# WOMEN ON THE FRONTLINES

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*This Article takes aim at the troubling and persistent disempowerment and invisibility of women generally, and particularly marginalized women of color even one hundred years after the ratification of the Nineteenth Amendment. It observes how the persistence of sexism, toxically combined with racism, impedes full political, economic, and social personhood of women and girls in society, sometimes to deadly effect. On the centennial anniversary of the Nineteenth Amendment, it speculates reasons for women's labor being undervalued, even while on the frontlines of service to their families, employers, and our nation. It examines how women's invisibility and sacrifice are particularly striking during the 2020 pandemic—a public health crisis so severe that nations besieged by the novel coronavirus or COVID-19 closed their borders, issued shelter-in-place orders, or imposed quarantines.*

*In the United States, COVID-19 exposes preexisting institutional and infrastructural social problems, laid bare by a suffocating, debilitating virus. Racism, sexism, and xenophobia are the preexisting social conditions that further exacerbate harms manifested by the disease. Written during the heat of a pandemic, this Article closely examines the unique ways in which centuries of stereotypes and stigma further undermine women and girls as laborers during the 2020 pandemic and as patients. Meanwhile, their suffering is obscured in news media and not sufficiently accounted for in political spheres.*



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## INTRODUCTION

The spring and summer of 2020 sweltered under the thick heat of shots ringing out in the middle of a southern night, loudly ricocheting as if a combat sport against a hostile, weapon-bearing, foreign enemy. Under the cloak of darkness, they arrived, seemingly on a mission of search and destroy. Arguably the goal was not to serve or save a life but perhaps inflict death or injury itself.[1] As the men assembled with their weapons loaded and bulletproof vests secured, they instructed the ambulance—on standby—to leave, in violation of departmental protocols.[2]

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1 *See* Richard A. Oppel Jr. & Derrick Bryson Taylor, *Here's What You Need to Know About Breonna Taylor's Death*, N.Y. TIMES (Sept. 15, 2020), https://www.nytimes.com/article/breonna-taylor-police.html. [https://perma.cc/LF67-C7H2] ("An ambulance on standby outside the apartment had been told to leave about an hour before the raid, counter to standard practice.").

2 *See id.*

Like hunters for enemy combatants, they operated by surprise.[3] According to police, they knocked. Their account is disputed. Whether they knocked or not—no introductions or explanations were given on that evening.[4] This practice is known as the controversial "no-knock warrant."[5] It is a type of law enforcement strategy reserved for only the most exigent circumstances where officers fear armed suspects or the destruction of evidence,[6] because by default, "law enforcement officers must comply with the knock and announce rule."[7] To knock and announce is no modern rule. Rather, this "'ancient' common-law doctrine . . . generally requires officers to knock and announce their presence before entering a home to execute a search warrant."[8] On this night, constitutional protections found in the Fourth Amendment stood at bay, disarmed by local law enforcement.[9]

In reading the mounting reports and commentaries that copiously detail that tragic night,[10] I am reminded of President

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3 *See id.* (stating that Ms. Taylor's boyfriend called 911 and said, "I don't know what's happening. Someone kicked in the door and shot my girlfriend.").

4 *Id.*; David Alan Sklansky, *Stanford's David Sklansky on the Breonna Taylor Case, No-Knock Warrants, and Reform*, SLS BLOGS: LEGAL AGGREGATE (Sept. 28, 2020), https://law.stanford.edu/2020/09/28/stanfords-david-sklansky-on-the-breonna-taylor-case-no-knock-warrants-and-reform/ [https://perma.cc/64WM-XKZV].

5 *See Legal Sidebar: "No-Knock Warrants" and Other Law Enforcement Identification Considerations*, CONG. RES. SERV., at 1 (June 23, 2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10499 [https://perma.cc/23NE-MG3W].

6 *See id.* at 3.

7 *Id.* ("The Supreme Court has interpreted the Fourth Amendment's reasonableness requirement as generally mandating compliance with the knock and announce rule. knock and announce rule is also codified in a federal statute, but the Supreme Court has interpreted that statute as 'prohibiting nothing' and 'merely [authorizing] officers to damage property [upon entry] in certain instances.' When officers violate the knock and announce rule, they may be subject to civil lawsuits and 'internal police discipline.'") (alteration in original).

8 *Id.*

9 U.S. CONST. amend. IV.

10 *See, e.g.*, Oppel Jr. & Taylor, *supra* note 1; *What Breonna Taylor's Killing Says About Police Treatment of Black Women*, PBS NEWS HOUR (June 16, 2020), https://www.pbs.org/newshour/show/what-breonna-taylors-killing-says-about-police-treatment-of-black-women [https://perma.cc/MF5P-PDAW] ("I believe that her case was hidden, hidden from Louisville, hidden from Kentucky, hidden from America, primarily because she's black, and, secondarily, because she's a woman.") (quoting Hannah Drake); Errin Haines, *'It Helps Me Know That I Am Not in It Alone Anymore': Breonna Taylor's Mother On Her Daughter and Protests*, WASH. POST (June 5, 2020), https://www.washingtonpost.com/nation/2020/06/05/it-helps-me-know-that-i-am-not-it-alone-anymore-breonna-taylors-mother-her-daughter-protests/ [https://perma.cc/VC9H-M3FU] ("Taylor was killed March 13, fatally shot in her apartment by Louisville police officers serving a no-knock warrant on the wrong address. Her case is among the killings

Obama disclosing the tactical finesse of Osama bin Laden's killing, nine years prior by Navy Seals.[11] Bin Laden, the mastermind behind the September 11, 2001 terrorist attacks in the United States, deftly escaped surveillance and capture for a decade, fleeing from safehouse to guarded compound, masterfully eluding capture and death from highly skilled special forces.[12] The president referred to it as a "targeted operation" to murder one of America's foremost enemy—a person described by President Obama as "not a Muslim leader[,] [but] a mass murderer of Muslims."[13] Surely, the Navy Seals did not knock.

However, this was not Pakistan, Iraq, or Afghanistan. There were no hostile, enemy forces lurking there. No, it was the dim of night in Louisville, Kentucky. Breonna Taylor was not a terrorist or war criminal. She had not declared war on her neighborhood in Louisville or the state of Kentucky. Or on the United States. She was an essential worker, delivering medical aid amid a global pandemic.[14]

Nevertheless, on this evening, their forceful blasts, discharge after discharge, rapidly launch in search of prey. On this night, she will die. An officer shoots with sharp, exacting precision and another, seemingly firing without discernment or attention, launches ten bullets.[15] Shot after shot penetrate the flesh of a woman marked by the dubious distinction of being both essential and expendable. This is a lingering mark and contradiction of Black womanhood—the necessary, maligned social scapegoat against which a society steeped in a history of racism defines her. She is important in the fight against COVID-19 and yet fungible. As she writhes in pain, a woman who dedicated herself to saving the lives of others cannot count on the same from fellow civil servants.

In any case, Breonna Taylor will not survive this evening. Before the morning, she will be pronounced dead. She will not live to vocalize her fear or profess her pain. Her death will be recorded between (and somewhat eclipsed by) the murders of

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of unarmed black Americans by police and vigilantes that has led to national outrage and protests in recent weeks.").

11 *See* Peter Baker, Helene Cooper & Mark Mazzetti, *Bin Laden Is Dead, Obama Says*, N.Y. TIMES (May 1, 2011), https://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html [https://perma.cc/EME4-W74T].

12 *See id.*

13 *Id.*

14 *See* Oppel Jr. & Taylor, *supra* note 1 (stating that Breonna Taylor worked as an "emergency room technician").

15 *See, e.g.*, *id.* ("The police . . . [struck] Ms. Taylor five times. One of the three officers on the scene . . . shot 10 rounds blindly into the apartment.").

Ahmaud Arbery (chased by white men in Georgia who hunted him down in a pickup truck and murdered him)[16] and George Floyd, whose killing, caught on video, occurred under the pressed knee on his neck by Derek Chauvin, a Minneapolis police officer.[17] As Washington Post reporters noted, "[a]fter Louisville police fatally shot 26-year-old Breonna Taylor during a nighttime raid at her home in March, her killing could have been just another in a long line of deadly police shootings of women that have drawn little publicity"; however, her "death . . . fell between two high-profile killings of Black men."[18]

Louisville police officers will later write a skeletal "incident report" that on some level reflects how little Breonna Taylor's life mattered to them or the systems and institutions that historically devalue women like her.[19] After all, on the night in question, as Breonna Taylor's boyfriend pleaded on her behalf for officers to secure medical help for her, the officers provided none.[20] Despite the numerous times in which she was shot, they will list her injuries as "none" in this report.[21] The officers lie about their forced entry into her apartment, checking "no"

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16 *See, e.g.*, Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Sept. 10, 2020), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html [https://perma.cc/SV5G-8YEC] ("On Sunday, Feb. 23, shortly after 1 p.m., [Mr. Arbery] was killed in a neighborhood a short jog from his home after being confronted by a white man and his son.").

17 *See, e.g.*, Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Aug. 13, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/JH5J-UM6Z] ("On May 25, Minneapolis police officers arrested George Floyd . . . . Seventeen minutes after the first squad car arrived at the scene, Mr. Floyd was unconscious and pinned beneath three police officers, showing no signs of life.").

18 Marisa Iati, Jennifer Jenkins & Sommer Brugal, *Nearly 250 Women Have Been Fatally Shot By Police Since 2015*, WASH. POST (Sept. 4, 2020), https://www.washingtonpost.com/graphics/2020/investigations/police-shootings-women/ [https://perma.cc/7C8G-KHWM].

19 *See* Oppel Jr. & Taylor, *supra* note 1 ("The police's incident report contained multiple errors. It listed Ms. Taylor's injuries as 'none,' even though she had been shot several times, and indicated that officers had not forced their way into the apartment—though they used a battering ram to break the door open.").

20 *See, e.g.*, *id.* (stating that Ms. Taylor's boyfriend called 911 "just after the shots were fired" to seek help).

21 *See* Third District Incident/Investigation Report, Case No. 80-20-017049, at 1 (on file with author), https://htv-prod-media.s3.amazonaws.com/files/bt-incident-report-redacted-1591815417.pdf [https://perma.cc/K3VP-LPYX]; *see also* Audrey McNamara, *Louisville Police Release Breonna Taylor Incident Report—It Lists Her Injuries as 'None'*, CBS NEWS (June 11, 2020), https://www.cbsnews.com/news/louisville-police-breonna-taylor-death-incident-report/ [https://perma.cc/6XPU-Z9TH] ("Despite the fact that [Ms. Taylor] was shot at least eight times during the no-knock search, the report listed Taylor's injuries as 'none.'").

next to the box that says "forced entry" on the form.[22] It is well known now, by witness accounts and crime scene photos, that "officers used a battering ram to force entry into the apartment."[23] Notwithstanding the false police report, Breonna Taylor tragically died in a hail of bullets.

Arguably, Breonna Taylor's death became visible primarily through the tragic murder of George Floyd two months later.[24] Until then, her death was mostly ignored by national news media.[25] And, unlike the police killing of unarmed Black men, Breonna Taylor's death did not draw national protests or persistent news coverage.[26] As such, three painful truths have resurfaced and come to light. First, Black women are historically devalued. Second, Black women's identities are subsumed under race and not distinguished by race and sex. Third, Breonna Taylor's death indicates that despite her value or contribution to society, including service on the frontlines during a pandemic, Black women like her may be rendered invisible due to their race and sex and are therefore considered unimportant. And, as in Breonna Taylor's case, their deaths may be perceived as inconsequential even as they sacrifice their health and lives during a pandemic in service to others.

This Article does not follow the course of the civil litigation or seemingly unavailing criminal prosecution of the men who murdered Breonna Taylor in the deep of night on March 13, 2020. Despite calls for firings and prosecutions, most of the officers involved in her killing remain employed by the Louisville Police Department.[27] Nor does the Article regard Ms. Taylor's death as episodic. To the contrary, since 2015, nearly 250 women have been fatally shot by police.[28] In fact, "Black women are fatally shot at rates higher than women of other

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22 *See* McNamara, *supra* note 21 ("Police also checked 'no' next to the box that says 'forced entry' on the form, but witnesses and crime scene photos show officers used a battering ram to force entry into the apartment . . . .").

23 *Id.*

24 *See* Iati, Jenkins & Brugal, *supra* note 18 ("Taylor's death 'could have been easily forgotten, and it was almost forgotten . . . . But I think the fact that other cases were happening in the same season made it harder to simply overlook her case.'" (quoting Kimberlé Crenshaw)).

25 *See id.* ("Black women often are left out of the public narrative about the use of force by police against Black people.").

26 *See generally* KIMBERLÉ W. CRENSHAW, ANDREA J. RITCHIE, RACHEL ANSPACH, RACHEL GILMER & LUKE HARRIS, AFRICAN AM. POLICY FORUM, SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN 1 (2015).

27 *See* Iati, Jenkins & Brugal, *supra* note 18 (noting that one officer involved in the killing has been fired while others are under investigation).

28 *Id.*

races."[29] Rarely are these women's names fastened to memory. Even while hashtags such as #SayHerName urge remembrance,[30] too often Americans simply forget.

Yet Breonna Taylor's life represents more than its premature demise and proximity to the deaths of Ahmaud Arbery and George Floyd. She was more than the victim of police violence. Her life should be defined by more than her death. Breonna Taylor provided essential service to her community. Thus, this Article's touch point on Ms. Taylor considers her from a position as provider of essential care and service, during a period marked by pandemic. In this way, her life tells another provocative story about institutional and infrastructural inequalities laid bare by COVID-19 generally, and women's invisibility and erasure specifically.

Importantly, the erasure to which this Article speaks is not accidental, nor incidental or episodic. Rather, the function of women's erasure serves to preserve social norms, positions of power, and sex-based hierarchies. Clearly, these are not the destinies most women choose for themselves but rather that foisted upon them—sometimes with the force of law, and frequently enough within private spheres. Thus, by turning a lens toward persistent sex blind spots, a reordering of society emerges, particularly with the inclusion of an examination of race and racism. Importantly, this work is not a lofty academic foray detached from real life and real people. Instead, it centers on women, particularly the most vulnerable among them who through natural disaster and pandemic become expendable, fungible, and exploitable.

This invisibility which this Article describes is fourfold. First, women are rendered invisible as contributors to the advancement of society through law, medicine, science, and other fields to stunning effect. We could term this *professional invisibility*. Second, women's contributions to caregiving, broadly defined in essential care service is also muted, rendered invisible and devalued. COVID-19 brings this observation and deadly reality into stark relief. This Article describes this type of undervalued labor as *essential service invisibility.* Third and problematically, women as primary care providers in the domestic context are expected to assume such uncompensated roles. Thus, while in plain sight, *domestic invisibility* nonetheless harms women by foisting domestic service and the expectation of home-bound service upon them (even if they

29 *Id.*

30 *See id.* ("Taylor's name has become a rallying cry—#SayHerName . . . .").

simultaneously engage in professional invisibility or essential service invisibility).

Finally, women of color may suffer a unique invisibility, because they fall through the cracks of race and sex identities and social movements.[31] In other words, feminists historically imagined white women as the beneficiaries of their advocacy, and in racial justice movements, men take center stage. A 2020 study published by the American Psychological Association describes this phenomenon in the following way—"demographic group prototypes underdifferentiate Black women from Black men and exclude them from women. This may explain why Black women face disproportionate negative contact with the legal system and why the feminism and antiracism movements often fail to address their concerns."[32] We could refer to this as the *intersectional blind spot* and *intersectional invisibility.*

This Article concerns itself with an important, counterintuitive tension—women serving on the frontlines while also being undermined, undervalued, and invisible in the wake of pandemic. It analyzes asymmetries in how society situates women according to race, class, disability, immigration status and other social statuses. In other words, even while experiencing and working through COVID-19, women's experiences with misogyny and sex discrimination differ according to other identity statuses. The American tragedy of slavery bears this out to a chilling degree with Black women's bodies exploited and conscripted in service of that horrid enterprise. Or to enduring degree, with the harms inflicted on Indigenous communities.[33] More recently, the devastating impacts of COVID-19 within Latinx communities further illuminate the unique and intersecting ways vulnerable women can be harmed.[34] Or the violence directed at Asian women, during pandemic, including the murder of six women of Asian descent in a mass shooting at their workplaces prior to this Article's publication.[35] Simply

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31 *See* Stewart M. Coles & Josh Pasek, *Intersectional Invisibility Revisited: How Group Prototypes Lead to the Erasure and Exclusion of Black Women*, 6 TRANSLATIONAL ISSUES PSYCHOL. SCI. 314, 314 (2020).

32 *Id.*

33 *See infra* notes 90–100 and accompanying text.

34 *See infra* notes 90–100 and accompanying text.

35 Giulia McDonnell Nieto del Rio & Edgar Sandoval, *Women of Asian Descent Were 6 of the 8 Victims in Atlanta Shootings*, NY TIMES (March 24, 2021), https://www.nytimes.com/2021/03/17/us/asian-women-victims-atlanta-shootings.html [https://perma.cc/8E9R-A8YK].

put, not all women or their labor are equally situated in the United States, even as they experience sexism.

As such, this Article posits much can be learned by taking account of the confluence of health outbreak, racial unrest, and demands for sex equality. This Article takes up the challenge posed by Professor Victoria Nourse when she argues, "[W]e must take the ethnographer's view of experience about our most basic cultural and social concepts, whether they find their way into law cases or newspapers, diaries or Supreme Court opinions."[36] By doing so, this Article contributes to scholarship seeking to "dislodge even the firmest of our contemporary concepts,"[37] which includes the concept of women's dignity and social value. Otherwise, we fail to take them into account in our framing of legal issues, including women's constitutional rights, and thus our responsiveness to their plights.

This Article involved extensive research and compiling a data set of COVID19 cases, building from many primary sources, and detailed review of states' laws and policies. In various roles, my research benefitted from centering on policies and interventions related to women. My aim is to humanize the women subjects of this research to illuminate what is at stake when state and private power undermine their advancement. In other words, how can we take seriously the travails of women, including the most vulnerable among them, if we do not take into account their stories and life journeys?

Part I turns to COVID-19. It demonstrates how the pandemic exposes preexisting sex- and race-based institutional and infrastructural social problems. It argues that racism, sexism, and xenophobia are the preexisting social conditions that further exacerbate harms manifested by the pandemic. Part II turns to women's labor and invisibility. It queries women's positionality in society, scrutinizing how invisibility manifests and is magnified during the pandemic. Part III turns to women on the frontlines, providing empirical evidence of glass ceilings, glass cliffs, and pink ghettoes. Part IV reimagines ways in which value could be ascribed to women's labor.

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36 *See* Victoria Nourse, *History, Pragmatism, and the New Legal Realism*, Nov. 2005 (on file with the author).

37 *Id.*; *see also* Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?*, 95 CORNELL L. REV. 61, 64 (2009) (discussing the varieties of methods and the need to focus on "real life problems").

## I
## RACE, SEX, AND COVID

COVID-19 reveals underlying social inequalities in unique and devastating ways. In the United States, the pandemic exposes the fragility of constitutionally promised equality and uncovers a grim medical reality. Neither the contractions of COVID nor the deaths resulting are proportionate or equal.[38] And even while racial disparities in rates of disease in the United States are not a new phenomenon in the United States,[39] COVID-19 exacts a deadly toll bearing down in communities of color, harming women medically and economically.[40] Subpart A addresses healthcare's preexisting racial problem. Subpart B addresses how those harms manifest and are exacerbated during health crisis and the COVID pandemic.

### A. Racial Disparities and Social Determinants of Health

COVID-19 pulls at the scab of preexisting health disparities and social realities. These health disparities may emerge from the stresses associated with poor living conditions, environmental injustice, poverty, residing in food deserts, and implicit bias in the medical setting, and may be compounded by existing medical conditions.[41] Often health status is informed by a person's social status and the environmental conditions in which they live, especially for women.[42]

For example, researchers have long known that environmental factors may negatively affect physical health.[43] These

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38 *See infra* notes 90–100 and accompanying text.

39 *See, e.g.*, Chandra L. Ford, *Commentary: Addressing Inequities in the Era of COVID-19*, 43 FAM. & COMMUNITY HEALTH 184, 184 (2020) (asserting that the health care field must address the fundamental role of racism and other social inequalities in shaping the unequal spread and effect of viruses, including COVID-19).

40 *See id.* at 184 (noting that the gross "disparities in rates of hospitalization and mortality due to COVID-19" highlight the necessity of not "overlooking marginalized, underserved populations").

41 *See* Austin Frakt, *Bad Medicine: The Harm That Comes from Racism*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2020/01/13/upshot/bad-medicine-the-harm-that-comes-from-racism.html [https://perma.cc/RW9A-DSUG] (addressing reasons for poor, racially disparate health outcomes for people of color and explaining that "[r]easons include[ ] lower rates of health coverage; communication barriers; and racial stereotyping based on false beliefs").

42 *See, e.g.*, Nazli Hossain & Elizabeth Westerlund Triche, *Environmental Factors Implicated in the Causation of Adverse Pregnancy Outcome*, 31 SEMIN PERINATOL 240, 241 (2007) ("Lead has also been found to be associated with still births in humans.") (citation omitted).

43 *See, e.g.*, *id.* at 240 ("Adverse pregnancy outcome from environmental factors may include congenital anomalies, increased risk for miscarriage, preterm delivery, intrauterine growth restriction and still birth.").

factors include "video display terminals, anesthetic gases, antineoplastic drugs and exposure to lead, selenium and inorganic mercury."[44] Exposure to these factors may negatively affect women's pregnancies and harm children's cognitive development.[45] Findings by Professors Nazli Hossain and Elizabeth Westerlund Triche reveal that "[l]ead, mercury, nickel and manganese have been associated with poor reproductive outcome. An increased risk for spontaneous abortion has been associated with low levels of lead exposure."[46] Their research confirms prior studies that reach similar conclusions.[47]

For poor women of color and their children, who are more likely to live near toxic waste sites,[48] even the air they breathe and the water they drink might harm their health, as pollution is "associated with congenital birth defects, as well as with low birth weight and intrauterine growth restriction."[49] A detailed 2019 study conducted by Professors Daniel Grossman and David Slusky found that the fertility rates in Flint, Michigan—a municipality that "switched its public water source . . . , increasing exposure to lead and other contaminants"—decreased by 12% and "that overall health at birth decreased."[50]

However, it is not simply women's pregnancies that risk compromise by living in or near toxic environments. As Grossman and Slusky point out, high blood lead content is associated with later cognitive function, educational outcomes, mental health, as well as "cardiovascular problems, high blood pressure, and developmental impairment affecting sexual maturity and the nervous system."[51] In Flint, Michigan, children

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44 *Id.*

45 *See id.* at 240–41.

46 *Id.* at 241.

47 *See, e.g.*, Victor H. Borja-Aburto et al., *Blood Lead Levels Measured Prospectively and Risk of Spontaneous Abortion*, 150 AM. J. EPIDEMIOLOGY 590, 590 (1999) ("In the early part of this century, reports of pregnant women occupationally exposed to high levels of lead in England, Hungary, and elsewhere described increases in spontaneous abortions, stillbirths, premature births, and neonatal deaths, compared with mothers in nonexposed occupations.").

48 *See, e.g.*, Michael Gochfeld & Joanna Burger, *Disproportionate Exposures In Environmental Justice and Other Populations: The Importance of Outliers*, 101 AM. J. PUB. HEALTH S53, S53 (2011) ("Age, poverty, and minority status place some groups at a disproportionately high risk for environmental disease. Such groups are exposed to hazardous chemicals or conditions at levels well above those for the general populations.").

49 Hossain & Triche, *supra* note 42, at 241.

50 Daniel S. Grossman & David J.G. Slusky, *The Impact of the Flint Water Crisis on Fertility*, 56 DEMOGRAPHY 2005, 2005 (2019).

51 *Id.* at 2006, 2010.

experienced significant health harms too.[52] Perhaps, not surprisingly, people more likely to be exposed to negative environmental conditions are poor people of color, especially women.[53]

Nor is poor health derived simply by matter of where poor people of color live. Poor people of color are more likely to work in low wage industries that expose them to environmental harm, from meatpacking to agriculture.[54] For example, poor women of color, working in agriculture, are more likely to be at risk of pesticide exposure.[55]

Moreover, strained economic conditions and compromised living environments may also negatively impact psychological health and mental well-being.[56] Stress and trauma may also further compound underlying physical health concerns.[57] An inability to access healthcare or navigate medical systems may exacerbate and compound distress.[58] Justice Blackmun spoke to the psychological and mental health side of this concern for pregnant women in *Roe v. Wade*.[59] Writing for the majority in that 7-2 decision, he noted, "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by childcare."[60]

Understanding the social determinants of health provides a foundation for a critical evaluation of historic and contempo-

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52 *See, e.g.*, Mark A.S. Laidlaw, et al., *Children's Blood Lead Seasonality in Flint, Michigan (USA), and Soil-Sourced Lead Hazard Risks*, 13 INT'L. J. ENVTL. RES. & PUB. HEALTH 358, 367–69 (2016) ("Ultimately, the very fact that we are identifying these problems *after* the children have already been exposed and potentially *permanent harm has already come* to the health and future reveals a significant failing in the environmental health system, where environmental protection and management is disconnected from public health surveillance systems, often with corporate and/or municipal interests lying between the two. Indeed, public policy and systems need to change in order to more adequately integrate and inform issues of urban environmental exposure.").

53 *See* Gochfeld & Burger, *supra* note 48, at S59 (explaining that a sample of pregnant women, who were predominantly Black or Dominican, reported high use of pesticides in the home).

54 *See id.* at S53–54.

55 Hossain & Triche, *supra* note 42, at 240.

56 *See* K. Zivin, M. Paczkowski & S. Galea, *Economic Downturns and Population Mental Health: Research Findings, Gaps, Challenges and Priorities*, 41 PSYCHOL. MED. 1343, 1344 (2011).

57 *See id.*

58 *See Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. DISEASE CONTROL & PREVENTION, (JULY 24, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html [https://perma.cc/YX63-ZF2C].

59 410 U.S. 113, 153 (1973).

60 *Id.*

rary disparities and biases in health care.[61] That is, despite a well-documented history of racism in healthcare,[62] some researchers and policymakers may tend to ascribe poor health outcomes among people of color to their genes, habits, and biological factors.[63] By doing so, they problematically ignore the social conditions that emerge from poverty, the environment, a history of bias, or discrimination that persists in the medical profession.[64]

For example, racial disparities in the treatment of disease, quality of care, and mortality rates are a persistent phenomenon in American healthcare, which is sadly marked by a history of segregation, exclusion, and hostile care.[65] Even when adjusted for insurance, income, and education, expressed preference for treatments, and severity of disease, race-based health disparities persist.[66] Disquieting research results indicate that even when African Americans gain access to healthcare services, disparities persist in nearly every aspect of their medical experiences, including diagnostic screening and general medical care, mental health diagnosis and treatment, pain management, HIV-related care, and treatments in kidney disease, cancer, and heart disease.[67]

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61 *See, e.g.*, Robert B. Baker, *The American Medical Association and Race*, 16 AMA J. ETHICS 479, 483 (2014) (explaining how the AMA's origins resulted in black and female doctors having unequal opportunities compared to their white male peers for decades).

