury/ (citing 29 U.S.C. § 654).

161. *Id.* (citing Alan Ferguson, *OSHA's General Duty Clause*, SAFETY+HEALTH (Dec. 20, 2019), https://www.safetyandhealthmagazine.com/articles/19258-oshas-general-duty-clause.

162. *Id.* (internal footnotes omitted) (citing 29 C.F.R. §§ 1926.28, 1910.132; United States v. Margiotta, No. CR 17-143-BLG-SPW-2, 2019 U.S. Dis. LEXIS 156994, at *11–12 n.2 (D. Mont. Sept. 13, 2019); Sec'y of Labor v. Duriron Co., 1983 WL 23869, at *1 (1983 OSHRC); Duriron Co. v. Sec'y of Labor, 750 F.2d 28, 28 (6th Cir. 1984)).

163. *Id.* (citing *Margiotta*, No. CR 17-143-BLG-SPW-2, at *11–12 n.2; *Duriron Co.*, 1983 WL 23869, at *1; *Duriron Co.*, 750 F.2d at 28).

164. Bent, *supra* note 158, at 409 n.170 (quoting Donovan v. Royal Logging Co., 645 F.2d 822, 831 (9th Cir. 1981)).

165. Ayers, *supra* note 160, at 783 n.26 (quoting 29 U.S.C. § 654(a)(1)).

mental harm to employees.[166] Again, the hazard must be known to cause "'[d]eath or serious physical harm.'"[167] But as a society, we now know that mental harm can and does cause death or serious physical harm.

OSHA "covers most private sector employers and their workers, in addition to some state and local government employers and their workers in the 50 states and certain territories and jurisdictions under federal authority."[168] Since OSHA was created through a federal act, OSHA coverage for private employers and workers is through either federal OSHA or an OSHA-approved State Plan.[169] An OSHA-approved State Plan is a "job safety and health program[] operated by individual states rather than federal OSHA."[170] Section 18 of the OSH Act "encourages states to develop and operate their own safety and health programs and precludes state enforcement of OSHA standards unless the state has an OSHA-approved State Plan."[171] OSHA monitors the State Plans and even provides funding for the programs.[172] If a State Plan specifically excludes a type of worker, the federal OSHA may provide those workers coverage.[173]

The OSH Act "requires that every employer engaged in a business affecting commerce 'shall comply with occupational safety and health standards promulgated under this chapter'; violators are subject to severe penalties."[174] The Secretary of Labor—exercising its authority through OSHA—performs the "prosecutorial function (including investigation, issuance of citations, and assessing penalties)."[175] Citation adjudication is left to the Occupational Safety and Health Review Commission, "which acts as an impartial arbiter when employers challenge OSHA citations."[176] Filing a claim through OSHA for a workplace injury does not preclude an employee's right to file a claim via workers' compensation or tort.[177]

166. 29 U.S.C. § 654.

167. Ayers, *supra* note 160, 783 n.26 (quoting 29 U.S.C. § 654(a)(1)).

168. *Frequently Asked Questions*, Occupational Safety & Health Admin., https://www.osha.gov/stateplans/faqs (follow "What is an OSHA-Approved State Plan?" hyperlink) (last visited Jan. 7, 2024) (emphasis omitted).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Moran, *supra* note 154, at 778 (internal footnotes omitted) (quoting 29 U.S.C. §§ 654(a)(2), 666).

175. Bent, *supra* note 158, at 410 (citing 29 U.S.C. §§ 658–59, 666; Martin v. OSCHRC, 499 U.S. 144, 147, 151 (1991); N.Y. State Elec. & Gas Corp. v. Sec'y of Labor, 88 F.3d 98, 103 (2d Cir. 1996)).

176. *Id.* (citing Cuyahoga Valley Ry. v. United Transp. Union, 474 U.S. 3, 7 (1985)).

177. Flanagan, *supra* note 159, at 2.

### 1. *OSHA in Capital Punishment States*

Eleven death penalty states[178] have an OSHA-approved State Plan that covers private and state and local government workers: Arizona, California, Indiana, Kentucky, Nevada, North Carolina, Oregon, South Carolina, Tennessee, Utah, and Wyoming.[179] The other sixteen death penalty states do not have an OSHA-approved State Plan.[180] Since "[s]ection 3(5) of the OSH Act specifically excludes a State or any political subdivision of a State from the definition of an 'employer,'" executioners working in a prison run by a State without an OSHA-approved State Plan are not protected under the OSH-Act.[181] Executioners are usually state employees employed by state prisons because private prison companies do not want the liability that comes with carrying out executions.[182] Alabama,[183] Arkansas,[184] Florida,[185] Georgia,[186] Idaho,[187] Kansas,[188] Louisiana,[189] Mississippi,[190]Missouri,[191] Montana,[192] Nebraska,[193] Ohio,[194]

178. *State by State*, *supra* note 138.

179. *Frequently Asked Questions*, *supra* note 168.

180. *State by State*, *supra* note 138.

181. *OSHACT Cannot Directly Protect Employees of State and Local Governments*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (Mar. 10, 1994), https://www.osha.gov/laws-regs/standardinterpretations/1994-03-10-0.

182. *See* Jennifer Steinhauer, *Arizona May Put State Prisons in Private Hands*, N.Y. TIMES (Oct. 23, 2009), https://www.nytimes.com/2009/10/24/us/24prison.html.

183. *William C. Holman Correctional Facility*, ALA. DEP'T OF CORR., http://www.doc.state.al.us/facility?loc=33 (last visited Nov. 19, 2022).

184. *Cummins Unit*, ARK. DEP'T OF CORR., https://doc.arkansas.gov/facilities/cummins-unit/ (last visited Nov. 19, 2022).

185. *Death Row*, FLA. DEP'T OF CORR., http://www.dc.state.fl.us/ci/deathrow.html (last visited Nov. 19, 2022).

186. *GA Diagnostic Class Prison*, GA. DEP'T OF CORR., https://gdc.georgia.gov/locations/ga-diagnostic-class-prison (last visited Nov. 19, 2022).

187. *Execution Procedures*, *supra* note 17.

188. Nancy Burghart, *Capital Punishment Information*, KAN. DEP'T OF CORR. (updated Nov. 14, 2023, 3:06 PM), https://www.doc.ks.gov/newsroom/capital.

189. The Associated Press, *Why Louisiana Executions Have Stalled for a Decade with 68 Remaining on Death Row*, THE ADVOC. (updated Feb. 3, 2020), https://www.theadvocate.com/baton_rouge/news/politics/legislature/why-louisiana-executions-have-stalled-for-a-decade-with-68-remaining-on-death-row/article_a802a5f6-46d1-11ea-9f51-eff2fa808090.html.

190. Mina Corpuz, *New Law Gives MDOC Commissioner Choice in How People are Executed*, MISS. TODAY (June 21, 2022), https://mississippitoday.org/2022/06/21/new-law-mdoc-commissioner-execution-choice/.

191. Jim Suhr, *New Bonne Terre Execution Area Termed 'Ready,'* COLUMBIA MISSOURIAN (updated May 8, 2015), https://www.columbiamissourian.com/news/local/new-bonne-terre-execution-area-termed-ready/article_a2cd4107-046b-54cb-bee5-1c4f32a793e5.html.

192. *Montana*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/montana (last visited Nov. 19, 2022).

193. Mitch Smith, *Fentanyl Used to Execute Nebraska Inmate, in a First for U.S.*, N.Y. TIMES (Aug. 14, 2018), https://www.nytimes.com/2018/08/14/us/carey-dean-moore-nebraska-execution-fentanyl.html.

194. *Death Row*, OHIO DEP'T OF REHAB. & CORR. (updated Nov. 8, 2023), https://drc.ohio.gov/about/capital-punishment/death-row/death-row.

Oklahoma,[195] Pennsylvania,[196] South Dakota,[197] and Texas[198] all perform executions in state-run prisons.

### 2. *OSHA in South Carolina*

The South Carolina State Plan was initially approved in 1972 and certified by OSHA in 1976.[199] "The South Carolina State Plan applies to all private and public sector workplaces within the state with the exception of private sector maritime activities; employment on military bases; Savannah River and Three Rivers Solid Waste Authority private sector employment; federal government workers; and the United States Postal Service (USPS)."[200] South Carolina OSHA "has identically adopted OSHA standards and regulations applicable to private sector and state and local government employment."[201]

## III. Creating Remedies for Executioners via Workers' Compensation Statutes and OSHA

The current lack of coverage for emotional and psychological harms under most existing workers' compensation statutes and OSHA's General Duty Clause leaves executioners remedy-less when suffering from debilitating mental harm caused by their work. This section proposes a comprehensive addition to death penalty states' workers' compensation statutes and argues that OSHA should include emotional and psychological harms in its General Duty Clause to keep employers accountable and help prevent PTSD in executioners. First, this section reflects on Mr. Baxley and Mr. Bracey's cases and describes how South Carolina's current workers' compensation statute prevented them from adequately recovering from the PTSD they now live with because of their employment as executioners. Then, this section uses pieces of Maine, California, Florida, and Idaho's workers' compensation statutes to create a workers' compensation statute that would more adequately

195. *Offender Information and Resources*, Okla. Corr. (Jan. 12, 2023), https://oklahoma.gov/doc/offender-info.html (follow "Death Penalty" hyperlink).

196. *Death Penalty*, Pa. Dep't of Corr., https://www.cor.pa.gov/About%20Us/Initiatives/Pages/Death%20Penalty.aspx (last visited Nov. 19, 2022).

197. *Frequent Questions: Capital Punishment*, S.D. Dep't of Corr., https://doc.sd.gov/about/faq/capitalpunishment.aspx (last visited Nov. 19, 2022).

198. *Death Row Information*, Tex. Dep't of Crim. Just., https://www.tdcj.texas.gov/death_row/dr_facts.html (last visited Nov. 19, 2022).

199. *South Carolina State Plan*, Occupational Safety & Health Admin., https://www.osha.gov/stateplans/sc (last visited Nov. 19, 2022).

200. *South Carolina*, Occupational Safety & Health Admin., https://www.osha.gov/contactus/bystate/SC/areaoffice (last visited Nov. 19, 2022).

201. *South Carolina State Plan*, *supra* note 199.

allow executioners to recover for mental only injuries arising out of their employment. The last section argues why OSHA should add emotional and psychological harm to its General Duty Clause and how this addition would support executioners seeking a legal remedy for their emotional and psychological harm.

### *A. Remedies for Executioners through Workers' Compensation Statutes in Capital Punishment States*

Generally, workers' compensation statutes adequately serve their original purpose and sufficiently protect employees and employers simultaneously.[202] "It has been estimated that before the enactment of the workers' compensation laws, between seventy and ninety-four percent of all industrial accidents went uncompensated."[203] Workers' compensation exclusivity clauses are necessary to balance the no-fault system.[204] Therefore, this Note does not argue to eliminate the exclusivity clauses. This Note argues that workers' compensation statutes should be more inclusive so that employees suffering from emotional or psychological harms from work that is inevitably traumatic have a remedy for their injury—especially when employers do not have systems in place to help employees manage or prepare for the trauma that their work inherently causes.

Mr. Baxley and Mr. Bracey were not able to recover for their emotional and psychological harms through South Carolina's workers' compensation statute because it only allows employees to recover for mental injuries that occurred because of a physical injury or an "unusual or extraordinary condition[] of employment."[205] Therefore, South Carolina employees cannot recover under workers' compensation for mental or psychological harm experienced because of the normal conditions of the workplace.[206] In Mr. Baxley and Mr. Bracey's case, executing condemned prisoners was a normal condition of their employment as executioners. Also, South Carolina's workers' compensation law does not allow employees to recover for mental injuries absent a physical injury.[207]

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202. King Jr., *supra* note 113, at 410–11.

203. *Id.* at 415 (citing DOBBS ET AL., PROSSER AND KEETON ON TORTS § 80 at 572 n.43 (W. Keeton 5th ed. 1984)).

204. *Id.* at 411.

205. Dirk J. Derrick, *What Myrtle Beach Workers Need to Know About Unusual Work Injuries and South Carolina Workers' Compensation Claims*, DERRICK LAW FIRM, https://www.derricklawfirm.com/library/unique-workers-compensation-injuries-in-myrtle-beach-south-carolina-workers-compensation-lawyer.cfm (last visited Jan. 1, 2024) (internal quotation marks omitted).

206. *Id.*

207. Denise Dawson, *Florida Governor Rick Scott Signs Order Expanding Workers' Compensation Benefits to First Responders*, HALL BOOTH SMITH, P.C. (May 25, 2018), https://

Because of this lack of coverage, Mr. Baxley and Mr. Bracey were unable to recover via workers' compensation. Lastly, they could not pursue a negligence claim because workers' compensation exclusivity provisions prevented them from filing a negligence suit against their employer.

