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STATEMENT OF PURPOSE

The *Wisconsin Journal of Law, Gender & Society* grew out of two traditions: the University of Wisconsin Law School's "law in action" approach and the interdisciplinary design of gender studies. Through "law in action" we look beyond the statutes and cases to study the practical effects of the law on individuals, marginalized communities, and society at large. The interdisciplinary approach, with an emphasis on gender identity, offers different perspectives through which to expand and challenge our understanding of the law and its implications for society.

The Journal, originally the *Wisconsin Women's Law Journal,* one of the earliest in the nation devoted to the study of women and the law, has strived to contribute insightful scholarship to this evolving field of study. Recognizing that women are a diverse group with differing beliefs and interests, and moreover that gender stereotyping and gender identity discrimination of any kind inhibits each individual's full equality under the law, we encourage articles that examine the intersection of law and gender with issues of race, ethnicity, socioeconomic status, and sexual orientation.

We look forward to your contributions for it is through our discussions and debates that we fulfill the motto of the state of Wisconsin by moving "Forward."

To further our Statement of Purpose, the Journal adopted the Fair Citation Rule, starting with Volume 36, Number 2. The Fair Citation Rule is an expansive interpretation of *The Bluebook* Rule 15.1(b), which allows for the use of *et al.* when a work has more than two authors, by requiring first full citations to list all contributing authors. Research demonstrates that, as a direct result from the use of *et al.*, women and underrepresented groups are often under-cited—impacting job placements, tenure considerations, and other professional and scholarly recognitions. The adoption of the Fair Citation Rule is one way in which the Journal seeks to put "law in action."

WISCONSIN JOURNAL OF LAW, GENDER & SOCIETY

Spring 2025

THE TRUE HARMS OF TRUE CRIME

Leigh Goodmark,[*] *Kim Hricko, and Kwaneta Harris*[**]

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ABSTRACT

The true crime industry is booming. Countless podcasts, books, documentaries, and television shows are dedicated to the "ripped from the headlines" stories of crimes. Criminalized survivors—criminal defendants and people convicted of crimes who have experienced gender-based violence and whose crimes are often related to that violence—are fodder for true crime and

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have little to no legal recourse when their names, likenesses, and stories are used to create this form of entertainment. Its legality notwithstanding, true crime does enormous harm to criminalized survivors. True crime shapes narratives about criminalized survivors, dehumanizes people accused and convicted of crimes, shores up the carceral system, inflicts trauma on criminalized survivors, and makes it difficult for them to resume their lives if and when they are released from prison. True crime contributes to the kind of othering that provides a justification for mass incarceration and impedes progress towards abolition. In this article, in partnership with two of my clients who have been the subject of true crime programs, I examine the impact of true crime on criminalized survivors through the lenses of their experiences and my own.

INTRODUCTION

I started reading true crime in high school. As a lifelong mystery reader, true crime felt like a logical progression for a teenager ready to move on from Nancy Drew and Trixie Belden.[1] I started, like many people did, with Ann Rule, the "queen" of true crime. I cannot remember all of what I read, but I know I read *The Stranger Beside Me*, Rule's biography of Ted Bundy, who killed women in the northern part of my home state of Florida,[2] and *Small Sacrifices*, the story of a woman who shot her three children.[3] I vividly remember reading *Helter Skelter*, locking the doors as I sat down with prosecutor Vincent Bugliosi's account of the Manson Family murders.[4] I didn't like horror movies, but I devoured true crime books.[5] As a college student, I read Truman Capote's *In Cold Blood* and Norman Mailer's *The*

1. I suspect that many women make a similar transition. *See, e.g.*, The Argument, *I Love True Crime. Should I Feel Guilty?*, N.Y. TIMES, at 10:02 (Oct. 27, 2021), https://www.nytimes.com/2021/10/27/opinion/true-crime.html [https://perma.cc/25U6-TNP8] (host, Jane Coaston, attributing her love of true crime to the mystery). Women are the primary consumers of true crime: 73% of the true crime podcast audience, 70% of the reviewers of true crime books on Amazon, and 80% of the attendees of CrimeCon. Lindsey Webb, *True Crime and Danger Narratives: Reflections on Stories of Violence, Race, and (In)Justice,* 24 J. GENDER, RACE, & JUST. 131, 158 (2021) (summarizing data). *See also* Amanda M. Vicary & R. Chris Fraley, *Captured by True Crime: Why Are Women Drawn to Tales of Rape, Murder, and Serial Killers?*, 1 SOC. PSYCH. & PERSONALITY SCI. 81 (2010). Author Hillary Fitzgerald Campbell suggests that women gravitate towards the genre because "[r]elating to the victim is a huge part of true crime fandom for women. We are almost always the victim." HILLARY FITZGERALD CAMPBELL, MURDER BOOK: A GRAPHIC MEMOIR OF A TRUE CRIME OBSESSION 278 (2021). *See also* TANYA HORECK, JUSTICE ON DEMAND: TRUE CRIME IN THE DIGITAL STREAMING ERA 1 (2019); E-mail from Laurie Houston, Jupiter Ent., to Kwaneta Harris (Feb. 11, 2016, 12:09 PM EST) (on file with author) ("We believe that our viewers—most of whom are women—watch shows like ours in order to compare themselves to the women we profile; they want to know, 'Could that happen to me?' 'Could that happen to someone I know?' The answer, of course, is 'yes.'"); DIANA RICKARD, THE NEW TRUE CRIME: HOW THE RISE OF SERIALIZED STORYTELLING IS TRANSFORMING INNOCENCE 31 (2023).

2. ANN RULE, THE STRANGER BESIDE ME (1980).

3. ANN RULE, SMALL SACRIFICES (1987).

4. VINCENT BUGLIOSI & CURT GENTRY, HELTER SKELTER: THE TRUE STORY OF THE MANSON FAMILY MURDERS (1974).

5. The first time I wrote this, I wrote "true crime novels"—which gives you a sense of how unreal the stories they told felt to me.

Executioner's Song—a more literary and critically acclaimed version of true crime.[6] As true crime expanded into documentary films, I watched those, too: from the *Thin Blue Line* to *The Jinx,* from *Making a Murderer* to *The Keepers* to *Shiny Happy People*.[7] I listened, rapt, as Sarah Koenig reinvestigated the murder of Hae Min Lee in the *Serial* podcast; I even bought a *Serial* notebook. For me, crime was a form of entertainment.[8]

Kim Hricko, by contrast, *hated the popular television show "Cops" when I was younger because it reminded me of my childhood when the local police would come to our house and break up fights between my mother and stepfather. Seeing people in their worst moments didn't seem very entertaining to me and I now wonder if that was prescience. Maybe I knew somehow that one day my criminal case would spawn dozens of television shows.*[9]

The kind of true crime I consumed changed over time, however. Shortly after graduating from law school, I began representing survivors of intimate partner violence. I quickly found that I could not read or watch things involving graphic violence against women. I was already immersed in the violence my clients experienced every day. I needed something else to focus on in my off-work hours. I still consumed true crime, but I was more discriminating in my choices about what to read and watch—not as a function of my opposition to the genre, but to protect my ability to do the work.

Then ten years ago, I began representing criminalized survivors of violence—people (mostly women and trans and gender-nonconforming people) incarcerated for crimes related to their own victimization. In the first years that I was doing this work, my family was still consuming a fair amount of true crime. One night, I sat down on our couch to read. My husband was watching an Investigation Discovery show.[10] Within seconds, I realized that the show was about one of my clients, Kim Hricko. I stopped to watch. I wanted to know if what they were saying squared with my understanding of the facts of Kim's case. I internally debated the presenters on the show, then went on with my night. I don't remember mentioning what I had seen to Kim. Kim says that I did, but that we didn't dwell on it.

A few years later, I went to the prison where many of my clients are incarcerated to run an educational program on intimate partner violence. A woman

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6. TRUMAN CAPOTE, IN COLD BLOOD (1965); NORMAN MAILER, THE EXECUTIONER'S SONG (1979).

7. THE THIN BLUE LINE (Miramax 1998); *The Jinx: The Life and Deaths or Robert Durst* (HBO Documentary Films 2015); *Making a Murderer* (Netflix 2015-2018); *The Keepers* (Netflix 2017); *Shiny Happy People: Duggar Family Secrets* (Amazon Prime Video 2023).

8. *Serial: Season One*, N.Y. TIMES (2014-2022) (downloaded using Apple Podcasts). Crime was a form of entertainment for me and for many others. As Jessa Crispin writes regarding her own attempt to sell a true crime book, "I keep thinking, people are going to be entertained reading this. They will only kind of pay attention to it on an airplane. They will speculate as to motivations on social media. They will distill this trauma into a hundred-word review on Goodreads." JESSA CRISPIN, MY THREE DADS: PATRIARCHY ON THE GREAT PLAINS 23 (2022). *See also* RICKARD, *supra* note 1, at 16–17.

9. The portions of the article individually written by Kim Hricko and Kwaneta Harris are indicated by italics. In addition, both Kim and Kwaneta read drafts of the article and contributed to its development.

10. Hilary Fitzgerald Campbell's mother calls Investigation Discovery "The All Murder Channel." CAMPBELL, *supra* note 1, at 192.

I knew in the group entered the room. Her face was downcast. When I asked what was wrong, she said that other women in the prison had told her that they had seen her on television. Knowing that her crime was many years in the past and that she had had no recent court appearances, I asked her why. "Leigh," she sighed, "there are all kinds of shows about me." When I left the prison that evening, a quick Google search proved her correct—there were articles in major magazines, podcasts, YouTube videos, and episodes of television shows about her case. She wasn't the only one. Another client told the student attorney representing her through my Gender, Prison, and Trauma Clinic how disheartened she felt when other women in the prison saw her story on a "killer couples" series.[11] I began to wonder just how many of my clients were unwillingly contributing to the boom in true crime.

And the true crime industry is absolutely booming.[12] Although true crime has been around for centuries, as podcaster and lawyer Rabia Chaudry notes, "newer forms of media give us faster and easier accessibility, oftentimes with near-instant reporting, and greater global reach . . . . [T]he obsession isn't new, and neither is the societal preoccupation with notorious criminals. It's just easier to feed."[13] The sheer number of books, documentaries, podcasts, and other media attests to the popularity of the genre. Referencing the huge community that follows true crime, media studies scholar Judith Fathallah writes, "[F]ascination with and entertainment/infotainment based on true crime is absolutely mainstream, an endlessly profitable and sometimes

11. This was likely *Snapped: Killer Couples*, the latest iteration of the *Snapped* series. *Snapped: Killer Couples* (Jupiter Entertainment 2013). Note that *Snapped* is shown on the Oxygen Network, a television network founded in part by Oprah Winfrey. Though Winfrey has since sold the network, the show, which sensationalizes the lives of women subjected to gender violence (among others) began during her tenure. Organizations including Free Battered Women and the National Clearinghouse for the Defense of Battered Women protested the show, reaching out directly to Winfrey, to no avail. *Snapped* is now Oxygen's longest-running show. Melissa Jeltsen, *She Didn't Just "Snap": Mindy Dodd Was Convicted of Murdering Her Abuser. Then Came the TV Cameras*, THE CUT (Dec. 13, 2021), https://www.thecut.com/2021/12/domestic-abuse-survivors-dont-just-snap.html [perma.cc/C68Q-SQUD].

12. Jessa Crispin observes: "We're in a true-crime boom . . . So I'm pitching this book, because if you're a writer, at least when something terrible happens to you or near you or to someone you kind of know, you can often transform that terrible act into a six-figure book deal with a possible Netflix option." CRISPIN, *supra* note 8, at 20.

13. Rabia Chaudry, *Introduction*, *in* EVIDENCE OF THINGS SEEN: TRUE CRIME IN AN ERA OF RECKONING xi (Sarah Weinman ed. 2023). Even policing agencies have capitalized on the public's appetite for true crime. In Maricopa County, Arizona, for example, Sheriff Joe Arpaio installed webcams in the Madison Street Jail, explaining that the webcams enhanced the public understanding of what was happening in the jail. Pretrial detainees sued Arpaio, arguing that the use of webcams violated their Fourteenth Amendment right to be free of punishment, and the United States Court of Appeals for the Ninth Circuit upheld the injunction, explaining that "we fail to see how turning pretrial detainees into the unwilling objects of the latest reality show serves" the interests offered by the sheriff. Demery v. Arpaio, 378 F.3d 1020, 1031 (9th Cir. 2004).

respectable staple of the media landscape."[14] People love true crime despite—and maybe because of—the voyeuristic opportunities it provides.[15]

What constitutes true crime can be difficult to pin down.[16] Professors Paul Kaplan and Daniel LaChance broadly define true crime as any media that turns a crime, trial, or punishment into a story for the general public.[17] Chaudry describes the essential components: "[T]rue crime has to have a reporting of at least the bare minimum facts of the case that are publicly available. There's a victim. There's an identified perpetrator or suspect or somebody at large. So there's some mystery involved."[18] Law professor Lindsey Webb notes that all true crime purports to include both story- and truth-telling.[19] Media professor and broadcaster Ian Case Punnett notes that this storytelling often features themes including: seeking justice for victims; subverting the status quo; raising awareness of systemic injustice; highlighting the setting of a crime; emphasizing forensic science; advocating rather than telling neutral stories; and serving as explanatory folk tales, explaining a truth to the public.[20] Journalist Kat Rosenfield describes true crime as "equal parts pulp thriller and morality play."[21] English professor Jean Murley says, "Modern true crime is almost a fantasy genre."[22] True crime is a hybrid of "news . . . superimposed on entertainment."[23] What makes true crime so addictive, Webb argues, "is in the

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14. Judith Fathallah, *"Being a Fangirl of a Serial Killer is Not OK": Gatekeeping Reddit's True Crime Community,* NEW MEDIA & SOC'Y 5638, 5639 (2022). The latest example of the legal system as entertainment is "Jury Games," an "immersive theater production" that asks "jurors" to decide in an hour whether fictional defendants are guilty of serious crimes, including arson and murder. Claire Moses & Kate Christobek, *Hate Jury Duty? These People Actually Pay for It,* N.Y. TIMES (Mar. 20, 2025), https://www.nytimes.com/2025/03/20/arts/jury-duty-experience-game.html.

15. Fathallah, *supra* note 14, at 5652. *See also* Susan Weiner, *True Crime: Fact, Fiction, and the Law*, 17 LEGAL STUD. F. 275, 283 (1993).

16. In her graphic memoir about her true crime fixation, Hilary Fitzgerald Campbell defines true crime as "a pile of Ann Rule's books . . . When someone at a dinner party whispers, 'Did you hear about those kids in Idaho?' . . . Most shows on Netflix . . . The reason my mom calls me . . . Nancy Grace's determination . . . The reason I call my mom . . . All podcasts post-2014." CAMPBELL, *supra* note 1, at 7. For a discussion of a variety of definitions of true crime, *see* HORECK, *supra* note 1, at 7–11.

17. PAUL KAPLAN & DANIEL LACHANCE, CRIMESPLOITATION: CRIME, PUNISHMENT, AND PLEASURE ON REALITY TELEVISION 2 (2022). Kaplan and LaChance distinguish true crime from what they call "crimesploitation": the blend of true crime texts and "'exploitation' films, which satisfy the voyeuristic desire to witness the violation of taboos." *Id.*

18. The Argument Podcast, *supra* note 1, at 03:11.

19. Webb, *supra* note 1, at 143.

20. IAN CASE PUNNETT, TOWARD A THEORY OF TRUE CRIME NARRATIVES: A TEXTUAL ANALYSIS 95–99 (2018).

21. Reason Podcast, *True Crime Distorts the Truth About Crime,* REASON, at 03:16 (Oct. 2023), https://reason.com/2023/09/23/true-crime-distorts-the-truth-about-crime/ [perma.cc/NLK8-NBEX].

22. Elon Green, *The Enduring, Pernicious Whiteness of True Crime*, THE APPEAL (Aug. 21, 2020) (quoting Murley), https://theappeal.org/whiteness-of-true-crime/ [perma.cc/74NX-NKZW].

23. Gray Cavender & Lisa Bond-Maupin, *Fear and Loathing on Reality Television: An Analysis of "America's Most Wanted" and "Unsolved Mysteries,"* 63 SOCIO. INQUIRY 305, 305 (1993).

storytelling—how those themes are presented and the ways in which the tales are told."[24] True crime is not exactly journalism, but it's not *not* journalism either.[25] And it shapes "how we understand risk and violence, as well as ourselves and our social world."[26]

Outlets from National Public Radio to NBC News to Investigation Discovery churn out true crime stories for public consumption. There is nothing unlawful about telling these stories. Although there is debate about whether true crime is a form of journalism (with most observers agreeing that the boundaries between the two have become blurry),[27] the law is clear that high profile crimes are a matter of public interest and, therefore, fair game for storytellers of all types.[28] So long as true crime adheres to some version of the truth, it is generally safe from liability for telling the story, regardless of whether the actors described endorse or are involved in the telling.[29]

Producing true crime is legal. And producing and consuming true crime is deeply harmful. Those who consume true crime acknowledge the ethical complexity of that choice, recognizing that what they use as entertainment often involves someone's victimization and that continuing to watch, read, or listen creates greater demand for content.[30] "[A]t the end of the day," podcaster Jane Coaston notes, "the genre itself is driven by telling the real stories of horrifying events that ruined or even ended the lives of real people. Sometimes, when I'm listening to a true crime

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24. Webb, *supra* note 1, at 144.

25. *See* RICKARD, *supra* note 1, at 5 (explaining that "[t]he relationship between reality and entertainment is fluid" with journalists using "entertainment values" to sell their stories). CBS's *48 Hours* rebranded itself as *48 Hours Mystery* "as ratings for investigative journalism plummeted and ratings for true-crime shows began to soar." MAGGIE NELSON, THE RED PARTS 66 (2007).

26. RICKARD, *supra* note 1, at 15.

27. *See, e.g.*, Kelli S. Boling, *True Crime Podcasting: Journalism, Justice or Entertainment?*, 17 RADIO J.: INT'L STUD. BROAD. & AUDIO MEDIA 161, 171–73 (2019); Laura Callihan, *Infringement, She Wrote: The Intellectual Property Rights of Victims in True Crime Craze*, 6 U. CIN. INTELL. PROP. & COMPUT. L.J. 1, 11–12 (2022); Ken Dowler et al., *Constructing Crime: Media, Crime, and Popular Culture*, CANADIAN J. CRIMINOLOGY & CRIM. JUST. 837, 837–39 (2006); Webb, *supra* note 1, at 142–43. The breadth of true crime is quite wide as well: as journalist Phoebe Lett writes, "the genre to which 'Tiger King' [a Netflix series described by one critic as 'gawk[ing] at the yokels'] belongs also includes the 'In the Dark' podcast, which investigates the failures of law enforcement and miscarriages of justice" and which has been universally lauded for the strength of its reporting. Phoebe Lett, *Is Our True-Crime Obsession Doing More Harm Than Good?*, N.Y. TIMES (Oct. 28, 2021), https://www.nytimes.com/2021/10/28/opinion/true-crime-petito.html. How streamers like Netflix would characterize their role in producing true crime content is also a question. In response to a lawsuit filed against Netflix for broadcasting a photograph of someone completely unrelated to the crime as part of its publicity for "The Hatchet Wielding Hitchhiker," described as "a true-crime documentary about a hitchhiker turned convicted murderer," professor of cinema studies Nathaniel Brennan observed, "I don't know if Netflix would consider themselves journalists . . . I don't know if they hold themselves to a different standard." Remy Tumin, *Netflix Put His Photo in a True-Crime Film. Now, He's Suing.*, N.Y. TIMES (Apr. 18, 2023), https://www.nytimes.com/2023/04/18/business/netflix-hatchet-wielding-hitchiker-lawsuit.html.

28. *See infra* Part I.

29. *See id.*

30. Fathallah, *supra* note 14, at 5652.

podcast, I feel like I'm crashing a funeral."[31] The complexities of the victims' lives are often flattened by true crime; fascinated by what makes perpetrators do what they do, victims' stories can become secondary.[32] Victims who believe that they are participating in news stories sometimes find themselves featured on syndicated shows for years to come.[33] Victims and family members are not always consulted by filmmakers and re-traumatized when—sometimes without warning—their story becomes fodder for public consumption yet again.[34]

In the world of true crime, criminal defendants often get the most airtime. Reams of information and speculation have been produced to try to explain (in an entertaining fashion) the Ted Bundys and Jeffrey Dahmers of the world.[35] Nonetheless, in this article I have chosen to focus not on serial killers, but on criminalized survivors of violence—people who are prosecuted and/or convicted of crimes and who have suffered some form of gender-based victimization. I have argued elsewhere that the criminal legal system is especially harsh on "imperfect victims"—people who fail to conform to stereotypes requiring victims of gender-based violence to be meek, weak, passive, white, heterosexual, cisgender, and utterly without blame or any "problematic" condition (mental illness, substance use

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31. The Argument Podcast, *supra* note 1, at 02:02. *See also* Laura Browder, *Dystopian Romance: True Crime and the Female Reader,* 39 J. POP. CULTURE 928, 933 (2006) ("[T]o those who do not love the genre, true crime can easily appear to be nothing more than a form of pornography—a repetition of violence, and of sexualized violence, that heightens the senses."); HORECK, *supra* note 1, at 12-17 (discussing "the ethics of looking").

32. Mallory Cheng & Cait Flynn, *The Double-Edged Sword of True Crime Stories' Popularity, a UWM Professor Explains,* WUMW 89.7 FM MILWAUKEE'S NPR (Jan. 20, 2023, 10:05 PM), https://www.wuwm.com/2023-01-20/the-double-edged-sword-of-true-crime-stories-popularity-a-uwm-professor-explains [perma.cc/9PZT-P8W9]. Some victims receive much more media coverage than others; true crime has disproportionately focused on victimized white women. *See generally* Webb, *supra* note 1. Author Maggie Nelson recalls an exchange with a *48 Hours Mystery* correspondent who reassured Nelson that she looked fine on camera without makeup: "She tells me not to worry—they wouldn't be filming me if I didn't look good. *This is primetime,* she winks. *No black people, no bad teeth."* NELSON, *supra* note 25, at 174.

33. Melissa Hook, *The Real CSI: Are Crime Victims Being Re-Victimized by Filmmakers?*, DOCUMENTARY MAG. (Mar. 31, 2004), https://www.documentary.org/feature/real-csi-are-crime-victims-being-re-victimized-filmmakers [perma.cc/T3MR-2F8Y].

34. Annie Nichol, *Opinion: My Sister Was Murdered 30 Years Ago. True Crime Repackages Our Pain as Entertainment,* N.Y. TIMES (Jan. 8, 2024), https://www.nytimes.com/2024/01/08/opinion/movies-books-true-crime.html [https://perma.cc/A8CK-UCMP]; Ming Wei Yeoh, *The Ethics of True Crime Media and Its Consumption,* TEEN INK (Dec. 23, 2022), https://www.teenink.com/opinion/pop_culture_trends/article/1176348/The-Ethics-Of-True-Crime-Media-And-Its-Consumption [https://perma.cc/PC8K-EFWM]. In a few well-publicized cases, true crime purveyors who started out as the victims' allies have turned against victims and encouraged their social media followings to do the same. Sarah Viren, *Podcasters Took Up Her Sister's Murder Investigation. Then They Turned on Her,* N.Y. TIMES (Dec. 5, 2023), https://www.nytimes.com/2023/12/05/magazine/murder-podcast-debbie-williamson.html [https://perma.cc/TSG3-ERXY].

35. *See, e.g.,* Katie Rife, *The 25 Best Serial Killer Documentaries and Docuseries,* ENT. WKLY. (Jan. 8, 2024), https://ew.com/best-serial-killer-documentaries-8409501 [https://perma.cc/Y45G-LWX5].

disorder) or characteristic (anger, belligerence, autonomy).[36] This piece builds on my body of work examining how the legal system regularly fails people subjected to gender-based violence and grew out of my interest in how true crime was harming my own clients.[37] Nonetheless, the observations about the destruction done by true crime are applicable to other vulnerable defendants—for example, people who have killed abusive parents, made failed self-defense claims, or have been found not guilty by reason of insanity. Moreover, I am cognizant of (and share) the critiques of what has been called "domestic violence exceptionalism" and I am not arguing that we should treat criminalized survivors differently than others.[38] This article is a starting point for a more general conversation about the impact of true crime on those accused and convicted of crimes.

For the criminalized survivors that I represent—people whose crimes are almost always related in some way to the gender-based trauma they've experienced—true crime often focuses on why they "

," how otherwise "normal" women could possibly have committed such heinous crimes. Very little attention has been paid to the impact of true crime on people like my clients—on their reactions to seeing their stories depicted, the way that true crime shapes the public narrative about them, and the impact of that depiction in legal proceedings. This article considers those questions, and it does so in partnership with those who are directly affected.

Kim Hricko, who is currently incarcerated at the Maryland Correctional Institution for Women, co-conceived and wrote parts of this article. Kwaneta Harris, recently released from solitary confinement in a Texas prison after eight years and in her fifteenth year of incarceration, also contributed. Kim and Kwaneta have first-hand experience with the feelings of powerlessness, lasting trauma, and other consequences associated with being the subjects of true crime. In an article that asks who owns their stories, it feels essential that those directly affected by true crime have a forum to talk about their experiences with the genre. Their perspectives lend this article a level of insight that I could never provide on my own.[39] I have also asked other clients, who remain unnamed here for concerns about their safety and the impact of participation on their legal claims, for permission to share their

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36. *See generally* LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM (2023).

37. *See, e.g., id.*; LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE (2018); Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System,* 48 HARV. C.R.-C.L. L. REV. 51 (2013); Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back,* 20 YALE J. L. & FEMINISM 75 (2008).

38. *See generally* Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence,* 90 N.Y.U. L. REV. 397 (2015).

39. Although it is clear that we have not achieved the level of co-authorship in this article that they have reached in their work together, thanks to Terrell Carter, Rachel López, and Kempis Songster for providing the foundational example of how to engage in participatory law scholarship. *See generally* Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice,* 116 NW. U. L. REV. 315 (2021); *see also* Rachel López, *Participatory Law Scholarship,* 123 COLUM. L. REV. 1795 (2023). Co-writing with directly affected people is a way of combatting epistemic injustice. S. Lisa Washington, *Survived and Coerced: Epistemic Injustice in the Family Regulation System,* 122 COLUM. L. REV. 1097 (2022).

experiences.[40] In an article that questions true crime's right to publicize the stories of criminalized survivors, we do not want to commit the same harms.

Part I of this article asks who owns a person's story and who can benefit from it. In many jurisdictions, people convicted of criminal offenses are prohibited from financially benefitting from their own stories, and the rights of privacy and publicity generally do not attach to matters of public interest, like crimes. Having established that producing true crime is not unlawful, Part II considers the harm that true crime does to criminalized survivors. Part III looks at "rehabilitative" true crime—true crime meant to tell the stories of people like my clients in a positive way—and asks whether that kind of true crime avoids the harms considered in Part II. Part IV explores how true crime fosters othering and impedes work towards abolition. We consider whether there are ways to mitigate the harms of true crime and I grapple with my own contribution to the true crime industry in the Conclusion.

I. WHO OWNS THE STORIES?

From the moment it was first reported, the story of Meredith Kercher's murder became the Amanda Knox story. Knox, who was convicted and later exonerated of Kercher's murder, became a true crime sensation. Twelve years after her release she still commands headlines.[41] Knox has long grappled with her notoriety: "Does my name belong to me? Does my face? What about my life? My story? . . . I return to these questions again and again because others continue to profit off my identity, and my trauma, without my consent."[42]

Criminal defendants and people convicted of crimes have few avenues to prevent their stories from being told.[43] Nothing in the law "secures to individuals the exclusive right in the facts that comprise the narrative of their lives."[44] Although the right to privacy is protected both constitutionally and in state tort law, those rights diminish considerably—almost completely—when a person becomes a public figure by virtue of committing or being convicted of a crime. So long as what is said about

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40. I should also admit that although they chose to do so, I am nervous about having Kim and Kwaneta use their names in this article. I hope that your first response is not to Google them, though I fear it will be. At the very least, we ask that you not watch the true crime produced about them.

41. *See, e.g.,* Angela Giuffrida, *Amanda Knox to Face New Trial in Italy Over Slander Conviction,* THE GUARDIAN (Oct. 13, 2023), https://www.theguardian.com/us-news/2023/oct/13/amanda-knox-slander-conviction-overturned-italy-retrial [https://perma.cc/LA6R-DPVZ].

42. Amanda Knox, *Who Owns Amanda Knox?*, *in* EVIDENCE OF THINGS SEEN, *supra* note 13, at 131.

43. Although this article focuses on the right to privacy, there are also First Amendment arguments weighing the defendant's rights against the public's right to open courts, Fourth Amendment claims related to unreasonable search and seizure, and Sixth Amendment fair trial claims to be made in certain situations. *See, e.g.,* Kyle J. Kaiser, *Twenty-First Century Stocks and Pillory: Perp Walks as Pretrial Punishment,* 88 IOWA L. REV. 1205, 1214 (2003).

44. Jorge L. Contreras & Dave Fagundes, *The Life Story Rights Puzzle,* 14 HARV. J. SPORTS & ENT. L. 153, 157 (2023) (discussing life story rights in the context of intellectual property law and tort law). Under intellectual property law, life stories are explicitly ceded to the public domain in copyright and so long as the facts are true, there is no trademark protection for life stories. *Id.* Tort law is discussed further *infra.*

them is true,[45] convicted and incarcerated people have little recourse in preventing others from telling their stories and benefitting economically from doing so.

> Kim: *Truth. Even the slim protections that may be afforded a convicted felon in the realm of privacy rights are removed when the facts relied upon are "true." But criminalized survivors have long experienced truth as subjective. Any convicted felon will confirm that upon verdict, every comment, inference and implied aspersion is made true. The state's case provides ample fodder for true crime journalists—it's all legally "true."*

Against a backdrop of "[i]instantaneous photographs and newspaper enterprise hav[ing] invaded the sacred precincts of private and domestic life," Samuel D. Warren and Louis D. Brandeis called for a right to privacy—a right to be left alone—in 1890.[46] The need for such a right arose, they argued, because "[t]he press is overstepping in every direction the obvious bounds of propriety and decency" and "the supply creates the demand."[47] Even in its earliest iteration, the right to privacy excluded "publication of matter which is of public or general interest."[48] People who have "renounced the right to live their lives screened from public observation," Warren and Brandeis wrote, should not expect the same level of privacy as those who have kept their lives out of public view.[49] "After all," writes Ava Kofman, "one definition of journalism is the invasion of privacy in the public interest."[50]

Warren and Brandeis theorized the public or general interest exclusion by reference to men seeking or holding public office. The class of people whose lives are considered public is much broader in modern jurisprudence, however, and includes those accused and convicted of crimes. Older cases recognize an invasion of the right to privacy where a person's criminal history is disclosed after a number

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45. When what is said is untrue, defamation actions may be possible. The Wall Street Journal recently noted an uptick in the number of defamation suits filed in response to Netflix true crime content. Though Netflix has reportedly won many of those cases, others have been settled privately. Joe Flint & Itzel Luna, *Streamers' Love of True Story TV Draws Lawsuits,* WALL ST. J. (Aug. 6, 2024), https://www.wsj.com/business/media/netflix-true-stories-lawsuits-77b3494e [https://perma.cc/L4NT-DAY7].

46. Samuel Warren & Louis D. Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193, 195 (1890). The impetus for the article was press coverage of the "social entertainments on an elaborate scale" Mrs. Warren held in the Warren home; "[t]he matter came to a head when the newspapers had a field day on the occasion of the wedding of a daughter, and Mr. Warren became annoyed." William L. Prosser, *Privacy,* 48 CALIF. L. REV. 383, 383 (1960).

47. Warren & Brandeis, *supra* note 46, at 196. The Supreme Court of California elaborated on this idea in 1971, noting that "[a]cceptance of the right to privacy has grown with the increasing capability of the mass media and electronic devices with their capacity to destroy an individuals' anonymity, and expose his most personal characteristics to public gaze." Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 37 (Cal. 1971).

48. Warren & Brandeis, *supra* note 46, at 214.

49. *Id.* at 215. *See also* Robert C. Post, *The Social Foundation of Privacy: Community and Self in the Common Law Tort,* 77 CALIF. L. REV. 957, 995 (1989) (explaining that the right to publicize newsworthy events is acknowledged by all courts that recognize the public disclosure tort); Scott Skinner-Thompson, *Privacy's Double Standards,* 93 WASH. L. REV. 2051, 2062-63 (2018) (citing RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977)).

50. Ava Kofman, *Open Secrets,* N.Y. REV. BOOKS (Feb. 22, 2024), at 37.

of years have passed.[51] But more recent cases have declined to find an invasion of privacy in cases involving people who became public figures as a result of criminal activity.[52] The Restatement Second of Torts is clear that "[t]hose who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed."[53] Moreover, the Restatement notes that facts that otherwise would be considered private (and the disclosure of which would otherwise be considered an invasion of privacy) may be freely shared in the case of a public figure: "Thus, the life history of one accused of murder, together with such heretofore private facts as may throw some light upon what kind of person he is, his possible guilt or innocence, or his reason for committing the crime are a matter of legitimate public interest."[54] Courts have refused to find a right to privacy where information from a police report was made public,[55] where police publicized a report suggesting that a person had committed a crime despite concluding that no crime was committed prior to releasing the report,[56] when determining whether to redact the

51. Those cases involved claims made under the "public disclosure of private fact" tort, one of four torts covered by the right to privacy and what law professor Robert Post calls "[t]he core of the invasion of privacy tort." Post, *Social Foundation*, *supra* note 49, at 978. In *Melvin v. Reid*, 297 P. 91, 93-94 (Cal. Dist. Ct. App. 1931), a California district court of appeal found that the use of a woman's real name in a fictional movie based on the events of her life as a prostitute tried and acquitted of murder eight years after she "had abandoned her life of shame, had rehabilitated herself, and had taken her place as a respected and honored member of society," violated her right to privacy. In *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 36, 44 (Cal. 1971), the California Supreme Court held that the plaintiff could bring an action for public disclosure of private facts when a national magazine wrote a story about how he had hijacked a truck more than a decade earlier. *See also* Conklin v. Sloss, 86 Cal. App. 3d 241 (Cal. Ct. App. 1978) (finding that publication of true facts about a man's conviction for murdering his brother-in-law twenty years later could give rise to a claim for public disclosure of private fact). In a later case, the same court described *Briscoe* as "an exception to the more general rule that 'once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days.'" Forsher v. Bugliosi, 608 P.2d 716, 726 (Cal. 1980) (quoting Prosser, *supra* note 46, at 418). Torts scholars have described the public disclosure of private fact tort as weak, stunted, and even dead because of the breadth of the definition of newsworthiness. Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective,* 22 YALE J.L. & HUMAN. 171, 172 (2010). *See also* Robert Post, *Data Privacy and Dignitary Privacy: Google Spain, The Right to Be Forgotten, and the Construction of the Public Sphere,* 67 DUKE L.J. 981, 1061 (2018) (questioning whether the public disclosure tort is viable under the First Amendment).

52. *See, e.g.,* Leopold v. Levin, 259 N.E.2d 250 (Ill. 1970) (finding no liability for a fictionalization of the infamous Leopold-Loeb case). Even in *Briscoe,* the court held that "[i]n general . . . truthful reports of *recent* crimes and names of suspects of offenders will be deemed protected by the First Amendment." *Briscoe*, 483 P.2d at 39.

53. RESTATEMENT (SECOND) OF TORTS § 652D cmt. f (AM. L. INST. 1977); *see also* Capra v. Thoroughbred Racing Ass'n, 787 F.2d 463 (9th Cir. 1986).

54. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (AM. L. INST. 1977).

55. Scheetz v. Morning Call, Inc., 946 F.2d 202 (3d Cir. 1991).

56. Baker v. Howard, 419 F.2d 376 (9th Cir. 1969). *See also* Rosenberg v. Martin, 478 F.2d 520 (2d Cir. 1973) (holding that pre-trial police comments to the media about a defendant did not violate defendant's right to privacy).

trial testimony of an expert witness discussing incarcerated people who died by suicide,[57] and where a criminal defendant was videotaped after being arrested.[58]

Given the scope of the newsworthiness exception to the right to privacy,[59] people convicted of crimes cannot prevent true crime coverage of their lives by invoking the right to privacy.[60] And they generally cannot prevent others from profiting from the use of their stories either.[61] As of 2022, thirteen states had created a specific remedy for public figures whose identities or likenesses are used for commercial gain, while several others recognize the right in their common law.[62] Known as right to publicity laws, these laws (in theory) enable public figures to control how their names and images are used and to sue for damages when their identities are "exploited for commercial purposes."[63] But people convicted of crimes may be limited in their ability to invoke right to publicity laws. In California, for

57. The court declined to redact the testimony in part because information relating to three of the six deaths by suicide had already been reported in the media. Braggs v. Dunn, 276 F. Supp. 3d 1253 (M.D. Ala. 2017).

58. Caldarola v. County of Westchester, 343 F.3d 570 (2d Cir. 2003); Watkins v. City of Highland Park, 232 F. Supp. 2d 744 (E.D. Mich. 2002). *But see* Lauro v. Charles, 219 F.3d 202, 203 (2d Cir. 2000) (finding that the "perp walk" was "staged…for the benefit of the press," as opposed to being filmed while happening in real time, which constituted a violation of Lauro's Fourth Amendment rights). One commentator has suggested that "perp walks" be treated as pretrial punishment, in violation of the due process guarantees of the Fifth and Fourteenth Amendments. Kaiser, *supra* note 43, at 1229. *See also* Hannah Shay Chanoine, *Clarifying the Joint Action Test for Media Actors When Law Enforcement Violates the Fourth Amendment,* 104 COLUM. L. REV. 1356, 1358-59 (2004).

59. *See, e.g.,* Post, *Data Privacy and Dignitary Privacy*, *supra* note 51, at 1057 (describing newsworthiness as "so encompassing and so vague that it can frequently mean nothing more than what answers to the sheer curiosity of the public as determined by the very media outlets publishing the offending communication").

60. Of course, this assumes that the retelling of the crime is, in fact, accurate. A person who is depicted in a "false light" may recover for invasion of privacy if untrue private material is widely publicized, the false light would be highly offensive to a reasonable person, and the matters disclosed are not of legitimate concern to the public. RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW. INST. 1977). A false light claim might be appropriate where the facts presented are simply untrue or when they give rise to unsupported innuendo or suggestion about the motivation for the person's actions. Dice v. Johnson, 711 F. Supp. 2d 340, 359-60 (M.D. Pa. 2010). In the context of criminal defendants, courts have found that being accused of a different, more salacious murder than the one for which you might actually be responsible gives rise to a claim for false light. Wallace v. Media News Group, Inc., 568 Fed. App'x. 121 (3d Cir. 2014). Publishing that a person is a "felon" when that person has been convicted of a misdemeanor also gives rise to a false light claim. Myers v. The Telegraph, 773 N.E.2d 192 (2002). False light claims have been rejected in a number of states; in others, they have been folded into defamation claims or required showings of actual malice. John C.P. Goldberg & Benjamin C. Zipursky, *A Tort for the Digital Age: False Light Invasion of Privacy Reconsidered,* 73 DEPAUL L. REV. 461 (2024); Logan v. D.C., 447 F. Supp. 1328, 1334 (D.D.C. 1978).

61. *See generally* Contreras & Fegundas, *supra* note 44.

62. Callihan, *supra* note 27, at 8.

63. Laura Hock, *What's in a Name? Fred Goldman's Quest to Acquire O.J. Simpson's Right of Publicity and the Suit's Implications for Celebrities,* 35 PEPP. L. REV. 347, 355 (2008). The United States Supreme Court recognized the right to publicity in *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

instance, a public figure who is newsworthy can invoke the right to publicity only if the defendant disseminated information about the public figure knowing that information was false or without regard to the truth.[64] "Newsworthy" is broadly construed in the case law to include public figures from the past.[65]

Another way to ensure the privacy of some of those convicted of crimes might be through a right to be forgotten. In some European countries, for example, the "right to oblivion" has historically enabled a person who has been convicted of a crime, served their sentence, and been "rehabilitated" to object to publication of the facts surrounding that conviction.[66] The modern incarnation of that right, the right to be forgotten, enables individuals to request that misleading or embarrassing information available online about them be eliminated or restricted so that the past information does not color present impressions of the requester.[67] Recital 153 of the European Union's General Data Protection Regulation makes it clear, however, that the right to erasure of data can be trumped by the right to freedom of expression and information, particularly when asserted by journalists.[68] Information can be removed only when that information is no longer newsworthy.[69] Nonetheless, the right to be forgotten was the basis for an Italian court's ruling that an article regarding the criminal conviction of a restaurant owner be removed from the archives of an Italian

64. William O'Neil & Co. v. Validea.com Inc., 202 F. Supp. 2d. 1113, 1118 (C.D. Cal. 2002).

65. Eastwood v. Nat'l Enquirer, Inc., 149 Cal. App. 3d 409, 420-21 (Cal. Ct. App. 1983). Whether people convicted of crimes can sell their own stories is a different issue; although a number of states have passed "Son of Sam" laws designed to prevent convicted people from profiting from their crimes, those statutes have largely been found unconstitutional. *See generally* Justin Burnworth, *Making a Constitutional "Son of Sam" Law: Netflix's Booming True Crime Business,* 49 HASTINGS CONST. L.Q. 3 (2022).