62 *See, e.g.*, Jonathan Sidhu, *Exploring the AMA's History of Discrimination*, PROPUBLICA (July 16, 2008), https://www.propublica.org/article/exploring-the-amas-history-of-discrimination-716 [https://perma.cc/L489-D3UF] ("Black doctors who attended an AMA meeting in Atlanta were arrested by the police because the AMA luncheon was being held in a segregated cafeteria. When the AMA was asked for comment, they did not defend them. The AMA simply stressed the importance of adhering to the laws of the land. And of course segregation was the law of the land.") (interviewing and quoting Harriet Washington).

63 *See* HARRIET WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 205, 258, 292 (2008).

64 *See* K. M. Hoffman, Sophie Trawalter, Jordan R. Axt & M. Norman Oliver, *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs about Biological Differences between Blacks and Whites*, 113 PROC. NAT'L ACAD. SCI. U.S. 4296, 4296–97, 4300 (2016).

65 *See* WASHINGTON, *supra* note 63, at 45, 301.

66 *See* Carmen R. Green et al., *The Unequal Burden of Pain: Confronting Racial and Ethnic Disparities in Pain*, 4 PAIN MED. 277, 281 (2003).

67 *See* Michelle van Ryn & Steven S. Fu, *Paved with Good Intentions: Do Public Health and Human Service Providers Contribute to Racial/Ethnic Disparities in Health?*, 93 AM. J. PUB. HEALTH 248, 249, 251 (2003); Council on Ethical & Judicial Affairs, *Black-White Disparities in Health Care*, 263 (J)AMA 2344, 2344–45 (1990); *see also* COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE 2–3, 58, 61 (Brian D. Smedley, Adrienne Y. Stith & Alan R.

Despite the implementation of standardized pain assessment in health care settings, discrepancies in pain management persist by race and ethnicity.[68] African Americans and Latinx populations are far more likely to experience the undertreatment of their pain in comparison to white counterparts.[69] Even when researchers adjust for multiple confounders (age, wealth, insurance status, etc.), research data reveal the harsh, constant barriers experienced by African Americans, including undertreatment or conditions ranging from cancer pain to post-operative pain, chest pain, chronic low back pain, and other acute pain.[70] These experiences occur whether African Americans present as patients in primary care settings, emergency hospital facilities, inpatient hospital or nursing home settings.[71]

Consider the research on heart disease. Studies that track the management of heart disease show similar racial disparities.[72] When compared to white patients, African Americans are less likely to be informed of their options and receive the standard of care afforded to white patients.[73] In the treatment of heart disease, they are unlikely to undergo cardiac catheterization for acute myocardial infarction.[74] This is a form of care to which they will be typically denied.[75] Equally, they are significantly less likely to access coronary artery bypass grafting even after controlling for appropriateness and medical necessity.[76] These findings are not related to patient refusal of care or other demographic factors.[77]

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Nelson eds., 2003) (explaining the disparities between black and white patients in myriad medical contexts), https://www.ncbi.nlm.nih.gov/books/NBK220358/pdf/Bookshelf_NBK220358.pdf [https://perma.cc/386H-FCHY].

68 *See* COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE, *supra* note 67, at 55–56.

69 *See id.* at 64–65.

70 *See* Green et al., *supra* note 66, at 281; Vickie L. Shavers, Alexis Bakos & Vanessa B. Sheppard, *Race, Ethnicity, and Pain Among the U.S. Adult Population*, 21 J. HEALTH CARE FOR POOR & UNDERSERVED 177, 180, 183 (2010); Alexie Cintron & R. Sean Morrison, *Pain and Ethnicity in the United States: A Systematic Review*, 9 J. PALLIATIVE MED. 1454, 1456, 1468 (2006).

71 *See* Green et al., *supra* note 66, at 277, 286.

72 *E.g.*, Edward L. Hannan et al., *Access to Coronary Artery Bypass Surgery by Race/Ethnicity and Gender Among Patients Who are Appropriate for Surgery*, 37 MED. CARE 68, 75 (1999).

73 *E.g.*, COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE, *supra* note 67, at 173.

74 *See* Alain G. Bertoni et al., *Racial and Ethnic Disparities in Cardiac Catheterization for Acute Myocardial Infarction in the United States, 1995–2001*, 97 J. NAT'L MED. ASS'N 317, 320–21 (2005).

75 *See id.*

76 *See* Hannan et al., *supra* note 72, at 75.

77 *See id.*

The National Academy of Medicine (formerly the national Institute of Medicine) defines disparities in care "as racial or ethnic differences in the quality of healthcare that are not due to access-related factors or clinical needs, [patient] preferences, and appropriateness of intervention."[78] From this definition, disparities may be investigated on two levels in the American medical system. First, at the macro-level of healthcare systems and regulatory climate, disparities can be tracked. Second, disparities may also be rendered visible at the micro-level by identifying discriminatory behavior occurring at the patient-provider level.[79] Importantly, these types of "differences in care . . . result from biases, prejudices, stereotyping, and uncertainty in clinical communication and decision-making."[80]

Even while implicit biases may explain various types of discrimination in the delivery of healthcare and may contribute to poor patient outcomes, recognizing explicit bias in medicine is also important. In other words, sometimes the biases contributing to disparate health outcomes result from explicit discriminatory intent,[81] and at other times cognitive biases influence medical provider behavior.[82] In the former, differentials in care result from direct and even calculated, unjust or unethical intent, and in the former they are driven by cognitive heuristics.

Research over the past twenty years offers myriad examples and indicators of implicit bias occurring at both the macro- and micro-levels.[83] The impact of implicit bias at the systems level can be seen in disparate geographic positioning of healthcare facilities.[84] Equally, implicit bias can be evidenced in institutional limitations placed on resource allocation of ventilators or interpreter and translation services. Implicit biases at the systems level may also relate to institutional restrictions imposed on the number of patients seen by payer status and rigid time structures ordering the medical visit.

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78 COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE, *supra* note 67, at 32.

79 *See id.*

80 *Id.*

81 *See* Baker, *supra* note 61, at 479; *see also* Sidhu, *supra* note 62 ("[T]he AMA worked to close down African-American medical schools.").

82 *See* COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE, *supra* note 67, at 10–11, 162–63.

83 *See id.* at 172–73, 543.

84 *See id.* at 543.

Implicit personal preferences and biases also operate within the medical sphere. As distinguished from explicit biases, implicit cognitive biases are not readily accessible to the medical professional engaged in sex or race discriminatory conduct, even when it may seem obvious.[85] However, patients pick up on these cues and biases, which may operate in the form of non-verbal body language of the provider,[86] which is readily interpreted by the patient. Equally, objective evidence may be overlooked or disregarded in favor of cognitive shortcuts, rooted in stereotypes, population-based heuristics, and social categorizations, which may be further consonant with underlying preformed opinions. In the case of implicit personal bias, cognitive shortcuts often form and influence biases that drive decision-making, diagnostic judgments, and recommendations regarding treatment.

### B. COVID-19: Race and Sex Disparities

As the discussion from Subpart A shows, racial disparities in the quality of health care and health outcomes for people of color are evidenced in our nation's hospitals and clinics every day.[87] The disparities are not adequately explained by differences in patient education, income, insurance status, expressed preference for treatments, and severity of disease.[88] Currently, the COVID-19 pandemic in the United States follows a similar trend, where "stark racial/ethnic inequities" have emerged "in diagnosed cases and in deaths due to the virus."[89]

According to Centers for Disease Control and Prevention ("CDC"), in survey data compiled even during the early spread of the novel coronavirus, racial disparities in the contraction and deaths associated with COVID-19 were significantly pronounced.[90] Even while Black Americans represent 12.4% of the United States population, they accounted for 22.1% of

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85 *See id.* at 10.

86 *See id.* at 172.

87 *See supra* subpart I.A.

88 *See, e.g.*, Green et al., *supra* note 66, at 281 ("[A]fter adjustment for demographic, clinical, and psychosocial variables, African Americans with chronic knee and hip pain had lesser [quality of life] than Caucasians.") (citation omitted).

89 Ford, *supra* note 39, at 184; *see also Health Equity Considerations and Racial and Ethnic Minority Groups*, *supra* note 58 (enumerating the "social determinants of health that put racial and ethnic minority groups at increased risk of getting sick and dying from COVID-19").

90 *See* Shikha Garg et al., *Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019—COVID-NET, 14 States, March 1–30, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 458, 459 (2020).

known COVID-19 cases during the early stages of tracking the virus.[91] Months later, Black Americans, Indigenous populations, and members of Latinx communities remain over-represented in deaths and contractions of COVID-19.[92]

Data from a 2020 American Public Media study, *The Color of Coronavirus*, provides important insights regarding the deadly racialized reach of COVID-19 in communities of color.[93] The study's findings are alarming, even if predictable based on social determinants of health and racial bias in medicine. They write, "Black, Indigenous, Pacific Islander and Latino Americans all have a COVID-19 death rate of *triple* or more White Americans (age-adjusted)."[94] Even as they adjusted their findings based on age, "Black Americans continue to experience the highest COVID-19 mortality rate."[95] In fact, by adjusting for age factors, the "Black and White mortality" gap widens "from 2.2 to 3.6 times as high."[96]

Based on the most recent data available, the authors paint a grim picture of the racial disparities that mark COVID-19 death rates:

- 1 in 1125 Black Americans has died (or 88.4 deaths per 100,000)
- 1 in 1375 Indigenous Americans has died (or 73.2 deaths per 100,000)
- 1 in 1575 Pacific Islander Americans has died (or 63.9 deaths per 100,000)
- 1 in 1850 Latin[x] Americans has died (or 54.4 deaths per 100,000)
- 1 in 2450 White Americans has died (or 40.4 deaths per 100,000)
- 1 in 2750 Asian Americans has died (or 36.4 deaths per 100,000).[97]

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91 APM Research Lab Staff, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RES. LAB (Aug. 19, 2020), https://www.apmresearchlab.org/covid/deaths-by-race?fbclid=IWAR1AFTKAmRLzMz5IUj_8YLrr9WdY4Uh4EEiBmrogNKRqI-5jFld54gctJeg#data [https://perma.cc/49J7-UYF2].

92 *See* Tiffany N. Ford, Sarah Reber & Richard V. Reeves, *Race Gaps in COVID-19 Deaths Are Even Bigger Than They Appear*, BROOKINGS INST. (June 16, 2020), https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/ [https://perma.cc/TBR6-LDSH].

93 *See* APM Research Lab Staff, *supra* note 91.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

These datapoints are glaring, but what more can we learn from them? According to researchers, these rates of death indicate that "many *younger* Americans who are Black, Latino, Indigenous, or Pacific Islanders are dying of COVID-19—driving their mortality rates far above White Americans'."[98] Thus, it is not the death rate alone that should cause alarm. That young people of color are dying from COVID-19 is particularly worrying, highlighting the importance of such data, especially as "youth" is considered a safety guardrail *against* COVID-19. Research from the Brookings Institute framed the matter this way: "in every age category, Black people are dying from COVID at roughly the same rate as white people more than a decade older."[99] Substantively, this indicates that the racial disparities that mark COVID-19 deaths are "even bigger than they appear."[100]

Yet, an examination of race alone does not begin to capture the unique devastations visited by COVID-19 in communities of color. That is, the COVID-19 pandemic exposes the unique ways in which social determinants of health, racial biases, *and sex* biases merge to undermine the health and safety of children and women of color. And while the devastating impacts of COVID-19 also cut short the lives of men, this Article seeks to illume these concerns as they relate to girls and women, particularly as their concerns are more likely to be rendered invisible. In common among the brief sampling of cases below are valuable narratives of being turned away from care, complaints ignored, and ensuing deaths, across an age spectrum. Unlike numeric data, narratives serve to humanize the people whose concerns we study.

### 1. *Skylar Herbert*

On April 19, 2020, Skylar Herbert, a five-year-old, African American died from complications relating to COVID-19 after enduring two weeks on a ventilator.[101] Skylar had tested positive for the virus in March 2020 and then later developed a rare form of meningitis, leading to brain swelling.[102] News reports

98 *Id.*
99 Ford, Reber & Reeves, *supra* note 92.
100 *Id.*
101 *See* Jasmin Barmore, *5-Year-Old with Rare Complications Becomes First Michigan Child to Die of COVID-19*, DETROIT NEWS (Apr. 19, 2020), https://www.detroitnews.com/story/news/local/detroit-city/2020/04/19/5-year-old-first-michigan-child-dies-coronavirus/5163094002 [https://perma.cc/4RFV-R3PN].
102 *See id.*

highlighted that Skylar was among the first children in the United States to die from COVID-19[103] at a time when politicians downplayed that possibility.[104] Yet, it was not simply the fact that a child could die from COVID-19 that was concerning about her death.

Rather, prior to Skylar's hospitalization, her parents, Ebbie and LaVondria Herbert, both Detroit-area first responders, sought medical attention for their daughter.[105] Like Breonna Taylor, Skylar's parents served the public.[106] LaVondria was a police officer for 25 years and Ebbie was a firefighter for 18 years.[107]

First, the Herberts brought their daughter to a pediatrician, explaining her fever and the child's complaints of discomfort, aches, and pain.[108] It does not appear that a COVID-19 test was administered.[109] Medical staff prescribed antibiotics and advised that Skylar rest.[110] Skylar's symptoms did not abate. Her parents reached out to their pediatrician and even after they advised that the medications provided did not appear to reduce Skylar's symptoms or ease her pain, they were told to wait 48 hours for the medicine to take effect.[111]

Skylar's parents took her to the local hospital's emergency room.[112] After a COVID-19 test was finally administered, a positive result was detected.[113] Skylar had contracted COVID-19 and it killed her. At the time of her death, she was one of the youngest people to die from the disease in the United States

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103 *See, e.g.*, Chelsea Janes & Vicki Elmer, *'The Numbers Are Low Until It's Your Child': The Coronavirus Can Be Deadly for Children, Too*, WASH. POST (April 21, 2020), https://www.washingtonpost.com/health/the-numbers-are-low-until-its-your-child-the-coronavirus-can-be-deadly-for-children-too/2020/04/21/0f5ab28a-83e9-11ea-ae26-989cfce1c7c7_story.html [https://perma.cc/J4UT-ZK3Z].

104 *See* Valerie Strauss, *The Weird Things Sen. Rand Paul Said About Reopening Schools*, WASH. POST (May 12, 2020), https://www.washingtonpost.com/education/2020/05/12/weird-things-sen-rand-paul-said-about-reopening-schools/ [https://perma.cc/N4TS-ZTBB].

105 *See* Barmore, *supra* note 101.

106 *See id.*

107 *See id.*

108 *See id.*; Maria Moseley, *5-Year-Old Daughter of Detroit First Responders Dies from Coronavirus Complications*, ABC NEWS (Apr. 25, 2020), https://abcnews.go.com/US/year-daughter-detroit-responders-dies-coronavirus-complications/story?id=70256558 [https://perma.cc/C2BC-UR8D].

109 *See* Barmore, *supra* note 101 ("After testing positive for strep throat, [Skylar's] doctor gave her antibiotics and sent [her] home to rest.").

110 *See id.*

111 *See id.*

112 *See id.*

113 *See id.*; Moseley, *supra* note 108.

and the youngest person on record to have died from the virus in Michigan.[114]

### 2. *Kimora "Kimmie" Lynaum*

Similarly, Kimora "Kimmie" Lynum, also African American, holds the tragic distinction of being the youngest COVID-19 fatality in Florida at age nine.[115] Her untimely death due to coronavirus complications gave further evidence that not only could a young person contract the virus, but also she could die from it.[116] According to her family and medical reports, Kimmie had no preexisting or underlying health conditions.[117]

Sadly, the patterns of bias that mark disparate healthcare treatment also manifested in her case. When Kimmie fell ill, her family sought medical care.[118] Despite the fact that her temperature was 103 degrees, doctors sent Kimmie home without the care or treatment that could possibly have saved her life.[119] As her mother sorrowfully recounted, "I thought they would have jumped on that when they saw her fever."[120] Rather, Kimmie was not tested for coronavirus at the hospital and, days after returning home, she laid down to take a nap and did not wake up.[121] She was posthumously tested and found to be COVID-19 positive.[122]

Kimmie supplanted Daequan Wimberly, an eleven-year-old African American, as the youngest COVID-19 death in the state of Florida.[123] Daequan died only weeks before.[124]

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114 *See* Moseley, *supra* note 108.

115 *See* Gabrielle Chung, *Florida's Youngest Coronavirus Victim Identified as 9-Year-Old Kimora 'Kimmie' Lynum*, PEOPLE (July 27, 2020), https://people.com/health/florida-youngest-coronavirus-victim-identified-as-9-year-old-girl-with-kimora-kimmie-lynum-no-preexisting-health-issues/ [https://perma.cc/H52S-28MT].

116 *See id.*

117 *See* Denise Royal & Rosa Flores, *A 9-Year-Old Who Died of Coronavirus Had No Known Underlying Health Issues, Family Says*, CNN (July 26, 2020), https://www.cnn.com/2020/07/25/us/kimora-lynum-dies-of-coronavirus/index.html [https://perma.cc/3FY5-Y4SD].

118 *See* Chung, *supra* note 115.

119 *See id.* ("Though [Kimmie's] temperature was 103 degrees, Kimmie was diagnosed with a urinary tract infection and sent home . . . .").

120 *Id.*

121 *See id.*

122 *See id.*

123 *See* David Ovalle & Michelle Marchante, *Miami Boy, 11, is Florida's Youngest Death from COVID-19*, TAMPA BAY TIMES (July 3, 2020), https://www.tampabay.com/news/health/2020/07/03/miami-boy-11-is-floridas-youngest-death-from-covid-19/ [https://perma.cc/N3MU-PMK9].

124 *See id.* (Daequan passed away on June 30, 2020, while Kimmie passed away on July 18, 2020).

### 3. *Deborah Gatewood*

Deborah Gatewood, a 63-year-old Black phlebotomist from Detroit, Michigan, died on April 17, 2020 from symptoms related to coronavirus.[125] Similar to the cases described above, Ms. Gatewood was turned away from diagnosis and care.[126] According to reports, prior to her positive diagnosis, she was denied a coronavirus test four times by her employer: Beaumont Hospital, Farmington Hills.[127]

Despite articulating her health concerns, including discomfort, fever, and difficulty breathing, Ms. Gatewood was denied the care she sought.[128] Initially, Ms. Gatewood sought tests from the hospital's emergency room on March 18.[129] However, she was denied care and turned away because she was not perceived as sick enough; doctors informed her that her symptoms were not severe.[130] A day later, she returned to the hospital on March 19, 2020, again complaining of conditions indicative of COVID-19. She was provided a prescription for cough medicine.[131]

Two days later, on March 21, 2020, Ms. Gatewood returned to the hospital.[132] Her temperature had spiked.[133] Even though medical providers speculated that she "most likely had COVID-19," they did not test her, ultimately denying Ms. Gatewood the care she sought.[134] Yet again, she sought care. On March 23, Ms. Gatewood made a fourth trip to the hospital but was not tested for COVID-19.[135] Finally, nine days after her first attempts to receive the care she sought and deserved, she was taken to Sinai-Grace Hospital by ambulance and admitted as a patient.[136] Ms. Gatewood tested positive for coronavirus and eventually had to be intubated for more than two weeks

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125 Janelle Griffith, *Detroit Health Care Worker Dies After Being Denied Coronavirus Test 4 Times, Daughter Says*, NBC NEWS (Apr. 25, 2020), https://www.nbcnews.com/news/us-news/detroit-health-care-worker-dies-after-being-denied-coronavirus-test-n1192076 [https://perma.cc/J5Z2-CMX3].

126 *See id.* ("They said she wasn't severe enough and that they weren't going to test her.").

127 *See id.*

128 *See id.*

129 *See id.*

130 *See id.*

131 *See id.*

132 *See id.*

133 *See id.*

134 *Id.*

135 *See id.*

136 *See id.*

after developing pneumonia.[137] Shortly thereafter, her kidneys and heart failed, and she was declared dead on April 17.[138]

4. *Brittany Bruner-Ringo*

Like Ms. Gatewood, Brittany Bruner-Ringo also worked in medicine as a nurse.[139] In fact, she represented her family's third generation of nurses.[140] Also like Ms. Gatewood, she was ignored by her employer when she raised health concerns based on her medical judgement.[141] Yet, unlike Ms. Gatewood, it was Ms. Bruner-Ringo's medical assessments about a patient that her colleagues ignored, which her family members attribute to her death.[142]

In Ms. Bruner-Ringo's case, the 32-year-old cared for patients at an elite dementia care center in Los Angeles, California, where costs can exceed $15,000 per month.[143] The facility was already "under lockdown to prevent the sort of COVID-19 outbreaks that were cropping up in [New York City]."[144] Despite this fact, Brittany's supervisors "instructed her to admit a new resident, a retired doctor flown in from New York City."[145] Ms. Bruner-Ringo advised against it.[146] After all, in California shelter-in-place orders were already in effect. Family visits to the facility had been canceled.[147] And, nonessential employees were prohibited from coming to the facility.[148] According to her family, when she warned that the doctor should not be admitted, supervisors "ignored her suggestion."[149]

Ms. Bruner-Ringo's mother—Kim Bruner-Ringo—a veteran nurse in Oklahoma City, described her daughter as "uncharacteristically rattled" by this and sought her advice.[150] As she explained to her mother, the doctor "was showing signs of

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137 *See id.*
138 *See id.*
139 *See* Harriet Ryan, *A Nurse Died From COVID-19. Her Family Says Elite L.A. Care Home Ordered Her to Admit A Sick Man*, L.A. Times (May 1, 2020) https://www.latimes.com/california/story/2020-05-01/coronavirus-silverado-nurse-death [https://perma.cc/YX6F-UTBG].
140 *See id.*
141 *See id.*
142 *See id.*
143 *See id.*
144 *Id.*
145 *Id.*
146 *See id.*
147 *See id.*
148 *See id.*
149 *Id.*
150 *Id.*

illness—profuse sweating, a 'productive' cough and a fever close to 103 degrees."[151]

As news reports would later reveal, within a day of the doctor's arrival, he was "so ill that Bruner-Ringo called 911 for an ambulance."[152] He tested positive for COVID-19.[153] In text messages to her sister, Brittany confirmed her fears.[154] Concerned that she may have contracted COVID-19 when checking in the patient, she self-quarantined at a hotel to reduce the possibility of transmission to her roommate.[155] Eventually, she too tested positive and, in the weeks after, more than sixty residents and employees of the care center contracted COVID-19 and nine died, including Ms. Bruner-Ringo.[156]

Her sister, Breanna Hurd, told reporters, "I was just praying every day that Brittany would be able to [live and] tell her own story."[157] Brittany fought hard to survive, even while in intensive care. She died while still on a ventilator.[158] The doctor, however, survived and is now a resident at the facility where Brittany worked.[159]

Even while Brittany's tragic story and that of similarly situated Black women may appear anecdotal, the cruel realities of being unheard, ignored, and overruled in the medical setting are not unusual or uncommon. Mostly, law has done little to address this. According to researchers, "Black women, who live at the intersection of racism and sexism, may be harmed when their unique experiences as Black women are not recognized."[160] This "intersectional invisibility" can operate to deadly effect.[161]

## II
## WOMEN'S LABOR AND INVISIBILITY

As demonstrated in Part I, underlying social inequities manifest in health disparities, including who contracts diseases, the types of diseases they contract, access to healthcare, and whether women of color receive the medical care they seek.

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151 *Id.*
152 *Id.*
153 *See id.*
154 *See id.*
155 *See id.*
156 *See id.*
157 *Id.*
158 *See id.*
159 *See id.*
160 Coles & Pasek, *supra* note 31, at 314.
161 *Id.*

COVID-19 places these matters in plain sight. Additionally, this national crisis places prevailing, preexisting forms of labor inequality in stark relief. This headline says it all: *The US Economy Lost 140,000 Jobs in December. All of Them Were Held by Women.*[162] Indeed, women lost more than five million jobs in 2020.[163]

The pandemic exposes the myriad institutional and infrastructural social and economic conditions that undermine women's equality and progress toward overcoming sex-based gaps in salary, economic advancement, job attainment, seniority, and leadership. However, COVID-19 also renders these matters visible in the domestic context too. In this Part, the Article turns to women's labor.

To level set, it unpacks the interconnected dimensions of women's lives, illuming the lines between domestic life, the professional, and law which too often are amputated from the other. By isolating or fragmenting women's full experience from home to work an incomplete picture dominates. In other words, to tell the story of economic disenfranchisement properly, homelife must be considered, which COVID-19 teaches us. When homelife is considered, systemic inequalities and even abuses in homelife emerge and form a fuller picture of some women's lived lives.

Thus, Subpart A briefly examines how law is implicated in women's homelife disenfranchisement. Subpart B then turns to the pre-COVID-19 sex gaps to make visible the hidden ways in which women continue to experience disparities in the workforce independent of pandemic. Subpart C examines how such harms manifest during pandemic and add burdens on women.

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162 Annalyn Kurtz, *The US Economy Lost 140,000 Jobs in December. All of Them Were Held by Women*, CNN (Jan. 8, 2021), https://www.cnn.com/2021/01/08/economy/women-job-losses-pandemic/index.html [https://perma.cc/BC5R-RCEM]. *See also* Maria Aspan, *Nearly 80% of the 346,000 Workers Who Vanished from the U.S. Labor Force in January Are Women*, FORTUNE (Feb. 5, 2021), https://fortune.com/2021/02/05/covid-unemployment-rate-january-jobs-report-2021-jobless-job-loss-us-economy-working-women/ [https://perma.cc/FQP8-AN5C]; Maggie McGrath, *American Women Lost More Than 5 Million Jobs in 2020*, FORBES (Jan. 12, 2021), https://www.forbes.com/sites/maggiemcgrath/2021/01/12/american-women-lost-more-than-5-million-jobs-in-2020/?sh=6c36eba12857 [https://perma.cc/WPZ4-YLA9].

163 McGrath, *supra* note 162.

A. Law, Sex, and Violence

The culture of sex-based disenfranchisement begins with government.[164] Legislatures and courts legitimized status-based harms against women such as slavery[165] and coverture,[166] and physical harms such as marital rape[167] and domestic violence.[168] According to Professor Anita Bernstein, "[t]he two oppressions of slavery and coverture, unalike in so many respects, both let [women] down by failing to honor their right to put themselves first."[169] In each category, legislatures and courts denied the full personhood of women, including the right to be free, autonomous, and independent of the harms of men.

Even more, laws endowed white men with the power to inflict themselves on women—regardless of race and often without serious repercussion—physically in the form of battery

164 *See, e.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES *442–45 (discussing the "chief legal effects of marriage during the coverture").

165 *See, e.g.*, State v. Mann, 13 N.C. (2 Dev.) 263, 267–68 (1829) (determining that slave owners could not be found guilty for committing acts of violence against their slaves because they had "full dominion" over them); MELTON A. MCLAURIN, CELIA, A SLAVE 93 (1991) ("Judge Hall's denial of the defense's instruction to acquit Celia because of Newsom's [raping of her] was practically a foregone conclusion."); HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 35 (1861) ("The secrets of slavery are concealed like those of the Inquisition. My master was, to my knowledge, the father of eleven slaves. But did the mothers dare to tell who was the father of their children? Did the other slaves dare to allude to it, except in the whispers among themselves? No, indeed! They knew too well the terrible consequences.").

166 *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1389–92 (2000); *see also* Jane E. Larson, *"Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America*, 9 YALE J.L. & HUMAN. 1, 21 (1997) (describing that "women under the common law regime of marriage were legally subject to a husband's . . . disciplinary authority").