Alternatively, Mr. Baxley and Mr. Bracey filed an intentional infliction of emotional distress claim against their employer since that was the only legal avenue left for them to pursue. To succeed in their tort claim, Mr. Baxley and Mr. Bracey needed to show that their employer intentionally caused them emotional and psychological harm. Unfortunately, they failed to prove intent, and their tort claim failed.

If South Carolina's workers' compensation statute expanded to allow recovery for mental only injuries, Mr. Baxley and Mr. Bracey would have been able to recover for the emotional and psychological harm that was inevitably caused by their employment as executioners. To recover for an injury under workers' compensation, the injury must arise out of the employment.[208] "An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury."[209] It is "typical" to experience psychological or emotional harm "when people are involved with something traumatic like killing."[210] "[H]aving to take someone else's life is the highest predictor of most mental health problems among veterans."[211] A rational mind would find that there was a causal relationship between Mr. Baxley and Mr. Bracey's work as executioners and the emotional and psychological harm they experienced.

This Note proposes that every death penalty state replicate Maine and California's workers' compensation statutes as a foundation for allowing correctional officers like Mr. Baxley and Mr. Bracey to recover via workers' compensation. Maine's statute allows correctional officers to recover for mental injuries arising out of and in the course of employment.[212] There is also a rebuttable presumption that the employee's PTSD "[arose] out of and in the course of the worker's employment."[213] Similarly, California Labor Code § 3212.15 allows correctional officers

hallboothsmith.com/florida-governor-rick-scott-signs-order-expanding-workers-compensation-benefits-to-first-responders/.

208. Loges v. Mack Trucks, Inc., 308 S.C. 134, 138 (1992).
209. *Id.* (citing Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 200 (1973)).
210. Eisner, *supra* note 42.
211. Eisner, *supra* note 8.
212. Me. Rev. Stat. Ann. tit. 39-A, § 201 (2023).
213. *Id.* at § 201(3-A)(B).

to recover workers' compensation benefits when suffering from PTSD.[214] Like Maine's workers' compensation statute, the California statute says that when a correctional officer is diagnosed with PTSD, there is a rebuttable presumption "that the PTSD developed or manifested arising out of and in the course of employment."[215] The mental injury in California and Maine does not need to be accompanied by a physical injury.[216] Under California's statute, correctional officers suffering from PTSD may be awarded "full hospital, surgical, medical treatment, disability indemnity, and death benefits."[217] California and Maine recognize that correctional officers face unique challenges because of their work, and the state legislature wanted to ensure that the state's workers' compensation statute allowed for recovery.[218] Some death penalty states, as explained in the following paragraphs, are moving towards allowing for recovery for mental only injuries under very specific circumstances. But none, so far, cover correctional officers in the way that Maine and California do.

In 2018, Florida's Governor Rick Scott signed a bill that allows "[f]irefighters, police officers, and other first responders" to recover full workers' compensation benefits for PTSD caused by their work.[219] The mental injury does not need to accompany a physical injury.[220] Before the bill was passed, first responders in Florida could only recover medical benefits for mental injuries unaccompanied by a physical injury.[221] With the passage of the 2018 bill, first responders may now also recover wage replacement benefits for a mental only injury.[222] Lobbyists for the bill understood that the trauma from seeing someone die takes its toll on those trying to save that life.[223] How much more trauma does someone suffer when they are required to take a life? Common sense tells us that this law should naturally extend to correctional officers working as executioners if not all correctional officers. The Florida law takes the solution one step further by requiring "an employing agency of a first responder . . . to provide educational training related to mental health awareness, prevention, mitigation, and treatment."[224] This Florida bill would be perfect if it covered correctional officers because

214. The law here says "peace officers" which under CAL. PEN. CODE § 830.55 includes correctional officers. CAL. LAB. CODE § 3212.15 (2024).

215. *Workers' Compensation Update: Presumption of Injury for Posttraumatic Stress Disorder (PTSD) for Peace Officers and Firefighters*, GEKLAW, https://www.geklaw.com/news/presumption-of-injury-ptsd.html (last visited Apr. 13, 2022).

216. CAL. LAB. CODE § 3212.15.

217. CAL. LAB. CODE § 3212.15(c)(1).

218. *See* ME. REV. STAT. tit. 39-A, § 201; CAL. LAB. CODE § 3212.15.

219. Dawson, *supra* note 207.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

it would not only provide executioners with a remedy via workers' compensation but also help to prevent PTSD amongst executioners.

Like Florida, two other death penalty states have workers' compensation statutes that allow recovery for PTSD unaccompanied by a physical injury, but again, these statutes do not include correctional officers. Idaho's workers' compensation law includes a special provision for first responders.[225] Typically, psychological injuries must be accompanied by a physical injury, but § 72-451, 4 allows first responders to recover workers' compensation benefits for PTSD that arise out of their work.[226] Under this law, a "first responder" does not include correctional officers.[227] So, like in Florida, this law should be extended to correctional officers. In Texas, Texas Labor Code § 504.019 allows certain first responders to recover workers' compensation benefits for PTSD, but this statute, like in Idaho, does not include state correctional officers.[228]

Thus, this Note's solution is not novel. Some death penalty states already allow workers' compensation recovery for mental only injuries. But only Maine and California extend this coverage to correctional officers. Yet Maine and California's workers' compensation statutes could go further by implementing a part of Florida's workers' compensation statute, requiring employers to implement preventative measures so fewer employees develop illnesses such as PTSD.[229]

An ideal workers' compensation statute would allow executioners to recover from PTSD and require the employer to implement preventative measures. This ideal statute would be a combination of Maine's, California's, and Florida's workers' compensation statutes. Like Maine and California's current statute, the ideal statute would allow correctional officers to recover from PTSD that arises out of their employment without the need for an accompanying physical injury. Because of the inherently traumatic nature of an executioner's work—and generally a correctional officer's work—there would be a rebuttable presumption that PTSD arose out of their employment in the prison system. Unlike Maine and California's workers' compensation statutes, this ideal statute would go further and require employers to take actionable steps to prevent correctional officers from developing PTSD. Like Florida's workers' compensation statute for first responders, police officers, and firefighters, my proposed statute would include a

225. Idaho Code Ann. § 72-451 (2021).
226. *Id.*
227. *Id.*
228. Tex. Lab. Code Ann. § 504.019 (2019).
229. Dawson, *supra* note 207.

preventative piece. Prisons would also be required to provide mental health awareness training to all correctional officers. Additionally, mitigation and treatment sessions would be required after a traumatic event, such as an altercation with a prisoner or an execution.

Under the ideal proposed workers' compensation statute outlined above, Mr. Baxley and Mr. Bracey would have been able to recover for emotional and psychological harm arising out of their work as executioners.

Next, this Note explains how more can be done through OSHA's General Duty Clause to ensure prisons are implementing the necessary preventative measures to minimize PTSD amongst correctional officers and executioners.

### *B. Mental Injury Prevention and Employer Accountability through OSHA's General Duty Clause*

Currently, the OSHA General Duty Clause only covers hazards that are "likely to cause death or serious physical harm."[230] There is no avenue to allow for recovery from hazards likely to cause serious mental harm. OSHA should amend the General Duty Clause to cover hazards that are likely to cause death, serious physical injury, *or serious mental injury* to account for the mental harm likely to be experienced in occupations like executioners.

By including *serious mental injury* in the General Duty Clause coverage, employers, like correctional facilities, would be incentivized to create programs that help to prevent, mitigate, and treat PTSD. Moreover, by implementing these programs, correctional facilities would protect themselves from General Duty Clause violation claims by defeating the fourth element required under General Duty Clause violations: "[t]here was a feasible means by which the employer could have eliminated or materially reduced the hazard."[231] These feasible means could include mental health programs for executioners to equip them with the tools necessary to deal with any psychological, mental, or emotional harm they experience in the workplace. At a minimum, as Mr. Baxley has suggested, "executioners should be screened and evaluated by a psychologist before taking on their roles."[232] He also recommends "carefully train[ing]" executioners and that they be "required to report to counseling" after

230. Ayers, *supra* note 160.

231. *Id.* (citing United States v. Margiotta, No. CR 17-143-BLG-SPW-2, 2019 U.S. Dis. LEXIS 156994, at *11–12 n.2 (D. Mont. Sept. 13, 2019); Sec'y of Labor v. Duriron Co., 1983 WL 23869, at *1 (1983 OSHRC); Duriron Co. v. Sec'y of Labor, 750 F.2d 28, 28 (6th Cir. 1984)).

232. Eisner, *supra* note 42.

each execution.[233] "[B]asic support [should] be mandatory for everyone involved with executions."[234]

Implementing programs to help employees deal with trauma caused by working in stressful environments is not a new idea. Prison systems could consider emulating "The Brandon Act," which President Joe Biden signed into law in December 2022.[235] The Act requires a servicemember's commanding officer to ensure that the servicemember receives a mental health evaluation when requested.[236] The Act ensures that beyond scheduling, the care is kept confidential.[237] The purpose of the mechanisms put in place by the Act is to allow servicemembers easier access to mental health care and less fear of retaliation for needing mental health care services.[238]

Implementing preventative measures through OSHA's General Duty Clause benefits employers and employees. The stress that correctional officers experience negatively affects not just the employees themselves but the larger organization "through reduce[d] work performance, absenteeism, employee turnover[,] and replacement costs for new employees."[239] Moreover, litigating "mental stress claims" such as PTSD is expensive.[240]

Employees' mental health issues cost employers approximately $228.8 billion every year.[241] Employers pay "$44 billion per year in lost productivity" when their employees suffer from depression.[242] Failing to treat employees' mental health issues costs an employer more than it would to prevent and actively treat such issues.[243] Employees with untreated diagnosed depression "utilize two to four times the healthcare resources of their peers."[244] Considering the American Psychological Association predicts that mental stress diseases such as

233. *Id.*

234. Eisner, *supra* note 8.

235. Melissa Chan, *U.S. Military Hasn't Implemented Measure to Help Service Members Seek Mental Health Care*, NBC NEWS (June 29, 2022, 12:52 PM), https://www.nbcnews.com/news/us-news/us-military-hasnt-implemented-measure-help-service-members-seek-mental-rcna34586.

236. Patricia Kime, *Commanding Officers Must Help Troops Get Mental Health Care Under New Legislation*, MILITARY.COM (Dec. 8, 2021), https://www.military.com/daily-news/2021/12/08/commanding-officers-must-help-troops-get-mental-health-care-under-new-legislation.html.

237. *Id.*

238. *Id.*

239. BROWER, *supra* note 11.

240. Aya V. Matsumoto, *Reforming the Reform: Mental Stress Claims Under California's Workers' Compensation System*, 27 LOY. L.A. L. REV. 1327, 1331 n.17 (1994).

241. Matthew Jones, *How Mental Health Can Save Businesses $225 Billion Each Year*, INC. (Jun. 16, 2016), https://www.inc.com/matthew-jones/how-mental-health-can-save-businesses-225-billion-each-year.html.

242. *Id.*

243. *Id.*

244. *Id.*

PTSD will continue to increase drastically,[245] employers can prevent expensive litigation costs by creating programs that prevent mental health injuries.

If South Carolina's OSHA had implemented the above preventative measures while Mr. Baxley and Mr. Bracey were employed as executioners, their injuries might have been avoided or severely reduced. Mr. Baxley and Mr. Bracey would have had the tools necessary to build the emotional and psychological resilience to avoid developing PTSD.

## Conclusion

Many former executioners do not support the death penalty because they do not want other executioners to live with the trauma they live with.[246] Unfortunately, right now, it is extremely rare for correctional facilities to equip executioners with the appropriate mental health resources to deal with the trauma they experience from killing people.[247] If states want to execute people for crimes, then those states have a responsibility to protect executioners' "health and well-being."[248]

California's legislature understands its duty to help correctional officers deal with the unique trauma they experience in the workplace. When enacting California Labor Code § 3212.15—allowing correctional officers to recover solely for PTSD injuries—the legislature mentioned its reasoning in the notes.[249] The legislature admitted that correctional officers are a part of one of the "most stressful occupations" only second to combat soldiers.[250] Suicide rates are "39 percent higher for corrections officers than for people in all other professions."[251] Correctional officers "face unique and uniquely dangerous risks in their sworn mission to

245. Matsumoto, *supra* note 240, at 1335.

246. Eisner, *supra* note 8.

247. *See id.* ("Only one of the 26 people NPR interviewed across the country said they received psychological support from the government to help them through the process of working on executions.").