66. Jeffrey Rosen, *The Right to Be Forgotten,* 64 STAN. L. REV. ONLINE 88 (2012); Aurealia Tamó & Damain George, *Oblivion, Erasure and Forgetting in the Digital Age,* 5 JIPITEC 71 (2014). As the European Court of Human Rights explained in *Hurbain v. Belgium*, "With the passage of time, a convicted offender might have an interest in no longer being confronted with his or her offence, to ensure reintegration into society . . . the electronic archiving of an article about the offence must not create a kind of 'virtual criminal record' for the person concerned.'" Press Release, Eur. Ct. H.R., *Le Soir Newspaper Ordered to Anonymise Identity of Rehabilitated Offender to Respect His Right to Be Forgotten: No Violation of Freedom of Expression* 3 (June 22, 2021). *See also* Hurbain v. Belgium, App. No. 57292/16, ¶ 109 (June 22, 2021), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-210884%22]} [https://perma.cc/NF47-FZFF]; Hurbain v. Belgium, App. No. 57292/16 (July 4, 2023), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-225814%22]} [https://perma.cc/5359-STHZ].

67. Michael J. Kelly & David Satolam, *The Right to Be Forgotten,* 2017 U. ILL. L. REV. 1, 3 (2017). The European Court of Justice established the right to be forgotten in *Google Spain SL v. Agencia Espanola de Proteccion de Datos*. Case C-131/12, Google Spain SL v. Agencia Espanola de Proteccion de Datos, ECLI:EU:C:2014:317 (May 13, 2014). That right has been codified in Article 17 and Recitals 65 and 66 of the European Union's General Data Protection Regulation. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 65, 66.

68. *Id.* at recital 153.

69. Cécile de Terwangne, *Internet Privacy and the Right to Be Forgotten/Right to Oblivion,* 13 REVISTA DE INTERNET, DERECHO Y POLITICA 109, 111 (2012).

online news site after two years.[70] U.S. commentators agree, however, that establishing such a right in the United States is unlikely given the First Amendment,[71] and at least one U.S. court has declined to adopt the right to be forgotten.[72] Moreover, the reach of such interventions is limited; as a practical matter, by the time a criminalized survivor has served her sentence, been "rehabilitated," and requested removal of identifying information, the true crime content about her case would most likely have already been widely disseminated.

The rights to privacy and against publicity ensure that a person's "existence is his own. And this is a precondition of personhood."[73] But these rights are among the many vestiges of personhood that a convicted person loses by virtue of being convicted.[74] Instead, the stories of criminalized people become intellectual property "to be exploited."[75] Kwaneta: *They say we can't profit off our crime, but they can.*[76] While economic exploitation is part of the harm done by true crime, because "true crime does pay,"[77] criminalized survivors experience equally, if not more, serious harms when they are featured in true crime.

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70. Athalie Matthews, *How Italian Courts Used the Right to be Forgotten to Put an Expiry Date on News,* THE GUARDIAN (Sept. 20, 2016), https://www.theguardian.com/media/2016/sep/20/how-italian-courts-used-the-right-to-be-forgotten-to-put-an-expiry-date-on-news [https://perma.cc/HJ4T-8N4U]. *See also* Hurbain v. Belgium, App. No. 57292/16 (holding that the order to anonymize the name of a driver convicted in a driving accident in the electronic archives of *Le Soir* did not violate Article 10 of the European Convention on Human Rights because the driver had served his sentence, been rehabilitated, and tried to stay out of the media).

71. *See, e.g.,* Steven C. Bennett, *Is America Ready for the Right to Be Forgotten,* 88 N.Y. ST. B.A.J. 11, 12 (2016); Michael J. Kelly & David Satola, *The Right to Be Forgotten,* 2017 U. ILL. L. REV. 1, 38 (2017); Dawn Carla Nunziato, *The Fourth Year of Forgetting: The Troubling Expansion of the Right to Be Forgotten*, 39 U. PA. J. INT'L L. 1011, 1051 (2018); Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, The Right to Be Forgotten, and the Construction of the Public Sphere,* 67 DUKE L.J. 981, 989 (2018); Savanna Shuntich, *The Life, the Death, and the Long-Awaited Resurrection of Privacy,* 41 HUM. RTS. 2 (2016); Craig Timberg & Sarah Halzack, *Right to be Forgotten vs. Free Speech,* WASH. POST (May 14, 2014), https://www.washingtonpost.com/business/technology/right-to-be-forgotten-vs-free-speech/2014/05/14/53c9154c-db9d-11e3-bda1-9b46b2066796_story.html [https://perma.cc/YCY3-SHUN].

72. *See* Garcia v. Google, 786 F.3d 733 (9th Cir. 2015).

73. Jeffrey Reiman, *Privacy, Intimacy, and Personhood,* 6 PHIL. & PUB. AFFS. 26, 39 (1976).

74. Other facets of personhood lost through criminal convictions include the right to vote, the right to pursue employment of one's choice, and the right to live in the place where one chooses. *See generally,* Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction,* 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006).

75. The Argument Podcast, *supra* note 1, at 34:03. *See also* Lili Pâquet, *Seeking Justice Elsewhere: Informal and Formal Justice in the True Crime Podcasts Trace and The Teacher's Pet,* 17 CRIME MEDIA CULTURE 421, 433 (2021).

76. Vidal Guzman, *Punishment TV,* INQUEST (Feb. 25, 2025), https://inquest.org/punishment-tv/ [https://perma.cc/NE5N-PMZM].

77. Weiner, *supra* note 15, at 275.

II. THE DESTRUCTIVE WORK OF TRUE CRIME

True crime's defenders contend that it is doing important work in society. The genre reflects the community's concern with crime, provides information about crime, and could (in theory) serve as a deterrent to engaging in criminal behavior.[78] On a pragmatic level, they argue that true crime helps us to identify the characteristics of people who kill and prevent others from becoming killers themselves.[79] They say true crime illuminates the techniques killers use and even occasionally solves crimes.[80] True crime purports to provide audiences with a bird's eye view into the workings of the criminal legal system.[81] On an existential level, true crime confronts social disorder and helps consumers quell their feelings of horror and shock by suggesting how order can be restored.[82]

While some, or even all, of this may be true, the damage true crime does to criminalized survivors far outweighs any of the benefits. After all, "'asking questions,' and writing,"—or broadcasting—"are violent acts," as May Jeong observes.[83] That violence creates significant fallout in the lives of criminalized survivors.

A. True Crime Shapes the Narrative

No single story captures the unvarnished truth of a situation.[84] Every storyteller makes choices about how to tell a story: what details to include; what tropes and stereotypes to rely upon; what historical events to include or omit.[85] True crime is no

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78. Taking this idea a step further, one might argue that true crime could serve as a form of social sanction, potentially obviating the need for legal intervention. My thanks to participants in the University of Miami's faculty workshop for this observation.

79. HORECK, *supra* note 1, at 2 (explaining that true crime has been seen as a way of preparing young women particularly for dealing with dangerous men); Vatsa Singh, *Our Obsession With Serial Killers*, THE GAZELLE (Nov. 9, 2019), https://www.thegazelle.org/issue/168/our-obsession-with-serial-killers [https://perma.cc/A8Z5-Q3XF] ("Many argue this fascination for serial killers stems for an evolutionary subconscious desire to identify potential threats.").

80. Weiner, *supra* note 15, at 277–78. At the end of *The Jinx*, for example, after being confronted by filmmakers with incriminating evidence, Robert Durst was caught on tape saying, "There it is. You're caught." The Associated Press, *Millionaire Robert Durst Was in HBO's 'The Jinx.' It Led to His Murder Conviction,* NAT'L PUB. RADIO (Sept. 17, 2021, 7:23 PM), https://www.npr.org/2021/09/17/1038465926/robert-durst-convicted-of-murder-in-best-friends-killing [https://perma.cc/BDP7-EEF2]

81. Chaudry, *supra* note 13, at x.

82. Webb, *supra* note 1, at 131.

83. May Jeong, *How the Atlanta Spa Shootings—The Victims, The Survivors—Tell a Story of America*, in EVIDENCE OF THINGS SEEN, *supra* note 133, at 124.

84. TED Talk, *The Danger of a Single Story: Chimamanda Adichie 2020*, YOUTUBE (Mar. 20, 2020) https://www.youtube.com/watch?v=LmjKUDo7gSQ [https://perma.cc/LQ2X-MJCG].

85. As Kathryn Beardsley and Carrie Teresa note in the context of the media coverage of the assault of a female jogger in Central Park, New York City, in 1989, mainstream journalists covering the crime "narrated the case as a contemporary drama, complete with easily identifiable villains, victims, and heroes," while the *Amsterdam News* portrayed the young men wrongfully convicted of the crime as "victimized children, and called into question

different. The choices that true crime storytellers make—what they stress or obscure—shape the way that true crime consumers understand not just the case itself, but the legal system writ large.

For consumers, true crime is a significant source of information about the criminal legal system.[86] Consuming true crime may lead people to believe that they have a better understanding of crime than the general public.[87] But the stories true crime tells about the prevalence of certain crimes, who commits them, and why they do so is inconsistent with crime data and skews how true crime consumers understand crime. Homicides are vastly overrepresented in true crime, as compared to crime statistics.[88] True crime victims tend to be either older or younger than "typical" victims, are much more likely to be white, and are more likely to be women.[89] Women are also overrepresented as offenders in true crime content.[90] As a result of the choice to feature crimes, victims, and offenders who differ from what crime statistics suggest is the norm, "exposure to true crime cases results in a mistaken understanding of the homicide problem, as well as misinformed judgements regarding the steps that ought to be taken to address the problem."[91] True crime narratives are enormously powerful—even when untrue.[92]

For true crime to sell, it must be compelling, which can lead producers of true crime to sensationalize stories.[93] The Oxygen television show *Snapped* is a prime example.[94] As journalist Melissa Jeltsen explains, "*Snapped*, as the name suggests, is interested in how average women turn into killers."[95] Producer Zak Weisfeld contends that *Snapped* does not involve "the old stereotypes of battered women who are trying to defend themselves. This is the dark side of female empowerment. This

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the heroism of a judicial system hell bent on prosecuting them despite the absence of strong evidence." Kathryn Beardsley & Carrie Teresa, *The Journey from "Just Us" to Some "Justice": Ideology and Advocacy, the New York Amsterdam News, and the Central Park Jogger Story,* 27 AM. PERIODICALS 165, 167, 170 (2017).

86. Alexis M. Durham III, et al., *Images of Crime and Justice: Murder and the "True Crime" Genre*, 23 J. CRIM. JUST. 143, 146 (1995).

87. Webb, *supra* note 1, at 163.

88. Durham III, et al., *supra* note 86, at 146–47.

89. Durham III, et al., *supra* note 86, at 147. *See also* Garry Gray & Brigitte Benning, *Crowdsourcing Criminology: Social Media and Citizen Policing in Missing Person Cases*, SAGE OPEN 1 (2019), https://doi.org/10.1177/2158244019893700 [https://perma.cc/2BBV-9PFF] (explaining that the media has the ability to both define and distort victimization).

90. Kwaneta: *Do men have as many true crime shows? At last count, I have four shows.* By June 2024, at least two additional shows had been added. *See also* Durham III, et al., *supra* note 86, at 147.

91. Durham III, et al., *supra* note 86, at 151. *See also* Webb, *supra* note 1, at 163.

92. Rosenfield, *supra* note 21.

93. As Lili Pâquet explains, true crime wants to tell good stories and uses "the style and techniques common in fiction storytelling to heighten the drama," blurring the line between fact and entertainment and using a seemingly objective narrative voice to persuade listeners of a point of view. Pâquet, *supra* note 75, at 426–27.

94. These experiences are not specific to *Snapped*. Film and television scholar Elizabeth Walters observes that true crime documentaries are often dominated by the criminal legal system's version of events. Elizabeth Walters, *Netflix Originals: The Evolution of True Crime Television,* 88 VELVET LIGHT TRAP 25, 27 (2021).

95. Jeltsen, *supra* note 11.

is not syrupy, and these women are not sympathetic."[96] But to tell those stories, critics of the show have argued, *Snapped* took liberties with how they presented the cases. Nancy Seaman, for example, killed her husband in self-defense after thirty-one years of abuse during their marriage.[97] The *Snapped* episode on Seaman "focus[ed] on the salacious and titillating details of her crime."[98] Seaman told Jeltsen, "They didn't tell a story of a woman who was a kind, loyal, gentle person, a devoted and faithful wife, loving mother, and award-winning teacher. No…they portrayed me as some ax-wielding crazy who 'snapped' and killed her husband. That's *not* what happened."[99] When Mindy Dodd saw the episode *Snapped* made about her after she killed her husband, who had previously been her stepfather and who had sexually abused her since childhood, she felt that the show minimized the abuse she experienced, choosing instead to tell the prosecution's story.[100]

> Kim: *I believe I was one of the first Snapped episodes ever made, when the Oxygen network was brand new. I knew they were making an episode on my case and from the working title Snapped I knew it wouldn't be a balanced piece. Still, a friend of mine tried to say nice things about me which ended up on the cutting room floor or as a punch line somehow. My episode seems to air frequently after all these years, and I often wonder if the public will ever tire of seeing it.*

Dixie Shanahan Duty, the subject of an early episode of *Snapped*, had an experience similar to Mindy Dodd's. Duty killed her husband, Scott Shanahan, after enduring decades of abuse.[101] The episode makes mention of some of what Duty

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96. Jeltsen, *supra* note 11. The producers of *Snapped* have since softened their tone in reaching out to the criminalized survivors whose participation they are soliciting. In a message to Kwaneta, Jupiter Entertainment employee Laurie Houston wrote, "[W]e have, over the past years of the show, expanded the meaning of 'snapped' to signify a breaking point in the life of the woman being profiled (as opposed to the woman herself reaching a breaking point)." E-mail from Laurie Houston to Kwaneta Harris (Feb. 11, 2016) (on file with the author and Kwaneta Harris).

97. Hannah Rappleye, *The Judge Who Sentenced Nancy Seaman for Murder Now Wants to Set Her Free*, NBC NEWS (Apr. 26, 2018), https://www.nbcnews.com/news/crime-courts/judge-who-sentenced-nancy-seaman-murder-now-wants-set-her-n868841 [https://perma.cc/6YMA-4WJ4].

98. Jeltsen, *supra* note 11.

99. *Id.* Nancy Seaman is still incarcerated in Michigan. The judge who sentenced her said that "[t]he jury just didn't get the whole story" because of limitations on expert testimony on battered woman syndrome and has advocated for her release. Rappleye, *supra* note 97.

100. Jeltsen, *supra* note 11. *See also* Kwaneta Harris, *'True Crime' Shows Exploit and Lie About Women Like Me,* THE APPEAL (July 24, 2024) https://theappeal.bluelena.io/index.php?action=social&chash=2f55707d4193dc27118a0f19a1985716.535&s=4d12703674da8aaaef77a19e07f81e58 [https://perma.cc/A66H-3EEP] ("Then the woman returned to the dorm with a face full of professionally applied make-up and reenacted the interviews for us, ecstatic she got to tell her story. Until she realized that anything she said that didn't fit the show's narrative was cut."). Note, too, true crime often includes evidence that would not have been admissible at trial. Pâquet, *supra* note 75, at 433.

101. Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?,* 55 KAN. L. REV. 269 (2007).

experienced during her marriage: a black eye during her first pregnancy; Shanahan's control of her actions; Shanahan "beating" Duty.[102] It covers an incident during which Shanahan bound Duty's hands and feet with wire coat hangers and threw her in the basement for three days.[103] The show then cuts to Scott Shanahan's disappearance in the fall of 2002.[104] Friends and neighbors observed that Duty was healthier, happier, and better off after Shanahan left. As one friend told *Snapped*, "No one had really cared. Nobody looked for him."[105] In July 2003, though, a "concerned citizen called the Shelby County Sherriff's Department and asked them to investigate."[106] Police ultimately found Shanahan's body in the back bedroom of Duty and Shanahan's home; he had been shot in the back of the head.[107]

Snapped recounts how Duty's neighbors and friends in Defiance, Iowa, came together to pay her bail. One of Duty's co-workers told *Snapped*, "if she wouldn't have killed him in self-defense, eventually he would have killed her."[108] Duty rejected a plea deal and testified in her own defense. At trial, she described how, on the day Shanahan was killed, he beat her, told her he would kill their unborn child, and pointed a gun at her and threatened to kill her.[109] Duty decided to call for help, but the only phone was in Shanahan's room.[110] As she moved toward the phone, Duty said, Shanahan started to come towards her, so she grabbed the gun he had earlier pointed at her and shot it.[111] As jury foreman Chad Bruns recalls on *Snapped*, "The defense tried to make Scott look out, like he was a very bad person."[112]

This might seem like a balanced portrayal of what happened in Defiance, Iowa, on August 30, 2022. But no thirty-minute show (approximately twenty-one minutes with commercial breaks) could ever convey the horror of Duty's nineteen years with Scott Shanahan.

> Kim: *The lives represented on a 30-minute true crime episode cannot be fleshed out beyond the quick designation of "good" or "bad." They are flattened into easily digestible tropes because mitigating circumstances might muddy the formulaic narrative, confuse viewers who crave the palatable justice such shows offer. Complicated characters are bad for the brand.*

At trial, Duty testified to numerous other incidents of violence that *Snapped* did not include in its account. Duty described how Shanahan had abused her verbally and physically from the beginning of their relationship. Shanahan beat Duty because

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102. *Snapped: Women Who Kill, Dixie Shanahan* (Oxygen Network broadcast Oct. 29, 2006) (Season 4, Episode 5).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Transcript of Record at 489–92, State v. Shanahan, 2004 WL 5388084 (Iowa Dist. Ct. Shelby Cnty.) (No. FECR006475) (on file with author).

108. *Snapped*, *supra* note 102.

109. Transcript of Record, *supra* note 107, at 486–87.

110. *Id.* at 488.

111. *Id.* at 489.

112. *Snapped: Women Who Kill*, *supra* note 102.

she visited her family, because his mother was ill, because his grandfather died.[113] While his mother was alive, Shanahan beat both his mother and Duty about twice a week.[114] After Shanahan's mother died, Duty testified, Shanahan "[w]ent off the wall . . . beating [Duty] more frequently about anything."[115] Shanahan beat Duty during each of her pregnancies; during her second pregnancy, after Duty refused to have an abortion, Shanahan targeted her stomach, telling her that he would get rid of the baby.[116] Duty testified that Shanahan threw her down the basement steps, chipping her teeth.[117] He beat her on top of the head with a cowboy boot.[118] He poked her in the eye until it bled.[119] Shanahan broke two doors by smashing Duty's head into them, ran over her legs with a lawn tractor, and smashed a plate of potatoes over her head because they were runny.[120] All of this, in addition to the regular beatings. And none of that made it on to *Snapped*.[121]

Snapped also gave airtime to the prosecution's theory that Duty had a financial motive in killing Shanahan. In 1994, Shanahan's mother died, leaving him a house and $150,000. By 2002, though, the money had run out, and, *Snapped*'s omniscient narrator explains, "once the money was gone, Dixie decided to get rid of Scott."[122]

Prosecutors, like *Snapped*, conceded that Duty had been a victim of intimate partner violence. But they blamed Duty for that violence. *Snapped* recounts how Duty asked law enforcement for assistance on three occasions. The first instance resulted in a two-day jail stay for Shanahan and a stay away order, which Duty later asked to have lifted. The second led to four days in jail. But, the *Snapped* narrator explains, after the second jail stay, "Once again, Dixie decided to give Scott another chance, and he moved back in."[123] The show then cuts to a "friend of Dixie Shanahan," Marcie Carl, saying, "I don't know, she thought she couldn't make it on her own—she was kind of codependent on him in a weird way."[124] Another friend suggested, "She didn't know no different."[125] What *Snapped* does not mention (but what Duty testified to at trial) was that Duty had promised Shanahan's mother, Beverly, to whom she was deeply devoted, that she would never leave Shanahan.[126] Or that after each incident, Shanahan would call Duty, her family, and her friends relentlessly, promising to change, begging her to come back, asking her friends to

113. Transcript of Record, *supra* note 107, at 447, 455–456.

114. *Id.* at 453.

115. *Id.* at 456–457.

116. *Id.* at 458–59. Duty's co-worker saw the bruises and red marks on Duty's abdomen after that incident. *Id.* at 658–59.

117. *Id.* at 460.

118. Transcript of Record, *supra* note 107, at 461. One of Duty's co-workers testified that she felt the lumps on Duty's head left by the beating with the cowboy boot. *Id.* at 673–74.

119. *Id.* at 469.

120. *Id.* at 463–64, 476.

121. Even this much longer recitation of the facts in Duty's case does not include all of the abuse she testified to at trial, let alone all of the abuse she endured.

122. *Snapped: Women Who Kill*, *supra* note 102.

123. *Id.*

124. *Id.*

125. *Id.*

126. Transcript of the Record, *supra* note 107, at 452, 457–58.

urge her to go back to him.[127] Shanahan was charged a third time after the basement incident; by then, Duty had moved to Texas with her children. "Unfortunately," the narrator says, "Dixie neglected to take care of a little unfinished business from her old life: her husband's court date," and adds, "Dixie decided not to testify . . . out of fear, or love."[128]

Moreover, what the account of Duty's encounters with law enforcement misses entirely is how useless law enforcement was in keeping her safe. Six days in jail (two after the first arrest, four after the second) did nothing to deter or decrease Shanahan's violence. Rather than acknowledging that the intervention of law enforcement had not made Shanahan less violent, and that Duty was likely far safer in Texas than she would have been if she had returned to Iowa, *Snapped* blamed Duty for her failure to participate in prosecution, saying, "Prosecutors had no choice but to drop the charges against Scott."[129] But prosecutors had ample evidence of Duty's victimization: they saw Duty's injuries (two black eyes); they had Duty's statement about what Shanahan had done to her;[130] and they saw the hole in the door created when Shanahan rammed Duty's head through it. Prosecutors could have pursued the case without Duty.[131] They chose not to.

The last few minutes of the episode recount Duty's conviction for second degree murder and the prosecution's theories: that the position of Scott Shanahan on the bed demonstrated that he was sleeping, not reaching for a gun; that if she had acted in self-defense, Duty would have called police rather than pretending Shanahan was alive (and forging his name on checks); that "[h]er attempt to cover this up really rebutted" her self-defense claim.[132] At the end of the episode, one juror seems to express regret about the length of the sentence imposed.[133] *Snapped* provides the number of the National Domestic Violence Hotline with the message "Abuse is never OK. If you or someone you love is in an abusive relationship, there is help available."

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127. *Id.* at 449–450, 459, 462, 472–474, 659, 675–76, 683. Duty's co-workers and friends confirmed this testimony. *Id.*

128. *Snapped: Women Who Kill*, *supra* note 102.

129. *Id.*

130. The third prosecution would have come before the Supreme Court's ruling in Crawford v. Washington, 541 U.S. 36, 68 (2004), which restricted prosecutors' ability to use out-of-court statements made to police in the investigation of a crime against criminal defendants.

131. Victimless prosecution was designed for cases like this one. Victimless prosecution enables prosecutors to pursue cases without the victim's testimony, using instead physical evidence, photographs, 911 tapes, statements to police, medical records, and other witness statements. LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 110–11 (2012).

132. *Snapped: Women Who Kill*, *supra* note 102.

133. Jury foreman Chad Bruns stated, "Thirty-five years is a long time to serve in prison for what she did." *Id.* Jurors were unaware that second degree murder in Iowa carried a mandatory minimum sentence of fifty years, with a mandatory term of incarceration of thirty-five years before parole eligibility. Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?,* 55 U. KAN. L. REV. 269, 270 (2007). Governor Tom Vilsack commuted Duty's sentence in 2007, reducing the mandatory pre-parole portion of her sentence to ten years. *Vilsack Commutes Dixie Shanahan Duty's Sentence for Murdering Abusive Husband,* RADIO IOWA (Jan. 5, 2007), https://www.radioiowa.com/2007/01/05/vilsack-commutes-dixie-shanahan-dutys-sentence-for-murdering-abusive-husband/. [https://perma.cc/E8YN-4EPB].

But only Duty's defense attorney is seen questioning whether justice was done in this case.[134]

The story that *Snapped* told about Dixie Shanahan Duty shaped how viewers would subsequently see her. *Snapped* told a story that minimized the violence she endured for nineteen years, held her responsible for the violence done to her, and portrayed her as a gold digger and a liar. She returned to the community with that image.[135]

> Kim: *How many of Snapped's featured women have themselves suffered traumas? I've always said of my own case that "damaged woman makes horrible choices" would sell far less than "calculating, diabolical wife murders husband on romantic getaway." The narrative was shaped early (pretrial coverage) and often. Violent male offenders don't titillate the media like a violent female offender does, yet a higher percentage of us have suffered significant traumas before offending, often at the hands of men.*

The desire to counter the "snapped" narrative entices some criminalized survivors into participating in true crime productions. But criminalized survivors often lack full or truthful information about what the end result will be. Journalist Victoria Law, who has corresponded with and written about criminalized survivors for decades, remembers one woman who agreed to be on a television show because she was told it would be her opportunity to tell her story to the public. What she was not told was that the show involved "criminology students dissecting why they thought each person was a liar."[136] Another incarcerated woman participated in an interview only because she believed that podcast producers were making a show about prison music programs; instead, the show was called "My Life of Crime," focused (not surprisingly, given the name) on her crime, and only briefly mentioned the music program she was a part of in the prison.[137]

> Kim: *I always instinctively felt that true crime producers who approached me for my cooperation promising to value my input for their work were a lot like the police detectives who'd told me they "only want to help me" with cuffs and a gun under their jacket. Say what they want, both specialize in twisting words to fit an already developed story line.*

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134. *Snapped: Women Who Kill*, *supra* note 102.

135. Dixie Shanahan Duty was granted work release in 2018 and was later paroled. Linh Ta, *Who is Dixie Shanahan Duty and why did she murder her husband?*, DES MOINES REG. (June 20, 2018), https://www.desmoinesregister.com/story/news/2018/06/20/troubled-life-dixie-shanahan-duty-domestic-abuse-violence-husband-defiance-iowa-work-parole-culver/713488002/#:~:text=After%20nearly%2014%20years%20in,for%20more%20than%20a%20year [https://perma.cc/NM4M-D59P].

136. E-mail from Victoria Law (Mar. 8, 2024) (on file with author). For a brief description of the series, see ABC Action News, *"The Lesson is Murder," Streaming on Hulu Features a USF Criminology Professor*, YOUTUBE (Mar. 24, 2023), https://www.youtube.com/watch?v=tWowwkkuQdQ. [https://perma.cc/CM6T-65H6].

137. E-mail from Victoria Law, *supra* note 136. Law notes that in this way, true crime productions mimic the ways that law enforcement tricks people into talking with them.

> *I occasionally flip past a program featuring an incarcerated woman, easy to spot because of the uniform and background that scream "guilty!" I wonder why they chose to participate. Are they hoping for a miracle? Did they need the money? Or were they just desperate to tell a truth? I continue channel surfing, saying a little prayer that they get what they sought, a little worried they didn't, angry at the predatory true crime producer that used her for profit.*

True crime shapes the narrative not just in individual cases, but in the community's larger understanding of what it means to be a criminalized survivor. Powerful stereotypes shape expectations for how victims of gender-based violence present and act.[138] As criminologist Diana Rickard writes, "Crime news and crime entertainment are usually built around 'ideal victims,' those in whom innocence and virtue, in the broadest, most stereotypical strokes, can be imbued."[139] Those stereotypes are reinforced when true crime rejects the victimization claims of criminalized survivors. Jurors in future cases may hearken back to the portrayals of women like Nancy Seaman, Mindy Dodd, and Dixie Duty in determining whether the woman standing before them is a "real" victim deserving of mercy or an "imperfect victim" whose claims can be discounted.[140]

B. True Crime Dehumanizes People Convicted of Crimes

True crime has a complicated relationship with gender and violence. It loves women as victims but ranges from ambivalent to hostile when people subjected to abuse become criminal defendants, particularly when they are "imperfect victims." Criminalized survivors are not permitted to be fully realized individuals in true crime. As a result, those who consume true crime often don't see the criminalized survivors depicted as human,[141] let alone as people who have experienced significant abuse and trauma, which is often related to the crimes they commit. True crime portrayals of people who commit crimes are often simplistic and stereotyped: "Like the villains of urban legends, criminals are dangerous people who are beyond social control."[142] Any prior victimization that the person convicted of a crime may have experienced is minimized or flattened.[143] Most true crime adheres to the same victim/offender binary endemic in the criminal legal system: a person can be a victim or an offender, but not both.[144] Criminalization trumps every other facet of a person's identity, making it easier to define people convicted of crimes as deviants who "masquerade" as regular citizens but are in fact criminals and nothing more.[145]

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138. GOODMARK, *supra* note 36, at 9–10.

139. RICKARD, *supra* note 1, at 78–79.

140. *See generally* GOODMARK, *supra* note 36.

141. Laura Bogart, *Why Our True Crime Obsession is Bad for Society,* THE WEEK (Jan. 31, 2018), https://theweek.com/articles/736073/why-true-crime-obsession-bad-society; RICKARD, *supra* note 1, at 105.

142. Gray Cavender & Lisa Bond-Maupin, *supra* note 23, at 311.

143. *See, e.g.,* Jeltsen, *supra* note 11.

144. GOODMARK, *supra* note 36, at 10.

145. Cavender & Bond-Maupin, *supra* note 23, at 312.

And in true crime, people are not just criminals—they are the worst kind of criminals.[146] Kim: *True crime feeds the ugliest thoughts of society, the idea that a person who does a terrible thing was always terrible, twisted from birth and doing their best to seem normal.* Kwaneta: *Everyone who has been on a show, voluntary or involuntary, we'd call ourselves Monsters Ball. They all use the same language to refer to us all: evil, diabolical, monsters, jealous, angry, manipulative, incorrigible, sociopath*.

Amanda Knox describes feeling as though prosecutors and the media created "a doppelgänger version of me, onto which people could affix all their uncertainties, fears, and moral judgments."[147] The problem for Knox, and for others convicted of crimes, is that "the guards couldn't handcuff that invented person. They couldn't escort that fiction into a cell. That was me, the real me, who returned to that windowless prison van, to those high cement walls topped with barbed wire, to those cold, echoing hallways and barred windows, to that all-consuming loneliness."[148]

Criminologist Michelle Brown describes how the distance that many citizens have from the criminal legal system fosters a kind of "penal spectatorship;" penal spectators derive their understandings of criminalized people and punishment systems from the "popular discourse," including true crime.[149] Penal spectatorship makes punishment abstract, enabling the system to inflict the pain of punishment without engendering public opposition.[150] That numbing to the infliction of pain is only possible, however, if criminalized people are an abstraction or a political shell rather than flesh and blood people. True crime helps to create the conditions in which penal spectatorship can flourish.

C. True Crime Shores Up the Carceral System

The real hero of most true crime is the carceral system and its stand-ins, the people who make it run—police, prosecutors, forensic investigators, correctional officers.[151] In part, that positive lens is a function of what sells; as communications

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146. Harris, *supra* note 100 ("One show referred to me as a 'mastermind whose evil stretches the limits of imagination. In another, a prosecutor stated that my 'levels of depravity are the top five I've ever known,' that I am 'one of the most diabolical people' he'd ever dealt with, and that I am a 'master manipulator.'"). *See also* RICKARD, *supra* note 1, at 19.

147. Knox, *in* EVIDENCE OF THINGS SEEN, *supra* note 42, at 132–33. Samantha Schuyler, *The Short Life of Toyin Salau and a Legacy Still at Work*, *in* EVIDENCE OF THINGS SEEN, *supra* note 13, at 19 (describing victims and their families and friends experience a similar disembodiment: "[A]s thousands of people retweeted photos and videos of Toyin, sharing her story so widely that she became a trending topic on Twitter, they knew they were watching their friend become a symbol.").

148. Knox, *supra* note 42, at 132–33.

149. Michelle Brown, *Penal Spectatorship and the Culture of Punishment*, *in* WHY PRISON? 108-09 (David Scott ed., 2013).

150. *Id.* at 113.

151. In Episode 3 of the Netflix true crime series *The Real Bling Ring: Hollywood Heist*, the narrator intones, "In nearly every crime story, a time comes when the tables are turned on the bad guy, and the good guys start writing the script." On screen, one of the perpetrators of a series of robberies of celebrity homes is identified as "bad guy" and the detective in charge of the investigation is labelled "good guy." *The Real Bling Ring: Hollywood Heist, Fame and Misfortune* (Netflix Sept . 21, 2022) (Season 1, Episode 3). *See also* Jason Cherkis, *Telling*

professor Laramie Taylor explains, studies on the enjoyment of crime dramas suggest that "when crime results in appropriate punishment, enjoyment increases," and people are more likely to tune in. [152]

True crime does important legitimacy work for the carceral state. For example, involvement in true crime programming enables police to project their perceptions of crime to the general public, "a world view that is largely dominated by a 'war' metaphor in which . . . criminals are viewed as 'predators,' justifying the use of more law enforcement and incarceration as the answer to the 'crime problem.'"[153] Participating in true crime also gives police the ability to control how they are portrayed, ensuring that the public sees them in a positive light.[154] Police are "the mystery solvers, using science and intuition and investigation to find the perpetrator and bring him to justice."[155] Kim: *The police are always the best good guys. I believe that is what caused the pandemic lockdown boom in true crime consumption, a desire to feel like some part of "the system" was working to keep society safe as the world seemingly fell apart.*

Paul Kaplan and Daniel LaChance argue that true crime encourages viewers to identify with and even wield repressive state power: "When the show was successful and audience members identified with the police, they were no longer mere spectators watching for 'pleasure or enjoyment.' They became witnesses actively authorizing, rather than passively consuming, the state's use of its police powers."[156] Disseminating positive images of law enforcement undermines efforts to convince a true crime-consuming public of the harm that police regularly inflict on victims, witnesses, people accused of crimes, and their own partners.[157]

True crime shores up prisons as well. By focusing on violent crimes and shaping narratives around the salacious details of those crimes, true crime sends the message that prison is a necessary bulwark between a law-abiding society and the

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Stories About Crime Is Hard. That's No Excuse for Not Doing Better, COLUM. JOURNALISM REV. (Aug. 24, 2020), https://www.cjr.org/first_person/crime-reporting-police-shootings.php [https://perma.cc/FA72-6WVZ]; Diana Moskovitz, *Tie a Tourniquet on Your Heart: Revisiting Edna Buchanan, America's Greatest Police Reporter, in* EVIDENCE OF THINGS SEEN, *supra* note 13, at 143; Jeltsen, *supra* note 11, at 7; Webb, *supra* note 1, at 164–65. *But see* Ethan Stoneman & Joseph Packer, *Reel Cruelty: Voyeurism and Extra-Juridical Punishment in True-Crime Documentaries,* 17 CRIME, MEDIA, CULTURE 401 (2021) (arguing that true crime shows that agents of carceral state are not infallible, effective, or equitable). This counternarrative will be explored *infra* Part IV.

152. Laramie D. Taylor, *Death and Television: Terror Management Theory and Themes of Law and Justice on Television,* 36 DEATH STUD. 340, 343 (2012). Hillary Fitzgerald Campbell calls true crime "highly addictive justice." CAMPBELL, *supra* note 1, at 102.

153. Michael Hallett & Dennis Powell, *Backstage with "Cops": The Dramaturgical Reification of Police Subculture in American Crime "Info-Tainment,"* 14 AM. J. POLICE 101, 105 (1995).

154. *Id.* at 122–23.

155. Webb, *supra* note 1, at 165.

156. KAPLAN & LACHANCE, *supra* note 17, at 22.

157. *See generally* GOODMARK, *supra* note 36; Leigh Goodmark, *Hands Up At Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse,* 2015 B.Y.U. L. REV. 1183 (2015); ANDREA RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017).

violence of convicted people.[158] Law professor Craig Haney argues that true crime has contributed to what he calls the "War on Prisoners," a response to crime that casts people who commit crimes as the "enemy" and that centers on increased, harsher punishment rather than addressing the underlying causes of crime.[159] Writing about the television show "COPS," Haney explains that true crime enlists the public in the "War on Prisoners" both directly (by encouraging the public to become involved in finding fugitives) and vicariously (by giving them the police perspective on responding to crime).[160] That involvement, in turn, has helped to spur mass incarceration by feeding on the public's belief that the failure to harshly punish through incarceration is a sign of weakness.[161]

True crime also touts the benefits of incarceration. Prison is portrayed as a place where people "suffer into truth," with incarceration providing them the time and the space, as well as the hardship and deprivation, to confront and accept responsibility for their crimes, show remorse, and seek redemption.[162] From there, "rehabilitation is presented as an inevitable outcome" of incarceration.[163] That trajectory makes the "harsh punishment" of prison "palatable to the public."[164]

D. True Crime Creates Trauma

True crime creates trauma for criminalized survivors—both in how it is made and in the aftermath of its creation.[165] Rarely are criminalized survivors involved in

158. Dawn K. Cecil, *Prisons in Popular Culture, in* OXFORD RESEARCH ENCYCLOPEDIA, CRIMINOLOGY AND CRIMINAL JUSTICE 1 (2017), https://oxfordre.com/criminology/display/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-194 [https://perma.cc/WYH7-8TAS]. *See also* RICKARD, *supra* note 1, at 20. Research shows that the public vastly overestimates the amount of violence that happens in prisons, in part because of the media's focus on that violence. JAMIE BENNETT, THE SOCIAL COSTS OF DANGEROUSNESS: PRISON AND THE DANGEROUS CLASSES 8 (2008).

159. Craig Haney, *Counting Casualties in the War on Prisoners,* 43 U.S.F. L. REV. 87, 129-30 (2008); *see also* Craig Haney, *Demonizing the "Enemy": The Role of "Science" in Declaring the "War on Prisoners"*, 9 CONN. PUB. INT. L.J. 185, 188 (2010) (arguing that demonizing the enemy—in this case, incarcerated people—increases public willingness to wage war, justifies expenditures to wage war, minimizes concern about casualties, and "heightens the risk that the war that follows may be waged with cruel excess"); Nichol, *supra* note 34 (arguing that true crime helped create demand for 'tough on crime' legislation).

160. Haney*, Counting Casualties, supra* note 159, at 131–33; *see also* Walters, *supra* note 94, at 28 (explaining that the framing of true crime creates an "us against them mentality" and aligns viewers with the carceral system).

161. Craig Haney, *Politicizing Crime and Punishment: Redefining "Justice" to Fight the "War on Prisoners,"* 114 W. VA. L. REV. 373, 399 (2012). *See also* Green, *supra* note 22.

162. KAPLAN & LACHANCE, *supra* note 17, at 71–73.

163. AURORA WALLACE, *Better Here than There: Prison Narratives in Reality Television*, *in* PUNISHMENT IN POPULAR CULTURE 55, 71 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2015).