167 *See* Michael G. Walsh, Annotation, *Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 24 A.L.R. 4th 105, 112 (2009); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 64–65 (1990) (explaining that "the common law[ ] assum[es] that marriage results in the unification of husband and wife and that marital rape thus constitutes rape of oneself, [which is] a legal impossibility").

168 *See, e.g.*, Abbott v. Abbott, 67 Me. 304, 305, 309 (1877) (ruling that a divorced woman cannot sue her ex-husband for assault committed upon her coverture); State v. Oliver, 70 N.C. 60, 62 (1874) (explaining that "it is better [for courts] to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive" in a case of domestic violence where a woman's husband has not inflicted a permanent injury or shown malice); Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 5 (2000) ("[T]he distinction between the market and the family, and the distinction between the state and civil society . . . both . . . characterize violence against women as belonging to the private sphere, removed from the realm of law and politics.").

169 ANITA BERNSTEIN, THE COMMON LAW INSIDE THE FEMALE BODY 27 (2019).

and sexually.[170] As law disempowered one group, it empowered the other. As such, historically, women's diminished liberty has not been a concern for courts. For centuries, the common law was weaponized against the interests of women.[171] Cynthia Grant Bowman articulated nearly thirty years ago that law has generally ignored sex-based harms that men do not experience as a problem.[172] Indeed, one area in which the common law (judge-made law) could cohere was in the unified view of the subordination of women.

1. *Domestic Violence*

American legal norms, including policies, laws, and cases, inform its history. Its history—American history—is not forged simply of mundane facts, but rather of principles, processes, values, and philosophies.[173] And, this history is replete with violence, including sex-based violence from the colonial period to the present.[174] And historically, this sex-based American violence primarily involved men harming women and girls.[175] Indeed, "[i]t is the historic oppression of women through physical and sexual abuse which paved the way for male economic dominance over women."[176] In *An Economic History of Women in America*, Julie A. Matthaei writes, "The key to understanding woman's present and future economic position in the capitalist world lies in history."[177]

When courts sanctioned intimate partner violence or domestic abuse—which they uniformly did—they betrayed recognition of women's personhood and human dignity.[178] As such, historically, American courts complicitly participated in the

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170 *See id.* at 26–27.

171 *See id.* at 25.

172 *See, e.g.*, Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 520 (1993) (discussing the failure of the American legal system to provide effective remedies for women who have endured street harassment).

173 *See* JULIE A. MATTHAEI, AN ECONOMIC HISTORY OF WOMEN IN AMERICA: WOMEN'S WORK, THE SEXUAL DIVISION OF LABOR, AND THE DEVELOPMENT OF CAPITALISM 3 (1982).

174 *See* Dana Harrington Conner, *Financial Freedom: Women, Money, and Domestic Abuse*, 20 WM. & MARY J. WOMEN & L. 339, 343 (2014).

175 *See, e.g.*, Sally F. Goldfarb, *supra* note 168, at 5, 22 (describing how an "ideology of nonintervention in the family [permitted] . . . violence against women [and girls]" through "[d]octrines like interspousal tort immunity, parental tort immunity, and the marital rape exemption in criminal law").

176 Conner, *supra* note 174, at 343.

177 MATTHAEI, *supra* note 173, at 3.

178 *See, e.g.*, Bowman, *supra* note 172, at 552 ("In a 1985 Georgia case, for example, four motorcyclists at a gas station propositioned four women customers in extremely obscene language and, when asked by the female station attendant to leave, verbally abused and threatened her. However, because the attendant

creation of systems of oppression and the establishment of sex-based hierarchies sanctioned by law.

In the United States, courts granted *gentle restraint* as a type of physical punishment men could legally inflict on their wives.[179] If the restraint was "gentle," husbands could avoid criminal punishment or civil liability.[180] Tort exemption doctrines, such as spousal immunity, served to foreclose civil legal remedies to battered wives.[181]

Gentle restraint was perceived as more progressive than prior legal doctrines that explicitly empowered men to inflict *non-gentle* restraint.[182] Judges also claimed their thinking had evolved.[183] In reality, law related to domestic violence shifted only from arcane monstrousness to modern cruelty and courts across the country were generally aligned.

Thus even in the wake of modern enlightenment, the North Carolina Supreme Court opined, "If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."[184] Similarly, throughout the United States, courts adopted parallel rules of law related to domestic violence, stressing the social importance of maintaining "domestic harmony" as a public policy value and goal.[185]

Courts advanced various legal fictions to justify upholding a legal system that permitted men to impose violence on their wives.[186] This included the legal fiction that husbands and wives were one legal person.[187] Courts claimed women were legally subsumed within the identities of their husbands.[188]

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was inside the station and seventy feet away from the bikers . . . the appellate court overturned the bikers' assault convictions.") (citations omitted).

179 *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122, 2124–2125, 2125 n.25 (1996).

180 *See* Goldfarb, *supra* note 168, at 23.

181 *See id.* at 22.

182 *See generally* Siegel, *supra* note 179, at 2121–25 (quoting William Blackstone, who stated that a husband could subject his wife to "chastisement" if she defied his authority but that this "power of correction" was to be confined within reasonable bounds).

183 In one illustrative case, the North Carolina Supreme Court noted that "[w]e may assume that the old doctrine, that a husband had a right to whip his wife, provided he used a switch no larger than his thumb, is not law in North Carolina." State v. Oliver, 70 N.C. 60, 61 (1874).

184 *Id.* at 61–62.

185 *See* Goldfarb, *supra* note 168, at 22 n.92.

186 *See id.* at 21–23.

187 *See id.* at 21.

188 *See id.* at 21 n.90.

Sophistry dominated domestic violence jurisprudence. *Could a man unlawfully rape himself? Could a man unlawfully harm himself with a switch or whip?* If a man could not be punished for inflicting harm on himself, then neither could he be guilty of doing so to his wife.

Courts in Maine and elsewhere adopted the general principle that men could not be liable criminally or civilly for imposing physical violence on their wives.[189] In *Abbott v. Abbott*, the court denied Mrs. Abbott relief to recover for injuries sustained during the attack by her husband, which required hospitalization.[190] In denying Mrs. Abbott relief, the court underscored that the "husband and wife are one person."[191]

As tort law is the product of judge-made law, courts played a crucial role in legitimizing and providing safe harbor for domestic violence. Courts legalized inequality and the common law served as a powerful tool to advance male-centered jurisprudence. Courts established the interspousal immunity doctrine, shielding men from liability in domestic violence cases.[192] And courts upheld spousal immunity in cases where men sought to use it as a defense from liability.[193] These were choices courts made and positions they adopted until relatively recently.

Some scholars may perceive this record as one of "more passive than active" betrayal in the common law "as a jurisprudential system did not actively issue orders or judgments to oppress."[194] But, such a view ignores the agency of courts, the lawmaking performed within the tort system, and the values actively expressed. Courts *actively* issued rulings denying women relief from physical and sexual harm imposed by men and in doing so cast judgements about women's personhood, autonomy, and liberty.[195]

Judges claimed that spousal immunity advanced important policy goals, including discouraging intrafamilial litigation.[196] As a public policy matter, courts regarded it in society's interest that women reside in harmonious compan-

189 *See, e.g.*, Abbott v. Abbott, 67 Me. 304, 309 (1877); *see also* Goldfarb, *supra* note 168, at 23 ("The denial of criminal and tort remedies for violence committed within marriage has a legal pedigree reaching back hundreds of years.").

190 Abbott, 67 Me. at 305.

191 *Id.* at 306.

192 *See* Goldfarb, *supra* note 168, at 22.

193 *See* Siegel, *supra* note 179, at 2163–66.

194 BERNSTEIN, *supra* note 169, at 27.

195 *See* Goldfarb, *supra* note 168, at 22 n.92.

196 *See* Siegel, *supra* note 179, at 2165.

ionship with their husbands, unimpaired by the tensions that could arise from litigation.[197] As such, many courts refused to acknowledge that avoiding the marital tensions and disharmony that could possibly result from litigation did not cure physical, emotional, and sexual abuse in the marital homes.[198] This judicial philosophy did not consider, let alone ensure, the safety, care, and betterment of women and girls.

### 2. *Sexual Violence*

The history of which Part II speaks resonates today. Even as women demand change in laws historically permitting marital battery and sexual assault, the vestiges of such laws and judicial opinions continue to resonate and inform social norms. In 2015, President Donald Trump's then-lawyer, Michael Cohen, responded to allegations that his client had raped his first wife,[199] by declaring that "by the very definition, you can't rape your spouse."[200] He claimed, "It is true . . . . You cannot rape

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197 *See id.* at 2162, 2165 ("Interspousal litigation violated fundamental precepts of the doctrine of marital unity.").

198 *See* Goldfarb, *supra* note 168, at 22 n.92.

199 Ivana Trump issued a statement on the eve of a publication that reported on a deposition she gave during divorce proceedings against Donald Trump. The deposition described a violent encounter with her then-husband that included physical and sexual assault. The deposition was later written about in a 1993 book, *Lost Tycoon: The Many Lives of Donald J. Trump,* by journalist Harry Hurt III. Prior to the book's release, Donald Trump and his lawyers provided a statement from Ivana Trump, which is now posted in the book.

> During a deposition given by me in connection with my matrimonial case, I stated that my husband had raped me . . . . [O]n one occasion during 1989, Mr. Trump and I had marital relations in which he behaved very differently toward me than he had during our marriage. As a woman, I felt violated, as the love and tenderness, which he normally exhibited towards me, was absent. I referred to this as a 'rape,' but I do not want my words to be interpreted in a literal or criminal sense.

Brandy Zadrozny, *Ex-Wife: Donald Trump Made Me Feel 'Violated' During Sex*, DAILY BEAST (Feb. 27, 2019, 11:17 AM), https://www.thedailybeast.com/ex-wife-donald-trump-made-me-feel-violated-during-sex [https://perma.cc/HF52-QX3R] ("Not only does the current frontrunner for the Republican presidential nomination have a history of controversial remarks about sexual assault, but as it turns out, his ex-wife Ivana Trump once used 'rape' to describe an incident between them in 1989. She later said she felt 'violated' by the experience.").

200 Tanya Basu, *Donald Trump Lawyer Sorry for Saying 'You Can't Rape Your Spouse'*, TIME (July 28, 2015), https://time.com/3974560/donald-trump-rape-ivana-michael-cohen [https://perma.cc/QKL7-R8BS]; *see also* Dara Lind, *Donald Trump's Lawyer Said It's Legal to Rape Your Spouse. Nope.*, VOX (July 29, 2015), https://www.vox.com/2015/7/28/9057911/donald-trump-rape-ivana [https://perma.cc/5PH2-ZSEE] (writing that Michael Cohen's statement is false, as "[e]very state and the federal government allows people to prosecute their spouse for rape").

your spouse. And there's very clear case law."[201] Despite women's advocacy organizations rightfully chiding Donald Trump's lawyer for being "absurdly behind the times,"[202] in reality some states continue to regard married women "differently when it comes to rape."[203]

Notwithstanding recent progress in repealing marital rape laws,[204] some legislators and judges maintain the view that marriage both uniquely denies or disqualifies women the personhood and autonomy to refuse sexual intercourse from their spouses and empowers men to impose sexual demands without legal consequence.[205] In 2017, Richard "Dick" Black, a Virginia state representative running for Congress, queried, "How on earth you could validly get a conviction of a husband-wife rape when they're living together, sleeping in the same bed, she's in a nightie, and so forth, there's no injury, there's no separation or anything."[206] Perhaps as a former military prosecutor, Black's experiences led him to conclude such cases were difficult to prosecute. Even so, his view that "no injury" could be shown or established in marital rape cases reflected the tendency even among prosecutors to view marital rape not only as lawful and defensible but also *unharmful.*

Senator Black's views were not much different than those uttered decades prior in 1979 by California state senator Bob Wilson, chair of the Judiciary Committee, when he questioned, "If you can't rape your wife . . . who can you rape?"[207] Or South

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201 Zadrozny, *supra* note 199. Donald Trump also denied the allegation, claiming, "It's obviously false . . . . It's incorrect and done by a guy without much talent . . . . He is a guy that is an unattractive guy who is a vindictive and jealous person." *Id.* (second omission in original).

202 Danielle Paquette, *Nearly Half of States Treat Married Women Differently When It Comes to Rape*, WASH. POST (July 29, 2015, 10:23 AM), https://www.washingtonpost.com/news/wonk/wp/2015/07/29/the-ancient-sexist-roots-of-what-donald-trumps-adviser-said-about-rape/ [https://perma.cc/266F-YDHU].

203 *Id.*

204 *See* Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS 119, 121 (1999) ("Women's groups . . . lobbied state legislatures to revise antiquated rape laws . . . .").

205 *Cf.* Michael D.A. Freeman, *"But If You Can't Rape Your Wife, Who[m] Can You Rape?": The Marital Rape Exemption Re-examined*, 15 FAM. L.Q. 1, 21–22, 25–26 (1981) (discussing courts that have recognized marital exemption and states whose statutes preserve the marital exemption rule).

206 Lizzie Crocker, *Virginia Legislator Running for Congress Says Spousal Rape Should Be Legal*, DAILY BEAST (Apr. 14, 2017, 1:04 PM), https://www.thedailybeast.com/virginia-legislator-running-for-congress-says-spousal-rape-should-be-legal [https://perma.cc/S4YN-LMBX].

207 DIANA E.H. RUSSELL, RAPE IN MARRIAGE 18, 18–20 (1990); Freeman, *supra* note 205, at 1; Carol Tavris, Opinion, *What We Talk About When We Talk About*

Carolina representative Charles Sharpe, who believed the state "need[s] to stay out of a man's bedroom."[208] Sharpe was later charged with federal crimes involving the violent, illegal enterprise of cockfighting while he was the commissioner of agriculture for the state.[209]

And, despite repeals of marital rape statutes, states continue to draft loopholes and exceptions.[210] In West Virginia, "sexual contact" excludes contact with a person *you are married to*.[211] Similar to domestic violence, courts and legislatures created the legal standards or *legal fictions* by which men and women would abide.[212] As the New York Supreme Court acknowledged in *Thaler v. Thaler*, "[T]his Court has previously observed [that] at common law the husband and wife were one, and the husband was the one."[213] These were not the conditions for which women foisted upon themselves. Rather, legislatures and courts declared sexual violence was irrevocably and implicitly consented to (if not explicitly) in the marital contract.[214] And even while the court intimated a significant per-

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*Rape*, L.A. TIMES (Oct. 4, 2015), https://www.latimes.com/opinion/op-ed/la-oe-1004-tavris-what-is-rape-20151004-story.html [https://perma.cc/NA4L-EX45].

208 *Marital Rape Bill Advances in House*, SPARTANBURG HERALD-JOURNAL, Jan. 30, 1991, at 8, https://news.google.com/newspapers?nid=1876&dat=19910130&id=srAeAAAAIBAJ&sjid=q84EAAAAIBAJ&pg=4995,4286589&hl=en [https://perma.cc/PMS3-K8YE]; Joann M. Ross, Making Marital Rape Visible: A History of American Legal and Social Movements Criminalizing Rape in Marriage 201 n.574 (Dec. 2015) (Ph.D. dissertation, University of Nebraska-Lincoln) (on file with the Dissertations, Theses, & Student Research, Department of History, University of Nebraska-Lincoln) (citing Cindy Ross Scoppe, *Clock Running Out for House Action on Marital Rape Bill*, THE STATE, (May 31, 1990)).

209 *See* Ron Menchaca, *Ex-lawmaker Finds Life After Prison*, POST & COURIER (Mar. 23, 2008), https://www.postandcourier.com/news/ex-lawmaker-finds-life-after-prison/article_513fa3ca-c36f-5ffe-b903-63690407124b.html [https://perma.cc/MW6H-AAUS] ("[T]o many South Carolinians, the former state lawmaker and former state agriculture commissioner's name is synonymous with cockfighting, the shadowy bloodsport in which chickens brutally ravage one another with razor-sharp spurs.").

210 *See, e.g.*, MODEL PENAL CODE § 213.1(1) (AM. LAW INST. 2020) (containing the language "with a female not his wife" in its definition of rape offenses).

211 W. VA. CODE ANN. § 61-8B-1 (West 2019).

212 *See* Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346, 347 (1979).

213 391 N.Y.S.2d 331, 336 (Sup. Ct. 1977) ("But, with the advent of the married woman's property acts, L.1848, c. 200, §§ 1, 2, allowing married women to own and control property, any previous justification for this one-way support duty faded. With the current status of women and perceptions of equality, it disappears.").

214 *See* Lalenya Weintraub Siegel, Note, *The Marital Rape Exemption: Evolution To Extinction*, 43 CLEV. ST. L. REV. 351, 353–54 (1995) ("For more than 330 years [Hale's] statement has been the justification for the marital rape exemption, as well as serving as the backbone for judicial recognition of spousal immunity in the United States since 1857."); Linda Jackson, *Marital Rape: A Higher Standard Is in*

centage of married women feel "compelled" by a sense of "marital duty" to have sex with their male partners, it is worth noting that a deep sense of conflict arises when they lack the desire for sexual intimacy.[215]

Myriad defenses have been offered over the past four centuries to justify marital sexual violence.[216] For example, Blackstone's commentaries are traditionally cited for the proposition that women are property or chattel of their husbands,[217] the legal rule being men can do what they will with their property.[218] This latter notion brought into stark reality with American slavery: sexual assault, rape, battery, and even murder.

Contemporary justifications are rooted in traditional rationales harmful toward women's equality, including that the marital rape exemption must survive as "the marital exemption protects against governmental intrusion into marital privacy and promotes reconciliation of the spouses."[219] Even as judicial doctrine on marital rape evolves, recognizing that rape "is the 'ultimate violation of self,'"[220] the influence of traditional rationales in justifying sexual violence against women remains in the present.

Law played a non-insignificant role in shaping women's internalization of "fault" and sense of obligation to have sex under any circumstances with their spouses as part of the marital contract.[221] Sometimes women feared physical violence against themselves or their children if they resisted sexual violence.[222] However, their concerns for safety and skepticism about the legal system to keep them safe were quite distinct from women who opposed marital rape reform based

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*Order*, 1 WM. & MARY J. WOMEN & L. 183, 185–86 (1994); Sandra L. Ryder & Sheryl A. Kuzmenka, *Legal Rape: The Marital Rape Exemption*, 24 J. MARSHALL L. REV. 393, 394–95 (1991).

215 Kathleen C. Basile, *Prevalence of Wife Rape and Other Intimate Partner Sexual Coercion in a Nationally Representative Sample of Women*, 17 VIOLENCE & VICTIMS 511, 518–19 (2002).

216 *See* Siegel, *supra* note 214, at 354–57.

217 *See* Jackson, *supra* note 214, at 187.

218 *Cf.* Freeman, *supra* note 205, at 8 ("[T]he law regarding rape developed to protect the interests of men, not women.").

219 People v. Liberta, 474 N.E.2d 567, 574 (N.Y. 1984).

220 *Id.* at 575 (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (holding that the death penalty for rape was excessive and unconstitutional)).

221 *See, e.g.*, Freeman, *supra* note 205, at 7 ("Some [women] consider it their fault; others are ashamed to talk about it. Many have adopted cultural definitions of the act [of rape] and see themselves as property at their husband's disposal.").

222 *See, e.g.*, Ross, *supra* note 208, at 9 (stating that women exhibit "concern about retribution from an abuser").

on the notion that marriage obligated women to have sex with their husbands under any and all circumstances.

For example, some women, even politicians, perceived sexual violence as part of the marital contract.[223] Irin Carmon writes, "Conservative activist Phyllis Schlafly . . . repeatedly said she doesn't believe that marital rape exists."[224] Schlafly, most closely associated with opposing ratification of the Equal Rights Amendment ("ERA"), persisted in the view that, "[b]y getting married, the woman has consented to sex, and I don't think you can call it rape."[225] Nor was Schlafly necessarily an outlier among conservative women who lobbied legislatures and lectured on college campuses that both marital rape and campus sexual assaults unfairly targeted men.[226]

In the 1980s as courts began repealing marital rape exemptions, the New York Court of Appeals stated, "The fact that rape statutes exist, however, is a recognition that the harm caused by a forcible rape is different, and more severe, than the harm caused by an ordinary assault."[227] This stratification of rape into degrees of harm or *mens rea* reified the underlying problem of women's disempowerment and invisibility and preserved antiquated principles of male supremacy in law. Courts analogized these rankings of rape according to general physical assault.[228] In *People v. Liberta,* according to the court, this meant "if the defendant had been living with [his wife] at the time he forcibly raped and sodomized her he probably could not have been charged with a felony, let alone a felony with punishment equal to that for rape in the first degree."[229]

Courts justified marital rape exemptions on myriad grounds. Among the theories was the idea that "elimination of

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223 *Cf.* Irin Carmon, *Meet the Marital Rape Deniers*, MSNBC (July 28, 2015), http://www.msnbc.com/msnbc/meet-the-marital-rape-deniers [https://perma.cc/4NB5-DFUD] (stating that Schlafly has said "when you get married you have consented to sex . . . . When it gets down to calling it rape though, it isn't rape . . . .").

224 *Id.*

225 Sarah A. Harvard, *8 Worst Things Phyllis Schlafly Ever Said About Women's Right*, MIC (Sept. 6, 2016), https://www.mic.com/articles/153506/8-worst-things-phyllis-schlafly-ever-said-about-women-s-rights [https://perma.cc/WX4C-BP3V]; Amanda Marcotte, *Phyllis Schlafly in Her Own Words: Her Many Opinions About Women, Sex, and Equality*, SALON (Sept. 6, 2016), https://www.salon.com/2016/09/06/schlafly-in-her-own-words-her-many-opinions-about-women-sex-and-equality [https://perma.cc/LEL4-WXGT].

226 *See, e.g.*, Marcotte, *supra* note 225 (recognizing that Schlafly's views "turned out to be effective tools for organizing the right").

227 People v. Liberta, 474 N.E.2d 567, 574 (N.Y. 1984).

228 *See id.* at 575.

229 *Id.*

the exemption would be disruptive to marriages."[230] Or that it would impede or even discourage reconciliation.[231] Other rationales included doubts of provability, the questionable seriousness of the crime, and unfairness to defendants.[232]

On one hand, courts became an obstacle to pursuing and vindicating marital rape claims. On the other, legislatures equally weaponized law in the service of marital rape. That is, throughout the United States, state legislatures enacted laws *decriminalizing* marital rape.[233] Adopting a similar posture, courts followed suit by granting marital status a viable tort defense in civil litigation.[234] Until recent legislative repeal starting in the late 1970s[235] and judicial repeal in the 1980s,[236] marital rape was legal.[237] When courts finally began the process of repeal, they noted there was no rational basis by which to justify holding rape during marriage as distinct from that involving unmarried individuals.[238]

Judicial repeal gained momentum on the heels of a particularly heinous New York case, *People v. Liberta*.[239] In this case, Mario Liberta, already under court order to live apart from his wife, "forcibly raped and sodomized her in the presence of their $2^1/_2$-year-old son."[240] The trial court granted the defendant's motion to dismiss the case.[241] The court found that the "marital exemption" applied.[242]

On appeal, however, the court denied Liberta marital statutory protection because he was under a family court order, which the court interpreted as granting the parties the status

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230 *Id.* at 574.

231 *See id.*

232 *See id.*

233 *See infra* notes 252–254 and accompanying text (discussing marital rape exemption statutes in Oklahoma, Montana, and Colorado).

234 *See* Freeman, *supra* note 205, at 21–22.

235 *See Liberta*, 474 N.E.2d at 571.

236 *See* David Margolick, *New York Joins 17 States That Deny Wives Are Property; Rape in a Marriage Is No Longer Within Law*, N.Y. TIMES (Dec. 23, 1984), https://www.nytimes.com/1984/12/23/weekinreview/new-york-joins-17-states-that-deny-wives-are-property-rape-marriage-no-longer.html [https://perma.cc/RV5M-RHXK].

237 Les Ledbetter, *Oregon Man Found Not Guilty on a Charge of Raping His Wife*, N.Y. TIMES (Dec. 28, 1978), https://www.nytimes.com/1978/12/28/archives/oregon-man-found-not-guilty-on-a-charge-of-raping-his-wife-husband.html [https://perma.cc/HY4L-9SSA].

238 *See Liberta*, 474 N.E.2d at 573.

239 *Id.*

240 *Id.* at 569.

241 *See id.* at 570.

242 *See id.*

of being "unmarried" for purposes of criminal violations.[243] Tellingly, even at the appellate court level, the court would have upheld the marital exemption so long as it could be proved that a marriage "existed" at the time of the sexual battery.[244] In this case, the relevant question was the status of the marriage in light of the court order.[245]

Interestingly, Liberta argued the statutes—"rape in the first degree (Penal Law, § 130.35) and sodomy in the first degree (Penal Law, § 130.50)"—violated equal protection under the Fourteenth Amendment.[246] He claimed that the laws burdened some men, but not others.[247] The direct implication was that, at least in his case, rape should be exempt from prosecution whether one is married or not.[248] The court averred on Liberta's constitutional arguments that the penal code uniquely burdened him and men like him.[249] The court concluded there was "no rational basis for distinguishing between marital rape and nonmarital rape."[250]

*People v. Liberta* was a watershed moment in that it represented the first judicial repeal of a marital rape law. Until then, state laws generally permitted marital rape.[251] For example, Oklahoma defined rape as "an act of sexual intercourse . . . accomplished with a [person] who is not the spouse of the perpetrator . . . ."[252] Similarly, Montana's Rape Exemption Statute prior to 1983 read in relevant part: "Sexual intercourse without consent. (1) A person who knowingly has sexual intercourse without consent with a person of the opposite sex *not his spouse* commits the offense of sexual intercourse without consent."[253]

In Colorado, the legislature specified, "(1) The criminal sexual assault offenses of this part 4 shall not apply to acts between persons who are married, either statutorily, putatively,

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243 *See id.*
244 *Id.* at 571.
245 *See id.* at 570.
246 *Id.* at 569.
247 *See id.* at 570.
248 *See id.*
249 *See id.* at 571–72.
250 *Id.* at 573.
251 *See* Helaine Olen, *The Law: Most States Now Ban Marital Rape: Until the '70s, the Act Generally Was Not a Crime. In California, It Can Be Treated as a Misdemeanor or Felony*, L.A. TIMES (Oct. 22, 1991), https://www.latimes.com/archives/la-xpm-1991-10-22-mn-163-story.html [https://perma.cc/J8C7-2XWP].
252 OKLA. STAT. tit. 21, § 1111 (2018).
253 MONT. CODE ANN. § 45-5-503 (1977) (amended 1985) (emphasis added).

or by common law."[254] Notably, Colorado, Montana, and Oklahoma were not outliers; nearly all states adopted some version of a marital rape exception.[255] Until 2015, Louisiana had in its law language distinguishing "who is not the spouse" in its sexual battery statute.[256]

These legislative enactments categorically undermined the dignity and bodily autonomy of married women. Equally, marital rape exemptions conferred significant power and legal protections in men who violate their wives. They created asymmetries in marital relationships, which shaped domestic norms that extended into the social sphere. In case after case, courts chose to uphold state legislation protecting the interests of men who sexually violate and rape their wives.[257]

The Alabama Supreme Court ruled "a husband may enforce sexual connection[ ] and . . . in the exercise of his marital right he cannot be guilty of the offense of rape."[258] Consistently courts ruled against married women in cases involving rape.[259] In *State v. Paolella*, the Connecticut Supreme Court considered (on two separate appeals in the same year) a grisly, though not particularly unusual marital rape case. Joseph Paolella plotted to kidnap and rape his estranged wife.[260] He succeeded in both. According to the court on the second appeal:

> During the course of the argument, the complainant tried to escape from the house through both the doors and windows; however, the defendant forcibly prevented her from doing so. When she attempted to use the phone again, the defendant hit her with it. Still holding his rifle, the defendant then grabbed the complainant, hit her, and pushed her against a wall with such force that her head and heel went through the wall . . . .

