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## Dismantling the Discrimination-to-Incarceration Pipeline for Trans People of Color

Chinyere Ezie

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ARTICLE

**DISMANTLING THE DISCRIMINATION-TO-  
INCARCERATION PIPELINE FOR TRANS  
PEOPLE OF COLOR**

CHINYERE EZIE\*

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\* Legal Scholar and Senior Attorney at the Center for Constitutional Rights. J.D., Columbia Law School 2010; B.A., Sociology and International Relations, Yale University 2006. Since coining the phrase “discrimination-to-incarceration pipeline” in 2015, I have benefited from tremendous collaborations with others committed to dismantling it. Special thanks go to my current and former clients, including Ashley Diamond and Mariah Lopez, who have served as my co-conspirators in this work. I also want to acknowledge Richard Saenz, Amy Whelan, Chase Strangio, Leah Todd, the Transgender Law Center, National Trans Bar Association, and Sylvia Rivera Law Project, among so many others, for their thought leadership in the fight for trans liberation. I also want to thank Kelechi Ezie, Nicole Humphrey, and Scott Loren Moore for their careful read and for always encouraging me to write.

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INTRODUCTION

Growing up as a Black trans<sup>1</sup> woman in the rural town of Rome, Georgia, Ashley Diamond was kicked out of the house by her father, harassed until she dropped out of school, and shunned by employers—including a retailer who accused her of fraud after learning that the gender marker on

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1. This Article opts to use the word “trans” throughout to refer to individuals who identify as transgender, two spirit, gender non-conforming, non-binary, and gender fluid, among others, in recognition of the community’s expansiveness and the fact that nomenclature continues to evolve. See Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. REV. 51, 56–59 (2013) (explaining the expansiveness of the community and the importance of language choice among cisgender legal scholars). Common among trans people is having a gender identity that differs from one’s sex as assigned at birth. The term “cisgender,” in contrast, refers to people whose gender identity and sex assigned at birth are aligned.

her driver's license said "M" not "F."<sup>2</sup> After a lifetime of being excluded from opportunities in ways that left her struggling to survive, Ashley Diamond was convicted of burglary and sentenced to twelve years in prison.<sup>3</sup> Her crime? Pawning a used, allegedly stolen, saw.<sup>4</sup>

The "discrimination-to-incarceration pipeline" is a phrase that I coined as a young lawyer with a sociology degree after reflecting upon experiences like Ashley Diamond's and contextualizing them in the larger body of legal work.<sup>5</sup> As a legal advocate working at the intersection of LGBTQ+ rights and racial justice, time and again I was encountering similar narratives and themes: narratives about how discrimination and societal exclusion thrust trans people of color into poverty and homelessness before funneling them into the system of mass incarceration for "crimes" of survival.

The root causes of the pipeline and the discrimination that propels it are societal contempt for trans people and the ways they unsettle the gender binary to which adherence is strictly demanded, despite its ahistoricism and the ways that sex, like race, can be viewed as a social construct.<sup>6</sup> The consequences of the discrimination-to-incarceration pipeline are also deadly serious, with the burdens falling most heavily on trans women of color.<sup>7</sup> Take, for instance, Miss Major Griffin-Gracey, the Stonewall Veteran who helped pioneer the modern LGBTQ+ rights movement in the United States.<sup>8</sup> As a Black trans woman in her eighties, Miss Major has experienced every facet of the pipeline: she has been called vile, disgusting, and an abomination by employers who proceeded to deny her job opportunities; she has been poor, homeless, and engaged in sex work to survive; and she

2. Deborah Sontag, *Transgender Woman Cites Attacks and Abuse in Men's Prison*, N.Y. TIMES (Apr. 5, 2015), <https://www.nytimes.com/2015/04/06/us/ashley-diamond-transgender-inmate-cites-attacks-and-abuse-in-mens-prison.html>; other stories on file with author.

3. *Id.*; see also James Factora, *For Years, Ashley Diamond Advocated from Inside a Men's Prison. She's Finally Free*, THEM (Aug. 15, 2022), <https://www.them.us/story/ashley-diamond-trans-prisoner-released-parole-advocacy>.

4. Factora, *supra* note 3.

5. Sontag, *supra* note 2 (describing, in an interview, how Ashley Diamond's experiences "dramatized the 'discrimination-to-incarceration pipeline'").

6. See, e.g., James Casey Edwards, *Justifying the Margins: Granting Suspect Classification to Trans\* Individuals in the U.S. Judicial System*, 55 U. ILL. CHI. L. REV. 403, 413 (2022) (expanding how gender pluralism was embraced in many societies, including the Americas, prior to the advent of colonialism, enslavement, and the forcible displacement of Indigenous people); Brian Kritz, *The Global Transgender Population and the International Criminal Court*, 17 YALE HUM. RTS. & DEV. L.J. 1, 1–4, 21–22 (2014) (same); Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—the Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141 (2011) (explaining how sex classifications are socially constructed). For a deeper exploration on trans people in pre-colonial societies up through present, see LESLIE FEINBERG, *TRANSGENER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RuPAUL* (1996).

7. See *infra* Sections I–III for a detailed discussion and supporting citations.

8. Brief of the Transgender Law Center & Center for Constitutional Rights et al. as Amicus Curiae Supporting Respondent Aimee Stephens at 29–30, R.G. v. G.R. Harris Funeral Homes, Inc., v. Equal Emp. Opportunity Comm'n and Aimee Stephens, 884 F.3d 560 (2018) (No. 18-107) [hereinafter "Trans Voices Amicus Br."].

has been incarcerated, survived anti-trans violence, and lost friends to homicide.<sup>9</sup> While Miss Major leads the House of GG, an education, wellness, and historical center serving trans Southerners today, her adverse experiences illustrate how the discrimination-to-incarceration pipeline jettisons away trans people's futures, funnels them into prisons, and can even leave them dead.<sup>10</sup>

This Article is a humble attempt to synthesize my decade of learning about the discrimination-to-incarceration pipeline and its catastrophic effects on trans people of color and to share it with new, uninitiated readers. This Article is also meant to serve as both a call to action and an SOS to the broader legal advocacy community. Simply put, because of our collective inattention to the startling ways that trans people of color experience discrimination, marginalization, and exclusion, generations of trans people have already been denied the opportunity to live and participate in our society without the specter of violence or criminalization. This must stop now.

By providing concrete guidance on how attorneys and legal advocates can work to dismantle the discrimination-to-incarceration pipeline and effectuate necessary course corrections, this Article seeks to imagine a world where, instead of fighting for basic survival, trans people of color simply thrive.

## I. UNDERSTANDING THE DISCRIMINATION-TO-INCARCERATION PIPELINE AND ITS ORIGINS

Key to understanding the discrimination-to-incarceration pipeline is understanding the pernicious ways that trans people—particularly people of color—experience discrimination in a manner that precipitates poverty, homelessness, and criminalization. This section reviews these discrimination *push factors* in turn.

### A. Familial Rejection

Since not all families will accept their trans members, the first place that many trans people experience bias is in their homes.<sup>11</sup> An estimated fifty-seven percent of trans people have experienced rejection from their families.<sup>12</sup> Trans youth also enter the child welfare system at disproportion-

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9. *Id.* at 30; Jessica Stern, *This is What Pride Looks Like: Miss Major and the Violence, Poverty, and Incarceration of Low-Income Transgender Women*, SCHOLAR & FEMINIST ONLINE (Fall 2011–Spring 2012), <https://sfonline.barnard.edu/a-new-queer-agenda/this-is-what-pride-looks-like-miss-major-and-the-violence-poverty-and-incarceration-of-low-income-transgender-women/>.

10. HOUSE OF G.G., <https://houseofgg.org> (last visited Aug. 15, 2022).

11. Juline A. Koken, David S. Bimbi & Jeffrey T. Parsons, *Experiences of Familial Acceptance–Rejection Among Transwomen of Color*, 23 J. FAM. PSYCH. 853, 853–60 (2009) (analyzing the experiences of trans women of color in particular).

12. Fran Watson, *Protecting the Vulnerable: Transwomen of Color and the Legal System*, 59 HOUS. LAW. 26, 26 (2022) (discussing familial rejection rates); Samuel Ritholtz, *Is Queer-And-*

ate rates due to challenges they encounter with family acceptance and, once there, are subjected to shocking amounts of gender-based harassment, discrimination, and abuse.<sup>13</sup>

Taken together, family rejection and child welfare system participation lead to staggering rates of trans homelessness.<sup>14</sup> According to the United States Transgender Survey, a nationwide survey of approximately 28,000 trans adults living in the United States conducted by the National Center for Transgender Equality in 2015, seventy-four percent of trans people who were kicked out by their families went on to experience homelessness.<sup>15</sup> Trans youth in the child welfare system also experience high rates of homelessness because many flee their foster care placements due to bias or eventually age out of coverage.<sup>16</sup> Trans youth who experience familial rejection or the child welfare system frequently experience negative mental health impacts.<sup>17</sup> Trans youth from the South or rural communities who migrate to

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*Trans Youth Homelessness a Form of Displacement? A Queer Epistemological Review of Refugee Studies' Theoretical Borders*, ETHNIC & RACIAL STUD. 1, 1–23 (2022) (noting correlation between family rejection and LGBTQ+ youth homelessness); Jonah P. DeChants, Jama Shelton, Yolanda Anyon & Kimberly Bender, “I Just Want to Move Forward”: Themes of Resilience Among LGBTQ Young Adults Experiencing Family Rejection and Housing Insecurity, 139 CHILD. & YOUTH SERVS. REV. 1, 1–8 (2022) (same). Trans homelessness is discussed at length in Section II.A.2.

13. See Benjamin Long, *LGBT+ Teens in US, Rejected by Families, Struggling in Foster Care*, REUTERS (Feb. 12, 2019), <https://www.reuters.com/article/usa-lgbt-teens/lgbt-teens-in-us-rejected-by-families-struggling-in-foster-care-research-idUSL1N20716L>; Laura Baams, Bianca D.M. Wilson & Stephen T. Russell, *LGBTQ Youth in Unstable Housing and Foster Care*, 143 PEDIATRICS no. 3, 2019, at 1, 4, <https://doi.org/10.1542/peds.2017-4211> (noting that five percent of youth surveyed in foster care identified as trans, despite being just one percent of the U.S. population); Roxanna Asgarian, *America's Foster Care System Is a Dangerous Place for Trans Teens. Now They're Fighting for Change*, TIME (Dec. 7, 2021), <https://time.com/6124930/oregon-foster-care-trans-youth-lawsuit/> (discussing the problems of discrimination and harassment that trans youth in foster care face); Julia Alberth, *LGBTQ Youth Homelessness and Discrimination in the Foster Care System* (Spring 2020) (MPH/MD Degree 785 Public Health Course Paper, University of Wisconsin-Madison), <https://patientpartnerships.wisc.edu/wp-content/uploads/sites/1237/2021/02/AlberthFinal.pdf> (same).

14. SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 73 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (reporting on findings of the 2015 nationwide survey).

15. *Id.*

16. See *Our Issue*, TRUE COLORS UNITED, <https://truecolorsunited.org/our-issue/> (last visited July 30, 2022). For instance, in a study of LGBTQ+ youth in New York City, a jurisdiction outwardly considered to be accommodating to LGBTQ+ people, seventy percent of youth placed in group homes reported experiencing physical violence due to their statuses. In addition, seventy-eight percent of youth who received placements in the child welfare system ran away or were subsequently removed due to the hostility they experienced. Markie Flores, *LGBTQ Youth Homelessness and Discrimination in the Child Welfare System*, 13 POVERTY L. CONF. & SYMP. 1, 3 (2020), <https://digitalcommons.law.ggu.edu/povlaw/13>.

17. Emily Pariseau et al., *The Relationship Between Family Acceptance-Rejection and Transgender Youth Psychosocial Functioning*, 7 CLINICAL PRAC. PEDIATRIC PSYCH. 267, 267–77 (2019), <https://doi.org/10.1037/cpp0000291> (noting the poor mental health outcomes among trans youth who are rejected by their families); Andrew M. Seaman, *For Trans People, Family Rejection Tied to Suicide Attempts, Substance Abuse*, REUTERS HEALTH (May 27, 2016), <https://>

larger urban centers in search of safety after experiencing family rejection, ironically, may end up cut off from resources and support, living in even more perilous conditions.<sup>18</sup> Further, whether the push factors are family rejection, homelessness, or child welfare systems, trans people of color end up being disproportionately impacted.<sup>19</sup>

### B. *Anti-Trans Discrimination and Harassment in Schools*

The next site where many trans people of color enter the discrimination-to-incarceration pipeline is schools. According to the 2015 United States Transgender Survey, seventy-seven percent of trans people surveyed have experienced some form of gender-based discrimination or harassment while in school.<sup>20</sup> These experiences include verbal harassment (fifty-four percent), physical assault (twenty-four percent), and being prohibited from wearing gender-affirming clothing (fifty-two percent).<sup>21</sup> Rates of discrimination and harassment in schools were highest among trans people of color.<sup>22</sup>

When anti-trans harassment takes place in classrooms and schools, it detrimentally impacts the health and well-being of trans students.<sup>23</sup> Heart-rending accounts of the effects of anti-trans bullying appear in the social science literature and recent news reporting, with trans students experienc-

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[www.reuters.com/article/us-health-transgender-suicide-rejection/for-trans-people-family-rejection-tied-to-suicide-attempts-substance-abuse-idUSKCN0YI22T](http://www.reuters.com/article/us-health-transgender-suicide-rejection/for-trans-people-family-rejection-tied-to-suicide-attempts-substance-abuse-idUSKCN0YI22T) (same).

18. Ritholtz, *supra* note 12 (documenting trend and advocating that it be viewed as a form of forced migration). Indeed, trans youth who experience homelessness in large cities often are forced to navigate the additional burden of biased policing and anti-trans violence that are all too commonplace in large urban environments, as discussed further below in Section II.B and II.C, *infra*.

19. JAMES ET AL., *supra* note 14, at 70–73, 175–79; Flores, *supra* note 16.

20. JAMES ET AL., *supra* note 14, at 131–38. See also Patti Neighmond, *Home But Not Safe, Some LGBTQ Young People Face Rejection from Families in Lockdown*, NPR (May 17, 2020), <https://www.npr.org/sections/health-shots/2020/05/17/856090474/home-but-not-safe-some-lgbtq-young-people-face-rejection-from-families-in-lockdo> (providing anecdotal corroboration of report findings).

21. JAMES ET AL., *supra* note 14, at 131–38.

22. JAMES ET AL., *supra* note 14, at 132–33. Other research studies corroborate these trends: in a 2018 study analyzing the experiences of approximately 840,000 youth attending middle school or high school in California, trans youth reported three times the rates of bullying and harassment as their cisgender peers. Jack K. Day, Amaya Perez-Brumer & Stephen T. Russell, *Safe Schools? Transgender Youth's School Experiences and Perceptions of School Climate*, 47 J. YOUTH ADOLESCENCE 1731, 1731–42 (2018) (collecting data). Likewise, in a nationwide survey of LGBTQ+ students conducted by GLSEN in 2013, 59.2% of trans students reported being forced to use restrooms or locker rooms that were inconsistent with their gender, while 31.6% reported facing restrictions on their clothing and gender expression and 42.2% reported being deadnamed, which is a term used to refer to or address trans people by a name or surname they ceased to use following transition. See NEAL A. PALMER, EMILY A. GREYAK & JOSEPH G. KOSCIW, GLSEN, EDUCATIONAL EXCLUSION: DROP OUT, PUSH OUT, AND SCHOOL-TO-PRISON PIPELINE AMONG LGBTQ YOUTH 14 (2016); *Why Deadnaming Is Harmful*, CLEV. CLINIC (Nov. 18, 2021), <https://health.clevelandclinic.org/deadnaming/>.

23. Day et al., *supra* note 22, at 1731–42.

ing high rates of depression, substance abuse, and, in some instances, even being bullied to suicide.<sup>24</sup> Trans youth are also more likely to struggle academically, report lower grades, and experience absenteeism relative to their peers because of how school makes them unsafe.<sup>25</sup> Anti-trans discrimination and harassment also reduce rates of educational attainment among trans people, even though doing so can significantly reduce their job prospects and the salaries they command.<sup>26</sup> Trans youth are three times more likely to drop out of school without obtaining a high school diploma because of the extent to which schools are inhospitable.<sup>27</sup> Incidence rates of trans people leaving schools are also highest among trans people of color.<sup>28</sup>

Yet, instead of receiving support when their attendance rates or academic performance drop due to school safety issues or when they are involved in fights with bullies, trans students often find themselves facing school discipline, suspension, and expulsion instead.<sup>29</sup> Research also confirms that trans youth of color are substantially more likely to experience school discipline than their white peers in ways that thrust them into the school-to-prison pipeline oft-discussed in social science literature.<sup>30</sup> Re-

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24. See, e.g., Day et al., *supra* note 22; Jo Yurcaba, *Sexual Assault, Harassment, Bullying: Trans Students Say They're Targeted at School*, NBC NEWS (Dec. 14, 2021, 10:55 AM), <https://www.nbcnews.com/nbc-out/out-news/sexual-assault-harassment-bullying-trans-students-say-targeted-school-rena7803>; Karina Bolster, *Nottoway Mom Claims Son Committed Suicide Due to Bullying*, NBC NEWS 12 (May 5, 2022, 5:11 PM), <https://www.nbc12.com/2022/05/05/nottoway-mom-claims-son-committed-suicide-due-bullying-superintendent-speaks-following-claims/>.

25. PALMER ET AL., *supra* note 22, at 18 (noting that 58.6% of students who experience anti-trans harassment have problems with truancy); Day et al., *supra* note 22, at 1739 (finding truancy rates to be three times as high among trans youth due to bullying).

26. See generally Day et al., *supra* note 22.

27. PALMER ET AL., *supra* note 22, at 18, 27 (finding that 7.6% of trans students also indicated that they may not complete high school, compared to approximately 2.2% of cisgender students); JAMES ET AL., *supra* note 14, at 131–32 (noting that students who faced harassment at school were also the most at risk of abandoning their studies). For an in-depth discussion of these impacts, see Section II.A.

28. JAMES ET AL., *supra* note 14, at 135.

29. Shannon D. Snapp, Jack K. Day & Stephen T. Russell, *School Pushout: The Role of Supportive Strategies Versus Punitive Practices for LGBT Youth of Color*, J. RES. ON ADOLESCENCE 1, 2 (2022), <https://doi.org/10.1111/jora.12720>; PALMER ET AL., *supra* note 22, at 11–13, 27, 36 (noting, *inter alia*, that 45.2% of trans students surveyed reported a past experience of school discipline, and that 53.6% of students who missed school due to safety concerns went on to be disciplined); JAMES ET AL., *supra* note 14, at 11, 132 (noting that 36% percent of survey participants reported being disciplined for fighting their bullies while 6% were ultimately expelled from school).

30. PALMER ET AL., *supra* note 22, at 22, 25–28 (noting that 3.5% of the trans students surveyed by GLSEN made contact with the juvenile justice system as a result of school discipline, and observing racial disparities across youth); Snapp et al., *supra* note 29 (same). See generally Judith A.M. Scully, *Examining and Dismantling the School-to-Prison Pipeline: Strategies for a Better Future*, 68 ARK. L. REV. 959, 960 (2016) (describing the pipeline generally). While most of the existing literature on the school-to-prison pipeline focuses on the experiences of cisgender students of color, one exception to that is Deanna J. Glickman, *Fashioning Children: Gender Restrictive Dress Codes as an Entry Point for the Trans\* School to Prison Pipeline*, 24 AM. U. J. GENDER SOC. POL'Y & L. 263, 275–76 (2015) (urging that the experiences of trans students be analyzed in a similar frame).



searchers have observed a correlation between being on the receiving end of gender-based harassment in school settings and being incarcerated as an adult.<sup>31</sup>

As sobering as these trends may be, trans people's experiences of harassment in schools are likely to worsen in coming years due to a spate of state laws seeking to ban trans youth and students from participating in public life.<sup>32</sup> This includes bans on participation in school sports, bans on gender-congruent restroom and locker room use, and laws prohibiting or restricting gender-affirming healthcare to trans people.<sup>33</sup> In an astonishingly punitive measure, the governor of Texas instructed state child protective services personnel to begin investigating parents who affirm their trans children as presumptive child abusers.<sup>34</sup> Data suggests that the anti-trans measures introduced across the country are already harming the mental and physical well-being of trans kids.<sup>35</sup> Further, these measures show no sign of

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31. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANS. EQUAL., NAT'L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 44–45 (2011), [https://transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf).