164. KAPLAN & LACHANCE, *supra* note 17, at 87.

165. Stoneman & Packer, *supra* note 151, at 405 (calling true crime's tendency to create/reignite trauma "the black hole at its core").

the creation of the true crime that features their stories.[166] And when creators of true crime do reach out, they sometimes make it clear that they will proceed with the project regardless of whether the criminalized person participates. In a letter from *Snapped* to a woman convicted of killing her husband in self-defense, the show's researcher wrote, "We are producing a show on your case, and want to give you the opportunity to tell your story in your own words."[167] The researcher assured the woman that they wanted her to participate so that "our viewers get to know and understand who you really are" and to ensure that the information provided was accurate.[168] The letter explained that *Snapped* did not "aim to make anyone out to be monsters or demonize them; our goal is to have viewers relate to them."[169] But, the researcher continued, the show would be made whether she participated or not. If she failed to participate, the show would likely be less sympathetic to her: "Therefore, you can see how, if the people we profile decline to participate, and we can only interview people who are pro-prosecution, the emotional tone of the show may seem unsympathetic."[170] Kwaneta received two similar letters: *the first offering me $8000 to be given to a loved one? Then a cruel letter saying they were going to do it whether you participated or not…*

Though the letter's language stresses the desire to provide a balanced, even positive, portrayal of the recipient, the undertone is clear: participate or we define who you are. Receiving that letter created months of trauma for my unnamed client, as she relived the events prior to her husband's death and waited to see if *Snapped* would ultimately produce an episode on her case (they didn't). Nancy Seaman describes her experience with an episode of *Snapped* that was made: "These vultures preyed on the wounded and vulnerable victims of my personal tragedy. They picked at the carcass of our shattered lives and feasted on our pain and misery—solely for their own personal profit."[171]

Participating in making true crime does not necessarily alleviate this trauma. Mindy Dodd received a letter from *Snapped* similar to the one described above and decided to take the opportunity to "have a voice."[172] Denied permission by the prison to be interviewed herself, Dodd asked her mother and daughter to speak with *Snapped*. Dodd "was led to believe that they were doing a positive story about my case."[173] Instead, after reading the transcript of the episode, Dodd was "disappointed and hurt . . . They made it out like it was just some big sex scandal" involving an "unemotional," "cold-blooded" killer—not the story of a woman who had been raped, sexually abused, and physically threatened by her step-father/husband from

166. Reporters have debated the ethics of appropriating these stories, especially when, as Alice Bolin writes, "they won't (or can't) participate in your version of it." Alice Bolin, *The Ethical Dilemma of Highbrow True Crime*, VULTURE (Aug. 1, 2018), https://www.vulture.com/2018/08/true-crime-ethics.html [https://perma.cc/3HY2-B2CS]. There are exceptions, particularly in the "new true crime." *See infra* Part III.

167. Letter from Ryan Daeche to formerly incarcerated woman (name withheld for her protection) (undated) (on file with the author).

168. *Id.*

169. *Id.*

170. *Id.*

171. Jeltsen, *supra* note 11.

172. *Id.*

173. *Id.*

the age of six years old.[174] Kaplan and LaChance describe this misuse of people's stories as the "commodification of other's pain."[175]

The trauma criminalized survivors experience when they are featured in true crime is not individual. They hurt for their families as well.[176] Kwaneta: *I wouldn't care if the costs of their salaciousness targeted me solely. It didn't, it ricocheted to everyone I care about.* Jupiter Entertainment sent letters to Kwaneta's mother seeking an interview and photographs. Kwaneta's daughter made two suicide attempts after true crime shows about her aired. Her son was asked about a show involving her during a job interview requiring security clearance. He describes the shows as the worst part of his mother's incarceration. Kwaneta: *To this day, he says that more than anything else, the shows ruined his trust in people. Look what they'll do for a few coins.*

> Kim: *Shortly after my parole hearing,* Snapped *contacted my now grown daughter to see if she wanted to participate in a new episode, a longer one. She couldn't understand why after twenty-five years this would need to happen and contacted the producers herself. After several layers of "producers" she was able to speak with someone of authority and tell them that she is the victim and does not want another show to be made. After being told that with or without her the show would go on, she convinced them to halt production at least for now. This caused her terror and pain, for herself and for her own young daughter. For the time being, at least, she won't have to see a new episode of the wildly popular show depict her father's murder again, for more money. I am proud of her for standing up for herself and equally sickened that I brought this into her life. She does not deserve it but because I do, she must endure it.*

E. True Crime Prevents Criminalized People from Moving On With Their Lives

Most criminal sentences (with the exception of death by incarceration—also known as life without the possibility of parole) don't last forever. But true crime can, especially in an era where everything is accessible online.[177] True crime prevents

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174. *Id.*

175. KAPLAN & LACHANCE, *supra* note 17, at 124.

176. Harris, *supra* note 100. This is one of the many ways that families are directly impacted by criminalization. *Id*. at 90.

177. True crime's reach is astounding. Within one month, nineteen-million people had seen Netflix's *Making a Murderer;* as of 2022, the first season of the *Serial* podcast had been downloaded 300 million times. Jethro Nededog, *Here's How Popular Netflix's "Making a Murderer" Really Was According to a Research Company,* BUS. INSIDER (Feb. 12, 2016), https://sports.yahoo.com/news/heres-popular-netflixs-making-murderer-192813617.html. Marisa Dellatoto, *"Serial" Leads Apple and Spotify Podcast Charts After Adnan Syed Freed From Prison,* FORBES (Sept. 21, 2022), https://www.forbes.com/sites/marisadellatto/2022/09/21/serial-leads-apple-and-spotify-podcast-charts-after-adnan-syed-freed-from-prison/?sh=60b15d05554e [https://perma.cc/9DC5-M35H].

criminalized survivors from ever moving past their crimes.[178] Victims' families, reminded of their loved ones' experiences via true crime, may be less willing to forgive and more likely to oppose a person's modification of sentence or release on parole.[179] Parole commissioners and others, searching for information about

178. The inability to move past a well-publicized crime and to successfully rejoin the community has long been the justification for restricting media coverage of children charged in the juvenile system. *See, e.g.,* Laura Cohen, *Kids, Courts, and Cameras: New Challenges for Juvenile Defenders,* 18 QUINNIPIAC L. REV. 701, 704-08 (1999); David C. Howard, J. Thomas Grisso & Roberts Neems, *Publicity and Juvenile Court Proceedings,* 11 CLEARINGHOUSE REV. 203, 209-11 (1977); Andrew R. Kitzinger, *Freedom of the Press v. Juvenile Anonymity: A Conflict Between Constitutional Priorities and Rehabilitation,* 65 IOWA L. REV. 1471, 1485 (1980); Patrick Webb, *Privacy or Publicity: Media Coverage and Juvenile Proceedings in the United States,* 3 INT'L J. CRIM. JUST. SCI. 1, 2–4 (2008). Note that these critics were focused on news coverage, not sensationalized retellings of crimes. Note, too, that the anonymity traditionally granted to juveniles has eroded significantly in recent years. *See* Alicia N. Harden, *Rethinking the Shame: The Intersection of Shaming Punishments and American Juvenile Justice,* 16 U.C. DAVIS J. JUV. L. & POL'Y 93, 128 (2012); Webb, *supra* note 1, at 10.

179. Victims are forced to relive these experiences whenever and wherever they see true crime, which undermines their ability to heal.

> Kim: *I understand the gravity of my crime and that I deserve to be in prison, I don't need a true crime show to convince me of that. What does seem undeserved to me is that my victims, the family of my husband, will continually be subject to these programs, continually be catapulted to the moment I killed my husband. I have done my prison time with the hope that they would be able to heal knowing that I am punished. That's the point, right? But the poison of true crime feeds the worst fears of victims. I feel that they are suffering without end because more and more programming must be made. They can't get distance from my act, ever.*

Elizabeth Kloepfer's memoir, *The Phantom Prince: My Life With Ted Bundy* was part of the source material for Netflix's 2019 movie, *Extremely Wicked, Shockingly Evil and Vile.* But at the start of the film, producers did not include her in the production. Kloepfer thought, "Oh, no, here we go again, and returned to counseling. 'I knew it was going to be hard,' she said. 'I was just appalled that this was going to start up again.'" Julie Miller, *Ted Bundy's Longtime Girlfriend Finally Speaks, and Finds (Some) Relief,* VANITY FAIR (Jan. 31, 2020), https://www.vanityfair.com/hollywood/2020/01/ted-bundy-girlfriend-elizabeth-kendall-interview [https://perma.cc/M2HK-C7K3]. Kim Hricko observes that this is the opposite of restorative justice. *See also* Jeltsen, *supra* note 11, at 8 (explaining one incarcerated woman's concern about how a potential episode of *Snapped* would affect her children and her husband's family); NELSON, *supra* note 25, at 16-17 (describing how her mother responded to the sight of autopsy photos of her sister Jane during an interview with *48 Hours Mystery:* "[M]y mother did not cry. Her body simply collapsed in on itself. Her shoulders rounded over, her chest hollowed out, her whole body becoming more and more of a husk. Her knees shaking in spasms…It was clear that she had entered a world beyond touch, a world beyond comfort.") While she hoped that "we brought some dignity, some depth to the genre, and to Jane's life," Nelson did not watch the episode of *48 Hours Mystery* about her Aunt Jane; "I don't want to see the crime scene photos flashed over and over again on TV, nor do I want to think about millions of Americans flipping by Jane's corpse while channel-surfing at their in-laws, up late, still stuffed from Thanksgiving dinner." *Id.* at 70–71.

incarcerated people online, may be exposed to information via true crime that isn't part of the official record.

Kim: *The words coming from my parole commissioner's mouth sounded eerily familiar in a way that wouldn't come from trial transcripts only. The same shows that make a parole commissioner sure that I belong in prison forever are the same shows lulling the public into the falsehood that longer prison sentences keep them safer.*

Kwaneta, who was held in solitary confinement for eight years, reports that true crime broadcasts were mentioned during the classification reviews that could have led to her release from solitary.[180]

True crime reminds the community of crimes that they might otherwise have forgotten—and might lead them to seek revenge. True crime exposes criminalized people and their families to violence and gives those interested in doing harm enough information to find their targets. As one formerly incarcerated woman reminded me, the true crime show about her made a point of noting that she had been released and that she and her young child were now living in a particular state. Shortly after a re-run of that show, the woman found that her tires had been slashed.

As Amanda Knox has observed, through true crime "[y]ou're captured in amber in the worst experience of your life, and nobody really wants you to evolve outside that moment in time."[181] In some cases, true crime forever conveys misleading information—for example, by covering events until the initial arrest, but failing to follow up when people are ultimately acquitted.[182] On her release from incarceration, Knox noted, "I knew that my doppelgänger was there alongside me. I knew that everyone I would ever meet from then on would have already met, and judged, her . . . everywhere I went I met people who already thought they knew who I was, what I'd done or not done, and what I deserved."[183] In holding that a criminalized person has a right to privacy after the passage of time, the California Supreme Court wrote, "One of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from which he has been ostracized for his anti-social acts. In return for becoming a 'new man,' he is allowed to melt into the shadows of obscurity."[184] True crime makes that impossible.

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180. E-mail from Laurie Houston, *supra* note 96. Needless to say, being the subject of a true crime television show is not grounds for placement in solitary confinement and should not be relevant to that determination.

181. Rosenfield, *supra* note 21. That problem is particularly acute for people acquitted of crimes.

182. *See, e.g.,* Joshua Irwin, *Good TV Makes Bad Justice: How the Rules of Professional Conduct Can Protect Fair Trial Rights,* 102 IOWA L. REV. 2325, 2327–29 (2017) (describing how television shows broadcast true crime stories in which people were investigated and arrested but did not cover their ultimate acquittals). In two of those cases, Irwin notes, there were allegations that the creators of the show *Cold Justice* told law enforcement officials that the episodes would not air unless there were indictments—which, if true, created problematic incentives for prosecutors. *Id.* at 2346. *See also* Karthryn Beardsley & Carrie Teresa, *The Journey from "Just Us" to Some "Justice": Ideology and Advocacy, the New York Amsterdam News, and the Central Park Jogger Story,* 27 AM. PERIODICALS 165 (2017) (describing the media portrayals of the "Central Park Five," who were ultimately exonerated of the rape and assault of Tricia Meili, also known as the Central Park Jogger).

183. Knox, *supra* note 42, at 133.

184. Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 41 (Cal. 1971).

III. THE "NEW" TRUE CRIME

True crime has its roots in the sensational, the demonization of criminalized people, and the maintenance of the carceral state. But a recent wave of true crime has focused not on convincing the public of criminalized people's guilt, but of their innocence (or their lack of legal culpability).[185] In podcasts like *Undisclosed* and *In the Dark*, attorneys and journalists re-investigate old cases, exposing the injustice of the criminal legal system.[186] This new form of true crime, attorney and podcaster Rabia Chaudry argues, educates the public "about how the criminal justice system really works."[187] Further, Chaudry argues, this "new true crime"[188] serves as a corrective against both unchecked state power and true crime's tendency to focus on white victims at the expense of those "from the margins and the shadows."[189] The new true crime tells stories of police corruption and misconduct.[190] It takes the perspective of criminalized people and their advocates.[191] It asks viewers to recognize the biases and flaws endemic in the criminal legal system, conditions that should prompt questions about why certain people are targeted for arrest and prosecution and whether those actions are just.[192] And the new true crime sometimes encourages consumers to take action: to sign petitions; to attend rallies; and to donate to defense funds.[193]

The new true crime is also arguably feminist. The new true crime often centers women, as victims and as criminalized people, which some see as a "feminist

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185. RICKARD, *supra* note 1, at 41. In 2015, journalist Mike Hale referred to *Making a Murderer* and other docuseries like it as "the glam genre of the moment." Mike Hale, *Review: 'Making a Murderer,' True Crime on Netflix,* N.Y. TIMES (Dec. 16, 2015), https://www.nytimes.com/2015/12/17/arts/television/review-making-a-murderer-true-crime-on-netflix.html.

186. *See* In The Dark, APM REPORTS, https://features.apmreports.org/in-the-dark/; Undisclosed, https://undisclosed-podcast.com/.

187. Chaudry, *supra* note 13, at x.

188. David Costello uses this term to refer to a particular type of true crime: "a powerful genre that applies classical true crime sensationalism toward a new motive—influencing the outcome of a specific case." David Costello, *Un-Making a Murderer: New True Crime Sensationalism and the Criminal Justice System*, 55 AM. CRIM. L. REV. ONLINE 77, 81 (2018). While some of the true crime that I describe in this section shares that motive, it has broader aspirations of unearthing the injustice at the heart of the criminal legal system as well (something Costello critiques as a "pro-defendant motive"). *Id.* at 86; *see also* RICKARD, *supra* note 1, at 4 (describing the "new true" as true crime involving wrongful convictions).

189. Chaudry, *supra* note 13, at xiii; *see also* Aja Romano, *Serial Transformed True Crime—and the Way We Think About Criminal Justice,* VOX (June 3, 2024), https://www.vox.com/culture/351238/serial-true-crime-podcast-criminal-justice-adnan-syed [https://perma.cc/X8L3-3BSJ].

190. Webb, *supra* note 1, at 162.

191. The Argument Podcast, *supra* note 1.

192. RICKARD, *supra* note 1, at 4; Walters, *supra* note 94, at 30.

193. Costello, *supra* note 188, at 94 (arguing that by engaging consumers, "the genre transcends conventional entertainment and becomes a different beast entirely: a catalyst of real social change"); HORECK, *supra* note 1, at 8 (contending that true crime is both a form of entertainment and "a media format that effects social change" by fostering the involvement of the audience). This focus on social change isn't entirely altruistic, however. Tanya Horeck observes that "corporations such as Netflix exploit a notion of true crime's interactivity as a means of binding users more tightly to their commercial products." *Id.*

choice."[194] Those stories frequently involve the ways that the criminal legal system fails to meet the needs of women subjected to gender-based violence.[195] Of course, many of the criminalized people in true crime have themselves been victims of gender-based violence, particularly in those stories devoted to people who fight back against intimate partners. The *Believe Her* podcast tells the story of Nikki Addimando, convicted of murder for killing her abusive boyfriend.[196] The *Blind Plea* podcast describes how Deven Grey, a Black woman in Alabama who killed her white partner, felt forced to plead guilty despite having a strong self-defense claim.[197] The failure of the legal system to intervene to protect Addimando and Grey from violence sets the stage for the actions for which they would later be convicted. The new true crime can also highlight the stories of Black victims of violence, stories that are often missing from mainstream media.[198]

This kind of true crime—the kind that gives voice to marginalized people in and questions the operation of the criminal legal system—is undoubtedly doing different work than the true crime of *Snapped*.[199] And participating in—or even co-creating—the new true crime can be empowering for criminalized survivors, enabling them to articulate a compelling counternarrative and shape future storytelling around their cases.[200] Despite its good intentions, however, there are reasons to be leery about the new true crime's impact on criminalized survivors. First, as Kat Rosenfield notes, "Even in the hands of the most careful storyteller,

194. Webb, *supra* note 1, at 161.

195. HORECK, *supra* note 1, at 170–71 (describing the Netflix series *The Keepers,* which "maintain[ed] its focus on the victims and the wider societal structures at work in Baltimore in the late 1960s and early 1970s that allowed such widespread violence to occur…the series…works to expose sexual violence as a wider social problem, one that is enabled by systems of power and is not therefore simply attributable to the actions of individual 'bad men.'"). *See also* Pâquet, *supra* note 75, at 425.

196. *Believe Her*, LEMONADA (2021), https://lemonadamedia.com/show/believeher/ [https://perma.cc/6KJU-SQQR]. Nikki Addimando and her family worked closely with Justin van der Leun, the freelance reporter who created the podcast. E-mail from Michelle Horton to Author (Nov. 6, 2023) (on file with author).

197. *Blind Plea*, LEMONADA (2023), https://lemonadamedia.com/show/blind-plea/ [https://perma.cc/X9SN-DWWS].

198. Ron Stodghill wrote: "Journalist Gwen Ifill famously coined the phrase 'missing white women syndrome' to describe the media obsession with that demographic, contrasted with relative negligence toward missing women of color;" that discrepancy exists despite data showing that Black victims are "significantly underrepresented" in true crime. Ron Stodghill, *Opinion: I Wrote a Black True Crime Book 20 Years Ago. Why is the Genre Still So White?*, L.A. TIMES, (Jan. 11, 2024), https://www.latimes.com/opinion/story/2024-01-11/black-authors-true-crime-atlanta-lance-herndon [https://perma.cc/XV22-ZPPB]. *See also* RICKARD, *supra* note 1, at 29.

199. With its focus on the injustices experienced by those who may have been wrongfully convicted, the new true crime has been vulnerable to criticism for failing to attend sufficiently to the people harmed in those crimes—both the victims and their families. RICKARD, *supra* note 1, at 52, 57, 63, 71 (describing criticism of *The Staircase, Serial, Making a Murderer,* and *The Innocent Man*).

200. This idea of co-creating stories is consistent with client-centered lawyering, a type of lawyering that values collaboration between lawyers and clients in legal matters and stresses the role of clients in co-creating case theories. Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory,* 93 MICH. L. REV. 485, 553 (1994).

there's no nonautobiographical version of these stories that isn't at least a little bit exploitive."[201] Moreover, to the extent that it focuses on white people, the new true crime continues to obscure the racism of the criminal legal system.[202] Finally, though they may challenge the actions of individual law enforcement officials in specific cases, critics argue that the new true crime fails to "encourage a deeper interrogation of the criminal justice system and the politics that have made the United States a punitive outlier among western democracies," a failure that "individualizes injustice." [203]

IV. TRUE CRIME, OTHERING, AND ABOLITION

We are endlessly fascinated by the workings of the criminal legal system. But being educated about that system is different than being entertained by it, and there are any number of good reasons not to use the criminal legal system as entertainment.[204] Here's another reason—it does tangible harm to criminalized survivors, constituting a form of retributive punishment beyond the criminal legal system. The state may not impose that punishment, but it often supports and facilitates it, and it absolutely benefits from it. And that punishment attaches not just to serial killers like Jeffrey Dahmer[205] and Ted Bundy,[206] but to people who act in self-defense, people who have been victimized, and people who will rejoin society, wearing the scarlet "TC"[207] imprinted on them by Investigation Discovery, *Snapped*, or the latest murder podcast. People like Kim Hricko and Kwaneta Harris.

Law professor Susan Stabile has suggested that current law and policy conversations suffer from an epidemic of "othering": "a process by which individuals and society view and label people who are different in a way that devalues them."[208] Othering allows one group of people to see another not only as different but as inferior in morally relevant ways, allowing one group to view another as unworthy of concern.[209] Stabile argues that the law promotes othering in a variety of ways, including through the operation of the criminal law:

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201. Rosenfield, *supra* note 21.

202. KAPLAN & LACHANCE, *supra* note 17, at 111–12; *see also* Stodghill, *supra* note 198.

203. KAPLAN & LACHANCE, *supra* note 17, at 94, 115.

204. *See, e.g.,* Walters, *supra* note 94, at 28 (because true crime endorses the views of law enforcement); Webb, *supra* note 1, at 133 (because true crime shores up a deeply racist system).

205. Associated Press, *Dahmer is Sentenced to 15 Life Terms: "Society Will Never Be Able to Forgive Me",* WASH. POST (Feb. 18, 1992) https://www.washingtonpost.com/archive/politics/1992/02/18/dahmer-is-sentenced-to-15-life-terms/1c3c3176-2199-4393-84b5-5a6723c5360e/.

206. David Brand, *A chilling piece of Tallahassee history: Ted Bundy and the Chi Omega murders,* TALLAHASSEE DEMOCRAT, September 2, 2024, https://www.tallahassee.com/story/life/communities/2024/09/02/remembering-tallahassee-history-of-serial-killer-ted-bundy/74238528007/ [https://perma.cc/8A4K-7VN7].

207. "TC" stands for true crime.

208. Susan Stabile, *Othering and the Law*, 12 U. ST. THOMAS L. REV. 381, 382 (2016).

209. *Id.* at 386.

> There is a tendency to view people who break the law and who are jailed for doing so as irrevocably other. Whatever may have been their status before committing their crimes—and, in reality, a significant number were already "other" on racial or economic grounds before they engaged in any act in violation of the law—once convicted and labeled "criminals," they cease to be us. And they cease to matter in the same way they would if they were us.[210]

True crime facilitates othering. Elizabeth Walters explains that the framing of true crime "subtly perpetuates an 'us against them' mentality in regard to criminality, reinforcing the ominous threat of 'otherness' and aligning viewers with those combatting its criminal elements: law enforcement and authorities within the criminal justice system."[211] And that othering makes possible the pleasure that true crime consumers experience when the "other" experiences the pain, shame, and humiliation of punishment.[212] The othering of true crime is trauma inducing, indiscriminate (ask Amanda Knox), and omnipresent in an online world.[213]

Othering also makes it more difficult for many people to imagine a world without oppressive carceral systems. One of the obstacles to abolishing such systems is the intense, irrational fear of criminalized people.[214] True crime stokes that fear. Jamie Bennett notes that media portrayals of criminalized people have "darken[ed]," disproportionately featuring people involved in violent and sexual crimes.[215] Moreover, true crime (and other media) establish and police the parameters of our collective understanding of justice.[216] True crime's valorization of police and prosecutors and its presentation of prison as the only possible response to crime have contributed to a society where "we have lost the ability to imagine other ways to solve the problem of 'crime.'"[217]

> Kim: *This othering allows a true crime soaked public to ignore, remain numb to the prison industrial complex and the human beings within. Stories of abuse or corruption might escape the*

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210. *Id.* at 395.

211. Walters, *supra* note 94, at 28.

212. KAPLAN & LACHANCE, *supra* note 17, at 124–25.

213. *See, e.g.,* Stoneman & Packer, *supra* note 151, at 405 (calling true crime a form of "emotional pornography" and arguing that "the capacity if not tendency of the true crime genre to cause harm or retraumatize makes up the black hole at its core").

214. DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 11 (2019); *see also* BENNETT, *supra* note 158, at 5–6. One of the major obstacles to abolition is the question of what to do about "the dangerous few," those people who seem so dangerous and so uncontrollable that prisons are necessary to contain them. For potential responses to that question, see Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics,* 135 HARV. L. REV. 2013 (2022).

215. BENNETT, *supra* note 158, at 7.

216. As Ko Bragg writes, most people can't "imagine what justice outside the criminal-legal system even looks like." Ko Bragg, *Abolition, Popular Culture, and Justice: Introducing 'Pop Justice'*, SCALAWAG (June 2, 2022), https://scalawagmagazine.org/2022/06/pop-culture-abolition/ [https://perma.cc/3C72-NHLG].

217. Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation,* 27 SOC. JUST. 212, 217 (2000).

> *razor wire buffer occasionally, but to little notice. After all, true crime programming has shown them what kinds of monsters are in there. They deserve what they get.*
>
> *The same for the political realm. Even state legislators with a heart for "justice reform" hesitate or balk at supporting prison or parole reform initiatives. The political cost is too high, the wager too risky. Prisons represent, even if they don't truly deliver, public safety. True crime cements this in the minds of viewers.*
>
> *The nationwide downward spiral felt in most prison systems is given justification in the true crime mania sweeping the country. Reports of inadequate physical and mental health care, reduced rehabilitative programming, and unsafe housing seem unimportant to politicians whose constituents want a "tough on crime" representative. This support for a carceral state is given all the oxygen it needs to flourish by true crime producers. We are adequately vilified, fully othered.*

Even "the new true crime" can impede abolition, film and media studies professor Pooja Rangan and filmmaker Brett Story argue. Rangan and Story cite three ways that the new true crime can stymie abolition: by supporting the concept of crime as an absolute rather than a social construct; focusing on innocence and therefore reinforcing guilt as a justification for carceral punishment; and individualizing the failures but refraining from questioning the legitimacy of the carceral state.[218]

That true crime fosters othering and creates obstacles to abolition may not be compelling to many who love it. It should give pause, however, to those of us who have indulged in the genre but would be appalled to think that our entertainment was inflicting harm on individuals and fostering societal resistance to a movement we embrace. Rejecting true crime is a small part of the larger project of "grounding justice" central to establishing an abolitionist ethic.[219]

CONCLUSION

True crime is everywhere, including prisons.

> Kim: *True crime programming is a regular part of prison life now. Friendships are made and destroyed depending on what an episode reveals. My first experience with a television episode on my case was a Dick Wolf show called "Arrest and Trial." I was playing Scrabble in the rec when someone said, "Hey Kim, this show is about you!" I didn't get up to crowd around the television, but nearly everyone else did. Now that I am an old head, I talk to*

218. Pooja Rangan & Brett Story, *Four Propositions on True Crime and Abolition*, WR: WORLD RECS. J., https://worldrecordsjournal.org/four-propositions-on-true-crime-and-abolition/ (last visited July 17, 2024).

219. Allegra M. McLeod, *Prison Abolition and Grounded Justice,* 62 UCLA L. REV. 1156, 1232 (2015).

> *the newbies about how best to ignore that crap, which is much more difficult when the viewer is an officer or other staff members. This phenomenon is frequent and results in insults and slurs from some and questions about who makes the money from others.*

Law review articles frequently offer solutions to the problems they raise. I'm honestly not sure what the legal solution is to this problem or if there is a legal solution. It seems unlikely that privacy doctrine could extend to protect criminalized people from having their stories told without their consent. The only comprehensive solution that comes to mind sounds in capitalism. Demand drives markets. Eliminate the demand for true crime—or at the very least, for the kind of true crime that inflicts so much trauma on criminalized people and prevents them from ever owning their own narratives—and true crime wouldn't be made. Stop watching. Stop listening. Stop reading. Find another way to entertain yourself. And if you can't, understand that you are inflicting a form of extralegal punishment on someone who is already carrying the tremendous burden of state-imposed punishment through criminalization.

Of course, few people are going to stop interacting with true crime because of an earnest plea in a law review article. So short of eliminating true crime altogether, what can we do to better protect those who are its subjects? We could create guidelines for the ethical production and consumption of true crime.[220] Journalists, for example, could agree to cover only cases in which the parties involved give their consent or have some degree of involvement in the telling of the story. Consumers could agree not to watch true crime that does not reflect this type of involvement. We could create additional spaces for counternarratives, enabling directly affected people to share their own stories.[221]

It is certainly possible to limit the role that true crime plays in subsequent criminal legal decisions about the lives and liberty of the people it depicts. A small but important policy response to true crime would be to limit judges and parole commissioners to the information available in the case record, prohibiting them from seeking out or using information obtained through true crime.

In working on this project, I have thought a great deal about my own role in the true crime industry. I have been the legal expert—a "talking head"— in a few true crime projects.[222] I do have standards (my own ethical guidelines) for deciding when

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220. Costello, *supra* note 188, at 94–96 (arguing that journalists should adopt ethical regulations specific to true crime, in part to protect criminal defendants). For guidance about writing about incarcerated people, *see generally* THE PRESS IN PRISON: A PRACTICAL, ABOLITIONIST GUIDEBOOK FROM SCALAWAG (Lovey Cooper, Emily Nonko & Danielle Purifoy eds. 2021).

221. *See, e.g.,* Shivani Gonzalez, *On Tik Tok, True Crime Survivors Take Control,* N.Y. TIMES (July 21, 2024), True Crime Survivors Own Their Stories on TikTok - The New York Times (nytimes.com) ("Tik Tok has also given survivors a way to own their stories, and point out ethical concerns over their consumption.") These stories, which often feature redemption and remorse, resonate strongly with the public and could change public opinion. My thanks to the faculty workshop at the University of Miami for this observation.

222. Other lawyers have grappled with similar problems. *See, e.g.,* Cohen, *supra* note 178, at 702 ("As reluctant as we were to do anything to encourage the exploitative news coverage, we ultimately concluded that the participation of juvenile defenders was necessary

to get involved. The project must involve a criminalized survivor of gender-based violence and that criminalized survivor must have approved the project. But even projects made within those parameters feed the public's seemingly insatiable desire to be entertained by crime. While I feel strongly that it is important to provide an informed legal perspective on the experiences of criminalized survivors, I am undeniably part of the problem. I am rethinking what my involvement in such projects should be going forward, but I have not yet decided what lines to draw.

Kwaneta and Kim should have the last words.

> Kwaneta: *True crime punishes us and punishes our kids for the sins of their parents. It causes self-harm and suicides. Correctional officers dissect our cases over and over based on the shows that they watch. People can't get jobs after leaving prison because of what has been broadcast about them.*
>
> *At the very least, true crime shows should respect it when we decline to participate. They should check the credentials of the judges and prosecutors they put forward as the "good guys" and there should be a Bechdel test*[223] *for true crime (are the judges, cops, and prosecutors ALWAYS the good guys?) They should avoid demeaning language and "dog whistles" (for example, one show describes my mother as a single teenaged mom from Detroit, but never mentions that she was engaged and that my father was in Vietnam). They should stop relying on junk science as proof and acknowledge when the science has changed or was inaccurate. They shouldn't lie to us about the stories they intend to tell (saying that they're writing a feature about some aspect of our lives but focusing only on the crime). They should portray things accurately (at the very least, the person they say is "me" should look something like me). And they should extend the timeline of the show to let us show that we are more than the crimes we were convicted of and allow us to start over.*
>
> *But most of all, they should let us tell our own stories instead of profiting from our lives. Because people are taking what these shows say as the truth. America is not a country that understands the difference between a documentary and a docuseries. They think it's all as reputable as Ken Burns. We need to push back.*

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to dispel many of the myths about youth crime and the responses to it, and that our clients would be ill-served by silence.").

223. The Bechdel test is "a set of criteria used as a test to evaluate a work of fiction (such as a film) on the basis of its inclusion and representation of female characters. NOTE: The usual criteria of the Bechdel Test are (1) that at least two women are featured, (2) that these women talk to each other, and (3) that they discuss something other than a man." MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/Bechdel%20Test#:~:text=Note%3A%20The%20usual%20criteria%20of,something%20other%20than%20a%20man (last visited July 24, 2024).

Kim: *It has been said that writing In Cold Blood destroyed Truman Capote. He got too close to the source, the offender, too connected. From that I deduce two things. One is that Capote was the first human to be harmed by the voyeuristic, low hanging fruit of the crime writing. The other is that today's true crime manufacturers are less human than dear Truman, less empathetic, driven purely by the filthy lucre of true crime. It's the easiest paycheck. The narrative has already been created by the state. True crime producers parrot the sometimes unvetted work of others without conscience.*

I understand that most people will agree that what happens to the perpetrator matters least. I feel this way myself. But consider the victim who must always be on guard while channel surfing or walking through the Best Buy electronics section lest they be thrust back to the most awful day of their lives. They suffer in perpetuity for profit. I take responsibility for my part in this equation, I carry it every day, but the ongoing assault of true crime programming is not within my control. Nor is it in my daughter's, or any victim for that matter. The producers of Snapped made that clear. They hide their true motives under a cloak of public service, the emperor's new clothes.

True crime is a uniquely American invention, which should not be a shock. By comparison to most of the world, we are a young country, still in the throes of patriarchal adolescence. Fascination with criminal behavior, especially that of women, is an addiction with a downside that the country hasn't yet realized. Perhaps our words will start an important dialogue.

UNDOCUMENTED ELDERCARE, LLC

Kit Johnson[*]

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ABSTRACT

Americans are aging. Within five years, 20% of the U.S. population will be over the age of 65. In the next 25 years, the number of citizens over the age of 80 is expected to triple.

Many older Americans, particularly the oldest, need help with daily life—everything from dressing and showering to cooking and cleaning. Assistance, however, is hard to come by. At-home caregivers are expensive. Institutional settings, also expensive, are routinely understaffed.

Thousands of noncitizens provide eldercare in home and institutional settings. Many of these noncitizens have work authorization pursuant to Temporary Protected Status (TPS), an immigration program that President Trump, unsuccessfully, endeavored to restrict during his first administration. Now back in office, the Trump administration has already announced the end of TPS for over one million noncitizens.

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This Essay considers how noncitizens who lose TPS work authorization may, nevertheless, continue providing much needed eldercare services in the United States: by forming a limited liability company (LLC).

INTRODUCTION

My mom was 75 when it became clear that she could no longer live independently. Over the next three years, she moved from an independent retirement community to low-level memory care, to the hospital, to a rehabilitation facility, and finally to high-level memory care. At every step of the way, she needed added help with daily activities such as cleaning, showering, and dressing.

Almost a quarter of Americans are part of the "sandwich generation," simultaneously juggling the needs of children under 18 and aging parents.[1] Those of us lucky enough to afford help during this time rely heavily on in-home caregivers and nursing-home aides. Thousands of these eldercare workers are not U.S. citizens. And while many currently have authorization to work in the United States, that permission may soon be revoked.

This Essay explores the boundaries of the looming problem of noncitizen workers and eldercare staffing. Part I provides some context regarding aging in America as well as the current and growing caregiving gap. Part II discusses Temporary Protected Status (TPS), a U.S. immigration program under which an estimated 1.4 million noncitizens have been given a limited right to work and stay in the United States.[2] The second Trump administration has announced the

1. Juliana Menasce Horowitz, *More than half of Americans in their 40s are 'sandwiched' between an aging parent and their own children*, PEW RSCH. CTR. (April 8, 2022), https://www.pewresearch.org/short-reads/2022/04/08/more-than-half-of-americans-in-their-40s-are-sandwiched-between-an-aging-parent-and-their-own-children/ [https://perma.cc/XLW4-9F74] (noting that 23% of Americans "have a parent age 65 or older and are either raising at least one child younger than 18 or providing financial support to an adult child").

2. The exact number of noncitizens who have TPS status is not entirely clear. In March 2024, the Pew Research Center estimated that around 1.2 million noncitizens had or were eligible for TPS protection. Mohamad Moslimani, *How Temporary Protected Status Has Expanded Under the Biden Administration*, PEW RSCH. CTR. (Mar. 29, 2024), https://www.pewresearch.org/short-reads/2024/03/29/how-temporary-protected-status-has-expanded-under-the-biden-administration/ [https://perma.cc/B3BZ-DEZ8] (estimating 1,187,230 noncitizens with TPS). In 2024, different federal reports estimated the TPS population at just over 870,000 and just under 1.1 million. *Compare* U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., TEMPORARY PROTECTED STATUS: CALENDAR YEAR 2023 ANNUAL REPORT 4 tbl. 2 (2024) (estimating 870,332 noncitizens with TPS), https://www.uscis.gov/sites/default/files/document/reports/TPS_CY23_Congressional_Report.pdf [https://perma.cc/2V4H-J92S] *with* JILL H. WILSON, CONG. RSCH. SERV., RS20844, TEMPORARY PROTECTED STATUS AND DEFERRED ENFORCED DEPARTURE, Cong. (Dec. 5, 2024) (estimating 1,095,115 noncitizens with TPS). Yet the recent announcements ending TPS for Venezuela and Haiti, discussed at length in Part II.B, indicate that there are more than 1.1 million noncitizens from Venezuela and Haiti alone. *See* Partial Vacatur of 2024 Temporary Protected Status Decision for Haiti, 90 Fed. Reg. 10511 (Feb. 24, 2025) (setting a deadline for the end of TPS protection for 520,794 Haitians); Termination of the October 3, 2023

end of TPS entitlement for some 1.1 million noncitizens, a move that will end work authorization for many eldercare workers. Finally, Part III considers how, if noncitizen caregivers remain in the United States without authorization after the revocation of TPS, they could nonetheless lawfully work: by creating an LLC.

I. AGING IN AMERICA

The silver tsunami. The gray wave. These are just two of the metaphors used to describe the fact that America is aging.[3] Americans today are older than they have ever been, and that trend is projected to continue.[4] By 2030, it is estimated that one in five Americans will be over the age of 65.[5] By 2050, the over-80 population is expected to triple.[6] This section discusses the caregiving needs of older Americans and the noncitizens with temporary protected status who are providing that much needed care.

A. The Caregiving Needs of Older Americans

Many older Americans need help with a range of activities related to the physical and mental consequences of aging. These include getting dressed, walking across the room, using the toilet, showering, laundry, cooking, eating, driving, managing their money, making phone calls, taking medication, and even experiencing basic companionship.[7]

Designation of Venezuela for Temporary Protected Status, 90 Fed. Reg. 9040, 9043 (Feb. 5, 2025) (ending TPS protection for 381,802 Venezuelans granted TPS under one program and preparing to not renew another program affecting some 243,000 more Venezuelans). There are more than 500,000 noncitizens from countries besides Venezuela who also hold TPS status. *See Temporary Protected Status (TPS): Fact Sheet*, NAT'L IMMIGR. F. (March 15, 2025), https://immigrationforum.org/wp-content/uploads/2025/03/Temporary-Protected-Status-Fact-Sheet-March-2025.pdf [https://perma.cc/3NL7-Y2LD].

3. Jeffrey C. Delafuente, *The Silver Tsunami is Coming: Will Pharmacy Be Swept Away with the Tide*, 73 AM. J. PHARM. EDUC. 1 (2009); Press Release, The U.S. Census Bureau, America is Getting Older, (June 22, 2023), https://www.census.gov/newsroom/press-releases/2023/population-estimates-characteristics.html [https://perma.cc/K74X-FC2L].

4. *Id*. (noting the median age of populations in every state grew between 2021 and 2022).

5. NAT'L ACADS. SCIS., ENG'G, AND MED., FAMILIES CARING FOR AN AGING AMERICA (2016), https://doi.org/10.17226/23606 [https://perma.cc/7U3W-5EQB] [hereinafter NASEM]. By 2050, it is estimated there will be a 47% increase in Americans over the age of 65 and the over-65s in American will represent nearly a quarter (23%) of the total national population compared to the 17% that group currently represents. *See* Mark Mather & Paola Scommegna, *Fact Sheet: Aging in the United States*, POPULATION REFERENCE BUREAU (Jan. 9, 2024), https://www.prb.org/resources/fact-sheet-aging-in-the-united-states/ [https://perma.cc/GVP2-ZSQN].

6. Emile Escourrou et al., *Cognitive, functional, physical, and nutritional status of the oldest old encountered in primary care: a systematic review*, 21 BMC FAM. PRAC. 58, 2 (2020), https://doi.org/10.1186/s12875-020-01128-7 [https://perma.cc/K7MN-697F].

7. *See* Press Release, Bureau of Labor Statistics, *Unpaid Eldercare in the United States—2021-2022 Summary* (Sept. 21, 2023), https://www.bls.gov/news.release/elcare.nr0.htm [hereinafter BLS]; *see also* Paola

The demand for eldercare is not linear. As America ages, the most sizeable increase will be among the "oldest old."[8] And the oldest old are most in need of assistance because they are the most likely to be suffering from the physical and mental limitations of aging.[9]

While the need for eldercare grows, the population of potential caregivers shrinks.[10] Those who rely on unpaid care provided by family will experience the effects of divorce, increased geographical distance from potential caregivers, and having fewer—or no—children.[11] Moreover, unpaid caregiving, even if available, is not without problems. It can be immensely challenging for untrained family caregivers to provide medically complex care such as managing and monitoring ventilation equipment, gastronomy tubes, and catheters.[12] Over 70% of family caregivers have full-time jobs apart from their eldercare obligations.[13] And the cost of providing eldercare on top of full time work is high, leading to depression, anxiety, stress, degradation of physical health, and economic harms for those caregivers.[14]

Meanwhile, paid care is hard to come by. Only 23% of adults pay for professional assistance in meeting their daily needs.[15] Cost is unquestionably a factor. One study concluded that home healthcare aides charge an average of $20

Scommegna & Morgan Sherburne, *Vulnerable Older Americans Aren't Getting Adequate Care—Even With Paid Caregivers or Grown Children*, POPULATION REFERENCE BUREAU, 1 (Oct. 19, 2022), https://www.prb.org/resources/vulnerable-older-americans-arent-getting-adequate-care-even-with-paid-caregivers-or-grown-children/ [https://perma.cc/B8XH-VT6V]; Jessica Forden & Teresa Ghilarducci, *U.S. Caregiving System Leaves Significant Unmet Needs Among Aging Adults*, SCHWARTZ CTR. FOR ECON. POL'Y ANALYSIS (Dec. 5, 2023), https://www.economicpolicyresearch.org/images/Retirement_Project/Policy_Notes/2023/December_Caregiving/Unmet_Care_Needs_Among_Aging_Adults.pdf [https://perma.cc/R862-8PUR].