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254 COLO. REV. STAT. § 18-3-409 (1973) (amended 1988).

255 *See* Briana Bierschbach, *This Woman Fought to End Minnesota's 'Marital Rape' Exception, and Won*, NPR (May 4, 2019; 7:52 AM), https://www.npr.org/2019/05/04/719635969/this-woman-fought-to-end-minnesotas-marital-rape-exception-and-won [https://perma.cc/DZ93-HNCH] (noting that "[m]ost states had marital rape exceptions as part of their law until 1979," and while "marital rape was technically illegal in all 50 states" by 1993, there are still loopholes).

256 2015 La. Sess. Law Serv. Act 256 (S.B. 117) (West).

257 *See* Hasday, *supra* note 166, at 1465–66.

258 Anonymous, 89 So. 462, 463 (Ala. 1921) (citing 13 R. C. L. pp. 987, 988, § 6).

259 *See, e.g.*, State v. Paolella, 554 A.2d 702, 708 (Conn. 1989) (pointing to Connecticut law for the proposition that a finding by a trier that the alleged offender and the victim were married exonerates the alleged offender, regardless of the proof of forcible sexual intercourse); *see also* CONN. GEN. STAT. § 53a-70(a), 53a-70a(a) (2019) (defining aggravated sexual assault in the first degree in Connecticut).

260 *Paolella*, 554 A.2d at 704.

> Carrying the rifle, the defendant dragged the complainant by her hair down the stairs to the basement, where he pointed the rifle at her head and threatened to kill her. He then tied her wrists and legs to his weightlifting bench with a telephone cord while he berated her and called her names . . . . The defendant then untied the complainant's legs, removed her pants, retied her legs above her head to the bar over the weight bench, and had sexual intercourse with her.[261]

Like similar marital rape violence, the case turned on whether the survivor and rapist were married at the time of the rape. In this case, they lived apart and both had filed for divorce.[262] Turning to Connecticut law, the court acknowledged that "[c]ertainly there is ample evidence at this point for the court to find that the . . . basic elements of the rape have been proven."[263] Nevertheless, the court on the first appeal held:

> As noted . . . General Statutes § 53a-65(2), which defines the sexual intercourse prohibited under §§ 53a-70(a) and 53a-70a(a), excludes married people. Under this statutory scheme, a defendant married to the alleged assault victim cannot be found guilty of violating those sexual assault statutes. A finding of non-culpability based on the "marital exemption" of § 53a-65(2) necessarily depends upon proof of the fact that the victim and the defendant were legally married . . . [and] a finding by the trier that the alleged offender and the victim were married exonerates the alleged offender, regardless of the proof of forcible sexual intercourse.[264]

Understandably, one might struggle to understand such judicial conclusions, given the psychological terror, physical punishment, and underlying domestic, sexual violence in such cases. Notwithstanding judicial deference to the legislatures, judges are not automatons and courts are not agencies of lawmakers. Even while dispassionate judicial review of marital rape cases could be argued to serve a broader purpose in law, which is commonly understood to suggest that calm judicial temperament, cool deliberation, and objective neutrality serve the interests of justice, ironically, the exercise of such values in the marital rape context consistently resulted in harm to the interests of marital rape survivors.

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261 State v. Paolella, 561 A.2d 111, 113–14 (Conn. 1989).

262 *Id.* at 113.

263 *Paolella*, 554 A.2d at 705 (quoting the trial court, which clarified that "[t]he basis of the ruling as I indicated is the opinion of the Court that the spousal exemption is valid and the evidence indicates clearly . . . that these parties were still legally married on that day, and it is for that reason I am granting the Judgment of Acquittal as to these two counts").

264 *Id.* at 708.

According to Professor Robin West, "Marital rape exemptions are strikingly easy to trace to misogynist roots, from Hale's infamous argument that a married woman is presumed to consent to all marital sex and, therefore, cannot be raped, to the common law's assumption that marriage results in the unification of husband and wife . . . ."[265] Sir Matthew Hale's 1736 treatise, *Historia Placitorum Coronae, History of the Pleas of the Crown*, theorized that a "husband cannot be guilty of a rape" because marriage conveys unconditional consent.[266] According to Hale, the fulfillment of men's sexual desires is a part of the marital contract and a married woman "hath given up herself in this kind unto her husband, which she cannot retract."[267]

Similarly, Blackstone claimed married women's identities and legal rights should be subsumed under the broader scope of their husbands' identities.[268] American courts adopted this principle, borrowing from European coverture laws. Thus, not only were married women powerless in relation to forced sex but also rendered invisible in terms of their identities. Courts claimed that coverture preserved legal and social order and promoted familial harmony.[269] In reality, coverture instantiated male dominance and rule, situated power in the hands of men, and forged a legal culture of misogyny and violence in American households. According to Blackstone,

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-[F]rench a *feme-covert* . . . .[270]

In short, it is hard to ignore the role of legislatures and courts in weaponizing law for the protection of men and harm

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265 West, *supra* note 167, at 64–65 (citations omitted).

266 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 628 (1736).

267 *Id.*

268 *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *442–45 (discussing the "chief legal effects of marriage during coverture").

269 *See id.*

270 *Id.* at *442 ("Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage . . . . For this reason, a man cannot grant any thing [sic] to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage.") (citations omitted).

of women.[271] In other words, legislatures and courts provided legal sanctuary or safe harbor for men who raped their wives[272] and even their daughters.[273] In *Roller v. Roller,* the Washington Supreme Court held that a minor could not maintain a cause of action against her father for rape.[274] The fact of the rape was not at issue in the case.[275] Rather, the court claimed public policy dictated its holding; a sexually-assaulted daughter should not be able to recover against her father as it was presumed disruptive to the family household.[276] The justices asserted maintaining "harmony in the domestic relations" necessitated such an outcome.[277]

From the judicial perspective, society's interest in preserving domestic tranquility manifested in the "earliest organization of civilized government . . . [and was] inspired by the universally recognized fact that the maintenance of harmonious and proper family relations is conducive to good citizenship, and therefore works to the welfare of the state."[278] And, while the court acknowledged that rape is a terrible crime, the justices juxtaposed the daughter's harm against "any other tort," opining that any generic tort compared to a rape "would be different only in a degree."[279]

Time and again, courts gave their imprimatur to systemic harms foisted on girls and women. In *Commonwealth v.*

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271 The "marital exception," for example, shielded husbands from criminal liability for the sexual assaults and rapes perpetrated against their wives. According to the American Law Reports 4th Edition on marital rape, "Until very recently, the courts were nearly unanimous in their view that a husband could not be convicted of rape, or assault with intent to commit rape, upon his wife as the result of a direct sexual act committed by him upon her person." *See e.g.*, Walsh, *supra* note 167, at § 2[a] (explaining that the exception was said to "serve a legitimate state interest in encouraging the preservation of family relationships"). *See also* MISS. CODE ANN. § 97-3-99 (Supp. 1991) ("A person is not guilty of any offense under sections 97-3-95 through 97-3-103 if the alleged victim is that person's legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart . . . .").

272 *See, e.g.*, Davis v. State, 611 So. 2d 906, 912 (Miss. 1993) (citing MISS. CODE ANN. § 97-3-99 (Supp. 1991)). Davis challenged his conviction of aiding and abetting in the rape of his wife. His defense, that he could not be prosecuted (and therefore convicted) if he raped his wife, was supported by the majority: "Davis is, of course, correct that if he had himself solely perpetrated this atrocity, then under Miss.Code Ann. § 97-3-99 he was immune from prosecution." *Id.*

273 Roller v. Roller, 79 P. 788, 788 (Wash. 1905).

274 *Id.* at 788–89.

275 *See id.* at 788.

276 *Id.* at 789.

277 *Id.* at 788.

278 *Id.*

279 *Id.* at 789.

*Fogerty*,[280] a case involving the gang rape of a ten-year-old girl, the Supreme Court of Massachusetts acknowledged that the men who "ravished" the child could not plead exceptions.[281] However, in an utterly unnecessary, but nonetheless revealing dicta, the justices declared, "Of course, it would always be competent for a party indicted to show, in defence [sic] of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife."[282]

Given this history, are there lessons for law, policy, and society? Sadly, the concerns articulated herein are not confined to the past. Recently a Montana judge overturned a 25-year plea deal negotiated in the case of a forty-year-old man that serially raped his twelve-year-old daughter.[283] Prosecutors claimed that the father habitually raped his daughter—a crime he later admitted having committed.[284] Prosecutors recommended a sentence of one hundred years, with seventy-five years suspended, which would result in twenty-five years' incarceration.[285] Prosecutors informed Judge John McKeon that such a sentence was what Montana law called for.[286] After taking the prosecutors' recommendation under advisement, Judge McKeon sentenced the father to sixty days.[287]

Judge McKeon voiced doubts about the appropriateness of the prosecutors' recommended punishment, determining that the father had already suffered separation from his family and was remorseful.[288] Judge McKeon offered credit for the seventeen days the abuser already served in jail, thereby reducing his sentence to a mere forty-three days.[289] Even if rare, rulings such as McKeon's send a troubling signal to all victims and their advocates. Such a lenient sentence for an admitted serial child rapist with intimate and unfettered access to the victim

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280 74 Mass. (8 Gray) 489 (1857).

281 *Id.* at 490–91.

282 *Id.* at 491; *see also* People v. Henry, 298 P.2d. 80, 84 (Cali. Dist. Ct. App. 1965) (stating that "[a]n essential element of the crime of rape is that the female is 'not the wife of the perpetrator'").

283 *See* Travis M. Andrews & Fred Barbash, *Father Who 'Repeatedly Raped His 12-Year Old Daughter' Gets 60-Day Sentence. Fury Erupts.*, WASH. POST (Oct. 19, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/10/19/father-who-repeatedly-raped-his-12-year-old-daughter-gets-60-day-sentence-fury-erupts/ [https://perma.cc/WG4P-HVR7].

284 *See id.*

285 *See id.*

286 *See id.*

287 *See id.*

288 *See id.*

289 *See id.*

undoubtedly places the child at risk. Such lenient sentences send clear and traumatizing messages to other young rape victims who experience similar crimes against their dignity, leaving them emotionally and mentally vulnerable. Who would risk telling her story and confronting an abuser if the legal system returns him to the neighborhood, let alone the family home, in a few weeks?

### B. Law and Station: Revisiting Women and Slavery

Understanding the correlation between sex, race, and power is crucial to comprehending and addressing patriarchal discrimination embedded in American law.[290] From the earliest foundations of American law, lawmakers settled on the notion that women were destined to a subordinate status and instantiated that thinking into law.[291] And, in the context of human slavery, lawmakers explicitly tied capitalism to sexual subordination, rape, and American economics.[292] Even so, studies in American history and law generally render enslaved Black women invisible, incidental, and dispensable to studies in American law, feminism, and civil rights, erasing them from their own American legal story. Humanizing the accounts of vulnerable women and rescuing their stories from the dustbins of history offers legal scholars and students of the law a more expansive lens through which to study the intersections of race, sex, and the law.

For example, a recent study on the genetic consequences of slavery provides a DNA roadmap of the politics of sexual subordination, uncompensated forced labor, and political inequality.[293] Researchers investigating the genetic underpinnings of slavery report "the brutal treatment of enslaved people has shaped the DNA of their descendants."[294] Scientists analyzed genotype array data from over 50,000 research participants, combining their genetic data with historical shipping records to

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290 *See, e.g.*, Michele Gillespie, *The Sexual Politics of Race and Gender: Mary Musgrove and the Georgia Trustees*, *in* THE DEVIL'S LANE: SEX AND RACE IN THE EARLY SOUTH 187 (Catherine Clinton & Michele Gillespie eds., 1997) (researching the rape and torture of Black women on American plantations).

291 *See* Michele Goodwin, *A Different Type of Property: White Women and the Human Property They Kept*, MICH. L. REV. (forthcoming 2021).

292 *See id.*

293 *See* Steven J. Micheletti et al., *Genetic Consequences of the Transatlantic Slave Trade in the Americas*, 107 AM. J. HUM. GENETICS 265, 274 (2020), *available at* https://doi.org/10.1016/j.ajhg.2020.06.012 [https://perma.cc/Z52K-NEFK].

294 Christine Kenneally, *Large DNA Study Traces Violent History of American Slavery*, N.Y. TIMES (July 23, 2020), https://www.nytimes.com/2020/07/23/science/23andme-african-ancestry.html [https://perma.cc/7SRC-U2SV].

document the current genetic landscape of Black Americans in accordance with "slave voyages."[295] They found a greater contribution of Black women to the American Black gene pool than Black men.[296] Even more revealing was the conclusive genetic data that explained it, namely the dramatic tie to white American men.[297]

Their research adds to the vault confirming slavery as "one of the darkest chapters of world history, in which 12.5 million people were forcibly taken from their homelands in tens of thousands of European ships."[298] The import of this research is not in the basic fact of slavery, but rather the evidence of wide-scale, normalized sexual assaults committed by white men against Black, enslaved women.[299]

These important findings fill in the gap of American history and law that denied such experiences and rebuffed Black women's allegations of them.[300] For example, for nearly two centuries, most white historians discredited accounts that President Thomas Jefferson fathered children by Sally Hemings, an enslaved teenager who was the biological half-sister of his white wife.[301] In the process, they wrote Sally Hemings out of Thomas Jefferson's life despite the fact that she mothered six of his children, traveled to and lived in Europe with him, and slept in a windowless chamber next to his.[302] In fact, her existence was literally papered over at Monticello—Jefferson's plantation—as managers and curators of his estate converted her dark chamber into a men's bathroom, quite literally erasing her very existence.[303] In recent years, Jefferson's estate has

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295 Micheletti et al., *supra* note 293, at 265.

296 *See id.* at 270.

297 *See id.* at 273.

298 Kenneally, *supra* note 294.

299 *See* Farah Stockman, *Monticello Is Done Avoiding Jefferson's Relationship with Sally Hemings*, N.Y. TIMES (June 16, 2018), https://www.nytimes.com/2018/06/16/us/sally-hemings-exhibit-monticello.html [https://perma.cc/ZD8G-RF4E].

300 *See id.*

301 *See, e.g.*, ANNETTE GORDON-REED, THE HEMINGSES OF MONTICELLO: AN AMERICAN FAMILY 586–606 (2008).

302 *See The Life of Sally Hemings*, MONITCELLO.ORG (last visited Sept. 11, 2020), https://www.monticello.org/sallyhemings [https://perma.cc/S5BK-L3AH]; Michael Cottman, *Historians Uncover Slave Quarters of Sally Hemings at Thomas Jefferson's Monticello*, NBC NEWS (July 3, 2017), https://www.nbcnews.com/news/nbcblk/thomas-jefferson-sally-hemings-living-quarters-found-n771261 [https://perma.cc/M7GG-G6TD].

303 *See* Phillip Kennicott, *Jefferson's Monticello Finally Gives Sally Hemings Her Place in Presidential History*, WASH. POST (June 13, 2018), https://www.washingtonpost.com/entertainment/museums/jeffersons-monticello-finally-gives-sally-hemings-her-place-in-presidential-history/2018/06/12/

revisited this record, acknowledging Sally Hemings and that she "bore children fathered by her owner"—nearly two hundred years after her death.[304]

Most of the sexual carnage of slavery was so common as to be taken for granted. Some cases, however, became newsworthy. According to abolitionist Levi Coffin, "Perhaps no case that came under my notice, while engaged in aiding fugitive slaves, attracted more attention and aroused deeper interest and sympathy than the case of Margaret Garner, the slave mother, who killed her child rather than see it taken back to slavery."[305] Years later, an abolitionist wrote:

> Who can fathom the depths of her heart as she brooded over the wrongs and insults that had been heaped upon her all her life? Who can wonder if her faith staggered when she saw her efforts to gain freedom frustrated, when she saw the gloom of her old life close around her again, without any hope of deliverance?[306]

When Margaret Garner, the real-life subject of Toni Morrison's *Beloved*,[307] "absconded" with her four children to Cincinnati in 1856, she was charged with "stealing" the property of Abner Gaines, her owner.[308] Cincinnati was a "free" city in Ohio and a critical passage point for enslaved Black people fleeing slavery.[309] As such, it came to be known as an important destination on the "Underground Railroad."[310]

Many speculated that Gaines fathered some of her children, including her youngest daughter and the daughter she killed.[311] An abolitionist in Cincinnati described her slain

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55145ac0-6504-11e8-a69c-b944de66d9e7_story.html [https://perma.cc/873K-NMEB].

304 *See The Life of Sally Hemings*, *supra* note 302.

305 LEVI COFFIN, REMINISCENCES OF LEVI COFFIN, THE REPUTED PRESIDENT OF THE UNDERGROUND RAILROAD 557, 563 (2d ed. 1880) ("The case seemed to stir every heart that was alive to the emotions of humanity. The interest manifested by all classes was not so much for the legal principles involved, as for the mute instincts that mold every human heart—the undying love of freedom that is planted in every breast—the resolve to die rather than submit to a life of degradation and bondage.").

306 *Id.* at 564.

307 *See generally* TONI MORRISON, BELOVED (1987).

308 *See generally* STEVEN WEISENBURGER, MODERN MEDEA: A FAMILY STORY OF SLAVERY AND CHILD-MURDER FROM THE OLD SOUTH 56–58 (1998).

309 *See* Julius Yanuck, *The Garner Fugitive Slave Case*, 40 MISS. VALLEY HIST. REV. 47, 50 (1953).

310 *Id.*

311 *See* Nikki Taylor, *The Fugitive Slave Margaret Garner and Tragedy on the Ohio*, AFR. AM. INTELL. HIST. SOC'Y, https://www.aaihs.org/the-fugitive-slave-margaret-garner-and-tragedy-on-the-ohio/ [https://perma.cc/S7TY-EC9E].

daughter as "almost white."[312] Garner's own sexual trauma and forced servitude likely motivated her harrowing escape, which included hiding out and traversing the frigid conditions on foot, aided with a sled, transporting her children from Kentucky to Cincinnati in the dead of winter, navigating a frozen river.[313] At trial, scars on her face were observed and when asked what caused them, she replied, "White man struck me."[314]

As her captors approached— "the masters of the fugitives, with officers and a posse of men"[315] —rather than releasing her daughter to the bounty hunters hired to return Garner and her children to Gaines' plantation, she slashed her daughter's throat.[316] Reports indicate that Garner was attempting to kill the second child before she was subdued.[317]

News of Garner's escape and the killing of her little girl spread rapidly throughout the country.[318] Witness accounts stated that Garner said "[I] would rather kill them all than have them taken back over the river!"[319] Margaret's mother-in-law, Mary, also an enslaved Black woman, testified that Garner cried, "Mother, I will kill my children before they shall be taken back, every one of them."[320] She begged for her mother-in-law's help, "Mother, help me to kill the children."[321]

Abolitionists believed Garner's case provided compelling evidence of slavery's horrors.[322] That a mother would kill her child to prevent its enslavement was perhaps the most salient and powerful condemnation of the enterprise.[323] To them, Garner's act of killing further evidenced the terrors inflicted on Black women and children as part of the slave economy—after

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312 COFFIN, *supra* note 305, at 563.

313 *See* Yanuck, *supra* note 309, at 50–51.

314 COFFIN, *supra* note 305, at 562 ("That was all, but it betrays a story of cruelty and degradation, and, perhaps, gives the key-note to Margaret's hate of slavery, her revolt against its thralldom, and her resolve to die rather than go back to it.").

315 *Id.* at 559.

316 *See* Yanuck, *supra* note 309, at 52.

317 *See* COFFIN, *supra* note 317, at 560.

318 *See The Slave Tragedy in Cincinnati*, N.Y. TIMES, Jan. 29, 1856, https://timesmachine.nytimes.com/timesmachine/1856/02/02/76452571.pdf [https://perma.cc/4X5E-EBTJ].

319 *Id.*

320 *Id.*

321 *Id.*

322 *See* Yanuck, *supra* note 309, at 47.

323 *See id.*

all why else would a mother kill her child?[324] Lucy Stone, an ardent abolitionist, addressed the court, expressing to the judge, "I told [Margaret Garner] that a thousand hearts were aching for her, and that they were glad one child of hers was safe with the angels."[325] Stone gave voice to slavery's dirty secret:

> "The faded faces of the negro children tell too plainly to what degradation female slaves must submit. Rather than give her little daughter to that life, she killed it. If in her deep maternal love she felt the impulse to send her child back to God, to save it from coming woe, who shall say she had no right to do so?"[326]

Garner's attorney argued that the Fugitive Slave law was unconstitutional, because it was this law that would return Garner and her children back to slavery even while they were apprehended in a "free" territory.[327] According to Levi Coffin, the Fugitive Slave law had driven a frantic mother to murder her own child rather than see it carried back to the seething hell of American slavery. This law was of such an order that its execution required human hearts to be wrung and human blood to be spilt.[328]

At trial, Garner was prosecuted not for murder, but for violating the Fugitive Slave Act.[329] According to local reports, the murder charge "was practically ignored."[330] Black children were not presumed to have emotional value; they were, according to the law, property.[331] To the commissioner who oversaw the trial, "the law of Kentucky and of the United States made it a question of property."[332]

Because Garner was "property" in American law, she had no entitlement to property or legal relationship to her children.[333] In law, her children belonged to her owner, Gaines,

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324 *See* NIKKI TAYLOR, DRIVEN TOWARDS MADNESS: THE FUGITIVE SLAVE MARGARET GARNER AND TRAGEDY ON THE OHIO 3–4, 92–109 (Ohio Univ. Press, 2017).

325 COFFIN, *supra* note 305, at 564–65 (quoting Lucy Stone).

326 *Id.* at 565.

327 *See* Yanuck, *supra* note 309, at 55.

328 COFFIN, *supra* note 305, at 561.

329 *See* Yanuck, *supra* note 309, at 51.

330 COFFIN, *supra* note 305, at 566.

331 *See, e.g.*, Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 330 (1996) (describing the inheritance system that ensured the continual supply of slaves).

332 COFFIN, *supra* note 305, at 566.

333 Paul Finkelman, *Slavery in the United States: Persons or Property?*, *in* THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 111–12 (Jean Allain ed., 2012).

not as his children but as his property. Interestingly, a murder conviction would have kept Garner in prison, but that would have required recognizing the personhood in both Garner and her daughter. Punishment as a fugitive slave simply returned Garner to Gaines' plantation and involuntary servitude. Shortly after her trial, Garner was sent to various other plantations and eventually sold to DeWitt Clinton Bonham, a Mississippi plantation owner.[334]

What contemporary lessons can be drawn from peering into the antebellum archive? If we are to take seriously the history of women in America, this intergenerational sexual violence committed against Black girls and women has an important place for acknowledgement and study. For example, what were the legal structures that created a sexual caste of Black women and girls, including hypodescent laws?[335]

In other words, the sexual subordination of Black women and the active sexual batteries committed upon them constituted pathologies in law. These pathologies were not incidental nor accidental, but part of debated processes and systems and not mere happenings. Implicitly and explicitly, sexual battery against Black women and girls was part of a system of social codes, legislative enactments, and judicial opinions.[336]

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334 *See* Steven Weisenburger, *A Historical Margaret Garner*, MODERN MEDEA, http:/mullinspld.weebly.com/uploads/1/9/7/9/19799485/mgarner_history.pdf [https://perma.cc/M3S7-4785].

335 Otherwise regarded as "one drop rules," hypodescent statutes created American caste systems whereby children born of enslaved mothers took their status regardless of their father's race and social status. Christine B. Hickman, *The Devil and The One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1175 (1997); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1719 (1993).

336 *See* Paul Finkelman, *Crimes of Love, Misdemeanors of Passion: The Regulation of Race and Sex in the Colonial South*, in THE DEVIL'S LANE: SEX AND RACE IN THE EARLY SOUTH 124-25, 129 (Catherine Clinton & Michele Gillespie eds., 1997) (describing the "perverse result that masters who fathered children with their female slaves would end up enslaving their own mixed-race children"); Katharine Gerbner, *Most People Think 'Whiteness' is Innate. They're Wrong: It Was Created To Keep Black People From Voting*, WASH. POST (Apr. 27, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/04/27/most-people-think-whiteness-is-innate-theyre-wrong-it-was-created-to-keep-black-people-from-voting [https://perma.cc/N4K5-EXFT]; *see also* Rebecca Carroll, *Margaret Garner*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/obituaries/margaret-garner-overlooked.html [https://perma.cc/M9S4-JZHV] (noting that white slave owners raped black slave mothers and recognizing cruel treatment by slave owners drove enslaved families to try to escape); JACOBS, *supra* note 165, at 29 ("I saw a man forty years my senior daily violating the most sacred commandments of nature. He told me I was his property; that I must be subject to his will in all things."); MCLAURIN, *supra* note 165, at 110.

The point here, is to understand law as a dynamic force with significant reach into the most intimate spaces of our lives. And as such, the historic record begs acknowledgment that Black women's antebellum oppression was not an account of *passive human enslavement and trafficking*. Rather, active predation inflicted on Black girls and women fueled the American economy and its international trade.[337] Slavers sought to maximize and extract profit from Black women by whatever means they could, including sexually.[338] Black women's centrality to the American economy extended beyond southern agrarian plantations to the nation's economic prosperity.[339] In fact, "slave-grown cotton was the most valuable export made in America."[340]

Owners of human beings understood the value in enslaved persons "exceeded the combined value of all the nation's railroads and factories."[341] Black bodies were leveraged in trade, paving the way for foreign investment to "underwr[i]te the expansion of plantation lands in Louisiana and Mississippi."[342] As such slavery was not mildly lucrative, but it was an important economy in the U.S.[343] In fact, the "highest concentration of steam power in the United States was . . . along the Mississippi rather than on the Merrimack."[344] William Gregg, a South Carolina industrialist claimed that northern cities prospered on the system slavery "built by the capital of Charleston."[345] Others proclaimed slavery the "nursing mother of the prosperity of the North."[346]

This system of human trafficking was also deliberate sex trafficking, reifying and regenerating slavery through means of rape and reproduction.[347] For example, in debating *whether*

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337 *See* SVEN BECKERT & SETH ROCKMAN, SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT 11 (2016).

338 *See* Finkelman, *Slavery in the United* States, *supra* note 333, at 112; MCLAURIN, *supra* note 165, at 105, 114 (describing the sexual abuse and exploitation leading to Celia's trial).

339 *See* BECKERT & ROCKMAN, *supra* note 337, at 11.

340 *Id.* at 1.

341 *Id.*

342 *Id.*

343 *See id.*

344 *Id.* at 1–2.

345 *Id.* at 2.

346 *Id.* (citing GENERAL CONVENTION OF AGRICULTURISTS AND MANUFACTURERS, AND OTHERS FRIENDLY TO THE ENCOURAGEMENT AND SUPPORT OF THE DOMESTIC INDUSTRY OF THE UNITED STATES 15 (Baltimore 1827)).