32. See, e.g., Kiara Alfonseca, *Trans Students Face Worsening Classroom Hardships Amid Anti-Transgender Legislation*, ABC NEWS (May 26, 2021, 5:59 AM), <https://abcnews.go.com/US/anti-transgender-legislation-reignites-classroom-hardships-trans-students/story?id=77494309>; Priya Krishnakumar & Devan Cole, *2022 Is Already a Record Year for State Bills Seeking to Curtail LGBTQ Rights, ACLU Data Shows*, CNN (July 17, 2022, 5:57 PM), <https://www.cnn.com/2022/07/17/politics/state-legislation-lgbtq-rights/index.html>; Kate Sosin, *Why Is the GOP Escalating Attacks on Trans Rights? Experts Say the Goal Is to Make Sure Evangelicals Vote*, PBS (May 20, 2022, 3:37 PM), <https://www.pbs.org/newshour/politics/why-is-the-gop-escalating-attacks-on-trans-rights-experts-say-the-goal-is-to-make-sure-evangelicals-vote> (explaining how anti-trans bills are being used to mobilize voting among evangelical conservatives); Mabinty Quarshie & David Jackson, *Anti-Trans Bills Could Be One Key Republicans Use to Rally Their Base Ahead of Midterms. Will It Work?*, USA TODAY (May 4, 2022, 5:04 AM), <https://www.usatoday.com/story/news/politics/2022/05/04/republicans-anti-transgender-bills-midterm/7384097001/?gnt-cfr=E1> (same).

33. See *2023 Anti-Trans Legislation*, TRACK TRANS LEGISLAT., <https://www.tracktranslegislation.com/> (last visited Feb. 20, 2023); Anne Branigin, *10 Anti-LGBTQ Laws Just Went into Effect. They All Target Schools*, WASH. POST (July 8, 2022, 12:27 PM), <https://www.washingtonpost.com/nation/2022/07/08/anti-lgbtq-education-laws-in-effect/>.

34. Shira Stein, *Transgender Advocates Worry Texas "Abuse" Policy May Spread*, BLOOMBERG L. (June 22, 2022, 4:35 AM), <https://news.bloomberglaw.com/health-law-and-business/transgender-advocates-worry-texas-abuse-policy-may-spread> (explaining these investigations may lead to family separation and the termination of parental rights).

35. See Brooke Migdon, *Anti-Trans Legislation Negatively Impacted Mental Health of LGBTQ+ Youth: Poll*, HILL (Jan. 10, 2022), <https://thehill.com/changing-america/respect/equality/589067-anti-trans-legislation-negatively-impacted-mental-health-of/>; Kim Bojórquez, *Transgender Sports Ban Could Fuel More Bullying, Suicide Risk Among LGBTQ Kids, Experts Say*, SALT LAKE TRIB. (Apr. 15, 2022), <https://www.sltrib.com/news/politics/2022/04/15/transgender-sports-ban/>. While lawsuits have been brought to challenge some of these measures, they are resource intensive and difficult to litigate. For instance, despite a series of lawsuits, the Texas child abuse directive has yet to be fully enjoined, and copycat legislation may soon be introduced in other states. See, e.g., Eleanor Klibanoff, *Texas Supreme Court Allows Child Abuse Investigations into Families of Transgender Teens to Continue*, TEX. TRIB. (May 13, 2022), <https://www.texastribune.org/2022/05/13/transgender-teens-child-abuse-texas/> (reporting that with few

receding even though they conflict with an overwhelming body of scientific research establishing that trans youth who are not supported in their transition experience elevated rates of depression, suicidality, and death.<sup>36</sup> Indeed, the state of Virginia just introduced a devastating policy concerning trans students—arguably the most hostile state education policy formulated to date—just ahead of the November 2022 elections.<sup>37</sup> The proposed Virginia policy bans trans students from using gender-affirming restrooms or locker rooms, bans them from participating in sports and extracurriculars in accordance with their gender identities, and bans them from being addressed by their names and pronouns in school settings “even upon written instruction of a parent.”<sup>38</sup> Given the ways that anti-trans measures inspire copycat policies in other jurisdictions,<sup>39</sup> it is only a matter of time before other states follow suit.

As if these developments are not concerning enough, school administrators who want to ensure that their schools are safe spaces for trans youth are increasingly facing constraints. Florida and Alabama each passed “Don’t Say Gay” bills during the 2022 legislative session which prohibit educators from being vocal allies to trans, lesbian, gay, bisexual, and queer

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exceptions trans child abuse investigations in Texas were allowed to proceed); Stein, *supra* note 34 (noting copycat fears in other states).

36. Compare Samantha Riedel, *A GOP Congressman Wrote an Anti-Trans Bill Based Off YouTube Videos About Trans People*, THEM (July 14, 2022), <https://www.them.us/story/ohio-gop-congressman-anti-trans-bill-based-off-youtube-videos> (noting how the congressional bills conflict with science), with JAMES ET AL., *supra* note 14, at 132 (reporting that trans people who experienced abuse in K-12 schools were fifty-two percent more likely to have attempted suicide); *Study Finds That Early Social Transition for Transgender Youth Results in Good Mental Health Outcomes, but Unaccepting School Environments May Lead to Greater Risk of Suicidality*, FENWAY HEALTH (July 27, 2021), <https://fenwayhealth.org/study-finds-that-early-social-transition-for-transgender-youth-results-in-good-mental-health-outcomes-but-unaccepting-school-environments-may-lead-to-greater-risk-of-suicidality/> [hereinafter FENWAY HEALTH]; Amy E. Green, Jonah P. DeChants, Myeshia N. Prince & Carrie K. Davis, *Association of Gender-Affirming Hormone Therapy with Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, 70 J. ADOLESCENT HEALTH 643 (2021), <https://doi.org/10.1016/j.jadohealth.2021.10.036> (aggregating related data). Nor is there any evidence whatsoever suggesting that trans girls unfairly dominate cisgender girls when they participate in female sports. See Alfonso, *supra* note 32.

37. Jaclyn Diaz, *Virginia Has Moved to Restrict the Rights of Trans Students in Its Public Schools*, NPR (Sept. 18, 2022, 12:57 PM), <https://www.npr.org/2022/09/18/1123697784/virginia-transgender-students-public-schools-glenn-youngkin> (summarizing policy); Eesha Pendharkar, *What One State’s Transgender Student Policy Could Mean for Students* (Sept. 21, 2022), ED. WK., <https://www.edweek.org/leadership/what-one-states-transgender-student-policy-could-mean-for-students/2022/09> (noting the only education policy currently more sweeping is a policy that was introduced in a school district in Texas).

38. Diaz, *supra* note 37.

39. See, e.g., Savannah Kuchar, *A Wave of Anti-LGBTQ Laws for Schools in Red States Has Biden Administration Weighing a Response*, USA TODAY (Jan. 27, 2023), <https://www.usatoday.com/story/news/politics/2023/01/27/anti-lgbtq-laws-red-states-schools/10996463002/>; Marissa Martinez & Bianca Quilantan, *Defining ‘Woman’ Battle Heads to States Amid New Wave of LGBTQ Bills*, POLITICO, <https://www.politico.com/news/2022/12/28/states-sex-restrict-care-lgbtq-legislation-00074834> (Jan. 2, 2023).

students.<sup>40</sup> Furthermore, at least two courts have adopted the misguided view that intentionally misgendering trans people is First Amendment protected speech.<sup>41</sup> These developments suggest that, despite the best efforts of school administrators seeking to create a more welcoming educational environment for trans youth, schools will remain a hostile place for trans students for a long time to come.

### C. *Employment Discrimination Against Trans Employees and Job Applicants*

In addition to suffering disadvantages in the job market due to the myriad ways that discrimination impacts educational attainment, trans people also experience rampant employment discrimination.<sup>42</sup> Four out of five trans people surveyed by the Center for American Progress in 2020 indicated that anti-trans discrimination had negatively impacted their ability to get or retain employment.<sup>43</sup> Research has also shown that rates of workplace discrimination are higher across the board for trans people of color.<sup>44</sup>

Employment discrimination against trans people is frequently open and unapologetic.<sup>45</sup> During my time as a civil rights lawyer, I have represented a number of trans people who received job offers based on the strength of their qualifications, only to have them rescinded after their iden-

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40. Branigin, *supra* note 33 (describing the “chilling effect” these bills are likely to have on school teachers and administrators).

41. *See* *Taking Offense v. State*, 281 Cal. Rptr. 3d 298 (Cal. Ct. App. 2021) (striking a statutory provision that barred misgendering under the First Amendment and the free speech clause of the California Constitution); *Meriwether v. Hartop*, 992 F.3d 492, 505–07 (6th Cir. 2021) (holding that a university professor who was reprimanded for misgendering a trans student stated a First Amendment claim). *But see* *Kluge v. Brownsburg Cmty. Sch. Corp.*, 548 F. Supp. 3d 814, 842 (S.D. Ind. 2021) (declining to apply *Hartop* to Title VII religious discrimination claim brought by a K-12 teacher accused of misgendering).

42. Julie Moreau, ‘*Laughed Out of Interviews*’: *Trans Workers Discuss Job Discrimination*, NBC NEWS (Oct. 6, 2019, 1:22 PM), <https://www.nbcnews.com/feature/nbc-out/laughed-out-interviews-trans-workers-discuss-job-discrimination-n1063041>.

43. CAROLINE MEDINA, THEE SANTOS, LINDSAY MAHOWALD & SHARITA GRUBERG, PROTECTING & ADVANCING HEALTH CARE FOR TRANSGENDER ADULT COMMUNITIES 11 (2021), <https://www.americanprogress.org/wp-content/uploads/2021/08/Advancing-Health-Care-For-Transgender-Adults.pdf> (noting that forty-three percent of respondents described the impact as *significant*). *See also* JAMES ET AL., *supra* note 14, at 149–50 (reporting similar results in 2015).

44. JAMES ET AL., *supra* note 14, at 149–50.

45. *Trans Voices Amicus Br.*, *supra* note 8 (collecting the experiences of trans employees). While the examples in the Amicus Brief and the client stories I share herein predate the Supreme Court’s decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which held that sex discrimination under Title VII encompasses discrimination against LGBTQ+ persons, anti-LGBTQ+ discrimination persists today. *See* BRAD SEARS, CHRISTY MALLORY, ANDREW R. FLORES & KERITH J. CONRON, UCLA SCH. OF L. WILLIAMS INST., LGBTQ PEOPLE’S EXPERIENCES OF WORKPLACE DISCRIMINATION & HARASSMENT 1, 1–2, 12–13, 26 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf> (reporting that employment discrimination against LGBTQ+ people remains “persistent and widespread” post *Bostock*).

tity documents or background check effectively outed them as trans.<sup>46</sup> For instance, Jessi Dye, a trans woman who was hired to work at a nursing home in Alabama, was fired during her employee orientation and asked “What are you?” after her employer saw an “M” on her driver’s license.<sup>47</sup> Tristan Broussard, a trans man hired to work at a Louisiana bank, was similarly terminated after hiring when the background check process outed him, and he refused his employer’s demand to act “female” as a condition of retaining his job.<sup>48</sup> The challenges that trans people face when trying to obtain identity documents that correctly reflect their name and gender marker are often what enable summary hirings and firings like the ones Ms. Dye and Mr. Broussard experienced.<sup>49</sup> Many states impose steep, costly barriers to updating identity records, such as proof of surgery—surgeries that many trans people cannot afford and that some do not want or need—while a handful of states do not permit gender marker updates at all.<sup>50</sup>

Even when trans people are able to secure employment, gender-based harassment often makes the work environment so hostile that it is difficult for them to remain on the job.<sup>51</sup> Fifteen percent of participants in the 2015

46. See, e.g., Bil Browning, *Fired Trans Employee Asked ‘What Are You?’ Settles Discrimination Case*, ADVOCATE (Sept. 15, 2015, 10:24 AM), <https://www.advocate.com/transgender/2015/9/15/fired-trans-employee-asked-what-are-you-wins-discrimination-case>; Kenny Lopez, *Transgender Louisiana Employee Wins Sex Discrimination Case*, WGNO.COM (Dec. 7, 2016, 6:32 PM), <https://wgno.com/news/transgender-louisiana-employee-wins-sex-discrimination-case/>; Trans Voices Amicus Br., *supra* note 8, at 14–23 (collecting stories).

47. Browning, *supra* note 46 (summarizing Ms. Dye’s lawsuit and subsequent legal victory); Dan Tracer, *Alabama Boss Asks Trans Employee Two Worst Questions, Fires Her, and Now Has to Pay Big Time*, QUEERTY (Sept. 11, 2015, 12:09 PM), <https://www.queerty.com/alabama-boss-asks-trans-employee-two-worst-questions-fires-her-and-now-has-to-pay-big-time-20150911> (same).

48. Trans Voices Amicus Br., *supra* note 8, at 15–16. Mr. Broussard ultimately prevailed in his employment discrimination lawsuit against his employer Tower Loan. Lopez, *supra* note 46.

49. Lark Mulligan, *Dismantling Collateral Consequences: The Case for Abolishing Illinois’ Criminal Name-Change Restrictions*, 66 DEPAUL L. REV. 647, 648–49 (2017) (describing phenomenon); Bryanna A. Jenkins, *Birth Certificate with a Benefit: Using LGBTQ Jurisprudence to Make the Argument for a Transgender Person’s Constitutional Right to Amended Identity Documents*, 22 CUNY L. REV. 78, 92–93 (2019) (same).

50. Jenkins, *supra* note 49 (providing an overview); Doran Shemin, Comment, *My Body Is My Temple: Utilizing the Concept of Dignity in Supreme Court Jurisprudence to Fight Sex Reassignment Surgery Requirements for Recognition of Legal Sex*, 24 AM. U.J. GENDER SOC. POL’Y & L. 491 (2016) (same); Matthew Brown, *Montana Bans Birth Certificate Changes, Even After Gender-Confirming Surgery*, PBS NEWS HOUR (May 24, 2022, 5:31 PM), <https://www.pbs.org/newshour/politics/montana-bars-birth-certificate-changes-even-surgery> (noting outright bans in Tennessee, Oklahoma, West Virginia, and Montana).

51. See, e.g., JAMES ET AL., *supra* note 14, at 148, 153; see also MAKE THE ROAD N.Y., *TRANSGENER NEED NOT APPLY: A REPORT ON GENDER IDENTITY DISCRIMINATION* (2010), [https://ecommons.cornell.edu/bitstream/handle/1813/73787/TransNeedNotApplyReport\\_05\\_10.pdf?sequence=1&isAllowed=Y](https://ecommons.cornell.edu/bitstream/handle/1813/73787/TransNeedNotApplyReport_05_10.pdf?sequence=1&isAllowed=Y); HUM. RTS. CAMPAIGN FOUND., *U.S. LGBTQ PAID LEAVE SURVEY: REPORT ON THE EXPERIENCES OF TRANSGENDER & NON-BINARY RESPONDENTS* (2018), [www.hrc.org/resources/2018-us-lgbtq-paid-leave-survey-report-on-the-experiences-of-transgender](http://www.hrc.org/resources/2018-us-lgbtq-paid-leave-survey-report-on-the-experiences-of-transgender); Ciarán McFadden, *Discrimination Against Transgender Employees and Jobseekers*, in *HANDBOOK OF LABOR, HUMAN RESOURCES & POPULATION ECONOMICS* (Klaus Zimmermann ed., 2018), [https://doi.org/10.1007/978-3-319-57365-6\\_35-1](https://doi.org/10.1007/978-3-319-57365-6_35-1).

United States Transgender Survey reported being verbally harassed, physically attacked, or sexually assaulted at work because of their gender expression in the year prior to the survey.<sup>52</sup> In addition, twenty-three percent of survey participants reported being mistreated by their employer in some form or another.<sup>53</sup> Retaliation is also a problem that trans employees face when they complain about abusive on-the-job treatment. For instance, Danielle Feola, a trans woman hired to work as a restaurant hostess, was terminated by management when she complained that her coworkers were subjecting her to anti-trans harassment and making crude remarks about her genitals.<sup>54</sup> To cope with the hostile environment that many workplaces create, the majority of trans employees surveyed in 2015 (seventy-seven percent) took self-effacing measures to protect themselves from bias, such as concealing their identities or delaying their transitions, albeit at significant personal cost.<sup>55</sup>

In 2020, the Supreme Court issued an important ruling in *Bostock v. Clayton County*, clarifying that discrimination against trans people in the workplace is a prohibited form of sex discrimination.<sup>56</sup> However, employment discrimination against trans people remains rampant today, especially among trans people of color.<sup>57</sup> The challenges that trans people of color face finding decent work have led to unemployment rates that vastly exceed the national average and have fueled participation in criminalized economies (i.e., economic activities like sex work that are subject to criminal penalty) as a means of survival as discussed in Section II below.<sup>58</sup>

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52. JAMES ET AL., *supra* note 14, at 148.

53. JAMES ET AL., *supra* note 14, at 148, 153.

54. Bill Heltzel, *EEOC Sues Hawthorne Applebee's for Gender Discrimination*, WESTCHESTER & FAIRFIELD CNTY. BUS. J. (June 20, 2017), <https://westfaironline.com/90601/eec-sues-hawthorne-applebees-gender-discrimination/>. Ms. Feola ultimately received a settlement from the Applebee's franchise that wrongfully terminated her. See Braden Campbell, *Ex-Applebee's Hostess to Receive \$100K in Trans Bias Case*, LAW360 (Oct. 26, 2017, 7:42 PM), <https://www.law360.com/articles/1096189/ex-applebee-s-hostess-to-receive-100k-in-trans-bias-case>.

55. JAMES ET AL., *supra* note 14, at 148–49, 154. As used here, transition refers to taking steps to secure social recognition of their gender and/or other obtaining forms of gender-affirming healthcare.

56. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

57. SEARS ET AL., *supra* note 45, at 1–2, 13.

58. See SEARS ET AL., *supra* note 45. Compare MEDINA ET AL., *supra* note 43, at 11 (reporting 27% trans unemployment rate in 2020), with Sean M. Smith, Roxanna Edwards & Hao C. Duong, *Unemployment Rises in 2020, as the Country Battles the COVID-19 Pandemic*, MONTHLY LAB. REV. (June 2021), <https://www.bls.gov/opub/mlr/2021/article/unemployment-rises-in-2020-as-the-country-battles-the-covid-19-pandemic.htm> (reporting a 3.6% overall unemployment rate prior to the Covid-19 pandemic and a 13% unemployment rate during the peak of the pandemic—the highest rate recorded since 1940).