248. Pyle, *supra* note 51.

249. Cal. Lab. Code Ann. § 3212.15 (2024); *see also California: First Responder PTSD Presumption: What RAND Reveals About its Import and Effectiveness*, LexisNexis (Dec. 13, 2021), https://www.lexisnexis.com/community/insights/legal/workers-compensation/b/recent-cases-news-trends-developments/posts/california-first-responder-ptsd-presumption-what-rand-reveals-about-its-import-and-effectiveness.

250. An Act to Add and Repeal Section 3212.15 of the Labor Code, Relating to Workers' Compensation, S.B. 542, 2019–2020 Leg., Reg. Sess. (Cal. 2019); *see also California: First Responder PTSD Presumption: What RAND Reveals About Its Import and Effectiveness*, *supra* note 249.

251. The Council of State Governments Justice Center Staff, *Berkeley Study Shines Light on the Pressures of Being a Corrections Officer*, Nat'l Reentry Res. Ctr., https://nationalreentryresourcecenter.org/resources/berkeley-study-shines-light-pressures-being-corrections-officer (last visited Jan. 7, 2023).

keep the public safe."[252] Employers need to start recognizing that PTSD in correctional officers is a severe occupational injury.[253]

Thus, it is important for death penalty states to amend their workers' compensation statutes to provide a remedy for the emotional and psychological harm executioners experience because of their work. As previously discussed, death penalty states' workers' compensation statutes should allow correctional officers to recover for PTSD—regardless of the existence of a physical injury—that arises out of the correctional officer's employment. Death penalty states' workers' compensation statutes should also require correctional facilities to implement PTSD prevention programs, especially for executioners. In addition, OSHA should amend its General Duty Clause to hold employers accountable for *likely severe mental injury* arising out of the workplace.

The solutions proposed in this Note would add costs to an already expensive system. Sentencing people to death costs ten times more than sentencing people to life without parole,[254] yet this higher cost is accepted because this country sees the death penalty as necessary. The United States could avoid the costly but necessary solutions discussed in this Note by eliminating the death penalty altogether.[255] "[T]he death penalty experiment has failed,"[256] so it is time to eliminate it once and for all to avoid the harm it brings not only to the condemned but to society.

252. Cal. S.B. 542; *see also California: First Responder PTSD Presumption: What RAND Reveals About Its Import and Effectiveness*, *supra* note 249.

253. Cal. S.B. 542; *see also California: First Responder PTSD Presumption: What RAND Reveals About Its Import and Effectiveness*, *supra* note 249.

254. Nelson, *supra* note 27.

255. Long & Robertson, *supra* note 45 ("The simplest (and best) solution would be to remove the cause of the problem and abolish the death penalty.").

256. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting); *see also* Rohde, *supra* note 9.

# Don't Forget About Me: The Epidemic and Erasure of Violence Against Black Women and the Power of the Enforcement Clause of the Thirteenth Amendment

Jasmine Marchbanks-Owens*

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* Jasmine Marchbanks-Owens is a 2024 graduate of Howard University School of Law. This note is dedicated to my mother and grandmother, who consistently nurture me, exemplifying the strength and resilience of Black women across generations. May this note catalyze legislation and pave the way for Black women to attain equal protection under the law. Many thanks to Professor Kacey Mordecai and the editors of the Howard Human & Civil Rights Law Review.

## INTRODUCTION

*The most disrespected person in America is the Black woman.*
*The most unprotected person in America is the Black woman.*
*The most neglected person in America is the Black woman.*

-Malcolm X[1]

Black women and girls experience disproportionate rates of violence in the United States.[2] This violence is something that I, as a Black woman, have both witnessed and personally experienced throughout my life in the United States. One example of this happened in eighth grade when a friend of mine was almost abducted while heading home from our bus stop. A van pulled up beside her, and a man jumped out and tried to grab her. It was not until I grew older that I began to grasp

1. Nintendo87, *Malcolm X Speech in Los Angeles (May 5, 1962)*, DAILYMOTION (Feb. 3, 2017), https://worldhistoryarchive.wordpress.com/2017/02/03/malcolm-x-speech-in-los-angeles-may-5-1962/.

2. When I mention violence, I am referring to domestic violence, rape, homicide, police brutality, punishment, institutionalized racism, forced sex work, uninvestigated crimes against Black women, and missing Black women. *See* Alicia Nichols & Christina Jones, *Black Women Deserve the Right to Be Free from Violence*, BATTERED WOMEN'S JUST. PROJECT (Feb. 28, 2022), https://bwjp.org/black-women-deserve-the-right-to-be-free-from-violence.

how these incidents would shape my sense of safety and my perception of the world as a Black woman.

During my college years, pivotal events deepened my understanding. As I matured, I came to recognize not only the violence directed towards me but also towards the women around me. I came to learn that both of my grandmothers were victims of the Eugenics Movement and, consequently, underwent hysterectomies. Shockingly, one of my grandmothers was just twenty-five years old at the time, younger than I am now.

In graduate school, I experienced the disillusionment and inequity of not being taken seriously when I reported my third death threat to the local police. Their response was, "This could be a Jussie Smollett situation." This reference by the officer resulted in the dismissal of my experience and drew a disconcerting parallel between my genuine assault and a situation that had garnered public condemnation. Tragically, later that year, my stepmother's sister was fatally shot by her husband after she decided to leave him. Acts of violence towards Black women, such as these, are regrettably not uncommon—another recent example, though closer to home, happened just last month. My little cousin fell victim to a senseless act of violence; she was tragically shot and killed by the father of her children within the sanctity of her own home.

For Black women, these experiences are not anecdotal. Black women face elevated rates of abuse in areas such as domestic violence, rape, homicide, punishment, police brutality, and institutionalized racism.[3] Due to the Federal Bureau of Investigations (FBI) and other national law enforcement agencies failing to investigate and address this issue adequately, many governmental and nonprofit agencies who work directly with Black women victimized by violence have picked up the responsibility of collecting and reporting accurate data.[4]

Congress has the authority to create legislation to address violence against Black women at the federal level through the Enforcement Clause of the Thirteenth Amendment. Yet, unlike their white counterparts, Black women and girls are rarely seen as victims but are often seen as needing less protection.[5] For example, in the United States, Black women are four times more likely to die from violent acts than

3. Susan Green, *Violence Against Black Women–Many Types, Far-reaching Effects*, Inst. for Women's Pol'y Rsch. (July 13, 2017), https://iwpr.org/violence-against-black-women-many-types-far-reaching-effects/.

4. Chandra Thomas Whitfield, *The Pandemic Created a "Perfect Storm" for Black Women at Risk of Domestic Violence*, MIT Tech. Rev. (Sept. 28, 2022), https://www.technologyreview.com/2022/09/28/1060057/pandemic-black-women-domestic-violence/.

5. 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/news/racial-justice/legal-system-has-failed-black-girls-women-and-non.

white women.[6] Worse, in some cases, Black women "are seen as deserving of harm or unable to be harmed."[7] Dating back to the Antebellum period, Black women continue to be dehumanized and sexualized, with no legal recourse.[8] This culture of invalidity has increased their likelihood of being targeted for abuse and violence.[9] Moreover, it has facilitated an environment where Black women and girls are more reluctant to seek help and resources.[10]

The racialized and negative perceptions from society and lack of legal recourse have created a culture of silence as a method of survival among Black women who have endured violence for centuries.[11] Black women who speak out about the abuse they experience are frequently dismissed or face even greater levels of violence as a result of their efforts to seek justice.[12] Compared to any other female subgroup, Black women face stark realities, thus, it is Congress' responsibility to address the ongoing epidemic of violence against Black women.

This note argues that Congress has the power and duty through the Enforcement Clause of the Thirteenth Amendment to address violence against Black women because their ill-treatment is a "badge and incident" of enslavement.[13] Part I will show the importance of the Enforcement Clause of the Thirteenth Amendment and how it can be used as a tool to prevent violence towards Black women. Part II and Part III will discuss the violence inflicted on enslaved women during the Antebellum period and identify its current badges and incidents. Part III will analyze the existing policies used to protect women against violence and illustrate the ways in which they have failed to protect Black women. Lastly, Part IV will present solutions and potential legislation that Congress can use under the Enforcement Clause of the Thirteenth Amendment to help eradicate and prevent the increasing rates of violence against Black women.

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6. Lois Beckett & Abené Clayton, *The Killings of Black Women: Five Findings from Our Investigation*, THE GUARDIAN (June 30, 2022, 7:15 AM), https://www.theguardian.com/us-news/2022/jun/30/black-women-murder-rate-data-stats-study.

7. finoh & Sankofa, *supra* note 5.

8. *See id.*

9. *See id.*

10. *See id.*

11. Patricia A. Broussard, *Black Women's Post-Slavery Silence Syndrome: A Twenty-First Century Remnant of Slavery, Jim Crow, and Systemic Racism–Who Will Tell Her Stories?*, 16 J. GENDER RACE & JUST. 373, 386 (2013).

12. *See id.*

13. Hereinafter, "badges and incidents" refers to the legal restrictions that were enforced on African Americans during the Antebellum period. The Court has stated that Congress can create legislation that eradicates incidents reflecting the "badges and incidents" of enslavement. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438–39 (1968). I will expand more on this throughout the paper.

## I. Power of the Thirteenth Amendment's Enforcement Clause

The Thirteenth Amendment is one of the most powerful and overlooked reconstruction amendments in the United States of America's Constitution.[14] The Thirteenth Amendment covers two provisions: (1) Section 1, which addresses the abolishment of slavery and involuntary servitude, except as a punishment for a crime, and (2) Section 2, which proclaims that Congress has the "power to enforce [the] article by appropriate legislation."[15]

The enactment of the Thirteenth and Fourteenth Amendments elevated the status of Black freedmen and enslaved people to full personhood.[16] The legislative history shows that the drafter's purpose of the amendment was to further the liberation of African Americans in the United States.[17] Moreover, in the *Slaughter-House Cases* of 1873, the Supreme Court explicitly stated that the original intent of the Thirteenth Amendment was to protect formerly enslaved people.[18]

Both the Thirteenth and Fourteenth Amendments protect the freedom of individual citizens. However, the Fourteenth Amendment is limited because its State Action requirement is restricted to actions committed by or on behalf of the state.[19] The Thirteenth Amendment does not have this same restriction.[20] Additionally, the Thirteenth Amendment allows victims of discrimination to go after private and public actors.[21] As such, the state may intervene in the citizen's liberty even if it impedes public interest.[22]

The court's interpretation has made it so that the Enforcement Clause of the Thirteenth Amendment can help facilitate the next wave of meaningful civil rights legislation if used to its fullest.[23] Under its Enforcement Clause, the Thirteenth Amendment is the only reconstruction amendment that allows Congress to impact private conduct

14. Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 Colum. L. Rev. 1641, 1641 (2012).

15. U.S. Const. amend. XIII; *see, e.g.*, Hodges v. United States, 203 U.S. 1, 19 (1906) (holding that Congress's authority "to enforce the Thirteenth Amendment 'by appropriate legislation' includes the power to eliminate all racial barriers to the acquisition of real and personal property"), *overruled in part by* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

16. *See* Broussard, *supra* note 11, at 401.

17. *See* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. Pa. J. Const. L. 561, 608 (2012).

18. *See* Slaughter-House Cases, 83 U.S. 36, 71–72 (1872).

19. Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. Rev. 307, 365 (2004).

20. *Id.* at 362.

21. *Id.*

22. *See id.*

23. *See* Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. Pa. L. Rev. 1097, 1098 (1998).

directly.[24] As explained above, the Thirteenth Amendment was first introduced to the Supreme Court in the *Civil Rights Cases,* where the Court affirmed Congress's power "to enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents."[25] In the *Civil Rights Cases*, the Court upheld a conservative and narrowed view of the amendment but settled on a more progressive and broad view in *Jones v. Alfred H. Mayer Co*.[26] While the Supreme Court has not granted *cert* on the Thirteenth Amendment issue since *Jones*, lower courts have continued to follow the Court's prior findings and affirm Congress's authority to eliminate all badges and incidents of enslavement through the Thirteenth Amendment.[27]

### *A. Badges and Incidents*

The term "badges and incidents of slavery" has been used to refer to specific aspects of enslavement and the violent and dark legacy it has left behind.[28] "Badges of slavery" have commonly referred to the legal restrictions that were enforced on African Americans by the state.[29] An example of this was illustrated in Frederick Douglass' Henry Clay essay, where he explained that life after emancipation required formerly enslaved individuals to "cleanse [themselves] of the badge of slavery."[30] Similar to "badges of slavery," "incidents of slavery" was a term that

24. *See* United States v. Diggins, 36 F.4th 302, 306–07 (1st Cir. 2022); *see also* Griffin v. Breckenridge, 403 U.S. 88, 105 (1971) ("[T]here has never been any doubt of the power of Congress to impose liability on private persons under §2 of [the Thirteenth Amendment].").