347 *See, e.g.*, Carroll, *supra* note 335 (mentioning that Margaret Garner, an enslaved woman, was the product of the rape of her Black slave mother by a White slave owner); *see also* RICHARD BELL, STOLEN: FIVE FREE BOYS KIDNAPPED INTO SLAVERY AND THEIR ASTONISHING ODYSSEY HOME 33–35 (2019).

*the offspring of a white man and an enslaved Black woman would be "free" or enslaved*, legislatures chose the latter.[348] In 1662, the Virginia Grand Assembly enacted one of its first "slave laws" related to sex, race, and power.[349] The legislature affirmed, "[Whereas] some doubts have arrisen [sic] whether children got by any Englishman upon a [N]egro woman should be slave or ffree [sic], [b]e it therefore enacted and declared by this present [G]rand [A]ssembly, that all children born[ ] in this country shalbe [sic] held bond or free only according to the condition of the mother."[350] In essence, Black women were clearly foundational to the southern and national economies as uncompensated laborers but also as conscripted sexual chattel in a system that fought to keep them subordinate and disempowered.[351]

### C. Law's Suppression of Women

If we turn the knob once more, we may see through additional lenses ways in which legislatures and courts historically disserved the basic interests of women in political, legal, and social contexts. A thoughtful reading of sex-based discrimination tells the story of lawmakers (legislatures, courts, judges, and other lawmakers) not as accomplices, but as chief conspirators and architects in denying women's equality and personhood, while at the same time privileging men and creating systems of male dominance and supremacy. It is within American law that its sex-based caste system is born.

This point is not trivial. Lawmakers and judges positioned women as invisible, incapable, unendowed with the essence of personhood, and ultimately undeserving of certain legal protections depending on a woman's social and or racial and immigration status. Their efforts embedded stereotypes about women's capacities into law. These stereotypes were of legislators' and judges' own creation even though they ascribed their opinions and presentments to natural law or the nature of law.

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348 *See* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860, at 45 (1999).

349 *See* Act XII of December 1662, *reprinted in* 2 WILLIAM WALLER HENING & JOHN CAMPBELL, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 170 (New York, R. & W. & G. Bartow, 1823).

350 *Id.*

351 *See* Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 257, 264 (1999).

Law serves a profound role in the making and unmaking of persons, particularly women, and especially women of color.[352] In cases relevant to women's autonomy and privacy, including *Maher v. Roe*,[353] *Beal v. Doe*,[354] and *Harris v. McRae*[355] the Supreme Court asserted that poor women were responsible or the cause for their vulnerable economic conditions—not the state. Thus, if impoverished, women created that on their own. As such, states were simply bystanders as women failed to accord themselves in a manner that might relieve them of poverty or afford them economic stability and attainment.[356]

By denying that states share at least some responsibility or complicity in poor women's indigence, the Court showed an unwillingness to recognize government's investment in constructing a sex-based American caste system—one that shackled women to subordinate lives. When the Court expresses that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation," it ignores centuries of state legislation that place obstacles in the path of women making choices about their lives.[357]

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352 *See generally* COLIN DAYAN, THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS 52–53, 164–65, 240 (2013) (discussing the various ways certain groups, such as women, and particularly women of color, have been deprived of personhood by the law).

353 *See* 432 U.S. 464, 474 (1977) ("The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.").

354 *See* 432 U.S. 438, 445–46 (1977) ("That interest [in protecting human life] alone does not, at least until approximately the third trimester, become sufficiently compelling to justify unduly burdensome state interference with the woman's constitutionally protected privacy interest. . . . Absent such a showing, we will not presume that Congress intended to condition a State's participation in the Medicaid program on its willingness to undercut this important interest by subsidizing the costs of nontherapeutic abortions.").

355 *See* 448 U.S. 297, 316 (1980) ("[R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty . . . , it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."). According to the Court, indigent women set the conditions for their own poverty. *See* Maher, 432 U.S. at 474; Beal, 432 U.S. at 445–46; Harris, 448 U.S. at 316.

356 *See* Maher, 432 U.S. at 464, 474 ("An indigent woman who desires an abortion suffers no dis-advantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires."); Harris, 448 U.S. at 316 ("The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency[.]").

357 *Harris*, 448 U.S. at 316.

Long before the sophistry articulated in *Maher*, *Beal*, *and Harris*, stereotypes rooted in claims that women lacked intellectual acumen and dexterity to reason stigmatized whole classes of women and defined the limits of their personhood and citizenship.[358] These presentments sprang forth from law. Whether imposing constraints on women's exercise of bodily autonomy, denying their right to vote, or prohibiting their employment, law conveyed these limitations. And as law does not self-propagate or create itself from thin air, the roles of courts and legislatures in law must be acknowledged in the enduring subordination of women.[359]

By marking women's capacities almost exclusively along the lines of duties to a father or husband, mothering, reproducing, and as obligatory sexual chattel, lawmakers and courts scripted women's destinies. They conscripted women into the army of domestic servitude. Stereotypes shaped and cultivated by legislation and applied by courts framed social and legal expectations between men and women.[360] Common law granted men recovery for the losses associated with their wives' sexual unavailability under the *loss of consortium* causes of action and even for the debauchery of their daughters.[361]

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358 *See* Jerry Bergman, *Darwin's Teaching of Women's Inferiority*, INST. FOR CREATION RESEARCH (Mar. 1, 1994), https://www.icr.org/article/darwins-teaching-womens-inferiority/ [https://perma.cc/J8VA-CVV2] (discussing Charles Darwin's misleading and disparaging teachings that women are biologically inferior to men).

359 The Court barred them equal rights to contract for longer workdays as men could, which compressed women's wages, creating a wage gap. The Court upheld legislation exempting women from jury service, thereby limiting their engagement across various systems of justice. The Court upheld dubious restrictions related to women's range of employment (ironically banning them from work as bartenders even in establishments they owned). *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 421–23 (1908) (upholding Oregon legislation limiting the number of hours women were permitted to work); Hoyt v. Florida, 368 U.S. 57, 65 (1961) (upholding a statute allowing women to automatically be exempted from serving on juries), *overruled by* Taylor v. Louisiana, 419 U.S. 522, 537 (1975).

360 *See, e.g.*, In re Bradwell, 55 Ill. 535, 538 (1869), ("Upon this question, it seems to us neither this applicant herself, nor any unprejudiced and intelligent person, can entertain the slightest doubt."), *aff'd sub nom.* Bradwell v. Illinois, 83 U.S. 130, 139 (1872) (upholding the denial of a married woman's application for a license to practice law).

361 *See, e.g.*, Parker v. Elliott, 20 Va. (6 Munf.) 587, 587–88 (1820) (affirming a man's claim for loss of services of his daughter, who was "debauch[ed] and g[ot] with child"); Hyde v. Scyssor (1620) 79 Eng. Rep. 462, 462; Cro. Jac. 538, 538 (concluding that the loss of consortium applied to a suit brought by a husband for "loss and damage[s]" and "for want of [his wife's] company"); Ohio & Miss. Ry. v. Cosby, 7 N.E. 373, 375 (Ind. 1886) (indicating that the husband was permitted to submit a claim to recover for "loss of service, and of the society of his wife"); Birmingham S. Ry. v. Lintner, 38 So. 363, 365 (Ala. 1904) (recognizing the husband's right of consortium). *See also* Susan G. Ridgeway, *Loss of Consortium and*

In *Minor v. Happersett,* the Supreme Court upheld a law that denied women voting rights.[362] The Court acknowledged women's citizenship on one hand and denied them the benefits of that citizenship on the other. Shortly thereafter in *Bradwell v. Illinois*, the U.S. Supreme Court upheld a law barring women law graduates from practicing law.[363] Justice Joseph Bradley claimed that nature and law deemed it "repugnant" for a woman to adopt "a distinct and independent" civic life from her husband.[364] Explicit in the Court's reasoning were stereotypes about women's capacities. Subsequently, the Wisconsin State Supreme Court in *In re Goodell* articulated a similar principle:

> We cannot but think the common law wise in excluding women from the profession of the law. . . . The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. . . . There are many employments in life not unfit for female character. The profession of the law is surely not one of these.[365]

The court also stated, "The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife."[366] Women did not frame their destinies as such, but lawmakers and courts presumed women as a class of persons unfit for the pursuit of life and livelihoods independent of the men in their lives.

A mere few years after women secured voting rights through the Nineteenth Amendment, the Supreme Court issued the landmark decision of *Buck v. Bell*, upholding the constitutionality of Virginia's Eugenical Sterilization Act.[367] In an 8–1 decision, the Court ruled the power that grants states the authority to vaccinate is broad enough to compel the forced sterilization of girls and women deemed unfit.[368] Writing for the majority, Justice Holmes issued a haunting condemnation

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*Loss of Services Actions: A Legacy of Separate Sphere*, 50 MONT. L. REV. 349, 352–53 (1989).

362 88 U.S. 162, 176 (1874).

363 83 U.S. at 139.

364 *Id.* at 141.

365 39 Wis. 232, 244–45 (1875) ("Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things.").

366 *Id.* at 245.

367 274 U.S. 200, 207 (1927).

368 *See id.*

of the female sex, declaring "[t]hree generations of imbeciles are enough."[369]

This case involved Carrie Buck, whom Justice Holmes described as, "a feeble minded white woman."[370] He claimed that she was the "daughter of a feeble minded mother" and "the mother of an illegitimate feeble minded child."[371] These statements were inaccurate.[372] Nevertheless, Carrie's poverty, perceived intellectual shortcomings, teenage pregnancy (the result of a rape), and family history of alcoholism served to justify the state's reprisal and her sterilization.[373] Justice Holmes declared:

> It would be strange if [the legislature] could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.[374]

Justice Holmes concluded, "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."[375] In the wake of the Supreme Court declaring the Virginia eugenics law constitutional, sixty thousand Americans were convicted of social unfitness and surrendered to public health officials for compulsory sterilizations.[376] Most victims were girls and women.[377] In North Carolina, nearly 30% of forced sterilizations were forced on children "under age 18" and 60% of all sterilization victims were Black.[378] Notably,

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369 *Id.*

370 *Id* at 205.

371 *Id.*

372 *See* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 51–52 (1985). The state of Virginia had claimed that Buck possessed low social character and intelligence; it predicted that were she to have more children they would be born of inferior intelligence. She and others like her were collected by public health officials to be sterilized. However, years after the case, Holmes and public health officials in Virginia were proven wrong, Buck's daughter, Vivian, was a successful student—well above average. *Id.* at 61

373 *Id.* at 50 (noting that the Defendant's attorney, Aubrey Strode, "presented eight witnesses from the area near Carrie's home in an attempt to prove her social inadequacy.'").

374 *Buck*, 274 U.S. at 207.

375 *Id.*

376 Kim Severson, *Thousands Sterilized, A State Weighs Restitution*, N.Y. TIMES, Dec. 10, 2011 at A1; Lombardo, *supra* note 372, at 31.

377 *Id.*

378 *See* Lutz Kaelber, *Eugenics/Sexual Sterilizations in North Carolina*, UNIV. OF VT., https://www.uvm.edu/~lkaelber/eugenics/NC/NC.html [https://perma.cc/

years after in *Oklahoma v. Skinner*,[379] the Supreme Court overturned a state's law that would impose reproductive constraints on a male petty-thief, while never overturning *Buck v. Bell.*

The legacy of implicit and explicit sex bias and discrimination informs the present status(es) of women in relation to their labor, caregiving, and invisible work. This is particularly so in the present moment, marking the 100th year anniversary of the Nineteenth Amendment's ratification, which coincides with global coronavirus pandemic and racial unrest. The former places demand on women as visible and invisible caregivers and COVID-19 sets the stage for interrogating women and work generally, and specifically in times of national or state crisis.

## III
## WOMEN ON THE FRONTLINES: GLASS CEILINGS, GLASS CLIFFS, AND PINK GHETTOES

In March 1986, the *Wall Street Journal* issued a special report on the "glass ceiling." The authors identified imperceptible impediments that hindered female managers from advancing and that stymied their progress because of what they described as a "corporate tradition and prejudice."[380] Rather than overt prejudice of the type embedded in legislation explicitly denying women entry in particular professions, the glass ceiling operates in plain view of law in covert ways. Even then, the term was not new as it had been introduced by others.

The term glass ceiling has been attributed to Marilyn Loden, who, in *Implementing Diversity* and a speech delivered in 1977 to the Women's Action Alliance, posed critical data about the impediments in women's full progress toward employment equity and attainment.[381] She described invisible barriers to women's advancement to leadership positions, de-

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V83U-XWBY] (last updated Oct. 30, 2014); Valerie Bauerlein, *North Carolina to Compensate Sterilization Victims*, WALL ST. J. (July 26, 2013, 1:46 PM), https://www.wsj.com/articles/SB10001424127887323971204578629943220881914 [https://perma.cc/DD4X-SFVD].

379 316 U.S. 535, 542–43 (1942).

380 *See* Ben Zimmer, *The Phrase 'Glass Ceiling' Stretches Back Decades*, WALL ST. J. (Apr. 3, 2015, 3:23 PM) ("They detailed imperceptible obstacles faced by female managers, stymied by 'corporate tradition and prejudice' rather than overt discrimination."), https://www.wsj.com/articles/the-phrase-glass-ceiling-stretches-back-decades-1428089010 [https://perma.cc/2TQG-L2QR].

381 Molly Carnes, Claudia Morrissey & Stacie E. Geller, *Women's Health and Women's Leadership in Academic Medicine: Hitting the Glass Ceiling*, 17 J. WOMEN'S HEALTH 1453, 1453 (2008).

spite important civil rights gains.[382] In recent years, the "glass ceiling" framework has been adopted by government in the establishment of the Federal Glass Ceiling Commission, established by the Civil Rights Act of 1991. The Commission, launched by President George Bush, operates "with a mandate to identify barriers that have prevented the advancement of women and minorities in the labor force."[383]

Today, women's progress is not only measured by glass ceilings but also by a lexicon of terminologies and metaphors to describe and capture impediments to full inclusion and advancements. These include glass *walls* (barriers that hold women in the pink collar); *glass escalators* (occupational segregation where men in female dominated occupations are promoted to leadership positions at a much faster rate); *sticky floors* (where women are held "down to low level jobs" that prevent them from seeking management positions), *and glass cliffs* (where women in leadership are precariously positioned to fail).[384]

In other words, even when women reach senior leadership, they continue to encounter obstacles and challenges, including tending to be "evaluated less favorably, receive less support from their peers, [be] excluded from important networks, and receive greater scrutiny and criticism even when performing exactly the same leadership roles as men."[385] When women in leadership encounter an "uphill battle with these challenges which may set them up for failure, thus pushing them over the edge [they experience] a phenomenon [known] as 'glass cliff.'"[386]

### A. Labor's Glass Ceiling: Law Firms

Professor Naomi Cahn recently wrote, "Even before the pandemic, women of color often stood at the intersection of multiple barriers," including exclusions at the top of America's

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382 *Id.*

383 *Id. See also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, GLASS CEILINGS: THE STATUS OF WOMEN AS OFFICIALS AND MANAGERS IN THE PRIVATE SECTOR (2004), https://www.eeoc.gov/special-report/glass-ceilings-status-women-officials-and-managers-private-sector [https://perma.cc/2SR2-EQEX]; Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1082, § 203.

384 Meghna Sabharwal, *From Glass Ceiling to Glass Cliff: Women in Senior Executive Service*, 25 J. PUB. ADMIN. RES. & THEORY 399, 399–400 (2013); Michelle K. Ryan & S. Alexander Haslam, *The Glass Cliff: Exploring the Dynamics Surrounding the Appointment of Women to Precarious Leadership Positions*, 32 ACAD. MGMT. REV. 549, 549–50 (2007).

385 Sabharwal, *supra* note 384, at 400.

386 *Id.*

business industries—as less than "1% of Fortune 500 CEOs."[387] Her observation illuminates a significant workforce problem. In fact, not one Black woman holds a Fortune 500 CEO seat.[388] Labor's glass ceiling affects women at both ends of the labor spectrum as discussed in Subpart A.

A 2017 report by Vault and the Minority Corporate Counsel Association ("MCCA") on diversity in law firms illuminates the problem related to women and elite employment, at least within law. Their research presents alarming data, noting for example that at law firms, the rate of recruiting and hiring Black lawyers "remains below pre-recession levels."[389] For more than a decade, the MCCA and Vault have collected data and gathered detailed "breakdowns of law firm populations by race/ethnicity, gender, sexual orientation and disability status across attorney levels—from summer associates hired to partners promoted, from the lawyers who serve on management committees to the attorneys who leave their firms."[390] This comprehensive collection of data on placement in the legal profession offers a detailed "demographic snapshots of the nation's leading law firms as well as of the industry as a whole."[391]

Most tellingly, despite women's advancements as law students and stature as junior associates, the decline in employment at the nation's law firms "is primarily among women."[392] Troubling for many reasons, researchers explain that, "in both 2007 and 2008, more than 3 percent of lawyers hired were African American women; since 2009 that number has not climbed above 2.77%, the most recent figure."[393] Women of color are also overrepresented in departures from law firms.[394]

In 2016, according to Vault's most recently available research, Black women attorneys resigned their firms at the

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387 Naomi Cahn, *COVID-19's Impact On Women of Color*, FORBES (May 10, 2020, 6:01 PM), https://www.forbes.com/sites/naomicahn/2020/05/10/mothers-day-and-covid-19s-impact-on-women-of-color/?sh=7ed4017541ac [https://perma.cc/TC2F-5QSN].

388 Phil Wahba, *The Number of Black CEOs in the Fortune 500 Remains Very Low*, FORTUNE (June 1, 2020, 11:19 AM), https://fortune.com/2020/06/01/black-ceos-fortune-500-2020-african-american-business-leaders/ [https://perma.cc/T8D3-LMW8].

389 VAULT & MCCA, 2017 VAULT/MCCA LAW FIRM DIVERSITY SURVEY 12 (2017), https://www.mcca.com/wp-content/uploads/2017/12/2017-Vault-MCCA-Law-Firm-Diversity-Survey-Report.pdf [https://perma.cc/VW82-FERA].

390 *Id.* at 3.

391 *Id.*

392 *Id.* at 12.

393 *Id.*

394 *Id.*

highest rates among all women at 18.4 percent.[395] Similarly, Asian American women departed elite law firms at a high rate (14.4 percent), followed by Latinas (12.4 percent).[396] Notably, white women were the least likely among women to depart law firms (11.6 percent).[397] Even so, their resignations remained higher than that of white men (9.1 percent).[398]

Women comprise nearly fifty percent of associates at law firms, yet they account for less than twenty percent of equity partners.[399] *What accounts for such sex disparities? Why are women making such limited progress in these spheres?*

Notably, these conditions and the disparities that emerge from them are not confined to law firms. General counsel positions are equally stratified.[400] For example, even while "progress has certainly occurred since . . . there were only 11 minorities who were general counsel" at Fortune 500 companies in 1999.[401] According to a study focused on diversity and the legal profession, much of the slow but seemingly steady progress among women as general counsels has been concentrated among white women.[402] Women of color are essentially shut out.

Prior work speculated whether the social sorting of women law graduates resulted in a stratification into law's invisible pink collar.[403] My co-author and I noted that women who place at elite firms might find the environments unwelcoming, unsupportive, and quite frankly, toxic.[404] This might contribute to the sex flight from top firms. But, even if those are the reasons why women leave elite firms, it begs the questions why such cultures persist at law firms and why the conditions continue to be tolerated?

Moreover, these pipeline trends may affect the highest reaches of law in legislatures—state and federal—as well as

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395 *Id.*

396 *Id.*

397 *Id.*

398 *Id.*

399 *Women in Law: Quick Take*, CATALYST (Oct. 2, 2018), https://www.catalyst.org/knowledge/women-law [https://perma.cc/L35B-8ZSC].

400 *See id.*

401 *Breaking Through the Concrete Ceiling: One Woman at a Time*, DIVERSITY & BAR MAG., Dec. 27, 2017, at 9, https://issuu.com/mcca10/docs/05_-_db_winter_2017 [https://perma.cc/57RL-D45J].

402 *Id.* at 13.

403 *See, e.g.*, Michele Goodwin & Mariah Lindsay, *American Courts and the Sex Blind Spot: Legitimacy and Representation*, 87 FORDHAM L. REV. 2337, 2347 (2019) (examining the underrepresentation of women on the federal judiciary).

404 *Id.* at 2347–48.

courts. In 2018, women held barely twenty percent of elected federal offices[405] and roughly twelve percent of federal judgeships.[406] A year later, a study conducted by the Inter-Parliamentary Union—based on information provided by national governments as of February 2019—ranks the United States seventy-sixth worldwide in women's federal leadership.[407] There are greater percentages of women in central government leadership in developing nations such as Nicaragua, Rwanda, and Ecuador than in the U.S. Congress.[408]

### B. Glass Cliffs: U.S. Courts

Data on American courts reveal a similarly daunting story. According to Sherrilyn Ifill, the president of the NAACP Legal Defense Fund, "[w]e pretend that these monumental questions of who sits on the Supreme Court have nothing to do with how equality is defined in our country."[409] Who sits on our courts matters and this, according to Ifill, is deeply relevant to dignity, equality and opportunity for all the people in the United States.[410] She's right.

Researchers at the Gavel Gap project, sponsored by the American Constitution Society for Law and Policy, report "troubling differences between the race and gender composition of the courts and the communities they serve."[411] The Gavel Gap research studies diversity on state courts and their data provides an important lens for examining and measuring

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405 *Women in Elective Office 2018*, CTR. FOR AM. WOMEN & POL'Y, http://www.cawp.rutgers.edu/women-elective-office-2018 [https://perma.cc/8ZAH-DFRY] (last visited Apr. 18, 2021).

406 In our research, we tracked appointments of women to federal appellate courts. As of 2018, 754 judges had served on the U.S. courts of appeals and only 91 of those judges were women. That is, roughly 12 percent of all court of appeals judges have been women. Mariah Lindsay & Michele Goodwin, *Study of Female Representation on the Federal Bench 1790–2017* (2018) (unpublished study) (on file with authors).

407 *See Women in National Parliaments*, INTER-PARLIAMENTARY UNION (Feb. 1, 2019), http://archive.ipu.org/wmn-e/classif.htm [https://perma.cc/EBZ8-BMUG].

408 *Id.*

409 Vandana Menon, *Sherrilyn Ifill Explains the Racial Politics Behind the Supreme Court Nomination Process During Public Interest Week Lunch Talk*, PENN L., https://www.law.upenn.edu/live/news/8531-sherrilyn-ifill-explains-the-racial-politics/news/publicervice-news (Oct. 5, 2018) [https://perma.cc/AXU9-3Y47].

410 *Id.*

411 Introduction Webpage to *Who Sits in Judgment on State Courts?*, THE GAVEL GAP, *available at* http://gavelgap.org (last visited Sept. 13, 2020) [https://perma.cc/SV4X-GMSC].

the glass ceiling and cliff. For instance, "[p]eople of color are 40% of the population, but less than 20% of state judges."[412]

In state courts, only thirty percent of judges are women, and, overall, eighty percent of judges are white.[413] This disconcerting data cannot be explained by women not attending law school in critical mass. Nor can it be explained by women's performance or accomplishments in the early stages of their law careers. They write, "We find that courts are not representative of the people whom they serve—that is, a gap exists between the bench and the citizens."[414]

Research exposes similar patterns in the federal judiciary, highlighting a persistent sex gap on the bench. Despite the additions of Justices Sotomayor and Kagan to the Supreme Court (both appointed by President Barack Obama), women remain critically underrepresented in the judiciary at every level. They remain less than one third of judges presently serving on courts.[415] This long-standing problem of imbalanced representation by women in the American judiciary dates back to the founding and incorporation of the judiciary itself.

Of the 114 justices who have served on the Supreme Court since 1790, only five have been women. Barack Obama appointed forty percent of them. In more than 225 years, only three justices have been persons of color (two of whom are presently serving on the court).[416] Women were essentially excluded from attaining the federal judiciary ranks until well after the courts of appeals were established. Florence Allen, the first woman appointed to a U.S. Court of Appeals (in 1934) by President Franklin D. Roosevelt[417] remained the only woman to serve on a U.S. Court of Appeals until her departure in 1959. The next woman judge on the U.S. Court of Appeals would not be confirmed until 1968, when President Lyndon B. Johnson

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412 *Id.*

413 TRACEY E. GEORGE & ALBERT H. YOON, AM. CONSTITUTION SOC'Y, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? 10, 18 (2016), http://gavelgap.org/pdf/gavel-gap-report.pdf [https://perma.cc/C98U-4B3N].

414 *Id.* at 2.

415 COMM'N ON WOMEN IN THE PROFESSION, AMERICAN BAR ASSOC., A CURRENT GLANCE AT WOMEN IN THE LAW 5 (Jan. 2018), https://www.americanbar.org/content/dam/aba/administrative/women/a-current-glance-at-women-in-the-law-jan-2018.authcheckdam.pdf [https://perma.cc/B7TE-39RP].

416 *See* Jessica Campisi & Brandon Griggs, *Of the 113 Supreme Court Justices in US History, All But 6 Have Been White Men*, CNN (Sept. 5, 2018, 8:56 AM), https://www.cnn.com/2018/07/09/politics/supreme-court-justice-minorities-trnd/index.html [https://perma.cc/7LYV-YA6D].

417 *See Florence Ellinwood Allen*, NAT'L WOMEN'S HALL FAME, http://www.womenofthehall.org/inductee/florence-ellinwood-allen (last visited Sept. 13, 2020) [https://perma.cc/CS8B-N6M5].

nominated Shirley Ann Mount Hufstedler to the Ninth Circuit.[418]

Prior research tracked these appointments.[419] As of 2018, 754 judges had served on the U.S. courts of appeals and only ninety-one of those judges were women.[420] That is, roughly twelve percent of all court of appeals judges have been women. Again, as of 2018, there were 269 sitting judges in the federal circuit courts, but only seventy-three of those judges were women.[421] Two important datapoints can be extrapolated and analyzed from this tracking. First, as of a few years ago, of the ninety-one women to ever sit on the courts of appeals, 73 were currently serving. This datapoint underscores both the historic legacy of women's exclusion and the recent trickling of inclusion. Second, women only represented roughly twenty percent, barely over a fourth, of the judges then serving on the bench. In some circuits, as few as two women have ever served as a judge.[422] On some, there have never been a woman of color.[423]

For example, as of 2018, no women of color had ever served as circuit judges in the Third, Fifth, Eighth, Tenth, and Eleventh Circuits.[424] That these circuits include Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, New Mexico, and Texas, among other states is revealing and should cause concern. Common among each of the states are dense populations of people of color and legacies of slavery and Jim Crow. In these states, histories of race and sex subordination instantiated by government and the private sector are hard to erase and have affected nearly every aspect of life.

This sex gap on America's courts was further magnified under the Trump administration. More than ninety percent of President Donald Trump's nominees were white and more than eighty percent male.[425] According to one report, this placed President Trump on pace to nominate more white men than

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418 *See Hufstedler, Shirley Ann Mount*, FED. JUDICIAL CTR., https://www.fjc.gov/history/judges/hufstedler-shirley-ann-mount (last visited Sept. 13, 2020) [https://perma.cc/2KWU-UHHV].

419 Goodwin & Lindsay, *supra* note 403, at 2352.

420 *Id.*

421 *Id.*

422 *Id.*

423 *Id.*

424 *See id.* at 2353 tbl.2.