#### D. *Housing Discrimination and Insecurity*

Trans people experience elevated rates of housing discrimination and instability due to anti-trans bias.<sup>59</sup> Approximately one in four (twenty-three percent) trans people surveyed in 2015 reported that they had been denied or evicted from housing in the previous year, while nearly one in three (thirty percent) reported facing housing discrimination and instability of some kind over the same period.<sup>60</sup> Housing discrimination against trans people also resembles employment discrimination insofar as it is often blatant, and frequently occurs when individuals are outed as trans by their identity documents or during the background check process.<sup>61</sup> Like most forms of anti-trans discrimination, rates of housing discrimination and instability are even more pronounced among trans people of color, with nearly half (forty-nine percent) of Black trans women reporting incidents of housing discrimination, followed by just under forty percent of trans women who are Indigenous, multiracial, or Latinx.<sup>62</sup>

#### E. *Barriers to Healthcare Access*

Another push factor in the discrimination-to-incarceration pipeline is how trans people face obstacles while trying to access healthcare that supports their gender transition. Transition-related healthcare includes puberty blockers (for trans youth), hormone therapy, gender confirmation surgeries, and procedures such as hair removal treatment.<sup>63</sup> Another vital component of a gender transition is living in one's gender through clothing, hairstyles, name and pronoun use, and wider societal acceptance.<sup>64</sup> As scientific research confirms, transition-related healthcare is a survival necessity for peo-

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59. JAMES ET AL., *supra* note 14, at 175–80 (discussing incidence rates); DIANE K. LEVY ET AL., URBAN INST., A PAIRED-TESTING PILOT STUDY OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES & TRANSGENDER INDIVIDUALS 60–63 (2017), [https://www.urban.org/sites/default/files/publication/91486/2017.06.27\\_hds\\_lgt\\_final\\_report\\_report\\_finalized\\_0.pdf](https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized_0.pdf) (observing overt discrimination against trans housing applicants, and fewer referrals by rental listing agents, in empirical study).

60. JAMES ET AL., *supra* note 14, at 176.

61. See Justin Stabley, *For Transgender People, Finding Housing Has Become Even Harder During the Pandemic*, PBS (Mar. 12, 2021, 5:08 PM), <https://www.pbs.org/newshour/economy/for-transgender-people-finding-housing-has-become-even-harder-during-the-pandemic>.

62. JAMES ET AL., *supra* note 14, at 180 (noting that thirty-nine percent of trans women who were Indigenous or multiracial, and thirty-seven percent of trans Latina women reported discrimination). While not a focus of this Article, trans people also have relatively low rates of homeownership, with only sixteen percent of the trans people surveyed indicating that they owned their own homes, compared to sixty-three percent of the overall U.S. population (not adjusted for race) in the same year. Compare JAMES ET AL., *supra* note 14, at 177, with PETER J. MATEYKA & CHRISTOPHER R. MAZUR, U.S. CENSUS BUREAU, HOMEOWNERSHIP IN THE UNITED STATES: 2005 TO 2019, at 2 (2021), <https://www.census.gov/content/dam/Census/library/publications/2021/acs/acsbr-010.pdf>

63. WORLD PRO. ASS'N FOR TRANSGENDER HEALTH (WPATH), STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 8–10 (7th ed. 2011) (discussing treatment modalities and their use in patients, singly or in combination).

64. FENWAY HEALTH, *supra* note 36.

ple in the trans community.<sup>65</sup> Trans people who are able to access transition-related healthcare experience vast improvements to their mental and physical well-being.<sup>66</sup> In contrast, trans people who lack access to transition-related healthcare are prone to depression, anxiety, suicidality, substance abuse, and even death.<sup>67</sup>

Nonetheless, trans people face immense barriers accessing transition-related healthcare nationwide.<sup>68</sup> Challenges even persist in instances where trans people have health insurance through an employer.<sup>69</sup> Private insurance policies are often issued with language that categorically excludes transition-related healthcare from the scope of coverage.<sup>70</sup> Trans people who qualify for Medicaid based on disability or poverty are often subject to similar coverage exclusions in many states.<sup>71</sup> Taken together, these coverage bans mean that transition-related healthcare is out of financial reach for many, despite being a medical necessity that promotes psychological well-being.<sup>72</sup>

For instance, the United States Transgender Survey found that while seventy-eight percent of trans survey participants indicated that they wanted hormone therapy to support their transition, only forty-nine percent had

65. See Green et al., *supra* note 36; Jeremy A. Wernick, Samantha Busa, Karen Matouk, Joey Nicholson & Aron Janssen, *A Systematic Review of the Psychological Benefits of Gender-Affirming Surgery*, 46 UROLOGIC CLINICS N. AM. 475, 484 (2019) (affirming the beneficial health effects); Nova J. Bradford, G. Nic Rider & Katherine G. Spencer, *Hair Removal and Psychological Well-Being in Transfeminine Adults: Associations with Gender Dysphoria and Gender Euphoria*, 32 J. DERMATOLOGICAL TREATMENT 635, 640 (2021) (same).

66. Green et al., *supra* note 36; Wernick et al., *supra* note 65; Bradford et al., *supra* note 65.

67. See, e.g., Bradford et al., *supra* note 65, at 639–40; Wernick et al., *supra* note 65; Tiffany A. Ainsworth & Jeffrey H. Spiegel, *Quality of Life of Individuals With and Without Facial Feminization Surgery or Gender Reassignment Surgery*, 19 QUALITY LIFE RES. 1019, 1022–23 (2010); Esther Gómez-Gil et al., *Hormone-Treated Transsexuals Report Less Social Distress, Anxiety and Depression*, 37 PSYCHONEUROENDOCRINOLOGY 662 (2012). Note, the term transsexual is no longer used to describe trans people because of how it is stigmatizing.

68. JAMES ET AL., *supra* note 14, at 10, 93–95, 99–100.

69. JAMES ET AL., *supra* note 14, at 10 (noting fifty-five percent of trans people who sought insurance coverage for gender-confirmation surgery were denied); MEDINA ET AL., *supra* note 43, at 12, 18 (reaching a similar finding, but noting that, compared to cisgender people, trans employees are less likely to have employer-provided insurance at all).

70. MEDINA ET AL., *supra* note 43, at 18 (reporting that forty-six percent of trans people surveyed by CAP in 2020 had been denied transition-related care in the prior year).

71. While a handful of state Medicaid programs provide members comprehensive transition related healthcare, this was only after trans advocates brought lawsuits challenging coverage restrictions. See, e.g., Stephen Gruber-Miller, *Iowa Can't Block Medicaid Coverage for Gender Confirmation Surgery, Judge Rules*, DES MOINES REG. (Nov. 22, 2021), <https://www.desmoinesregister.com/story/news/politics/2021/11/22/iowa-law-unconstitutional-ban-medicaid-coverage-transgender-transition-gender-confirmation-surgery/8722373002/>; *VICTORY! Alaska Removes Medicaid Ban on Transition-Related Health Care*, LAMBDA LEGAL (June 29, 2021), [https://www.lambdalegal.org/blog/being\\_ak\\_20210628\\_alaska-removes-medicaid-ban-on-transition-related-health-care](https://www.lambdalegal.org/blog/being_ak_20210628_alaska-removes-medicaid-ban-on-transition-related-health-care).

72. See JAMES ET AL., *supra* note 14, at 99–103 (reporting that while seventy-eight percent of trans survey participants wanted hormone therapy, only forty-nine percent had ever received it, and trans people in extreme poverty (defined as earning \$10,000) had even lower access rates).

ever received it, and trans people living in extreme poverty (defined as earning \$10,000 or less per year) had even less access.<sup>73</sup> Similarly, only twenty-five percent of trans people reported receiving any form of transition-related surgery, even though surgery can be a medically necessary form of treatment that prevents suicide attempts and promotes psychological well-being.<sup>74</sup> Transition healthcare rates plummeted even lower for trans people who were living in poverty or uninsured: sixty percent of trans people of color surveyed indicated that they had foregone or postponed receiving medically necessary healthcare simply because they were unable to afford it.<sup>75</sup> Mutual aid networks have formed in some cities in an attempt to fill in these gaps, but they are not sufficient to meet all existing needs.<sup>76</sup>

The high cost of transition healthcare coupled with the absence of consistent coverage drives some trans people to participate in criminalized economies in order to pay for their healthcare needs.<sup>77</sup> Others may resort to seeking gender-affirming healthcare from unlicensed providers (who are, at times, community members themselves), even though doing so can endanger their lives.<sup>78</sup> State and federal legislative proposals seeking to restrict or even criminalize trans healthcare access are poised to contribute to these worrisome trends by making transition-related healthcare even less accessible to those in need.<sup>79</sup>

73. JAMES ET AL., *supra* note 14, at 100.

74. JAMES ET AL., *supra* note 14, at 100. *See also* Anthony N. Almazan & Alex S. Keuroghlian, *Association Between Gender-Affirming Surgeries and Mental Health Outcomes*, 156 J. AM. MED. ASS'N SURG. 611, 615–617 (2021) (observing a positive association between gender-confirmation surgery and mental health outcomes).

75. MEDINA ET AL., *supra* note 43, at 10 (citations omitted).

76. For the Gworlds is an example of a mutual aid collective that raises funds for trans people seeking healthcare. *See Welcome to For the Gworlds*, <https://www.forthegworlds.party/home> (last visited Aug. 1, 2022).

77. *See, e.g.*, Alex Waterfield & Melia Patria, *Transgender Teen Turns to Prostitution to Raise Cash for Surgery*, ABC NEWS (Aug. 26, 2011, 4:16 PM), <https://abcnews.go.com/Health/transgender-teen-turns-prostitution-raise-cash-surgery-female/story?id=14390170>. From 2013 to 2019, the hit Netflix program *Orange Is the New Black* depicted one such story. Trans actress Laverne Cox portrayed Sophia Burset, a trans woman who was imprisoned after she began engaging in petty theft to finance her gender confirmation surgery. While Cox's character was fictional, her story shone a light on the impossible choices that trans people of color regularly face while trying to survive. Mey, *Real-Life Sophia Bursets: Transgender Women Face a Nightmare in Men's Prisons*, AUTO STRADDLE (July 25, 2013), <https://www.autostraddle.com/real-life-sophia-bursets-transgender-women-face-a-nightmare-in-mens-prisons-186876/>.

78. *See, e.g.*, Anemona Hartocollis & Christina Davidson, *A Cheap, Fast and Possibly Deadly Route to Beauty*, N.Y. TIMES (Apr. 16, 2009), <https://www.nytimes.com/2009/04/17/nyregion/17silicone.html>; Vikki Vargas, *Transgender Woman Charged in Silicone Injection Death of Another Transgender Woman*, NBC NEWS L.A. (Feb. 10, 2015, 6:21 AM), <https://www.nbclosangeles.com/news/local/transgender-woman-charged-silicone-injection-death/1998460/>.

79. Kelly Rissman, *"Disgusting And Appalling": Rep. Marjorie Taylor Greene Introduced a Bill That Criminalizes Performing Transgender Medical Care*, VANITY FAIR (Aug. 20, 2022), <https://www.vanityfair.com/news/2022/08/rep-marjorie-taylor-greene-wants-to-criminalizes-transgender-medical-care>. Though partially beyond the scope of this Article, trans people who are able to obtain optimal health insurance coverage still suffer from anti-trans bias in the healthcare



*F. Anti-Trans Violence, Legislation, and the Worsening Political Climate*

Discrimination against trans people often takes lethal forms.<sup>80</sup> Trans people face disproportionate rates of assault, intimate partner violence, and even murder, with trans women of color—particularly Black trans women—invariably the most at risk.<sup>81</sup> Trans homicides are such a common occurrence that the Transgender Day of Remembrance/Resilience (“TDOR”) is observed annually to provide members of the trans community a day to grieve those inevitably lost to violence.<sup>82</sup>

Trans people are currently facing an unprecedented backlash that has the potential to make these trends worse.<sup>83</sup> Specifically, since 2018, Republican lawmakers have introduced an explosion of state bills aimed at restricting the ability of trans people to access healthcare, participate in schools, and exist in civic life.<sup>84</sup> The 2023 legislative session has been the worst session yet, producing nearly 300 anti-trans bills and counting, a grim first.<sup>85</sup> Because anti-trans measures have proven to be an effective Republican base-building strategy in state elections, anti-trans bills were introduced by Republicans in the United States Congress ahead of the 2022 midterm elections.<sup>86</sup> These political machinations have also ignited a broader wave

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profession. Nearly 1 in 2 trans people surveyed by the Center for American Progress in 2020, including sixty-eight percent of trans people of color, reported being mistreated by a healthcare provider in the prior year. MEDINA ET AL., *supra* note 43, at 17. The U.S. Transgender Survey reported equally stark findings, including that more than one in three trans people report instances of being refused care or subjected to harassing conduct. JAMES ET AL., *supra* note 14, at 10, 93, 96–99. As a result, nearly one in three trans people report they have delayed or forgone medical appointments and procedures simply to shield themselves from discrimination on the part of their healthcare providers—trends which decrease trans people’s receipt of preventative care and worsen their overall health outcomes. Kim D. Jaffee, Deirdre A. Shires & Daphna Stroumsa, *Discrimination and Delayed Health Care Among Transgender Women and Men: Implications for Improving Medical Education and Health Care Delivery*, 54 MED. CARE 1010, 1010, 1012–16 (2016).

80. See Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. 1411, 1418–25 (2020) (discussing the long legacy of violence that trans people have faced).

81. Lee, *supra* note 80, at 1419 (discussing how trans women are often killed by cisgender men who are embarrassed by their own attraction); Goodmark, *supra* note 1 (discussing the incidence of often lethal intimate partner violence).

82. See SUSAN STRYKER, *TRANSGENDER HISTORY* 132–65 (Seal Press 2008) (ebook) (discussing the origins of TDOR); FORWARD TOGETHER, <https://forwardtogether.org/programs/art-as-power/> (last visited Aug. 15, 2022) (noting recent effort to reframe TDOR as the Transgender Day of Resilience); TRANSGENDER DAY OF RESILIENCE, <https://tdor.co/> (last visited Aug. 15, 2022) (same).

83. See, e.g., Sosin, *supra* note 32 (explaining how anti-trans bills are being used to mobilize voting among evangelical conservatives).

84. See generally *supra* note 32 (explaining how anti-trans bills are being used to mobilize voting among evangelical conservatives).

85. Amy Littlefield & Heron Greenesmith, *Fresh Off Victory Against Roe, the Religious Right Is Pushing a Record Number of Anti-Trans Bills*, NATION (Jan. 31, 2023), <https://www.thenation.com/article/society/transgender-abortion-rights-attacks/>.

86. Moira Warburton & Rose Horowitz, *Republicans in Congress Lay Groundwork for Anti-Transgender Push*, REUTERS (July 14, 2022, 5:31 AM), <https://www.reuters.com/world/us/>

of anti-trans rhetoric nationwide by suggesting that the very existence of trans people—and their need for healthcare or legal protections—are proper subjects for debate.<sup>87</sup>

Because cultural forces do not operate in a vacuum, the United States has experienced an uptick in violence against trans people over the same timetable that anti-trans legislation has increased.<sup>88</sup> 2021 was the deadliest year on record for trans people in the United States, with more than fifty trans homicides reported, and with victims being primarily women of color.<sup>89</sup> Regrettably, 2022 seems poised to follow the same trend, as two dozen trans people—primarily women of color once again—have already been murdered as of midyear.<sup>90</sup>

In addition to facing pernicious and often lethal forms of violence as a community made worse by political rhetoric, trans survivors of violence are often criminalized for acting in their own self-defense—a disturbing trend that is particularly prevalent among trans people of color.<sup>91</sup> For instance, CeCe McDonald, a Black trans woman from Minnesota, was convicted of manslaughter for killing an avowed white supremacist who was assaulting her during a transphobic attack.<sup>92</sup> Ky Peterson, a Black trans man from Georgia, was sentenced to twenty years in prison for killing, in self-defense,

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republicans-congress-lay-groundwork-anti-transgender-push-2022-07-14/ (summarizing federal proposals); Rissman, *supra* note 79 (same).

87. See, e.g., Nardine Saad, *J.K. Rowling Backs Macy Gray's Anti-Trans Remarks About What Makes 'a Woman'*, L.A. TIMES (July 5, 2022, 2:03 PM), <https://www.latimes.com/entertainment-arts/music/story/2022-07-05/macy-gray-catalog-jk-rowling-transphobic-comments> (explaining how entertainers have joined politicians in demeaning trans women); Kylie Cheung, *Dave Chappelle and the Warped Self-Victimhood of Transphobes*, SALON (Oct. 9, 2021, 3:30 PM) <https://www.salon.com/2021/10/09/dave-chappelle-terf-transphobia-joyce-carol-oates/> (explaining how anti-trans rhetoric fuels repression). See also James Factora, *Trans Cyclist Leia Genis Has Been Stripped of Her Silver Medal Midway Through a National Competition*, THEM (Aug. 3, 2022), <https://www.them.us/story/trans-cyclist-silver-medal-revoked> (reporting on continued attacks on trans athletes).

88. See Madeleine Carlisle, *Anti-Trans Violence and Rhetoric Reached Record Highs Across America in 2021*, TIME (Dec. 30, 2021, 7:06 AM), <https://time.com/6131444/2021-anti-trans-violence/>; Lee, *supra* note 80, at 1414 n.18 (noting a 187% uptick in hate crimes targeting the trans community).

89. Carlisle, *supra* note 88. See also Nico Lang, *2021 Was the Deadliest Year on Record for Anti-Trans Murders*, THEM (Jan. 4, 2022, 4:45 PM), <https://xtramagazine.com/power/deadliest-year-anti-trans-murders-215625>. These numbers also likely reflect an undercount of the true number of trans fatalities.

90. *Fatal Violence Against the Transgender & Gender Non-Conforming Community in 2022*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2022> (last visited Aug. 7, 2022) (noting number of homicides as of August 2022).

91. See, e.g., Samone Ijoma, *False Promises of Protection: Black Women, Trans People & the Struggle for Visibility as Victims of Intimate Partner and Gendered Violence*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 255 (2018); Shawn E. Fields, *The Elusiveness of Self-Defense for the Black Transgender Community*, 21 NEV. L.J. 975 (2021).

92. Sabrina Rubin Erdely, *The Transgender Crucible*, ROLLING STONE (July 30, 2014), <https://www.rollingstone.com/culture/culture-news/the-transgender-crucible-114095/>; Russell Goldman, *Transgender Activist CeCe McDonald Released from Prison*, ABC NEWS (Jan. 13,

the man who was raping him.<sup>93</sup> Regrettably, these are only two examples of a broader trend of denying trans people of color the ability to be seen as deserving of sympathy or protection, even in moments when they are brutally attacked.<sup>94</sup>

Accordingly, at each of its axes, the discrimination that trans people of color experience as part of the pipeline serves to deny them the basic conditions of life necessary for survival.

## II. THE PREDICTABLE CONSEQUENCES OF ANTI-TRANS DISCRIMINATION: POVERTY, HOMELESSNESS, AND CRIMINALIZATION

Because of their experiences of marginalization along the discrimination-to-incarceration pipeline, trans people—particularly trans people of color—experience staggering rates of poverty and homelessness.<sup>95</sup> Trans people of color are also forced into criminalized economies as a means of survival at significant rates, even though doing so can precipitate their entry into the system of mass incarceration and immigrant detention.<sup>96</sup> This Article discusses each of these issues in turn.

### A. *Trans Poverty and Unemployment*

Trans people in the United States—and particularly trans people of color—experience disproportionate levels of poverty and unemployment because of how bias impedes them from completing their educations and finding work in the formal economy.<sup>97</sup> Trans people of color experience unemployment at four times the rate of the general population, and at twice the rate of white trans people.<sup>98</sup> Trans people of color also experience astronomical rates of poverty—four times higher than the general population,

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2014), <https://abcnews.go.com/blogs/headlines/2014/01/transgender-activist-cece-mcdonald-released-early-from-prison>.