8. NASEM, *supra* note 5, at 1.

9. *Id*.

10. *Id*. at 2.

11. *Id.*

12. *Id*. at 4. Other senior care needs—such as coordinating doctors' visits, maintaining health records, and wrestling with insurance companies—can be time consuming and challenging in their own right, but do not necessarily require technical expertise. *See Caregiving can be brutal. Here are 8 ways to make it easier*, WASH. POST (Oct. 20, 2024), https://www.washingtonpost.com/opinions/2024/10/20/elder-care-kamala-harris-costs/ [https://perma.cc/33T6-TPSU] [hereinafter *Caregiving 2024*] ("the paperwork was daunting! My father, who was an engineer, and my brother, who is has an MBA and is a certified public accountant, each spent at least 20 hours a month on it.").

13. BLS, *supra* note 7.

14. NASEM, *supra* note 5, at 5*; see Caregiving 2024*, *supra* note 12 ("The last decade of my widowed parent's life broke my career, stripped my finances, destroyed my back and left me dreading the idea of my own end in a nursing home.").

15. Forden & Ghilarducci, *supra* note 7, at 3.

an hour.[16] Others peg the cost between $35 and $70 an hour.[17] Institutional care can also be prohibitively expensive—ranging from $3,500 to $6,800 a month in some locations[18] to between $9,733 and $16,500 a month in others, with $16,500 still being considered a "veritable bargain".[19] Beyond cost, there is also the problem of available workers. One MIT professor has estimated that the next five years will see a shortfall of 151,000 direct care providers, a gap that he estimates will grow to 355,000 in the next fifteen years.[20] A comprehensive study of nursing homes backs up these estimates, revealing that a majority of facilities currently report working short-staffed multiple times a week.[21] Nursing care facilities also report that they do not believe it is possible to overcome staffing challenges due to "the stigma of working in nursing homes, low pay, and difficult working conditions" as well as "workforce competition" from other healthcare employers offering better pay and more flexibility.[22]

Given the gap in available unpaid caregivers and the high cost of paid caregivers, it is no surprise that half of older Americans are not getting the help with daily activities that they need.[23] The consequences are significant. One study found that seniors with unmet needs are more prone to accidents, hospital visits, disability, and death.[24]

B. Eldercare Providers with TPS

It is estimated that one in four direct-care workers are noncitizens.[25] This includes home care providers, such as certified nursing assistants, home health

16. *Id*. at 4.

17. Megan McArdle, *My father's story shows Harris's home health-care plan is no easy fix*, WASH. POST (Oct. 15, 2024), https://www.washingtonpost.com/opinions/2024/10/15/harris-medicare-home-health-care/ [https://perma.cc/39W6-2DDW] (showing $35 per hour as the cost for one aid, with 2 aids costing $75 per hour).

18. Forden & Ghilarducci, *supra* note 7, at 4.

19. McArdle, *supra* note 17.

20. Abigail Abrams, *How Trump's Immigration Policies Could Hurt Senior Care*, TIME (May 10, 2018), http://time.com/5272775/donald-trump-immigration-tps-temporary-protected-status/1 [https://perma.cc/N9TG-UUGL] (citing the work of Paul Osterman, a professor of human resources and management at MIT's Sloan School of Management).

21. Alan J. White & Lauren E.W. Olsho, et. al., NURSING HOME STAFFING STUDY 27 (June 2023), https://edit.cms.gov/files/document/nursing-home-staffing-study-final-report-appendix-june-2023.pdf [https://perma.cc/A4AT-PGUS] (summarizing results from the Nursing Home Staffing Study activities between May and December of 2022 and presenting options for minimum nurse staffing requirements for consideration by the U.S. Centers for Medicare & Medicaid Services).

22. *Id*. at 31.

23. Scommegna & Sherburne, *supra* note 7, at 1.

24. Forden & Ghilarducci, *supra* note 7, at 1.

25. Melissa Bailey, *As Trump targets immigrants, elderly and others brace to lose caregivers*, WASH. POST (Mar. 24, 2018), https://www.washingtonpost.com/national/health-science/as-trump-targets-immigrants-elderly-and-others-brace-to-lose-caregivers/2018/03/24/72d5a0d0-2d3e-11e8-8ad6-fbc50284fce8_story.html

aides, personal care aides, caregivers, and companions.[26] It also includes those working within skilled nursing facilities, from assisted living centers to group homes.[27]

Many noncitizen direct-care-providers have authorization to work in the United States pursuant to an immigration program known as Temporary Protected Status (TPS).[28] TPS beneficiaries hold a range of elder-caregiving roles—from registered nurses[29] and nurse practitioners to nursing assistants and cleaning staff.[30]

Experts debate how many noncitizen eldercare workers are beneficiaries of TPS. Some suggest it is less than 10,000.[31] Other sources estimate the number of TPS holders involved in caregiving to be much higher.[32] In a letter concerning the proposed end of TPS for Haitians, the President of the Massachusetts Senior Care Foundation and President of the Massachusetts Senior Care Association

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[https://perma.cc/H2BB-GSQJ]. In some states—New York, California, New Jersey, and Florida—40% of eldercare providers are immigrants. *See* Gerald F. Seib, *How A Heated Immigration Debate Might Affect Grandma's Care,* WALL ST. J., Jan. 22, 2018, https://www.wsj.com/articles/how-a-heated-immigration-debate-might-affect-grandmas-care-1516636317 [https://perma.cc/ZVN9-LRQV].

26. U.S. Dep't of Lab., https://www.dol.gov/agencies/whd/direct-care/workers [https://perma.cc/6GDW-CPAR] (last visited May 29, 2025) (defining "direct care worker").

27. Bailey, *supra* note 25; *see also* Dan Gorenstein, *Long-Term Health Care Industry Vexed by Immigration Restrictions*, MARKETPLACE (June 7, 2018), https://www.marketplace.org/story/2018/06/07/long-term-health-care-industry-vexed-by-immigration-restrictions [https://perma.cc/D5B2-CNCS] ("The long-term care industry relies on immigrants to fill relatively low-paying jobs, from laundry workers to home health care aides.").

28. Bailey, *supra* note 25. Part II will provide more detail about TPS, how the program works, and why it is currently under threat.

29. *The Essential Role of Immigrant Workers in America: Hearing Before the S. Comm. on the Judiciary Subcomm. on Immigr., Citizenship, and Border Safety*, 117th Cong. (2021-2022) (statement of Rose Michelle Tilus).

30. Raymond G. Lahoud, *Study Says 69% of Undocumented Immigrant Workers Hold Essential Jobs to Fight COVID*, 15 NAT'L LAW REV. 59 (2021).

31. Nicole Svajlenka and Tom Jawetz estimated that more than 8,000 TPS holders were working as home health and personal care aides, nursing assistants, orderlies, and psychiatric aides, with an additional 6,000 TPS holders working in a health-related setting "keeping these spaces functioning." While the study did not provide more detail regarding this second category of workers, presumably it would include janitorial and perhaps kitchen staff. *See* Nicole Svajlenka & Tom Jawetz, *A Demographic Profile of TPS Holders Providing Essential Services During the Coronavirus Crisis*, CTR. FOR AM. PROGRESS (Apr. 14, 2020), https://www.americanprogress.org/article/demographic-profile-tps-holders-providing-essential-services-coronavirus-crisis/ [https://perma.cc/ABS9-Z7SD]. However, I am skeptical of the validity of these particular figures. Svajlenka and Jawetz indicate that their report is based on "analysis of three years of pooled American Community Survey microdata … accessed via the University of Minnesota's IPUMS USA." I accessed the IPUMS data and was unable to replicate their study. The IPUMS data does not differentiate among noncitizens by immigration status. Given the wide range of available immigration statuses in the United States, it is impossible to conclude that the noncitizens in that study have TPS.

32. Bailey, *supra* note 25 (reporting "tens of thousands" of home healthcare aides have TPS and that "many" Haitian TPS holders work as "nursing assistants, home health aides and personal care attendants").

wrote, in 2017, that over 4,300 Haitians were employed by that state's nursing facilities alone.[33] Extrapolating from that figure suggests that perhaps more than 30,000 Haitian TPS holders in the United States might work in nursing facilities.[34] This figure, of course, includes neither home health care workers nor non-Haitian TPS holders.[35]

The fact that thousands of eldercare providers work pursuant to TPS is cause of potential concern because, as discussed below, in Part II of this Essay, President Trump has vowed to end TPS programs.

II. TEMPORARY PROTECTED STATUS

This section begins by introducing temporary protected status—explaining what it is and how it operates. Next, it explores challenges to TPS during the first Trump administration and the beginning of the second Trump administration.

A. An Introduction to TPS

Temporary Protected Status (TPS) is a form of blanket humanitarian relief that Congress created as part of the Immigration Act of 1990.[36] It is unique among U.S. immigration programs in that it responds to country-wide conditions as opposed to the circumstances of individuals.

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33. Marva Serotkin & Tara Gregorio, *Nursing Facilities, and Their Residents, Will Feel Impact if Haitians' Status Ends*, BOSTON GLOBE (Dec. 4, 2017, 12:00 a.m.), https://www.bostonglobe.com/opinion/letters/2017/12/04/nursing-facilities-and-their-residents-will-feel-impact-haitians-status-ends/K9WM260olXPEIPlAzuQtcO/story.html [https://perma.cc/WQ62-TQRG] (in a letter opposed to the ending of TPS for Haiti, writing: "There are approximately 4,300 Haitians who provide care and companionship to our residents"); *see also* Letter from Martin J. Walsh, Mayor, Bos., to Rex Tillerson, Sec'y of State, and John F. Kelly, Sec'y of Homeland Sec. (May 16, 2017) (on file with the Mayor's Office) (advocating for an extension of TPS for Haiti, noting that its beneficiaries "make vital contributions to … key industries such as … elder care.").

34. There are 27,780 individuals with TPS living in the state of Massachusetts. JILL H. WILSON, CONG. RSCH. SERV., RS20844, TEMPORARY PROTECTED STATES AND DEFERRED ENFORCED DEPARTURE 28, tbl.1 (2024). This means that potentially 15.5% of Massachusetts TPS holders are eldercare providers (4,300 ÷ 27,780). Currently 200,005 Haitians have TPS in the United States. NT'L IMMIGR. F. *supra* note 2. If 15.5 % of that nationwide population work in eldercare, then 30,958 Haitians with TPS work in eldercare.

35. *See*, *e.g.*, Nat'l Hispanic Council on Aging, Statement from The National Hispanic Council on Aging about Temporary Protective Status (June 10, 2021), https://web.archive.org/web/20210610211614/https://nhcoa.org/nhcoa-statement-about-temporary-protective-status-tps/ (quoting the President of the National Hispanic Council on Aging as stating "We know that many workers with temporary protected status are engaged in the care of the elderly."); Shannon Gleeson & Kati L. Griffith, *Employers as Subjects of the Immigration State: How the State Foments Employment Insecurity for Temporary Immigrant Workers*, LAW & SOC. INQUIRY, 2020, at 1, 15 (discussing a Salvadoran woman with TPS working in elder care); Abrams, supra note 20 (following a Salvadoran woman with TPS working in elder care); Rachel Barber, *The Caregiving Industry Relies on Immigrants. These Workers Fear Deportation Under Trump*, USA TODAY (March 9, 2025) (following a Salvadoran woman with TPS working in elder care).

36. Immigration Act of 1990, Pub. L. No. 101-649, § 302, 104 Stat. 4978, 5036-38.

To understand how TPS fits into U.S. immigration law, it is helpful to consider, as context, lawful permanent resident (LPR) status, temporary permission to enter, and asylum. Lawful permanent residence—often colloquially referred to as receiving a green card—requires a noncitizen to have a specified familial relationship, a job offer from a U.S. employer, or to win the green card lottery.[37] Permission to enter the United States temporarily, say for work or pleasure, similarly turns on the characteristics of the individual—who they will work for and under what conditions, what their plans are, and whether the United States believes the noncitizen will return to their country of origin after their temporary stay.[38] A noncitizen will be eligible for asylum only if they can establish their own persecution or fear of persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion.[39]

TPS works differently. With TPS, the United States can designate entire countries as unsafe due to armed conflict, natural disasters, or other "extraordinary and temporary conditions."[40] Once a country is so designated, qualified nationals already present in the United States become eligible for an authorized 18-month stay in the United States during which they will not be deported and can lawfully work.

TPS has been described as a liminal status.[41] As just explained, its recipients have the right to work and live in the United States for only 18 months. Their future status is always uncertain. Yet some individuals have been able to renew their status under TPS, year over year, for decades. The United States first designated Nicaragua for TPS in 1999,[42] Honduras in 1999,[43] and El Salvador in 2001.[44] Each of those designations has been renewed regularly and remains in place as of writing this Essay. Thus, some TPS recipients have been living and working in the United States for over 25 years. But the TPS program provides no pathway for noncitizens to obtain more permanent status in the United States,

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37. *See*, *e.g.*, KIT JOHNSON, IMMIGRATION LAW: AN OPEN CASEBOOK § 3.1 (author ed. version 2.1 2024).

38. *See*, *e.g.*, *id.* § 4.

39. Immigration and Nationality Act (INA) § 101(a)(42), 8 U.S.C. § 1101(a)(42).

40. INA § 244, 8 U.S.C. § 1254a.

41. *See*, *e.g.*, Jennifer M. Chacón, *Producing Legal Limnality*, 92 DENV. UNIV. L. REV. 709, 722 (2015); Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOCIO. 999, 999-1003 (2006).

42. *Temporary Protected Status Designated Country: Nicaragua*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-nicaragua [https://perma.cc/9FVV-CQ88] (last visited Oct. 11, 2024).

43. *Temporary Protected Status Designated Country: Honduras*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-honduras [https://perma.cc/HJ85-QUYA] (last visited Oct. 11, 2024).

44. *Temporary Protected Status Designated Country: El Salvador*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-el-salvador [https://perma.cc/EE49-M5TH] (last visited Jan. 17, 2025).

much less U.S. citizenship. And, as soon as TPS is lifted, grantees are expected to return to their countries of origin.

In early 2025, the United States had TPS programs in place for Afghanistan, Cameroon, El Salvador, Ethiopia, Haiti, Honduras, Myanmar, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, Ukraine, Venezuela, and Yemen.[45] These programs provided TPS protection to an estimated 1.4 million noncitizens who would otherwise be undocumented and without any authorization to be present in the United States.[46] Notably, more than 88% of these TPS beneficiaries were employed.[47]

B. President Trump and TPS

The first Trump Administration was highly critical of TPS. Between October 2017 and June 2018, the U.S. Department of Homeland Security (DHS) announced that it would be begin rolling terminations of TPS for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan.[48]

A lawsuit quickly followed these announced terminations of TPS. A group of TPS beneficiaries and their U.S.-citizen children sued to enjoin the termination of TPS for four of the affected countries: El Salvador, Haiti, Nicaragua, and Sudan.[49] The trial court granted the plaintiffs' motion for a preliminary injunction, finding: (1) a "substantial record" that DHS applied a different standard in making the decision to terminate TPS than was applied by other administrations, "without any explanation or justification in violation of the Administrative Procedure Act;" (2) evidence that the TPS for these countries was terminated "to implement and justify a pre-ordained result desired by the White House;" and (3) "serious questions" that the termination of TPS for these countries was "based on animus against non-white, non-European immigrants in violation of Equal Protection guaranteed by the Constitution."[50]

A second lawsuit followed, seeking to prevent DHS from completing the announced termination of TPS for Honduras and Nepal. Plaintiffs in the second suit argued that termination of TPS for Honduras and Nepal suffered from the same flaws identified in the litigation concerning TPS for El Salvador, Haiti,

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45. *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status [https://perma.cc/M347-H6FT] (choose "Countries Currently Designated for TPS") (last visited Oct. 17, 2024).

46. *See supra* note 2 for discussion of estimates of the number of TPS holders in the United States.

47. National Hispanic Council on Aging, *supra* note 35.

48. *Termination of the Designation of El Salvador for Temporary Protected Status*, 83 Fed. Reg. 2654 (Jan. 18, 2018); *Termination of the Designation of Haiti for Temporary Protected Status*, 83 Fed. Reg. 2648 (Jan. 18, 2018); *Termination of the Designation of Honduras for Temporary Protected Status*, 83 Fed. Reg. 26074 (Jun. 5, 2018); *Termination of the Designation of Nepal for Temporary Protected Status*, 83 Fed. Reg. 23705 (May 22, 2018); *Termination of the Designation of Nicaragua for Temporary Protected Status*, 82 Fed. Reg. 59636 (Dec. 15, 2017); *Termination of the Designation of Sudan for Temporary Protected Status*, 82 Fed. Reg. 47228 (Oct. 11, 2017).

49. Ramos v. Nielsen, 321 F. Supp. 3d 1083, 1092 (N.D. Cal. 2018).

50. Ramos v. Neilsen, 336 F. Supp. 3d 1075, 1080–81 (N.D. Cal. 2018).

Nicaragua, and Sudan.[51] The parties agreed to stay proceedings pending the outcome of the litigation concerning El Salvador, Haiti, Nicaragua, and Sudan.[52]

The Trump administration appealed the district court's injunction staying the termination of TPS for El Salvador, Haiti, Nicaragua, and Sudan. A three-judge panel on the Ninth Circuit sided with the Trump administration and vacated the trial court's preliminary injunction.[53] The case was subsequently designated for rehearing en banc.[54] In the interim, however, President Biden took office, designated Haiti and the Sudan for TPS, rescinded the termination of TPS for El Salvador and Nicaragua, and moved to dismiss the appeal.[55] The motion to dismiss was granted, ending the threatened halt of TPS for these countries.[56]

During his 2024 campaign for reelection, President Trump stated that he would "absolutely … revoke" TPS for Haiti.[57] Vice President JD Vance's pre-inauguration message was the same—that the Trump administration would "stop doing mass grants of Temporary Protected Status."[58]

Now, President Trump has taken office for the second time. On his first day in office, President Trump signed an executive order purporting to protect the United States from "invasion," including by "promptly tak[ing] all appropriate action, consistent with law, to rescind the policy decisions of the previous administration that led to the increased or continued presence of illegal aliens in the United States."[59] He vowed to ensure that TPS designations would be "appropriately limited in scope and made for only so long as may be necessary to fulfill the textual requirements of that statute."[60]

The Trump administration wasted no time in moving to truncate TPS. On her third day in office, Secretary of Homeland Security Kristi Noem announced[61]

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51. *Cases: Bhattarai v. Nielsen*, ACLU S. CAL. (March 12, 2019), https://www.aclusocal.org/en/cases/bhattarai-v-nielsen [https://perma.cc/6DGJ-HY8G].

52. *Id*.

53. Ramos v. Wolf, 975 F.3d 872 (9th Cir. 2020).

54. Ramos v. Wolf, 59 F.4th 1010 (9th Cir. 2023).

55. Ramos v. Mayorkas, No. 18-16981, 2023 WL4363667 (9th Cir. June 29, 2023).

56. *Id*.

57. Miriam Jordan & Hamed Aleaziz, *Trump Immigration Targets: Ukrainians, Venezuelans, Haitians*, N.Y. TIMES (Nov. 15, 2024), https://www.nytimes.com/2024/11/15/us/trump-immigrants-temporary-protected-status.html [https://perma.cc/GD62-R2AP].

58. *Id*. *See also* Tyche Hendricks, *Immigrants with Temporary Protected Status Fear Deportation as Trump Returns*, NPR (Dec. 23, 2024), https://www.npr.org/2024/12/19/nx-s1-5202829/immigrants-with-temporary-protected-status-fear-deportation-as-trump-returns [https://perma.cc/Z6UQ-9YQP] (quoting Trump's proposed "border tzar," Thomas Homan, as stating the incoming administration needs to take a "hard" approach to TPS: "Temporary means temporary. Whatever reason [why] you got temporary protected status—maybe it's a hurricane in your homeland, maybe war in your homeland—but [when] this situation clears up, you need to go home.").

59. Exec. Order No. 14159, 90 Fed. Reg. 8443 (Jan. 29, 2025).

60. *Id*.

61. Hamed Aleaziz, *Trump Officials Revoke Biden's Extension of Protections for Venezuelans*, N.Y. TIMES (Jan. 28, 2025),

her recission[62] of the most recent extension[63] of the 2023 TPS program for Venezuela. This move will end TPS status for an estimated 381,802 Venezuelans as of April 7, 2025.[64] Noem did not immediately end a second Venezuelan TPS program,[65] which protects another 242,200 Venezuelans;[66] that program will come to an end in September 2025.[67] Noem also announced that TPS for Haiti will end six months earlier than authorized by the Biden administration—on August 3, 2025—a move that will affect an estimated 520,794 Haitians currently in the United States.[68]

Not only is President Trump interested in curtailing TPS, but he is also likely to be successful. Certainly, immigrant advocacy groups will look to hold the government to its burden of "an objective assessment of the conditions for each country to decide whether that country is safe for the return of nationals," as described by Professor Ahilan Arulanantham, who litigated the 2018 TPS case.[69] Several lawsuits have already been filed to challenge Noem's actions regarding TPS for Venezuela and Haiti, and one suit has even landed in front of the same federal judge who presided over the 2018 litigation.[70] But the Trump administration will have learned from the 2018 litigation. And this time, as Professor Lenni Benson has noted, "the Trump administration is likely to be

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https://www.nytimes.com/2025/01/28/us/politics/trump-tps-venezuelan-immigrants.html [https://perma.cc/34QK-NJ26].

62. Vacatur of 2025 Temporary Protected Status Decision for Venezuela, 90 Fed. Reg. 8805 (Feb. 3, 2025).

63. Extension of the 2023 Designation of Venezuela for Temporary Protected Status, 90 Fed. Reg. 5961 (Jan. 17, 2025).

64. Vacatur of 2025 Temporary Protected Status Decision for Venezuela, 90 Fed. Reg. 8805 (noting 348,202 Venezuelans initially were granted TPS under the 2023 program and an additional 33,600 Venezuelans who entered the United States in 2024 pursuant to a parole program also received TPS under the 2023 program).

65. Designation of Venezuela for Temporary Protected Status and Implementation of Employment Authorization for Venezuelans Covered by Deferred Enforced Departure, 86 Fed. Reg. 13574 (Mar. 9, 2021).

66. NATIONAL IMMIGRATION FORUM, *supra* note 2.

67. Vacatur of 2025 Temporary Protected Status Decision for Venezuela, 90 Fed. Reg. 8805 (Feb. 3, 2025).

68. Partial Vacatur of 2024 Temporary Protected Status Decision for Haiti, 90 Fed. Reg. 10511 (Feb. 24, 2025). Since then, the administration has announced that TPS protection for Afghans will end on May 20, 20205, and TPS for Cameroonians will end July 7, 2025. Termination of the Designation of Afghanistan for Temporary Protected Status, 90 Fed. Reg. 20309 (May 13, 2025) (affecting an estimated 11,700 individuals); Termination of the Designation of Cameroon for Temporary Protected Status, 90 Fed. Reg. 23697 (June 4, 2025) (affecting an estimated 5,200 individuals).

69. Miriam Jordon & Hamed Aleaziz, *Trump Immigration Targets: Ukrainians, Venezuelans, Haitians,* N.Y TIMES (Nov. 15, 2024), https://www.nytimes.com/2024/11/15/us/trump-immigrants-temporary-protected-status.html [https://perma.cc/GD62-R2AP].

70. Verónica Egui Brito, *Federal judge signals 'likelihood of injury' as Venezuelan TPS deadline looms*, MIAMI HERALD (Mar. 25, 2025, 2:59 PM), https://www.miamiherald.com/news/local/immigration/article302719949.html [https://perma.cc/4K7Y-FHLV].

more sophisticated in documenting its policy rationale for why Temporary Protected Status is no longer justified."[71]

If the second Trump administration successfully ends TPS, many thousands of noncitizens who currently have authorization to live and work in the United States will lose those rights. That does not mean that the former beneficiaries of TPS will necessarily leave the United States. They may well choose to remain stateside.[72] Because these then-undocumented individuals will not have government authorization to work in the United States, Part III of this essay considers ways in which these workers could continue working without violating U.S. law.

III. WORKING UNDOCUMENTED AND THE LLC SOLUTION

It is not a crime for a noncitizen to work in the United States without authorization.[73] Their U.S. employers, on the other hand, face civil and criminal liability for hiring employees who do not have permission to work in the country.[74] This section begins by discussing the history of employer sanctions for hiring unauthorized workers and how it is that unauthorized workers still account for over 5% of the U.S. workforce. Next, it considers how forming an LLC might help eldercare providers who lose TPS work authorization to be compensated for their labor without being "employed" by those benefitting from their labor.

A. Employer Sanctions for Hiring Unauthorized Workers

In 1986, Congress, for the first time, made it unlawful for employers to hire noncitizens who lack work authorization.[75] Such conduct had been entirely lawful for the more than 200 years of our nation's existence prior to passage of the Immigration Reform and Control Act of 1986 (IRCA).[76]

What prompted the legislative change? Congress hoped that making U.S. employers liable for the hiring of unauthorized workers would reduce the

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71. Jordon & Aleaziz, *supra* note 69.

72. *Id*. (quoting one Haitian beneficiary of TPS as stating: "We will try to live peacefully and stay alive here."); *see also* Carrie Kahn, '*We Want to Stay': Haitian Immigrants in U.S. Fear End of Temporary Protected Status*, NPR (Nov. 5, 2017, 2:27 AM), https://www.npr.org/sections/parallels/2017/11/05/561922898/we-want-to-stay-haitian-immigrants-in-u-s-fear-end-of-temporary-protected-status [https://perma.cc/5FP7-2FCL] (noting one TPS recipient interviewed "says she doesn't want to leave—and if the U.S. tells her to go, then they'll have to come get her and drive her to the airport.").

73. Kit Johnson, *Lawful Work While Undocumented: Business Entity Solutions*, 64 ARIZ. L. REV. 89, 91 (2022).

74. *Id*.

75. INA § 274A(a)(2), 8 U.S.C. § 1324a(a)(2) ("It is unlawful for a person or other entity…to hire…for employment in the United States an alien knowing the alien is an unauthorized alien…with respect to such employment.")

76. Admittedly, the first federal immigration law was not passed until 1875. *See*, *e.g*., KIT JOHNSON, CRIMMIGRATION LAW: AN OPEN CASEBOOK 42 (2024). Even using this later marker, the employment of undocumented workers had been (federally) lawful for more than a century prior to passage of IRCA.

undocumented population by curtailing their work opportunities.[77] Insofar as that ambition went, IRCA has been a failure.[78]

An estimated 3.2 million undocumented individuals resided in the United States prior to the passage of IRCA.[79] That number declined immediately following passage of IRCA in no small part because IRCA provided amnesty (that is, legal immigration status) to 2.7 million of the undocumented noncitizens already living in the country.[80] The decline did not last. Today, the undocumented population is estimated at 13.7 million.[81] As such, IRCA did not achieve its goal of reducing the undocumented population of the United States.

IRCA also did not foreclose work opportunities for undocumented individuals. An estimated 70% of noncitizens currently present without authorization in the United States are employed.[82] With an undocumented population estimated at 13.7 million, a 70% employment rate means that the United States hosts around 9.59 million undocumented workers. That figure exceeds the estimated 3.2 million total population of undocumented individuals present in the United States before the passage of IRCA. Indeed, undocumented workers account for over 5% of the total U.S. workforce.[83] IRCA thus also failed in its goal of eliminating work as a pull factor drawing undocumented migrants to the United States.

There are many explanations for how it is that so many noncitizens are working in the United States without authorization despite the sanctioning framework established by IRCA. For one, the statute itself has exceptions. The hiring of individuals to perform "casual domestic service" or to work as

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77. Johnson, *supra* note 73, at 97.

78. Michael Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 195 (2007).

79. RUTH ELEN WASEM, CONG. RSCH. SERV., RL33874, UNAUTHORIZED ALIENS RESIDING IN THE UNITED STATES: ESTIMATES SINCE 1986 2 (2012).

80. *Id*. at 1—2 (noting 2.7 million individuals regularized their status pursuant to IRCA and estimating the 1988 undocumented population at 1.9 million).

81. Jennifer Van Hook, Ariel G. Ruiz Soto & Julia Gelatt, *The Unauthorized Immigrant Population Expands amid Record U.S.-Mexico Border Arrivals*, MIGRATION POLICY INSTITUTE (February 2025), https://www.migrationpolicy.org/news/unauthorized-immigrant-population-mid-2023 [https://perma.cc/K6R9-VUEA]. The undocumented population today is significantly higher than it has been any time over the last 15 years. *See id*; Robert Warren, *US Undocumented Population Increased to 11.7 Million in July 2023: Provisional CMS Estimates Derived from CPS Data*, CENTER FOR MIGRATION STUDIES (Sept. 5, 2024), https://cmsny.org/us-undocumented-population-increased-in-july-2023-warren-090624 [https://perma.cc/Q2Q3-JN4P].

82. Kevin Appleby, *The Importance of Immigrant Labor to the US Economy*, CENTER FOR MIGRATION STUDIES (Sept. 2, 2024), https://cmsny.org/importance-of-immigrant-labor-to-us-economy/ [https://perma.cc/EU97-DNQY] ("According to estimates from the Center for Migration Studies of New York (CMS) and other groups, as many as 8.3 million undocumented immigrants work in the US economy, ….").

83. *Id*. (estimating undocumented noncitizens account for 5.2% of the total U.S. workforce).

"independent contractors" does not fall within the prohibitions of IRCA.[84] To the extent that an employer hires noncitizens workers who can be so characterized, there is no IRCA problem.[85]

A certain percentage of employers are also perfectly willing to break the law by hiring unauthorized workers.[86] Those that do are frequently motivated by the "competitive advantage" involved,[87] including the financial rewards of offering workers lower wages and no benefits coupled with avoiding federal and state tax obligations.[88] Such employers reason, logically, that the odds of being caught, much less sanctioned, for their hiring practices are long. One government report concluded that only 0.02% of U.S. employers were subject to civil fines under IRCA.[89] Few employers are criminally prosecuted, much less convicted, under IRCA.[90]

One particularly cynical commentator has described IRCA as giving rise to a "counterfeit-documents industry" allowing "workers to pretend to be legal and employers to pretend to believe them."[91] Fake documents pave the way for

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84. 8 C.F.R. § 274a.1(f) (2020) ("The term employee means an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors as defined in paragraph (j) of this section or those engaged in casual domestic employment as stated in paragraph (h) of this section:").

85. Johnson, *supra* note 73, at 98–105 (exploring the meaning of these two IRCA exemptions).

86. *Id*. at 105–11 (discussing employers who hire unauthorized labor and the difficulties facing workers under such conditions).

87. Wishnie, *supra* note 78, at 195.

88. *Id*. It should be noted that federal and state courts are "virtually unanimous" in finding that undocumented workers should receive minimum wage and overtime under the Fair Labor Standards Act. Jacob Hamburger, *Hybrid-Status Immigrant Workers*, 73 DUKE L.J. 737, 771 (2024). That may or may not be less than the going rates paid to authorized workers. Still, many undocumented workers do not receive even minimally required wages. *See*, *e.g*., Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558, 1561 (2015) ("Although these protections theoretically apply regardless of citizenship status, undocumented workers' illegality under immigration laws often leads them to accept substandard conditions."); Susan Ferris & Joe Yerardi, *Wage theft hits immigrants—hard*, PBS NEWS (Oct. 24, 2021, 4:28 PM), https://www.pbs.org/newshour/economy/wage-theft-hits-immigrants-hard [https://perma.cc/N8L8-QR4C] ("Immigrants perform some of America's lowest-paying, arduous jobs, and are among those most victimized by employers failing to pay them fairly.").

89. ANDORRA BRUNO, CONG. RESEARCH SERV., R40002, IMMIGRATION-RELATED WORKSITE ENFORCEMENT: PERFORMANCE MEASURES 4–5 (2015). *See also* Wishnie, *supra* note 78, at 210 (noting that even when employers are fined, they commonly "negotiate down" fine amounts).

90. Miriam Jordan, *Trump's Crackdown on Illegal Immigration: 11 Employers Prosecuted in the Past Year*, N.Y TIMES (May 31, 2019), https://www.nytimes.com/2019/05/31/us/illegal-immigration-employers-prosecutions.html [https://perma.cc/9SMG-ZPWC] (noting that from March 2018 through March 2019, only 11 employers faced criminal charges for hiring unauthorized workers and that only 3 of the 11 employers convicted of hiring unauthorized workers between March 2018 and March 2019 served prison time).

91. Jerry Kammer, *Three Decades of Failed Reform: Immigration Politics and the Collapse of Worksite Enforcement*, CTR. IMMIGR. STUD. (Aug. 2, 2018),

employers to present their "good faith" belief that they hired an authorized worker, an affirmative defense to any IRCA charge of improper employment.[92] At the same time, IRCA requires employers to fire employees any time it is discovered that they do not have work authorization, an obligation that provides a mechanism for complicit employers to let go of undocumented employees without warning.[93] That looming threat means workers who present false papers are unlikely to complain about the conditions of employment and likely to accept the lower wages and lack of benefits that characterizes undocumented work generally. But situations of mutual pretense are even riskier for unauthorized workers because IRCA made it a crime for employees to present false paperwork.[94]

B. LLCs for Undocumented Eldercare Providers

IRCA, as explained above, has made it unlawful for an employer to "hire" an undocumented worker.[95] So how could a family lawfully employ an undocumented noncitizen to provide eldercare in their home? How could a nursing home lawfully employ undocumented noncitizens? The answer lies in business entity formation, specifically, the formation of limited liability companies (LLCs).

1. Limited Liability Companies

Lawyers love to recommend limited liability company formation to their clients because an LLC is a hybrid business entity that combines the most business-favorable aspects of corporations with the business-favorable attributes of partnerships.[96] From corporations, LLCs have adopted limited liability[97] and separate legal entity status.[98] From partnerships, LLCs have appropriated shared

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https://cis.org/Oped/Three-Decades-Failed-Reform-Immigration-Politics-and-Collapse-Worksite-Enforcement [https://perma.cc/B324-VE5H].

92. Johnson, *supra* note 73, at 106.

93. *Id.* at 107–08.

94. INA § 274C(a), 8 USC § 1324c(a) (2020). *See also* Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 138 (2002) (noting IRCA "makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents").

95. *See* Johnson, *supra* note 73.

96. Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW. 1, 2 (1995).

97. "Limited liability" in this context means that third parties who sue the LLC will typically recover only the funds held by LLC and not funds held by the LLC's owners. See Johnson, *supra* note 73, at 124 & nn.222–23.

98. Corporations are considered separate entities from their owners (shareholders), policymakers (directors) and day-to-day managers (officers). *See* Johnson, *supra* note 73, at 117 & n.170, 120–21 & nn.196–97. LLCs, in turn, are separate from their members and managers. *Id.*

governance[99] and tax benefits.[100] The "best of both worlds" approach of LLCs has made them an immensely popular business form in the United States.[101]

Establishing an LLC is simple.[102] Pick a name. Appoint an agent for service of process. File a certificate formation that lists nothing more than the chosen name and appointed agent.[103] Pay the fee.[104]

Running an LLC can be equally simple. LLCs are owned by "members" and run by "managers." An LLC where the members are also managers is known as a member-managed LLC. So, if two people agree to form an LLC and own it jointly, they will be the LLC's members. If they further agree to run the business jointly, they will be the LLC's managers in a member-managed LLC.

Here is the important bit: a member-manager of a member-managed LLC is not considered an *employee* of that LLC.[105] This means that an LLC member-manager who is a noncitizen without authorization to work can, legally, do the work of a member-managed LLC without being employed by that LLC. And because the LLC is a separate legal entity from its members or managers, third parties can hire the LLC to do work without hiring the otherwise unhireable member-managers of the LLC itself.

There is one hitch. Third parties that hire the LLC cannot use the LLC as a replacement for ordinary employees. That is because IRCA specifies that anyone who "obtain[s] the labor"[106] of a noncitizen knowing that the individual does not have work authorization will be considered to have "hired" the noncitizen in contravention of IRCA.[107] With this language, IRCA intended to prevent employers from simply using subcontractors to insulate themselves from

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99. Partners have an equal voice in the operations of the partnership. Managers also have an equal voice in the operations of an LLC. *See* Johnson, *supra* note 73, at 115 & n.163.

100. LLCs can choose to be taxed as partnerships wherein profits flow to members who are taxed individually on that income. This contrasts with corporations, which are subject to "double taxation": taxation of the corporation directly and personal taxation of shareholders who receive any dividends from the corporation. *See* Johnson, *supra* note 73, at 125 & nn.224–25.

101. Rodney D. Chrisman, *LLCs Are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LPs Formed in the United States Between 2004-2007 and How LLCs Were Taxed for Tax Years 2002-2006*, 15 FORDHAM J. CORP. & FIN. L. 459, 459—60 (2010) (finding LLCs to be "undeniably the most popular form of new business entity in the United States").

102. Johnson, *supra* note 73, at 122–29 (discussing the formation and functioning of LLCs).

103. *See*, *e.g.*, Del. Div. of Corps., *Certificate of Formation of a Limited Liability Company*, https://corpfiles.delaware.gov/LLCFormation.pdf [https://perma.cc/NNS3-CMMG].

104. In Delaware, that fee is $90. *Id*. Wisconsin charges $130 if filing LLC formation paperwork online. Wis. Division of Corporate and Consumer Services, *Corporation Fees: Domestic Entities*, State of Wisconsin Department of Financial Institutions, https://dfi.wi.gov/Pages/BusinessServices/BusinessEntities/Fees.aspx [https://perma.cc/HZ94-P5QQ] (last visited Apr. 22, 2025).

105. Johnson, *supra* note 73, at 122–29 (discussing the formation and functioning of LLCs).

106. INA § 274A(a)(4), 8 U.S.C. § 1324a(a)(4).

107. *Id*.

statutory liability.[108] The only extant example[109] of subcontractor impropriety involves Walmart. Back in 2005, Walmart paid the government $11 million to settle accusations that the company benefitted from janitorial-service contractors who, in turn, employed undocumented laborers to undertake overnight cleaning in Walmart stores across several states.[110]

As the Walmart example shows, and the IRCA "obtains" language indicates, an employer cannot use an LLC as a replacement for labor. But it *can* use an LLC as an independent contractor. That is, it would be appropriate for an employer to hire an LLC that operates as an independent business, contracts to do work according to the LLC's own means and methods, and is subject to the employer's control only insofar as results are concerned.[111] If that is the true relationship between the employer and the LLC, then it is one of independent contracting, and so it would fall under the independent-contactor exception to IRCA.[112]

2. Eldercare Providers, LLC

There are several ways in which noncitizens might use an LLC to continue providing eldercare after the loss of TPS work authorization.

Consider home care first. An at-home eldercare provider might be an individual who was hired by word-of-mouth or in response to an advertisement.[113] If that person currently has TPS and loses that status, they could still provide eldercare if they establish a single-member LLC, which is a permissible business entity form.[114] This would prevent the benefitting senior or their family from employing a noncitizen without work authorization and thereby incurring IRCA liability. As noted, the eldercare provider would need to maintain an independent contracting relationship with those paying for the care. But,

108. *But see* Wishnie, *supra* note 78, at 214 (noting some U.S. employers in fields as diverse as agriculture, construction, retail sales, and computer programming rely on subcontractors who hire undocumented labor as a means of competing with employers who directly hire undocumented labor and as a means to insulate themselves from IRCA liability).

109. As discussed in Johnson, *supra* note 73, at 102 n.81, there is no relevant caselaw discussing the subcontractor provision of IRCA.

110. Steven Greenhouse, *Wal-Mart to Pay U.S. $11 Million on Lawsuit on Illegal Workers*, N.Y. TIMES (Mar. 19, 2005), https://www.nytimes.com/2005/03/19/business/walmart-to-pay-us-11-million-in-lawsuit-on-illegal-workers.html [https://perma.cc/2TRH-4QEV].