425 Catherine Lucey & Meghan Hoyer, *Trump Choosing White Men as Judges, Highest Rate in Decades*, AP NEWS (Nov. 13, 2017), https://apnews.com/a2c7a89828c747ed9439f60e4a89193e/Trump-choosing-white-men-as-judges,-highest-rate-in-decades [https://perma.cc/X5AT-Q7UX].

any president in nearly thirty years.[426] According to the Brennan Center, "[n]ot a single one of Trump's 53 confirmed appeals court nominees [was] Black. Only a single confirmed appeals court nominee is Latino."[427] President Trump ultimately appointed three in ten federal appellate judges and more than one in four federal district court judges.[428] Given that federal judicial seats come with life appointments, women will be shut out for decades to come. Similar patterns are detected within the ranks of U.S. attorneys: "There are 93 offices around the country" and as of 2020 "just seven [U.S. attorneys] who are women. There are only two who are Black."[429]

Importantly, the sex gap on the federal bench is also racialized. The vast majority of female judges serving on both state and federal courts are white. White women are more likely to be nominated than women of color to the federal judiciary. A look at appointments by presidents over the past fifty years (and more) illustrates the slow change in the federal judiciary's composition. For example, President Carter expanded the number of women nominated to the federal bench.[430] Indeed, he nominated more black judges to federal courts than all prior presidents combined.[431] Even so, according to the Congressional Research Service, "of all the district court judges appointed by President Carter, 67% were white men; 11% were white women; 19% were non-white men; and 3% were non-white women."[432]

In those instances, clearly women broke glass ceilings—and yet they lacked a critical mass,[433] which affects a group's

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426 *Id.*

427 *See* Andrew Cohen, *Trump and McConnell's Overwhelmingly White Male Judicial Appointments*, BRENNAN CTR. JUSTICE (July 1, 2020), https://www.brennancenter.org/our-work/analysis-opinion/trump-and-mcconnells-overwhelmingly-white-male-judicial-appointments [https://perma.cc/NLD5-VDE7].

428 John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RESEARCH CTR.: FACT TANK (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ [https://perma.cc/BX7W-GD6U].

429 Cohen, *supra* note 427.

430 *See The Higher Education of the Nation's Black Women Judges*, 16 J. BLACKS IN HIGHER EDUC. 108, 108 (1997) ("Jimmy Carter appointed seven black women to federal judgeships.").

431 *Id.*

432 BARRY J. MCMILLION, CONG. RSCH SERV., R43426, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS 22 (2017).

433 *See, e.g.*, ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 206–21 (1977) (discussing how female employees' status as "tokens" at a large corporation in the 1970s "set in motion self-perpetuating cycles that served to

ability to influence and wield power and authority. As prior research reports, "[a] lack of critical mass in any polity risks producing both sociological and normative illegitimacy, including within courts."[434] Normative illegitimacy on the federal bench means that while women's presence on the bench is crucial, when there are too few it may offer underserving legitimacy or cover to the court that may yet be hostile to the concerns of women or women of color. In other words, institutions that lack "a critical mass of women can produce and reify tokenism, and it can create barriers to meaningful participation and persuasion."[435]

Finally, even under President Barack Obama's administration, women of color were less likely as a group to be nominated to the federal judiciary—by a significant margin.[436] During the Obama administration, 15.7 percent of district court appointees were women of color, while 20.9 percent where nonwhite men and 25.4 percent were white women.[437] If one were to closely examine federal judgeships under President Obama, he appointed seven of the nine Asian American women (or seventy-eight percent) "to ever serve as federal district court judges. He also appointed each of the four multiracial women to ever serve as district court judges."[438] In total, "he . . . appointed 42 (or 45%) of the 93 non-white women to ever serve as U.S. district court judges."[439] Even so, almost forty percent of President Barack Obama's district court appointees were white men.[440] President Obama's nomination of women of color to the federal judiciary was often hailed as historic and unprecedented. Sadly, while true, it also likely reflects the near absence and isolation of non-white women in federal judgeships during prior administrations.

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reinforce the low numbers of women and . . . to keep women in the position of token"); Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965, 966, 969–77 (1977) (discussing how the numerical dominance of a majority group shapes members of a minority's status as "tokens"); Pamela Oliver, Gerald Marwell & Ruy Teixeira, *A Theory of the Critical Mass. I. Interdependence, Group Heterogeneity, and the Production of Collective Action*, 91 AM. J. SOC. 522, 524 (1985) (calling attention to collective action depending on a critical mass).

434 Goodwin & Lindsay, *supra* note 403, at 2361 (footnote omitted).

435 *Id.*

436 MCMILLION, *supra* note 432, at 22.

437 *Id.*

438 *Id.*

439 *Id.*

440 *Id.*

### C. The Academic Pink Collar

Law firms and courts represent only slices of America's labor glass ceiling. In academia similar patterns of the "hemorrhaging" effect persists. That is, nearly fifty years since "Title IX and affirmative action policies promised to transform the demographic profile of the American faculty, how far has American higher education progressed toward the goal of diversification?"[441] Persistent and discernible sex gaps, revealing women's marginalization in the academy are well documented.[442]

John Curtis, Director of Research and Public Policy at the American Association of University Professors, warns against what he describes as a "common presumption, both within and outside the higher education community, that as bastions of innovation and consideration of ideas and people on their merits, colleges and universities must be at the leading edge of efforts to implement equitable employment practices in their own organizations"[443] However, the empirical data amassed by social scientists who study gender and sex disparities in the academy simply does not support that presumption.[444] It is worth considering why the presumption holds, however. Even ten years ago nearly sixty percent of both undergraduates and graduate students were women.[445] At each level at which degrees are awarded, women will make up the majority.

In view of such data, some researchers raise alarm, questioning, "[w]here are the men?" rather than considering who are the mentors for these women and are they mentored?[446] The trends, despite women's expanded enrollment, "is slow—actually, very slow—progress."[447] For example, "after graduate school . . . the precipitous declines begin, as the number of women falls approximately ten percentage points each at the stages of assistant and associate professorship, so that finally

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441 MARTIN J. FINKELSTEIN, VALERIE M. CONLEY, & JACK H. SCHUSTER, TIAA INST., TAKING THE MEASURE OF FACULTY DIVERSITY 1 (2016), https://www.tiaainstitute.org/sites/default/files/presentations/2017-02/taking_the_measure_of_faculty_diversity.pdf [https://perma.cc/6LHA-B248].

442 John W. Curtis, AM. ASS'N UNIV. PROFESSORS, PERSISTENT INEQUITY: GENDER AND ACADEMIC EMPLOYMENT 1–12 (2011), https://www.aaup.org/NR/rdonlyres/08E023AB-E6D8-4DBD-99A0-24E5EB73A760/0/persistent_inequity.pdf [https://perma.cc/4J2U-M9DR].

443 *Id.* at 1.

444 *Id.*

445 *Id.*

446 *Id.*

447 *Id.* at 2 (emphasis omitted).

the percentage of female full professors hovers around 32 percent."[448]

Despite women's progress at the undergraduate and graduate levels, their numbers fall sharply when attempting to gain a foothold as professors. According to an often-cited report, *Taking the Measure of Faculty Diversity*, "[a]s recently as 20 years ago, men dominated women in the tenured ranks at research universities by a whopping 4.4 to 1."[449] The study's authors report that "[w]hile that gender gap has shrunk by nearly half over the ensuing twenty years, it nonetheless remains fairly substantial (2.3 men to 1 woman) among tenured appointments at the research universities, especially the private research universities."[450] One researcher speculates that "[w]hile there were significant gains during much of the 20th century, feminist progress in the academy . . . may have already come to a halt."[451]

Professor Troy Vettese points to the fact that "[s]ince the 1970s, an increasing number of women have joined university faculties, but this obscures the fact that in the last thirty years much of that influx has been directed toward non-tenure-track positions."[452] Women are overrepresented in contingent or non-tenure track positions, which have become pink collar academic mills. As of a decade ago, "three quarters of the total instructional staff [was] in contingent positions, including full- and part-time non-tenure-track faculty and graduate student employees" and women were disproportionately "overrepresented in each of the contingent faculty categories."[453]

It appears that women are in the most marginalized positions throughout the academy, whether as a version of contin-

448 Troy Vettese, *Sexism in the Academy: Women's Narrowing Path to Tenure*, N+1 (2019), https://nplusonemag.com/issue-34/essays/sexism-in-the-academy/ [https://perma.cc/U54U-AUVE].

449 Finkelstein, Conley & Schuster, *supra* note 441, at 5.

450 *Id.*

451 Vettese, *supra* note 448.

452 *Id.*

453 Curtis, *supra* note 442, at 2.

gent faculty,[454] adjunct faculty,[455] or as part-time faculty.[456] This may be invisible to the students they teach. Students may believe that their universities, law schools, and medical schools are advancing diversity, equity, and inclusion, but there are hidden, internal hierarchies. Moreover, "[t]here's a myth about adjuncts that just won't die: that most have well-paying day jobs and teach as a hobby . . . Just 15 percent of adjuncts said they are able to comfortably cover basic expenses from month to month."[457]

To place the overrepresentation of women among the lowest ranks of professors and teaching in context, "[n]early 25 percent of adjunct faculty members rely on public assistance, and 40 percent struggle to cover basic household expenses."[458] These women are less likely to receive paid family leave (seventeen percent) or paid parental family leave (fourteen percent).[459] A 2020 report by the American Federation of Teachers, *An Army of Temps*, "the first nationwide survey of contingent faculty conducted since 2013" illustrates how "precarious academic work was even before the coronavirus pandemic, which has made a grave situation even worse."[460] Among the key takeaways:

- "[N]early 20 percent rely on Medicaid";
- "About 45 percent of faculty members surveyed have put off getting needed healthcare, including mental healthcare";
- "65 percent forgo dental care";
- "41 percent struggle with job security, reporting that they don't know if they will have a teaching job until one month before the beginning of the academic year";

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454 *Id.* at 2 ("But here, too, the proportion of women in that contingent situation has been and remains larger; the gap is not closing.").

455 Colleen Flaherty, *Barely Getting By*, INSIDE HIGHER ED. (April 20, 2020), https://www.insidehighered.com/news/2020/04/20/new-report-says-many-adjuncts-make-less-3500-course-and-25000-year [https://perma.cc/3FM7-QDQH] ("It is well established that underrepresented minorities and women are overrepresented among adjuncts. The [American Federation of Teachers] sample is 64 percent female, 33 percent male, 1 percent gender nonconforming and 0.1 percent transgender."); *see also* American Federation of Teachers, *An Army of Temps: AFT 2020 Adjunct Faculty Quality of Work/Life Report* (2020), https://www.aft.org/sites/default/files/adjuncts_qualityworklife2020.pdf [https://perma.cc/7G8M-G5NH] (providing the source of the statistics previously cited).

456 Curtis, *supra* note 442, at 2 ("As of fall 2009 more than half of all faculty members are employed part time, and there is a significant gap between women and men in the proportion in that situation.").

457 Flaherty, *supra* note 455.

458 *Id.*

459 American Federation of Teachers, *supra* note 455, at 6.

460 *Id.* at 1.

- "For 3 out of 4 contingent faculty, employment is only guaranteed from term to term."[461]

These jobs, which once provided a middle-class wage, have, with the entry of women, become low wage positions. According to a 2014 report commissioned by Congress, adjunct and contingent employees now make up a "'just-in-time' workforce, with lower compensation and unpredictable schedules for what were once considered middle-class jobs."[462] Congressional investigators offer the following conclusion: "[A]djuncts and other contingent faculty likely make up the most highly educated and experienced workers on food stamps and other public assistance in the country."[463] The report makes clear that not only do the women who take on these jobs suffer, but the quality of education their students receive may be compromised, too.[464]

Furthermore, after entering the tenure track, "[i]n the US, the share of female full professors as a proportion of all female faculty remains stuck in the single digits, increasing only modestly since the early 1990s."[465] Notwithstanding their pace of enrollment and rates of graduation with terminal degrees, "[t]he culmination of a faculty career, full professor status, remains an elusive goal for women."[466] Even in law and medicine, where the "increase in the proportion of degrees earned by women has been especially dramatic . . . rising from only 3 percent in 1960-61 to a projected 51 percent [in 2011]," still the overall percentage of full professors lags woefully behind.[467]

In U.S. medical schools, "[w]omen represent 17% of tenured professors, 16% of full professors, 10% of department chairs, and 11% of medical school deans at U.S. academic medical centers."[468] This rate of progress belies the high rate of women entering and successfully graduating from medical

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461 *Id.*

462 Colleen Flaherty, *Congress Takes Note*, INSIDE HIGHER ED. (Jan. 24, 2014), https://www.insidehighered.com/news/2014/01/24/house-committee-report-highlights-plight-adjunct-professors [https://perma.cc/2GMU-FMWY]; *see also* STAFF OF H. COMM. ON EDUC. AND THE WORKFORCE: 113TH CONG. REP. ON EFORUM RESPONSES ON THE WORKING CONDITIONS OF CONTINGENT FACULTY IN HIGHER EDUCATION 2 (2014) (Democratic Staff).

463 STAFF OF H. COMM. ON EDUCATION AND THE WORKFORCE, *supra* note 463, at 26.

464 *Id.* at 27 ("Since I need to teach so many classes and have to work a third job right now, I cannot put in as much time with my students as I would like to.").

465 Vettese, *supra* note 448.

466 Curtis, *supra* note 442, at 2.

467 *Id.*

468 Carnes, Morrissey & Geller, *supra* note 381, at 1455.

schools. As researchers suggest, despite evidence of progress, "the rate of advancement of women into leadership positions in academic medicine is slower than would be predicted by their numbers in medicine for the past 35 years."[469]

Even while the AFT and congressional studies do not investigate race or racism at the frontlines of American institutions of higher education, other reports do. There has been exponential growth of women of color in the academy, given that they were almost entirely shut out just two decades ago. Asian American and Latinx women have made great strides. However, their relative climbs must be evaluated over the whole, which remains predominately male and overwhelmingly white.[470] According to Troy Vettese, "[a]mong the most serious expressions of women's hardship in the academy is the case of US black female scientists, who often experience desolate isolation in addition to sexual and racial harassment."[471] Black and Latino faculty grew only from 8.2 percent to 11.1 percent from 1993 to 2013.[472] However, rather than climbing, the "proportion of black women among tenured female faculty in the U.S. has actually fallen since 1993."[473]

### D. Sticky Floors and Low Wage Jobs

Even while women's inability to gain a foothold in the nation's most competitive and lucrative industries is problematic, equally so are the depressed, lower wage conditions to which women are relegated. Women are compressed in the lower tiers of the nation's economy as much as they are shut out at the higher tiers. Thus, despite marked advancements in educational attainment and "sharp increase in credentials, women are still far more likely than men to work for low pay."[474]

Notwithstanding decades of effort and advocacy across various spheres of employment, women are nearly sixty percent

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469 *Id.*

470 Finkelstein, Conley & Schuster, *supra* note 441, at 13 ("Asian-American women showed robust growth rates across all appointment types, ranging from 238.4% (among tenure-track, full-time faculty) to 321.6% (among tenured faculty); and 321.3% (among part-time faculty)"—yet this represents only an increase from 2.9% to 7.2% of tenured women faculty overall).

471 Vettese, *supra* note 448.

472 Finkelstein, Conley & Schuster, *supra* note 441, at 8.

473 Vettese, *supra* note 448; *see also* Finkelstein, Conley & Schuster, *supra* note 441, at 13.

474 Jasmine Tucker & Kayla Patrick, *Low-Wage Jobs Are Women's Jobs: The Overrepresentation of Women In Low-Wage Work*, NAT'L WOMEN'S L. CTR. 1, 1 (Aug. 2017), https://nwlc.org/wp-content/uploads/2017/08/Low-Wage-Jobs-are-Womens-Jobs.pdf [https://perma.cc/Q7PM-DREV].

of the "26 million workers in low-wage occupations that typically pay less than $11 per hour."[475] Moreover, according to a report commissioned by the National Women's Law Center, "the lower paid the job, the greater women's overrepresentation: women make up close to seven in ten workers in jobs that typically pay less than $10 per hour."[476]

The reality of women working on the frontlines but being financially relegated to the backlines persists. This is so regardless of "education level, parental status, race or ethnicity, regardless of whether they are foreign born or native born, women generally make up larger shares of the low-wage workforce than do their male counterparts."[477] To extrapolate further, no matter women's demographic background, they are "overrepresented in the low-wage workforce compared to their representation in the workforce overall."[478]

When considering race, women account for "larger shares of the low-wage and lowest-wage workforce than their male counterparts, even though their shares of the overall workforce are similar or smaller."[479] White women are also disproportionately represented on the bottom of the pay scale when compared to white men.[480] By contrast, white men are "dramatically underrepresented in the low-wage workforce."[481] For example, even though white men make up over a third of the overall national workforce in the U.S., they comprise seventeen percent "in jobs that typically pay less than $10 per hour."[482] And while Black and Latinx men are "slightly overrepresented" in the low-wage workforce, compared to Black and Latinx women, "they make up much smaller shares."[483]

Even when they have earned college degrees, women are far more likely than men to work in the low-wage workforce.[484] Men without any academic credentials, including high school diploma, are better off than their female counterparts in the workforce.[485] Women without high school diplomas are more likely to be stuck to the floor, unable to climb out of the low-wage workforce. However, even when they do have a high

475 *Id.*
476 *Id.*
477 *Id.*
478 *Id.*
479 *Id.* at 2.
480 *Id.*
481 *Id.*
482 *Id.*
483 *Id.*
484 *Id.* at 4.
485 *Id.*

school diploma—and nearly 80 percent of women in low-wage jobs do—the sticky floor latches them down, making it difficult to rise in their workplaces.[486]

In a pivotal study tracking employment opportunities of working-class women, Sally Hillsman Baker and Bernard Levenson found dramatic racial discrepancies associated with job placement and attainment.[487] They described how deep patterns of racial inequality and discrimination negatively affected working-class women's job opportunities, resulting in Black women earning lower wages and working in the least desirable jobs.[488] Professor Patricia Collins similarly documents this pattern. She explains, "[s]ome of the dirtiest jobs in [American] industries were offered to African-American women," including in the cotton mills, "as common laborers in the yards, as waste gatherers, and as scrubbers of machinery."[489] One of the reasons for this, as she explains, is that in the 1970s, "Black women could find work, but it was often part time, low paid, and lacking in security and benefits."[490]

Despite the gains of the civil rights movement and resultant civil rights laws, "[s]ince the 1970s, U.S. Black women have been unevenly incorporated into schools, jobs, neighborhoods, and other U.S. social institutions that historically have excluded [them]."[491] The removal of explicit barriers reduced *de jure* discrimination, but *de facto* discrimination prevails, and "[a]s a result, African-American women have become more class stratified than at any period in the past."[492] Black women can and do find work, but the present too closely resembles the past with their work "often part time, low paid, and lacking in security and benefits."[493]

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486 Kayla Patrick, *Low-Wage Workers are Women: Three Truths and a Few Misconceptions*, NAT'L WOMEN'S L. CTR. (Aug. 31, 2017), https://nwlc.org/blog/low-wage-workers-are-women-three-truths-and-a-few-misconceptions [https://perma.cc/58RT-8V86] ("However, among women in low-wage jobs paying $11 or less per hour, seventy-nine percent have a high school diploma or more education.").

487 Sally Hillsman Baker & Bernard Levenson, *Job Opportunity of Black and White Working-Class Women*, 22 SOC. PROBS. 510, 531 (1975).

488 *Id.*

489 PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 45, 57 (2d ed. 2000); *see also* Evelyn Nakano Glenn, *Racial Ethnic Women's Labor: The Intersection of Race, Gender and Class Oppression*, 17 REV. RADICAL POL. ECON. 86, 96 (1985) ("Manufacturing and white collar jobs were closed to black women, though some of the dirtiest jobs in industry were offered to them.").

490 Collins, *supra* note 489, at 58–59.

491 *Id.* at 110.

492 *Id.*

493 *Id.* at 58–59.

Women are more likely to be at the bottom of the ladder, while also caring for children and older relatives. Despite the presumption that most women in low-wage work are teenagers, the data does not bear that out. Instead, "nearly nine in ten women in jobs that typically pay less than $11 per hour are age 20 or older."[494] In fact, twenty percent of women working in low-wage jobs "are in their prime working years–ages 25–49."[495]

According to the NWLC study, "[w]hile mothers and fathers who live with their children are both underrepresented in the low-wage workforce compared to their share of the overall workforce, fathers are dramatically underrepresented."[496] Nearly one third of America's low wage-earning women are also mothers,[497] supporting their children on such low pay that it places them at the poverty line. These mothers have children that are under age eighteen and who live at home with them. By contrast, just twenty-two percent of men in the low-wage workforce report supporting children.[498] Among the lowest wage earners, women are more than twice the number who are working parents.[499]

As low-wage workers, poor women, and particularly women of color are disproportionately represented among low-wage essential care workers at the frontlines of disaster—not only during pandemic. California is notorious for its incarcerated women fighting its blazing wildfires.[500] The arid conditions and the effects of global warming make the state particularly vulnerable to devastating wildfires. With limited rainfall, the fires are a real danger each year. To put them out, the state calls upon incarcerated women and men.[501] The women take pride in their work—but they are nonetheless exposed to grave dangers and receive virtually *no pay* to do this labor.[502] States take advantage of an exception carved out in

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494 Patrick, *supra* note 486.

495 *Id.*

496 Tucker & Patrick, *supra* note 474, at 3.

497 *Id.*

498 *Id.*

499 *Id.* at 4.

500 *See* Jaime Lowe, *The Incarcerated Women Who Fight California's Wildfires*, N.Y. TIMES (Aug. 31, 2017), https://www.nytimes.com/2017/08/31/magazine/the-incarcerated-women-who-fight-californias-wildfires.html?mcubz=1&_r=0 [https://perma.cc/STR7-2ZV3].

501 See *id.* ("The inmates — including men, roughly 4,000 prisoners fight wildfires alongside civilian firefighters throughout California. . . .").

502 *See, e.g.*, Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 902–04 (2019)

the Thirteenth Amendment that permits slavery as a condition of punishment for those who are convicted of crimes.[503]

Despite the dangerousness of the work, toxic conditions, and lack of training, women convicted of crimes in California may find themselves in the precarious position of putting out these fires. Notably, they are denied the wages civilians earn for putting out fires. Civilian firefighters typically apprentice for three to four years and after completion of their program, receive a competitive wage.[504] Not these women. By contrast, after "as little as three weeks" training, the women who make it into the program are sent out to contain wildfires.[505] And after release these formerly incarcerated women's criminal records will follow them, which may preclude not only employment as firefighters but also hundreds of other jobs due to penal disenfranchisement.[506] Ironically, the first woman firefighter in the US was an enslaved woman in New York, Molly Williams, who was also forced to put out fires without pay.[507]

Women serve on the frontlines of the lowest wage, essential, but forgotten and overlooked work across multiple sectors. In a telling *New York Times* report, "[o]ne in three jobs held by women has been designated as essential."[508] They write, "[f]rom the cashier to the emergency room nurse to the drug-

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(describing how inmates receive "cents on the dollar" for performing incredibly dangerous work with little training).

503 *Id.* at 902–07; *see also* U.S. CONST. amend. XIII (exempting from the prohibition on slavery "punishment for crime whereof the party shall have been duly convicted").

504 Goodwin, *supra* note 502 at 903; *see also* U.S. Dep't of Labor, *How to Become a Firefighter*, OCCUPATIONAL OUTLOOK HANDBOOK (Apr. 24, 2018), https://www.bls.gov/ooh/protective-service/firefighters.htm#tab-4 [https://perma.cc/B4BY-FFQ8] ("Those wishing to become wildland firefighters may attend apprenticeship programs that last up to 4 years").

505 Lowe, *supra* note 500.

506 *See, e.g.*, *Barriers to Work: People with Criminal Records*, NAT'L CONF. OF ST. LEGISLATURES (July 17, 2018), https://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx [https://perma.cc/S46H-G7CX] ("The National Inventory of Collateral Consequences of Conviction (the NICCC), catalogs over 15,000 provisions of law in both statute and regulatory codes that limit occupational licensing opportunities for individuals with criminal records.").

507 Ginger Adams Otis, *Molly Williams, a Black Woman and a Slave, Fought Fires Years before the FDNY Was Formed Was a Pioneer for Fellow Female Smoke-Eaters*, N.Y. DAILY NEWS (Apr. 26, 2015, 12:01 AM), http://www.nydailynews.com/new-york/woman-slave-molly-williams-fought-fires-early-1800s-article-1.2197868 [https://perma.cc/B9RQ-JQ6L].

508 Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N.Y. TIMES (Apr. 18, 2020), https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html [https://perma.cc/PW2C-V4KP].

store pharmacist to the home health aide taking the bus to check on her older client, the soldier on the front lines of the current national emergency is most likely a woman."[509] These women serve as waitresses,[510] cashiers,[511] in meatpacking,[512] in agriculture—exposed to high levels of toxins and pesticides[513]—in clinics and hospitals,[514] and virtually every aspect of work that serves the public.

The numbers are stunning. Nearly 90 percent of nurses and nursing assistants are women.[515] Relevantly to coronavirus, most respiratory therapists are women as well as a "majority of pharmacists and an overwhelming majority of pharmacy aides and technicians."[516] More than two-thirds of the people packing groceries, working at food shops, and fast-food cashiers are women.[517] Thus, even though men were the majority of the workforce pre-pandemic, COVID-19 has changed that. However, what has not changed are the social narratives and stereotypes that cling to women and work.

And, because these various jobs have been designated "essential," their doors do not close. This means every day, during pandemic, these women show up to serve. However, it does not mean that these women are treated as if they are essential or important.[518] As one essential worker in the food industry la-

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509 *Id.*

510 Sara Selevitch, *The Un-Heroic Reality of Being an "Essential" Restaurant Worker*, EATER (May 12, 2020), https://www.eater.com/2020/5/12/21251204/being-an-essential-restaurant-worker-during-coronavirus-pandemic [https://perma.cc/K5CE-XTBX].

511 Robertson & Gebeloff, *supra* note 508.

512 Matt Perez, *87% of Meatpacking Workers Infected with Coronavirus Have Been Racial and Ethnic Minorities, CDC Says*, FORBES (July 7, 2020, 4:47 PM), https://www.forbes.com/sites/mattperez/2020/07/07/87-of-meatpacking-workers-infected-with-coronavirus-have-been-racial-and-ethnic-minorities-cdc-says/#548bd83634f5 [https://perma.cc/GZ7M-HYD7]; Brian Stauffer, *When We're Dead and Buried, Our Bones Will Keep Hurting*, HUM. RTS. WATCH (Sept. 4, 2019), https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat [https://perma.cc/B7ZF-9B76]; Vivian Ho, *"Everyone Tested Positive": Covid Devastates Agriculture Workers in California's Heartland*, GUARDIAN (Aug. 8, 2020, 6:00 AM), https://www.theguardian.com/us-news/2020/aug/08/california-covid-19-central-valley-essential-workers [https://perma.cc/M36Y-2VBX].