93. Sunnive Brydum & Mitch Kellaway, *This Black Trans Man Is in Prison for Killing His Rapist*, *ADVOCATE* (Apr. 8, 2015, 11:15 AM), <https://www.advocate.com/politics/transgender/2015/04/08/black-trans-man-prison-killing-his-rapist> (describing arrest and conviction); Sunnive Brydum, *Fateful Typo Discovered in Ky Peterson's Sentencing*, *ADVOCATE* (Apr. 17, 2015, 4:00 AM), <https://www.advocate.com/politics/transgender/2015/04/17/fateful-typo-discovered-ky-petersons-sentencing> (noting sentence exceeded what is even permitted for involuntary manslaughter under Georgia law). Ky Peterson was ultimately released on parole after serving nine years of his twenty-year sentence. Devin-Norelle, *After 9 Years of Incarceration, This Trans Sexual Assault Victim Is Finally Home*, *THEM* (July 30, 2020), <https://www.them.us/story/transgender-sexual-assault-victim-released-from-prison>.

94. See, e.g., Ijoma, *supra* note 91; Lee, *supra* note 80; Fields, *supra* note 91.

95. See *infra* Sections II.A and II.B.

96. See *infra* Sections II.C, II.D, and III.

97. See JAMES ET AL., *supra* note 14, at 139–57; see also CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, *PAYING AN UNFAIR PRICE: THE FINANCIAL PENALTY FOR BEING TRANSGENDER IN AMERICA* (2015), [www.lgbtmap.org/unfair-price-transgender](http://www.lgbtmap.org/unfair-price-transgender); M.V. Lee Badgett, Brad Sears, Holning Lau & Deborah Ho, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, 84 *CHI.-KENT L. REV.* 559 (2009).

98. JAMES ET AL., *supra* note 14, at 6, 141.

and twice as high as white trans people.<sup>99</sup> In addition, trans people of color are nearly five times more likely than the general population to meet the threshold for extreme poverty in the United States, which is defined as having a household income of less than \$10,000 per year.<sup>100</sup> Trans people who are rejected by their families of origin experienced greater levels of poverty and financial insecurity.<sup>101</sup> In addition, trans people who rely exclusively on criminalized economies as a means of survival experience rates of extreme poverty that are nearly *ten times* that of the general population.<sup>102</sup>

### B. *Trans Homelessness and Discrimination and Bias in Shelters*

Trans people's rates of homelessness also vastly exceed the national average.<sup>103</sup> Trans people were eight times more likely to have a recent experience of homelessness than their straight, cisgender counterparts.<sup>104</sup> Rates of trans homelessness have also increased year after year, with an eighty-eight percent increase observed between 2016 and 2019.<sup>105</sup> The experiences of trans women of color are even more stark.<sup>106</sup> While one in three trans people surveyed in 2015 reported being homeless before, more than *fifty percent* of Black, Indigenous, and multiracial trans women reported experiencing homelessness at some point in their lives.<sup>107</sup>

Trans youth also face jaw-dropping rates of homelessness, largely driven by their experiences of family rejection, as noted above.<sup>108</sup> Trans and LGBQ+ youth comprise forty percent of all homeless youth in the United States and sixty-five percent of all youth experiencing chronic homelessness (defined as four or more episodes of homelessness lasting

99. See JAMES ET AL., *supra* note 14, at 143–44 (noting that forty-three percent of Latinx trans people, forty-one percent of Indigenous trans people, forty percent of multiracial trans people, and thirty-eight percent of Black trans people reported living in poverty).

100. See JAMES ET AL., *supra* note 14, at 6, 143–44 (noting incidence rates of nineteen percent of Black trans people, eighteen percent of Latinx trans people, and fifteen to sixteen percent among Asian trans and Indigenous trans people, respectively).

101. GRANT ET AL., *supra* note 31, at 101.

102. JAMES ET AL., *supra* note 14, at 143–44 (noting a thirty-one percent incidence rate of extreme poverty, compared to four percent for the general population).

103. JAMES ET AL., *supra* note 14, at 175.

104. BIANCA D.M. WILSON, SOON KYU CHOI, GARY W. HARPER, MARGUERITA LIGHTFOOT & STEPHEN RUSSEL, UCLA SCH. OF L. WILLIAMS INST., HOMELESSNESS AMONG LGBT ADULTS IN THE U.S. 3 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Homelessness-May-2020.pdf>.

105. HOMELESSNESS RSCH. INST., NAT'L ALL. TO END HOMELESSNESS, TRANSGENDER HOMELESS ADULTS & UNSHELTERED HOMELESSNESS: WHAT THE DATA TELL US 1 (2020), <https://endhomelessness.org/wp-content/uploads/2020/07/Trans-Homelessness-Brief-July-2020.pdf>.

106. See JAMES ET AL., *supra* note 14, at 175–78 (compiling incidence rates).

107. JAMES ET AL., *supra* note 14, at 175–78. Rates of homelessness among Middle Eastern and Latinx trans women also surpassed rates among white trans women. JAMES ET AL., *supra* note 14, at 178 (reporting incidence rates of forty-nine percent, thirty-five percent, and thirty-one percent, respectively).

108. See GRANT ET AL., *supra* note 31, at 101 (linking family rejection to elevated rates of homelessness); Ritholtz, *supra* note 12 (collecting citations); Flores, *supra* note 16 (same).

twelve months or longer) despite collectively being less than ten percent of the United States population by size.<sup>109</sup> Trans and LGBTQ+ youth are also 120 percent more likely to be homeless than their straight, cisgender peers, with rates of homelessness being highest among trans and LGBTQ+ youth of color.<sup>110</sup> Trans and LGBTQ+ youth also experience enormous amounts of vulnerability while navigating homelessness relative to other youth, including greater levels of physical violence, sexual abuse, mental illness, suicidality, and homicide.<sup>111</sup>

Deepening these challenges, homeless shelters are rarely a safe option for trans people experiencing homelessness due to anti-trans bias.<sup>112</sup> According to the 2015 United States Transgender Survey, seventy-four percent of trans people who sought admission to a homeless shelter were turned away in an overt response to their gender or gender expression.<sup>113</sup> A 2016 study by the Center for American Progress yielded similar findings: *only thirty percent* of shelter providers surveyed indicated that they would be willing to house trans women at women's shelters they operated.<sup>114</sup>

Seventy percent of respondents to the 2015 United States Transgender Survey who sought services from homeless shelters also experienced abuse or mistreatment—statistics that are borne out by my own advocacy work supporting trans people experiencing homelessness in New York City.<sup>115</sup>

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109. TRUE COLORS UNITED, *supra* note 16 (collecting data); Flores, *supra* note 16, at 4 (discussing chronic homelessness rates); Cameron K. Ormiston, *LGBTQ Youth Homelessness: Why We Need to Protect Our LGBTQ Youth*, 9 LGBT HEALTH 217, 217 (2022), <https://doi.org/10.1089/lgbt.2021.0324> (same); *LGBTQ+ Youth Homelessness*, NAT'L NETWORK FOR YOUTH, <https://nn4youth.org/lgbtq-homeless-youth/> (last visited July 30, 2022) (same). One limitation of existing research, however, is that it aggregates the experiences of trans and LGBTQ+ youth.

110. Christianna Silva, *LGBT Youth Are 120% More Likely to Be Homeless Than Straight People, Study Shows*, NEWSWEEK (Nov. 30, 2017, 3:37 PM), <https://www.newsweek.com/lgbt-youth-homeless-study-727595>; see M.H. MORTON, G.M. SAMUELS, A. DWORSKY & S. PATEL, CHAPIN HALL UNIV. OF CHI., MISSED OPPORTUNITIES: LGBTQ YOUTH HOMELESSNESS IN AMERICA 3, 7–8 (2018), <https://voicesofyouthcount.org/wp-content/uploads/2018/05/VoYC-LGBTQ-Brief-Chapin-Hall-2018.pdf>.

111. See, e.g., MORTON ET AL., *supra* note 110, at 3, 8–10; Nicholas Forge, Robin Hartinger-Saunders, Eric Wright & Erin Ruel, *Out of the System and onto the Streets: LGBTQ-Identified Youth Experiencing Homelessness with Past Child Welfare Systems Involvement*, 96 CHILD WELFARE 47 (2018), <https://www.jstor.org/stable/48624544> (confirming that LGBTQ youth face greater risk of homelessness relative to their peers as they age out of foster care); Alberth, *supra* note 13, at 1, 3 (noting that seventy-eight percent of LGBTQ youth flee their foster care placements due to abuse they face).

112. KATHRYN O'NEILL, BIANCA D.M. WILSON & JODY L. HERMAN, UCLA SCH. OF L. WILLIAMS INST., HOMELESS SHELTER ACCESS AMONG TRANSGENDER ADULTS 2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Homeless-Shelter-Nov-2011.pdf> (highlighting key findings).

113. JAMES ET AL., *supra* note 14, at 181.

114. CAITLIN ROONEY, LAURA E. DURSO & SHARITA GRUBERG, CTR. FOR AM. PROGRESS, THE EQUAL RTS. CTR., DISCRIMINATION AGAINST TRANSGENDER WOMEN SEEKING ACCESS TO HOMELESS SHELTERS 2 (2016), <https://www.americanprogress.org/wp-content/uploads/2016/01/HomelessTransgender.pdf>.

115. JAMES ET AL., *supra* note 14, at 176, 181.

Over the course of interviews, focus groups, and a town hall, trans shelter residents shared their near-ubiquitous experiences of discrimination, harassment, and bias.<sup>116</sup> One trans woman was denied entry into the city's intake shelter for women and was forced to sleep on the streets instead.<sup>117</sup> Another trans woman who successfully gained a female shelter placement was subjected to a harassment campaign by shelter residents who misgendered her, called her anti-trans slurs, and even urinated on her property in one instance.<sup>118</sup> Shelter staff refused to intervene and instead joined in on the abuse, going so far as to chase her out of the shelter and down the street until she tripped and suffered a traumatic injury requiring hospitalization.<sup>119</sup>

Because homeless shelters often imperil the safety and well-being of trans shelter residents, as exemplified above, the majority of trans adults and youth who are experiencing homelessness are unsheltered, which means sleeping on the street or in other places unfit for human habitation, like cars or abandoned buildings.<sup>120</sup> A significant percentage of participants to the United States Transgender Survey—approximately one in four (twenty-six percent)—indicated that they avoided staying at homeless shelters due to concerns about abuse.<sup>121</sup>

### C. *The Criminalization of Survival*

#### 1. *Theft and Participation in Criminalized Economies*

Because of the discrimination-to-incarceration pipeline, trans people of color are disproportionately forced into underground economies, such as the sex or drug trades, or resort to petty theft offenses in order to survive.<sup>122</sup> Trans women of color polled during the United States Transgender Survey were almost twice as likely to participate in underground economies as a primary means of income as their white counterparts, with participation

116. Materials on file with author.

117. Materials on file with author.

118. Materials on file with author.

119. Materials on file with author.

120. See HOMELESSNESS RSCH. INST., *supra* note 105 (reporting that sixty-three percent of trans people are unsheltered, compared to forty-nine percent of cisgender people); SAMANTHA BATKO, ALYSE D. ONETO & AARON SHROYER, *URB. INST., UNSHELTERED HOMELESSNESS: TRENDS, CHARACTERISTICS, AND HOMELESS HISTORIES* 16 (2020), <https://www.urban.org/sites/default/files/publication/103301/unsheltered-homelessness.pdf> (noting that trans people are twice as likely to be unsheltered as sheltered); see also Reed Christian & Anya Mukarji-Connolly, *What's Home Got to Do with It? Unsheltered Queer Youth*, 10 SCHOLAR & FEMINIST ONLINE (Fall 2011/Spring 2012), <https://sfonline.barnard.edu/whats-home-got-to-do-with-it-unsheltered-queer-youth/> (discussing experiences of unsheltered youth).

121. JAMES ET AL., *supra* note 14, at 176.

122. JAMES ET AL., *supra* note 14, at 157–58, 164 (reporting that one in five trans people in the sample engaged in sex work, drug sales, or other activities for income, with higher rates for trans women of color); JASON LYDON, KAMARIA CARRINGTON, HANA LOW, REED MILLER & MAHSA YAZDY, *COMING OUT OF CONCRETE CLOSETS: A REPORT ON BLACK & PINK'S NATIONAL LGBTQ PRISONER SURVEY* 3, 21 (2015) (noting high participation rates in the sex and drug trades).

rates reaching as high as forty-four percent.<sup>123</sup> In addition, trans people who had been pushed out of their families or were experiencing homelessness were three times more likely to participate in criminalized economies as people who have stable housing.<sup>124</sup>

While participating in the sex trade or other underground economies is a survival necessity for many trans people of color because of the pervasive employment discrimination they face, it also serves as a direct conduit to prisons and jails.<sup>125</sup> More than fifty percent of Black trans sex workers surveyed in 2015 had at least one prior arrest—arrests that can be catastrophic due to their immigration consequences, as discussed below.<sup>126</sup>

The criminalization of sex work in the United States harms trans sex workers in myriad ways, first and foremost by forcing the industry underground in ways that are antithetical to safety.<sup>127</sup> The Fight Online Sex Trafficking Act, which was enacted by Congress in 2018 to allow websites to be held criminally liable for facilitating “prostitution,” contributed to this problem by shuttering many of the websites that sex workers traditionally relied on to screen and locate clients, forcing them back onto the streets and into increased peril.<sup>128</sup>

The fact that trans sex workers are deemed criminals—rather than laborers entitled to safe conditions of work—allows them to be abused with near impunity.<sup>129</sup> Forty-one percent of trans sex workers polled as part of the United States Transgender Survey reported being physically attacked in the year prior to the survey, while thirty-six percent reported incidents of

123. JAMES ET AL., *supra* note 14, at 158 (observing participation rates of forty-four percent among Black trans women, forty-one percent among Indigenous trans women, and thirty-seven percent among trans people without residency or work authorization).

124. JAMES ET AL., *supra* note 14, at 159; *see also* Trans Voices Amicus Br., *supra* note 8, at 28–32 (collecting the stories of Miss Major and other trans sex workers of color).

125. JAMES ET AL., *supra* note 14, at 163–64.

126. JAMES ET AL., *supra* note 14, at 163–64. For more discussion of the challenges that trans immigrants face with respect to criminalization, *see infra* Section II.D.

127. For general background, *see* NINA LUO, DATA FOR PROGRESS, DECRIMINALIZING SURVIVAL: POLICY PLATFORM AND POLLING ON THE DECRIMINALIZATION OF SEX WORK (2020), <https://www.dataforprogress.org/memos/decriminalizing-sex-work>.

128. 18 U.S.C. § 2421A, also known as the Fight Online Sex Trafficking Act / Stop Enabling Sex Traffickers Act or FOSTA-SESTA, allowing website hosts to be criminalized for hosting advertisements for consensual sex as opposed to facilitating sex trafficking. For a discussion of how FOSTA-SESTA harms trans and sex workers, *see, for example*, DANIELLE BLUNT & ARIEL WOLF, HACKING//HUSTLING, ERASED: THE IMPACT OF FOSTA-SESTA & THE REMOVAL OF BACKPAGE (2020); Regina A. Russo, *Online Sex Trafficking Hysteria: Flawed Policies, Ignored Human Rights, and Censorship*, 68 CLEV. ST. L. REV. 314, 330–34 (2020); Lura Chamberlain, FOSTA: A Hostile Law with a Human Cost, 87 FORDHAM L. REV. 2171, 2208 (2019) (advocating for the statute’s repeal).

129. *See* JAMES ET AL., *supra* note 14, at 163.

sexual assault.<sup>130</sup> Trans women of color, particularly immigrants, face increased risks related to human trafficking.<sup>131</sup>

Unfortunately, the abuse of trans sex workers also extends to law enforcement.<sup>132</sup> Eighty-six percent of trans sex workers who participated in the United States Transgender Survey reported experiencing abusive treatment from law enforcement, including instances of being coerced into sexual activity by police officers to avoid arrest.<sup>133</sup>

## 2. *Discriminatory Policing and False Arrests*

Deepening these challenges, trans women of color are frequently profiled and arrested on the suspicion that they are sex workers *regardless* of whether they are actually involved in the sex trades.<sup>134</sup> This practice of profiling and arresting trans women without cause has become so ubiquitous in jurisdictions that prohibit loitering for the purposes of prostitution that it has been nicknamed the “Walking While Trans Ban.”<sup>135</sup> Prior to the repeal of New York State’s own Walking While Trans Ban in 2021, thousands of Black and Latinx trans women were arrested for loitering for the purposes of prostitution simply for “showing cleavage,” walking to the grocery store, waiting for public transportation, or spending time outside with their partners or friends.<sup>136</sup> A trans Latina woman married to a cis-

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130. JAMES ET AL., *supra* note 14, at 202, 206.

131. See Lynly S. Egyes, *Borders and Intersections: The Unique Vulnerabilities of LGBTQ Immigrants to Trafficking*, in BROADENING THE SCOPE OF HUMAN TRAFFICKING RESEARCH: A READER 171, 181–82 (Eric C. Heil & Andrea J. Nichols eds., 2016).

132. See JAMES ET AL., *supra* note 14, at 163.

133. See JAMES ET AL., *supra* note 14, at 163. For additional background, see As It Happens, *N.Y. Paves Way for ‘Healing’ by Ending Its ‘Walking While Trans’ Ban, Says Advocate*, CBC RADIO (Feb. 3, 2021, 6:02 PM), <https://www.cbc.ca/radio/asithappens/as-it-happens-wednesday-edition-1.5899902/n-y-paves-way-for-healing-by-ending-its-walking-while-trans-ban-says-advocate-1.5899905>; Heidi Hoefinger, Jennifer Musto, P.G. Maciotti, Anne E. Fehrenbacher & Nicola Mai, *Community-Based Responses to Negative Health Impacts of Sexual Humanitarian Anti-Trafficking Policies and the Criminalization of Sex Work and Migration in the US*, 9 Soc. SCI. 1, 12, 22–23 (2020), <https://doi.org/10.3390/socsci9010001>.

134. Pooja Gehi, *Gendered (In)security: Migration and Criminalization in the Security State*, 35 HARV. J.L. & GENDER 357, 368–73 (2012) (describing phenomenon); JAMES ET AL., *supra* note 14, at 187 (reporting that Black trans women were three times as likely to be profiled as sex workers as white trans women).

135. Gehi, *supra* note 134 (describing phenomenon). A key problem of these loitering statutes is their vagueness and the amount of discretion they afford law officers to determine who qualifies as a prostitute. See Melissa Gira Grant, *The NYPD Arrests Women for Who They Are and Where They Go — Now They’re Fighting Back*, VILLAGE VOICE (Nov. 22, 2016), <https://www.villagevoice.com/2016/11/22/the-nypd-arrests-women-for-who-they-are-and-where-they-go-now-theyre-fighting-back/>.