25. Civil Rights Cases, 109 U.S. 3, 21 (1883).

26. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 (1968) (introducing a rational basis test for determining whether an incident violates the Enforcement Clause of the Thirteenth Amendment).

27. The following is a list of cases that have upheld the *Jones* rational determination standard and not been granted certiorari by the Supreme Court: *Diggins*, 36 F.4th at 314, 317 (stating Congress has the power to create legislation to address racially motivated hate crimes), *cert. denied*, 143 S. Ct. 383 (2022); United States v. Roof, 10 F.4th 314, 392 (4th Cir. 2021) (holding Congress had the authority under the Enforcement Clause of the Thirteenth Amendment to enact the Hate Crimes Prevention Act of 2009), *cert. denied*, 143 S. Ct. 303 (2022); United States v. Metcalf, 881 F.3d 641, 645 (8th Cir.) (reaffirming Congress has the authority under the Enforcement Clause of the Thirteenth Amendment to enact the Hate Crimes Prevention Act of 2009), *cert. denied*, 139 S. Ct. 412 (2018); United States v. Hatch, 722 F.3d 1193, 1193 (10th Cir. 2013) (stating Congress has the authority under the Enforcement Clause of the Thirteenth Amendment to enact § 249 to Title 18 section 249 of the Hate Crimes Prevention Act of 2009), *cert. denied*, 572 U.S. 1018 (2014); United States v. Maybee, 687 F.3d 1026, 1031 (8th Cir.) (stating Congress has the authority under the Enforcement Clause of the Thirteenth Amendment to enact Section 249(a)(1) in of the Hate Crimes Prevention Act of 2009), *cert. denied*, 568 U.S. 991 (2012).

28. McAward, *supra* note 17, at 566.

29. *Id.* at 580–81.

30. *Id.* at 577 n. 71 (explaining that life after emancipation requires formerly enslaved individuals to "cleanse [themselves] of the badge of slavery.").

began to take fruition in Antebellum courts.[31] The term art referred to "incidents" of enslaved African Americans being seen as chattel and the legal constraints and conditions imposed on them during and after enslavement.[32] An example of this was shown in *Bryan v. Walton,* where the Court held that a runaway slave submitting to arrest was a necessary incident of slavery.[33]

Focused on addressing the "badges and incidents of slavery," Congress has passed various civil rights bills prohibiting public and private racial discrimination. Both terms of art appeared throughout the Antebellum era in secondary materials and judicial opinions predating the Thirteenth Amendment.[34] One notable Act was the Civil Rights Act of 1875, which prohibited racial discrimination in public accommodations. Likewise, *The Civil Rights Cases* marked the first time that the Supreme Court evaluated Congress's scope of power under the Thirteenth Amendment since the Court affirmed Congress's power to address acts of private individuals with respect to public accommodations.[35] Justice Bradley, writing for the majority, used the terms "badges" and "incidents" when he referred to Congress's power to prevent states from taking official action or passing laws that reflected legal restrictions of slavery.[36] Thus, the Supreme Court found that the Enforcement Clause of the Amendment granted Congress the power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States . . . . "[37]

Following the *Civil Rights Cases*, the Court began to take a much narrower view of the powers of Congress under the Thirteenth Amendment by limiting what were considered "badges of slavery."[38] This was shown in *Plessy v. Ferguson*, where the Court held that a Louisiana law mandating trains to maintain "separate but equal" accommodations for white and Black passengers did not impose a badge of slavery or servitude because segregated public accommodations did not relegate African Americans to an inferior status in violation of the Equal Protection Clause.[39] The Court held that the Fourteenth Amendment was

31. *Id*. a 571; *see also* Bryan v. Walton, 14 Ga. 185, 198–99 (1853) (finding a runaway slave submitting to arrest was a necessary incident of slavery).

32. *See* McAward, *supra* note 17, at 571.

33. *See Bryan*, 14 Ga. at 198.

34. McAward, *supra* note 17, at 570.

35. *Id.* at 582; *see also* Civil Rights Cases, 109 U.S. 3, 20–21 (1883).

36. *Civil Rights Cases*, 109 U. S. at 20–21.

37. *Id.* at 20.

38. Tsesis, *supra* note 19, at 338 (finding a Louisiana law mandating trains to maintain separate but equal accommodations for white and Black passengers did not impose a badge of slavery or servitude).

39. Plessy v. Ferguson, 163 U.S. 537, 542–43 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

introduced to ensure that Black and white people receive equal treatment, not to erase racial distinctions.[40] The Court argued that segregation was a reasonable way for states to maintain social order and that the doctrine of "separate but equal" did not violate the Constitution's Equal Protection Clause.[41] Following *Plessy*, the Court continued to nullify congressional power under the Thirteenth Amendment.[42]

Ten years after the *Plessy* decision in 1906, the Court in *Hodges v. United States* held that the Enforcement Clause allowed Congress to create legislation to outlaw private conduct that subjected one person to the will of another.[43] In *Hodges,* a group of armed white men attacked and threatened Black workers to stop working at a local mill.[44] The Court ruled that "mere assault, trespass, or threatening of one's job based on race was not considered a badge of slavery because individual intimidation did not warrant the power of the Enforcement Clause.[45] The Court found that "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery."[46] Thus, the holding in *Hodges* severely limited the powers of the Enforcement Clause.[47] It was not until half a century later that the Court in *Jones* expanded the definition of the Thirteenth Amendment to refocus back on its original purpose.[48]

### *B. Rational Determination Standard and the Power of Jones*

In *Jones*, the Supreme Court clarified the powers of the Enforcement Clause, stating that it gave Congress the power to "eliminate all racial barriers to the acquisition of real and personal property."[49] The Court used a rational determination test to examine whether Congress had the authority to create legislation to prevent racial discrimination rationally related to the badges and incidents of slavery.[50] The Court found that Congress may create any laws it deems necessary and proper to abolish "all badges and incidents of slavery."[51] As such, the Court

40. *Id.* at 551.
41. *Id.* at 548.
42. Tsesis, *supra* note 19, at 349; *see also* Hodges v. United States, 203 U.S. 1, 19 (1906) ("[N]o mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery."), *overruled in part by* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).
43. *Hodges*, 203 U.S. at 16–17.
44. *Id.* at 20 n. 2.
45. *Id.* at 18.
46. *Id.*; United States v. Hatch, 722 F.3d 1193, 1199 (10th Cir. 2013).
47. *See Hodges*, 203 U.S. at 18–19.
48. McAward, *supra* note 17, at 592–96.
49. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).
50. *Id.* at 440.
51. *Id.* at 439.

reaffirmed Congress's power to pass legislation addressing all forms of racial discrimination, including race-based housing discrimination, which was the issue in *Jones*.[52] *Jones* was the first time the Court defined the Thirteenth Amendment as an absolute declaration and mechanism for eradicating slavery and involuntary servitude in the United States rather than a mere prohibition against state laws upholding slavery.[53]

### *C. Current Legal Standard*

Under the Thirteenth Amendment's judicial analysis, the Court must determine (1) whether an act is a badge or incident of enslavement or servitude and (2) whether Congress can conclude that the legislative action was rationally related to badge or incidents of slavery or servitude.[54] The First Circuit explicitly affirmed the rational determination standard from *Jones* in the 2022 case, *United States v. Diggins*.[55] In *Diggins*, a man alleged that Congress did not have the legislative authority to enact 18 U.S.C. § 249(a)(1) under the Shepard-Byrd Hate Crimes Prevention Act after he was convicted of committing two counts of hate crime and violating the Act by conspiring to commit a hate crime.[56] Under the Shepard-Byrd Act, crimes inflicted onto someone based on their salient identity, which results in causing bodily injury or attempts to inflict bodily injury with a weapon, will be outsourced and investigated by federal agencies.[57]

In *Diggins*, a man convicted by a jury on two counts of committing a hate crime and one count of conspiring to commit a hate crime under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act challenged the constitutionality of the statute.[58] The court held that under the rational basis standard as outlined in *Jones*, the Act was constitutional because the legislation outlawed racially motivated violence, which Congress has found to be a badge or incident of slavery.[59] Congress logically concluded that acts of racially motivated violence are remnants of slavery. As such, the prohibition of such acts falls

52. McAward, *supra* note 17, 590–91.

53. *Jones*, 392 U.S. at 440; *see also* Arthur Kinoy, *Jones v. Alfred H. Mayer Co.: An Historic Step Forward*, 22 VAND. L. REV. 475, 475 (1969).

54. Tsesis, *supra* note 19, at 358; *see also Jones*, 392 U.S. at 440; United States v. Hatch, 722 F.3d 1193, 1200 (10th Cir. 2013); United States v. Diggins, 36 F.4th 302, 311 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 383 (2022).

55. *See Diggins*, 36 F.4th at 306.

56. *Id.* at 306.

57. *See* Matthew Shepard & James Byrd, Jr., Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, §§ 4701–13, 123 Stat. 2835 (2009) (codified as amended in scattered sections of 18, 28, and 42 U.S.C.).

58. *Diggins*, 36 F.4th at 304.

59. *Id.* at 311.

within Congress's authority to enforce the Thirteenth Amendment and eradicate the vestiges of slavery.[60] As such, the Fourth Circuit found that in order for legislation to be deemed constitutional under the Enforcement Clause of the Thirteenth Amendment, Congress must follow the analysis the Supreme Court affirmed in *Jones*.[61]

## II. Enslavement: The Badges and Incidents

The United States of America was formed in opposition to British violation of civil liberties.[62] As such, slavery became an anomaly that was not eradicated until the inception of the Thirteenth Amendment, which brought the Constitution in alliance with the Declaration of Independence.[63] Yet, "the social, economic, and political systems constructed to protect slavery permeated the larger society and became inseparable from American life."[64] Before the Civil War, Black enslaved and non-enslaved people were denied access to "federal courts, labor rights, liberty, equality, justice, human dignity, and family integrity."[65] Throughout the Civil War and post-Antebellum period, non-enslaved and enslaved people were deemed socially and politically beneath their white counterparts.[66] This mindset led to the mistreatment and abuse of enslaved people.[67]

In the year of the case *Scott v. Sandford*, the Court held that enslaved people were not citizens of the United States and that an enslaved person living in a free state was still the property of their slave master and, therefore, not entitled to the protections of the Constitution.[68] Enslaved Black people were considered chattel and without civil or human rights unless under the view of criminal law.[69] The law protected enslavers from outside abuse of their slaves, allowing owners to find legal recourse from other whites who damaged an enslaved person based on property laws.[70] Such damages would go to the enslaver and not the enslaved.[71]

60. *Id.* at 314 (citing Griffin v. Breckenridge, 403 U.S. 88, 105 (1971)).
61. *Id.* at 311.
62. Tsesis, *supra* note 19, at 325.
63. *Id.* at 325–26.
64. Broussard, *supra* note 11, at 390.
65. McAward, *supra* note 17, at 599.
66. Tsesis, *supra* note 19, at 373.
67. *See* Emily West, *Enslaved Women and Slaveholders*, Lowcountry Digital His. Initiative (last visited Dec. 29, 2023), https://ldhi.library.cofc.edu/exhibits/show/hidden-voices/enslaved-women-and-slaveholder.
68. Scott v. Sandford, 60 U.S. 393, 453 (1857).
69. Broussard, *supra* note 11, at 382.
70. *Id.* at 383.
71. *Id.*

Enslavement was a highly gendered institution, and the lived experience of enslaved Black women differed from that of Black men.[72] Black women, in particular, were subjected to the double oppression of both racism and sexism.[73] While women had limited legal protections during the Antebellum period, such as pressing charges for rape and sexual assault, these protections only applied to white women.[74] As a result, Black women were left without the necessary protections, as their race prevented them from accessing the limited rights and privileges that were available to white women.[75] Due to the lack of records outlining the lived experience of Black enslaved women, there are limitations in understanding their suffering and roles during the Antebellum South.[76] During enslavement, White enslavers saw enslaved Black women as a commodity for reproduction and producing goods.[77] Courts recognized unrestrained violence inflicted by the enslavers on the enslaved as "one of slavery's most necessary features."[78] Black enslaved women were considered sexual objects to be raped and abused.[79]

### *A. Black Women: Then and Now*

"From the slave ship to the auction block, from the plantation to Jim Crow, from chain gangs to mass incarceration, Black women have been vulnerable, and Black women have been resilient."[80] According to a study conducted by the Center of Poverty and Inequality at Georgetown Law, Black girls as young as five years old are viewed as "less innocent" and "more adult-like than their white peers."[81] These racial biases influence how Black women are perceived and highlight the continual erasure and lack of acknowledgment of their suffering. Yet, Black

72. *See* Fatima Suarez, *Poisoning as Revenge for Intimate Violence Against Enslaved Women*, Stanford Univ. (June 1, 2022), https://gender.stanford.edu/news/poisoning-revenge-intimate-violence-against-enslaved-women.