513 Hossain & Triche, *supra* note 42, at 3.

514 Robertson & Gebeloff, *supra* note 508.

515 *Id.*

516 *Id.*

517 *Id.*

518 *See, e.g.*, Selevitch, *supra* note 510 ("The unacknowledged absurdity of the situation is almost comical. *I am handing you noodles wearing gloves and a mask because we are in the midst of a global pandemic!* I want to yell. *I am risking my health for your greasy meal!*").

ments, "[c]ustomers want their shelves stocked and their takeout delivered. The labor that makes their leisure possible remains, essentially, an afterthought."[519]

Finally, alongside whatever employment women engage in, invisible work follows. During crisis, the percentage of their work increases. Men report that they are doing the majority of homeschooling during COVID-19, but only three percent of women concur.[520] Despite how men see themselves, homeschooling during COVID-19 "is being handled disproportionately by women."[521] About eighty percent of mothers report spending more time on child-learning during COVID-19.[522] In fact, mothers are primarily responsible for homeschooling, "even when couples otherwise shared child care responsibilities."[523]

Women also disproportionately spend more time on domestic work. Again, during a crisis that necessitates more time at home, there are significant consequences. As commentators note, during a crisis such as the pandemic, "[women are] spending even more time on these chores" and "the repercussions could worsen."[524] Those who study women and labor fear that women "[b]eing forced to be at home is amplifying the differences we already know exist," and particularly concerning is the possibility of women being pushed "out of the labor force in a way that will be very hard to overcome."[525]

## IV
## REREADING, REDEEMING, AND REMEDYING WOMEN'S LABOR

According to Professor Catharine A. MacKinnon, "whose legal theories laid the basis for sexual harassment being defined as a form of sex discrimination," when "[y]ou go after sexuality and economics, you've gone to the heart of misogyny."[526] Over the past forty years, feminist scholars articulated various approaches to equalizing women's placement in the

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519 *Id.*

520 Claire Cain Miller, *Nearly Half of Men Say They Do Most of the Home Schooling. 3 Percent of Women Agree.*, N.Y. TIMES (May 6, 2020), https://www.nytimes.com/2020/05/06/upshot/pandemic-chores-homeschooling-gender.html [https://perma.cc/FQP7-MF68] (updated May 8, 2020).

521 *Id.*

522 *Id.*

523 *Id.*

524 *Id.*

525 *Id.* (quoting Professor Barbara Risman).

526 Susan Chira, *Do American Women Still Need an Equal Rights Amendment?* N.Y. TIMES (Feb. 16, 2019), https://www.nytimes.com/2019/02/16/sunday-review/women-equal-rights-amendment.html [https://perma.cc/GCE8-GC33].

workforce. This Article briefly shines a light on that important scholarship.[527] As a general matter, advancing women's labor equality must also include elevating their reproductive rights; recognizing and fairly compensating caregiving; reducing economic barriers to childcare; establishing pipelines in the workforce; and mentoring.

As Parts II and III demonstrate, women's efforts to thrive within the American economy is affected by historic, intergenerational discrimination—both *de facto* and *de jure.* Legal institutions and infrastructures chiefly contributed to the marginalization women historically endured and the legacies of explicit and implicit discrimination and bias prevail in society today.

The outlawing or repeal of *de jure* discriminatory laws did very little to create and maintain robust *affirmative* programs that benefit women across industries, despite impressive gains in education. Indeed, what studies examining education attainment between the sexes reveals is that although women now obtain undergraduate and graduate degrees at rates that exceed men, that has not and likely will not change the structure of the American labor force. That women now represent the majority in higher education does not in itself alter patterns of advantage bestowed on men or the power dynamics that undergird America's labor forces from elite jobs to those at the margins.

As described throughout this Article, history matters. Canvasing American history reveals women forced into sexually exploitative uncompensated labor, during the antebellum period. Later, during Jim Crow, with whatever skillsets they possessed, all women suffered marginalization in the labor market, being shut out through *de jure* laws and *de facto* social practices from full economic participation. Critically, this history reveals an American labor force built on exclusion rather than inclusion and monopolies in male labor.

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527 *See, e.g.*, Katharine K. Baker, *The Problem with Unpaid Work*, 4 U. ST. THOMAS L.J. 599, 601 (2007) (discussing two standard explanations—biological and patriarchal—used to address why women do more unpaid work than men); Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 82 (1997) (defending the use of an economic view of domestic labor); Beth Anne Shelton & Juanita Firestone, *Household Labor Time and the Gender Gap in Earnings*, 3 GENDER & SOC'Y 105, 105 (1989) (finding the impact of women's unpaid labor on their paid employment is essential to understanding the relative earnings of women to men); Julie Brines, *Economic Dependency, Gender, and the Division of Labor at Home*, 100 AM. J. SOC. 652, 652 (1994) (examining economic and gender role symbolic views of housework).

The results are the conditions analyzed in Part III and the conclusion is that although women have made important gains in their education, those attainments have not altered the architecture of male hierarchy and privilege across various disciplines—from law to education and low-wage work. Part IV turns to potential solutions. It takes into account that women's advancement will depend on dismantling barriers and affirmative steps.

### A. Redressing the Sex Gap and Sex Trap: Acknowledging the Problem

To borrow from the late social science researcher James Jackson, rather than asking the inane: *what's wrong with women? Why can't they move ahead? If they only tried harder, wouldn't they crack that glass ceiling? Or, why are they complaining, men take good care of them?* The question should be given the structural impediments that women face, especially those burdened by racism, xenophobia, homophobia, and other biases: Why have they done as well?[528]

Even while history forgot them, or their male colleagues took credit for their labor and discoveries from precisely calculating the trajectories to launch rockets,[529] to discovering sex determination,[530] capturing the images of the double helix before any man had,[531] shaping civil rights most impactful legal theories,[532] or creating America's most successful boardg-

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528 Neil Genzlinger, *James Jackson, Who Changed the Study of Black America, Dies at 76*, N.Y. TIMES (Sept. 14, 2020) https://www.nytimes.com/2020/09/11/us/james-jackson-dead.html [https://perma.cc/55DE-X3C6] (describing how Jackson began all his research with a "positive premise").

529 *See, e.g.*, MARGOT LEE SHETTERLY, HIDDEN FIGURES: THE UNTOLD TRUE STORY OF FOUR AFRICAN AMERICAN WOMEN WHO HELPED LAUNCH OUR NATION INTO SPACE 106 (2016); Margalit Fox, *Katherine Johnson Dies at 101: Mathematician Broke Barriers at NASA*, N.Y. TIMES (Feb. 24, 2020), https://www.nytimes.com/2020/02/24/science/katherine-johnson-dead.html [https://perma.cc/Y9MJ-MU98] ("Wielding little more than a pencil, a slide rule and one of the finest mathematical minds in the country, Mrs. Johnson, who died at 101 on Monday at a retirement home in Newport News, Va., calculated the precise trajectories that would let Apollo 11 land on the moon in 1969 and, after Neil Armstrong's history-making moonwalk, let it return to Earth.") (last updated July 9, 2020).

530 Stephen G. Brush, *Nettie M. Stevens and the Discovery of Sex Determination by Chromosomes*, 69 ISIS 162, 163 (1978) ("[T]he role of [Nettie] Stevens, who died in 1912 before she could attain a reputation comparable to that of Wilson, has sometimes been forgotten").

531 Editorial, *Rosalind Franklin Was So Much More Than the 'Wronged Heroine' of DNA*, NATURE (July 21, 2020), https://www.nature.com/articles/d41586-020-02144-4 [https://perma.cc/K9FY-D9HH].

532 Kathryn Schulz, *The Many Lives of Pauli Murray*, NEW YORKER (April 10, 2017), https://www.newyorker.com/magazine/2017/04/17/the-many-lives-of-pauli-murray [https://perma.cc/DU7R-MMUK] (describing how Pauli Murray's

ame, somehow they forged ahead.[533] That some women have done so well, despite barriers and impediments, provides compelling evidence as to how much more they could achieve were those barriers not in place.

A recent audit of sex disparities in medical schools offers important insights and recommendations for the broader labor force.[534] Chief among them is the importance of recognizing the impact of socialized sex and race socialized differences and their impacts on hiring, promotion, and pay.[535] Biases and barriers are the lived experiences of women, but they may not be acknowledged in the workforce.

Even in the wake of numerous empirical studies sponsored by government, the academy, and private industries, employers, managers, and those responsible for hiring and promotion decisions may not be paying attention.[536] And, if they are not paying attention, they may make decisions on hiring and promotion based on implicit biases, perceiving men as more capable and smarter.[537] Their assessments regarding qualifications may be based on standards wholly unrelated to what is necessary to perform the job.

For example, studies show that the standards for entry in most police departments are based on male-centered criteria from fifty years ago.[538] These standards largely favored men but have little to do with successful and effective policing. These standards favor or reward brawn and brute force rather

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legal theories in the 1940s served as the foundation for landmark civil rights litigation, including in *Brown v. Board of Education*).

533 Mary Pilon, *Monopoly's Inventor: The Progressive Who Didn't Pass 'Go'*, N.Y. TIMES (Feb. 13, 2015), https://www.nytimes.com/2015/02/15/business/behind-monopoly-an-inventor-who-didnt-pass-go.html [https://perma.cc/9K95-TXMW] ("Magie's identity as Monopoly's inventor was uncovered by accident. In 1973, Ralph Anspach, an economics professor, began a decade-long legal battle against Parker Brothers over the creation of his Anti-Monopoly game. In researching his case, he uncovered Magie's patents and Monopoly's folk-game roots. He became consumed with telling the truth of what he calls 'the Monopoly lie.'").

534 Carnes, Morrissey & Geller, *supra* note 381 at 1459.

535 *See id.*

536 *See* Felice Klein, *The Gender Pay Gap That No One Is Paying Attention To*, THE CONVERSATION (July 29, 2020, 8:19 AM), https://theconversation.com/the-gender-pay-gap-that-no-one-is-paying-attention-to-142698 [https://perma.cc/MK6B-TFJN]; Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789 (2017).

537 *See* Carnes, Morrissey & Geller, *supra* note 381, at 1458.

538 *See* Laura Goodman et al., *Police Leaders Speak Out: "Women in Law Enforcement Must Have a Seat at the Table"*, MS. MAG. (June 23, 2020), https://msmagazine.com/2020/06/23/police-leaders-speak-out-women-in-law-enforcement-must-have-a-seat-at-the-table/[https://perma.cc/NVU3-NYMN].

than the ability to discern, evaluate, or deescalate conflict.[539] As one study in the *Washington Post* reports, one reason for police violence is that there are "[t]oo many men with badges."[540]

Women make up just 12.6 percent of all persons in police forces and largely this is due to barriers to entry and toxic environments after they make it onto the force.[541] Decades of research[542] demonstrate women's abilities to handle hostile situations and that they are less likely to kill people in the process.[543] In fact, "only 11 percent of female officers reported they had ever fired their weapon while on duty, compared with 30 percent of male officers."[544] Indeed, female officers experiences diverge significantly from their male counterparts. Unlike the spates of police shootings, choke holds, and other practices engaged in by male officers that end in killing civilians, women are less likely to report being in such situations.[545]

According to the Pew Center for research, "when it comes to their experiences in the field, women are less likely than men to say they have physically struggled with a suspect who was resisting arrest in the past month (22% vs. 35% of male officers)."[546] Even while women may experience nearly as much aggression from civilians as men,[547] compelling data demonstrate that they are less likely to respond inappropriately or

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539 Rosa Brooks, *One Reason for Police Violence? Too Many Men with Badges*, WASH. POST (June 18, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/06/18/women-police-officers-violence [https://perma.cc/GMT2-8QCE].

540 *Id.*

541 *Id.*

542 *See* PENNY E. HARRINGTON, NAT'L. CTR. FOR WOMEN & POLICING, RECRUITING & RETAINING WOMEN: A SELF-ASSESSMENT GUIDE FOR LAW ENFORCEMENT 9, https://www.ncjrs.gov/pdffiles1/bja/185235.pdf [https://perma.cc/NW7F-QXGV].

543 Brooks, *supra* note 539.

544 *Id.*; *see also* Renee Stepler, *Female Police Officers' on-the-Job Experiences Diverge from Those of Male Officers*, PEW RESEARCH CTR. (Jan. 17, 2017), https://www.pewresearch.org/fact-tank/2017/01/17/female-police-officers-on-the-job-experiences-diverge-from-those-of-male-officers [https://perma.cc/V966-Q869] ("Female officers are much less likely than male officers to report that they have ever fired their weapon while on duty – 11% of women vs. 30% of men").

545 *See* Timothy Williams & Caitlin Dickerson, *Rarity of Tulsa Shooting: Female Officers Are Almost Never Involved*, N.Y. TIMES (Sept. 24, 2016), https://www.nytimes.com/2016/09/25/us/rarity-of-tulsa-shooting-female-officers-are-almost-never-involved.html [https://perma.cc/CP4V-ZVKF] (suggesting one reason why female officers are less likely to engage in these practices is in part because male officers are more likely to be assigned to difficult situations).

546 Stepler, *supra* note 544.

547 *Id.* ("Six-in-ten female officers say they have been verbally abused by a citizen while on duty in the past month, compared with 69% of men.").

aggressively. These differences remain whether women are patrol officers, detectives, or on field assignments.[548] Simply put, data suggest that women police better than men, cause fewer deaths, deescalate better, and likely save departments from civil litigation over their conduct. Yet, the barriers they face to joining the police force likely have much to do with enduring stereotypes related to the qualifications necessary to be a successful officer.

Thus, so long as employers and supervisors continue to make hiring and promotion decisions based on problematic, outdated myths, women will be harmed in the workforce. These harms will also extend to the fields that continue to bar women's entry. The killings of Natasha McKenna, Michelle Cusseaux, Breonna Taylor, George Floyd, Tamir Rice, Eric Garner, Philando Castille, and too many others were facilitated in a system that shuts out women and promotes male aggression to deadly affect. If the barriers are not acknowledged, resolving them is almost impossible. And, with auditing and recognition of the biases perpetuated within the specific spheres of employment, supervisors and employers should be transparent and disseminate the data related to sex-based, internal glass ceilings, barriers to entry, and pay gaps.

### B. Critical Mass, Quotas, and Tokenism

The U.S. sex-gap in employment and representation on corporate boards, in government, on courts, and in various positions of leadership persists, confirmed by numerous studies. For example, as of September 2020, women hold only 6.2 percent of CEO positions at S&P 500 corporations.[549] That amounts to only 31 positions out of 500.[550] By comparison, white men hold two-thirds of board seats on the Fortune 500.[551] In relation to service on corporate boards, women hold barely one quarter of those seats.[552] Most of these gains are

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548 *Id.*

549 *List: Women CEOs of the S & P 500*, CATALYST (Sept. 1, 2020), https://www.catalyst.org/research/women-ceos-of-the-sp-500/ [https://perma.cc/AQE8-XU3U].

550 *Id.*

551 *Too Few Women of Color on Boards: Statistics and Solutions*, CATALYST (Jan. 31, 2020), https://www.catalyst.org/research/women-minorities-corporate-boards/ [https://perma.cc/4Q9H-3GY2].

552 *Women on Corporate Boards: Quick Take*, CATALYST (Mar. 13, 2020), https://www.catalyst.org/research/women-on-corporate-boards/#:~:text=AN%20analysis%20of%20more%20than,up%20from%2015.0%25%20in%202016.&text=companies%20with%20a%20woman%20board,men%20board%20chairs%20(17.1%25) [https://perma.cc/LQ3B-X9KS].

fairly recent; in 2019, "women accounted for almost half . . . of new board directors in the S&P 500."[553] Just a decade ago, more than one third of America's boards had only one woman to serve.[554]

For women of color the problem is even more glaring as they "hold only 4.6 percent of board seats in Fortune 500" corporations,[555] despite advertisement campaigns and public statements from those organizations expressing commitments to diversity, equity, and inclusion (DEI). And although nations around the world have successfully implemented quotas to increase the representation of women, the US lags behind.[556]

Thus, to address the significant sex-based gaps on corporate boards, in law firm hiring, at universities, and in other organizations, coercion may be necessary, including the use of quotas, incentives, and disincentives. In 2018, the California legislature enacted SB 826, a quota policy, mandating a minimal inclusion on boards organized in that state, and despite criticism, the state may be on the right track.[557] The California law, which requires publicly traded companies to add at least one woman to their boards by 2020 and "as many as three by 2021, depending on the size of the board," was criticized as possibly being illegal and a strong-arm tactic.[558] The state imposes a fine of $100,000 for failure to comply by 2020 and failure to meet the 2021 requirements could be as much as a $300,000 penalty "per woman not added to the board."[559]

According to the most recent data available, overwhelmingly California-based companies complied with the state's mandate. Nearly 200 new women-held seats now exist on California boards where previously they had not.[560] Critics claim that the law violates the Fourteenth Amendment's Equal Protection Clause. Even while the law may not be unconstitutional, it certainly is coercive. However, a coercive state

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553 *Id.*

554 *Id.*

555 *Too Few Women of Color on Boards*,*supra* note 551.

556 *See, e.g.*, *Women on Corporate Boards*, *supra* note 552 (highlighting the difference percentages of female board membership between Europe and the United States and attributing this difference to a lack of quotas in the U.S.).

557 The Times Editorial Board, *California Law Forcing Companies to Put Women on Corporate Boards Is Coercion. But It's Working*, L.A. TIMES (Jan. 6, 2020 3:00 AM), https://www.latimes.com/opinion/story/2020-01-06/woman-quota-law-scares-companies-into-doing-the-right-thing [https://perma.cc/UF7W-PBV3].

558 *Id.*

559 *Id.*

560 *Id.*

program is not illegal or unconstitutional simply because it imposes conditions to operate in the state. Would the companies in compliance have added the seats without the law?[561]

In France, Germany, the Netherlands, and Sweden, measurable results are seen in women's corporate leadership since the implementation of quotas. In each country, the percentage of women on corporate boards exceeds that of the US[562] However, even in nations that have not implemented quotas, the percentage of women in those countries serving on boards exceeds that of the US, including in Australia, Canada, and the United Kingdom.[563] Thus, recruiting, hiring and retaining more women across the labor force and onto boards can occur without coercion if the will to do so exists. No matter the method, greater inclusion of women in this sphere is an urgent goal deserving serious attention.

To be clear, a woman's hire even under fraught and marginal conditions that reflect tokenism does remove the barrier of sex-based hiring exclusion at least in that one case. That is a good thing, but it cannot be enough. Nor are women a monolith; some women may be disinterested in inclusive hiring practices that increase the representation of women in the workplace.

However, hiring more women in law firms, in STEM, at universities, in medical spheres, in organizations or recruitment onto corporate boards, or appointments to judicial positions will not be sufficient without attention to and engagement with critical mass practices.[564] Critical mass theory refers to a

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561 *See* Meland v. Padilla, No. 2:19-cv-02288-JAM-AC, 2020 WL 1911545 at *1 (E.D. Cal. Apr. 20, 2020) (involving a shareholder's claim that the law's requirement violated his right to vote for a board member of his choice and thus violates the Fourteenth Amendment. This case was dismissed at the trial court level and appealed before the US Court of Appeals for the Ninth Circuit); Teal N. Trujillo, *Do We Need to Secure a Place at the Table for Women? An Analysis of the Legality of California Law SB-826*, 45 J. LEGIS. 324, 337 (2018) (suggesting the rigid percentage required by the law is an unconstitutional quota).

562 *See, e.g.*, *Women on Corporate Boards*, *supra* note 552 (highlighting the increase in the percentage of female board directorship in France, Germany, Netherlands, and Sweden after implementing quotas in the early 2010s).

563 *See, e.g.*, *id.* (stating that Australia, Canada, and the United Kingdom all have higher percentages of Women Directorships in 2019 than the United States).

564 *See* KANTER, MEN AND WOMEN OF THE CORPORATION, *supra* note 433 at 206–21; Drude Dahlerup, *From a Small to a Large Minority: Women in Scandinavian Politics*, 11 SCANDINAVIAN POL. STUD. 275, 280 (1988); Kanter, *Some Effects of Proportions on Group Life*, *supra* note 432 at, 969–77; *see also* Oliver, Maxwell & Teixeira, *supra* note 433, at 524 (calling attention to collective action depending on a critical mass). *See generally* MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 164, Note 102 (1965) (describing the "threshold concept"); Stephanie J. Creary, Mary-Hunter ("Mae") McDonnell,

minimum or sufficient percentage of individuals within an organization who share ideology or affinity and collectively believe in an ideal.[565] With a sufficient baseline of presence on a board or within an organization, the group is able to meaningfully contribute to the culture of the department, firm, board, or court such that they are able to exert influence, inspire interest in their platforms, produce desired outcomes, and avoid tokenism.[566]

According to sociologists W.M. Phillips and Rhoda Blumberg, tokenism is a condition that appears in organizations where discrimination was previously present or subordination by one group, "the dominants, over another group, the minority."[567] They refer to tokenism as "a technique of resistance to change in the relationships between dominant and minority groups."[568] They suggest that it is an "attempt to maintain patterns of . . . dominance."[569] Importantly, tokenism may produce myriad organizational problems, including maintaining cultures of sexism, racism, or homophobia.

That said, tokenism may appear in universities, law firms, courts, and other organizations that actively or passively depress the inclusion of subordinated minority groups. Researchers suggest multiple ways in which tokenism may appear in an organization. For example, it may arise in the form of some concession, as a show of change.[570] Such concessions might include purposefully interviewing, but not hiring more women or hiring one additional woman while hiring several men. Ironically, it may also include hiring "semi-competent" minorities "deliberately over better qualified [minority] candidates[.]"[571]

According to one theory, by purposefully hiring less competent minorities over those who are more capable, the majority in the firm is able to maintain power and influence. Tokenism may also be expressed by addressing a failure to competitively retain women by hosting diversity workshops rather than offer-

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Sakshi Ghai, Jared Scruggs, *When and Why Diversity Improves Your Board's Performance*, HARV. BUS. REV. (Mar. 27, 2019), https://hbr.org/2019/03/when-and-why-diversity-improves-your-boards-performance [https://perma.cc/4834-UX7A] (explaining the benefits of an egalitarian board).

565 Oliver, Maxwell & Teixeira, *supra* note 433, at 523–24.

566 *Id.* at 542.

567 W.M. Phillips Jr. & Rhoda L. Blumberg, *Tokenism and Organizational Change*, 20 EQUITY & EXCELLENCE EDUC. 34, 35 (1982).

568 *Id.* at 34.

569 *Id.*

570 *Id.* at 35.

571 *Id.*

ing competitive financial retention packages.[572] Researchers note that "[a]n early and common ploy is to provide discontented groups with symbolic rewards or reassurances, such as formal acceptance of petitions or grievances."[573] Researchers assert that "limited or superficial change can usually be observed quantitatively."[574]

Tokenism is often expressed by "a large preponderance of one type over another . . . The numerically dominant types . . . control the [organization] and its culture in enough ways to be labelled 'dominants.'"[575] The relative "few" in the minority or "skewed group" are "appropriately called "tokens."[576] Within organizations that express a culture of tokenism, harmful stereotypes against minority groups may persist such that the lone minorities within the firm, university, or court were the only ones of their sex or race "qualified" for the role. A person "serving as token is seen as someone who has made it up through the system, official demonstration that the system works."[577]

Professor Rosabeth Kanter's research and landmark book on men and women in corporations, examines tokenism in the organizational setting. She observes that tokenism relates not only to the suppressed number of the excluded group within the organization but also the manner in which the dominant group establishes the norms within the workplace and controls the culture of the organization.[578] The problem with organizational tokenism is that they create ecosystems wherein it is difficult if not impossible for the thinly represented minority group to express influence whether with hiring, promotion, or shift cultural norms that rely on and perpetuate stereotypes.[579]

As such, tokenism can be very difficult to navigate for marginally represented women within an organization or organizational leadership. For example, "[s]uffering or stress is a natural consequence of the dilemmas and paradoxes inherent in playing or resisting the token role."[580] Phillips and Blumberg explain, "Entry into it constitutes a breakthrough against prior exclusion, and a relative gain in status for the

572 *Id.*
573 *Id.*
574 *Id.*
575 KANTER, MEN AND WOMEN OF THE CORPORATION, *supra* note 433at 208.
576 *Id.*
577 Phillips & Blumberg, *supra* note 567, at 35.
578 KANTER, MEN AND WOMEN OF THE Corporation, *supra* note 433 at 210.
579 *See id.* at 236.
580 Phillips & Blumberg, *supra* note 567, at 36.

chosen individual. At the same time the actor becomes part of a production staged to serve organizational purposes in the face of external and internal pressures."[581] Another tensions that they point to is the possibility of *cooptation,* leading to "the neutralization" of the marginalized woman through her absorption into official structures, such that she defends the organization's exclusionary practices against other women.[582]

Simply put, organizations that engage in tokenism are threatened by the increased number of the subordinated group in the organization.[583] With regard to race, the authors write, "We perceive tokenism as an essential element in the ideological hegemony of the institutional process of racism."[584] Tokenism, however, is not limited to implicitly or explicitly expressing racial bias; it can involve any status where a group has been subordinated or excluded in society generally and specifically within an organization.

For the reasons outlined above, hiring and retaining women without commitment and practice to critical mass can produce tokenism. Tokenism can result in hostile work and learning environments and manifest in women being or perceiving themselves as silenced, their ideas overlooked or discounted, and their ideas passed over. Organizations that express a commitment to diversity, equity, and inclusion, but lack a critical mass of women can produce and reify tokenism. And, tokenism can create barriers to women's meaningful participation and persuasion.[585]

On the other hand, researchers who study "critical mass" theory argue that a baseline of a minority group's representation within an organization avoids the pitfalls of tokenism and produces healthier and advantageous organizational dynamics and outcomes.[586] Women's critical mass within an organiza-

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581 *Id.*

582 *Id.* at 36.

583 *Id.* at 35.

584 *Id.* at 34.

585 *See generally* Charles G. Lord & Delia S. Saenz, *Memory Deficits and Memory Surfeits: Differential Cognitive Consequences of Tokenism for Tokens and Observers*, 49 J. PERSONALITY & SOC. PSYCHOL., 918, 918–19 (1985) (stating that tokens may experience cognitive and behavioral deficits due to "being the only person of their kind in an otherwise homogeneous group").

586 *See, e.g.*, VICKI W. KRAMER, ALISON M. KONRAD & SUMRU ERKUT, CRITICAL MASS ON CORPORATE BOARDS: WHY THREE OR MORE WOMEN ENHANCE GOVERNANCE iv (2006), https://www.wcwonline.org/vmfiles/WCW11.pdf [https://perma.cc/657T-MDL6 (arguing that a critical mass of women on the board of directors can enhance corporate governance and fundamentally alter the boardroom); Creary, , *supra* note 563 (arguing that diversity in boards works best when the board is egalitarian and the board seeks out different forms of diversity).

tion has the potential to enhance governance and achieve substantive equality goals.[587] Studies show that boards with more women "lead to better financial performance" and create more dynamic environments, "in which innovative ideas can spring from gender diversity."[588]

Moreover, "women holding leadership positions on boards is positively associated with other women directors having longer board tenures."[589] Data also suggests that women in senior leadership are more successful at recruiting other women into leadership roles. In a study of 8,600 companies in forty-nine countries, fewer women served on boards with men in leadership (seventeen percent) as compared with boards where women led (twenty-eight percent).[590] This data suggests that women in leadership may identify more women for leadership opportunities than men and successfully recruit them into service.[591]

Finally, a note of caution. Women's critical mass representation alone does not achieve sex equality in organizations, dismantle sexism within the labor force, or remove all the barriers to inclusion, hiring, promotion, and retention.[592] While women can be agents of change and sometimes the best advocates on issues that concern them, as a normative matter, men must also play critical roles. Firms and organizations that position women to bear the brunt of equality work perpetuate sex inequality and stereotypes. Rather, men in leadership share the responsibility to reduce and eliminate the barriers to women's entry, retention, fair pay, and fair treatment in the labor force. Men can and should be as forceful as women in dismantling sex-based barriers in the labor force.