136. Grant, *supra* note 135; Ricardo Cortés, *An Arresting Gaze: How One New York Law Turns Women into Suspects*, VANITY FAIR (Aug. 3, 2017), <https://www.vanityfair.com/culture/2017/08/nypd-prostitution-laws>; Alanna Vagianos, *Civil Rights Groups Call Out ‘Archaic’ N.Y. Loitering Law for Targeting Trans People*, HUFFPOST (June 12, 2019, 10:25 AM), [https://www.huffpost.com/entry/civil-rights-groups-call-out-archaic-ny-loitering-law-for-targeting-trans-people\\_n\\_5d00067ae4b011df123c0fd1](https://www.huffpost.com/entry/civil-rights-groups-call-out-archaic-ny-loitering-law-for-targeting-trans-people_n_5d00067ae4b011df123c0fd1).



gender man in Queens reported being stopped by the NYPD so frequently when they were together as a couple—on the theory that she was a prostitute and her husband a client—that she began carrying a copy of her marriage license around whenever they left the house.<sup>137</sup> NYPD officers were also trained to view trans women and prostitutes as being synonymous and to make arrests under the statute by looking for “women with Adam’s apples, big hands and big feet” during their street patrols.<sup>138</sup>

Not only do these biased police encounters lead to cases of false arrest—arrests that can also be catastrophic for immigrants, as discussed below<sup>139</sup>—they facilitate incidents of abuse and sexual coercion by law enforcement as detailed above.<sup>140</sup> Indeed, a majority of the trans people of color surveyed in 2015 had experienced at least one form of mistreatment from law enforcement, including incidents of verbal, physical, or sexual abuse.<sup>141</sup>

#### D. Additional Challenges Unique to Trans Immigrants

Trans people who are immigrants to the United States also have unique and complex experiences with criminalization.<sup>142</sup> Even though many trans people immigrate to the United States to flee persecution in their home countries, they often face obstacles obtaining legal status in the United States.<sup>143</sup> While asylum is theoretically a path to United States residency and citizenship, it is subject to strict time limits and evidentiary requirements.<sup>144</sup> The Trump Administration introduced a barrage of new policies

137. Materials on file with author.

138. Jo Yurcaba, *New York Repeals ‘Walking While Trans’ Law After Years of Activism*, NBC NEWS (Feb. 4, 2021, 11:40 AM), <https://www.nbcnews.com/feature/nbc-out/new-york-repeals-walking-while-trans-law-after-years-activism-n1256736>.

139. See *infra* Section II.D.

140. See, e.g., JAMES ET AL., *supra* note 14, at 187–88 (reporting incidence rates of sexual abuse by law enforcement as high as twenty percent among trans people of color); Hoefinger et al., *supra* note 133; As It Happens, *supra* note 133 (trans activist recounting her own experiences of being profiled and sexually abused by police).

141. JAMES ET AL., *supra* note 14, at 185–87 (reporting seventy-four percent incidence rate of law enforcement abuse among Indigenous trans people, seventy-one percent incidence rate among multiracial people, sixty-six percent incidence rate among Latinx people, and sixty and sixty-one percent incidence rates among Black and Asian trans people respectively in the year prior to the survey).

142. For an in-depth exploration of this topic, see Gehi, *supra* note 134.

143. See generally Gehi, *supra* note 134; *The Precarious Position of Transgender Immigrants and Asylum Seekers*, HUM. RTS. CAMPAIGN (Jan. 4, 2019), <https://www.hrc.org/news/the-precarious-position-of-transgender-immigrants-and-asylum-seekers>; JESSICA JEANTY & HARPER JEAN TOBIN, NAT’L CTR. FOR TRANSGENDER EQUAL., *OUR MOMENT FOR REFORM: IMMIGRATION & TRANSGENDER PEOPLE* (2013), [https://transequality.org/sites/default/files/docs/resources/OurMoment\\_CIR\\_en.pdf](https://transequality.org/sites/default/files/docs/resources/OurMoment_CIR_en.pdf).

144. See VICTORIA NEILSON, ELISSA STEGLICH & ERIN HARRIST, IMMIGR. EQUAL. & MIDWEST IMMIGRANT & HUM. RTS. CTR., *ASYLUM MANUAL* § 5, <https://immigrationequality.org/asylum/asylum-manual/immigration-basics-the-one-year-filing-deadline/> (last visited Aug. 15, 2022) (summarizing the one-year rule and its exceptions).

and restrictions that turned the asylum process into a legal minefield in ways that the Biden Administration is still working to undo.<sup>145</sup> As a result, Trump-era policies continue to make it difficult for trans people—and indeed all immigrants—to enter the United States in search of safety or to have their asylum claims adjudicated without being forced to remain in Mexico, wholly cut off from legal resources for long, perilous stretches of time.<sup>146</sup>

Even for the trans immigrants who overcome these hurdles, successfully navigating the asylum process still requires finding a competent legal advocate, satisfying a significant evidentiary burden, and adhering to strict time limits that make asylum petitions largely unavailable to anyone who has been present in the United States for more than a year—oftentimes all while being held in an immigration detention center.<sup>147</sup> While other means of obtaining lawful status may be available to trans people, including U and T visas, they typically require legal support as well.<sup>148</sup>

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145. Trump’s rules, *inter alia*, barred asylum to anyone who crossed the Southern border without presenting at an authorized port of entry, barred asylum to anyone who failed to apply first in a Central American country (irrespective of whether it was available to people fleeing LGBTQ+ persecution), and limited the overall number of asylum applications processed daily. Then, in an even more direct attack on trans immigrants, the Trump administration issued a final rule categorically banning asylum claims based on gender-based persecution until it was blocked by litigation.

For background, see, for example, Nicole Narea, *The Demise of America’s Asylum System Under Trump, Explained*, VOX (Nov. 5, 2019, 12:00 PM), <https://www.vox.com/2019/11/5/20947938/asylum-system-trump-demise-mexico-el-salvador-honduras-guatemala-immigration-court-border-ice-cbp> (summarizing Trump’s changes to the immigration and asylum system as of 2019); Camilo Montoya-Galvez, *Trump Rushes to Enact Asylum Restrictions Ahead of Biden Presidency*, CBS NEWS (Jan. 11, 2021, 10:28 AM), <https://www.cbsnews.com/news/trump-asylum-restrictions-biden-presidency/> (discussing additional Trump initiatives); Sarah Stillman, *The Race to Dismantle Trump’s Immigration Policies*, NEW YORKER (Feb. 1, 2021), <https://www.newyorker.com/magazine/2021/02/08/the-race-to-dismantle-trumps-immigration-policies> (describing the complicated federal picture); Camilo Montoya-Galvez, *U.S. Rescinds Trump-Era Rules That Limited Processing of Asylum-Seekers at Border Crossings*, CBS NEWS (Nov. 3, 2021, 1:08 PM), <https://www.cbsnews.com/news/immigration-us-processing-asylum-seekers-border-crossings-metering/> (discussing metering); Priscilla Alvarez, *Biden Administration Rescinds Trump-Era Policy Limiting Migrants at Legal Ports of Entry*, CNN (Nov. 3, 2021, 8:45 AM), <https://www.cnn.com/2021/11/03/politics/migrants-legal-ports-of-entry-biden/index.html>.

146. See, e.g., Uriel J. García, *Here’s What You Need to Know About Title 42, the Pandemic-Era Policy That Quickly Sends Migrants to Mexico*, TEX. TRIB. (June 28, 2022), <https://www.texastribune.org/2022/04/29/immigration-title-42-biden/>; Uriel J. García, *Supreme Court Rules Biden Administration Can End “Remain in Mexico” Policy, Sending Case Back to a Texas Court*, TEX. TRIB. (June 30, 2022, 6:00 PM), <https://www.texastribune.org/2022/06/29/supreme-court-migrant-protection-protocols-remain-mexico-biden/>; Myah Ward & Jonathan Lemire, *Judge Blocks Biden Administration from Lifting Title 42 Border Policy*, POLITICO (May 20, 2022, 7:25 PM), <https://www.politico.com/news/2022/05/20/judge-blocks-biden-administration-from-lifting-title-42-border-policy-00034195>.

147. See *The Precarious Position of Transgender Immigrants and Asylum Seekers*, *supra* note 143 (discussing challenges).

148. See *U and T Visa Certifications*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/immigration/u-t-visa>.

Trans people who are unable to claim lawful residence often rely on criminalized economies, like the sex trade, to survive because formal employment is closed off to them entirely.<sup>149</sup> However, doing so simultaneously exposes them to arrest, detention, and deportation because prostitution-related arrests are deemed to be crimes of moral turpitude that make adjusting one's immigration status virtually impossible, with few exceptions.<sup>150</sup>

Trans immigrants who lack formal legal status also fall prone to the special forms of criminalization that exist within the United States immigration system and frequently end up in immigration detention centers that mirror the worst prisons and jails, even as they are pursuing asylum claims or fighting to adjust their status.<sup>151</sup>

### III. THE MASS INCARCERATION CRISIS IMPACTING TRANS PEOPLE OF COLOR

#### A. *The Trans Incarceration Epidemic*

Due to the operation of the discrimination-to-incarceration pipeline—and specifically, the ways that discrimination denies trans people of color the opportunity to participate in formal economies—mass incarceration has become a crisis of epidemic proportions.<sup>152</sup> Forty-seven percent of Black

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149. See Gabriela Barzallo, *Trans Sex Workers Speak Out About Legalization, Health Care, and Working During the Pandemic*, PRISM (Mar. 15, 2021), <https://prismreports.org/2021/03/15/trans-sex-workers-speak-out-about-legalization-health-care-and-working-during-the-pandemic/>. The lack of opportunity that trans migrants face may soon extend to education as well, as Texas Governor Greg Abbott has vowed to challenge *Plyer v. Doe*, the Supreme Court decision establishing that undocumented youth can still receive public school education. See Bill Chappell, *Texas Governor Says the State May Contest a Supreme Court Ruling on Migrant Education*, NPR (May 6, 2022, 3:56 PM), <https://www.npr.org/2022/05/06/1097178468/texas-governor-says-the-state-may-contest-a-supreme-court-ruling-on-migrant-educ>.

150. Luis Medina, *Immigrating While Trans: The Disproportionate Impact of the Prostitution Ground of Inadmissibility and Other Provisions of the Immigration and Nationality Act on Transgender Women*, 19 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 253, 281 (2017) (discussing how sex work makes trans immigrants vulnerable to deportation); Gehi, *supra* note 134, at 377–82 (same).

151. Lauren Zitsch, Note, *Where the American Dream Becomes a Nightmare: LGBT Detainees in Immigration Detention Facilities*, 22 WM. & MARY J. WOMEN & LAW 105, 105–06 (2015) (noting that “immigration detention has become known as the fastest-growing, least scrutinized form of incarceration in the United States.”) (citation omitted); SHARITA GRUBERG, CTR. FOR AM. PROGRESS, DIGNITY DENIED: LGBT IMMIGRANTS IN U.S. IMMIGRATION DETENTION (2013) (describing detention conditions).

152. See Jaelyn M. White Hughto, Sari L. Reisner, Trace S. Kershaw, Frederick L. Altice & Katie B. Biello, *A Multisite, Longitudinal Study of Risk Factors for Incarceration and Impact on Mental Health and Substance Use Among Young Transgender Women in the USA*, 41 J. PUB. HEALTH 100, 103–04 (2019), <https://pubmed.ncbi.nlm.nih.gov/29474682/> (corroborating that homelessness, school pushout, and sex work participation are strong predictors of incarceration for trans women); GRANT ET AL., *supra* note 31 (same); LYDON ET AL., *supra* note 122, at 3 (in nationwide survey of LGBTQ+ prisoners, finding that nearly twenty percent were homeless, thirty-three percent were unemployed, thirty-nine percent were engaging in survival sex-work prior to their incarceration).

trans people have been jailed or imprisoned at some point in their lives, according to the United States Transgender Survey.<sup>153</sup> In contrast, less than three percent of the general United States population will be incarcerated in their lifetimes—making incidence rates of incarceration among Black trans people more than 15.5 times higher.<sup>154</sup> Trans people are frequently incarcerated for their participation in criminalized economies and for survival-related offenses, like theft.<sup>155</sup> Research has also confirmed the link between trans people’s experiences of discrimination and their incarceration rates.<sup>156</sup>

### B. *Cruel and Unusual Conditions of Confinement*

Trans people of color who populate United States prisons and jails face horrific conditions of confinement, including unconscionable levels of sexual abuse and assault.<sup>157</sup> Trans people face rates of sexual abuse that are ten times higher than the general population in prisons and jails.<sup>158</sup> Trans women are especially vulnerable to sexual abuse because they are typically placed in facilities contrary to their gender identity—alongside cisgender

153. GRANT ET AL., *supra* note 31, at 163.

154. THOMAS P. BONZCAR, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1972–2001, at 1 (2003), <https://bjs.ojp.gov/content/pub/pdf/piusp01.pdf> (estimating lifetime incarceration rates); LAUREN E. GLAZE & ERIKA PARKS, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011, at 1 (2012), <https://bjs.ojp.gov/content/pub/pdf/cpus11.pdf> (providing snapshot of rates during year of survey).

155. See generally AMNESTY INT’L, STONEWALLED: POLICE ABUSE & MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL & TRANSGENDER PEOPLE IN THE U.S. 21, 171 (2005); CATHERINE HANSSSENS, AISHA C. MOODIE-MILLS, ANDREA J. RITCHIE, DEAN SPADE & URVASHI VAID, CTR. FOR AM. PROGRESS & CTR. FOR GENDER & SEXUALITY L. AT COLUM. L. SCH., A ROADMAP FOR CHANGE: FEDERAL POLICY RECOMMENDATIONS FOR ADDRESSING THE CRIMINALIZATION OF LGBT PEOPLE & PEOPLE LIVING WITH HIV 36–38 (2014).

156. See, e.g., White Hughto et al., *supra* note 152 (corroborating trend). Prior to drafting this article, I had lectured extensively on the subject and incorporated discussion into my press statements and legal briefs. See, e.g., Trans Voices Amicus Br., *supra* note 8, at 33–36; Sontag, *supra* note 2. I also published a short reflection piece on the subject with Richard Saenz, a close collaborator who also advocates for trans rights. See Chinyere Ezie & Richard Saenz, *Abuse and Neglect of Transgender People in Prisons and Jails: A Lawyer’s Perspective*, PLI CHRON.: INSIGHTS AND PERSP. FOR LEGAL CMTY. (2020), <https://plus.pli.edu/Details/Details?fq=~2B-id-3A282B22-315011-ATL3~2229~>.

157. See, e.g., JAMES ET AL., *supra* note 14, at 191–93 (reporting high incidence rates and noting that abuse occurs at the hands of guards as well as other incarcerated people); ALLEN J. BECK, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, SUPPLEMENTAL TABLES: PREVALENCE OF SEXUAL VICTIMIZATION AMONG TRANSGENDER ADULT INMATES (2014), [https://bjs.ojp.gov/content/pub/pdf/svpjri1112\\_st.pdf](https://bjs.ojp.gov/content/pub/pdf/svpjri1112_st.pdf) (same); VALERIE JENNESS, CHERYL L. MAXSON, KRISTY N. MATSUDA & JENNIFER MACY SUMNER, UNIV. OF CAL. IRVINE CTR. FOR EVIDENCE-BASED CORR., VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 31 (2007) (same).

158. Compare Beck, *supra* note 157, at tbl. 1, with ALLEN J. BECK, MARCUS BERZOFSKY, RACHEL CASPAR & CHRISTOPHER KREBS, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12: NATIONAL INMATE SURVEY, 2011–12 (2013), [www.bjs.gov/content/pub/pdf/svpjri1112\\_st.pdf](http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf) (estimating rates of sexual abuse among the general population to be 3.2–4%, depending on facility type).

men—even though these placements expose them to an outrageous risk of sexual and physical violence.<sup>159</sup>

More than two-thirds of trans people who suffered sexual abuse in prison or jail indicated that they were sexually assaulted more than one time.<sup>160</sup> In fact, in the United States Transgender Survey, twenty-three percent of respondents indicated that they had been sexually abused or assaulted *eight or more times*.<sup>161</sup> Adding on to these dire circumstances, prison officials are notoriously indifferent to the sexual abuse claims of trans prisoners.<sup>162</sup> Oftentimes, the only relief from sexual abuse that trans prisoners receive comes from paying other incarcerated people for protection with money or favors.<sup>163</sup>

Incarcerated trans people also face systemic challenges accessing transition-related health care.<sup>164</sup> At times, these care denials are so extreme they are tantamount to a forced de-transition—which, in the case of trans rights activist and my longtime client, Ashley Diamond, meant being treated like a man in a man’s facility and cut off from the hormone therapy she had received for most of her life while incarcerated in Georgia between 2012 and 2015.<sup>165</sup> Experiences like Ashley Diamond’s are all too common; thirty-seven percent of trans people who had a recent experience of incarceration, according to the United States Transgender Survey, reported that their hormone therapy was abruptly discontinued by correction officials and never resumed while they were in custody.<sup>166</sup>

While access to hormone therapy has slowly increased nationwide thanks to successful litigation, accessing transition-related healthcare beyond hormone therapy remains almost impossible for trans people in cus-

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159. See *LGBTQ People Behind Bars: A Guide To Understanding the Issues Facing Transgender Prisoners and Their Legal Rights*, NAT’L CTR. FOR TRANSGENDER EQUAL. 1, 14–15 (2018), <https://transequality.org/transpeoplebehindbars> (discussing issue).

160. See, e.g., JENNESS ET AL., *supra* note 157, at 29–30 (reporting that fifty-nine percent of trans women surveyed about their experience in California prisons reported experiencing sexual assault, and that seventy-five percent of these respondents reported being sexually assaulted multiple times); JAMES ET AL., *supra* note 14, at 193 (reporting that fifty-seven percent of survey respondents who indicated they had suffered abuse in prison or jail were sexually or physically assaulted more than one time).

161. JAMES ET AL., *supra* note 14, at 193.

162. See, e.g., Sontag, *supra* note 2 (explaining that prison officials responded to Ashley Diamond’s sexual assault concerns by instructing her to “guard her booty” and prepare to fight).

163. LYDON ET AL., *supra* note 122, at 32.

164. See, e.g., Jacelyn M. White Hughto et al., *Creating, Reinforcing, and Resisting the Gender Binary: A Qualitative Study of Transgender Women’s Healthcare Experiences in Sex-Segregated Jails and Prisons*, 14 INT’L J. PRISONER HEALTH 69, 69–88 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5992494/> (surveying twenty trans women incarcerated in the United States between 2010 and 2015 and finding that insufficient access to mental and transition-related care negatively impacted their health).

165. See, e.g., Sontag, *supra* note 2; Complaint at 2, *Diamond v. Owens*, 131 F. Supp. 3d 1346 (M.D. Ga. 2015) (No. 15-cv-00050).

166. JAMES ET AL., *supra* note 14, at 193.

tody without legal advocates.<sup>167</sup> Being cut off from necessary transition-related healthcare—including surgery and the ability to live openly in accordance with their gender—has catastrophic effects on the mental and physical health of incarcerated trans people, often leading to depression, suicide, and self-surgery attempts.<sup>168</sup> Although the United States Department of Justice recently announced that refusing to house trans people in facilities according to their gender identity or to provide them comprehensive transition-related care can violate the Eighth Amendment to the United States Constitution and its prohibition on Cruel and Unusual Punishment, these practices have been slow to change.<sup>169</sup>

As a result of all the above, many trans people are forced to serve terms of incarceration marked by state-sanctioned violence, abuse, and torture, which in turn leads to trauma, anguish, and, oftentimes, substance abuse disorders that continue to plague them if or when they return to their communities.<sup>170</sup> Ashley Diamond experienced these horrors firsthand while incarcerated in Georgia. Between 2012 and 2015 while incarcerated for theft-related offenses, Ashley Diamond was placed in a series of men’s prisons where she was sexually abused repeatedly and denied access to transition health care (including hormone therapy) until she filed a successful lawsuit.<sup>171</sup> While trans people incarcerated in Georgia are now able to access hormone therapy, thanks to Ashley Diamond’s advocacy, other consti-

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167. See, e.g., *Edmo v. Corizon, Inc.*, 935 F.3d 757, 795–97 (9th Cir. 2019) (surgery for trans inmate); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1194 (N.D. Cal. 2015), *appeal dismissed*, 802 F.3d 1090 (9th Cir. 2015) (same); *Iglesias v. Fed. Bureau of Prisons*, No. 19-CV-00415, 2022 WL 1136629, at \*1–11 (S.D. Ill. Apr. 18, 2022) (instructing corrections officials to confirm a trans plaintiff for hair removal and gender confirmation surgery plan for a second time and contemplating sanctions based on their delay). *But see Gibson v. Collier*, 920 F.3d 212, 223–25 (5th Cir. 2019) (effectively putting surgical care out of reach for trans prisoners in Texas, Mississippi, and Louisiana).