111. 8 C.F.R. § 274a.1(j) (2020).

112. *See supra* notes 86–87 and accompanying text.

113. *See*, *e.g.*, *Caregiving 2024*, *supra* note 12 ("[M]y sister and I were able to find some women who had experience taking care of elderly people. They were not certified or professionally trained, but they were kind and accommodating and did the work for between $12 and $15 per hour."). One of my great aunts, who suffered from dementia, was cared for by a series of women who were referred to us by community members and the church.

114. *See* Johnson, *supra* note 73, at 125 & nn.226–29.

often, these are workers who provide care to multiple families at a time,[115] a hallmark of independent contractor work.[116]

Some at-home eldercare workers are provided by agencies.[117] A family might contract with an agency to provide a certain number of hours of care a week or particular kinds of care. The agency might send the same worker each time, or a rotation of caregivers. A caregiver who currently holds TPS authorization and loses it will not be able to stay employed by the agency they have been working for. As discussed, that would be an IRCA violation.[118] And it is highly unlikely that an established agency would be interested in converting to an LLC entity where the caregiver would become a member-manager.[119] However, a new agency could be formed as an LLC with a handful of direct-care providers as member-managers, providing care to families as independent contractors.

Another LLC form would enable a large number of individual eldercare providers without work authorization to join together: the worker-cooperative LLC.[120] U.S. worker cooperatives date all the way back to the 1840s and 1880s.[121] Their popularity has waxed and waned alongside the economic outlook of the United States generally.[122] LLCs, however, are a newer invention. They've only been around since 1977.[123] And, so, worker cooperative LLCs are newer still.

It is estimated that there are over 300 worker cooperatives operating in the United States today,[124] but there are no estimates as to how many of these cooperatives have organized as an LLC as opposed to a corporation or other

115. *See* Bailey, *supra* note 25 (following one caregiver working 70 hours a week providing care to senior citizens as well as sick and disabled patients in a variety of settings); Kahn, *supra* note 72 (following one TPS holder from Haiti who "already has helped transport one of her regular patients, a young girl with a severe respiratory disease, to school, and visited two senior patients in their homes."); *Id*. ("On weekends she picks up a few extra patients").

116. Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 350 (2001) ("if the worker is free to work for other clients, this fact supports independent contractor status").

117. My sister and I hired eldercare workers through an agency.

118. *See supra* notes 73–76and accompanying text.

119. Given the popularity of the LLC form, it is likely that the agency is already an LLC. The one my family worked with is an LLC. LifeSpring In-Home Care Network LLC, LIFESPRING HOME CARE, https://www.lifespringhomecare.com [https://perma.cc/JJA2-MMDZ] (last visited April 24, 2025). An already established entity will have management in place and would be unlikely to see the benefit of bringing direct care providers into that team.

120. *See* Johnson, *supra* note 73, at 125–29 (discussing this business entity form).

121. Gowri Jaya Krishna, *Worker Cooperative Creation as Progressive Lawyering? Moving beyond the One-Person One-Vote Floor*, 34 BERKELEY J. of EMP. & LAB. L, 101, 114 (2013).

122. *Id*.

123. Johnson, *supra* note 73, at 122.

124. *Worker Cooperative FAQ*, DEMOCRACY AT WORK INST., https://institute.coop/about-worker-co-ops/worker-cooperative-faq [https://perma.cc/87ZP-UZ5T] (last visited April 22, 2025).

business entity.[125] A recent study of 100 California worker cooperatives found only seven formed as worker cooperative LLCs—three providing cleaning services, one taxi service business, one IT entity, one community service organization, and one home health care entity.[126] There are many reasons why the worker cooperative LLC has not been a widespread success in California. For one, a cooperative organized as an LLC cannot use the word "cooperative" in their legal name.[127] Additionally, not many have the skills necessary to help an inexperienced group get one up and running.[128] Still, the entity form has tremendous potential for eldercare.

Here is how a worker-cooperative LLC for eldercare providers could work.[129] Individual care providers would come together to form the LLC. Each would make a capitol contribution to become members of the LLC. The providers would also have to actively participate in the management of the LLC in order to be considered member-managers. Management decisions could be made collectively by, for example, voting on new members, approving new clients, and agreeing how to distribute income. There could also be an elected committee that would focus on details—advertising the LLC, paying bills, arranging benefits—so long as other member-managers continue to vote on critical issues and rotate on-and-off of this more specialized committee. While not previously used by eldercare providers, worker-cooperative LLCs could be critical to staunching the growing eldercare gap.

Now consider institutional providers—retirement communities, assisted living centers, group homes, and memory care units. There is no question that it will be much more difficult for institutional eldercare providers to hire LLCs—whether individual, agencies, or worker cooperatives—to provide services within their facilities. To the extent that an institutional provider would like to hire an LLC to provide a segment of direct care for residents—medical supervision, bathing, feeding, enrichment—it is hard to envision how the facility would get around the Walmart precedent,[130] which tells us that employers cannot evade IRCA by using third party subcontractors to provide work the facility would otherwise need to do.

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125. *See* Scott L. Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-Income Workers*, 25 N.Y.U. REV. L & SOC. CHANGE 181 (1999) (considering the benefits of structuring a worker cooperative as a corporation or as an LLC); *see also How To: Choose an Entity for your Cooperative; A Bite-Sized Legal Guide*, SUSTAINABLE ECONOMIES L. CENTER. 1, 1–3 (2019), https://clinical.aals.org/wp-content/uploads/sites/3/2021/05/43390912-12.pdf [https://perma.cc/JV4N-MM7Y] (presenting the differences between forming a worker cooperative as an LLC or corporation).

126. Hilary Abell, Kim Coontz and Ricardo Nuñez, *California Worker Cooperatives* (Oct. 2021), https://project-equity.org/wp-content/uploads/2023/07/CaliforniaWorkerCooperatives_October2021_FINAL.pdf [https://perma.cc/JUQ2-72V6].

127. *Id.* at 6.

128. Johnson, *supra* note 73, at 125–26 (discussing general unfamiliarity with the worker cooperative LLC even among corporate attorneys).

129. *See* Cummings, *supra* note 125, at 185–86 (describing worker cooperatives).

130. *See supra* notes 101–02 and accompanying text.

Yet institutional eldercare facilities currently rely extensively on independent contractors to provide care that would otherwise be deemed work of the facility. Take hospice, which "focuses on the care, comfort, and quality of life of a person with a serious illness who is approaching the end of life."[131] Hospice can include assistance with bathing, dressing, grooming, and other personal care services that would typically be provided by the institution.[132] Hospice agencies send caregivers into institutions, with which they are unaffiliated, to provide this exact care. Given the short staffing of institutions generally,[133] facilities are grateful for the care provided by hospice workers as it frees employees to better assist other, non-terminal, seniors.

Perhaps hospice works as it does because the arrangement is made on a person-by-person basis. That is, Resident A may contract with Hospice A to provide hospice care. Resident B may contract with Hospice B to provide hospice care. The institutional facility might recommend certain hospice providers, but it does not contract with the hospice providers directly. Given that, it would seem entirely appropriate for residents to contract with an LLC providing hospice services whose member-managers are undocumented eldercare providers.[134]

There may also be room for institutions to contract directly with LLCs whose member-managers are undocumented. An LLC that provides extra, not core, services would certainly avoid IRCA prohibitions. For example, an institutional provider might contract with an LLC to provide haircutting, manicures, or massage services. These services would stand in contrast to the janitorial work that was central to resolution of the Walmart dispute. Janitorial work is a necessary part of a retail operation. Spa services are not a necessary part of institutional eldercare. That said, while such services would be lovely, they are not the true direct eldercare services that are in demand.

On the other hand, maybe there are aspects of institutional care that fall somewhere between "extra" and "core" where an independent contractor could take on the work without invoking IRCA. Consider enrichment. Many institutional providers offer various forms of enrichment activities for their residents—everything from trips to Walmart and the movies to classes designed to help those with memory loss to retain vocabulary. Those activities, while essential to the seniors themselves, are arguably not central to institutional care, which focuses on housing, feeding, cleaning, and medicine. An institutional

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131. National Institute on Aging, *What Are Palliative Care and Hospice Care?*, https://www.nia.nih.gov/health/hospice-and-palliative-care/what-are-palliative-care-and-hospice-care [https://perma.cc/9S8B-8MQJ] (last visited April 22, 2025). Notably, hospice care is typically covered by Medicare. *Hospice* care, CTRS. FOR MEDICARE AND MEDICAID SERVS., https://www.medicare.gov/coverage/hospice-care [https://perma.cc/HS3S-35YG] (last visited April 22, 2025).

132. *See The Role of Hospice Aides*, COMPASSUS, https://www.compassus.com/healthcare-professionals/role-of-the-hospice-aide [https://perma.cc/X4UV-Y66A] (last visited Apr. 23, 2025).

133. *See supra*, Part I.A.

134. It would be fruitful for future researchers to examine whether there are any Medicare-specific issues related to hospice that might prevent LLCs with undocumented member-managers from providing such care.

provider could, therefore, have a legally defensible argument for hiring an LLC to provide enrichment services as an independent contractor.

Perhaps institutional providers will need to think entirely outside of the box by establishing facilities that provide, say, housing, janitorial care, food service, and medicine, but mandate that residents hire an LLC of their choosing for support with personal care—showers and dressing. Such an institution could predicate residence on evidence of outside supportive care.

In sum, formation of LLCs offers a promising way in which individuals might obtain home-based eldercare without violating IRCA while simultaneously enabling noncitizens to continue providing eldercare services after losing work authorization. The prospects for institutional eldercare providers to take advantage of LLCs formed by unauthorized workers, however, are less clear.

CONCLUSION

This Essay has confronted aging in America and the growing need for eldercare providers. It has considered the outsized role that noncitizens play in the eldercare sphere, with attention paid to noncitizens who have work authorization pursuant to Temporary Protected Status. It has discussed how many TPS beneficiaries may soon lose work authorization, further depleting eldercare resources, while suggesting a possible solution that would allow out-of-status providers to continue working: establishing an LLC.

Notably, this Essay has, until now, ignored one salient fact: any noncitizen who loses TPS work authorization will also lose their authorization to be present in the United States. This means that former TPS beneficiaries will become undocumented. And undocumented individuals are always subject to removal from the United States. Thus, this Essay proposes a solution to one problem only: how an undocumented individual can find work in the United States without triggering IRCA liability on the part of those paying for their services. There are myriad other consequences facing TPS beneficiaries who lose their status, each of which merits study and demands solutions.

CREATIVELY CONCEALED BUT STILL PERSISTENTLY PERVASIVE: RACIAL STEERING IN AMERICAN REAL ESTATE

Stevie J. Swanson[*]

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ABSTRACT

Racial steering has been illegal in the United States since 1866. The Civil Rights Act of 1866 stated that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[1] *Despite nearly one hundred sixty years of illegality, racial steering is alive and well in America. How has it survived? This article explores historical forms of steering and assesses their current efficacy. It illuminates modern forms of steering and considers methods to curb them. It concludes with an analysis of remediation attempts to rectify the harms of over a century of racial steering in America.*

Racial steering is continuing to further segregation, which deprives Americans of the benefits of integrated communities. This article will begin with a discussion of the benefits of integration and the challenges that plague Americans due to extensive and pervasive segregation in housing. Next, it will examine impediments to ownership, occupancy, and alienability of real property because of racial steering. It will explore historical methods of steering such as blockbusting, direct realtor-based action, and redlining. It will assess whether any of these mechanisms have been resolved and/or remediated, or whether they continue to impact land ownership in new ways. Individual, governmental, and institutional types of steering will also be examined.

Having painted the historical backdrop, this article will transition into the modern era. While redlining and race-based covenants are less likely to steer land occupancy demographics in the present, this article posits that race-based steering is alive and well. It will explore the dramatic differences in property values when appraisers are valuing white-owned homes versus those owned by non-whites. The article will examine how an inability to extract equity from one's home impacts the homeowner's upward financial and geographic mobility, while further perpetuating segregation.

Later, this article will explore new changes in realtor fee arrangements that impact how buyers, brokers, and agents, are compensated, the challenges to affordability, and the increased access issues this presents for homebuyers. It will assess whether these fee structure changes will inhibit purchasers' ability to buy homes in more affluent areas.

Additionally, the article will highlight racial steering through problematic algorithms utilized by social media platforms. It will examine how these hidden steering techniques are damaging access to housing opportunities and what the government is trying to do about it.

The article will conclude with suggested processes to eradicate steering and create remediation techniques for those negatively impacted.

1. 42 U.S.C. § 1982; *See also* FAIR HOUS. JUSTICE CTR., https://www.fairhousingjustice.org/wp-content/uploads/2021/01/Civil-Rights-Act-of-1866.pdf [https://perma.cc/GNY4-43Z8] (last visited Oct. 2, 2024) (currently codified in 42 U.S.C. § 1982).

I. INTRODUCTION TO RACIAL STEERING

A. What is it?

Racial steering is a relic of slavery. The enabling clause of the Thirteenth Amendment to the United States Constitution gives Congress the power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[2] The "badges and incidents of slavery" include restraints upon the rights to "inherit, purchase, lease, sell, and convey property."[3] The United States Supreme Court stated in 1968 that "[j]ust as the Black Codes…, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos…then it too is a relic of slavery."[4] Racial steering has spent over a century "herding men into ghettos."[5]

B. How was it utilized?

1. Realtors

Historic racial steering came in many forms. It was a nationally organized effort on the part of realtors and brokers.[6] A former President of the National Association of Realtors ("NAR") once said, "[w]e are not going to be a party to the salt and peppering of the whole community."[7] Realtors, as racially homogenous private membership bodies "with extraordinary economic power and political legitimacy," were a driving force in segregating American cities.[8] In fact, Gene Slater argues, in *Freedom to Discriminate,* that "[o]rganized segregation could not have been created until realtors organized the real estate industry itself."[9]

Another type of racial steering perpetrated by real estate brokers and agents was blockbusting, also known as "panic peddling."[10] The process of

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2. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (quoting Civil Rights Cases, 109 U.S. 3, 22 (1883)).

3. *Id.* at 441 (quoting *Civil Rights Cases*, 109 U.S. at 22).

4. *Id.* at 441–42.

5. *Id.* at 441–43.

6. Gary Ashton, *What's the Difference Between a Real Estate Agent, a Realtor, and a Broker?,* ASHTON REAL EST. GRP. BLOG (Apr. 29, 2022), https://www.nashvillesmls.com/blog/real-estate-agent-vs-realtor-vs-broker.html [https://perma.cc/S62J-XPDQ] ("REALTORS® are real estate agents or brokers who have taken an extra step and joined the National Association of REALTORS® (NAR)." … "REALTORS® abide by the association's Code of Ethics to ensure best practices across the country.").

7. GENE SLATER, FREEDOM TO DISCRIMINATE: HOW REALTORS CONSPIRED TO SEGREGATE HOUSING AND DIVIDE AMERICA, 209 (2021) (quoting Mr. Charles Shattuck, Chairman of the Los Angeles Realty Board (LARB) Race Relations Committee and former President of the LARB, Canadian Real Estate Association, and National Association of Real Estate Brokers in 1961).

8. *Id*. at 50.

9. *Id.* at 50.

10. KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP, 48 (2019).

blockbusting, as described by a blockbuster in 1962, involved beating down prices paid to whites, selling to Blacks at inflated prices, and then financing the purchases by Black buyers at exorbitant interest rates.[11] Blockbusters used rent-to-buy arrangements called installment land contracts as financing mechanisms.[12] This method of financing was dangerous for buyers because the seller held title to the property until it was paid in full and had the ability to evict the purchaser for a missed payment—causing the buyer to lose all equity accrual.[13] Blockbusters were successful due to the lack of traditional mortgage financing available to Black homebuyers[14] as well as the unavailability of land for purchase.[15] Real estate agents and brokers utilized racial steering as a remarkably effective tool to keep American housing segregated, but they are not the only group to blame.

2. Private parties

Private parties (landowners) independently contracted with one another to keep their neighborhoods all-white. They placed these private agreements in deeds which were typically recorded at the county public records office to make everyone aware of the restriction.[16] Racially restrictive deed covenants rose in popularity in the 1920's after race-based zoning ordinances were deemed illegal by the Supreme Court in *Buchanan v. Warley*.[17] In *Corrigan v. Buckley*, in 1926, the Supreme Court upheld a private race-based deed covenant.[18] In 1948, in *Shelley v. Kraemer*, the Supreme Court held that racially restrictive covenants were unenforceable (through State action), but not illegal.[19] Their illegality was not established until the passage of the Fair Housing Act ("FHA") in 1968.[20] From *Shelley* to the FHA, hundreds of thousands of new race-based covenants were recorded.[21] "Real estate appraisers were strongly supportive of restrictive covenants as a means of protecting neighborhoods and preserving property value."[22] Racially restrictive covenants were utilized for years after the passage of the FHA and still appear at public records offices across America.[23]

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11. *Id.* (quoting a Saturday Evening Post article from 1962).

12. ANTERO PIETILA, NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY, 99 (2010).

13. *Id.*

14. TAYLOR, *supra* note 10, at 73.

15. *See infra* pp. 4–5 (land was unavailable due to racially restrictive covenants.)

16. Anything recorded at a public records office becomes imputed knowledge to the public through the concept of record notice. *See* Sharad Mehta, *Understanding the Concept of a Real Estate Constructive Notice*, RE SIMPLI, https://resimpli.com/blog/real-estate-constructive-notice/ [https://perma.cc/4M2Q-BXNE] (last visited Oct. 2, 2024).

17. Buchanan v. Warley, 245 U.S. 60 (1917).

18. Corrigan v. Buckley, 271 U.S. 323 (1926).

19. Shelley v. Kraemer, 334 U.S. 1 (1948).

20. 42 U.S.C. § 3601.

21. STEVIE J. SWANSON, *The Metamorphoses of Racial Discrimination in American Real Estate*, 42 MINN. J. LAW & INEQ., 183, 214 (2024).

22. Raymond Mohl, *The Second Ghetto and the 'Infiltration' Theory in Urban Real Estate*, 1940-1960, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 69 (June Manning Thomas and Marsha Ritzdorf, ed., 1997).

23. SWANSON, *supra* note 21, at 185.

3. The Federal Government and Lending Institutions

The federal government and lending institutions played a substantial role in steering Black individuals and families away from white neighborhoods through redlining.[24] Redlining is the practice by which a bank, or the Federal Housing Administration, draws a red line around a geographic area and refuses to lend within that area because of the perceived risk.[25] In 1933, the Home Owners' Refinancing Act of 1933 was created to bail out homeowners facing foreclosure.[26] The Home Owners' Loan Corporation ("HOLC") grew out of the 1933 Act.[27] The HOLC created maps in the 1930's to "classify neighborhoods by their perceived lending risk."[28] The HOLC utilized the presence of race-based covenants as "supremely important" when creating their maps.[29] The presence of a race-based covenant made the area a low risk for lending. By contrast, redlined districts made it so that most Black homebuyers could not get loans.[30] The Federal Housing Administration issued its "insurance underwriting guidelines based on HOLC security maps."[31] In 1939, the Federal Housing Administration started redlining to "retain property values in certain districts."[32] In fact, the Federal Housing Administration did more to institutionalize redlining than any other agency, according to Professor Amy Hillier.[33] Richard Rothstein notes that because the Federal Housing Administration's appraisal standards included a "whites-only requirement," racial segregation was "an official requirement of the federal mortgage insurance program."[34]

Loans insured by the Federal Housing Administration were desirable because they offered fixed low-interest rate loans payable over thirty-year terms with low down payments.[35] These loans made the dream of homeownership a reality for many, but they were not an option for non-whites. For a lender to offer a borrower an FHA-insured loan, the financed property had to be subject to a racially restrictive covenant.[36] If the property wasn't subject to such a restriction, it was redlined and deemed a high-risk investment.[37] By refusing to lend money to individuals seeking to purchase property in high risk (non-white) redlined areas, lenders kept Blacks from integrating white neighborhoods.

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24. RICHARD ROTHSTEIN, THE COLOR OF LAW vii–viii (2017).

25. AFRED BROPHY ET AL., INTEGRATING SPACES, PROPERTY LAW AND RACE, 163–164 (2010).

26. PIETILA, *supra* note 12, at 62.

27. *Id.*

28. Bruce Mitchell & Juan Franco, *HOLC "Redlining" Maps: The Persistent Structure of Segregation and Economic Inequality*, NAT'L CMTY. REINVESTMENT COAL. (Mar. 20, 2024), https://ncrc.org/holc/ [https://perma.cc/9KAL-FUN5].

29. PIETILA, *supra* note 12, at 70.

30. Mohl, *supra* note 22, at 67.

31. PAIGE GLOTZER, HOW THE SUBURBS WERE CREATED: DEVELOPERS AND THE BUSINESS OF EXCLUSIONARY HOUSING, 1890-1960 158 (2020).

32. BROPHY, *supra* note 25, at 164.

33. PIETILA, *supra* note 12, at 73.

34. ROTHSTEIN, *supra* note 24, at 64–65.

35. SWANSON, *supra* note 21, at 187.

36. *Id.* at 214.

37. *Id.* at 186–88.

II. HARMS OF SEGREGATION

Racial steering has segregated American communities for over a century. Segregation is detrimental to communities in a plethora of ways. Segregation "undermin[es] social cohesion, perpetuat[es] racial stereotypes and prejudice, erod[es] democracy, foment[s] social instability, and drag[s] down long-term economic growth."[38] Social mobility, access to public services and recreational facilities, availability of reliable childcare facilities, opportunities for educational attainment and gainful employment, and good health are limited by segregation as well.[39] Home price appreciation and wealth accumulation are stunted by segregation.[40] Homes in areas where non-whites are forced into segregation are often in "older neighborhoods where the housing is already obsolescent or deteriorating."[41]

Perhaps the most detrimental effects of segregation, as suggested by James Carr and Nandinee Kutty in *Segregation: The Rising Costs for America*, are the "sustain[ed] racial and ethnic inequality in the United States" and the undermined "prospects for long-term prosperity."[42] As William Julius Wilson noted in *The Truly Disadvantaged*, "centuries, or even decades of racial subjugation can result in a system of racial inequality that may linger on for indefinite periods of time after the racial barriers are eliminated."[43] The reason for the lingering stench, Wilson notes, is the lack of "resources to compete effectively in a free and open market."[44] The lack of resources such as educational and job opportunities, as well as the ability to accrue generational wealth through increased property values, can trap families in cyclical poverty and segregation. Segregation has gotten worse over the past thirty years.[45] Segregation in housing is tied to school segregation, income inequality and racial inequality in home values. In fact, according to Craig Gurian, the executive director of the Anti-Discrimination Center, '[y]ou really cannot name any significant social injustice problem in the United States that's not undergirded by residential housing segregation.'[46] "In large school districts, white-Black segregation has increased 35% and economic

38. Jonathan Spader et al., *Fostering Inclusion in American Neighborhoods,* A SHARED FUTURE: FOSTERING COMMUNITIES OF INCLUSION IN AN ERA OF INEQUALITY 22, 38 (Christopher Herbert, Jonathan Spader, Jennifer Molinsky & Shannon Rieger eds., 2018).

39. *Id.*; Margery Austin Turner & Lynette Rawlings, *Promoting Neighborhood Diversity*, THE URB. INST. 2 (Aug. 2009), https://www.urban.org/sites/default/files/publication/30631/411955-Promoting-Neighborhood-Diversity-Benefits-Barriers-and-Strategies.pdf.

40. *Id.*

41. JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 282 (1959) (quoting DAVIS MCENTIRE, WHERE SHALL WE LIVE? REPORT OF THE COMMISSION ON RACE AND HOUSING 19-20 (1958)).

42. Turner & Rawlings, *supra* note 39, at 3.

43. WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 113 (1987).

44. *Id.*

45. Alana Semuels, *The U.S. Is Increasingly Diverse, So Why Is Segregation Getting Worse?*, TIME (June 21, 2021, 5:35 AM), https://time.com/6074243/segregation-america-increasing/ [https://perma.cc/M6H8-LDSQ].

46. *Id.*

segregation has increased 47% over the past 30 years."[47] Racial and ethnic income inequities have not improved in the last half-century.[48] "Racial inequality in home values is greater today than it was 40 years ago…."[49] As the next section will illustrate, integration addresses many of these issues.

III. BENEFITS OF INTEGRATION

Integrated communities are beneficial for everyone. As the Urban Institute notes, "exposure to diversity helps broaden people's social networks by creating meaningful opportunities for interaction across racial and ethnic lines."[50] Society generally fears people and things that it does not understand or is unfamiliar with. People resent being scared and get defensive. This leads to hostility and a desire to surround oneself with uniformity. Homogeneity leads to increased segregation. Interaction between races and ethnic groups creates more understanding and openness to others.[51] Researchers have found that people who live in integrated neighborhoods "express less racial and ethnic prejudice."[52] Diverse, integrated neighborhoods can boost the local economy, provide exposure to culturally rich foods, art, traditions, and music, and even spark creativity and innovation through the incorporation of a multiplicity of viewpoints and experiences.[53]

An excellent example of the benefits of integration stems from the aftermath of *Southern Burlington County NAACP v. Township of Mount Laurel* ("*Mt. Laurel I*") which held that municipalities "must…make realistically possible an appropriate variety and choice of housing."[54] The *Mt. Laurel I* court further concluded that municipalities cannot zone in a way that totally excludes "low and moderate income housing" and they "must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need…."[55]

Mt. Laurel Township did not follow the court order and a second case, *Mt. Laurel II,* ensued, resulting in the New Jersey Supreme Court reaffirming its

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47. Janesse Miller, *New 'Segregation Index' shows U.S. schools remain highly separated by race, ethnicity and economic status*, USC TODAY (May 17, 2022), https://today.usc.edu/new-segregation-index-shows-u-s-schools-remain-highly-segregated-by-race-ethnicity-and-economic-status/ [https://perma.cc/7F8P-AMSK].

48. Arloc Sherman et al., *Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES 1, 1 (Dec. 11, 2024), https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality

49. Julia Howell & Elizabeth Korver-Glenn, *Race determines home values more today than it did in 1980*, Rice Univ. (Sep. 24, 2020), https://kinder.rice.edu/urbanedge/race-determines-home-values-more-today-it-did-1980 [https://perma.cc/FTF7-FTFF].

50. Turner & Rawlings, *supra* note 39, at 4.

51. *Id*.

52. *Id.*

53. *Neighborhood Diversity: The Benefits of Living in a Multicultural Community*, ERA REAL ESTATE (Apr. 19, 2022), https://erainyourcorner.com/your-home/neighborhood-diversity-the-benefits-of-living-in-a-multicultural-community/ [https://perma.cc/3PVK-GFXH].

54. S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel, 336 A.2d 713, 724 (N.J. 1975).

55. *Id.*

earlier decision and "ordering the township to recalculate its fair share of affordable housing and redo its zoning amendments quickly."[56] Two years later, in 1985, Mt. Laurel township officials entered into a settlement with the plaintiffs which permitted multifamily zoning and partial funding to help the project move forward.[57] Fiery public hearings and public opposition to the affordable housing complex lasted until 1997 and, finally, in 2000, the 100-unit project, named "Ethel Lawrence Homes" ("ELH") was completed.[58] ELH was unique in that it was a one-hundred-percent affordable complex.[59]

Given that it took twenty-five years from the completion of the case (*Mount Laurel I*) for the project to be completed due to the township's opposition to integration, the success of the project is quite noteworthy. Massey et al. note, in *Climbing Mt. Laurel*, that "an affordable housing project for low-and moderate-income minority residents can indeed be developed in an affluent white suburb without imposing significant costs on the surrounding community or its residents."[60] The ELH project residents benefitted through a "marked reduction in residents' exposure to social disorder and violence, which in turn produced a sharp reduction in the frequency of negative life events they experienced."[61] It is also noteworthy that ELH children gained access to higher quality schools and quieter places to study which led to improvements in their grade point averages.[62] Massey et al., conclude that the "development of affordable housing projects in affluent white suburbs constitutes an efficacious means to lower levels of racial and class segregation while increasing mobility for disadvantaged inner-city residents."[63] They also acknowledge that the gains are realized without imposing serious costs to the taxpayers of the state or township.[64]

IV. THE PAST—IS IT OVER?

The historical forms of racial steering have improved with time and evolutions in the law, such as the passage of the Fair Housing Act ("FHA") in 1968. This section will assess the progress that has been made in extinguishing problems like blockbusting, racially restrictive covenants, and redlining.

A. Blockbusting

Section 3604(e) of the FHA states that it shall be unlawful "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race…."[65] Subsequent to the passage of the

56. DOUGLAS S. MASSEY ET AL., CLIMBING MT. LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB 3 (2013).
57. *Id.* at 3–4.
58. *Id.*at 4.
59. *Id.* at 4.
60. *Id.* at 186.
61. *Id.* at 187.
62. *Id.* at 190.
63. *Id.* at 193.
64. *Id.*
65. 42 U.S.C. § 3604(e).

FHA, many courts have weighed in on its meaning and enforcement. In 1971, the United States District Court for the Northern District of Georgia enjoined a group of Atlanta real estate brokers from blockbusting in *United States v. Mitchell*.[66] In the 1973 follow-up to one of the companion cases of *Mitchell*, the United States Court of Appeals for the Fifth Circuit held that FHA Section "3604(e) is a constitutional exercise of congressional authority to enact legislation to effectuate the Thirteenth Amendment."[67] The Fifth Circuit further held that "any informational value" in blockbusting speech is outweighed by the "power of Congress to regulate the…commercial activity of blockbusting."[68] Also in 1973, the United States District Court for the Eastern District of Michigan concluded that racial steering was a violation of the Fair Housing Act (Section 3604(a)).[69] Finally, in 1974, the Supreme Court of Missouri found that the City of St. Louis's anti-blockbusting ordinances were within the legitimate scope of the police powers and did not violate equal protection.[70]

Another evolution in the law that tempered the viability of blockbusting was the shift in land contract jurisprudence from the traditional (blockbusting) forfeiture model to a modern foreclosure approach. The traditional forfeiture approach, as discussed above, allowed for vendees (purchasers under the land contract) to simply be evicted upon a single missed payment. "The modern trend is for courts to treat land sale contracts as analogous to conventional mortgages, thus requiring a seller to seek a judicial sale of the property upon the buyer's default."[71] The modern approach forces a foreclosure sale where the vendee has an opportunity to receive the equity accrued in the property as well as any potential increases in value due to improvements. This simple change in land-contract law would severely disincentivize blockbusting by sellers.

B. Race-Based Covenants

As discussed above, race-based covenants became unenforceable in 1948 because of *Shelley,*[72] and became illegal once the FHA[73] was enacted. The modern era concerns regarding race-based covenants are two-fold. First, whether the re-publishing of racially restrictive covenants violates Section 3604(c) of the FHA[74] which prohibits making, printing, or publishing, or causing "to be made, printed, or published any notice, statement, or advertisement… that indicates any preference, limitation, or discrimination based on race . . . ."[75] The second concern addresses what should be done about the fact that in almost all jurisdictions race-based covenants remain on the public record in the chain of

66. United States v. Mitchell, 335 F. Supp. 1004, 1007 (N.D. Ga. 1971).

67. United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 127 (5th Cir. 1973).

68. *Id.*

69. Zuch v. Hussey, 366 F. Supp. 553, 557 (E.D. Mich. 1973).

70. Howe v. St. Louis, 512 S.W.2d 127, 132 (Mo. 1974).

71. Sebastian v. Floyd, 585 S.W.2d 381, 383 (Ky. 1979).

72. Shelley v. Kraemer, 334 U.S. 1 (1948).

73. 42 U.S.C. § 3601.

74. Stevie J. Swanson, *Indignity Perpetuated: Race-based Housing Post-Reconstruction to the Fair Housing Act's Impact on the Digital Age: Where do we go from here?* 22 CONN. PUB. INT'L. L.J. 126, 145 (2023).

75. 42 U.S.C. § 3604.

title for property.[76] The presence of race-based covenants, though now illegal and unenforceable, may still deter integration because they may make certain homebuyers feel unwelcome. There are four current techniques utilized by a variety of states to deal with this issue. They are repudiation, notification, modification, and redaction.[77] These approaches range from statutory notification that race-based covenants exist on recording office websites and in statutes to removal of the offending language from the property owner's deed or from the public record entirely.[78] Not every state has adopted one of these approaches, and undoubtedly the unsuspecting homebuyer who encounters them in the home-buying process will be impacted and perhaps still be steered away.

C. Redlining

Redlining violates the FHA, which was enacted in 1968.[79] Pursuant to Section 3605(a) of the FHA, "[i]t shall be unlawful for any . . . entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race . . . ."[80] Section 3605(b) defines "residential real estate-related transactions" to include the "making or purchasing of loans or providing other financial assistance . . . for purchasing, constructing, improving, repairing, or maintaining a dwelling . . . ."[81] Redlining also violates the Equal Credit Opportunity Act ("ECOA").[82] The ECOA was passed in 1974[83] and prohibits a creditor from discriminating "against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race, color . . . ."[84] Congress passed the Home Mortgage Disclosure Act[85] in 1975 to force lenders to publish data on the race of applicants.[86] In 1977, it also passed the Community Reinvestment Act[87] to prohibit redlining.[88]

Despite a multiplicity of federal laws outlawing redlining, the National Community Reinvestment Coalition notes that "the economic and racial segregation created by 'redlining' persists in many cities."[89] For example, 74%

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76. Swanson, *supra* note 74, at 151.

77. *Id.* at 152.

78. *Id.* at 154–57.

79. *The Fair Housing Act,* CIVIL RIGHTS DIVISION: U.S. DEPARTMENT OF JUSTICE, https://www.justice.gov/crt/fair-housing-act-1 [https://perma.cc/SG9R-2LTR] (last visited Apr. 18, 2025).

80. 42 U.S.C. § 3605.

81. *Id.*

82. *Legal Framework: Redlining Violates the Fair Housing Act and the Equal Credit Opportunity Act*, NAT'L FAIR HOUS. ALL., https://nationalfairhousing.org/wp-content/uploads/2022/03/Topic-2.pdf [https://perma.cc/22QH-4HVL] (last visited Jan. 18, 2025).

83. MASSEY, *supra* note 56, at 20.

84. 15 U.S.C.S § 1691.

85. 12 U.S.C.S § 2801.

86. MASSEY, *supra* note 56, at 20.

87. 12 U.S.C.S § 2901.

88. MASSEY, *supra* note 56, at 20.

89. Mitchell & Franco, *supra* note 28, at 4.

of the neighborhoods graded high risk by the HOLC are still low to moderate income today, and 64% of the high risk HOLC designated neighborhoods are minority neighborhoods at present.[90]

A modern derivation of redlining is reverse redlining. Reverse redlining is the "excessive marketing of exploitative loans" in Black communities.[91] Richard Rothstein argues that "[t]he consequences of racially targeted subprime lending continue to accumulate."[92] Subprime loans were designed for failure because they were marketed to borrowers with a higher risk of default and larger interest rates.[93] Banks expected subprime borrowers to default. Even the Justice Department concurred.[94] In 2010, it stated that there was a higher rate of foreclosures in communities of color because that is where the most "toxic" loans were peddled.[95] Upon default, these "toxic" loans would simply foreclose and start the process anew much like the blockbusters of the 1960s.[96]

D. Assorted Other post-FHA Updates

In 1979, the United States Supreme Court determined that testers had standing to sue to determine if racial steering existed.[97] As recently as 1984, one real estate appraisal educational text stated that the introduction of contentious groups into an area would lower property values.[98] In 2011, the City of Memphis sued Wells Fargo Bank alleging that their foreclosure rate in Black neighborhoods was much higher than in white communities.[99] The United States District Court for the Western District of Tennessee held that the FHA permits a city or county government to bring suit alleging FHA violations.[100] In 2014, the Report to the United Nations Committee on the Elimination of Racial Discrimination noted that "concrete, intensified measures on the part of the U.S. government were needed to reduce segregation" including ensuring the "effective implementation of legislation… to combat… 'steering.'"[101] In 2017, the National Fair Housing Alliance ("NFHA") sued Travelers Insurance, alleging that they refused to provide "habitational insurance policies" to landlords renting to tenants receiving Section 8 vouchers.[102] The United States District Court for

90. *Id.*

91. ROTHSTEIN, *supra* note 24, at 109.

92. *Id.* at 113.

93. *Id.* at 109.

94. *Id.* at 111–12.

95. *Id.*

96. *Id.* at 113.

97. Gladstone, Realtors v. Bellwood, 441 U.S. 91, 115 (1979).

98. Mohl, *supra* note 22, at 67–69.

99. City of Memphis v. Wells Fargo Bank, N.A., No. 09-2857-STA, 2011 U.S. Dist. LEXIS 48522, at *2 (W.D. Tenn. May 4, 2011).

100. *Id.* at 25.

101. Megan Haberle & Jorge Soto, *Discrimination and Segregation in Housing*, POVERTY & RACE RSCH. ACTION COUNCIL 3 (July 2014), https://www.prrac.org/pdf/CERD_Shadow_Report_Housing_Segregation_July_2014.pdf [https://perma.cc/9SA3-HNSQ].

102. Nat'l Fair Hous. All. v. Travelers Indem. Co., 261 F. Supp. 3d 20, 22 (D.D.C. 2017).

the District of Columbia held that NFHA had standing to bring claims for violations of the FHA.[103] Also in 2017, The City of Miami sued Bank of America and Wells Fargo alleging that they violated the FHA by engaging in predatory practices aimed at Black and Latino borrowers.[104] The Supreme Court found that the City of Miami had standing to sue.[105] In 2020, the Department of Justice sued the Housing Authority of Ashland, Alabama ("AHA") et al., claiming that from at least 2012-2020, the AHA racially steered applicants and maintained a racially segregated housing program.[106] In late 2022, the United States District Court for the Northern District of Alabama approved a consent decree resolving the lawsuit.[107] Under the decree, defendants must pay $275,000 in damages to plaintiffs, pay a civil penalty to the United States, implement policies and procedures to combat discrimination and segregation, undergo fair-housing training, submit compliance reports to the Justice Department, and contact 145 (predominantly Black) people who had been denied access to white facilities and offer them spots on the waitlist.[108] The last, and most recent, post-FHA update is an example of modern-day blockbusting in the form of VineBrook Homes ("VineBrook"). VineBrook owns over 24,000 single-family homes in eighteen states.[109] The president of an economic development and housing agency in Cincinnati has characterized their business model as "predatory."[110] Previously, VineBrook was sued for building code violations, litter and trash citations, and unpaid water bills.[111] VineBrook bought numerous inexpensive single-family homes after the foreclosure crisis.[112] Many of the neighborhoods that VineBrook targeted are low-to-moderate-income and are predominantly Black and Brown neighborhoods.[113] The homes were rented out to tenants who were subjected to unanswered maintenance requests, rent hikes, and often eviction.[114] Unfortunately, VineBrook's actions encompass more than just unsavory landlord tactics. They are purchasing up low-cost homes in Black and Brown

103. *Id.* at 24.

104. Bank of Am. Corp. v. City of Mia., 581 U.S. 189 (2017).

105. *Id.* at 200.

106. United States v. Hous. Auth. of Ashland Ala., No. 1:20-cv-01905-ACA, 2022 U.S. Dist. LEXIS 113520, at *6 (N.D. Ala. June 27, 2022).

107. *Justice Department Secures Settlement in Race Discrimination Lawsuit Against Public Housing Authority and Property Owners in Alabama*, DOJ (Dec. 15, 2022), https://www.justice.gov/opa/pr/justice-department-secures-settlement-race-discrimination-lawsuit-against-public-housing [https://perma.cc/44J3-7KU7].

108. *Id.*

109. Gretchen Morgenson, *'Easy to bully': A corporate landlord in Cincinnati is aggressive in trying to evict tenants, critics say*, NBC (Nov. 22, 2022), https://www.nbcnews.com/news/us-news/corporate-landlord-tactics-rcna48373 [https://perma.cc/48X8-56GA].

110. *Id.*

111. *Id.*

112. *Id.*

113. Kavahn Mansouri & Daniel Wheaton, *Vinebrook Homes owns thousands of Midwest properties and tenants are crying foul.*, ST. LOUIS PUB. RADIO (May 10, 2023), https://www.stlpr.org/economy-business/2023-06-07/vinebrook-homes-owns-thousands-of-midwest-properties-st-louis-tenants-cry-foul [https://perma.cc/4QA9-DH5R].