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587 KRAMER, KONRAD & ERKUT, *supra* note 585 ("Many of our informants believe that women are more likely than men to ask tough questions and demand direct and detailed answers.").

588 *See, e.g., Women on Corporate Boards: Quick Take, supra* note 552 (stating that women should account for three board seats in order to achieve the benefits of diversity). *But see*, Katherine Klein, *Does Gender Diversity on Boards Really Boost Company Performance?*, KNOWLEDGE@WARTON (May 18, 2017), https://knowledge.wharton.upenn.edu/article/will-gender-diversity-boards-really-boost-company-performance/ [https://perma.cc/LV52-QXB8] ("Rigorous, peer-reviewed studies suggest that companies do not perform better when they have women on the board. Nor do they perform worse.").

589 *Women on Corporate Boards: Quick Take, supra* note 552.

590 *Id.*

591 *Id.*

592 Colleen Chesterman, Anne Ross-Smith & Margaret Peters, *The Gendered Impact on Organisations of a Critical Mass of Women in Senior Management*, POL'Y & SOC'Y, 1, 20 (2005).

### C. Redressing Invisible Labor

Women's labor takes many forms, including some of it being entirely invisible, particularly in the home setting. Studies show that the more men rely on women for household or family-based care work, the less they are likely to do.[593] Even as the social meanings of housework have shifted, such that they are no longer completely defined by sex-role stereotypes, women continue to supply most of the caregiving in heterosexual households.[594]

Unpaid or "shadow" labor is not insignificant, even while it remains largely invisible to economists. According to the Organization of Economic Cooperation and Development (OECD), "unpaid labor" includes time spent shopping for goods, tending to the elderly, performing routine housework, caregiving for childcare, and other "unpaid activities related to household maintenance."[595] According to a 2020 *New York Times* report, unpaid labor exceeds the combined revenue of the 50 largest companies in 2019's Fortune Global 500 list, amounting to $10.9 trillion dollars a year globally.[596]

The authors claim that "[i]f American women earned minimum wage for the unpaid work they do around the house and caring for relatives, they would have made $1.5 trillion [in 2019]."[597] While the U.S. is not the worst among nations in exploiting shadow labor from women, it is certainly not among the best of nations. Canada, Germany, France, the Netherlands, Belgium, and other countries have far greater gender parity.[598] In some countries the problem is more glaring than others; in India women report spending six hours a day managing their homes, while "Indian men spend a paltry 52 minutes."[599] The gaps are least pronounced in Norway, Denmark, and Sweden, where state-subsidized programs "provide care for children and older people."[600]

In 1994, Professor Julie Brines observed that asymmetries in workforce labor correlated to unevenness in household la-

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593 *See, e.g.*, Brines, *supra* note 527.

594 *See id.* at 652.

595 Gus Wezerek & Kristen R. Ghodsee, *Women's Unpaid Labor is Worth $10,900,000,000,000*, N.Y. TIMES (Mar. 5, 2020), https://www.nytimes.com/interactive/2020/03/04/opinion/women-unpaid-labor.html [https://perma.cc/45VG-PQLJ].

596 *Id.*

597 *Id.*

598 *Id.*

599 *Id.*

600 *Id.*

bor.[601] Such asymmetries resulted in women's tangible, measurable, but uncompensated labor in the household. This creates not only a pay problem, according to Brines, but also results in unequal relationships between men and women in the household.[602] She writes, "The advantage such asymmetry confers upon the main breadwinner paves the way for exploitation, although the extraction of what might be considered the surplus labor of dependents need not arise through direct coercion or exploitation."[603]

Researchers, academics, and more recently policy makers attempt to account for the scope and scale of women's uncompensated household and caregiving labor, and debate whether that labor should be compensated. If it should be compensated, who should pay for it? Should household labor be viewed in market terms or through some other lens? Are women further exploited if their household labor is viewed in economic terms? According to Professor Katharine Silbaugh, denying the reality of an existing market "assists in maintaining the image of the unpaid household laborer as a nonworker" and creates an illusion of work as simply an expression of affections demonstrated through her activities.[604] Does the argument hold up that the difference between household labor and business labor is that the former involves relationships? The majority of America's companies are closely held corporations, the majority of which are family-owned.[605]

Professor Katharine Baker suggested more than a decade ago that there were two possible ways to address uncompensated caregiving and household labor. Men could compensate their wives for household labor[606] or the state could do so.[607] She claimed if men were to do so, it might achieve certain social benefits, such as shifting values about family breadwinner and in turn "decrease[] the amount of control" men exert over women.[608]

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601 Brines, *supra* note 527, at 659.
602 *Id.* at 656.
603 *Id.*
604 Silbaugh, *supra* note 527, at103.
605 Inc. Editorial & Inc. Staff, *Closely Held Corporations*, INC. (Feb. 6, 2020), https://www.inc.com/encyclopedia/closely-held-corporations.html [https://perma.cc/M4VP-KFFH].
606 Baker, *supra* note 527 at 615.
607 *Id.* at 604.
608 *Id.* at 615.

### D. Reordered Public Policy: Rethinking Affirmative Action

How do we reframe these debates to forge effective, measurable change? Some scholars suggest that to get to the heart of women's labor inequality more data and auditing are necessary.[609] While auditing and data collection are important, they are not enough. Indeed, dissemination of the data, which is important, is also not enough. Institutions must be committed to alleviating the sex-based pay gaps in their industries and identifying the ways in which the gaps materialize. For example, some pay gaps initiate upon women's entry or reentry into various workforces.[610] Studies often point to women taking breaks in their careers to care for family members (children or senior care) as a reason for gender pay gaps.[611] However, this "does not fully account for the gap. Neither do differences in education, experience, and occupation, as we can see from the controlled gender pay gap. It also doesn't negate sexism in the workplace."[612]

Instead, factors that may be more difficult to measure, such as implicit and explicit bias, may play the biggest role in pay gaps. Moreover, underlying stereotypes may be used as legitimate reasons to undercut women's pay even when doing so does not correlate to effectiveness on the job. For example, that women take a break from employment, seek opportunities to work remotely, or desire to work part time are sometimes used as justifications for unequal and unfair pay, when in fact they have nothing to do with capacities and competencies in job performance. This may account for why forty-two percent of women report experiencing sex discrimination in the workforce compared to twenty-two percent of men.[613]

One pay scale study reports, "[W]omen often incur a pay penalty upon returning to work after an absence."[614] Some gaps reflect the glass elevator, where men are paid more in

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609 *See, e.g.*, Donna Bobbitt-Zeher, *Gender Discrimination at Work: Connecting Gender Stereotypes, Institutional Policies, and Gender Composition of Workplace*, 25 GENDER & SOC'Y 764, 768 (2011), https://journals.sagepub.com/doi/10.1177/0891243211424741 [https://perma.cc/T9AE-8YBT].

610 *The State of the Gender Pay Gap in 2020*, PAYSCALE, https://www.payscale.com/data/gender-pay-gap [https://perma.cc/8TR2-8K4Z] (last visited Sept. 13, 2020).

611 *Id.*

612 *Id.*

613 Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RES. CTR. (Mar. 22, 2019), https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts/ [https://perma.cc/DUV7-C58Q].

614 *The State of the Gender Pay Gap in 2020*, supra note 610.

professions that are dominated by women. A few examples of the glass elevator include women elementary school teachers,[615] women flight attendants,[616] and women nurses making less than their male counterparts.[617] These differences are not explained by education or ability. However, they do reflect ingrained practices of discrimination and inequality.

Thus, a failure to identify pay gaps is not the problem. Nor is identifying pay gaps alone the solution. Decades of research outline and document sex-based pay gaps and, in some industries, they commission their own studies.[618] The problem then is the failure to prioritize resolving the pay gap by implementing strategies to standardize pay and promotion scales such that women are not discriminated against on entry or reentry.

Based on data presented in Part III, even after identifying barriers to workforce entry and promotion, industries are not sufficiently engaging in meaningful rigorous steps to turn the page and dismantle enduring obstacles to women's inclusion and ascendance within their organizations. Diversity, equity, and inclusion ("DEI") trainings, while increasingly popular are broadly criticized by those who support dismantling barriers and those who seem indifferent or willing only to take an incremental approach.[619] Those who fall in the former articulate skepticism in trainings producing urgent and meaningful results.[620] Those in the latter category claim DEI trainings trigger guilt and leave them without the tools to make change.[621]

Despite those debates, a trickling of women into various industries challenged by sex gaps will not produce transformative effects, break glass ceilings nor flatten the glass cliff. Neither has incrementalism leveled the playing field. In two generations of women gaining experience through education and licensure across fields ranging from medicine to law, the glass ceiling has been reinforced rather than dismantled. In-

615 *Id.*
616 *Id.*
617 *Id.*
618 *See, e.g.*, MEHUL PATEL, HIRED, THE WEIGHT OF EXPECTATIONS: THE 2020 STATE OF WAGE INEQUALITY IN THE WORKPLACE (2020), https://hired.com/h/wage-inequality-report#wage-gap [https://perma.cc/5MY2-LTWH] (finding a pay gap in the technology industry).
619 *See, e.g.*, Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (July–Aug. 2016), https://hbr.org/2016/07/why-diversity-programs-fail [https://perma.cc/PG7W-GFZN].
620 *See, e.g.*, *id.*
621 *See, e.g.*, *id.*

stead, research indicates that incrementalism can and has produced tokenism, isolation, and even backlash.[622]

If the goal of various organizations is to increase the representation of women and improve the likelihood of their success and retention, the targeted solutions should be aggressive, and confirm the probability of achievement. Turning to critical mass indicators, affirmative action, and quotas may hold answers.

Affirmative action has come under attack in American law and society. Among the reasons articulated for opposition to affirmative action are that unqualified individuals receive an unfair advantage, that affirmative action hurts better qualified individuals,[623] and that merit-based decision-making is supplanted by unclear, biased, vague, and ambiguous standards.[624] Some argue that affirmative action has no standards at all.[625] Still others claim that affirmative action programs produce poor results for the people they aim to help.[626] Those who make this claim suggest that ironically, the beneficiaries of affirmative action are worse off for having gained admission or entry.

These suppositions are worth scrutinizing rather than taking for granted as accurate and unbiased. Really, it seems the debate is not over whether affirmative action achieves its goal, such as moving individuals who otherwise would not gain admission, be hired, or advance over the threshold. Affirmative action accomplishes that. The point of resistance seems to be the question argued more than a century ago in Supreme Court cases, whether certain marginalized communities are *deserving* of entry and advancement. *Have they earned it?* Moreover, given the empirical data on hand, "earning it" has less to do

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622 *See* Joyce He & Sarah Kaplan, *The debate about quotas*, INST. FOR GENDER & ECON. (Oct. 26, 2017), https://www.gendereconomy.org/the-debate-about-quotas/ [https://perma.cc/Q5ZY-KQWN].

623 *See* Louis Menand, *The Changing Meaning of Affirmative Action*, NEW YORKER (Jan. 13, 2020), https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action [https://perma.cc/27MM-WMLB].

624 *See* Hua Hsu, *The Rise and Fall of Affirmative Action*, NEW YORKER (Oct. 8, 2018), https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action [https://perma.cc/7929-XHTJ].

625 *See* Dorothy Van Soest, *Multiculturalism and Social Work Education: The Non-Debate about Competing Perspectives*, 31 J. SOC. WORK EDUC. 55, 60 (1995).

626 Richard Sander & Stuart Taylor, Jr., *The Painful Truth About Affirmative Action*, THE ATLANTIC (Oct. 2, 2012), https://www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122/ [https://perma.cc/BHL8-NWVM].

with objective criteria than subjective notions as to who belongs or is a "good fit."

1. *White Male Public Policy or Affirmative Action?*

In other words, do the anti-affirmative action arguments still hold up given three important datapoints? First, affirmative action achieves transformative results and has for white males and corporations.[627] Historically, government and private industries actively practiced affirmative action to benefit white communities, especially white males, including the Servicemen's Readjustment Act of 1944 (commonly known as the G.I. Bill), which provided a range of benefits for veterans returning from World War II and largely excluded African Americans.[628] Congress enacted the bill in 1944 and President Franklin Roosevelt signed it into law. The bill provided financial benefits for veterans, including low-interest loans, low-cost mortgages, unemployment compensation, and dedicated payments for tuition to attend college, vocational schools, or complete high school.[629]

Some may argue that the G.I. Bill was harmful public policy because of racial discrimination in its implementation.[630] Today, government agencies are more forthright about federal policies that discriminated against African Americans and the G.I. Bill is no exception.[631] That the G.I. Bill excluded African Americans signifies that the policy implementation was normatively wrong, but the policy itself to help provide a foothold for veterans returning from war made for transformational public policy, spurred economic growth, provided the means for a broad scale of men to become educated, and ultimately pro-

627 Ira Katznelson, *Making Affirmative Action White Again*, N.Y. TIMES (Aug. 12, 2017) https://www.nytimes.com/2017/08/12/opinion/sunday/making-affirmative-action-white-again.html [https://perma.cc/9VFZ-UM2X].

628 Erin Blakemore, *How the GI Bill's Promise Was Denied to a Million Black WWII Veterans*, History (Sept. 30, 2019), http://history.com/new/gi-bill-black-wwii-veterans-benefits [https://perma.cc/CF9J-EN6B]; GLENN C. ALTSCHULER & STUART M. BLUMIN, THE GI BILL: A NEW DEAL FOR VETERANS (2009).

629 Greg Winter, *From Combat to Campus on the G.I. Bill*, N.Y. TIMES (Jan. 16, 2005), https://www.nytimes.com/2005/01/16/education/edlife/from-combat-to-campus-on-the-gi-bill.html [https://perma.cc/JKC9-7AMX].

630 *See* Hilary Herbold, *Never a Level Playing Field: Blacks and the GI Bill*, J. BLACKS HIGHER EDUC. 104, 106 (1994-1995).

631 *See, e.g.*, Brandon Weber, *How African American WWII Veterans Were Scorned by the G.I. Bill*, PROGRESSIVE (Nov. 10, 2017), https://progressive.org/dispatches/how-african-american-wwii-veterans-were-scorned-by-the-g-i-b/ [https://perma.cc/K2T5-X4BB].

vided an entry way into the middle class for individuals whose communities had previously been shut out.[632]

Similar public policies included the Homestead Act of 1862 (permitted white Americans to "lay claim to federal lands if they lived on the land and improved it"); New Deal legislation and the creation of the National Housing Act of 1934 (which promoted entry into the middle class through home ownership); the Glass-Steagall Act of 1933 (created the Federal Deposit Insurance Corporation, which "insures that the savings of average Americans are not lost if a bank fails"); and the National Labor Relations Act of 1935 (considered one of the greatest labor achievements by easing the way for union membership and collective bargaining), among others.[633] These affirmative practices have generally fallen under the framework or banner of "public policy" rather than the more taboo-laden term, "affirmative action."

### 2. *Meeting Systemic Discrimination with Affirmative Action*

Second, the U.S. government and private industries actively practiced *de jure* and *de facto* discrimination to exclude women in education, employment, and civil society based on sex-status. Legislative enactments formally barred women from advancing in myriad ways, with such policies upheld by courts. Courts were not neutral in this regard.[634] They upheld discriminatory laws.[635] In the common law, they objectified women as property or property-life of husbands and fathers.[636] They denied women recourse in cases of sexual and physical battery within marriages. In the criminal law they furthered the exemption of husbands from prosecution in cases of marital rape.[637] In other words, courts monopolized the workplace

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632 *Id.*

633 Nick Bunker, *The Top 10 Middle-Class Acts of Congress*, CTR. FOR AM. PROGRESS (Jan. 19, 2012, 9:00 AM), https://www.americanprogress.org/issues/economy/news/2012/01/19/10944/the-top-10-middle-class-acts-of-congress/ [https://perma.cc/P5ST-3AFG].

634 *See, e.g.*, Bradwell v. Illinois, 83 U.S. 130 (1873); Hoyt v. Florida, 368 U.S. 57 (1961); Muller v. Oregon, 208 U.S. 412 (1908); Minor v. Happersett, 53 Mo. 58 (1873).

635 *See, e.g.*, Bradwell, 83 U.S. 130; Hoyt, 368 U.S. 57; Muller, 208 U.S. 412; Minor, 53 Mo. 58.

636 Wendy Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L. J. 641, 654–55 (1981).

637 Lucinda Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1144 n.112, 1162–63 n.192 (1986).

for men and placed their imprimatur on obstacles impeding women's exercise of agency, autonomy, and privacy. When considering the measures necessary for corrective action in women's employment, taking into account past discrimination is relevant. This point related to government is not belabored here as Parts II and III take up those concerns.

However, women experienced systemic *de jure* and *de facto* discrimination not only in the public sector but also in private industry. *International Union v. Johnson Controls*[638] is one example. In the decade preceding *International Union,* leading industrial organizations enacted fetal protection laws framed as "medical regulations" or "medical policies."[639] These policies barred women of a certain age from some occupations.[640] Some policies excluded women from most or all jobs in the companies. Although explicitly discriminatory, the policies were justified based on the possibility that a woman might become pregnant at some point.[641]

Among the companies that enacted fetal protection rules were American Cyanid, Allied Chemicals, General Motors, B.F. Goodrich, St. Joseph Zinc, Gulf Oil, Dow Chemical, DuPont, BASF Wyandotte, Bunker Hill Smelting, Eastman Kodak, Firestone Tire & Rubber, Globe Union, Olin Corporation, Union Carbide and Monsanto.[642] Generally, the companies claimed their policies did not stem from the desire to discriminate against women.[643] Rather, their concern was the protection of fetal life if the women became pregnant.[644] However, the policies blanketly applied and were enforced with no differentiation or accounting for sexual orientation, desire to bear children, or marital status.[645]

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638 499 U.S. 187, 188 (1991). *See* Mary Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986); Finley, *supra* note 637); Hannah Arterian Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63 (1980); Linda G. Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798, 802–06 (1981); Williams, *supra* note 636.

639 MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 182 (2020).

640 *See* Joan Bertrin, *Reproductive Hazards in the Workplace*, *in* REPRODUCTIVE LAWS FOR THE 1990S 277, 301 n.5 (Sherrill Cohen & Nadine Taub eds., 1989).

641 Furnish, *supra* note 638, at 75.

642 GOODWIN, *supra* note 639, at 182.

643 *Id.*

644 *Id.*

645 *Id.*

For example, American Cyanide introduced a fetal protection policy in 1978.[646] Its plant, located in the rolling hills of an otherwise economically-depressed state (West Virginia), employed hundreds of workers.[647] The wages were competitive.[648] However, of among 500 employees only five percent were women.[649] Senior management met with its twenty-five female employees to inform them that women fifteen and forty years of age would be prohibited from working in most positions at the plant. Other companies enacted similar fetal protection regulations, effectively barring women from employment in many of the better paying jobs at manufacturing plants.[650]

As civil rights legislation was enacted to reduce or eliminate barriers to women's employment opportunities, companies created a blend of *de facto* and *de jure* discrimination strategies, including fetal protection policies. Fetal protectionist rules in the workplace served not only to bar women from gainful employment but also to secure a monopoly for men in coveted factory jobs. Fetal protection rules provided a proxy for sex-based discrimination. In *International Union,* the company established an internal fetal protection policy much like that of American Cyanide.[651] In the summer of 1977, the company issued "its first official policy concerning its employment of women in lead-exposure work."[652] The policy stated:

> Protection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons.
>
> . . . . Since not all women who can become mothers wish to become mothers (or will become mothers), it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant.[653]

Several years later, Johnson Controls modified their policy from one that warned female employees about the risks of lead exposure to a company rule that prohibited women from com-

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646 *Id.* at 182–83.
647 *Id.*
648 *Id.*
649 *Id.*
650 *Id.*
651 Int'l Union v. Johnson Controls, 499 U.S. 187, 191–92 (1991).
652 *Id.* at 191.
653 *Id.*

peting for manufacturing jobs that could expose them to lead.[654] The company barred all women, except those who could prove infertility, from holding certain jobs that could expose them to lead.[655] The new fetal protection policy stated: "It is Johnson Controls policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights."[656]

The Court found the fetal protection policy "obvious" in its "bias" against women.[657] The Court noted that fertile men were not subjected to the burdensome employment restrictions imposed on female employees. According to the Court, fertile men were afforded the "choice as to whether they wish to risk their reproductive health for a particular job."[658] The Court revisited Section 703(a) of the Civil Rights Act of 1964,[659] explaining that it "prohibits sex-based classifications in terms and conditions of employment, in hiring and discharging decisions, and in other employment decisions that adversely affect an employee's status."[660]

In other words, sex-based policy expressed as "protecting women's unconceived offspring" was not benign.[661] To the contrary, such policies constitute sex-based discrimination. Any assumptions otherwise are "incorrect."[662] The Court found the policy facially impermissible discrimination.[663] For example, the fetal protection policy classified its employees on the basis of gender and childbearing capacity rather than just fertility.[664] Moreover, the company did not care to protect its male employee's future born from possible risk of lead exposure, despite, as the record showed, "the debilitating effect of lead exposure on the male reproductive system," only Johnson's female employees.[665]

Given systemic public and private discrimination against women in the labor force, can anything less than concerted

654 GOODWIN, *supra* note 639, at 183.
655 *Int'l Union*, 499 U.S. at 191–92.
656 *Id.* at 192.
657 *Id.* at 197.
658 *Id.*
659 42 U.S.C. § 2000e-2(a) (1964).
660 *Int'l Union*, 499 U.S. at 197.
661 *Id.* at 198
662 *Id.*
663 *Id.*
664 *Id.*
665 *Id.*

action be justified? Decades of empirical data, including legislation, court cases, company policies, and research studies show women who are equally prepared as men—if not more so based on education—still suffer the price of admission and advancement. With this in mind, are the anti-affirmative action arguments even valid? For those who attack affirmative action programs, are they simply unwilling to move the needle and share space with women?[666]

If one is to take seriously a history of employment discrimination that unfairly advantages men (even in the present) to the detriment of women, one way to resolve it, is to implement strategies and policies that discontinue those practices. However, that alone will not achieve workplace parity. *Why?* Given the dramatic disparities that continue to define the American workforce, simply offering women an equal shot at employment or leadership will not reorganize organizations such that parity results sooner than later. Achieving proportional parity at a more rigorous pace will require deliberate or affirmative strategies and actions.

## CONCLUSION

On March 13, 2020, Breonna Taylor died in a hail of gunfire. She occupied a duality: essential, but dispensable. Important to the battle on COVID-19, but disposable like the masks and gloves she wore while on duty. Innocent, but also collateral damage in a system wherein racism in policing manifests in devastating, destructive, and structural ways. Her killing invites legitimate expressions of anger and frustration in response to lingering structural inequality. Yet, her death is more than a touchpoint for grief, it is a trigger for reform and an opportunity to reexamine and critique the devaluation of women in society and in the workforce—and hold law to account. In other words, this Article takes seriously the call to shine a light and to render visible that which has been cloaked in darkness.

In that vein, this Article explains how myths persist related to women in the workforce and women's work, including presumptions regarding their levels of educational achievement and seniority in the household. Researching, acknowledging, and dismantling barriers that impede women's entry and advancement into various labor forces will address some of struc-

666 *See generally* IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 152 (2006).

tural workforce problems. Providing solutions and pathways forward enables motivated employers with the tools to diversify workplaces and rethink institutional policies that hinder women's growth and success. However, these efforts will not on their own resolve two of the biggest obstacles: social stereotypes that undermine women's credibility in the workforce and male supremacy or misogyny in the workforce.

That is, COVID-19 exposes preexisting institutional and infrastructural social problems laid bare by a suffocating disease. The Article recognizes that far too often women's invisibility reflects dual discriminations of race or ethnicity and sex and sometimes a triad of oppressions, marked by homophobia, racism, and sexism. Even while the concerns of this Article antedated COVID-19, the deadly virus provides a crucial touchpoint for reflection and intervention. For example, with the rise of women in political office and the expanded force of women elected and nominated in the judiciary, some may be doubtful of the Article's premise. In other words, the gains of the few might obscure the deprivation of the many.

Potential doubts or skepticism about the premise of investigating the enduring record of sexism and its contemporary afflictions, during COVID-19 are easily answered by a broader record. In recent years, feminist scholars and journalists intensified the focus on women's invisibility across various discourses. Their effort, to retell and remap science,[667]

667 *See* Margaret W. Rossiter, *The Matthew Matilda Effect in Science*, 23 SOC. STUD. SCI. 325, 325 (1993); Beryl Lieff Benderly, *Rosalind Franklin and the Damage of Gender Harassment,* SCI., (Aug. 1, 2018, 1:20 PM),https://www.sciencemag.org/careers/2018/08/rosalind-franklin-and-damage-gender-harassment [https://perma.cc/QC74-NHYT] ("Franklin, one of the very few women doing world-class research in the 1950s, is among history's most prominent subjects of what historian of science Margaret Rossiter terms the 'Matilda Effect': the practice of ascribing women's accomplishments to men").

technology,[668] law,[669] medicine,[670] history,[671] and other discourses bears fruit and invites deeper examination and further exploration. This Article takes on that challenge.

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668 *See, e.g.*, MARIE HICKS, PROGRAMMED INEQUALITY: HOW BRITAIN DISCARDED WOMEN TECHNOLOGISTS AND LOST ITS EDGE IN COMPUTING 1–19 (2017); Lori Andrews, *The Technology Enterprise: Systemic Bias Against Women*, 9 U.C. IRVINE L. REV. 1035, 1035 (2019) ("Technology could provide a livelihood for women and enhance their lives, but all too often technology is designed by men, evaluated by men, marketed by men, and mandated by men—all in ways that disadvantage and even harm women."); Sage Isabella Cammers-Goodwin, *"Tech:" The Curse and The Cure: Why and How Silicon Valley Should Support Economic Security*, 9 U.C. IRVINE L. REV. 1063, 1071–72 (2019) ("Indeed, the most invisible of San Francisco's housing population are pregnant women.").

669 *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE REPRODUCTION AND THE MEANING OF LIBERTY 3–22 (1997); GOODWIN, *supra* note 639.

670 *See, e.g.*, Briony Hudson, *The 'Hidden' History of Women in Medicine: A Curator's Thoughts*, ROYAL C. COLLEGE OF PHYSICIANS (Jan. 15, 2019), https://history.rcplondon.ac.uk/blog/hidden-history-women-medicine-curator-sthoughts [https://perma.cc/9XGU-YCUK] ("The hidden nature of women's work often relates to their exclusion from the formal sphere of employment until recent years. This is certainly true for medicine: the Royal College of Physicians (RCP) used the silence on women in its founding documents as its rationale for their exclusion from its membership until the early twentieth century.").

671 *See, e.g.*, MARTHA JONES, VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL 227–65 (2020); DAINA RAMEY BERRY & KALI NICOLE GROSS, A BLACK WOMEN'S HISTORY OF THE UNITED STATES: REVISIONING AMERICAN HISTORY 2–9 (2020); MARTHA S, JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 160 (2018).