73. *See* Broussard, *supra* note 11, at 376–78.

74. *See id.* at 399–400.

75. *See id.* at 410–11.

76. Hailey Morrison, *The African American Women and Her Labor in Antebellum South Slavery*, *in* Wake Forest University Students, Gender & Sexuality: A Transnational Anthology from 1690 to 1990 ch. 13 (2019).

77. *Id.*

78. United States v. Hatch, 722 F.3d 1193, 1206 (10th Cir. 2013).

79. Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 Chi.-Kent L. Rev. 359, 366 (1993).

80. Jasmine Sankofa, *Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform*, 59 How. L.J. 651, 683 (2016).

81. Jamilia J. Blake & Rebecca Epstein, *Listening to Black Women and Girls: Lived Experiences of Adultification Bias*, Georgetown L. Ctr. on Poverty & Ineq. (May 15, 2019), https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/Listening-to-Black-Women-and-Girls.pdf.

women continue to be survivors in a system that would have destroyed a "less-enduring" subgroup.[82]

Violence and abuse inflicted on Black women have been erased from our history.[83] Black women continue to be marginalized and exploited by those who benefit from their erasure.[84] Unlike white women, Black women are not protected by society, which starts at a young age.[85] Throughout the history of the United States, Black women have been dehumanized and demeaned.[86] Negative stereotypes stemming from enslavement have made it harder for Black women to be taken seriously in the court of law, effectively othering them.[87] "Sapphire" and "Jezebel" are two stereotypes that continue to affect the way Black women are perceived today.[88] Jezebel has been used to justify the sexual assault and rape of Black women.[89] Stemming from enslavement, Jezebel is a hypersexual woman with little to no morals who seeks male attention.[90]

Sapphire describes an emotional, loud, and volatile woman and promotes the idea that Black women are unemotional and domineering.[91] This stereotype created what we now know as the "angry Black Woman," which continues to invalidate Black women and create barriers to receiving justice.[92] Jezebel and Sapphire have created negative perceptions of Black women that continue to be reinforced through the media.[93] Black women also face racial bias and discrimination within the criminal justice system, which can impact the way their cases are handled and result in lower rates of prosecution for perpetrators.[94] Black women who report abuse are often not taken seriously by law enforcement or other authorities, and their cases are often not thoroughly

82. *See* Broussard, *supra* note 11, at 379.

83. *See id.* at 417.

84. *See* Reema Sood, *Biases Behind Sexual Assault: A Thirteenth Amendment Solution to Under-Enforcement of The Rape of Black Women*, 18 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 405, 416 (2018).

85. *See* Epstein, et al., *supra* note 81, at 4–5.

86. *See* Amber Simmons, *Why Are We So Mad? The Truth Behind "Angry" Black Women and Their Legal Invisibility as Victims of Domestic Violence*, 36 HARV. BLACKLETTER L.J. 47, 57 (2020).

87. Fanta Freeman, Note, *Do I Look Like I Have an Attitude? How Stereotypes of Black Women on Television Adversely Impact Black Female Defendants Through the Implicit Bias of Jurors*, 11 DREXEL L. REV. 651, 674 (2019).

88. *See* Simmons, *supra* note 86, at 50.

89. *See* Colleen Campbell, *Medical Violence, Obstetric Racism, and the Limits of Informed Consent for Black Women*, 26 MICH. J. RACE & L. 47, 52 (2021).

90. *See* Simmons, *supra* note 86, at 50 n.29; *see also* Freeman, *supra* note 87, at 661.

91. Freeman, *supra* note 87, at 662.

92. *Id.* at 703.

93. Simmons, *supra* note 86, at 68.

94. Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence,* 24 WM. & MARY J. WOMEN & L. 39, 77–78 (2017).

investigated or prosecuted.[95] Black women are subjected to stereotypes and biases that depict them as sexually promiscuous, lying, and lacking credibility, which can make it difficult for them to be taken seriously when they report abuse.[96] It is important to note the impact of these stereotypes and how they inform the way Black women are perceived. The distrust of police and service providers stems from the criminalization of Black women.[97]

## III. Identifying Violence Against Black Women as a Badge or Incident of Enslavement

Congress has the power and duty through the Enforcement Clause of the Thirteenth Amendment to address violence against Black women because their treatment is a "badge and incident" of enslavement.[98] Under the rational determination test, Congress must (1) identify the conduct as a badge or incident of enslavement and (2) ensure the legislative action is rationally related to eliminating the badges and incidents of slavery. As mentioned above, "badges of slavery" have commonly referred to the legal restrictions that were enforced on African Americans by the state.[99] Whereas "incidents of slavery" refer to the legal constraints and conditions imposed on Black people during and after enslavement.[100]

Suppose it can be shown that the act being addressed is a badge and incident of enslavement. In that case, Congress can pass legislation that is rationally related to eliminating the badge and incident of enslavement.[101] Here, I will evaluate various acts of violence inflicted on Black women during and post the enslavement and why, under Part One of the test, they should be considered a badge and incident of enslavement. Although the violence inflicted on Black women comes in many forms, I will put a spotlight on homicide, rape and sexual assault, police abuse, uninvestigated disappearances, and sex trafficking.

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95. *Id.* at 46.

96. Freeman, *supra* note 87, at 674.

97. 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).

98. *See Jones*, 392 U.S. at 438–39.

99. *Id.* at 577 n.71; *see also* McAward, *supra* note 17, at 581.

100. McAward, *supra* note 17, at 571; *see generally* Bryan v. Walton, 14 Ga. 185 (1853) (finding a runaway slave submitting to arrest was a necessary incident of slavery).

101. United States v. Diggins, 36 F.4th 302, 308 (1st Cir. 2022).

### *A. Violence*

There is little understanding of the racial violence Black women experienced post and pre-Antebellum period because of the forced erasure of their lived experiences.[102] Black women and girls were not protected under the law during the Antebellum period.[103] The Antebellum court affirmed enslavers and enslaved sexual servitude as having complete control over their enslaved person's body.[104] Both white men and women often served as co-masters and were complicit in the violence inflicted on enslaved Black women and the economic benefits from their ownership.[105]

Abuse and violence towards Black women did not end after emancipation. [106] The violence inflicted on Black women has been and is essential to "preserving [a] racial capitalist state."[107] "Public benefits law, educational law, delinquency and neglect policy, and all aspects of criminal law have embedded the stereotypes as the normative foundation for how the government evaluates, judges, and punishes Black women."[108]

### *B. Homicide*

Homicide is the "killing of one human being by another."[109] Notably, during the Antebellum period, enslaved Black women were subjected to harsh treatment from their enslavers with no legal means to resist or protect themselves from violence, such as homicide.[110] For instance, in 1820, the North Carolina Supreme Court in *State v. Mann* acquitted an enslaver from all charges after he shot and killed his slave for attempting to flee.[111] There, the court held that the defendant was not criminally liable for killing the Black enslaved woman because enslaved people did not have rights.[112] The victim was legally restricted from receiving justice due to her enslavement and status as a Black woman.

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102. *See* David V. Baker & Gilbert Garcia, *An Analytical History of Black Female Lynchings in the United States, 1838– 1969*, 8 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 83, 84 (2019).

103. ROBIN L. KELLY ET AL., CONG. CAUCUS ON BLACK WOMEN & GIRLS, STATE OF BLACK WOMEN AND GIRLS IN 21ST CENTURY AMERICA: AN ANALYSIS OF CHALLENGES AND OPPORTUNITIES 35 (2014), https://robinkelly.house.gov/sites/evo-subsites/robinkelly.house.gov/files/evo-media-document/CCBWG-Report-Final-2.pdf.

104. State v. Mann, 13 N.C. 263, 266–67 (1829).

105. West, *supra* note 67.

106. *See* Broussard, *supra* note 11, at 374.

107. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 33 (2019).

108. Jacobs, *supra* note 94, at 46.

109. *Homicide*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/homicide.

110. State v. Mann, 13 N.C. 263, 266–67 (1829); *see also Sexual Violence Targeting Black Women*, EQUAL JUST. INITIATIVE (2020), https://eji.org/report/reconstruction-in-america/the-danger-of-freedom/sidebar/sexual-violence-targeting-black-women/.

111. *See Mann*, 13 N.C. at 264–65.

112. *Id.* at 267.

### *1. Grim Sleeper and the Lack of Protection Black Women Face*

Today, "Black women are still less likely to be protected by police when they are being murdered, beaten, and/or abused by their partners and community members."[113] There has been a slow progression since the court's findings in *State v. Mann* since Black women are still restricted from receiving justice even after enslavement. Indeed, Black women are killed at a higher rate than any other subgroup.[114] For example, in 2010, a man nicknamed the "grim sleeper" was arrested after killing Black women in South Central California for over twenty years.[115] He purposely targeted Black women engaging in sex work and addicts, knowing no one would look for them.[116]

For over twenty years, community members believed the police department was not doing enough to find out who was killing Black women in their community.[117] Community members believed racial biases led the department to purposely downplay the killings because no information about the murders nor any precautions to help protect Black women in the area were ever released.[118] For years, dead Black women were found, and nothing was done.[119] Although the serial killer was only charged with ten deaths, police found around 1,000 pictures of dead and mutilated Black women in his apartment at the time of his arrest.[120] Many of the women in the photos were never identified.[121]

### *2. Current Statistics*

In 2021, the number of fatalities among Black women and girls surpassed 2,000, marking a 51% surge from the figures recorded in 2019.[122] This increase represented the most substantial rise observed among

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113. Kimberlé Crenshaw & Andrea Ritchie, Afr. Am. Pol'y F., Say Her Name: Resisting Police Brutality Against Black Women 21 (2015), https://www.aapf.org/_files/ugd/62e126_9223ee35c2694ac3bd3f2171504ca3f7.pdf.

114. finoh & Sankofa, *supra* note 6; *see, e.g.*, *Mann*, 13 N.C. at 264.

115. Scott Glover, '*Grim Sleeper*' *Trial: Prosecution Opens its Case, Notes Pattern in Slayings*, CNN (last updated Feb. 16. 2016, 7:09 PM) https://www.cnn.com/2016/02/16/us/lonnie-franklin-grim-sleeper-killer-trial/index.html.

116. *See id.*; Suzanne Zuppello, '*Grim Sleeper*' *Serial Killer: Everything You Need to Know*, Rolling Stone (Aug. 18, 2016), https://www.rollingstone.com/culture/culture-features/grim-sleeper-serial-killer-everything-you-need-to-know-252246/.

117. Zuppello, *supra* note 116.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Zusha Elinson & Dan Frosch, *Murders of Black Women Rose During the Pandemic. The Solving of Their Cases Fell*, Wall St. J. (Dec. 31, 2022, 9:00 AM), https://www.wsj.com/articles/black-women-homicides-clearance-rates-murders-11672431377.

any racial or gender group during that time frame.[123] Moreover, "the number of unsolved homicides of Black women and girls rose by 89% nationwide."[124] According to the Guardian, in 2020, "five Black women and girls were killed every day in the United States."[125] However, due to the glaring gaps in the national law enforcement database, it is hard to obtain accurate numbers and details about the killer's relationship with their victims.[126] In the FBI's supplementary homicide rate for 2020, nearly half of all the documented murders of Black women and girls listed the relationship between their killers as "unknown."[127]

High homicide rates are a legal restriction to Black women. Despite Black women having more rights than they did during the Antebellum period, there is a gap in protecting Black women and agencies, such as the FBI, being held accountable to investigate these killings thoroughly. The sheer number of homicides for Black women shows a lack of accountability for investigators and prosecutors. The lack of serious attention given to the killings of Black women stems from the troubling tendency to rationalize the harm inflicted upon them, often resulting from detrimental stereotypes that portray them as overly aggressive.[128] Therefore, Black women being murdered without legal recourse or justice is a badge and incident of enslavement.

### *C. Rape and Sexual Assault*

Rape and sexual assault are vastly underreported.[129] "Sexual assault [is] sexual contact or behavior that occurs without explicit consent [from] the victim."[130] Rape is a form of sexual assault that involves "sexual penetration without consent."[131] The rape of a Black woman was not considered a crime for the majority of the history of the United States.[132] After the international slave trade ended in 1808, enslavers

123. *Id.*

124. *LA Civil Rights Releases New Report on Violence Against Black & Latina Women*, LA CIV. RTS. (Mar. 17, 2023), https://civilandhumanrights.lacity.gov/get-involved/highlights/la-civil-rights-releases-new-report-violence-against-black-latina-women.