114. Morgenson, *supra* note 109.

neighborhoods that might have been in reach for community residents, "the very people who need the opportunity to build wealth are being blocked out."[115]

V. MODERN-DAY STEERING

Modern-day steering appears in many forms. The three forms examined below involve real estate appraisers, new fee structures for Buyer's brokers, and digital steering.

A. Appraisers

Appraisers have come under recent federal scrutiny for undervaluing homes owned by non-white homeowners.[116] "Bias in home valuations limits the ability of Black and Brown families to enjoy the financial returns associated with homeownership, thereby contributing to the already sprawling racial wealth gap."[117] "The racial wealth gap refers to the disparity in assets of typical households across race and ethnicity."[118] The wealth gap is not improving. The Black/white wealth gap was 86% in 1992, and thirty years later (in 2022) it was 85%.[119] Between 1992 to 2022, the racial wealth gap decreased by only one percent. Black and Brown homeowners' inability to realize the full equity from an accurate home valuation disadvantages them compared to whites when seeking to extricate their wealth from property. Simply put, racial steering by appraisers severely impacts the already dramatic disparity in assets between Black and white households. "In 2022, Black and Hispanic households derived 44% and 45% of their wealth from home equity," whereas white households had about 19% of their wealth tied up in home equity.[120] Because Black and Brown wealth is tied up in home equity, under-valuation by appraisers is a particularly damaging form of modern-day racial steering.

Appraisers wield enormous power when valuing property. As explained by the Federal Finance Housing Agency ("FFHA") in 2023, "low appraisals can delay or even derail the closing of the sale."[121] This delay, for Black and Brown

115. Mansouri, *supra* note 113.

116. Statement of Interest at 2, Tate-Austin v. Miller, No. 3:21-cv-09319-MMC (N.D.C.A. 2022), https://www.justice.gov/crt/case-document/file/1472031/dl?inline [https://perma.cc/SYE5-W782]. (The Department of Justice issued a Statement of Interest in the Tate-Austin v. Miller case in 2022, stating that "[c]ombatting housing discrimination, including bias in appraisals, is a high priority across the federal government.").

117. *Fact Sheet: Biden-Harris Administration Tackles Racial and Ethnic Bias in Home Valuations*, WHITE HOUSE (Mar. 23, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/23/fact-sheet-biden-harris-administration-tackles-racial-and-ethnic-bias-in-home-valuations/ [https://perma.cc/D4SG-HHP3].

118. Daniel Thomas Mollenkamp, *What Is the Racial Wealth Gap? Definition, Statistics, and Impact*, INVESTOPEDIA (Jan. 31, 2024), https://www.investopedia.com/the-racial-wealth-gap-5105010 [https://perma.cc/DKD4-QKCU].

119. Joseph Dean, *The Racial Wealth Gap 1992-2022*, NAT'L CMTY. REINVESTMENT COAL. (Oct. 2024), https://ncrc.org/the-racial-wealth-gap-1992-to-2022/ [https://perma.cc/7QNH-K4JT].

120. *Id.*

121. *Have Racial and Ethnic Valuation Gaps in Home Purchase Narrowed?,* FED. HOUS. FIN. AGENCY (Aug. 8, 2023), https://www.fhfa.gov/blog/statistics/have-racial-and-ethnic-valuation-gaps-in-home-purchase-narrowed [https://perma.cc/YG76-KSP2].

homeowners, impedes access to a large share of their wealth. The FFHA further clarifies that since a buyer can back out of the contract if the purchase agreement has an appraisal clause, a "low appraisal may limit the amount a lender is willing to finance, which may require the seller and/or the buyer to cover the shortfall."[122] This is severely problematic because the "seller may have to cover at least part of the shortfall by reducing the contract price."[123] This leaves the seller only two options: to cover the shortfall or put the house back on the market. Low appraisals resulting in under-valued property decrease the equity realized by the seller.[124]

Three recent examples of undervaluation of Black owned property by appraisers illuminate the severity of the problem. In 2022, two Black professors at Johns Hopkins University (husband and wife) attempted to refinance their home in Baltimore and received an appraisal value of $472,000, which caused their mortgage lender to deny the refinancing of their loan.[125] Feeling something was amiss, they removed all family photos, their children's artwork, and any books that might indicate that they, the owners, were Black.[126] They replaced their belongings with photos of white people and had a white colleague stand-in during the appraisal.[127] After the home was appraised with the appearance of white homeowners, the revised home value was $750,000, a nearly 60% increase.[128]

In 2020, a Black wife and her white husband living in Jacksonville, Florida were seeking to refinance their home and sought an appraisal.[129] When that appraisal came back at a mere $330,000, the wife, who was an attorney, suspected discrimination.[130] To test this theory, she removed any family photos that included Black family members and had her husband meet with the appraiser while she and their son were gone.[131] The new white-washed appraisal came in at $465,000, an increase of 41%.[132]

The most dramatic example comes from Northern California in 2020. A Black couple had their home appraised at $995,000.[133] This seemed quite low to

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122. *Id.*

123. *Id.*

124. *Id.*

125. Debra Kamin, *Home Appraised With a Black Owner: $472,000. With a White Owner: $750,000*, N.Y. TIMES (Jun. 21, 2023), https://www.nytimes.com/2022/08/18/realestate/housing-discrimination-maryland.html [https://perma.cc/JU62-W4WX].

126. *Id.*

127. *Id.*

128. *Id.*

129. Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. TIMES (Jan. 26, 2023), https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html [https://perma.cc/6M2W-C6CZ].

130. *Id.*

131. *Id.*

132. *Id.*

133. CBS NEWS, *Black couple who say home was given low appraisal because of their race settles discrimination lawsuit* (Mar. 8, 2023), https://www.cbsnews.com/news/paul-

them, given that the year before, it had appraised at $1,450,000.[134] They removed any racially identifying photos and African themed art from the home and asked a white friend to stand in when the appraiser arrived.[135] The new appraisal came in at $1,482,500, an increase of $487,500, or 49%.[136] The couple filed a federal housing discrimination lawsuit against the first appraiser.[137] In a rare move, the Justice Department issued a Statement of Interest in the lawsuit to ensure "the correct interpretation and application of the Fair Housing Act ("FHA" or "Act") 42 U.S.C. §§ 3601 *et seq.,* with respect to appraisal related claims."[138] The Statement clarifies that not only does the FHA apply to appraisers and their employers, but also to lenders who rely on their valuations.[139]

Ultimately, the lawsuit (*Tate-Austin et.al. v. Miller et. al*) settled for an undisclosed sum and the appraiser agreed not to discriminate in the future, to watch a documentary about housing discrimination, and to attend a training session about local real estate discrimination.[140] Without knowing the full monetary amount of the settlement, it is difficult to discern whether the result was just, however, the appraiser did not admit fault.[141] Assuming, for the sake of argument, that the appraiser did discriminate on the basis of race, the "punishment" given seems less likely to serve as a deterrent to others and more like a simple slap on the wrist. It remains uncertain if punitive measures will be enforced if the appraiser does discriminate in the future.

The application of the FHA to real estate appraisers has been established by case law prior to *Tate-Austin*. In 1977, *United States v. American Institute of Real Estate Appraisers etc.* clarified that the FHA applies to real estate appraisers.[142] Specifically, Section 3605 states that it is "unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person … because of race, color, religion, sex, handicap, familial status, or national origin."[143] Section 3605 defines "residential real estate-related transactions" to include "[t]he selling, brokering, or appraising of residential real property."[144] United States District Court for the Northern

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austin-tenisha-tate-austin-black-couple-settles-housing-discrimination-lawsuit-marin-city/ [https://perma.cc/4Q27-B53C].

134. Vanessa Romo, *Black couple settles lawsuit claiming their home appraisal was lowballed due to bias*, NPR (Mar. 9, 2023), https://www.npr.org/2023/03/09/1162103286/home-appraisal-racial-bias-black-homeowners-lawsuit [https://perma.cc/6PB9-A5PZ].

135. *Id.*

136. *Id.*

137. Statement of Interest at 2, Tate-Austin. v. Miller, (N.D.C.A. 2022), NO. 3:21-cv-09319-MMC.

138. *Id.*

139. *Id.* at 6.

140. Bay City News, *Black couple settles with real estate appraiser who allegedly undervalued house based on race*, KRON 4 (Mar. 9, 2023), https://www.kron4.com/news/bay-area/black-couple-settles-with-real-estate-appraiser-who-allegedly-undervalued-house-based-on-race/ [https://perma.cc/QW2C-HWEJ].

141. Romo, *supra* note 134.

142. United States v. Am. Inst. of Real Est. Appraisers of Nat'l Ass'n of Realtors, 442 F. Supp. 1072, 1078 (N.D. Ill. 1977).

143. 42 U.S.C. § 3605(a).

144. 42 U.S.C. § 3605(b)(2).

District of Illinois approved a settlement agreement in 1977 that provided for the adoption of three fundamental policy statements by the American Institute of Real Estate Appraisers ("AIREA"):[145] that it is improper to base a conclusion about property value on the premise that racial homogeneity is necessary for the maximum value of the property,[146] that "[r]acial, religious or ethnic factors are deemed unreliable predictors of value trends or price variance,"[147] and that it was "improper to base a conclusion or opinion of value… upon stereotyped or biased presumptions relating to race.…"[148]

AIREA agreed to implement these three fundamental policies through specific changes to its textbook, *The Appraisal of Real Estate,* and other educational materials.[149] It also agreed to prepare a memorandum that explained "civil rights legislation pertinent to the real estate appraisal profession."[150] These ramifications are significantly more substantive than those in the *Tate-Austin* case. This may be because AIREA, as an entity, had much more power to effectuate change.[151] It is easy to wonder whether the updated textbook was used to educate the appraiser in the aforementioned *Tate-Austin* case.[152]

The 1996 version of *The Appraisal of Real Estate,* published nearly twenty years after the AIREA case, makes no mention of race.[153] In the section titled "Forces That Influence Property Values," the Appraisal Institute merely asserts that "social forces" relating to "population characteristics" impact property values.[154] By describing it in this way, the Appraisal Institute masks its previous sentiment that non-white owners decrease property values in more polite and deceptive language. The 1996 version states that "[r]eal property values are affected by not only population changes and characteristics, but also by the entire

145. *Am. Inst. of Real Est. Appraisers of Nat'l Ass'n of Realtors*, 442 F. Supp. At 1076 (N.D. Ill. 1977).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. The AIREA merged with the Real Estate Appraisers Society in 1991 to form the Appraisal Institute. *Empowering the Valuation Community*, THE APPRAISAL INST., https://www.appraisalinstitute.org/about# [https://perma.cc/W9UY-N3SY] (last visited Jan. 18, 2025). The Appraisal Institute touts itself as "the acknowledged worldwide leader in residential and commercial real estate appraisal education." *About Us*, SO. CAL. CHAPTER OF THE APPRAISAL INST., https://www.sccai.org/about/ [https://perma.cc/84MR-CMLG] (last visited Sept. 25, 2024).

152. The AIREA merged with another entity that ultimately merged into a Northern California Chapter of the combined entity. The Tate-Austin case originated in Northern California. It is possible that the appraiser in the Tate-Austin case was educated using the revised materials from the 1977 settlement. "The Appraisal Institute was established when the American Institute of Real Estate Appraisers (AIREA) and the Society of Real Estate Appraisers (Society) unified in January 1991… Later in 1999, the Central California Chapter of the Appraisal Institute voted to merge with the Northern California Chapter effective January 1, 2000." History, N. CAL. CHAPTER OF THE APPRAISAL INST., https://norcal-ai.org/our-chapter/history/ [https://perma.cc/7GWH-HHRJ] (last visited Sept. 25, 2024).

153. APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 814 (1996) (in the index, there is nothing between "Quesnay, Francois" and "radiant heating").

154. *Id.* at 48.

spectrum of human activity."[155] It also educates the reader that "the rate of household formation and dissolution strongly influence real property values" as do "attitudes toward education, law and order, and lifestyle options."[156] The quoted text infers that, with certain populations, factors like likelihood of family expansion, likelihood of divorce or single parenthood, rate of arrest or incarceration, and degree of educational attainment are likely to "strongly influence real property values."[157] *The Appraisal of Real Estate* also mentions that economic forces, like wage levels and availability of mortgage credit, impact property values.[158] For example, mortgage credit availability was systematically denied to Black people through redlining.[159] Richard Rothstein noted that "[f]or most of the 20th century banks…routinely and openly practiced redlining and refused mortgages or home improvement loans to African Americans…"[160] According to *The Appraisal of Real Estate*, since Black people had less mortgage credit availability for most of the 20th century, their properties are, on average, worth less than whites (who have had greater access to mortgage credit).

Today, the Black/white wealth gap is still prevalent. Discussions of wage levels and mortgage credit availability in America are typically thinly veiled discussions of race. In 2016, the median wealth for Black households in the United States was $17,100, and the median wealth for white households was $171,000.[161] In examining the environmental forces at play in determining property values, *The Appraisal of Real Estate* encourages appraisers to consider not only the property's location, but also "all possible origins and destinations of residents coming to or going from the property or neighborhood."[162] While one might interpret this passage to be discussing proximity to transportation, the reference to the "origins" of residents is perhaps more illustrative of the true meaning. Race-based zoning and racially restrictive covenants segregated the "origins" of most Black Americans for nearly a century.[163] While AIREA did honor its commitment to remove direct reference to race as a factor in decreasing property values from its textbook, the "revised" version still conveys the same message, just in slightly more polite terms.

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155. *Id.*

156. *Id.*

157. *Id.*; *see also* MICHELLE ALEXANDER, THE NEW JIM CROW 2 (2010) (discussion of how "criminals" is code for African Americans).

158. APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 48 (1996).

159. Swanson, *supra* note 21, at 203.

160. Richard Rothstein, *The Making of Ferguson: Public Policies at the Root of its Troubles*, ECON. POL'Y INST. (Oct. 15, 2014), https://files.epi.org/2014/making-of-ferguson-final.pdf [https://perma.cc/HX2G-XJUX].

161. Rakesh Kochhar & Anthony Cilluffo, *How Wealth Inequality Has Changed Since the Great Recession, by Race, Ethnicity and Income*, PEW RESCH. CTR. (Nov. 1, 2017), https://www.pewresearch.org/short-reads/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income [https://perma.cc/DB82-EJ54].

162. APPRAISAL INSTITUTE, *supra* note 153, at 49.

163. Swanson, *supra* note 74, at 127.

B. New Fee Structure for Buyer's Brokers

Racial steering has "been unlawful since 1866 but…the nation's real estate ethics rules required it."[164] The National Association of Realtors ("NAR") has ingrained racial steering in the organization's fabric for over a century. In 1924, the NAR Ethics Code stated that selling to Black buyers in white neighborhoods would result in professional misconduct and loss of license for the realtor facilitating the sale.[165] The Code was amended in 1950 to prohibit sales that were "detrimental to property values."[166] Lest any realtor be confused by the language shift, in 1955, the St. Louis Real Estate Board clarified in a memo sent to all members, that selling to Black buyers was still prohibited unless the block was already integrated.[167] In 1970, two years after the passage of the FHA, the federal government was still unwilling, in some cases, to facilitate housing for its Black contractors by forcing real estate agents to obey this law.[168]

The National Association of Realtors' ("NAR") $418 million settlement made a big splash in 2024, dramatically changing the way that buyer's agents get compensated.[169] The new structure of buyer's agent compensation under the NAR settlement is problematic because it opens up the opportunity for discrimination against certain buyers or their agents. Traditionally, the seller paid the buyer's real estate agent. The new compensation protocol allows for potential discrimination because the seller might refuse to pay the fees of the buyer's agent if the agent or the buyer is from a certain racial demographic. This means that sellers, or their agents, might have an increased opportunity to racially steer through payment mechanisms in listing agreements. Sellers might choose to pay buyer's agent fees to white buyers, but not Black buyers, for example.

C. Digital Steering

It has long been established that realtors cannot only show homes in predominantly Black neighborhoods to Black potential homebuyers; this is in violation of the FHA and is illegal. It is also well accepted that advertisements cannot be discriminatory pursuant to section 3604(c) of the FHA, which prohibits making printing or publishing "any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color…or an intention to make any such preference, limitation, or discrimination."[170] The FHA has made progress in combating these visible types of racial steering in the American housing market.

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164. Rothstein, *supra* note 160, at 28.

165. Rothstein, *supra* note 160, at 26.

166. *Id*.

167. *Id*.

168. Rothstein, *supra* note 160, at 27 (The Fair Housing Act, 42 U.S.C. § 3601, was enacted in 1968).

169. NAR Settlement FAQS, NAT'L ASS'N OF REALTORS, https://www.nar.realtor/the-facts/nar-settlement-faqs (last visited Oct. 2, 2024); *see also* Jack Gately, *Tutorial: Understanding the New Commission Rules in Real Estate*, YOUTUBE (Aug. 5, 2024), https://www.youtube.com/watch?v=pOnv95xOgh0 [https://perma.cc/P3ZP-CZC7].

170. 42 U.S.C. § 3604(c).

In the last decade or so, a new type of digital steering has emerged that is much more covert and difficult to detect.

In a 2016 article, ProPublica investigated claims that Facebook allowed advertisers to select their preferred audiences for housing advertisements.[171] They discovered that advertisers could exclude users from seeing their ads who had "Ethnic Affinities" for certain groups like African Americans, Hispanics, and Asian Americans.[172] As Julia Angwin and Terry Parris, Jr. aptly wrote, "[i]magine if, during the Jim Crow era, a newspaper offered advertisers the option of placing ads only in copies that went to white readers. That's basically what Facebook is doing."[173]

In November 2017, ProPublica investigated claims made by Facebook in 2017 that it had "built a system to spot and reject discriminatory ads."[174] ProPublica bought dozens of fictitious rental housing ads asking that they not be shown to certain groups based on race, religion, national origin, and disability status. The ads were all approved in minutes.

In June 2018, Facebook was sued by the National Fair Housing Alliance, among other fair housing groups, in the United States District Court for the Southern District of New York.[175] In the First Amended Complaint, the fair housing groups alleged that Facebook had "engaged in discrimination by design" by "stripping data from its users and using it to create discriminatory advertising content… in order to exclude certain home seekers from ever seeing their ads."[176] The fair housing groups conducted investigations in New York, Washington, D.C., Miami, and San Antonio.[177] They discovered that Facebook provides an option for advertisers to exclude based upon protected class characteristics (like disability, sex, familial status, and national origin), then, Facebook "approves the ads and permits advertisers to publish these ads in a discriminatory manner without consumers ever knowing they have been excluded."[178] This Complaint enunciated the true crux of the problem when it stated, "the stealth nature of Facebook's technology hides housing ads from entire groups of people. Facebook's algorithms can ensure exclusion and deny access to housing."[179]

How impactful are Facebook's discriminatory algorithms? The overwhelming majority of apartment seekers (72%) and homebuyers (90%) use

171. Julia Angwin & Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*, PROPUBLICA (Oct. 28, 2016), https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race [https://perma.cc/EC3W-FNJ6].

172. *Id.*

173. *Id.*

174. Julia Angwin, et. al., *Facebook (Still) Letting Housing Advertisers Exclude Users by Race*, PROPUBLICA (Nov. 21, 2017), https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin [https://perma.cc/2J7Q-WA6S].

175. First Amended Complaint, Nat'l Fair Hous. All. v. Facebook Inc., No. 1:18-cv-02689 (S.D.N.Y. 2018), https://nationalfairhousing.org/wp-content/uploads/2022/01/2018-06-25-NFHA-v.-Facebook.-First-Amended-Complaint.pdf [https://perma.cc/54DU-LGJE].

176. *Id.* at 1.

177. *Id.* at 2.

178. *Id.*

179. *Id.*

the internet to find housing.[180] Facebook (now known as Meta)[181] is the largest digitally based advertising platform in the country.[182] According to 2025 data, Facebook has approximately 250.2 million users in the United States.[183] This amounts to an astronomical amount of lost housing opportunities for America's protected communities.

The National Fair Housing Alliance lawsuit against Facebook was settled in March 2019.[184] In the settlement, Facebook agreed to make sweeping changes, the latest of which was to be implemented by December 31, 2019.[185] Specifically, Facebook agreed to:

> "[E]stablish a separate advertising portal for creating housing, employment, and credit ("HEC") ads on Facebook, Instagram, and Messenger that will have limited targeting options, to prevent discrimination; …create a page where Facebook users can search for and view all housing ads that have been placed by advertisers for the rental, sale, or finance of housing or for real estate related transactions (such as appraisals and insurance), regardless of whether users have received the housing ads on their News Feed . . .require advertisers to certify that they are complying with Facebook's policies prohibiting discrimination and all applicable anti-discrimination laws; …provide educational materials and features to inform advertisers about Facebook's policies prohibiting discrimination and anti-discrimination laws; …meet regularly with the Plaintiffs and their counsel to report on and discuss the implementation of the terms of the settlements; …permit the Plaintiffs to engage in testing of Facebook's ad platform to ensure the reforms established under the settlements are implemented effectively; …work with NFHA to develop a training program for Facebook's employees on fair housing and fair lending laws; …engage academics, researchers, civil

180. *Making Every Neighborhood a Place of Opportunity*, NAT'L FAIR HOUS. ALL. 79 (2018) https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report_4-30-18.pdf [https://perma.cc/H365-6CY4].

181. Chris Stokel-Walker, *Why Has Facebook Changed its Name to Meta and What is the Metaverse?*, NEWSCIENTIST (Oct. 29, 2021), https://www.newscientist.com/article/2295438-why-has-facebook-changed-its-name-to-meta-and-what-is-the-metaverse/ [https://perma.cc/HTW3-2TG9] (Facebook changed its name to Meta on October 28, 2021).

182. *Fair Housing Groups Settle Lawsuit with Facebook: Transforms Facebook's Ad Platform Impacting Millions of Users*, NAT'L. FAIR HOUS. ALL. (March 19, 2019), https://nationalfairhousing.org/national-fair-housing-alliance-settles-lawsuit-with-facebook-transforms-facebooks-ad-platform-impacting-millions-of-users/ [https://perma.cc/V6FP-E6MW].

183. Naveen Kumar, *Facebook Users Statistics (2025) – Worldwide Date*, DEMANDSAGE (Jan 1, 2025), https://www.demandsage.com/facebook-statistics/# [https://perma.cc/YBQ5-CHEB].

184. *Facebook Settlement*, NAT'L. FAIR HOUS. ALL. (March 14, 2019), https://nationalfairhousing.org/facebook-settlement/ [https://perma.cc/7L3P-WN5P].

185. *Id.*

> society experts, and civil rights/liberties and privacy advocates (including plaintiffs) to study the potential for unintended bias in algorithmic modeling used by social media platforms."[186]

These terms, agreed to in the 2019 settlement between Facebook and the fair housing groups, seemed very all-encompassing and comprehensive. Unfortunately, they did not result in the cessation of housing discrimination on Facebook's part.

On June 21, 2022, the Department of Justice sued Meta Platforms, Inc. (formerly known as Facebook) in the United States District Court for the Southern District of New York.[187] The United States alleged that Facebook violated the FHA and discriminated against its users on the basis of FHA-protected characteristics regarding three different aspects of its ad delivery system.[188] First, the government alleged that Facebook used "Trait-Based Targeting" that encouraged "advertisers to target ads by including or excluding FHA-protected characteristics."[189] Second, the government alleged that Facebook engaged in "Lookalike Targeting" to help advertisers use an algorithm to find users who look like the advertiser's source audience.[190] Third, the government alleged that Facebook used "Delivery Determinations" to "help determine which subset of the advertiser's targeted audience… will actually receive the ad… based in part upon FHA-protected characteristics."[191]

The 2022 Meta lawsuit referenced some of the changes made by Facebook as a result of the National Fair Housing Alliance settlement discussed above, but asserted that Facebook "continue[d] to exclude… users from receiving information about housing opportunities."[192] For example, the lawsuit alleged that despite modifications to Facebook's "look alike tool" after the National Fair Housing Alliance settlement, the modifications continue to "construct Lookalike Audiences for housing ads based in part upon FHA-protected characteristics…"[193] Additionally, the lawsuit references the Personalization Algorithm that Facebook uses to determine which users will see an ad.[194] Because this algorithm accesses Facebook's "massive trove of user data containing, encoding, or reflecting users' protected characteristics," the government alleged that Facebook's use of the algorithms had an unlawful disparate impact on users by "steering certain housing ads away" from them

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186. *Id.*

187. Complaint, United States v. Meta Platforms, Inc., No. 1:22-cv-05187 (S.D.N.Y. 2022), https://www.justice.gov/crt/case-document/file/1514111/dl?inline [https://perma.cc/RG58-7A4X].

188. *Id* at 2.

189. *Id.*

190. *Id.*

191. *Id*.

192. *Id.* at 3.

193. Complaint, United States v. Meta Platforms, Inc., No. 1:22-cv-05187, 4 (S.D.N.Y. 2022), https://www.justice.gov/crt/case-document/file/1514111/dl?inline [https://perma.cc/RG58-7A4X].

194. *Id.*

because of FHA-protected characteristics, like race.[195] Finally, the lawsuit alleged that Facebook had engaged in a pattern or practice of prohibited discrimination by failing to "adequately identify, avoid, mitigate, or cure the discriminatory outcomes of its system."[196]

The 2019 National Fair Housing Alliance settlement occurred in March 2019.[197] The deadline for the completed incorporation of the negotiated changes to Facebook's algorithms was December 31, 2019.[198] A year and a half later, on the same day that the Justice Department filed suit against Meta Platforms, Inc., a new settlement agreement was entered into by Meta and the United States.[199] This landmark settlement was the conclusion to the Justice Department's first case challenging algorithmic bias under the FHA.[200]

The settlement stipulates that Meta will discontinue use of the "Special Ad Audience" tool and create a new system to address "racial and other disparities caused by its use of personalization algorithms in its ad delivery system for housing ads."[201] The new system was subject to both Department of Justice approval and court oversight.[202] In a Justice Department press release about the settlement, U.S. Attorney Damian Williams, who filed the lawsuit against Meta, stated that "if Meta fails to demonstrate that it has sufficiently changed its delivery system to guard against algorithmic bias, this office will proceed with the litigation."[203] Meta had until December 31, 2022 to instate the changes dictated by the settlement agreement.[204] Meta built the new system, the Variance Reduction System—or VRS, and on January 9, 2023, Meta and the Justice Department "informed the court that they had reached an agreement on the new

195. *Id.*

196. *Id.* at 5.

197. NAT'L. FAIR HOUS. ALL., *supra* note 182.

198. *Id*.

199. *Justice Department Secures Groundbreaking Settlement Agreement with Meta Platforms, Formerly Known As Facebook, to Resolve Allegations of Discriminatory Advertising*, U.S. DEP'T OF JUST. (June 21, 2022), https://www.justice.gov/opa/pr/justice-department-secures-groundbreaking-settlement-agreement-meta-platforms-formerly-known [https://perma.cc/22CY-3ZPB] (This settlement was entered by the court on June, 27, 2022.); *see also Fair Housing Groups Settle Lawsuit with Facebook: Transforms Facebook's Ad Platform Impacting Millions of Users*, NAT'L. FAIR HOUS. ALL. (March 18, 2019), https://nationalfairhousing.org/national-fair-housing-alliance-settles-lawsuit-with-facebook-transforms-facebooks-ad-platform-impacting-millions-of-users/ [https://perma.cc/26GS-7QXB].

200. U.S. DEP'T OF JUST., *supra* note 199.

201. *Id.*

202. *Id.*

203. *Id.*

203. *Id.*

204. *Id*.

system's compliance targets."[205] This will result in continued court oversight and regular compliance review through June 27, 2026.[206]

Pursuant to subpart fifteen of the 2022 settlement agreement with the Department of Justice, Meta was required to pay a civil penalty in the amount of $115,054, pursuant to Section 3614(d)(1)(C)(i) of the FHA.[207] Section 3614(d)(1)(C) states, in relevant part, that "the court may, to vindicate the public interest, assess a civil penalty against the respondent—(i) in an amount not exceeding $50,000, for a first violation; and (ii) in an amount not exceeding $100,000, for any subsequent violation."[208] The subsection referenced in the settlement agreement is (i), which imposes a $50,000 penalty for the first violation of the Fair Housing Act. Perhaps the extra $65,054 dollars is due to inflation.[209] The Justice Department press release lauding this "groundbreaking settlement" refers to the $115,054 civil penalty as "the maximum penalty available under the Fair Housing Act."[210] Based upon a brief review of Section 3614, it would appear that any "subsequent violation" (after the first) would actually garner the maximum penalty of $100,000 (plus possible inflation).[211]

Whether $115,000 and change is the "maximum penalty" or not, will it really make any difference? Often, minor penalties are referred to as a "slap on the wrist." Given that "Facebook took in $8.246 billion in advertising revenue in the U.S. and Canada alone, in the fourth quarter of 2018," the $115,000 civil penalty barely qualifies as a disdainful side-eye, much less an actual slap on the wrist.[212] One can remain hopeful that the new Variance Reduction System and continued court oversight will be able to achieve the substantive changes that the civil penalty surely cannot. It is worth noting that in the 2022 settlement agreement with the Justice Department, Meta continued to deny "liability and any and all wrongdoing related to its provision of targeting options and delivery processes for housing advertisements on Meta platforms."[213] The settlement further clarifies that the settlement agreement "does not constitute an admission by Meta of any of the allegations contained in the HUD [Department of Housing and Urban Development] Charge or the Complaint, nor does it constitute any finding of liability against Meta."[214]

With no admission of wrongdoing on Meta's part, and inconsequential civil penalties imposed, one can only hope that the priorities of the Justice Department

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205. *Justice Department and Meta Platforms Inc. Reach Key Agreement as They Implement Groundbreaking Resolution to Address Discriminatory Delivery of Housing Advertisements*, U.S. DEP'T OF JUST. (Jan. 9, 2023), https://www.justice.gov/opa/pr/justice-department-and-meta-platforms-inc-reach-key-agreement-they-implement-groundbreaking [https://perma.cc/EX45-RJCE].

206. *Id.*

207. Settlement Agreement, United States v. Meta Platforms, Inc., No. 1:22-cv-05187-JGK (S.D.N.Y. 2022), https://www.justice.gov/crt/case-document/file/1516666/dl [https://perma.cc/V72H-JBC4].

208. 42 U.S.C. § 3614.

209. 28 C.F.R. § 85.3.

210. U.S. DEP'T OF JUST., *supra* note 199.

211. 42 U.S.C. § 3614; *see also* 28 C.F.R. § 85.3.

212. NAT'L. FAIR HOUS. ALL., *supra* note 182.

213. Settlement Agreement, U.S. v. Meta Platforms Inc, *supra* note 207, at 2.

214. *Id.*

in the new administration will be to remain vigilant in holding big tech companies like Meta accountable under the Fair Housing Act. Given President Trump's relationship with Elon Musk, who bought X, the social media platform formerly known as Twitter, in 2022,[215] increased restrictions on social media seem unlikely until 2028. President Trump appointed Musk and Vivek Ramaswamy to lead the Department of Government Efficiency, a non-governmental entity that President Trump has stated will "pave the way for my Administration to dismantle Government Bureaucracy, slash excess regulations, cut wasteful expenditures, and restructure Federal Agencies."[216]

VI. STEERING SOLUTIONS

Despite the uncertainty of the future, there has been substantive progress made to eliminate racial steering. There have been efforts in a variety of states to remove racial steering from the real estate appraisal process. There have also been modern-day redlining reforms and increased penalties for cyber-steering. These solutions are outlined below.

A. Efforts to Reduce and Eliminate Racial Steering in Real Estate Appraisals

Several states, including Massachusetts, New Jersey, Oregon, North Carolina, and California, have either enacted or are contemplating legislation to regulate appraisal and valuation practices.[217] In 2024, New Jersey's attorney general created an initiative that will require mandatory anti-bias training for appraisers starting in 2026.[218] Mandatory anti-bias training is already required in Virginia, Minnesota, New York, and California.[219] Government-sponsored entities, Freddie Mac and Fannie Mae, have created processes to remove unacceptable appraisal practices.[220] These processes will flag certain loan applications as "FATAL" if they contain certain prohibited or potentially biased words.[221] New York requires licensed and certified appraisers to complete a course in fair housing and fair lending every two years.[222]

The two Black professors from Baltimore, referenced earlier, filed suit against both the appraiser whom they allege discriminated against them by severely undervaluing their home in conjunction with the application to refinance

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215. Kate Conger et al., *How Elon Musk's Own Account Dominates X*, N.Y. TIMES (Nov. 3, 2024), https://www.nytimes.com/2024/11/03/technology/elon-musk-x-election.html [https://perma.cc/AA7D-852P].

216. Daniel Trotta & Erica Beech, *Trump Names Elon Musk to Lead Government Efficiency Drive*, REUTERS (Nov. 13, 2024), https://www.reuters.com/world/us/trump-says-elon-musk-vivek-ramaswamy-will-lead-department-government-efficiency-2024-11-13/ [https://perma.cc/QYL4-UZFM].

217. *Appraisal Bias: Here's What Appraisers and Lenders Should Know for 2024*, LIGHTBOX (Feb. 1, 2024), https://www.lightboxre.com/insight/appraisal-bias-heres-what-appraisers-and-lenders-should-know-for-2024/ [https://perma.cc/CVB4-KEJB].

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

their home, and the loan company that denied their application for a refinance loan.[223] The Department of Justice filed a Statement of Interest in the case, *Nathan Connolly and Shani Mott v. Shane Lanham et al.*, on March 13, 2023.[224] In the Statement of Interest, the government argued that under the FHA and Equal Credit Opportunity Act ("ECOA") "lenders can be held liable for relying upon discriminatory appraisals."[225]

In a 2023 Memorandum Opinion, the United States District Court for the District of Maryland agreed that the FHA, specifically Section 3605, "explicitly prohibits race-based discrimination during an appraisal."[226] Further, the District Court interpreted relevant sections of the Civil Rights Act to determine that the "full and equal benefit" of the FHA (from Section 1981) extends to "holding" property (from Section 1982) in the context of seeking an appraisal of a home in order to refinance a mortgage.[227]

The lawsuit against loanDepot was settled in March 2024 with loanDepot agreeing to pay Dr. Connolly and the estate of Dr. Mott an undisclosed sum.[228] LoanDepot also agreed to policy changes that included "immediately offering a second appraisal when there are indications of bias or discrimination."[229] Additionally, loanDepot agreed to inform applicants that they are entitled to (1) request a review or adjustment of an appraisal, to lock-in interest rates during the appraisal review; (2) to escalate any allegations of appraisal bias to loanDepot's Fair Lending group; (3) to overhaul their staff training on fair housing, fair lending, and the history of discrimination in American real estate; and (4) to sever ties with any appraisers shown to be biased.[230] These changes are significant compared to most lawsuits that have settled under similar facts. These broad-sweeping policy changes should make a difference nationwide, as loanDepot is the nation's sixth largest mortgage lender.[231]

Progress toward eliminating bias in appraisals is being made institutionally as well as in the courts. The new Uniform Standards of Professional Appraisal Practice ("USPAP') were released by The Appraisal Foundation and are effective as of January 1, 2024.[232] The Appraisal Foundation is authorized by Congress as the source of Appraiser Standards and Appraiser Qualifications.[233] The USPAP "represent the generally accepted and recognized standards of

223. Statement of Interest at 6, Nathan Connolly & Shani Mott v. Shane Lanham, No.: SAG-22-02048 (D.C.M.D. 2023), https://www.justice.gov/crt/case-document/file/1574081/dl?inline [https://perma.cc/G888-CQ4W].

224. *Id.* at 1.

225. *Id.* at 12.

226. Connolly v. Lanham, 685 F. Supp. 3d 327 (D. Md. 2023) (mem.).

227. *Id.* at 22.

228. Debra Kamin, *Lawsuit alleging Racial Bias in Home Appraisals Is Settled*, NY TIMES (March 25, 2024), https://www.nytimes.com/2024/03/25/realestate/racial-bias-appraisal-settlement.html?searchResultPosition=1.

229. *Id.*

230. *Id.*

231. *Id.*

232. THE APPRAISAL FOUNDATION, 2024 UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE.

233. *Id.*

appraisal practice in the United States."[234] The USPAP Nondiscrimination Ethics Rules ("Ethics Rules") state in part 1 that, "[a]n appraiser, when completing a residential real property assignment, must not base their opinion of value in whole or in part on race, color…."[235] Additionally, the Ethics Rules state that "whether or not any antidiscrimination law or regulation applies," the appraiser must "not base an opinion of value on the premise that homogeneity of the inhabitants… is relevant."[236] Further, the Ethics Rules state that an "appraiser must not perform an assignment with bias with respect to the actual or perceived race, color… of any person."[237] Finally, the Ethics Rules forbid an appraiser from relying "upon another characteristic as a pretext to conceal the use of or reliance upon race, ethnicity, color… when performing an assignment."[238]

At first glances, these rules and standards look like excellent progress from the Appraisal Standards Board ("ASB"), which "writes, amends, and interprets USPAP;" however, the Board does not enforce USPAP.[239] Instead, the federal government has mandated that states enforce real property appraiser compliance with USPAP.[240] Each state or territory, as required by federal law, has a State Appraiser Regulatory Agency responsible for certifying, licensing, and supervising real estate appraisers. [241] States are given authority to determine penalties for violating USPAP. Penalties for violating USPAP vary, but significant violations – like a violation of the Ethics Rules – could result in "a formal reprimand, a significant amount of corrective education that cannot be used for CE [Continuing Education] renewal, … suspension, … probation, monitoring, restriction on … ability to supervise, a large fine, downgrade of a credential, successful completion of the national exam, payment of restitution and costs, or any combination."[242] Depending on the State, the penalties range from nominal to quite severe: from a letter of warning, fines, and corrective education to probation, suspension, and payment of restitution.[243]

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234. *Id.* at vii.

235. *Id.* at 7.

236. *Id.* at 8.

237. *Id.*

238. THE APPRAISAL FOUNDATION, 2024 UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE, 8.

239. *What is USPAP?,* THE APPRAISAL FOUND., https://www.appraisalfoundation.org/imis/TAF/Standards/Appraisal_Standards/Uniform_Standards_of_Professional_Appraisal_Practice/TAF/USPAP.aspx [https://perma.cc/JAZ4-G2P2] (last visited Dec. 24, 2024).

240. *Id.*

241. *State Appraiser Regulatory Agencies*, THE APPRAISAL FOUND., https://www.appraisalfoundation.org/imis/TAF/About_Us/Appraiser_Regulatory_System/Regulatory_System_Structure/TAF/State_Regulatory_Agencies.aspx# [https://perma.cc/7HMG-5JCU] (last visited Dec. 24, 2024) (Congress passed the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), which "set up a real estate appraiser regulatory system involving federal and state government and The Appraisal Foundation….").

242. Kendra Budd, *Appraiser Disciplinary Levels and Their Consequences*, WORKING RE, https://www.workingre.com/appraiser-disciplinary-levels-and-their-consequences/ [https://perma.cc/EB5Q-6P7V] (last visited Dec. 24, 2024).

243. *Id.*

At the federal level there have also been positive reforms championed by the executive branch in the appraisal realm. In 2021, President Biden issued *Executive Order No. 13985 On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*.[244] The Executive Order directed the federal government to address "[o]ngoing legacies of residential segregation and discrimination" that include "a persistent undervaluation of properties owned by families of color."[245]

In 2022, the Biden-Harris Administration created an Interagency Task Force on Property Valuation and Equity ("PAVE").[246] The PAVE Task Force created an Action Plan to establish concrete steps toward proper valuation of minority owned properties.[247] The PAVE Task Force has clarified that the FHA applies to appraisers by filing a statement of interest in a 2022 federal case.[248] It has "[a]dvanced equity in the appraiser workforce through scholarships and other diversity, equity, and inclusion initiatives."[249] It has "[a]ssisted banks in providing fair, unbiased services to communities of color" through the Office of the Comptroller of Currency's ("OCC") Project Roundtable for Economic Access and Change ("REACh").[250] And it has enhanced enforcement of fair housing and fair lending requirements through a collaborative agreement between the United States Department of Housing and Urban Development ("HUD") and the Federal Fair Housing Finance Agency to promote information sharing and coordination on investigations.[251]

The Action Plan acknowledges that the biggest drivers of the racial and ethnic wealth gap today may be the racial and ethnic disparities in rates of homeownership and in the financial returns associated with owning a home.[252] It points out that "[t]oday, the median white family holds *eight times* the wealth of the typical Black family and *five times* the wealth of the typical Latino family."[253] Home valuation plays a large part in the acquisition of wealth. Fair and accurate property appraisals are essential if homeowners are to maximize their home equity. The PAVE Action Plan acknowledges that "[o]n average, homes in

244. *Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.

245. Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7487 (Jan. 29, 2021) (Memorandum for the Secretary of Housing and Urban Development).

246. WHITE HOUSE, *supra* note 117.

247. *Id.*

248. *Action Plan to Advance Property Appraisal and Valuation Equity: Closing the Racial Wealth Gap by Addressing Mis-valuations for Families and Communities of Color*, U.S. DEPT. OF HOUS. & URB. DEV., https://pave.hud.gov/sites/pave.hud.gov/files/documents/PAVEActionPlan.pdf (last visited Oct. 2, 2024).

249. *Id.* at 20.

250. *Id.* at 19.

251. *Id.* at *20.*

252. *Id.* at 1.

253. *Id.* (Emphasis added).

majority-Black neighborhoods are valued at *less than half* of those in neighborhoods with few or no Black residents." [254] The Action Plan is meant to help remedy this inequity.

The PAVE Action Plan institutes five commitments (each with multiple subparts): (1) "strengthening guardrails against unlawful discrimination in all stages of residential valuation;" (2) "enhancing fair housing/fair lending enforcement and drive accountability in the industry;" (3) "building a well-trained, accessible, and diverse appraiser workforce;" (4) "empowering consumers to take action;" and (5) "giving researchers and enforcement agencies better data to study and monitor valuation bias."[255]

In an effort to enhance "fair housing/fair lending enforcement and drive accountability in the industry," HUD, through the FHA, issued draft guidance in January 2023 to create a "process that people seeking FHA financing can use to request a review of their appraisal if they believe the results may have been skewed by racial bias."[256] This is necessary because it enables a homeowner in the process of refinancing their home with an FHA-insured mortgage "to take steps to ensure that their appraisal is fair."[257]

To facilitate building a "well-trained, accessible, and diverse appraiser workforce," the federal Appraisal Subcommittee awarded a grant to the state of Mississippi "to create an innovative pathway to appraiser licensure, including for appraisers from underrepresented groups, and with a particular focus on underserved communities within the State where there is a shortage of appraisers."[258] This has worked well, and other states are following Mississippi's lead.[259] The grant enabled Mississippi use a practicum program that increases the number of appraisers with "diverse backgrounds who historically experienced barriers to entering the real estate appraisal profession."[260] The grant also allowed for amendments to a practicum that creates focused skills in a controlled environment.[261] The Mississippi practicum is unique because it allows for up to a 100 % non-traditional client experience.[262] This means that students can get hands-on experience with extensive training in a clinical environment. Rather than watching a licensed appraiser work for a real client with concrete deadlines, the student in the practicum gets to perform tasks themselves for hypothetical clients with more flexible deadlines that allow for in-depth learning. In its first iteration, the revised Mississippi practicum had seventeen trainees successfully

254. *Id.* at 2 (Emphasis added).

255. *Id.* at 22-24.

256. Press Release, HUD Secretary Announces Step Toward Addressing Bias in the Home Appraisal Process for People Seeking FHA Financing, U.S. DEP'T. OF HOUS. & URB. DEV. (Jan. 12, 2023).

257. *Id.*

258. WHITE HOUSE, *supra* note 117.

259. *Id. See also* Kendra Budd, *MPAT Opening the Door for Prospective Appraisers*, WORKING RE, (last visited Oct. 2, 2024), https://www.workingre.com/mpat-opening-the-door-for-prospective-appraisers/ [https://perma.cc/2M3B-F6TL].

260. Budd, *supra* note 259.

261. *Id.*

262. *Id.*

complete the program and earn a pass rate on national licensing exams above the national average.[263]

To "empowering consumers to take action," the PAVE Task Force launched a website for "consumers who suspect misvaluations due to racial bias… to learn about their rights and steps they can take to file a discrimination complaint."[264] To give "researchers and enforcement agencies better data to study and monitor valuation bias," the Federal Housing Finance Agency released the first public datasets of appraisal record statistics, providing consumers with the data and trends of appraisal reports and increasing process transparency in October 2022.[265]

Progress is being made. "The U[niform] A[ppraisal] D[ataset] Aggregate Statistics data shows reduced appraisal gaps between white majority and both Hispanic/Latino and Black majority tracts in the period following the release of the PAVE Action Plan."[266] The Action Plan has only been around for a few years, but tangible progress is accumulating. With the re-election of President Trump certified,[267] one can only hope that he, and his administration, will see the immense value in continuing these efforts.

B. Modern-day Redlining Reform

In response to the redlining that went on for decades, the Equal Credit Opportunity Act ("ECOA") was amended in 1976 to prohibit discrimination against any applicant for credit on the basis of "race, color, religion, national origin, sex or marital status, or age…".[268] In July 2024, the United States Court of Appeals for the 7th Circuit held that an analysis of the ECOA "as a whole makes clear that the text prohibits not only outright discrimination against applicants for credit, but also the discouragement of prospective applicants as well."[269] In *Consumer Financial Protection Bureau* ("CFPB") *v. Townstone Financial, Inc.* ("Townstone"), the co-founder and CEO of Townstone, Mr. Sturner, made multiple statements on a radio show over a period of several years alleging that CFPB discouraged Black prospective applicants from applying for mortgage loans from Townstone.[270] Mr. Sturner's comments on the radio broadcast described Chicago's South Side as a scary and dangerous place inhabited by hoodlums.[271] During the years that these statements were made in radio broadcasts, Townstone had fewer mortgage applications from Black

263. *Id.*

264. WHITE HOUSE, *supra* note 117.

265. *Id.*

266. DAVIS ET AL., HAVE PROPERTY VALUATION INEQUALITIES DIMINISHED IN BLACK AND HISPANIC/LATINO NEIGHBORHOODS?, FED. HOUS. FIN. AGENCY (2024).

267. Hubbard et al., *What to know about Congress certifying Trump's victory*, CBS NEWS (Jan. 6, 2025), https://www.cbsnews.com/live-updates/congress-election-electoral-college-2025/ [https://perma.cc/LA9B-KM6F].

268. 15 U.S.C. § 1691(a)(1).

269. Consumer Fin. Prot. Bureau v. Townstone, Fin., Inc., 107 F.4th 768, 776 (7th Cir. 2024).

270. *Id.* at 771

271. *Id.* at 772.

applicants when compared to peer institutions operating in Chicago during the same timeframe.[272]

The Seventh Circuit's decision in *CFPB v. Townstone Financial* is critically important in the effort to remediate the harms of redlining. For decades, "African Americans were regarded as a pestilence or a contagion that necessitated containment or quarantine for fear of its ability to destroy value surrounding it."[273] Black prospective applicants for FHA-backed mortgage loans were systematically denied the opportunity to finance the purchase of property in white neighborhoods.[274] Extending protections from racial discrimination to prospective applicants for mortgage loans will hopefully expand Black homeownership opportunities.

C. Increased Penalties for Cyber Steering

The $115,054 civil penalty assessed against Meta, as discussed above,[275] was woefully inadequate given Meta's profit margins. Private individual owner FHA violations are likely to be somewhat deterred by the current FHA penalties for non-compliance. A private individual who is forced to pay $50,000 for their first violation of the Act would likely think twice about discriminating in the future.[276] If the same private individual owner was foolish enough to violate the FHA again, they would incur a $100,000 penalty for each subsequent violation.[277] It is nonsensical for the FHA to require a social media giant to pay the same penalty as a private individual owner. "The average savings balance for people ages 64 and younger range[s] from $5,400 to $8,700, according to data from the Federal Reserve."[278] The average private individual who violates the FHA would suffer a great deal if the current civil penalties were imposed against them. Meta, whose advertising profits for the 3rd quarter of 2024 alone totaled $39.9 billion,[279] would not.

Two potential solutions to improve the efficacy of the civil penalty under the FHA in a cyber steering context follow. First, the violator (Meta, for example) should be forced to pay an independent auditor to scan all housing advertisements to determine which ads involved inappropriate steering. This should include not just the number of discriminatory advertisement requests approved by the violator but every attempt to search for housing by potential purchasers/renters that were denied the opportunity to view those

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272. *Id.* at 773.

273. TAYLOR, *supra* note 10, at 18.

274. SLATER, *supra* note 7, at 119.

275. Settlement Agreement, at 9, United States v. Meta Platforms, Inc. f/k/a Facebook, Inc., No. 1:22-cv-05187-JGK (S.D.N.Y. 2022), https://www.justice.gov/crt/case-document/file/1516666/dl [https://perma.cc/HC99-VKTS].

276. 42 U.S.C. § 3614(d)(1)(C)(i).

277. *Id.*

278. Gayle Sato, *Average Savings by Age: How Americans Compare*, EXPERIAN: ASK EXPERIAN (Nov. 22, 2024), https://www.experian.com/blogs/ask-experian/average-savings-by-age/ [https://perma.cc/D2FH-26MT].

279. Yiannis Zourmpanos, *AI Powers Meta's Strong Q3 Growth: Profits Soar*, FORBES (Nov. 14, 2024), https://www.forbes.com/sites/gurufocus/2024/11/14/ai-powers-metas-strong-q3-growth-profits-soar/ [https://perma.cc/BZV2-9FS8].

advertisements. By treating all of these discriminatory advertising requests by advertisers and steered attempts to view advertisements as individual violations, the current fine can then be assessed for each and every violation. This could result in penalties more appropriate to corporate violators of the FHA.

The second solution suggests amending the FHA to increase penalties for subsequent violations. Why should the 1000th violation result in the same penalty as the 2nd violation? In addition to increasing penalties dramatically for subsequent violations, the FHA should be amended to have a different class of increased penalties for business versus individual perpetrators.

Treating violators differently within the FHA is not without statutory precedent. Section 3603(b) of the FHA "exempts any single-family house sold or rented by an owner: *[p]rovided,* [t]hat such private individual owner does not own more than three such single-family houses at any one time."[280] The exemption only applies if the property is transferred "without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings."[281] So, pursuant to Section 3603(b) of the FHA, people/entities in the "business of selling or renting dwellings" cannot discriminate, but private individual owners can.[282] Presumably this is because the detrimental impact of business violators far exceeds the impact of the private individual owner. If the FHA is willing to acknowledge this distinction in Section 3603, surely it could be amended to extend that distinction to the civil penalties in Section 3614.

CONCLUSION

Despite a decrease in the prevalence of historical forms of racial steering, its modern-day permutations continue to segregate America and infringe upon both the housing opportunities and wealth accrual of Black individuals and families. How long will it take to rectify past wrongs and achieve wealth and housing equity for Black Americans? Unfortunately, it may take centuries. Joseph Dean speculates that "[o]n our current trajectory, it would take at least five centuries to close the Black-White wealth divide – more than twice as long as the United States of America has existed."[283]

In addition to traditional Property courses, I have taught Slavery & Human Trafficking off-and-on for the past twelve years.[284] At the conclusion of the Trans-Atlantic Slave Trade module of the course, students often ask how long it will take for Black Americans to truly achieve equity. My answer is that "the

280. 42 U.S.C. § 3603(b)(1).

281. *Id.*

282. *Id.*

283. Dean, *supra* note 119.

284. Prof. Swanson has taught Property since 2006 and started teaching Slavery & Human Trafficking in 2013. The Slavery course combines a detailed analysis of the Atlantic Slave Trade and the evolution of Civil Rights Law in the United States with an exploration of modern-day human trafficking and the various legal means for combating modern-day slavery.

accepted date for the beginning of the Trans-Atlantic Slave Trade is 1502."[285] Slavery officially ended when the 13th Amendment to the U.S. Constitution was ratified on December 6, 1865.[286] Three hundred and sixty-three years of slavery may take an equal number of years to undo. The ramifications of racial steering, a "badg[e] and inciden[t] of slavery,"[287] are far reaching. The covert nature of some of the modern forms of steering make it very difficult to unearth and combat. Real estate agents, brokers, lenders, and appraisers, as well as the federal government and state governments, will have to work collaboratively to create and enforce multi-faceted approaches to achieve sustainable progress. More training to prevent discriminatory behavior, diversification of real estate and banking professionals, steeper penalties for violators of the FHA, and close monitoring of those engaged in cyber steering are viable means of achieving housing equity in America. It will take time, but it must be done.

285. Stevie J. Swanson, *Slavery Then and Now: The Trans-Atlantic Slave Trade and Modern Day Human Trafficking: What Can We Learn From Our Past?,* 11 Fla. A&M U. L. Rev. 127 (2015) (quoting Robert Fogel, *Slavery in the New World*, *in* SLAVERY IN AMERICAN SOCIETY 21-22 (Lawrence B. Goodheart et al. eds., 1992)).

286. *13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, NAT. ARCHIVES, (Jan. 18, 2025) https://www.archives.gov/milestone-documents/13th-amendment [https://perma.cc/X9XQ-2RM9].

287. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441–43 (1968) (quoting Civil Rights Cases, 109 U.S. 3, 22 (1883)).

WISCONSIN'S BIRTH COST RECOVERY: A GENDERED POLICY THAT POLICES FAMILIES AND WEIGHS THE FISCAL INTEREST OF THE GOVERNMENT AHEAD OF THE BEST INTERESTS OF THE CHILD

Claire Carey[*]

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INTRODUCTION

All new parents face stressful choices while trying to keep their children safe, healthy, and happy. But acting in "the best interest of a child" can be even more stressful for low-income parents and due to systemic inequities and disproportionate state surveillance, particularly for low-income parents of color.[1] In Wisconsin, for example, pregnant unmarried low-income mothers, and disproportionately Black pregnant unmarried low-income mothers, face a uniquely stressful choice created by a complex web of federal and state regulations related to Medicaid payments.[2] When a pregnant unmarried mother enrolls in Medicaid in Wisconsin, the state forces her to choose whether to identify the father of her child and, therefore, initiate a monetary collection action against him.[3] If the mother refuses to identify the father—perhaps because she fears domestic violence or financially burdening her child's father—local governments can sanction her, taking away her Medicaid benefits within only sixty days of giving birth.

At every step along this timeline of early parenthood, Wisconsin has also made a choice: to create and participate in a web-like regulatory system that effectively penalizes the babies of low-income unmarried mothers, placing new parents, and ultimately children, in an economically and medically vulnerable position. Under this so-called process of Birth Cost Recovery ("BCR"), if a pregnant mother is eligible and applies for Medicaid, a state court may order unmarried and non-custodial fathers to repay the state for all or part of the mother's pregnancy and childbirth costs that Medicaid covered.[4] But this money does not go to the child, the birth mother, or to support the family—it is recovered by the state to reimburse the government for Medicaid expenses.[5]

And it's not just state regulations at work. Although BCR is allowed, but not required, under Title IV-D of the Social Security Act, it involves a myriad of government actors and policy systems that sit at the intersection of federal and state law.[6] Enforcement ultimately lies with local government, child support

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1. Rachel Minkin & Juliana Menasce Horowitze, *Parenting in American Today,* THE PEW RESEARCH CENTER (Jan. 24, 2023), https://www.pewresearch.org/social-trends/2023/01/24/parenting-in-america-today/ [https://perma.cc/54UJ-8VTB].

2. Bobby Peterson, Mike Rust, Richard Lavigne Jr., Anna Kaminski, & Claire Culver, *Birth Cost Recovery in Wisconsin: "It's Not Child Support."*, PULSE REPORT, (2018), https://www.safetyweb.org/healthwatchwi/BCR%20Archive/Birth%20Cost%20Recovery,%20It's%20Not%20Child%20Support%20-%20Pulse%20Report.pdf [https://perma.cc/366C-EGSW].

3. *Id.* at 2.

4. WIS. DEP'T CHILD. FAMS., https://dcf.wisconsin.gov/cs/benefits-birth-costs [https://perma.cc/4RAN-BLXT] (last visited Mar. 7, 2024),

5. Brynne McBride, Robert Peterson, Dani Wetter, Sam Schmitt, Tim Hennigan & Mike Rust, *Merchants of Debt: Wisconsin Counties & The Birth Tax,* ABC FOR HEALTH (2022), https://www.safetyweb.org/pdfs/Merchants_of_Debt.pdf [https://perma.cc/U7SA-ZZ2N]; *see* Richard Lavigne, *Medicaid Birth Cost Recovery: New Rules Affect Unmarried Parents*, WISCONSIN LAWYER (2019), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=92&Issue=3&ArticleID=26891 [https://perma.cc/M5NS-5L3G].

6. 42 U.S.C. § 1396a(a)(25)(H).

officers, and the courts.[7] Currently, only three states actively collect BCR payments: Kansas, Michigan, and Wisconsin. Wisconsin leads this group in the amount collected from unmarried fathers.[8] Proponents of BCR argue that it promotes paternal "responsibility" and that the funds recovered support the sustainability of state Medicaid and other welfare programs.[9] Opponents argue that BCR places additional financial hardship on low-income families and ultimately hurts paternal involvement.[10]

Historically, much of the United States' social welfare system has been built upon policies like BCR that punish and surveil poor parents, particularly poor parents of color, often in the name of "family responsibility" and supporting "the best interests of the child."[11] Other social programs with cost recovery measures, like Temporary Assistance to Needy Families ("TANF"), child support, and foster care exemplify how cost recovery measures, implemented under the guise of "family responsibility" act at odds with the best interest of the child.[12] These cost recovery measures further impoverish children as they recover money from families in order to advance government fiscal interests, often to the detriment—not best interests—of the child.[13]

Recently, disputes over the continued existence of BCR have come to a head in Wisconsin; some counties have begun implementing policy changes to slow or stop the collection of BCR. These major policy changes began in 2018, when a new administrative rule limited BCR collection in Wisconsin if the unmarried father was part of an "intact family," meaning that the father lived with the mother and supported the child.[14] Then, in January 2020, Dane County,

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7. McBride et al., *supra* note 5.

8. MARGUERITE ROULET & MICHAEL RUST, *Report on Wisconsin's Medicaid-Supported Birth Cost Recovery Policy*, CNT. ON FATHERS, FAMS., AND PUB. POL'Y (2004), https://www.safetyweb.org/healthwatchwi/BCR%20Archive/3.%20Research%20Documents%20Relevant%20to%20BCR/2004_Report%20on%20WI%20Birth%20Cost%20Recovery_CFFPP.pdf [https://perma.cc/YXU5-KBLG].

9. TIFFANY GREEN, STEVEN T. COOK & HOA VU, *Effects of Medicaid Birth Cost Recovery Policy Changes on Child Support Outcomes,* INST. FOR RSCH. ON POVERTY UNIV. OF WISCONSIN–MADISON, 3 (2023); *see also* Marguerite Roulet & Michael Rust, *Report on Wisconsin's Medicaid-Supported Birth Cost Recovery Policy*, CNT. ON FATHERS, FAMS., AND PUB. POL'Y (2004), https://www.safetyweb.org/healthwatchwi/BCR%20Archive/3.%20Research%20Documents%20Relevant%20to%20BCR/2004_Report%20on%20WI%20Birth%20Cost%20Recovery_CFFPP.pdf [https://perma.cc/YXU5-KBLG.

10. *Id.*

11. IFE FLOYD, LADONNA PAVETTI, LAURA MEYER, ALI SAFAWI, LIZ SCHOTT, EVELYN BELLEW & ABIGAIL MAGNUS, *TANF Policies Reflect Racist Legacy of Cash Assistance Reimagined Program Should Center Black Mother*s, CNT. ON BUDGET AND POL'Y PRIORITIES (Aug. 4, 2021), https://www.cbpp.org/sites/default/files/8-4-21tanf.pdf [https://perma.cc/V638-C4XA].

12. *Id.*

13. Kyle Ross, *Learning from the United States' Painful History of Child Support,* CNT. FOR AM. PROGRESS (2022), https://www.americanprogress.org/article/learning-from-the-united-states-painful-history-of-child-support/ [https://perma.cc/J8PD-92HV].

14. WIS. ADMIN. REG, NO. 750B (June 2018), (adding the following language to Wis. Admin. Code section DCF 150.05(2)(a): "Recovery of birth costs is inappropriate in cases

the second-most populous county in Wisconsin, stopped collecting BCR altogether, citing racial disparities and burdens on low-income families.[15] Finally, Milwaukee County, the most populous county in Wisconsin, stopped collecting BCR in 2024.[16]

The current momentum to eliminate BCR, and the corresponding piecemeal approach of different counties across Wisconsin, provides an opportunity for researchers, advocates, and legal scholars to take a hard look at the history and impacts of paternalistic welfare recovery policies at the federal, state, and local level. This Comment argues that BCR should be eliminated throughout the United States and all of Wisconsin because it discriminates against unmarried fathers and mothers, does not support the best interests of the child, and places disproportionate financial and medical burdens on low-income families of color.

Section I of this Comment illustrates how the "Best Interests of the Child" standard developed as courts moved away from a gendered preference for the father or mother, including caselaw that established the standard, and why it continues to hold so much power in family law. This section also provides the background, history, and impacts of U.S. social welfare and cost recovery policies that were designed to penalize poor, unmarried people of color—tracing how these welfare policies went from overtly penalizing families to covertly penalizing families. Section II explains the federal laws that enable the discretionary practice of BCR and why most states moved away from the practice. Section III focuses on Wisconsin's BCR policy, explaining how the policy operates and who it affects most on the state and local level. Section IV advocates that all states, including Wisconsin, should end the practice of BCR to truly support the best interests of the child. In conclusion, Section IV discusses the types of policies that should supplant BCR and support the "best interests of the child" when the family is in the most economically precarious and vulnerable phase of life—birth to early childhood. Rather than punishing unmarried fathers, and consequently unmarried mothers and their children, with BCR, federal and state government should aid them by expanding and extending economic and healthcare programs like the Child Tax Credit and Postpartum Medicaid Care.

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where the alleged father is a member of an intact family that includes the mother and the subject child at the time paternity or support is established, and the father's income, if any, contributes to the support of the child").

15. JOE PARISI & SHARON CORRIGAN, DANE COUNTY, 2020 ADOPTED BUDGET (2020), https://admin.danecounty.gov/documents/pdf/budget/2020/adopted-budget-report.pdf, [https://perma.cc/7Z9M-NRAK] (announcing the end to Dane County's birth cost recovery collections, County Executive Joe Parisi states: "We can forgo this revenue and give these parents one less expense while many of them struggle to make ends meet. The racial disparities in Birth Cost Recovery are stark, with these parents being asked to reimburse the federal government hundreds of dollars each year for many years in some cases).

16. DAVID CROWLEY, MILWAUKEE COUNTY 2024 OPERATING BUDGET (Jan. 1, 2023), https://county.milwaukee.gov/files/county/administrative-services/PSB/BudgetsCopy-1/2024-Budget/2024-Adopted-Budget/2024-Operating-Budget.pdf [https://perma.cc/DZ5J-QJQA] (stating that, "the department of Child Support Enforcement will no longer pursue Birth Costs Recovery (BCR) efforts. This policy change results in a $200,000 reduction in revenue").

I. A HISTORY OF PENALIZING POOR PEOPLE OF COLOR: CHILD AND SOCIAL WELFARE POLICY, RACISM, SEXISM, AND COST RECOVERY

A. The Evolution of Child Welfare and the Gender Neutral "Best Interests of the Child" Standard

Today's courts are supposed to determine matters of child welfare and contested custody based on the best interests of the child or children involved. This ubiquitous and determinative legal standard evolved from a long history of gendered legal favoritism, first in favor of the father, and then the mother.[17] Throughout the late 1800s, the common law rule was that children were the property of their father, and mothers were not fully "persons" under the law.[18] Children were seen as economic tools of their fathers, and were often hired as indentured servants and given no rights.[19] For example, in a Civil-War Era case, the Wisconsin Supreme Court held that, a "father has a legal and paramount right to the custody and services of his child."[20]

Gradually throughout the twentieth century, the law evolved to favor maternal custody.[21] The maternal presumption rule, also known as the "tender years doctrine," was incorporated into statute and common law based on the idea that mothers were "better suited" to care for and nurture children.[22] For example, a Wisconsin court held for the mother in a 1921 custody matter, stating, "[f]or a boy of such tender years nothing can be an adequate substitute for a mother['s] love."[23]

In the 1960s and 1970s, courts began to reject legal favoritism of the mother or father and aimed to adjudicate in a gender-neutral manner. The Alabama Supreme Court held that the maternal presumption was an unconstitutional gender-based classification under the Fourteenth Amendment.[24] And in 1971, the Wisconsin Supreme Court held that, "the controlling consideration in all custody matters is the welfare of the child."[25] Thus, over the course of one-hundred years,

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17. Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. ILL. U. L. REV. 449, 452-456 (2005).

18. *Id* at 452. *Id.* at 452.

19. Janet L. Dolgin, *Why Has the Best Interest Standard Survived?: The Historic and Social Context,* 16 CHILD. LEGAL RTS. J.2, 4 (1996).

20. *In re Goodenough*, 19 Wis. 274, 277 (1865); Ronald R. Hofer, *The Best Interest of the Child Doctrine in Wisconsin Custody Cases*, 64 MARQ. L. REV. 343, 344 (1980).

21. Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 UNIV. CHI. L. REV. 1, 8 (1987).

22. *Id.*

23. *Jenkins v. Jenkins,* 173 Wis. 592, 181 N.W. 826, 827 (1921); *see also* Ronald R. Hofer, *The Best Interest of the Child Doctrine in Wisconsin Custody Cases*, 64 MARQ. L. REV. 343, 347 (1980).

24. *Ex parte Devine,* 398 So. 2d 686, 695 (Ala. 1981); Richard A. Warshak, *Parenting by The Clock: The Best-Interest-Of-The-Child Standard, Judicial Discretion, and The American Law Institute's "Approximation Rule*" 41 BALT. L. REV. 83, 86 (2011).

25. *Templeton v. Templeton*, 254 Wis. 92, 93, 35 N.W.2d 223 (1948); *see also* Ronald R. Hofer, *The Best Interest of the Child Doctrine in Wisconsin Custody Cases,* 64 MARQ. L. REV. 343, 348 (1980).

courts veered away from both the practical services-based preference for fathers and compassionate tender-years preference for mothers to the current non-gendered best interests of the child standard.[26]

Today, in all states, either statutory law or judicial precedent asks that courts determine contested custody cases and other family law matters involving children in a way which advances the best interests of the child or children involved.[27] The court must consider several factors, which vary state to state, to resolve family issues with the goal of bettering the child's circumstances.[28] Under the best interests standard, courts have wide discretion and often struggle to consistently apply the standard.[29] Wisconsin's best interests factors are codified in Wis. Stat § 767.41(5).[30] These factors include the child's wishes, the health of the parents, the child's special needs and parent's ability to accommodate those needs, evidence of any type of abuse, whether there has been domestic violence, and the expansive, "any other factor that the court determines to be relevant."[31] Additional factors in other states include: the willingness and ability of each parent to place the needs of the child ahead of his or her own needs, and the reasonable preference of the child (if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such preference).[32]

In certain custody cases, time is often the final and most determinative factor. In 1997, during the Clinton Administration, Congress passed the Adoption and Safe Families Act ("ASFA"), which created a set of funding incentives and mandates for state child welfare departments to more quickly move to terminate parent's rights under the "best interests standard."[33] For example, a child may be removed from their parent's care and placed with a family member, or in foster care, because of parental behavior or living circumstances that a court determines was not in a child's best interests. Once this occurs, ASFA funding guidelines kick in, requiring parents to resolve the contributing behavior or circumstances within twelve to eighteen months or lose temporary or permanent custody of their child.[34] Thus, a parent struggling with

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26. CHILDREN'S BUREAU AN OFFICE OF THE ADMINISTRATION FOR CHILDREN AND FAMILIES, *Determining the Best Interests of the Child* (State Statutes Current Through June 2023), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/determining-best-interests-child.pdf?VersionId=R1oX898e52Rk5qjeXhua3VD7ZCySHMFq [https://perma.cc/P3JN-BRYY].

27. Juliet A. Cox, *Judicial Enforcement of Moral Imperatives: Is the Best Interest of the Child Being Sacrificed to Maintain Societal Homogeny?*, 59 MO. L. REV. 775, 775 (1994).

28. *Id.*

29. MARTIN M. GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 147 (2005).

30. WIS. STAT. § 767.41(5) (2024).

31. *Id.*

32. 750 ILL. COMP. STAT. 5/602.7 (2024).

33. DOROTHY E. ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES: AND HOW ABOLITION CAN BUILD A SAFER WORLD, 120 (2022).

34. Adoption and Safe Families Act, 42 U.S.C.A. § 1305 (1997). AFSA requires that states move to terminate parental rights for children who have been in Foster Care for fifteen

a mental health condition that prevents them from maintaining a steady job or housing is required to resolve their mental health issue and achieve housing stability within as little as twelve months before having their parental rights temporarily removed or permanently terminated.[35]

Although the court now adjudicates in a gender-neutral manner, no longer overtly penalizing either the father or mother, the court's wide discretion and the rigid timeline that parents must maintain covertly penalizes poor or low-income parents and disproportionately poor or low-income parents of color.[36] Today's child welfare system and today's social welfare system, work in tandem, covertly policing and penalizing poor families rather than aiding them, in the name of the "best interests of the child" and family responsibility.

B. Explicit Family Policing and the Evolution of Social Welfare Policy

Social welfare programs also have a long history that is deeply entrenched in sexism and racism; these programs have been designed explicitly, and often evolved implicitly, to punish and stigmatize poor people of color in the name of policing "family responsibility."[37] In the early 1900's Mothers' aid became one of the first U.S. social welfare policies and correspondingly a model for future welfare programs.[38] As scholar Linda Gordon notes in her book, *Pitied But Not Entitled: Single Mothers and The History of Welfare*, the formation of Mothers' aid sparked questions about welfare: "Who is deserving? What is the role of gender, work, and moralism in aid? What is the state's role and should they get to police mothers?"[39] Mothers' aid, also referred to as "mothers' pensions" in order to relate the payments to the mothers' labor in caring for the child, was one of the first money-support based social welfare policies targeted at poor single mothers.[40] Illinois instituted the first mothers' pension law in 1911, which distributed cash payments to poor single mothers.[41] By 1919, thirty-nine states had adopted similar laws.[42] These laws were aimed at "family preservation" and were designed to allow widowed mothers to continue to care for their children.[43] However, these early laws were designed for the benefit of white mothers only. Black single mothers were mainly excluded from state aid; administrators of

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out of the last fifteen months. Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997—The Worst Law Affecting Families Ever Enacted by Congress*, 11 COLUM. J. RACE & L. 711 (2021).

35. S. Lisa Washington, *Time & Punishment*, 134 YALE L.J. 536, 587 (2024).

36. Roberts, *supra* note 29, at 115.

37. *See generally* Floyd, et al., *supra* note 11.

38. LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 37 (1994).

39. *Id* at 37.

40. *Id.* at 40.

41. Abe Bortz, *Mother's Aid*, VCU LIBRARIES SOCIAL WELFARE HISTORY PROJECT, https://socialwelfare.library.vcu.edu/programs/mothers-aid/#:~:text=The%20first%20Statewide%20mother's%20pension,or%2016%20years%20of%20age [https://perma.cc/H7ZQ-3WFQ].

42. Mark H. Leff, *Consensus for Reform: The Mothers'-Pension Movement in the Progressive Era,* 47 SOC. SERV. REV. 397, 400 (1973).

43. *Id.* at 397.

mothers' pension laws simply did not establish programs in areas with large Black populations or used tests, like suitable home provisions, which allowed social workers to disqualify Black mothers based on whether or not their home met a social worker's standard.[44] In 1931, a national survey of mothers' pensions found that ninety-six percent of welfare recipients were white, while only three percent of recipients were Black.[45]

Aid to Dependent Children ("ADC"), established by the Social Security Act of 1935, replaced mothers' pensions laws and provided federal funding to states to assist children who lived with a single mother.[46] ADC was designed to allow states to control how their ADC funds were spent and allocated, enabling some states to pass punitive policies to target, surveil, and control Black mothers.[47] Aiming to police Black mothers' relationships, many states passed "Man in the House" policies, which were rules that prevented unmarried adult males from living with mothers and their children who received public assistance.[48] Social Service employees raided Black family homes looking for either male clothing or a man to be physically present in the home to disqualify them from receiving aid.[49]

In 1962, Congress amended the Social Security Act, changing the Aid to Dependent Children program into the Aid to Families with Dependent Children ("AFDC") program.[50] Throughout the 1960s and 1970s, the media painted the AFDC and other public assistance programs as pictures of fraud and abuse perpetuated by Black mothers and fathers.[51] Not surprisingly, these racist portrayals created a stigmatized social construct and false stereotype of poor Black mothers and fathers as "Welfare Queens" and "Deadbeat Dads."[52] The federal government was complicit, condoning and promoting these stigmatizing narratives.[53] For example, under the Lyndon B. Johnson Administration, Assistant Secretary of Labor, Daniel Patrick Moynihan, advanced false racist narratives about Black single mothers and attacked Black family structure in his report on poverty, which he chose to title: *The Negro Family: The Case for*

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44. Gordon, *supra* note 38, at 45.

45. Roberts, *supra* note 33, at 115 (compounding this problem twenty years later were the government policies prohibiting Black people from obtaining loans for new homes after WWII. Similar data shows that home loan programs after the war went to 98% white people, thus all but ensuring stable housing only for white children).

46. *Id.*

47. *Id.*

48. Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L. J. 1347, 1347 (1963); C. Frank. Goldsmith Jr., *Social Welfare–The "Man in the House" Returns to Stay*, 47 N.C. L. REV. 228, 228 (1968).

49. Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 Yale L. J. 1347, 1353 (1963).

50. Floyd, et al., *supra* note 11, at 3.

51. *Id.* at 4.

52. Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L & SOC. JUST. 233, 237 (2014).

53. *Id.*

National Action.[54] And President Ronald Reagan attacked "Welfare Queens" in campaign speeches: "There's a woman in Chicago, she has 80 names, 30 addresses, 12 Social Security cards and is collecting veterans' benefits on four nonexistent deceased husbands."[55] Reports and speeches like these perpetuated the false notion that the majority of welfare recipients and abusers of the welfare system were single Black mothers.[56]

These harmful stereotypes laid the groundwork for the false narrative that single mothers' failure to keep a family together was the cause of poverty, and thus, welfare assistance was a culmination of the moral failings of poor women of color.[57] Although the majority of public assistance recipients—both then and now—are white children, dog whistle politics has stoked racial anxieties and drove the development and implementation of policy around poverty that was both feminized and racist.[58] The Nieman Foundation for Journalism at Harvard University released a study in 1999 finding that when Black women are depicted as welfare recipients, it "leads viewers to oppose welfare spending, cite individual attributions as causes for social problems, and endorse negative characterizations of African-Americans."[59]

In the 1980s, President Reagan capitalized on his dog whistle politics, making cuts to the AFDC program while creating waivers for state flexibility—handing states the responsibility and discretion to experiment with changes in their AFDC programs.[60] States and local governments had financial incentives to keep enrollments low and write eligibility rules that were more intrusive to prospective recipients, including income limits and means-testing for recipients.[61] The program that is now known as child support began with the goal to reduce spending on AFDC through a federal-state partnership.[62] The child

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54. OFF. OF POL'Y PLAN. AND RSCH. U.S. DEP'T OF LAB. *The Negro Family: The Case for National Action* (Mar. 1965), https://www.dol.gov/general/aboutdol/history/webid-moynihan [https://perma.cc/PQT8-R3W7].

55. *'Welfare Queen' Becomes Issue in Reagan Campaign,* N.Y. TIMES (Feb. 15, 1976), https://www.nytimes.com/1976/02/15/archives/welfare-queen-becomes-issue-in-reagan-campaign-hitting-a-nerve-now.html [https://perma.cc/Y5N3-6FJK].

56. *Id.*

57. Bridgette Baldwin, *Stratification of the Welfare Poor: Intersections of Gender, Race, and "Worthiness" in Poverty Discourse and Policy*, 6 MODERN AM. 4, 4, 10 (2010); DOROTHY E. ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD, 110 (2022).

58. IAN HANEY-LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS (2014) (highlighting racist dog whistles like promoting "personal responsibility" state policymakers created new requirements such as time limits, increased work requirements, and family caps).

59. Franklin D. Gilliam Jr., *The "Welfare Queen" Experiment: How Viewers React to Images of African-American Mothers on Welfare,* NIEMAN REPORTS (June 15, 1999), https://niemanreports.org/articles/the-welfare-queen-experiment/ [https://perma.cc/8XE8-V4C3].

60. Floyd et al., *supra* note 11.

61. VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2018).

62. CONG. RSCH. SERV., ANALYSIS OF FEDERAL-STATE FINANCING OF THE CHILD SUPPORT ENFORCEMENT PROGRAM, 6 (2012).

support program collected money from noncustodial parents, predominantly men, whose children were supported by AFDC benefits.[63] At its inception, this child support money went entirely to reimburse the government for the cost of the AFDC benefits.[64]

With these new waivers for state flexibility within AFDC, Wisconsin overhauled its welfare system in the 1990s. Wisconsin Works ("W-2") was signed into law in 1996 and conditioned the receipt of welfare benefits on time-limited, work-conditioned support, proposing movement up a "ladder of [….] work experiences to an ultimate goal of self-sufficiency."[65] In 1991, Governor Tommy G. Thompson proposed a pilot program to tie welfare benefits to marriage, thereby rewarding teenage mothers who married, penalizing those who did not.[66] Thompson's proposal, named the Parental and Family Responsibility Initiative, would have capped AFDC benefits for unmarried women to $440 a month. Teenage parents who married, however, would receive about $80 more per month.[67] In addition, AFDC recipients "under age 20 and their spouses or noncustodial fathers would be required to participate in classes on parenting, human development, sex education, and independent living."[68] Thompson explained the reasoning behind his policy, asserting that "the current system only encourages unmarried women to have more children," and maintaining that his plan would reinforce the "responsibility of parenting."[69] Although this particular pilot program was never adopted, proposed marriage incentives born of Thompson's so-called "Family Responsibility Initiative" live-on in Wisconsin's Birth Cost Recovery program today—a punitive cost recovery measure that is aimed at unmarried fathers to perpetuate notions of "family responsibility."

C. Implicit Family Policing Through Welfare Cost Recovery: The Evolution of Social Welfare Policy Today

The current design of much of the U.S. social welfare system is built on welfare cost recovery programs that do not support the best interests of the child.

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63. Ross, *supra* note 13.

64. *Id.*

65. THOMAS CORBETT, *Understanding Wisconsin Works*, WISCONSIN INSTITUTE FOR RESEARCH ON POVERTY, https://www.irp.wisc.edu/publications/focus/pdfs/foc181-3.pdf [https://perma.cc/VR5N-B8BD].

66. Deborah L. Cohen, *Thompson Would Reward Teenage Parents Who Marry,* EDUCATION WEEKLY (Feb. 20, 1991), https://www.edweek.org/education/thompson-would-reward-teenage-parents-who-marry/1991/02 [https://perma.cc/U8Y4-BJYZ].

67. *Id.*

68. *Id.*

69. Isabel Wilkerson, *Wisconsin Welfare Plan: To Reward the Married,* NEW YORK TIMES (Feb. 12, 1991), https://www.nytimes.com/1991/02/12/us/wisconsin-welfare-plan-to-reward-the-married.html [https://perma.cc/F9KE-X6J7].

1. Temporary Assistance to Needy Families

In 1996, President Clinton, after being elected on a campaign to "end welfare as we know it," replaced AFDC with Temporary Assistance for Needy Families ("TANF"), which is the biggest U.S. welfare program today.[70] States can use TANF money to meet these four purposes, including the express purpose of promoting marriage:

> 1) Provide assistance to needy families so that children can be cared for in their own homes or in the homes of relatives, 2) Dependence of needy parents on government benefits by promoting job preparation, work, and marriage, 3) Prevent and reduce the incidence of out-of-wedlock pregnancies, and 4) Encourage the formation and maintenance of two-parent families. . .[71]

States get to define what "needy families" means and many states set this "needy" threshold well below the federal poverty level.[72] The policy design of TANF, which gives block grants to states, allows state policymakers the ability to put time limits on assistance, add family caps, and increase work requirements for receiving welfare.[73] Family caps enable states to punish families by limiting the additional benefits they receive if a mother has another child while receiving benefits.[74] When speaking about family caps, a Health and Human Services official from the Clinton Administration said "[government should not] reward irresponsible behavior."[75] These policies were imbued with moralistic notions of family responsibility and paternalistic government control, perpetuating the idea that poor parents shouldn't have more children.