168. See, e.g., Annette Brömdal, Amy B. Mullens, Tania M. Phillips & Jeff Gow, *Experiences of Transgender Prisoners and Their Knowledge, Attitudes, and Practices Regarding Sexual Behaviors and HIV/STIS: A Systematic Review*, 20 INT’L J. TRANSGENDERISM 4, 4–20 (2019) (discussing abusive conditions and frequent healthcare denials); George Brown, *Auto-Castration and Auto-Penectomy as Surgical Self-Treatment in Incarcerated Persons with Gender Identity Disorder*, 12 INT’L J. TRANSGENDERISM 31, 31–39 (2010) (reporting on the severe consequences of transition health care denials in prison, including self-surgery attempts).

169. See Statement of Interest of the United States at 1–9, *Diamond v. Ward*, No. 20-cv-00453 (M.D. Ga. Apr. 22, 2021). Indeed, when California passed a law in 2020 that expanded the availability of gender-identity based housing placements, rollout stalled after it was subject to a legal challenge. See Christian Martinez, *Suit Takes Aim at Law That Lets Transgender Inmates Choose Housing Based on Gender Identity*, L.A. TIMES (Nov. 24, 2021), <https://www.latimes.com/california/story/2021-11-24/lawsuit-takes-aim-at-law-that-allows-transgender-inmates-to-choose-housing-location-based-on-gender-identity>.

170. See generally LYDON ET AL., *supra* note 122; CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS TRANSGENDER PEOPLE (2016), <https://www.lgbtmap.org/file/lgbt-criminal-justice-trans.pdf>.

171. Sontag, *supra* note 2; Cleis Abeni, *Trans Woman Ashley Diamond Reaches Settlement with Ga. Dept. of Corrections*, ADVOCATE (Feb. 12, 2016), <https://www.advocate.com/transgender/2016/2/12/watch-trans-woman-ashley-diamond-reaches-settlement-georgia-department> (describing legal victory).

tutional violations persist—including Georgia’s practice of housing trans women almost exclusively in men’s prisons where they face heightened vulnerability to rape.<sup>172</sup>

Regrettably, the challenges facing trans people in immigrant detention centers largely mirror those in prisons and jails, which is to say that trans women are primarily housed in men’s facilities where transition healthcare is largely unavailable, sexual abuse is rampant, and stints in solitary confinement serve as their primary form of “protection.”<sup>173</sup>

### C. *The Limits of Legal Redress*

Despite the established Constitutional rights and protections that trans people in jails and prisons enjoy, abuse often goes unremedied because legal remedies are notoriously difficult to access.<sup>174</sup> The Prison Litigation Reform Act (“PLRA”), signed into law under President Bill Clinton, purposefully makes it difficult for civil rights attorneys and jailhouse lawyers alike to bring prison condition lawsuits, be it due to exhaustion requirements, attorney-fee caps, restrictions on the availability of damages and the scope of injunctive relief, or three-strikes rules that restrict access to *in forma pauperis* filings.<sup>175</sup> The demand for legal services and representation among trans people in custody greatly outpaces the supply, forcing many would-be clients to navigate the legal system as pro se litigants, which is oftentimes a recipe for certain loss.<sup>176</sup>

For trans people who experience abuse while incarcerated in federal facilities, obtaining monetary damages is increasingly difficult due to court decisions casting doubt on the ongoing viability of *Bivens* remedies, which traditionally enabled federal actors to be held financially liable for Constitu-

172. Shaila Dewan, *Back in Prison, Transgender Woman Faces an Old Horror, Sexual Assault*, N.Y. TIMES (Nov. 23, 2020), <https://www.nytimes.com/2020/11/23/us/ashley-diamond-transgender-prison.html>.

173. See, e.g., Zitsch, *supra* note 151, at 110–12 (discussing trans women’s vulnerability to sexual abuse in detention centers); Laurel Anderson, Commentary, *Punishing the Innocent: How the Classification of Male-to-Female Transgender Individuals in Immigration Detention Constitutes Illegal Punishment Under the Fifth Amendment*, 25 BERKELEY J. GENDER L. & JUST. 1 (2010) (noting abuse is perpetrated by detainees and guards).

174. See, e.g., Jennifer Levi & Kevin M. Barry, *Transgender Rights & the Eighth Amendment*, 95 S. CAL. L. REV. 109, 110 (2021) (discussing the Constitutional and legal framework that protects the healthcare and safety rights of trans inmates); Sarah Ortlip-Sommers, Note, *Living Freely Behind Bars: Reframing the Due Process Rights of Transgender Prisoners*, 40 COLUM. J. GENDER & L. 355, 355–407 (2021), <https://doi.org/10.52214/cjgl.v40i3.8599> (explaining that similar theories are available under the Fourteenth Amendment for detainees).

175. Allen E. Honick, *It’s “Exhausting”: Reconciling a Prisoner’s Right to Meaningful Remedies for Constitutional Violations with the Need for Agency Autonomy*, 45 U. BALT. L. REV. 155, 167–69, 187–88 (2015) (summarizing the myriad ways the PLRA discourages legal challenges).

176. See, e.g., Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 882 (2009) (discussing the federal judiciary’s hostility toward prisoners’ rights lawsuits); Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 301, 302 (2022) (same); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1610–11 (2003) (noting the diminished success pro se litigants have relative to litigants with retained counsel).

tional violations.<sup>177</sup> Courts have also used the discretionary function exception of the Federal Torts Claims Act (“FTCA”) to limit the ability of abuse survivors to sue for monetary damages.<sup>178</sup> Trans immigrants in federal detention centers face similar difficulties in challenging their conditions of confinement, with language access issues and the fact that detainees are held in locations that are often physically inaccessible to lawyers serving as additional complications.<sup>179</sup>

Damages claims against corrections officers and immigration officers are also constrained by the judge-made doctrine of qualified immunity, which frequently serves to insulate governmental officials who violate the Constitution and federal law from legal consequences.<sup>180</sup> Finally, while the federal Prison Rape Elimination Act (“PREA”) Standards contain important guidance on sexual abuse prevention for trans people incarcerated in state and federal facilities and has been described as an “evolving standard[ ] of decency” relevant to Eighth Amendment claims, it does not, however, provide survivors of prison sexual abuse with a private cause of action to seek redress.<sup>181</sup>

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177. Compare *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (recognizing implied right of action for damages), with *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022) (stating that *Bivens* actions are now “a disfavored judicial activity”) (citation omitted); *Silva v. United States*, 45 F.4th 1134, 1138–41 (10th Cir. 2022) (citing *Egbert* and holding that an incarcerated plaintiff’s Eighth Amendment *Bivens* action was foreclosed, notwithstanding the prior judicial recognition of such remedies).

By declining to recognize a *Bivens* remedy in the Eighth Amendment context, *Silva* rebukes *Farmer v. Brennan*, 511 U.S. 825 (1994), the *Bivens* action brought by a Black trans woman that first established the duty to protect, as well as *Carlson v. Green*, 446 U.S. 14, 23–25 (1980), which allowed a *Bivens* claim to proceed on behalf of a plaintiff denied necessary healthcare.

178. *Gladney v. United States*, 858 F. App’x 221, 223–24 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 909 (2022) (finding a trans sexual assault survivor’s FTCA claims foreclosed under the exception). One silver lining of the *Gladney* decision, however, is that the Court acknowledged that on a different factual record, a plaintiff might be able to show that the discretionary function exception was unavailable based on violations of the Eighth Amendment duty to protect. *Id.* at 223–24 (stating “the Constitution can limit the discretion of federal officials such that the FTCA’s discretionary function exception will not apply”) (citations omitted).

179. See generally Dana O’Day, *The Forgotten Frontier? Healthcare for Transgender Detainees in Immigration and Customs Enforcement Detention*, 60 HASTINGS L.J. 453 (discussing the bleak legal landscape); ADITI SHAH & EUNICE HYUNHYE CHO, AM. CIV. LIBERTIES UNION, NO FIGHTING CHANCE: ICE’S DENIAL OF ACCESS TO COUNSEL IN U.S. IMMIGRATION DETENTION CENTERS (2022), <https://www.aclu.org/report/no-fighting-chance-ices-denial-access-counsel-us-immigration-detention-centers>.

180. See George A. Acosta, *Devolving Standards of Decency: How Eighth Amendment Jurisprudence Fails Transgender Inmates Seeking Necessary Medical Care*, 36 WIS. J.L. GENDER & SOC’Y 59, 78–80 (2021) (exploring the harms of qualified immunity for trans people in prisons and jails).

181. See National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act (PREA), 28 C.F.R. § 115 (2022) (PREA Standards); Statement of Interest of the United States, *supra* note 169, at 6–9 (describing how the PREA Standards reflect a contemporary standard of decency); Sage Martin, *The Prison Rape Elimination Act: Sword or Shield?*, 56 TULSA L. REV. 283, 293–95, 300–02 (2021) (same, but noting cause of action limitation).



#### IV. DISMANTLING THE DISCRIMINATION-TO-INCARCERATION PIPELINE: A MODEST PROPOSAL FOR THE WAY FORWARD

Because the discrimination-to-incarceration pipeline is occasioned by discrimination that occurs at many different nodes and sites, dismantling the pipeline requires myriad interventions in areas as various as education, employment, housing, and criminal justice. Below I discuss them in turn.

##### A. *Halting the Criminalization, Mass Incarceration, and Detention of Trans People of Color*

###### 1. *Decriminalizing Survival*

First and foremost, advocates who are concerned about the discrimination-to-incarceration pipeline must support measures that stop trans people of color from being criminalized for their attempts to survive.<sup>182</sup> Important here, advocates can join the movement to decriminalize consensual sex work between adults since criminalization promotes, rather than prevents, sex trafficking by forcing all sex workers, trans or otherwise, into a dangerous underground economy where they lack any possible protection from law enforcement.<sup>183</sup> Advocates can also call upon lawmakers to reexamine the provisions of FOSTA-SESTA that criminalize the advertisement of consensual sex for pay online, as well as HIV criminalization laws which exact a heavy public health cost, regardless of their original intentions.<sup>184</sup>

Measures short of decriminalization of the sex trades can also be helpful. For instance, advocates can call for the repeal of loitering laws that allow for people to be profiled as alleged sex workers and arrested without cause.<sup>185</sup> Advocates can call for the dissolution of police details whose primary aim is to target sex workers or engage in quality of life policing, and call for investment in social service programs aimed at eradicating poverty instead.<sup>186</sup> Advocates can also call on lawmakers to ban law enforcement

182. See LYDON ET AL., *supra* note 122, at 6 (calling for an end to quality-of-life policing).

183. For more background, see generally LUO, *supra* note 127; Joelle Freeman, *Legalization of Sex Work in the United States: An HIV Reduction Strategy*, 32 GEO. J. LEGAL ETHICS 597, 598 (2019).

184. See 18 U.S.C. § 2421A (establishing criminal penalties); see also Kate Holland, *New Bill Calls for Examination of Anti-Trafficking FOSTA-SESTA Law*, ABC NEWS (Dec. 20, 2019, 5:10 AM), <https://abcnews.go.com/Politics/bill-calls-examination-anti-trafficking-fosta-sesta-law/story?id=67831743>. In addition to FOSTA, HIV criminalization laws and laws that allow condoms to be used as evidence in support of prostitution convictions merit revisitation on public health grounds, as they ignore scientific data and have been shown to discourage STD testing and safe sex practices. For background, see LUO, *supra* note 127, at 11 (calling for the end to the use of condoms as evidence); Courtney K. Cross, *Sex, Crime, and Serostatus*, 78 WASH. & LEE L. REV. 71 (2021) (calling for an end to HIV criminalization); Joshua D. Blecher-Cohen, *Disability Law and HIV Criminalization*, 130 YALE L.J. 1560 (2021) (same).

185. E.g., Vagianos, *supra* note 136; Cortés, *supra* note 136.

186. See, e.g., Sessi Kuwabara Blanchard, *“Hotbed of Corruption”—NY Lawmakers Condemn Sex-Work Policing Amid Calls to Defund Vice Squad*, FILTER MAG (Apr. 22, 2019), <https://filtermag.org/lawmakers-nypd-criminalization-of-sex-work/>; NYCLU, *ELIMINATE VICE & REIN-*

officers from having sexual contact with sex workers and other members of the public for “investigative purposes,” since all too often this serves as both a form of sexual violence and entrapment.<sup>187</sup> Advocates can also oppose policies that make it difficult for sex workers to transition out of sex work, including policies that deem sex workers ineligible for benefits like public housing.<sup>188</sup>

Initiatives to legalize marijuana can also have tangible benefits for trans people of color who have been forced to rely on the drug trade for income due to the discrimination they face when seeking work, although efforts must be made to ensure that licensing regimes do not erect barriers that preclude meaningful participation by people of color—trans or otherwise—and expose street dealers to continued arrest.<sup>189</sup> Advocates can also push to decriminalize drug possession since substance abuse and addiction are often a response to trauma that is best addressed within a public health framework.<sup>190</sup>

## 2. Decriminalizing Immigration

To reduce the effects of the discrimination-to-incarceration pipeline on trans immigrants, advocates can launch pro bono asylum and immigration law clinics to support community members and push to expand, rather than restrict, pathways to residency and citizenship in this country.<sup>191</sup> Advocates should also push for an end to immigration detention facilities, as discussed further below,<sup>192</sup> and to the broader regime that treats unauthorized border crossings as a criminal offense in a manner that inflicts clear, racialized harms.<sup>193</sup> Given how discrimination can lead trans people of color, includ-

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VEST IN COMMUNITIES, [https://www.nyclu.org/sites/default/files/field\\_documents/2022-nyclu-onepager-defundvice.pdf](https://www.nyclu.org/sites/default/files/field_documents/2022-nyclu-onepager-defundvice.pdf) (last visited Aug. 1, 2022).

187. See Sirin Kale, *Police Are Allegedly Sleeping with Sex Workers Before Arresting Them*, VICE (May 3, 2017, 8:30 AM), <https://www.vice.com/en/article/59mbkx/police-are-allegedly-sleeping-with-sex-workers-before-arresting-them>.

188. See, e.g., Chelsea Breakstone, “*I Don’t Really Sleep*”: *Street-Based Sex Work, Public Housing Rights, and Harm Reduction*, 18 CUNY L. REV. 337 (2015).

189. See EZEKIEL EDWARDS ET AL., AM. CIV. LIBERTIES UNION, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 22–38 (2020), [https://www.aclu.org/sites/default/files/field\\_document/marijuanareport\\_03232021.pdf](https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf) (noting that racially disparate marijuana arrests persist nationwide, even in jurisdictions with legalization).

190. See White Hugtho et al., *supra* note 152, at 106 (highlighting the ways incarceration drives trauma and drug abuse among trans people). See also Leslie E. Scott, *Drug Decriminalization, Addiction, and Mass Incarceration: A Theories of Punishment Framework for Ending the “War on Drugs”*, 48 N. KY. L. REV. 267 (2021) (explaining why criminal punishment is an inept tool to respond to drug use and sales).

191. Among initiatives, advocates should call for an unequivocal end to the Trump-era policies that halted asylum in its tracks and forced applicants to remain in Mexico in perilous conditions. See, e.g., García, *Supreme Court Rules*, *supra* note 146; Ward & Lemire, *supra* note 146.

192. See *infra* Section III.A.4.

193. See, e.g., Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967 (2020); *Decriminalize Immigration*, NAT’L IMMIGRANT JUST. CTR., <https://immigrantjustice.org/issues/decriminalize-immigration> (last visited Aug. 15, 2022).

ing immigrants, to engage in sex work as a means of survival, advocates must work to end the federal policy that deems sex work to be a crime of moral turpitude that makes immigrants deportable.<sup>194</sup>

### 3. Investing in Decarceration Strategies

Advocates concerned about the discrimination-to-incarceration pipeline should also seek to shrink the footprint of mass incarceration overall given the harms that it inflicts on trans people, and indeed, all people of color, without so much as a veneer of rehabilitation.<sup>195</sup> This includes supporting policy proposals to limit the use of pretrial detention, investing in alternatives to incarceration, and abolishing mandatory minimum sentences while increasing opportunities for early release.<sup>196</sup> Advocates can also engage in a broader reflection on our use of incarceration as a one-size-fits-all response for behavior that is oftentimes rooted in poverty, addiction, mental illness, and past trauma.<sup>197</sup>

Advocates looking to support trans immigrants should launch parallel campaigns calling for the closure of immigration detention centers and for the increased use of non-carceral detention alternatives.<sup>198</sup> Advocates can also seek the release of trans detainees in tandem with these campaigns, given the additional harms they face while detained in facilities without regard for their gender and without access to transition-related healthcare.<sup>199</sup>

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194. See generally Kerry Q. Battenfeld, *Moral Crimes Post-Mellouli: Making a Case for Eliminating State-Based Prostitution Convictions as a Basis for Inadmissibility in Immigration Proceedings*, 65 *BUFF. L. REV.* 619 (2017) (discussing operation of current rule and explaining how it could be modified by the federal agency responsible for interpreting immigration laws).

195. See, e.g., Etienne Benson, *Rehabilitate or Punish?*, 34 *MONITOR ON PSYCH.* 46 (July/Aug. 2003); Josie Duffy Rice & Clint Smith, *Justice in America Episode 20: Mariame Kaba and Prison Abolition*, *APPEAL* (Mar. 20, 2019), <https://theappeal.org/justice-in-america-episode-20-mariame-kaba-and-prison-abolition/>.

196. For a summary of key proposals endorsed by the American Bar Association, see Amanda Robert, *ABA Provides 10 Principles for Ending Mass Incarceration and Lengthy Prison Sentences*, *ABA J.* (Aug. 8, 2022), <https://www.abajournal.com/web/article/resolutions-604-and-502-aba-provides-guidance-on-ending-mass-incarceration-and-lengthy-prison-sentences>.

197. For perspective on the importance of non-carceral responses to harm as well as what an abolitionist future may look like, see MARIAME KABA, *WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* (2021); D Dangaran, Note, *Abolition as Lodestar: Rethinking Prison Reform from a Trans Perspective*, 44 *HARV. J.L. & GENDER* 161, 206–15 (2021).

198. See, e.g., *Communities Not Cages*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/take-action/communitiesnotcages> (last visited Aug. 1, 2022) (nationwide campaign to close detention facilities); Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 *CARDOZO L. REV.* 2141 (2017) (discussing harms of immigrant detention centers for all immigrants and available alternatives); Jeremy Pepper, *Pay Up or Else: Immigration Bond and How a Small Procedural Change Could Liberate Immigrant Detainees*, 60 *B.C. L. REV.* 951 (2019) (discussing the availability of bond and parole and advocating for an expansion).

199. See *END TRANS DETENTION*, <https://www.endtransdetention.org/> (last visited Aug. 15, 2022); Tina Vásquez, *Organizers Say Ending Trans Detention Is a Matter of Life and Death*, *PRISM* (June 28, 2022), <https://prismreports.org/2022/06/28/ending-trans-detention-life-or-death/>.