125. Beckett & Clayton, *supra* note 7.

126. *Id.*

127. *Id.*; *see also Scope of the Problem: Statistics*, RAINN, https://www.rainn.org/statistics/scope-problem (last visited Dec. 29, 2023).

128. Brianna N. Banks, *The (De)valuation of Black Women's Bodies*, 44 HARV. J.L. & GENDER 329, 350–51 (2021).

129. Sankofa, *supra* note 80, at 669.

130. *Sexual Assault*, RAINN, https://www.rainn.org/articles/sexual-assault (last visited Dec. 29, 2023).

131. *Id.*

132. *See* Broussard, *supra* note 11, at 399–400.

were incentivized to increase their number of enslaved people.[133] As such, it became common for enslavers to impregnate enslaved women to capitalize on that investment.[134] "[E]nslaved women's children were classified as [enslaved people] regardless of [who their fathers were]," and slave owners faced no legal recourse for raping and impregnating Black enslaved women.[135]

Rather than blaming their husbands for taking advantage of enslaved women, white women further encouraged the narrative that enslaved Black women invited white men into sexual intimacy.[136] In many cases, white women reacted to their husbands' attraction by abusing and even murdering the women who caught their husbands' eyes.[137] As such, white women enslavers often neglected to protect or sympathize with enslaved Black women who experienced violence due to their status.[138] This mindset furthered the exploitation of enslaved Black women's bodies for the purposes of reproduction and forced labor.[139]

### *1. Lack of Bodily Autonomy and History of Dangerous Perceptions*

Courts did not recognize Black women's bodies or safety during enslavement.[140] Black women were essentially seen as "unrapeable."[141] Take, for example, the following cases where the judicial system failed to find legal resources for Black women during the Antebellum period.

In the 1859 case of *George v. State*, the Supreme Court of Mississippi found that it was legal for an enslaved man to rape an underaged enslaved girl.[142] The defendant argued, "[t]he crime of rape does not exist in this State between African slaves. . . . The regulations of law as to the white race on the subject of sexual intercourse do not and cannot, for obvious reasons, apply to slaves; their intercourse is promiscuous, and the violation of a female slave by a male slave would be a mere assault and battery."[143] The court stated, Masters and slaves, given their distinct positions, rights, and duties, cannot be subject to a common system of

133. Mikah K. Thompson, *Just Another Fast Girl: Exploring Slavery's Continued Impact on the Loss of Black Girlhood*, 44 HARV. J.L. & GENDER 57, 62 (2020).

134. *Id.*

135. *Id.*

136. West, *supra* note 67.

137. Thompson, *supra* note 128, at 6–7.

138. *See* West, *supra* note 67.

139. *Id.*

140. *See, e.g.*, George v. State, 37 Miss. 316, 320 (1859) (concluding it was legal for an enslaved man to rape an underaged enslaved girl because no offence existed in either the common or statutory law.)

141. Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 718 n.142 (2002).

142. *George*, 37 Miss. at 320.

143. *Id.* at 317.

laws, which is evident in the absence of legislation addressing the attempted or actual commission of rape by a slave on a female slave.[144]

In the 1847 case of *State v. Charles*, the Supreme Court of Florida highlighted the importance of considering the race of the victim.[145] The court evaluated a law stipulating that if a Black or mixed-race person assaulted a white woman with the intent to commit rape, the offender would be killed or severely injured.[146] The court determined it lacked jurisdiction and subsequently dismissed the case, exonerating an enslaved man of criminal responsibility due to the government's failure to identify the rape victim as white expressly.[147]

In the 1859 case of *Alfred v. State*, the Supreme Court of Mississippi ruled on a case involving an enslaved man facing a murder conviction for killing his overseer.[148] The case centered on the exclusion of testimony from Alfred's enslaved wife, Charlotte, who alleged that the overseer had raped her just two hours before the murder.[149] The defense contended that excluding Charlotte's testimony was an error, as it could have potentially reduced the charge from murder to manslaughter, and it was legally admissible.[150] The defense stressed that the court's role is to assess the competency of testimony, while the impact rests with the jury.[151] In the end, the appellate court's rationale for rejecting Charlotte's testimony remained unarticulated, and the matter appeared to be brushed aside. Nevertheless, the court's final determination stated that there was "no error . . . in the rejection of Charlotte's testimony."[152]

The violent history of Black women being "den[ied] . . . agency over their bodies" with no legal recourse "normalized and legitimized" their unrapable stereotype.[153] History continues to show us that the "relationship between enslavement and racial violence is . . . 'inescapable.'"[154]

### *2. Continued False Perceptions*

"The negative effects of sexualized racism continue to haunt black women."[155] Following the Antebellum period, Black women lost

144. *Id.* at 320.
145. State v. Charles, 1 Fla. 298, 298 (1847).
146. *Id.* at 298.
147. *Id.* at 300.
148. Alfred v. State, 37 Miss. 296, 315 (1859).
149. *Id.* at 315–16
150. *Id.* at 307.
151. *Id.*
152. *Id.* at 316.
153. Naomi Mann, *Classrooms into Courtrooms*, 59 HOUS. L. REV. 363, 390 (2021).
154. United States v. Roof, 10 F.4th 314, 392 (4th Cir. 2021).
155. Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 85 (1999).

protection from their enslavers and sequentially became available to all white men.[156] Although Black women are now protected under rape laws, the same dehumanizing perceptions of Black women create barriers of invalidation and a culture of silencing.[157] Black women continue to be perceived as unrapeable.[158]

Over 20% of Black women have reported physical violence, including rape, during their lifetimes, higher than any other female subgroup.[159] "For every Black woman who reports rape, at least 15 Black women do not report."[160] The perception of Black women as "unrapeable" is a legal constraint because it prevents the public and authorities from taking their cases seriously.[161] Instead of believing in Black women, perceptions of promiscuity and invalidation prevent them from achieving justice. Hence, the false perceptions of Black women as being "unrapeable" continue to thrive as a badge and incident of enslavement.

### *D. Policing*

"The relationship between Black women and the state was birthed in violence[.]"[162] During the Antebellum period, Black women did not have protection under the legal system.[163] The lack of protection "creat[ed] opportunities for law enforcement officials to sexually abuse" Black women knowing there would be no accountability for their actions.[164]

#### *1. Evolution of Policing*

Modern-day policing is rooted in enslavement.[165] The earliest form of slave patrols, or what we would know as policing, was created in the early 1700s to address growing concerns of enslaved rebellions and recapturing enslaved people who escaped in the Carolinas.[166] Slave patrollers were "not required to protect and serve Black slaves, especially

156. Simmons, *supra* note 86, at 52–53.
157. Hutchinson, *supra* note 155.
158. *See* Broussard, *supra* note 11, at 410.
159. Green, *supra* note 3.
160. Nat'l Ctr. on Violence Against Women in the Black Cmty., Black Women and Sexual Assault (Oct. 2018), https://ujimacommunity.org/wp-content/uploads/2018/12/Ujima-Womens-Violence-Stats-v7.4-1.pdf.
161. Hutchinson, *supra* note 155.
162. Jacobs, *supra* note 94, at 44.
163. *See* Crenshaw et al., *supra* note 113, at 26.
164. *Id.*
165. *The Origins of Modern-Day Policing*, NAACP, https://naacp.org/find-resources/history-explained/origins-modern-day-policing (last visited Dec. 29, 2023).
166. *Id.*

not Black female slaves."[167] After emancipation, the slave patrol force began to morph into what we know now as the police force.[168] This force was focused on implementing and maintaining Jim Crow laws around the country.[169] Many police officers were part of the Klu Klux Klan and would often assist in inflicting violence on Black communities.[170] Today, Black communities, in particular, struggle to trust the police because of their dark history of prejudice, violence, and racism.[171]

"Black women are particularly vulnerable to sexual assault by police due to historically entrenched presumptions of promiscuity and sexual availability."[172] In any context, sexual assault can cause trauma, and assault from those who are tasked to protect and serve can heighten that trauma even more.[173] Additionally, "[w]hile egregious acts of sexual violence committed by law enforcement have caught media attention, this problem remains substantially under-researched and underreported."[174] The gaps in reporting are further elevated because, since officers have a reputation for shielding one another, it is harder for them to be held accountable.[175]

### *2. Policing and Sexual Assault*

The court system has failed to protect Black women from the violent and racialized history of policing in this country, resulting in structural racism.[176] Today, incidents of sexual assault by police are not uncommon.[177] One particular illustration of the hyper-vulnerability of Black women is Daniel Holtzclaw, a white-passing police officer in Oklahoma City, who was arrested and charged with multiple counts of rape

167. Simmons, *supra* note 86, at 52.
168. *See* Sankofa, *supra* note 80, at 678.
169. *See id.*
170. *Id.*
171. *See* Sood, *supra* note 84, at 413.
172. Crenshaw et al., *supra* note 113, at 26.
173. 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, 158 (2016).
174. *Id.* at 156.
175. Sankofa, *supra* note 80, at 670.
176. *See* Nnennaya Amuchie, *"The Forgotten Victims" How Racialized Gender Stereotypes Lead to Police Violence Against Black Women and Girls: Incorporating an Analysis of Police Violence into Feminist Jurisprudence and Community Activism*, 14 SEATTLE J. FOR SOC. JUST. 617, 656 (2016).
177. *See* Eduardo Medina, *Ex-Police Detective Suspected of Preying on Black Women Faces U.S. Charges*, N.Y. TIMES (Sept. 5, 2022), https://www.nytimes.com/2022/09/15/us/kansas-police-officer-sexual-assault.html (discussing a Kansas officer who was arrested for raping and sexually assaulting Black women).

and sexual assault.[178] All of Holtzclaw's victims were Black women.[179] Holtzclaw took advantage of the systemic erasure of Black women's experiences and strategically targeted women whom he believed would be less likely to report or be believed.[180] Holtzclaw is an example of how officers abuse their authority in ways that disproportionately hurt Black women.[181]

The fear of retaliation and underreporting has made it difficult to record the sheer number of officers who use their power to prey on Black women.[182] This continued fear of retaliation and underreporting is a legal constraint for Black women because it prevents them from seeking justice. Like slave patrollers who elicited fear from Black women, Holtzclaw targeted women with the understanding that there would be little to no recourse. As a result of the angry Black woman stereotype, oftentimes, the abuse of Black women is not reported, or when it is, those women are not believed.[183] These barriers create legal constrictions for Black women to seek and receive justice. As such, the targeting of Black women by police officers is a badge and an incident of enslavement.

### *3. #Sayhername: Lack of Accountability of Black Women's Death at the Hands of Police*

In addition to Black women's vulnerability to sexual assault from police, they are also disproportionately killed at the hands of police and arrested more than their white counterparts.[184] "Negative stereotypes are at the core of Black women's oppression and influence the justification of excessive police force and even police killings of Black women."[185] Moreover, "[f]amilies who lose Black women to police violence are not regularly invited to speak at rallies and do not receive the same level of community support or media, and political attention as families who lose Black men."[186] Here, I will illustrate the lack of care the state continues to have for Black women.

178. *"Denied," Former OKCPD Officer Daniel Holtzclaw Will Not Have Chance at Parole this Year*, KFOR, (Feb. 12, 2022, 6:12 PM), https://kfor.com/news/local/denied-former-okcpd-officer-daniel-holtzclaw-will-not-have-chance-at-parole-this-year/; Sankofa, *supra* note 80, at 656.

179. Lindy West, *The Case of Serial Rapist Police Officer Daniel Holtzclaw Tells Us So Much About 2015*, Guardian, (Dec. 13, 2015, 3:00 PM), https://www.theguardian.com/commentisfree/2015/dec/13/daniel-holtzclaw-rape-convictionsoklahoma-city-police-officer.

180. Sood, *supra* note 84, at 416.

181. *See* Sankofa, *supra* note 85, at 655.

182. *See id.*

183. Simmons, *supra* note 85, at 53.

184. Jacobs, *supra* note 94, at 58.

185. Amuchie, *supra* note 176, at 636.

186. Crenshaw et al., *supra* note 113, at 7.

In 1997, Frankie Ann Perkins was beaten to death after being accused of swallowing drugs.[187] No drugs were ever found in her system.[188] In 2012, Shelly Frey was left dead in a car for eight hours after being killed by an off-duty officer who believed she had shoplifted from Walmart.[189] In 2014, just after the murder of Eric Gardner, Rosann Miller was choked to death by police for barbequing in the front of her home.[190] Rosann was seven months pregnant at the time of her death.[191] In 2015, Sandra Bland, a 28-year-old Black woman, was found dead in a jail cell after being beaten and arrested for failing to signal a lane change.[192] None of the officers who executed these murders were ever formally charged.[193]

There are countless names of women whose stories have been erased from society.[194] Black women murdered at the hands of police officers with no legal recourse is a legal restraint that stems back to enslavement. The lack of legal restraint and little to no media coverage creates an environment of no accountability or justice for the officers who prey on Black women. Thus, Black women being murdered at the hands of police officers is a badge and incident of enslavement.