Today, under TANF's discretionary block grant program, states have shifted funds that previously went directly to families to fund other programs that have nothing to do with supporting low-income families, and in egregious cases, have fraudulently gone to the wealthy, like former NFL quarterback Brett Favre.[76] The government has also used TANF money to encourage states to

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70. Martín Carcasson, *Ending Welfare as We Know It: President Clinton and the Rhetorical Transformation of the Anti-Welfare Culture*, 9 RHETORIC & PUB. AFF. 655, 655, 676 (2006).

71. ABOUT TANF, OFFICE OF FAMILY ASSISTANCE (2022).

72. POLICY BASICS: TEMPORARY ASSISTANCE FOR NEEDY FAMILIES, CTR. ON BUDGET AND POL'Y PRIORITIES.

73. Ife Floyd et al., *TANF Policies Reflect Racist Legacy of Cash Assistance Reimagined Program Should Center Black Mothers*, CTR. ON BUDGET AND POL'Y PRIORITIES (2021).

74. *Id. See also* Dandridge v. Williams, 397 U.S. 471 (1970) (holding that there is no substantive due process for economic rights and that family caps are constitutional).

75. IFE FLOYD ET. AL, *supra* note 73, at 27.

76. Krissy Clark, Caitlin Esch & Gina Delvac, *How Welfare Money Funds College Scholarships,* MARKET PLACE (June 10, 2016), https://www.marketplace.org/2016/06/10/how-welfare-money-funds-college-scholarships/ [https://perma.cc/H9TA-ZF6F]; Anthony Olivieri, *Brett Favre and the Mississippi Welfare Case Explained,* ESPN (May 9, 2023), https://www.espn.com/nfl/story/_/id/37565299/brett-favre-mississippi-welfare-case-line-explained [https://perma.cc/X46E-4W5U].

remove children from their families at quicker rates. In 2014, when the federal government paid states $424 million in adoption-incentive subsidies which exceeded the amount states had saved in foster care costs, the government offset this difference by drawing from the TANF contingency fund.[77]

Because unspent TANF block grants can be carried over to future years, a state is allowed to spend more or less than its annual block grant allocation.[78] For example, in 2022, Wisconsin spent about $521 million in federal and state funds under the TANF program.[79] However, it spent only thirteen percent of these funds on basic assistance, generally as cash assistance to TANF-eligible families. Much of the other money went to tax credits, childcare, and work activities.[80] By 2022, Wisconsin had also amassed $269 million in unspent TANF block grant funds—money that could be, but isn't, going to families.[81] Nationally, TANF supports fewer families and provides less direct cash assistance than AFDC did, leaving more families and children in deep poverty.[82] According to research conducted by the Center on Budget and Policy Priorities, an economic research institution, between 1996 and 2020, the number of families receiving TANF for every 100 families in poverty dropped from sixty-eight to twenty-one.[83]

2. Child Support

The designs of both TANF and child support together enable government welfare cost recovery from non-custodial parents. Custodial parents who are applying for TANF benefits are required to establish child support obligations against the absent parent and assign those child support payments to the government.[84] This means that the state can keep some, or all, of the money it collects from the non-custodial parent in order to recoup the cost of the TANF benefits provided to the custodial parent.[85] Federal policy allows states this discretion to divide between families and the government the amount of child support collected on behalf of families who receive TANF benefits.[86] State policy

77. DOROTHY E. ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES: AND HOW ABOLITION CAN BUILD A SAFER WORLD 122 (2022).

78. *Wisconsin TANF Spending*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/sites/default/files/atoms/files/tanf_spending_wi.pdf [https://perma.cc/9A95-4WUV].

79. *Id.*

80. *Id.*

81. *Id.*

82. *Policy Basics: Temporary Assistance for Needy Families,* CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 1, 2022), https://www.cbpp.org/sites/default/files/atoms/files/7-22-10tanf2.pdf [https://perma.cc/MT6F-G72H].

83. Aditi Shrivastava & Gina Azito Thompson, *TANF Cash Assistance Should Reach Millions More Families to Lessen Hardship,* CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 18, 2022), https://www.cbpp.org/sites/default/files/atoms/files/6-16-15tanf.pdf [https://perma.cc/S6ZX-JPRC].

84. Kyle Ross, *Learning From the United States' Painful History of Child Support,* CTR. FOR AM. PROGRESS (2022), https://www.americanprogress.org/article/learning-from-the-united-states-painful-history-of-child-support/ [https://perma.cc/7X5Z-VJAF].

85. CTR. ON BUDGET & POL'Y PRIORITIES, *supra* note 82.

86. *Id.*

determines how much of the child support is kept by the government, as compared to how much is "passed through" to the custodial parent who is receiving the TANF benefits.[87] Wisconsin's "pass through" law allows the custodial parent to keep 75% of child support payments a month.[88]

The pursuit of increased child support collection has negatively impacted low-income families and the relationship between fathers and children in those families.[89] University of Baltimore Law Professor Jane C. Murphy traces this negative impact to "the efforts to encourage early and easy paternity establishment." Murphy explains that this may cause more harm than good for fathers and children, as "the child support enforcement bureaucracy can destabilize relationships between parents, and easy paternity establishment has led to increased efforts to disestablish paternity several years later."[90]

3. Foster Care

Welfare recovery policies are not only aimed at parents, indirectly affecting their child; they are also aimed directly at children themselves. State governments seek the Social Security benefits of children in foster care who are orphaned or disabled to reimburse the state for the cost of their foster care—creating a government cost recovery system where foster children are paying for their own foster care.[91] State agencies, often employing private contractors, screen children in foster care to determine which children are eligible to receive Social Security benefits because of the child's own disability or because the child's parents are deceased or disabled.[92] The agencies then apply for benefits on the child's behalf and seek to become the children's representative payee in order to manage the benefits and reimburse the state for the cost of the youth's care.[93] Thus, only children who are impoverished and who receive Social Security benefits end up paying for their own foster care.[94]

An investigation in 2021 by NPR and the Marshall Project found evidence of this practice of foster youth benefits recovery in forty-nine states (Montana

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87. *Id.*

88. *Child Support Pass-Through and Disregard Policies for Public Assistance Recipients,* NAT'L CONF. OF STATE LEGS. (May 30, 2023), https://www.ncsl.org/human-services/child-support-pass-through-and-disregard-policies-for-public-assistance-recipients [https://perma.cc/8AS7-JREK].

89. *See generally* Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325 (2005).

90. *Id.* at 356.

91. Eli Hager & Joseph Shapiro, *State Foster Care Agencies Take Millions of Dollars Owed to Children in Their Care,* NPR (Apr. 22, 2021), https://www.npr.org/2021/04/22/988806806/state-foster-care-agencies-take-millions-of-dollars-owed-to-children-in-their-ca [https://perma.cc/4L9Z-R42T].

92. Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797, 1799 (2006).

93. *Id.*

94. *Id.* at 1798 ("Children can be eligible for two types of Social Security benefits: Old-Age, Survivors, and Disability Insurance (OASDI) under Title II of the Social Security Act and Supplemental Security Income (SSI) under Title XVI").

did not respond to the Marshall Project's information request).[95] The report found that in 2019, Wisconsin took $4.13 million in Social Security Income (SSI) disability benefits from foster children through a for-profit government contractor named MAXIMUS. Wisconsin and other states pay MAXIMUS to manage and administer their government programs.[96] Wisconsin has a long history with MAXIMUS; it was one of the first states to contract with MAXIMUS to run welfare-to-work programs in the 1990s when MAXIMUS was criticized for spending taxpayer money intended for benefits on marketing materials and workfare programs. [97]

NPR and the Marshall Project's report led to calls for reform and pushed some states and localities to move away from this practice.[98] If children were to get these benefits, it could help them transition out of foster care or provide for their current needs.[99] The U.S. Department of Health and Human Services and the Social Security Administration released a letter encouraging states to preserve the money of foster children.[100] Additionally, a state superior court in Alaska ruled that the state should notify foster children before applying to receive their benefits.[101]

But this practice continues, in red and blue states alike. California Governor Gavin Newsom vetoed a bill in 2023 that would have eliminated the practice in California.[102] In his veto letter, Newsom wrote, "[i]f counties are not permitted

95. Michelle Pitcher, Weihua Li & David Eads, *These States Take Money Meant for Foster Care*, THE MARSHALL PROJECT (May 17, 2021), https://www.themarshallproject.org/2021/05/17/these-states-take-money-meant-for-foster-children [https://perma.cc/8WUB-2KRX].

96. *Id.*

97. ADMINISTRATION OF THE WISCONSIN WORKS PROGRAM BY MAXIMUS, INC, MAXIMUS, https://legis.wisconsin.gov/lab/media/npypj5hh/maximus.pdf [https://perma.cc/CG49-JB43] (last visited Mar. 15, 2025); Ellen Reese, Vincent R. Giedraitis & Eric Vega Source, *Welfare Is Not for Sale: Campaigns Against Welfare Profiteers*, 33 SOC. JUST., 38, 38-39 (2006).

98. Joseph Shapiro, *These Kids Used to Get the Bill for Their Own Foster Care. Now That's Changing*, NPR (Sep. 12, 2023), https://www.npr.org/2023/09/12/1197610205/foster-care-social-security-benefits; *see also* L.B. 1173, 107th Leg., 2d Sess., (Neb. 2022), www.nebraskalegislature.gov/FloorDocs/107/PDF/Slip/LB1173.pdf [https://perma.cc/H48C-REFD]; S.B. 3470, 102nd Sess., (Ill. 2022), https://trackbill.com/bill/illinois-senate-bill-3470-dcfs-youth-ssi-vets-benefits/2198451/ [https://perma.cc/NPD6-8D8K].

99. Hatcher, *supra* note 93, at 1801—02.

100. *Letter Regarding Reminders to State and Tribal Title IV-E agencies about the Social Security Representative Payee Program and the Title IVE Federal Foster Care Program,* CHILD.'S BUREAU (Aug. 17, 2023), https://www.acf.hhs.gov/cb/policy-guidance/reminders-social-security-representative-payee-program [https://perma.cc/6GMG-8RDN].

101. Martin Macias, Jr., *Judge Curbs Alaska's Practice of Claiming Foster Youth's Federal Benefits*, THE IMPRINT (December 28, 2021), https://imprintnews.org/top-stories/judge-curbs-alaskas-practice-of-claiming-foster-youths-federal-benefits/61491 [https://perma.cc/9KUG-7Q53].

102. Jeanne Kuang, *Newsom's Veto Lets California Counties Continue Taking Foster Kids' Money*, CALMATTERS (Oct. 9, 2023), https://calmatters.org/california-divide/2023/10/california-foster-kids-money/ [https://perma.cc/85JW-FPU5]; *See also* Assem. B. 1512, Reg. Sess. (Cal. 2023), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB1512#95 ENR [https://perma.cc/XJP7-69RE].

to use SSI to cover the cost of providing care to foster youth, the General Fund will need to offset those costs."[103] Going on to cite the state's $30 billion budget shortfall, he stated that "[w]ith our state facing continuing economic risk and revenue uncertainty, it is important to remain disciplined when considering bills with significant fiscal implications, such as this measure."[104] The state recovery of benefits from foster children represents another insidious example of the state, time and again, placing the fiscal interest of the government ahead of the best interests of the child.

II. BIRTH COST RECOVERY: HOW AND WHO

BCR is then just one form of a state program that "recovers" benefits for states in the name of children. BCR operates across a complex web of government actors and policy systems; not only does it sit at the intersection of federal and state law, but it is enforced and implemented by local government, child support officers, and the courts while also interacting with the healthcare system. Federal statutes enable states to recover Medicaid-paid for birth costs, states require that mothers name the father to receive Medicaid supports, courts set the amount the fathers owe for the cost of the birth, and Child Support Agencies (CSAs) attempt to enforce and collect from the fathers by tying the cost of the birth to child support orders.

A. Birth Cost Recovery at The Federal Level

Medicaid covers the costs of the birth of a child whose mother's income is below 133% of the federal poverty level or at state option up to 185% of the federal poverty level.[105] Medicaid-paid birth costs are an entitlement to the mother, which means there is a right to this economic benefit granted by law; therefore neither federal nor state law allows recovery of the birth costs from the mother.[106] But in some states, like Wisconsin, paternity judgments and child support orders can require the repayment of Medicaid paid for birth costs from the father if the parents are not married.[107]

The Social Security Act has created a federal system to collect child support payments from non-custodial parents.[108] The system requires states to locate unmarried parents, determine paternity for non-marital children, and establish orders to collect financial support.[109] In 2021, the federal government kept an

103. *Id.*

104. *Id.*

105. CONG. RSCH. SERV., R43020, MEDICAL CHILD SUPPORT: BACKGROUND AND CURRENT POLICY 14 (2013), https://www.everycrsreport.com/reports/R43020.html [https://perma.cc/Z93G-BYPQ].

106. *Id.*

107. *Id.*

108. 42 U.S.C. § 654b.

109. *Id.*

estimated $1.38 billion in child support.[110] Under 42 U.S.C. § 1396a(25)(H), the system also allows, but does not require, states to recover Medicaid-related pregnancy and birth costs from unmarried fathers after the birth of a child.[111] The majority of states do not pursue birth costs from unmarried parents.[112] In fact, in 1993 the Office of Child Support Services released an Action Transmittal (AT) providing guidance to states, territories, and tribes on the use of child support guidelines for collection of unreimbursed assistance.[113] The AT makes clear that state debt laws—or laws where states that provide aid to a family constitute a debt for which the noncustodial parent is liable—exist independently of the IV-D program, and thus that State's use of IV-D funds to recover those debts is discouraged.[114]

According to ABC for Health, a Wisconsin-based health legal aid organization and research institution, only Kansas, Michigan, and Wisconsin currently collect BCR; Idaho and Minnesota have recently stopped collecting.[115] In fact, an Idaho District Court held that Idaho's BCR Program violated the Equal Protection Clause of the State and Federal Constitutions because the program discriminated against men.[116] Minnesota discontinued BCR over concerns that the policy negatively affects children.[117]

Wisconsin, Kansas, and Michigan interpret the third-party liability provision of federal Medicaid law to impose direct liability on unmarried fathers for the cost of pregnancy and childbirth originally paid for by the state's Medicaid program.[118] The federal law allows county Child Support Agencies (CSA) to take fifteen percent of the amounts collected, and the remaining eighty-five percent goes to the state and federal governments as reimbursement for Medicaid expenses.[119] This policy design, where CSAs act as the prosecutor and enforcer for BCR while also collecting money from BCR payments, dangerously incentivizes continued collection and promotes local government reliance on BCR to fund their CSAs.[120]

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110. *Preliminary Report FY 2021*, OFF. OF CHILD SUPPORT ENF'T., PRELIMINARY REPORT (2021), https://www.acf.hhs.gov/sites/default/files/documents/ocse/fy_2021_preliminary_report.pdf [https://perma.cc/U2QW-8X7N].

111. 42 U.S.C. § 1396a(25)(H).

112. *What is the Birth Tax?*, HEALTH WATCH WIS. (Aug. 10, 2024), https://www.safetyweb.org/healthwatchwi/birth-tax.html [https://perma.cc/9PEP-CJXG].

113. *Use of Presumptive Child Support Guidelines to Establish and Collect Support*, OFF. OF CHILD SUPPORT SERVS. (Nov. 17, 2021), https://www.acf.hhs.gov/css/policy-guidance/use-presumptive-child-support-guidelines-establish-and-collect-support [https://perma.cc/TA6B-MMF2].

114. *Id.*

115. *Birth Tax in Other States*, HEALTH WATCH WIS. (Aug. 10, 2024), www.safetyweb.org/healthwatchwi/birth-tax.html [https://perma.cc/5M5D-LYMD].

116. Idaho Dep't of Health & Welfare v. Cua Barrios, No. CV-2014-7359, (Kootenai Cty. Dist. Ct. March 7, 2016); *See also* McBride et al., *supra* note 5.

117. Lavigne, *supra* note 5.

118. 42 U.S.C. § 1396a(25)(H).

119. 42 C.F.R. § 433.153 (2025).

120. Peterson et al., *supra* note 2.

B. Wisconsin and Birth Cost Recovery at the State Level

In Wisconsin, when a mother applies for Medicaid, also known as BadgerCare Plus, coverage to assist in paying for the birth of her child, the state becomes an interested party and will ask the mother to declare the father of the child. According to Wis. Stat. § 767.205(2), the state becomes a "real party in interest" to a paternity action if a parent has requested or received certain types of benefits, including Medicaid (BadgerCare) or foster care.[121] The Wisconsin Department of Health Services (DHS) asks Medicaid agencies to refer cases to child support agencies once they receive an application for Medicaid, BadgerCare, or BadgerCare Plus for unmarried mothers, and married mothers not living with their husbands.[122] Once paternity is established, the county can then pursue the father for child support and birth cost recovery.[123] As noted, the county child support agency does have an incentive to choose to enforce collection of BCR, as it will be able to retain fifteen percent of those funds.

Under Wis. Stat. § 767.804(3)(d)(1), every paternity judgment must include an order establishing the amount of the father's obligation to pay or contribute to the reasonable expenses of the mother's pregnancy and the child's birth.[124] Wisconsin's Department of Children and Family Services' policy provides multiple ways to determine the amount the state will seek from unmarried fathers in the birth cost judgment.[125] The state courts in local counties have discretion to set the judgment amount at zero.[126] Wis. Stat. § 767.89(3)(e) provides that the birth cost judgment can only be "one-half of the total actual and reasonable pregnancy and birth expenses."[127] In *Madison Gen. Hosp. v. Haack,* the Supreme Court of Wisconsin underscored the notions of government-enforced "family responsibility" inherent in these BCR statutes: "public policy underlying these paternity statutes is that the father of the infant should bear responsibility for expenses incurred as a result of a pregnancy in which he participated."[128]

Despite BCR being a little-known policy, historically, the amount collected is not small—Wisconsin collected $106 million in BCR funds from 2011 to 2015, and over $16 million in 2016.[129] According to research conducted by Tiffany Green of the University of Wisconsin's Institute for Research on Poverty, prior to 2020, the average amount courts would charge unmarried

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121. WIS. STAT. § 767.205(2) (2023).

122. *BadgerCare Plus Handbook § 5.1.2*, WIS. DEP'T OF HEALTH SERVS. (Feb. 10, 2025), https://www.emhandbooks.wisconsin.gov/bcplus/bcplus.htm#t=policyfiles%2F2%2F05%2F5.1.htm [https://perma.cc/JE7X-782M]; *Medicaid Eligibility Handbook § 8.1.3*, WIS. DEP'T OF HEALTH SERVS. (Feb 10, 2025), https://www.emhandbooks.wisconsin.gov/meh-ebd/policy_files/8/8.1.htm [https://perma.cc/W7JP-GAXR].

123. *BadgerCare Plus Handbook § 5.1.2*, *supra* note 123; *Medicaid Plus Handbook § 8.1.3*, *supra* note 123.

124. WIS. STAT. § 767.804(3)(d)(1) (2023).

125. WIS. ADMIN. CODE § DCF 150.05(2)(b) (2024).

126. Lavigne, *supra* note 5.

127. WIS. STAT. § 767.89(3)(e) (2023).

128. Madison Gen. Hosp. v. Haack, 124 Wis. 2d 398, 411, 369 N.W.2d 663 (1985).

129. Peterson et al., *supra* note 2.

fathers for BCR was about $2,400 in Dane County and about $1,700 in other counties.[130]

C. Who: BCR's Effects on Fathers, Mothers, and Ultimately Families and Children

Although BCR is a gendered policy targeted at unmarried fathers, it also affects mothers and children as recent policy changes across the state have made clear. BCR creates dangerous incentives for mothers not to enroll in Medicaid, potentially threatening her and her child's lives in losing out on vital prenatal and postpartum care. BCR also necessarily ensures that fathers, at the most vulnerable time in their child's life, have less money to support their child.

A potentially life-threatening consequence of BCR is that it may cause some mothers to choose not to enroll in Medicaid, thereby losing access to important prenatal and postnatal care altogether.[131] Unmarried mothers may choose not to enroll in Medicaid when faced with naming the baby's father, due to concerns of domestic violence. Although, there is a good cause exception for some instances of domestic violence. The good cause exception allows the mother applying for BadgerCare Plus to be exempt from identifying the baby's father in situations where:

> Cooperation could result in physical and/or emotional harm to the mother or child; cooperation would make it more difficult to escape domestic abuse or risk of abuse; the child was born as a result of sexual assault or incest; a petition for adoption of the child is filed or someone is working with an agency that is helping the mother decide if she will place her child for adoption.[132]

Yet, these good cause exceptions often go unused or unapproved, often due to lack of knowledge of the good cause exception, or continued fear of the additional paperwork and information that must be shared to get that good cause exception. According to ABC for Health, between 2011 and 2015, an annual average of five hundred and twelve good cause exceptions requests were filed by unmarried mothers, and an average of only 28% were granted each year.[133] This low request and acceptance rate may be because the Child Support Agency, who grants the exception, can request corroborating documentation from the mother; like statements from health care providers about emotional or physical health, or

130. Tiffany Green, *Tiffany Green on How Charging Dads for The Medicaid Costs of Their Baby's Birth Affects Child Support*, UNIV. OF WIS.-MADISON INST. FOR RSCH. ON POVERTY (Nov. 8, 2023), https://www.irp.wisc.edu/resource/tiffany-green-on-how-charging-dads-for-the-medicaid-costs-of-their-babys-birth-affects-child-support/ [https://perma.cc/5DWP-LRA3].

131. Lavigne, *supra* note 5.

132. *Child Support Cooperation & Good Cause*, WIS. DEP'T OF CHILD & FAM. SERVS., https://dcf.wisconsin.gov/files/publications/pdf/5600.pdf [https://perma.cc/XTZ7-H79D] (last visited Feb. 18, 2025).

133. Peterson, *supra* note 2.

law enforcement records about domestic violence.[134] The difficulty of obtaining these documents, both practically and emotionally, can act as a major barrier for the mother to ever apply for or be granted a good cause exception. If the birthing parent does not want to declare paternity and does not have an approved good cause exception, Wisconsin can kick them off BadgerCare once they are finished with the six-week prenatal period of BadgerCare—a process aptly named sanctioning.[135]

If BCR acts as a deterrent to Medicaid enrollment, it may be contributing to worse prenatal care and birth outcomes. Wisconsin already has one of the highest mortality rates for Black infants in the US, at 13.2 deaths per 1,000 live births, it is triple the white infant mortality rate at 4.4 deaths per 1,000 births.[136] In 2019, Wisconsin ranked 4th worst in the nation for infant mortality for Black children.[137] In order to address this disproportionately high Black infant mortality rate in Wisconsin, the Department of Health and Human Services has called for better access to prenatal and postpartum care.[138]

Additionally, research by Dr. Megan Pesko found that the consequences of BCR may increase chronic stress and contribute to delayed entry into prenatal care—which in turn may contribute to infant mortality.[139] According to ABC for Health, about half of Wisconsin's annual births are covered by Medicaid, with 66% of those deliveries occurring among unmarried people. And among Black Medicaid covered deliveries 88% of Black mothers were unmarried and thus subject to BCR at a much higher rate.[140] Taking the disproportionately high Black infant mortality rate into account with disproportionately high rate that Black mothers are subject to BCR and its stressors, some doctors have suggested that eliminating BCR should be part of a much larger effort to reduce racial disparities in infant mortality in Wisconsin.[141]

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134. *Id.*

135. Green, *supra* note 131.

136. Jane Houseal & Drake White-Bergey, *Wisconsin's Black Infants Have Some of the Country's Highest Mortality Rates: These Solutions Could Help*, WIS. WATCH (Sept. 8, 2023), https://wisconsinwatch.org/2023/09/wisconsin-black-infants-high-mortality-rates/ [https://perma.cc/43NK-DWW5].

137. Colin Gordon, *Race in the Heartland: Wisconsin's Extreme Racial Disparity,* COWS (Oct. 2019), https://highroad.wisc.edu/wp-content/uploads/sites/1368/2020/04/2019-Race-in-the-Heartland-Wisconsins-Extreme-Racial-Disparity.pdf [https://perma.cc/6LT2-43XF].

138. *Id.*

139. Meghan Pesko, Wisconsin's Birth Cost Recovery Policy: Implications for Health Disparities in Infant Mortality (May 17, 2012) (unpublished manuscript).

140. *Id.*; McBride et al., *Merchants of Debt: Wisconsin Counties & The Birth Tax,* ABC FOR HEALTH (2022), https://www.safetyweb.org/pdfs/Merchants_of_Debt.pdf**.** [https://perma.cc/KL8M-RREC].

141. Rachel Azanleko-Akouete, The Impact of Stress, Racism & Poverty on Black Infant Mortality in Wisconsin (May 5, 2019) (MPH Thesis, University of Wisconsin – Madison).

In January 2020, Dane County stopped collecting BCR, while other Wisconsin counties continued to do so.[142] This policy change provided what some researchers have called a "natural experiment" to show the effects of BCR on mothers and fathers.[143] The University of Wisconsin's Institute for Research on Poverty found that fathers were more likely to pay child support to the birthing parent (who will get 75% of that money due to Wisconsin's pass through law) after Dane County stopped collecting BCR, and that those child support payments significantly increased after the cessation.[144] The study also found that the greatest increase in child support compliance was among Black fathers.[145] This means that the cessation of BCR increased the probability that the birth parent would receive money for the child.[146] Once unmarried fathers do not have to pay funds to the county, their money could instead be directed to their child.[147]

Importantly, although Dane County has stopped filing new BCR actions, the county continued to pursue judgments from 2019 and prior, up until November 2023.[148] In November 2023, the Dane County 2024 budget included language stating that the county will ask the state to "release all birth cost recovery judgments entered in Dane County Circuit Court."[149]

In the same month, the Milwaukee County 2024 budget included language that it will discontinue seeking BCR payments.[150] Accompanying the budget, Milwaukee County Executive, David Crowley, and Supervisor, Caroline Gómez-Tom, released a statement underscoring the racial disparities and health inequities that BCR perpetuates:

> There are glaring racial disparities in the Birth Cost Recovery system. To achieve race and health equity and become the

142. Off. of the Cnty. Exec., 2020 Budget: New Decade, Continued Commitment to Our People and Places (2020) https://exec.countyofdane.com/documents/pdf/2020-Budget-Memo.pdf [https://perma.cc/LGD9-8LZZ]. "With this budget I am ending the controversial practice known as 'birth cost recovery collections.' Currently, the federal government permits child support agencies to re-coup costs for Medicaid funded births. These dollars are collected after child support payments are made and counties retain a portion of the proceeds for the administration of this collection. We can forgo this revenue and give these parents one less expense while many of them struggle to make ends meet. The racial disparities in Birth Cost Recovery are stark, with these parents being asked to reimburse the federal government hundreds of dollars each year for many years in some cases."

143. Tiffany Green, et al., *Effects of Medicaid Birth Cost Recovery Policy Changes on Child Support Outcomes 2020–2022, Child Support Policy Research Agreement: Task 8,* INST. FOR RSCH ON POVERTY UNIV. OF WIS.– MADISON, 3 (2023).

144. *Id.*

145. *Id.*

146. *Id.*

147. *See id.*

148. DANE COUNTY, 2024 ADOPTED BUDGET 590 (2024), https://admin.danecounty.gov/documents/pdf/Budget/2024/Adopted-Budget-Report.pdf [https://perma.cc/J74G-KX88].

149. *Id*.

150. Gov't Fin. Officers Ass'n, *Milwaukee Cnty. 2024 Adopted Operating Budget*, 341 (Jan. 1, 2024). "The department of Child Support Enforcement will no longer pursue Birth Costs Recovery (BCR) efforts. This policy change results in a $200,000 reduction in revenue."

> healthiest county in the state, it's critical Milwaukee County discontinues this practice. . .From the day a child is born, we want to give families every opportunity to thrive. BCR creates a financial and emotional burden, especially on families of color. . . .

In August of 2024, Milwaukee County, stood by this declaration that BCR is discriminatory and announced that it would eliminate $67 million in birth costs owed to the State of Wisconsin releasing more than 32,0000 fathers of their debt.[151] As previously proposed in Governor Evers' 2019 Budget, Wisconsin should eliminate its practice of BCR statewide and release all past judgments, especially as Brown, Racine, Kenosha, Eau Claire, and Outagamie Counties continue to collect BCR.[152] According to ABC for Health, behind Milwaukee and Dane County, Racine and Kenosha have the largest concentration of BCR judgements and are also the next most racially diverse counties.[153] As of 2022, Racine, Kenosha, Brown, Eau Claire, and Outagamie Counties together have over $12 million in outstanding BCR judgments.[154] The current momentum to eliminate BCR and the corresponding piecemeal approach of different counties across Wisconsin provides a new moment for policymakers to take a hard look at the history and harms of paternalistic welfare recovery policies at the federal, state, and local level.

CONCLUSION—ELIMINATING BCR AND SUPPORTING THE BEST INTERESTS OF THE CHILD IN WISCONSIN AND NATIONWIDE

The practice of BCR stands on the shoulders of racist and gendered social welfare policies of the past to covertly police and penalize families who apply for Medicaid. The supposed need to police and penalize welfare recipients is rooted in deep stereotyped notions of welfare recipients as "Welfare Queens" and "Deadbeat Dads" intent on defrauding the government for social assistance funding. But it is now clear that welfare fraud is committed by the government, who pursues and collects funds for itself rather than children. BCR should be eliminated throughout the United States and all of Wisconsin because it disproportionately places financial and medical burdens on low-income families of color, discriminates against unmarried fathers and mothers, and works against the best interests of the child.

Proponents of BCR argue that promoting "paternal responsibility" is in the best interests of the child.[155] Yet, child poverty is inexorably linked to family and

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151. *County Executive David Crowley Announces $67 Million Eliminated in Birth Costs to Support Fathers* (Aug. 7, 2024), https://county.milwaukee.gov/EN/County-Executive/News/Press-Releases/County-Executive-David-Crowley-Announces-67-Million-Eliminated-in-Birth-Costs-to-Support-Fathers [https://perma.cc/9KR5-JNRY].

152. S.B. 59, 107th Leg. (Wis. 2019).

153. McBride et al., *supra* note 141.

154. *Id.*

155. Green et al., *supra* note 144; *see also* Marguerite Roulet & Michael Rust, *Report on Wisconsin's Medicaid-Supported Birth Cost Recovery Policy*, CTR. ON FATHERS, FAMILIES, & PUB. POL'Y (2004), https://shorturl.at/a4aev [https://perma.cc/L3W7-NMBH].

parent poverty. Research has shown that fathers will be more likely to pay child support, which in Wisconsin partially goes to the mother and child, if they are not subject to BCR.[156] BCR does not support the best interests of the child. Rather, it punishes low-income, unmarried parents with a welfare cost recovery measure, hitting parents' wallets when they are most vulnerable—at the start of their child's life.

Proponents of BCR also argue that it supports the fiscal interest of the state as the funds recovered from BCR support the sustainability of state Medicaid and other welfare programs.[157] Even if our policy makers were to make the morally fraught choice to weigh the fiscal interest of the state ahead of the best interests of the child, there is still research to show that welfare cost recovery policies ultimately only provide the state with fiscal sustainability in the short-term to the detriment of long-term fiscal sustainability. The highest rate of poverty occurs for children under age five in single-mother families: exactly the families who are being targeted by BCR measures.[158] Experiencing poverty in early childhood, during key times of brain development, has the most potential for negative long-term effects on health, education, and employment—ultimately costing society trillions in lost economic productivity and increased healthcare expenditures.[159] An early investment in parents and their children, rather than cost recovery measures, will ultimately support both the best interests of the child and lower long-term costs by improving health outcomes and reducing unemployment later down the line.

Instead of penalizing low-income unmarried parents and their children, our social policy should support the best interests of that child by expanding and extending programs like the Child Tax Credit (CTC) and postpartum Medicaid care. The CTC is a tax break one can take for qualifying children.[160] An expanded CTC is a policy solution that is proven to support the best interests of the child by greatly lowering child poverty. During the COVID-19 pandemic, the American Rescue Plan (ARP) created a one-year expansion of the CTC—raising its value from $2,000 to $3,000 for children below the age of six and $3,000 for children over six—and made the credit fully refundable, meaning that parents who owe little or no federal income tax, and consequently the lowest to no

156. Green, *supra* note 144.

157. *Id.*

158. *Child Poverty in America More Than Doubled in 2022*, THE ANNIE E. CASEY FOUND., (September 29, 2023), https://irp.cdn-website.com/fa7dc96b/files/uploaded/Child%20Proverty%20in%20America%20more%20that%20doubled%20in%202022.pdf [https://perma.cc/EPK7-B3S5].

159. Michael McLaughlin & Mark Rank, *Estimating the Economic Cost of Childhood Poverty in the United States*, 42 SOC. WORK RSCH. 2, 73 (June 2018); Neil Damron, *Brain Drain: A Child's Brain on Poverty*, UNIV. OF WISC. INST. FOR RSCH. ON POVERTY (2015), https://www.irp.wisc.edu/resource/brain-drain-a-childs-brain-on-poverty/ [https://perma.cc/62YL-N8TR].

160. *Child Tax Credit*, IRS (last visited Mar. 13, 2024), https://www.irs.gov/credits-deductions/individuals/child-tax-credit [https://perma.cc/9SMW-BWXZ].

income parents, could receive the full tax credit.[161] Before the pandemic-era expanded CTC expired, it cut child poverty in half, to a historic low of 5.2% in 2021.[162] Because Congress failed to renew the CTC expansion, child poverty rates doubled back up to 12.4% in 2022.[163]

A report by the Center on Budget and Policy Priorities found that if Congress had kept the expanded CTC, an additional 3 million children would have been kept out of poverty.[164] In 2019, Wisconsin ranked 4th worst in the nation for poverty for Black children.[165] Now, according to the Center on Budget, nationally, about 19 million children live in families whose incomes are too low to qualify for the full credit, including "nearly half (46 percent) of Black children, 1 in 3 Latino and American Indian and Alaska Native children, about 1 in 6 white and 1 in 7 Asian children, and 1 in 3 children in rural counties."[166] The pandemic-era expanded CTC not only cut the rate of child poverty in half, but it was also linked to lower involvement in the Child Welfare system, lower rates of hunger and housing hardship, and lower rates of anxiety and depression in low-income adults with children.[167] Rather than forcing low-income mothers to make the stressful choice of whether or not to name the father of their child and endure financial or medical hardship, the expanded CTC provides parents with the flexibility to make the choices that are in the best interests of their child. In fact, researchers found that during the expanded CTC era, families made the choice to do just that by spending their extra money on food, housing, and child-related goods and services.[168]

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161. The Child Tax Credit, THE WHITE HOUSE, (Nov. 20, 2023), https://bidenwhitehouse.archives.gov/cea/written-materials/2023/11/20/the-anti-poverty-and-income-boosting-impacts-of-the-enhanced-ctc/ [https://perma.cc/VNZ7-4XQK].

162. *Id.*

163. *Id.* Note these poverty rates are using Supplemental Poverty Measures, not Official Poverty measurements.

164. Sharon Parrott, *Record Rise in Poverty Highlights Importance of Child Tax Credit; Health Coverage Marks a High Point Before Pandemic Safeguards Ended***,** CTR. ON BUDGET AND POL'Y PRIORITIES (Sep. 12, 2023), https://tinyurl.com/5cp7efc7 [https://perma.cc/8PQZ-UBLR].

165. Colin Gordon, *Race in the Heartland: Wisconsin's Extreme Racial Disparity,* COWS (Oct. 2019), https://highroad.wisc.edu/wp-content/uploads/sites/1368/2020/04/2019-Race-in-the-Heartland-Wisconsins-Extreme-Racial-Disparity.pdf [https://perma.cc/8YSQ-K8ZN].

166. Parrott, *supra* note 165.

167. Pac et al., *The Effects of Child Poverty Reductions on Child Protective Services Involvement,* 97 SOC. SERV.'S REV. 43, 50 (2023); Parolin et al., *The Differential Effects of Monthly and Lump-Sum Child Tax Credit Payments on Food and Housing Hardship*, 113 AEA PAPERS & PROC. 406, 406 (2023); Karpman et al. *Who Has Received Advance Child Tax Credit Payments, and How Were the Payments Used?* TAX POL'Y CTR. URB. INST. (2021); Cha et al., *Impact of the expanded child tax credit and its expiration on adult psychological well-being*, SOC. SCI. & MED. (2023); *see* Claire Cain Miller, *Spending on Children Surged During the Pandemic. It Didn't Last*, N.Y. TIMES, (OCT. 1, 2022), https://www.nytimes.com/2022/10/01/upshot/children-pandemic-spending.html [https://perma.cc/WCR9-4GDQ].

168. Schild et al., *Effects of the Expanded Child Tax Credit on Household Spending: Estimated Based on U.S. Consumer Expenditure Survey Data,* (Nat'l Bureau of Econ. Rsch., Working Paper No. 31412, 2023).

After the expanded CTC expired and the proof of its former success mounted, many states created their own permanent and fully refundable CTC. Wisconsin most recently became one of those states, with Governor Evers signing into law an expanded tax credit.[169] Currently, Congress is debating whether to expand the CTC.[170] In order to support the best interests of the child, the U.S. government at the federal level should address family poverty head on and expand the CTC.

In Wisconsin, pregnant women with family incomes up to 300% of the federal poverty level qualify for extended Medicaid benefits for only sixty days postpartum or after they give birth.[171] Not only is Black infant mortality disproportionately high in Wisconsin, but so is Black maternal mortality—the rate of maternal mortality is about five times higher for Black women than white women in Wisconsin.[172] A recently proposed bill at the Wisconsin State Assembly, SB 110, would have extended Medicaid coverage for mothers to a year postpartum, a critical time for maternal healthcare, but failed to pass both houses and will not become law.[173] In order to support the best interests of the child, Wisconsin should join the other forty-two states that have implemented extensions of Medicaid benefits for postpartum women from sixty days to twelve months after they give birth.[174]

As shown, much of the United States' child welfare and social welfare system has been built upon stigmatizing and often gendered policies or standards. The child welfare system began with the paternal preference standard which evolved into today's best interests of the child standard. The social welfare system began with mothers' pension laws and evolved into today's TANF program, giving courts and states the discretion to punish and surveil poor parents, particularly poor parents of color, often in the name of "family responsibility" and supporting "the best interests of the child."[175] Cost recovery

169. Sarah Lehr, *Evers signs bill to expand Wisconsin's child care tax credit*, WIS. PUB. RADIO, Mar.4, 2024**.** States with fully refundable Child Tax Credits in 2024 include California, Colorado, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, and Vermont. Idaho, Oklahoma, and Utah offer nonrefundable credits.

170. Tobias Burn, *Tax deal could get new life under top-line spending agreement,* THE HILL, Jan. 11, 2024, https://thehill.com/business/4400880-tax-deal-could-get-new-life-under-top-line-spending-agreement/ [https://perma.cc/938A-K2VZ].

171. Baylor Speark, *Unanimous support on Senate committee for a year of postpartum health coverage,* WIS. EXAM'R, Mar. 30, 2023, https://wisconsinexaminer.com/2023/03/30/unanimous-support-on-senate-committee-for-a-year-of-postpartum-health-coverage/ [https://perma.cc/45YR-7Q6U].

172. Wisconsin Department of Health Services, Maternal Mortality and Morbidity. https://dhs.wisconsin.gov/mch/maternal-mortality-and-morbidity.htm [https://perma.cc/DJP6-99AB].

173. 2023-2024 Wisconsin Legislature Senate Bill 110 https://docs.legis.wisconsin.gov/2023/proposals/sb110.

174. Medicaid Postpartum Coverage Extension Tracker, KKF (Mar. 8, 2024), https://www.kff.org/about-us/.

175. Ife Floyd, LaDonna Pavetti, Laura Meyer, Ali Safawi, Liz Schott, Evelyn Bellew, Abigail Magnus, *TANF Policies Reflect Racist Legacy of Cash Assistance Reimagined Program Should Center Black Mother*s, CENTER ON BUDGET AND POL'Y PRIORITIES (Aug. 4,

measures further impoverish children as they recover money from families in order to advance government fiscal interests, to the detriment of the child.[176] Rather than facing low-income mothers, and disproportionately low-income mothers of color, with the stressful choice of whether or not to name the father of their child and endure financial or medical hardship through Birth Cost Recovery, our social policy should aid and entrust mothers to make the choices that best support their child, so that ultimately their child can be safe, happy, and healthy.

2021), https://www.cbpp.org/sites/default/files/8-4-21tanf.pdf [https://perma.cc/2X3Q-PHXC].

176. Kyle Ross, *Learning from the United States' Painful History of Child Support,* CENTER FOR AMERICAN PROGRESS (2022) https://www.americanprogress.org/article/learning-from-the-united-states-painful-history-of-child-support/ [https://perma.cc/J8PD-92HV].