#### 4. *Fighting Cruel and Unusual Conditions of Confinement in Prisons, Jails, and Detention Centers*

Although keeping trans people out of prisons, jails, and detention centers remains the priority, legal advocates looking for additional ways to neutralize the harms of the discrimination-to-incarceration pipeline can engage in pro bono litigation on behalf of trans people to improve their conditions of confinement under the Eighth and Fourteenth Amendments, along with other legal theories.<sup>200</sup> Even though the success of these lawsuits may be jurisdiction-dependent, they serve as an important form of harm reduction for trans people facing unimaginable conditions behind bars.<sup>201</sup>

Advocates should also demand that corrections departments allow trans people to be housed in facilities according to their gender, rather than their sex assigned at birth, for purposes of safety.<sup>202</sup> Demands of this type can be made in the context of litigation, through state legislative proposals, and by advocacy seeking to update the guidance documents applicable to state and federal correctional institutions.<sup>203</sup> Ideal housing policies would empower trans people navigating incarceration or detention to decide for themselves whether placement in a male or female facility is most appropriate given their safety needs. As such, the policies would be similar to, but ultimately more robust than, the PREA Standards, which instruct corrections officials to give “serious consideration” to trans people’s own views regarding safety but leave trans people without a remedy when their preferences are inevitably ignored.<sup>204</sup>

200. See Levi & Barry, *supra* note 174 (discussing Eighth Amendment theories); Williams v. Kincaid, 45 F.4th 759, 773–74, 779–80 (4th Cir. 2022) (holding that delays and denials of gender dysphoria treatment in carceral settings can violate the Americans with Disabilities Act); Tay v. Dennison, 457 F. Supp. 3d 657, 682 (S.D. Ill. 2020) (trans plaintiff was likely to succeed on her claim that her placement at a men’s prison violated the Equal Protection clause); Hampton v. Baldwin, No. 18-CV-550, 2018 WL 5830730, at \*12 (S.D. Ill. Nov. 7, 2018) (same). See also Ortlip-Sommers, *supra* note 174 (calling for increased use of the Due Process clause in trans prison litigation).

201. Compare Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019), with Edmo v. Corizon, Inc., 935 F.3d 757, 795–97 (9th Cir. 2019) (holding that denial of surgical care violated trans woman’s rights under the Eighth Amendment and criticizing the Gibson court for its unjustified and wide-reaching holding).

202. See, e.g., Carl Campanile, *Hochul Wants Transgender Inmates to Choose Where They’re Housed in Prisons*, NY POST (Jan. 19, 2022), <https://nypost.com/2022/01/19/hochul-wants-transgender-inmates-to-choose-prisons-for-housing/>.

203. See, e.g., Adam Beam, *California Will House Transgender Inmates by Gender Identity*, AP NEWS (Sept. 26, 2020), <https://apnews.com/article/us-news-laws-gavin-newsom-ca-state-wire-lifestyle-14cd954b06360d21349b77233318369e> (effectuating via state legislation); Doe v. Mass. Dep’t of Corr., No. 17-cv-12255, 2018 WL 2994403 (D. Mass. June 14, 2018) (effectuating move as part of lawsuit); Angie Leventis Lourgos, *Transgender Inmate Moved to Illinois Women’s Prison After Alleging Years of Abuse*, CHI. TRIB. (Dec. 27, 2018), <https://www.chicagotribune.com/news/ct-met-transgender-prisoner-transfer-illinois-20181227-story.html> (same).

204. Use of Screening Information, 28 C.F.R. § 115.42(e) (2022).

Advocates should also call for the revisitation of provisions like the one currently found in the PREA Standards that prevent trans housing units from being established on the theory that they are *per se* discriminatory.<sup>205</sup> Instead, policies like these should be replaced with a regime that permits trans housing units as a safety option that incarcerated trans people can opt into, alongside placements at male and female facilities.<sup>206</sup>

Finally, if outcomes for trans people who encounter the legal system are going to improve, creating a culture of accountability among law enforcement officers and prison officials alike is needed. In the effort to bring about such a paradigm shift, legal advocates should insist on the passage of a statutory *Bivens* remedy, ensuring that people who suffer abuse in federal corrections facilities or at the hands of federal law enforcement officers are not cut off from legal remedies.<sup>207</sup> Legal professionals should also advocate for legislation that eradicates the doctrine of qualified immunity so that constitutional violations stop going unremedied.<sup>208</sup>

##### 5. *Reducing the Collateral Consequences of Criminal Convictions*

Advocates concerned about the discrimination-to-incarceration pipeline should also take steps to facilitate the reentry of formerly incarcerated people and to prevent criminal convictions from permanently thrusting people into an underclass. This includes making changes to probation and parole to ensure that conditions are minimally restrictive, focused on reentry and social service interventions, and that revocation is always a last resort.<sup>209</sup> Advocates seeking to reduce the collateral consequences of conviction

205. *See id.* § 115.42(g) (preventing creation of units absent a settlement, consent decree, or court judgment).

206. *See, e.g.,* Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965 (2012) (discussing the relative safety of the LGBT housing unit in Los Angeles); Colleen Curry, *Rikers Island Jail to Open Special Housing Unit for Trans Women Inmates*, VICE (Dec. 1, 2014), <https://www.vice.com/en/article/xwp99d/rikers-island-jail-to-open-special-housing-unit-for-trans-women-inmates> (discussing the creation of the trans housing unit at Rikers Island); *What You Need to Know About the Treatment of Transgender Persons in Custody*, LEGAL AID SOC'Y, <https://legalaidnyc.org/get-help/bail-incarceration/what-you-need-to-know-about-the-treatment-of-transgender-persons-in-custody/> (last visited Aug. 15, 2022).

207. *See Bivens Act of 2021*, H.R. 6185, 117th Cong. (1st Sess. 2021) (seeking to codify *Bivens* remedies). *See also* Eric Lesh, *Justice Out of Balance: How the Election of Judges & the Stunning Lack of Diversity on State Courts Threaten LGBT Rights*, LAMBDA LEGAL 6–7 (2016), [https://www.lambdalegal.org/sites/default/files/justiceoutofbalance\\_final\\_rev1\\_2](https://www.lambdalegal.org/sites/default/files/justiceoutofbalance_final_rev1_2) (noting how bias pervades LGBTQ+ people's experiences with law enforcement and the criminal justice system).

208. *See Acosta, supra* note 180, at 78–80; David G. Maxted, *The Qualified Immunity Litigation Machine: Eviscerating the Anti-Racist Heart of § 1983, Weaponizing Interlocutory Appeal, and the Routine of Police Violence Against Black Lives*, 98 DENV. L. REV. 629 (2021) (calling for an end to qualified immunity and exploring the ways it enables abusive policing); Osagie K. Obasogie & Anna Zaret, *Plainly Incompetent: How Qualified Immunity Became an Exculpatory Doctrine of Police Excessive Force*, 170 U. PA. L. REV. 407, 409 (2022) (same).

209. *See Robert, supra* note 196 (summarizing recommendations and also advocating for an end to incarceration based on inability to pay fines or fees).

tions should also support the expansion of Ban the Box laws, which limit consideration of criminal convictions by employers so that having a criminal record ceases to be a scarlet letter in the context of employment.<sup>210</sup>

Lawyers with employment discrimination experience can also implement the United States Equal Employment Opportunity Commission's ("EEOC") guidance by asserting that employers who deny employment opportunities to applicants with criminal records are engaging in a species of discrimination because of the disparate impact such policies have.<sup>211</sup> Similar initiatives can be launched in the realm of housing, where restrictions on the use of criminal history information remain rare or poorly implemented.<sup>212</sup>

Finally, advocates should seek to amend state laws that prevent people with felony convictions from obtaining a legal name change, since restrictions of this type can prevent trans people impacted by the discrimination-to-incarceration pipeline from being socially recognized as their gender in ways that are necessary for purposes of housing, employment, and their overall well-being.<sup>213</sup>

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210. BETH AVERY & HAN LU, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR HIRING POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS, NAT'L EMP. L. PROJECT (2021), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-Oct-2021.pdf> (surveying laws). It should be noted, however, that most existing laws apply only to public sector employment, and defer, rather than prohibit, consideration of an applicant's criminal history. *Id.* at 2–3 (noting that while the federal government, 37 states, and 150 municipalities have adopted ban the box policies, only 15 states and 22 cities have adopted ban the box rules that apply to private employers as of October 2021).

211. U.S. EQUAL EMP. OPPORTUNITY COMM'N (EEOC), EEOC-CVG-2012-1, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT (2012), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>.

212. *See, e.g.*, Tracey Tully, *Landlords Barred from Using Criminal Records to Deny Housing*, N.Y. TIMES (June 4, 2021), <https://www.nytimes.com/2021/06/04/nyregion/nj-housing-bill-ban-the-box-bill.html> (highlighting passage of a New Jersey state law restricting the use of criminal records in tenant screening); Sophie Nieto-Munoz, *Murphy Signs Historic Law Banning N.J. Landlords from Asking Renters About Criminal Records*, NJ.COM (June 19, 2021), <https://www.nj.com/politics/2021/06/murphy-signs-law-banning-housing-discrimination-against-renters-with-criminal-records.html> (same). *See also* Josh Merchant, *Formerly Incarcerated Missourians Struggle for Decades to Find Stable Housing*, KAN. CITY BEACON (Mar. 15, 2022), <https://thebeacon.media/stories/2022/03/15/housing-with-felony-record/> (noting continued enforcement challenges in municipalities with favorable laws).

213. *See* Elizabeth Thomas, *I'm Not Out to Fool Anybody, I'm Out to Be Who I Am, and They Don't Get to Decide That: The Civil Rights Violation of Criminal Name Change Bans on Transgender Americans*, 43 WOMEN'S RTS. L. REP. 48 (2022) (surveying felony name change laws and their impact on trans people); Mulligan, *supra* note 49. Legal challenges to statutes of this type have often proven unsuccessful, making a legislative strategy all the more important. *See* State v. C.G. (*In re* Interest of C.G.), 976 N.W.2d 318, 323 (Wis. 2022) (upholding lifetime ban on name changes for trans woman convicted of a sex offense as a child).

## 6. Reducing Bias in the Criminal Justice System

For purposes of harm reduction, the protections that trans people enjoy in courtroom settings must be strengthened.<sup>214</sup> This includes ensuring that attorney and judicial codes of conduct prohibit discrimination or discourtesy towards trans and LGBTQ+ people so they do not suffer secondary harms, such as misgendering, in connection with court processes.<sup>215</sup> To ensure that trans people are tried by a jury of their peers, like everyone else, the *Batson* doctrine—prohibiting the discriminatory use of preemptory jury strikes—should also be extended to instances where trans people are purposefully removed from jury pools.<sup>216</sup> Efforts should be made to educate the criminal defense bar about the ways in which trans people are impacted by the discrimination-to-incarceration pipeline and abusive prison conditions, since it can potentially serve as mitigation evidence and influence the calculus about whether a guilty plea is truly in a trans client's best interests.<sup>217</sup>

### B. Addressing the Drivers of Incarceration

#### 1. Employment Discrimination

One of the first ways that advocates can mount a full frontal attack on the discrimination-to-incarceration pipeline is ensuring that the Supreme Court's decision in *Bostock v. Clayton County*, which recognized that discrimination against trans people is a prohibited form of sex discrimination, is consistently implemented and enforced across the country.<sup>218</sup> An essential prerequisite to that mission, however, is ensuring that trans employees and applicants are educated about and aware of the protections they enjoy under Title VII of the Civil Rights Act and companion state laws, since anti-trans workplace bias was the expected norm for decades. Partnering with local LGBTQ+ organizations to establish legal clinics, hotlines, and other free resources for trans employees experiencing discrimination can all be of assistance here.

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214. See JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 69–91 (Michael Bronski ed., 2011) (noting how lack of education among lawyers and the judiciary results in poor outcomes).

215. See Lesh, *supra* note 207, at 27 (explaining need and advocating for strengthening judicial codes of conduct); Chan Tov McNamara, *Some Notes on Courts and Courtesy*, 107 VA. L. REV. ONLINE 317 (2021) (exploring the harms of misgendering by judges); Chan Tov McNamara, *Misgendering*, 109 CAL. L. REV. 2227, 2317–20 (2021) (analyzing misgendering in the context of judicial ethics and attorney conduct standards). But for an extreme outlier view, see *United States v. Varner*, 948 F.3d 250, 254–58 (2020) (contending that litigants, judges, and court personnel cannot be required to respect trans people's gender identity or pronouns).

216. Lauren R. Deitrich, *Transgender and the Judiciary: An Argument to Extend Batson Challenges to Transgender Individuals*, 50 VAL. U. L. REV. 719 (2016).

217. See Brydum, *supra* note 93 (explaining how a careless plea deal impacted trans rape survivor Ky Peterson).

218. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

Attorneys can also offer representation to trans employees who are litigating trans discrimination claims in court or before the United States EEOC and its local counterparts and contend that denying transition-related insurance or restroom access constitutes sex discrimination as well.<sup>219</sup> Advocates can also push back on attempts to establish a religious right to discriminate against trans and LGBTQ+ employees by offering direct representation to affected employees or serving in an amicus capacity with the aim of keeping any and all exceptions narrow.

## 2. Education Discrimination

With respect to education, attorneys can engage in litigation and advocacy aimed at ensuring that Title IX of the Education Amendments is interpreted in concert with *Bostock*. Under such interpretation, trans students would be protected from anti-trans discrimination, harassment, and bullying in educational environments.<sup>220</sup> Attorneys can also devote time to fighting back against state laws and initiatives calculated to make schools an even more hostile environment for trans and gender non-conforming students. This includes the recent spate of restrictions on trans restroom access, sports participation, and classroom discussion of LGBTQ+ topics.<sup>221</sup> Attorneys must understand that solutions will require a combination of litigation and policy advocacy, as well as increased participation in local elections beginning at the school board level.

Legal advocates must oppose attempts to treat intentional misgendering as protected speech, distinct from racist speech or slurs. This can be accomplished by offering representation to impacted persons or serving in an amicus curiae capacity when legal challenges regarding misgendering are brought.<sup>222</sup> Since school discipline is a documented push factor into the juvenile justice system and the system of mass incarceration for trans students, as well as *all* students of color, advocates should also support strategies aimed at dismantling the school-to-prison pipeline in all its forms.<sup>223</sup>

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219. See, e.g., U.S. EQUAL EMP. OPPORTUNITY COMM'N (EEOC), PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY (June 15, 2021), <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender>. Note, the EEOC was partially enjoined from implementing this guidance following litigation in *Tennessee v. U.S. Dep't of Educ.*, No. 21-cv-00308 (E.D. Tenn. 2022).

220. See PAMELA S. KARLAN, CIV. RTS. DIV., U.S. DEP'T OF JUSTICE, MEM. RE APPLICATION OF *BOSTOCK V. CLAYTON COUNTY* TO TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download> (concluding that *Bostock* should inform analyses of Title IX).

221. See *supra* Section I.B. (summarizing developments).

222. For example, see the several Amici Curiae filed in support of Respondent in *Taking Offense v. State*, 498 P.3d 90 (Cal. 2021).

223. See PALMER ET AL., *supra* note 22, at 33–40 (promulgating series of policy recommendations that can make trans students safer); Scully, *supra* note 30, at 990–1003 (promulgating recommendations to tackle the school-to-prison pipeline more broadly).



### 3. Healthcare Discrimination and Access Challenges

Given how lacking the ability to pay for gender-affirming healthcare can funnel trans people of color into criminalized economies and the system of mass incarceration, expanding trans healthcare access is also essential. This includes challenging transition healthcare exclusions that exist under Medicaid and private insurance. It also includes supporting Medicaid expansion in local jurisdictions so that more people living in poverty qualify for coverage.<sup>224</sup> Fighting to preserve and expand Section 1557, the anti-discrimination provision of the Affordable Health Care Act, and its accompanying standards is also vital, since they serve as an important counterweight to the anti-trans discrimination that remains prevalent among healthcare providers.<sup>225</sup> This can be achieved by affirming the importance of Section 1557 in rulemaking processes and bringing affirmative litigation pursuant to its provisions.<sup>226</sup>

Likewise, it is vitally important that all advocates push back on recent attempts to criminalize or limit access to transition-related healthcare within state and federal legislatures given the existing medical consensus that it is both safe and effective.<sup>227</sup> Advocates should also fight the criminalization of reproductive health care and abortion access following the Supreme Court's repeal of *Roe v. Wade*, since trans men and non-binary people who experience unwanted pregnancies may experience life-threatening gender dysphoria that makes abortion care all the more of a healthcare necessity.<sup>228</sup>

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224. As of August 1, 2022, twelve states—including Texas, Georgia, Florida, Mississippi, Alabama, North and South Carolina, and Tennessee—have refused to extend Medicaid coverage to people who live at or near the federal poverty line. See *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAM. FOUND. (Sept. 20, 2022), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/>.

225. See *Nondiscrimination in Health Programs and Activities*, 87 Fed. Reg. 47,824 (proposed Aug. 4, 2022) (to be codified at 42 C.F.R. pts. 438, 440, 460); *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31,375 (May 18, 2016).

226. The scope of Section 1557's protections has been the subject of competing rulemaking by the Trump and Biden administrations, as well as ongoing litigation seeking to create a doctrine of religious exceptions. Compare Timothy S. Jost, *Trump Administration Amends ACA Antidiscrimination Rule, Cutting Transgender and Other Civil Rights Protections, but Supreme Court Decision Calls Amendments into Question*, COMMONWEALTH FUND (June 15, 2020), <https://www.commonwealthfund.org/blog/2020/trump-administration-amends-aca-antidiscrimination-rule-cutting-transgender-and-other-with-Shira-Stein, White House Reverses Trump Ban on LGBT Health Protections>, BLOOMBERG L. (May 10, 2021), <https://news.bloomberglaw.com/health-law-and-business/biden-administration-reverses-trump-ban-on-lgbt-health-guards, and HHS Announces Proposed Rule to Strengthen Nondiscrimination in Health Care>, U.S. DEP'T OF HEALTH & HUM. SERVS. (July 25, 2022), <https://www.hhs.gov/about/news/2022/07/25/hhs-announces-proposed-rule-to-strengthen-nondiscrimination-in-health-care.html>.

227. See, e.g., Brief of Amici Curiae American Academy of Pediatrics and Additional National and State Medical and Mental Health Organizations in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, *Eknes-Turner v. Ivey*, No. 22-cv-00184 (M.D. Al. May 5, 2022) (discussing medical consensus on the need for transition-related healthcare and the harms caused by denials).

228. See, e.g., Cazembe Murphy Jackson, *I Am a Trans Man. I Had an Abortion. Reproductive Rights Is Everyone's Fight*, ESQUIRE (June 27, 2022), <https://www.esquire.com/news-politics/>

Because the necessary fixes will require protective state legislation, at least for the indefinite future, reengaging in state-level politics, elections, and referendums while simultaneously deploying new strategies is most important here.<sup>229</sup>

#### 4. *Discrimination in Housing and the Homelessness Crisis*

Because such a high percentage of trans people of color are navigating homelessness or extreme forms of poverty, measures must be taken to ensure that trans people are safely and stably housed. Supporting affordable housing programs, voucher initiatives, and bans on source-of-income discrimination that prevent landlords from denying housing to people who receive public benefits is critically important.<sup>230</sup> Advocates can also offer pro bono representation to trans people who experience discrimination from landlords and rental companies, to prevent exclusion from becoming the norm.

Since homelessness is an unfortunate reality for so many trans people of color, advocates should push homeless shelters in their local jurisdictions to house trans people by their gender identity and bring compliance lawsuits as needed.<sup>231</sup> Advocates can also push for the creation of trans-affirming shelters at the municipal level so that trans shelter residents who prefer being housed with other trans or LGBTQ+ identified people as a safety option can be properly accommodated.<sup>232</sup> Advocates can also support organizations like the Ruth Ellis Center in Detroit, the House of Tulip in New Orleans, and Princess Janae Place in New York City that are seeking to

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a40410800/trans-man-abortion-story/ (Black trans man discussing his experience of abortion); Hallie Lieberman, *Trans Men Talk About Why They Got Abortions*, BUZZFEED (Aug. 15, 2022), <https://www.buzzfeednews.com/article/hallielieberman/trans-men-abortion-rights-roe> (describing the feelings of suicidality and depression that can accompany unwanted pregnancies in nonbinary and trans masculine people).