### *E. Missing Black Women*

Like the lack of investigation and legal recourse for Black women who are killed, sexually assaulted, raped, and abused by police, there has been little done to investigate or mitigate the high number of missing Black women. According to the Collins Dictionary, "missing" is when someone's whereabouts are unknown, and it is unknown whether they are dead or alive.[195] In the United States, there are around 70,000 missing Black women and girls.[196] Despite Black women only making up 13 percent of the female population, in 2020, they accounted for 35 percent of all missing women in the United States.[197]

187. *Id.* at 14.
188. *Id.*
189. *Id.* at 12.
190. *Id.* at 28.
191. *Id.*
192. *Id.* at 11.
193. *Id.* at 11, 28.
194. Kimberlé W. Crenshaw, *Do You Know Their Names?*, INQUEST (Sept. 7, 2023), https://inquest.org/do-you-know-their-names.
195. *Missing,* COLLINS ENGLISH DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/missing (last visited Dec. 29, 2023).
196. *See* Oversight Committee Democrats, *The Neglected Epidemic of Missing BIPOC Women and Girls*, YOUTUBE (Mar. 3, 2022), https://www.youtube.com/watch?v=rUc6pR0WoCM ("It is estimated that there are currently between 64,000 and 75,000 missing black women and girls in the United States, many of whom have been targeted by sex traffickers.").
197. *Id.*

In Kansas City, a 20-year-old woman was found with duct tape and a metal collar with a padlock around her neck, claiming to have been whipped and locked in a basement.[198] Many people in the community had reported that they believed a serial killer was targeting and killing Black women in the community.[199] Yet, weeks before the woman was found, the police responded by stating that the claims were unfounded with no factual basis.[200] The woman's escape came weeks after community leaders said they told authorities they believed a potential predator was targeting Black women in the Kansas City area.[201]

If the police had taken the community's concerns seriously when they were first reported, the woman might have been found sooner. Like many legal barriers Black women face in other realms of violence, missing Black women are rarely mentioned in the media or investigated.[202] The lack of legal and social attention to this problem is a legal constraint because it prevents Black women from being found and obtaining justice. This treatment is a similar theme that has stemmed throughout enslavement and further conveys the continued lack of humanity and autonomy of Black women. Therefore, the lack of investigation and legal recourse in finding missing Black women is a badge and incident of enslavement.

### *F. Sex Trafficking*

Similar to missing Black women and girls, "human trafficking also disproportionately affects Black women."[203] Around 40 percent of all sex trafficked victims in the U.S. are Black women and girls.[204] According to the FBI, in 2020, over 55 percent of all juvenile sex work arrests were Black children.[205] In Los Angeles County, over 90 percent of the Black girls in the juvenile system are identified as sex trafficked

198. *Excelsior Springs Kidnapping and Rape: Everything We Know and Don't Know About the Case*, KMBC News (last updated Jan. 11, 2023, 5:30 PM), https://www.kmbc.com/article/excelsior-springs-missouri-kansas-city-woman-kidnapping-rape-everything-we-know-2023/42465685.

199. *Id.*

200. Justin Gamble & Jalen Brown, *Black Woman Escaped After Being 'Held Against Her Will' by a White Man in Missouri, Police Say*, CNN (updated Oct. 19, 2022, 12:49 PM), https://www.cnn.com/2022/10/18/us/missouri-reports-missing-black-women-reaj/index.html.

201. *Id.*

202. Sharon Pruitt-Young, *Tens of Thousands of Black Women Vanish Each Year. This Website Tells Their Stories*, NPR (Sept. 24, 2021, 6:00 AM), https://www.npr.org/2021/09/24/1040048967/missing-black-women-girls-left-out-media-ignored.

203. Mace, *supra* note 196.

204. *Id.*

205. Samantha Davey, CBC, Snapshot on the State of Black Women and Girls: Sex Trafficking in the U.S. (2020), https://www.cbcfinc.org/wp-content/uploads/2020/05/SexTraffickingReport3.pdf.

victims.[206] The criminalization of individual women and the lack of legislation to protect trafficked women stems from enslavement. Black Women have been blamed for their enslaver's sexual promiscuity and have not been seen as people who needed help.[207] Thus, the high rates of trafficked Black women and the criminalization of Black sex workers is a badge and incident of enslavement.

### *G. Medical Discrimination*

During the Antebellum period, Black women did not have autonomy over their bodies because they lacked legal protection.[208] As legal property, enslaved women were prevented from giving or refusing consent to their bodies.[209] Due to the lack of legal protection, enslaved bodies were in high demand, dead or alive, to be used for furthering medicine.[210] Doctors often used enslaved people to practice surgical techniques before conducting the technique on white people.[211] One notable example of this was "the father of gynecology," Marion Sims, a surgeon who used enslaved women to conduct medical experiments without anesthesia.[212] Sims believed Black women had a higher tolerance for pain than their white counterparts.[213]

Following the Antebellum period, gynecological abuse continued to impact Black women.[214] "Poor Black women, especially those relying on public assistance or a state health care policy, were often pressured to be sterilized under the threat of losing their state benefits," resulting in mass sterilizations.[215] Like many women born in the 1940s and 1950s, both of my grandmothers were forcibly sterilized before the age of 40.

Recently, researchers have begun to look at the impact of systemic racism and how it weathers the body.[216] Weathering, the process by which chronic stress accelerates the aging of the body, is attributed to the quality of healthcare, contributing to the development of underlying chronic conditions.[217] Lack of quality healthcare in historically

206. *Id.*
207. West, *supra* note 67.
208. Campbell, *supra* note 89, at 53–54.
209. *Id.* at 53.
210. *Id.* at 54.
211. *Id.* at 53–54.
212. Broussard, *supra* note 11, at 417.
213. *See* Campbell, *supra* note 89, at 56.
214. *Id.* at 57.
215. *Id.* at 58–59.
216. NAT'L P'SHIP FOR WOMEN & FAMILIES, BLACK WOMEN'S MATERNAL HEALTH: A MULTIFACETED APPROACH TO ADDRESSING PERSISTENT AND DIRE HEALTH DISPARITIES 2 (Dec. 2023), https://nationalpartnership.org/wp-content/uploads/black-womens-maternal-health.pdf.
217. *Id.*

marginalized communities, especially Black communities, has long been attributed to both structural racism and implicit bias.[218] As such, Black women ages forty-nine to fifty-five are estimated to be seven and a half years older, biologically, than their white counterparts.[219] Black women are more likely to live with diabetes, obesity, high blood pressure, and major depression.[220] Current research shows that Black women who grew up during the Jim Crow era have a higher chance of being diagnosed with aggressive breast cancers that do not respond to traditional chemotherapy.[221]

## IV. Legislative Action Rationally Related to Eliminating the Badges and Incidents of Slavery

Congress has the power and duty through the Enforcement Clause of the Thirteenth Amendment to address violence against Black women because their treatment is a "badge and incident" of enslavement.[222] Here, the violence inflicted on Black women through homicide, rape, sexual assault, police abuse, uninvestigated disappearances, and sex trafficking all meet the first hurdle of the *Jones* test in that they all qualify as badges and incidents of enslavement.[223]

As such, Congress must ensure that legislative action created is rationally related to eliminating the badges and incidents of enslavement. Here, I will recommend various legislative actions that Congress can implement to eliminate the badges and incidents of enslavement. First, I will illustrate various policy actions that have failed to adequately protect Black women and how they perpetuate the existing badges and incidents of enslavement. Next, I will discuss new and proposed policies working to address and prevent Black women from experiencing violence. In this analysis, I will examine several federal laws and bills that have, unfortunately, proven inadequate in protecting Black women from violence. Additionally, I will evaluate a specific bill and non-profit organizations that have demonstrated promising efforts toward safeguarding Black women.

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218. *Id*.

219. Ericka Stallings, *The Article That Could Help Save Black Women's Lives*, O, the Oprah Mag. (Oct. 2018).

220. *See Working Together to Reduce Black Maternal Mortality*, CDC (Apr. 3, 2023), https://www.cdc.gov/healthequity/features/maternal-mortality/index.html.

221. *How Discrimination Can Harm Black Women's Health*, Harv. T.H. Chan Sch. Pub. Health (Oct. 31, 2018), https://www.hsph.harvard.edu/news/hsph-in-the-news/discrimination-black-womens-health/.

222. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438–39 (1968).

223. *Id.*

### *A. Policies*

"When the lives of marginalized Black women are centered, a clearer picture of structural oppressions emerges."[224] Race, enslavement, law, society, history, and the media have formed a complex and powerful system to silence and demean them.[225] When creating legislation, it is important to identify negative policies that have and continue to "discriminate and exclude Black women and girls from systems which are supposed to protect and include them."[226] Many laws that have been enacted to protect women fail to be applied equitably.[227] While the Thirteenth Amendment does not explicitly grant the power to declare laws or policies invalid, it does provide Congress with a vehicle for crafting legislation to address the badges and incidents of slavery.[228]

### *B. VAWA and Its Failures*

Congress enacted the Violence Against Women's Act (VAWA) in 1994.[229] The Act was intended to assist local law enforcement investigations and prosecutors in helping stop violence against women.[230] VAWA focuses on "domestic violence, dating violence, sexual assault, and stalking."[231] However, "VAWA was never intended for Black women."[232] VAWA was reauthorized in 2022 and expanded jurisdiction over American Indian and Alaskan Native Tribes.[233] However, the Act continues to ignore the epidemic of violence affecting Black women.[234] The Act only mentions Black when referring to Black women twice and only when referring to Black, Indigenous, and People of Color (BIPOC).[235] The epidemic of the violence Black women face is lumped into the issues affecting other female subgroups who are statistically better off.[236] Legislators

224. Crenshaw et al., *supra* note 113, at 30.
225. *Id.*
226. Davey, *supra* note 205.
227. *See* Broussard, *supra* note 11, at 379.
228. U.S. CONST. amend. XIII, § 1.
229. Simmons, *supra* note 86, at 60.
230. *Id.*
231. U.S. DEP'T OF JUST., THE 2018 BIENNIAL REPORT CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT v (2018), https://www.justice.gov/ovw/page/file/1292636/download.
232. Simmons, *supra* note 86, at 60.
233. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, §§ 40701(a)(3), 40702(a), and 40703(b), 108 Stat. 1902, 1953–55 (codified as amended in scattered sections of 28 and 42 U.S.C) [hereinafter VAWA].
234. Press Release, Justice Department Applauds Reauthorization of the Violence Against Women Act, U.S. DEP'T OF JUST. (Mar. 16, 2022).
235. VAWA, *supra* note 233.
236. *See* CONG. BLACK CAUCUS ON BLACK WOMEN & GIRLS, AN ECONOMY FOR ALL: BUILDING A "BLACK WOMEN BEST" LEGISLATIVE AGENDA 1, 66 (2022), https://watsoncoleman.house.gov/imo/media/doc/bwb_report_20220331.pdf.

failed to consider the ways the criminal justice system continues to fail Black women who are survivors of sexual and gender violence.[237]

One of the ways the Act has and continues to fail Black women is by its primary aggressor policy.[238] Under VAWA, an officer is required to arrest the "primary aggressor" in a domestic violence dispute.[239] The primary aggressor is determined based on the subjective observation of the responding officer.[240] Due to stereotypes like the "Angry Black Woman,'' Black women are more likely to be assumed as the aggressor and are "more likely to be arrested, even if they are the person who called the police for help."[241] VAWA also funds police departments, which have been shown to undermine the safety of Black women, as mentioned above.[242] Despite the Act being a step towards civil rights reform, the writers of VAWA failed to consider the historical development of policing and the continued trauma that the police have created for Black women.[243] VAWA is not effective because it fails to protect the women who need it most. "In a system that has already systematically over-policed Black communities, VAWA exacerbated the problem."[244] VAWA fails to fully protect Black women from violence because it does not center on Black women and is not intersectional enough to consider the unique barriers that Black women face in terms of police and being perceived as victims.

### *C. Trafficking and Violence Protection Act*

Congress, under its Thirteenth Amendment authority as per the Enforcement Clause, created the Trafficking and Violence Protection Act of 2000 (TVPA).[245] TVPA defines human trafficking as the use of force, fraud, or coercion to recruit, harbor, transport, or obtain a person for labor or commercial sexual exploitation.[246] The act considers all youth ages less than 18 years old as trafficking victims regardless of force or coercion.[247] Furthermore, the act works to treat minors as victims rather than criminal defendants.[248] TVPA fails to fully protect

237. *Id.* at 65.
238. VAWA, *supra* note 233; Jacobs, *supra* note 94, at 87.
239. Jacobs, *supra* note 94, at 87.
240. *See id.* at 240.
241. Simmons, *supra* note 86, at 55.
242. Cong. Black Caucus on Black Women & Girls, *supra* note 236, at 64.
243. *Id.*
244. Simmons, *supra* note 86, at 61.
245. Tsesis, *supra* note 14, at 1690.
246. *See* Tammy J. Toney-Butler, Megan Ladd, & Olivia Mittel, Human Trafficking (2023) (ebook).
247. Phillips, *supra* note 94, at 1654.
248. *Id.* at 1652.

Black women from violence because it does not center on Black women and is not intersectional to consider the unique barriers. Black women face in terms of police and being perceived as victims.

### *D. The Protect Black Women Girls Act*

The most recent Federal bill focused on protecting Black women was proposed in 2021.[249] The Bill focused on providing additional resources and support to Black women and girls who are survivors of violence and to prevent violence against them in the first place.[250] While the bill does not directly reference the Thirteenth Amendment, it is part of a larger effort to address the legacy of slavery and racial discrimination in the United States.[251] The Protect Black Women and Girls Act would have established a task force to examine the conditions and lived experiences of Black women and girls facing violence.[252] By working closely with policymakers to create reports to recommend policies on how to address and mitigate the harm inflicted on Black women and girls, the Protect Black Women and Girls Act was a positive step in the right direction.[253] However, it has not yet passed in Congress.[254]

### *E. The Black & Missing Foundation, Inc.*

The Black & Missing Foundation, Inc. (BAM), is a non-profit organization whose mission is to bring awareness and advocate for Black women who go missing.[255] The organization provides resources and support to families of missing persons, including assistance with searching for their loved ones and connecting them with law enforcement and other relevant agencies.[256] Like VAWA, BAM also works with law enforcement to provide training and support to help improve the response to missing-person cases involving people of color.[257] However, unlike VAWA, BAM was created for Black women by Black women. The foundation hosts a database for family and community members

249. Press Release, Reps. Robin Kelly, Clarke, Watson Coleman, Fitzpatrick Introduce the Bipartisan Protect Black Women and Girls Act (Dec. 15, 2021), https://robinkelly.house.gov/media-center/press-releases/reps-robin-kelly-clarke-watson-coleman-fitzpatrick-introduce-bipartisan.

250. *Id.*

251. *See id.*

252. *Id.*

253. *Id.*

254. *See* Protect Black Women and Girls Act of 2021, H.R. 6268, 117th Cong. (2021).

255. *Cases of Missing Black Women Continue to Be Ignored*, NEWSONE (Jan. 19, 2012), http://newsone.com/1806725/cases-of-missing-black-women-ignored.

256. *About the Black & Missing Foundation*, BLACK & MISSING FOUNDATION, INC., https://www.blackandmissinginc.com/about (last visited Dec. 29, 2023).

257. *Id.*

to record Black women who are missing and a tip line to gather and report information to authorities.[258] BAM and HF55 provide context on creating initiatives that center on Black women. BAM's work to track missing Black women and collect tips from its hotline to share with authorities is a sustainable way to eradicate the astronomical number of Black women that go missing. Data collecting and sustainable ways to lessen the numbers of Black women inflicted by violence is the first step to eradicating violence against Black women.

### *F. Minnesota Leading the Charge*

Despite the failure of the Federal legislatures to pass the Protecting Black Women and Girls Act, state legislatures in Minnesota have begun to take charge of protecting Black women. Like the Protecting Black Women and Girls Act, the Minnesota bill does not directly reference the Thirteenth Amendment. Policymakers in Minnesota created "the nation's first task force" to address missing and murdered Black women and girls filed under the name HF55.[259] Co-authored and legislated by a Black woman, the task force is responsible for reviewing and investigating cold cases, suspicious suicides, and death cases for Black women and girls.[260] Additionally, the task force distributes grants to community-based organizations to provide assistance and services to survivors of violence and to prevent Black women and girls from being targeted further.[261] Furthermore, the foundation set by the HF55 is the first step to creating a federal Black women's task force.

### *G. Ebony Alert*

This year, under the leadership of State Senator Steven Bradford, California achieved a groundbreaking milestone by unanimously passing SB 673, also known as Ebony Alert, into law on October 8, 2023.[262] This transformative legislation is set to take effect on January 1, 2024,

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258. *Tip Line*, Black & Missing Foundation, Inc., https://www.blackandmissinginc.com/tipline (last visited Dec. 29, 2023).

259. Ruth Richardson, *Legislative Update-July 22, 2022*, Minnesota Legis. (July 22, 2022), https://www.house.leg.state.mn.us/members/profile/news/15519/35955.

260. *Id.*

261. Tim Walker, *Proposed Office Would Address 'Disturbing Trend' of Missing, Murdered Black Women and Girls*, Minn. Legis. (Jan. 12, 2023, 3:36 PM), https://www.house.leg.state.mn.us/sessiondaily/Story/17515.

262. SB-673 Emergency Notification: Ebony Alert: Missing Black Youth, SB-673, 2023 Cal. Legis. Sess. (2023), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB673 [hereinafter SB-673]; Nicole Chavez, *New California Law Creates Ebony Alert to Find Missing Black Youth and Women*, CNN (October 11, 2023, 8:19 PM), https://www.cnn.com/2023/10/11/us/california-ebony-alert-reaj/index.html.

empowering California Highway Patrol to activate the Ebony Alert in response to requests from local law enforcement.[263] This alarm is similar to the Amber Alert, however it will be focused on alerting the public when a Black youth or young Black woman is reported missing "under unexplained or suspicious circumstances," is deemed "at risk, developmentally disabled, or cognitively impaired" or has been abducted.[264]

Notably, the Ebony Alarm marks one of the first of its kind, creating a statewide comprehensive alert system aimed at drawing attention and facilitating the search of missing Black women and children ages twelve to twenty-five years old.[265] Once triggered by local police, the California Highway Patrol can alert the public using highway signs, radio, television, and other media platforms to engage the public in the search for those who are missing.[266] This bill is influenced by the 2022 bill HB 1725, also known as Feather Alert, which targets missing indigenous women in Washington State.[267]

## V. Policies for the Future

Here, I will present solutions and potential legislation that Congress can use under the Enforcement Clause of the Thirteenth Amendment to help eradicate and prevent the increasing rates of violence against Black women.

### *A. Potential Solutions*

Indeed, "policymakers must find remedies for this centuries-old abuse and neglect" of Black women, which is just as complex and far-reaching as the destructive causes of the abuse.[268] Under the Thirteenth Amendment's Enforcement Clause, Congress can expand existing laws and create new legislation.[269] However, Congress does not need to reinvent the wheel. Congress can expand current legislation by creating

263. Chavez, *supra* note 262.

264. SB-673, *supra* note 262.

265. *Id.*; Jonathan Franklin, *California Creates Nation's First 'Ebony Alert' to Find Missing Black Children*, NPR (Oct. 11, 2023, 7:01 PM), https://www.npr.org/2023/10/11/1205151447/california-ebony-alert-system-missing-black-youth-women.

266. *Id.*

267. Paradise Afshar, *Washington State Creates Nation's First Alert System for Missing Indigenous People*, CNN (Apr. 1, 2022, 12:22 AM), https://www.cnn.com/2022/03/31/us/washington-new-alert-system-missing-indigenous-people/index.html; *see also* Concerning the Creation of an Endangered Missing Person Advisory Designation for Missing Indigenous Persons, H.B. 1725, 67th Legis. Sess. (2022), https://app.leg.wa.gov/billsummary?BillNumber=1725&Year=2021&Initiative=false.

268. Broussard, *supra* note 11, at 419.

269. Civil Rights Cases, 109 U.S. 3, 20–21 (1883).

a section of VAWA and TVPA that focuses on Black women and girls. This will help focus attention on the growing epidemic and help eradicate sexual and gender violence against Black women and girls.

Unlike VAWA, potential legislation should focus on community-based approaches instead of funding police. Additionally, part of the legislation should collect and track statistical analyses on the types of violence being inflicted on Black women because research has shown that national law enforcement databases fail to collect information about Black women experiencing violence accurately. Organizations like BAM show the possibilities of how statistical analysis and tracking can help eradicate violence and bring educational resources to the communities suffering the most. Furthermore, Congress can draw inspiration from the proactive measures taken by legislators in Minnesota and California. These measures include the establishment of task forces dedicated to investigating suspicious deaths and cold cases involving Black women and girls, as well as the development of an alert system specifically designed to address the needs and safety of Black women and children. Although these suggestions will not solve the epidemic of violence that many Black women and girls face, they will help bring awareness to the issue and hopefully lower the number of Black women impacted by violence.

Above, I demonstrated how violence against Black women in the form of homicide, sexual assault, lack of investigation of missing Black women, police abuse, and medical harm all constitute badges or incidents of enslavement. Attorneys and legislators have a unique role in continuing to shape the Enforcement Clause through litigation and legislation. Attorneys must begin to use the Thirteenth Amendment's Enforcement Clause to challenge the criminalization of Black women and push courts to recognize its powers. Additionally, as it is Congress' role to create legislation, Congress must further the power of the Thirteenth Amendment and work to eradicate the badges and incidents of enslavement. While I provided a critique of existing legislation, I concluded by recommending various legislative actions that Congress can implement to eliminate the badges and incidents of enslavement.

## Conclusion

The legacy of slavery and persistent systemic racism have created substantial hurdles for Black women in their pursuit of full citizenship. These hurdles impede their active engagement in social, political, and civil rights, all the while denying them equal protection under the law. Regrettably, the mistreatment and aggression directed towards Black

women has endured beyond the era of emancipation. Furthermore, this violence has been particularly directed at enforcing the badges and incidents of enslavement. The violence against Black women has functioned as a linchpin in perpetuating a "racial capitalist state."[270] Government regulations across various domains, including public welfare, education systems, neglect policies, and the criminal justice system, have entrenched stereotypes as the primary criteria for assessing, judging, and penalizing Black women. Continued efforts are crucial to confront and redress these deeply rooted issues.

Throughout this note, I conducted an examination of the various forms of violence inflicted on Black women during and after enslavement. I carried out a comprehensive analysis, presenting a compelling case for considering the violence against Black women as a badge and incident of enslavement within the framework of the Thirteenth Amendment's Enforcement Clause. Additionally, I drew parallel connections between various forms of violence that persist in today's society, underlining the enduring relevance of these issues and their historical continuity from the Antebellum period to the present day. These connections were illustrated through various forms of violence, including homicide, rape, sexual assault, police abuse, uninvestigated disappearances, and sex trafficking.

It's imperative to recognize that this discussion provides only a glimpse into the larger, complex landscape of racial inequality and gender-based violence. As we navigate a new era marked by bans, restrictions, and censorship, it becomes increasingly clear that many rights once available to my mother as a Black woman are now denied to me. In light of these disparities, nurturing a new generation of innovative social engineers is of paramount importance, as they possess the potential to confront the widespread challenges present in our society effectively.

The Thirteenth Amendment's Enforcement Clause legitimizes legislation created to eradicate the incidents and badges of enslavement. While the Thirteenth Amendment is not the sole remedy for addressing the ongoing challenges that systemic racism has posed for Black women in their quest for full citizenship, it does offer a promising start. Many of the issues related to the insufficient resources available for protecting the well-being of Black women, as well as the stereotypes and lack of concern for their protection, can be directly traced back to the legacy of enslavement. Further, this constitutional power can be used as a means to bypass the stringent scrutiny mandated by the Fourteenth Amendment and to transcend the economic limitations of

270. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 33 (2019).

the Commerce Clause. As a result, legal action and innovative legal strategies can manifest and carve a path for pursuing litigation against private entities that adversely affect Black women's safety.

Congress has the authority to create legislation to address violence against Black women at the federal level through the Enforcement Clause of the Thirteenth Amendment. Under the rational determination test, Congress must (1) identify the conduct as a badge or incident of enslavement and (2) ensure the legislative action is rationally related to eliminating the badges and incidents of slavery. My personal experiences have profoundly shaped my perspective and ignited my commitment to advocate for justice and equity for women who share my most salient identity. I hold a fervent hope that this note will serve as a catalyst for potential legislation and inspire meaningful dialogues regarding the transformative potential inherent within the Enforcement Clause of the Thirteenth Amendment. It is through this clause that I believe we can dismantle the deep-seated systems of racial prejudice and address gender-based violence inflicted on Black women. But even more, I recognize that this forgotten clause possesses the transformative potential to secure a future where the violence inflicted upon me and the women in my life will no longer persist as a common experience faced by Black women.