229. See, e.g., Alice Miranda Ollstein, *Kansas Voters Block Effort to Strip Abortion Protections from State Constitution*, POLITICO (Aug. 2, 2022), <https://www.politico.com/news/2022/08/02/kansas-voters-block-effort-to-ban-abortion-in-state-constitutional-amendment-vote-00049442> (discussing voters in Kansas ballot rejecting initiative to authorize abortion ban). For more discussion about the role of political participation in pipeline strategies, see *infra* Section III.D.

230. See, e.g., James Factora, *San Francisco Vows to End Trans Homelessness by 2027*, THEM (May 31, 2022), <https://www.them.us/story/san-francisco-end-trans-homelessness-2027>.

231. See Memorandum from Jeanine M. Worden, U.S. Dep't of Hous. & Urb. Dev., on the Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act (Feb. 11, 2021), [https://www.hud.gov/sites/dfiles/PA/documents/HUD\\_Memo\\_EO13988.pdf](https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf) (interpreting the Fair Housing Act to prohibit discrimination based on gender identity or sexual orientation following *Bostock*); Tracy Jan, *Biden Administration Withdraws Trump-Era Proposal to Allow Homeless Shelters to Discriminate Against Transgender People*, WASH. POST (Apr. 22, 2021), <https://www.washingtonpost.com/business/2021/04/22/transgender-homeless-shelters-biden-trump/> (describing the Equal Access Rule).

232. See Oliver Haug, *This Trans Activist Just Secured a Vital Win for Unhoused Trans People in New York City*, XTRA MAG. (Dec. 20, 2021), <https://xtramagazine.com/power/activism/mariah-lopez-trans-housing-215148> (describing settlement calling for the establishment of trans-affirming shelter options on an opt-in basis).

address the trans homelessness crisis by providing safe and affirming alternatives to congregate shelters.<sup>233</sup>

### 5. *Expanding Access to Identity Documents*

Possessing identity documents that correctly reflect one's name and gender marker can ease the burdens of discrimination that trans people face in the realm of housing and employment, making advocacy in this arena vital.<sup>234</sup> In states with permissive name and gender marker change laws, advocates can run pro bono legal clinics for trans people seeking updated identity documents, in partnership with local bar associations or LGBTQ+ organizations.<sup>235</sup> Advocates can also bring legal challenges in states that completely bar trans people from updating their identity documents or that make surgery a prerequisite.<sup>236</sup>

### C. *Attending to the Needs of Nonbinary and Gender Non-Conforming People*

In addition to all of the above, legal advocates need to give increased study and attention to the needs of nonbinary and gender non-conforming people to ensure that the legal strategies used to advance the rights of trans men and women do not diminish the protections available to others in the community.<sup>237</sup> One potential area of concern is continued reliance on any arguments that hinge demands for legal rights and recognition on the idea that gender identity is binary and fixed.<sup>238</sup> Though useful in the short term,

233. See RUTH ELLIS CTR., <https://www.ruthelliscenter.org/> (last visited Aug. 15, 2022); PRINCESS JANAE PLACE, <https://princessjanaeplace.org/> (last visited Aug. 15, 2022); HOUSE OF TULIP, <https://houseoftulip.org/> (last visited Aug. 15, 2022). See also Cady Lang, 'This Is Not a Shelter.' *Ceyenne Doroshov on Providing Free, Safe Space for LGBTQ People in Need*, TIME (Mar. 3, 2021), <https://time.com/5942121/ceyenne-doroshov-interview> (describing a housing initiative by trans-led organization GLITS).

234. See generally Jenkins, *supra* note 49 (discussing the value of an affirming ID and the legal arguments that can be used to promote document access); Shemin, *supra* note 50 (same).

235. See NAT'L CTR. FOR TRANS EQUAL., SUMMARY OF STATE BIRTH CERTIFICATE GENDER CHANGE LAWS (2020), <https://transequality.org/sites/default/files/images/Summary%20of%20State%20Birth%20Certificate%20Laws%20Apr%2028%202020.pdf> (listing state birth certificate policies as of April 2020); NAT'L CTR. FOR TRANS EQUAL., HOW TRANS FRIENDLY IS THE DRIVER'S LICENSE GENDER MARKER CHANGE POLICY IN YOUR STATE? (2021), [https://transequality.org/sites/default/files/Drivers%20License%20Grades%20July%202021a\\_0.pdf](https://transequality.org/sites/default/files/Drivers%20License%20Grades%20July%202021a_0.pdf) (summarizing driver's license policies as of July 2021).

236. As previously mentioned, surgical care may not be a necessary or desired component of healthcare for all trans and nonbinary people and may be financially inaccessible in any event given the health insurance gaps and exclusions that persist.

237. See Marie-Amélie George, *Expanding LGBT*, 73 FLA. L. REV. 243, 313 (2021) ("Advocacy for nonbinary rights requires moving away from an emphasis on the sexual binary, which has been important for securing gender conforming transgender rights."); see also Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555 (2019) (highlighting the dangers of advocating for trans rights within a binary frame).

238. George, *Expanding LGBT*, *supra* note 237, at 271–80 (noting the LGBTQ+ right movement's continued reliance on immutability arguments and some of the tensions).

this framing may prove detrimental to trans and gender non-conforming people who see their genders as more fluid.<sup>239</sup> Likewise, advocates fighting to secure restroom and identity document access for trans men and women should additionally support the expansion of gender neutral options that are more likely to benefit non-binary persons.<sup>240</sup>

#### D. *Building Trans Power and Pursuing New Strategies for Political Participation*

Given the compound ways that the discrimination-to-incarceration pipeline shapes and molds the lives of trans people of color, it is also imperative that the LGBTQ+ rights movement comes to see issues related to racial justice, immigrant rights, prisoner's rights, reproductive rights, and voting rights as their movement imperatives as well.<sup>241</sup> As Audre Lorde famously stated, "There is no such thing as a single-issue struggle, because we do not live single-issue lives," and the lives of trans people of color reflect this.<sup>242</sup> The Supreme Court's recent decisions on voting and reproductive rights and their catastrophic effects on LGBTQ+ people also make the folly of single-issue organizing plain.<sup>243</sup> Accordingly, engaging in cross-movement collaboration and coalition-building is the only way that advocates can meet the current moment and prevent the retreat of legally protected rights at the local, state, and federal level.<sup>244</sup>

Equally essential is funding and supporting trans leaders—including trans leaders of color—and trans-led organizations, since their voices and perspectives are undoubtedly the most vital when it comes to engineering

239. George, *Expanding LGBT*, *supra* note 237, at 271–80. For a more general reflection on the limitations of immutability arguments, see Jessica A. Clarke, *Against Immutability*, 125 *YALE L.J.* 2 (2015).

240. See Jessica A. Clarke, *They, Them, and Theirs*, 132 *HARV. L. REV.* 894, 963–66, 981–83 (2019) (discussing alternatives to non-binary erasure in a variety of contexts, including schools, sex-segregated facilities, and healthcare).

241. See, e.g., Gehi, *supra* note 134, at 390–98 (discussing unforced errors that the LGBTQ+ movement has engaged in when approaching work through a single-issue lens); MOGUL ET AL., *supra* note 214, at 141–58 (same).

242. Audre Lorde, *Learning from the 60s*, in *SISTER OUTSIDER: ESSAYS & SPEECHES BY AUDRE LORDE* 138 (Crossing Press 2007).

243. See Nikki McCann Ramirez, *Same-Sex Marriage and Contraception Should Be Next on Chopping Block: Clarence Thomas*, *ROLLING STONE* (June 24, 2022), <https://www.rollingstone.com/politics/politics-news/same-sex-marriage-contraception-roe-v-wade-decision-1373759/>; Olivia McCormack, *Transgender Advocates Say the End of Roe Would Have Dire Consequences*, *WASH. POST* (May 6, 2022), <https://www.washingtonpost.com/politics/2022/05/06/transgendermen-nonbinary-people-abortion-roe/>; Annie Melton, *Voting Rights Is an LGBTQ Issue*, *DEMOS* (June 27, 2018), <https://www.demos.org/blog/voting-rights-lgbtq-issue>.

244. See, e.g., David A. Love, *Opinion, Republican Party Is Waging a Nationwide Assault on Voting Rights*, *AL JAZEERA* (May 3, 2022), <https://www.aljazeera.com/opinions/2022/5/3/republican-party-is-waging-a-nationwide-assault-on-voting-rights>; James Bikales & Praveena Somasundaram, *State Supreme Courts Could Soon Decide on Abortion, Raising Stakes of Their Midterm Races*, *WASH. POST* (Aug. 9, 2022), <https://www.washingtonpost.com/politics/2022/08/09/dobbs-state-judicial-elections/>.

the path ahead for trans liberation and justice. The Stonewall Rebellion, the rise of the modern LGBTQ+ rights movement, and the successful campaign to prohibit employment discrimination against LGBTQ+ people all serve as proof of the wisdom and the necessity of supporting trans leaders and their movement infrastructure.<sup>245</sup>

Voting is also an essential element to advocacy aimed at dismantling the discrimination-to-incarceration pipeline because many of the strategies outlined above require policy changes or judicial rulings that move the law forward. However, new theories and understandings of voting are also necessary in order to meaningfully effectuate change. First and foremost, the legal community must acknowledge and reckon with the fact that voting has become an increasingly illusory right in the United States.<sup>246</sup> The United States is currently on track to have a generation or more of minority Republican rule, thanks to the Supreme Court's tripartite decision to gut the Voting Rights Act of 1965 ("VRA"), endorse voter disenfranchisement and suppression initiatives, and shield gerrymandering measures from judicial review.<sup>247</sup> Indeed, in the wake of the Supreme Court's disastrous VRA decision, Republicans have engaged in careful study and adopted new voter disenfranchisement laws after each and every election where they have suffered a loss, with the specific aim of suppressing Democratic turnout in elections to come.<sup>248</sup> Although the ostensible targets of the recent wave of Court-endorsed voter suppression initiatives are Black Democratic voters in the South, the voting rights of trans people also stand among the casual-

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245. See, e.g., Scott James, *Queer People of Color Led the L.G.B.T.Q. Charge, but Were Denied the Rewards*, N.Y. TIMES (June 22, 2019), <https://www.nytimes.com/2019/06/22/us/lgbtq-minorities-trans-activists.html>; Isabella Grullón Paz & Maggie Astor, *Black Trans Women Seek More Space in the Movement They Helped Start*, N.Y. TIMES (June 27, 2020), <https://www.nytimes.com/2020/06/27/us/politics/black-trans-lives-matter.html>; *Frequently Asked Questions: What the EEOC's Decision in Macy v. Holder Means for You*, TRANSGENDER L. CTR. (May 1, 2012), <http://transgenderlawcenter.org/wp-content/uploads/2013/06/92419763-F-A-Q-EEOC-Ruling-in-Mia-Macy-V-Eric-Holder.pdf>; Philip Picardi, *The Lawyer Behind the Biggest LGBTQ+ Legal Victory in History*, GQ (June 24, 2020), <https://www.gq.com/story/chase-strangio-aclu-lgbtq-legal-victory>.

246. Love, *supra* note 244; *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, AM. CIV. LIBERTIES UNION (Aug. 17, 2021), <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020>.

247. See, e.g., Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (upholding voter ID law expressly designed to disenfranchise voters); Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (invalidating a key oversight provision of the VRA); Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (ruling that political gerrymandering presents a non-justiciable issue). See also Chinyere Ezie, *Not Your Mule?: Disrupting the Political Powerlessness of Black Women Voters*, 92 COLO. L. REV. 659, 692–94 (2021) (collecting additional cases and analyzing the overall trend).

248. See, e.g., Elise Viebeck, *Here's Where GOP Lawmakers Have Passed New Voting Restrictions*, WASH. POST (July 14, 2021), <https://www.washingtonpost.com/politics/2021/06/02/state-voting-restrictions/>; *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, *supra* note 246.

ties.<sup>249</sup> Voter ID laws make it easy for trans people to be turned away from polls, and trans people who have had contacts with the system of mass incarceration face long-term exclusion from the franchise in states with voter disenfranchisement laws.<sup>250</sup> As such, shoring up voting rights protections nationwide through legislation is imperative for *all* social justice movements as well as the institution of democracy *itself*.<sup>251</sup>

Secondly, for trans people of color, or indeed, any marginalized groups to achieve advancement through voting, renewed attention must be paid to electoral strategy. Presently, minority voters, and particularly Black women, are a trapped constituency whose electoral concerns are deprioritized in comparison to the desires of swing voters within the Democratic party.<sup>252</sup> To effectuate a course correction, minority voters must actively participate in primaries and screen for candidates who will prioritize their concerns.<sup>253</sup> In addition, Democratic voters must couple their voting with clearly articulated political demands so that elected officials take office with a clear mandate on what is expected of them as the people's representatives, inclusive of legislation and judicial appointments.<sup>254</sup>

Voters should also participate in more than just national elections, since effective state and local political engagement is what has allowed conservative legal activists to target the trans community so effectively.<sup>255</sup> Attention should also be paid to judge and prosecutor races as a harm-reduction strategy, since the winners of such races will continue to decide the futures of so many people of color, trans or otherwise, who are ensnared in the criminal justice system.<sup>256</sup>

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249. See Katelyn Burns, *The Long History of Trans Voters' Disenfranchisement, Explained*, VOX (Sept. 23, 2020, 8:30 AM), <https://www.vox.com/identities/21441200/history-of-trans-voters-disenfranchisement-explained>.

250. For background, see *id.*; Ellen Bertels, *Strengthening the Trans Franchise*, 30 TUL. J.L. & SEXUALITY 21, 22–25 (2021); Nicole R. Gabriel, *Resurrecting the Nineteenth Amendment: Why Strict Voter ID Laws Unconstitutionally Discriminate Against Transgender Voters*, 56 IDAHO L. REV. 155 (2020).

251. See, e.g., Sean Morales-Doyle, *The Supreme Court Clearly Won't Protect Voting Rights. But Congress Can*, WASH. POST (July 3, 2021), <https://www.washingtonpost.com/outlook/2021/07/03/brnovich-alito-roberts-supreme-court-vra/>.

252. See Ezie, *supra* note 247, at 705–08 (explaining that the trapped constituency problem, which sees Black women's electoral interests sublimated to those of swing voters, derives from their consistent support for the Democratic party and perceived lack of alternatives).

253. See Ezie, *supra* note 247, at 708–09 (discussing the importance of primaries).

254. Additional observations about this election strategy appear in my 2021 article, Ezie, *supra* note 247, at 708–12.

255. For background, see Robert Faturechi, *Conservatives Plot Their Course on the Rising 'Sea of Red' in State Capitals*, PROPUBLICA (Jan. 6, 2017, 12:43 PM), <https://www.propublica.org/article/conservatives-plot-their-course-on-the-rising-sea-of-red-in-state-capitals>.

256. For additional discussion of these issues, see generally Lesh, *supra* note 207, at 4–5, 7, 17; Margaret Taylor, *Diversity Denied Is Justice Denied*, INT'L BAR ASS'N (June 3, 2021), <https://www.ibanet.org/diversity-denied-is-justice-denied> (discussing racial impacts).

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Although the recommendations summarized above should not be considered exhaustive, they represent vital interventions in the lives of trans people of color—interventions that will help *secure trans futures*. Take my client, Ashley Diamond, as an example: when Ashley Diamond was released from custody in 2015 and returned to her rural community in Georgia, she lacked access to even basic reentry services, despite being under parole supervision.<sup>257</sup> Ashley was unable to find employment due to bias she experienced as a Black trans woman with a criminal record.<sup>258</sup> She continued to face invidious discrimination due to her identities, and even became targeted by the Ku Klux Klan.<sup>259</sup> Ashley also struggled to find affordable healthcare providers who were attentive to her needs as a trans person until she traveled out of state—travel that unwittingly cost Ashley her freedom because it violated her restrictive terms of parole.<sup>260</sup> Thus, due to her inability to access healthcare, employment, and to shrug off the stain of her previous incarceration, the discrimination-to-incarceration pipeline began anew and Ashley Diamond was incarcerated once again.<sup>261</sup> When Ashley Diamond returned home in August 2022, following a three-year incarceration in Georgia marked by many of the same ills, she also returned home to a world where trans people are demonstrably less free.<sup>262</sup>

Although Ashley Diamond's experiences with criminalization and the system of mass incarceration have made her a devoted trans rights and prisoners' rights advocate, the simple fact remains that trans people of color *should not* have to fight for their mere survival. Nor should they have to fight *alone*. By working to implement the suggestions in this Article, we can ensure that future generations of trans people do not face such dire choices day in and out.

#### CONCLUSION: SECURING TRANS FUTURES

As this Article has shown, trans people of color are being hurtled into a discrimination-to-incarceration pipeline that is as pernicious as it is pre-

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257. Deborah Sontag, *Ashley Diamond, Transgender Inmate, Is Out of Prison but Far from Free*, N.Y. TIMES (Sept. 24, 2015), <https://www.nytimes.com/2015/09/25/us/ashley-diamond-transgender-inmate-out-of-prison-but-not-fully-free.html>.

258. *Id.*

259. Ashley Diamond, *I'm a Trans Woman Locked in a Men's Prison. I'm Fighting to Be Free*, THEM (May 14, 2021), <https://www.them.us/story/ashley-diamond-op-ed-trans-woman-lawsuit-abuse-mens-prison>.

260. *Id.* Specifically, Ashley Diamond was charged with a technical parole violation for leaving the state of Georgia without prior clearance and her twelve-year prison sentence was reinstated.

261. Ashley Diamond was ultimately incarcerated from October 2019 until August 2022. *See id.*; James Factora, *For Years, Ashley Diamond Advocated from Inside a Men's Prison. She's Finally Free*, THEM (Aug. 15, 2022), <https://www.them.us/story/ashley-diamond-trans-prisoner-released-parole-advocacy>.

262. *See also supra* Section I.F. and accompanying notes (describing the worsening climate).

ventable, but that shows no sign of slowing. To dismantle this pipeline, it is imperative that legal advocates take steps to disrupt the criminalization that trans people of color face, and remove the barriers to employment, housing, and educational attainment that force trans people into circumstances of extreme precarity. While the task ahead of us is significant, this Article makes clear that many solutions are already within our reach.

For example, in a world where we used legal advocacy and legislation to ensure that trans people do not face unmitigated bias and harassment in schools or employment, trans people of color could vault themselves out of poverty by pursuing rewarding careers. Likewise, in a world where trans people could access life-sustaining healthcare without coverage bans or discriminatory and dehumanizing providers due to legal advocacy and enforcement, they would not face as many impossible choices—choices like going without healthcare at the expense of their physical and mental well-being, or seeking care by risking life, limb, and criminal sanction.<sup>263</sup> Finally, in a world where we ensured that trans people—and indeed, all people—were not incarcerated for crimes of poverty or survival, where being incarcerated was not tantamount to state-sanctioned torture, and where being convicted of a crime was not equivalent to being emblazoned with a scarlet letter, individuals like my client, Ashley Diamond, would be able to live in society without having their dreams and futures ground to dust.

While this Article does not purport to identify every intervention that will benefit trans people of color currently being impacted by the discrimination-to-incarceration pipeline, it provides an initial, easily-digestible roadmap—one that can be supplemented in years to come.<sup>264</sup> The alternative of doing nothing is unacceptable, as it will doom another generation of trans people of color to living lives unmistakably shaped by discrimination, marginalization, criminalization, and the system of mass incarceration and detention—outcomes that would be avoided if we set aside our collective apathy long enough *to act*.

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263. See, e.g., Hartocollis & Davidson, *supra* note 78 (describing the dire lengths that many go to access healthcare); Waterfield & Patria, *supra* note 77 (same). See also Diamond, *supra* note 259 (explaining how her effort to access healthcare led to a revocation of parole).

264. Because the best ideas are iterative, my hope is that the list of strategies proposed by this article will be evaluated, workshopped, and supplemented by advocates and scholars in the future as necessary to achieve their goal: materially reducing the harms of criminalization that trans people of color face.