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

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ARTICLE

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INTRODUCTION

Growing up as a Black trans 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

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.” 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. Her crime? Pawning a used, allegedly stolen, saw.

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. 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. The consequences of the discrimination-to-incarceration pipeline are also deadly serious, with the burdens falling most heavily on trans women of color. Take, for instance, Miss Major Griffin-Gracey, the Stonewall Veteran who helped pioneer the modern LGBTQ+ rights movement in the United States. 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

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’”).
7. See infra Sections I–III for a detailed discussion and supporting citations.
has been incarcerated, survived anti-trans violence, and lost friends to homicide.\footnote{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/} 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.\footnote{HOUSE OF G.G., https://houseofgg.org (last visited Aug. 15, 2022).}

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.\footnote{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).} An estimated fifty-seven percent of trans people have experienced rejection from their families.\footnote{Fran Watson, Protecting the Vulnerable: Transwomen of Color and the Legal System, 59 House. 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.\textsuperscript{13}

Taken together, family rejection and child welfare system participation lead to staggering rates of trans homelessness.\textsuperscript{14} 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.\textsuperscript{15} 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.\textsuperscript{16} Trans youth who experience familial rejection or the child welfare system frequently experience negative mental health impacts.\textsuperscript{17} Trans youth from the South or rural communities who migrate to


\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{See Our Issue, True Colors United}, https://truelcolorsunited.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, \textit{LGBTQ Youth Homelessness and Discrimination in the Child Welfare System}, 13 \textit{Poverty L. Conv. & Symp.} 1, 3 (2020), https://digitalcommons.law.ggu.edu/povlaw/13.

\textsuperscript{17} Emily Pariseau et al., \textit{The Relationship Between Family Acceptance-Rejection and Transgender Youth Psychosocial Functioning}, 7 \textit{Clinical Prac. Pediatric Psych.} 267, 267–77 (2019), https://doi.org/10.1037/icp0000291 (noting the poor mental health outcomes among trans youth who are rejected by their families); Andrew M. Seaman, \textit{For Trans People, Family Rejection Tied to Suicide Attempts, Substance Abuse}, \textit{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. Further, whether the push factors are family rejection, homelessness, or child welfare systems, trans people of color end up being disproportionately impacted.

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. These experiences include verbal harassment (fifty-four percent), physical assault (twenty-four percent), and being prohibited from wearing gender-affirming clothing (fifty-two percent). Rates of discrimination and harassment in schools were highest among trans people of color.

When anti-trans harassment takes place in classrooms and schools, it detrimentally impacts the health and well-being of trans students. Heartrending accounts of the effects of anti-trans bullying appear in the social science literature and recent news reporting, with trans students experienc-
ing high rates of depression, substance abuse, and, in some instances, even being bullied to suicide.\textsuperscript{24} 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.\textsuperscript{25} 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.\textsuperscript{26} 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.\textsuperscript{27} Incidence rates of trans people leaving schools are also highest among trans people of color.\textsuperscript{28}

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.\textsuperscript{29} 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.\textsuperscript{30} Re-


\textsuperscript{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).

\textsuperscript{26} See generally Palmer et al., supra note 22.

\textsuperscript{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.

\textsuperscript{28} James et al., supra note 14, at 135.

\textsuperscript{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).

\textsuperscript{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.\(^\text{31}\)

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.\(^\text{32}\) 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.\(^\text{33}\) 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.\(^\text{34}\) Data suggests that the anti-trans measures introduced across the country are already harming the mental and physical well-being of trans kids.\(^\text{35}\) Further, these measures show no sign of


\(^{35}\) See Brooke Migdon, Anti-Trans Legislation Negatively Impacted Mental Health of LGBTQ+ Youth: Poll, Hn.L. (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 Klabinoff, 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.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. 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.” Given the ways that anti-trans measures inspire copycat policies in other jurisdictions, 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
students. Furthermore, at least two courts have adopted the misguided view that intentionally misgendering trans people is First Amendment protected speech. 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. 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. Research has also shown that rates of workplace discrimination are higher across the board for trans people of color.

Employment discrimination against trans people is frequently open and unapologetic. 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 identity was contested.

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, for example, Sebrina, an LGBTQ+ student who was consistently misgendered by school administrators and faculty. Despite her repeated requests to be called by her preferred name, her teachers continued to call her by her birth name, causing her significant distress.

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


44. James et al., supra note 14, at 149–50.

45. Trans Voices Amicus Br., supra note 8 (collecting the experiences of trans employees).
tity documents or background check effectively outed them as trans. 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. 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. 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. 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.

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. Fifteen percent of participants in the 2015


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.


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. In addition, twenty-three percent of survey participants reported being mistreated by their employer in some form or another. 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. 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.

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. However, employment discrimination against trans people remains rampant today, especially among trans people of color. 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.

52. JAMES ET AL., supra note 14, at 148.
53. JAMES ET AL., supra note 14, at 148, 153.
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.
57. SEARS ET AL., supra note 45, at 1–2, 13.
D. Housing Discrimination and Insecurity

Trans people experience elevated rates of housing discrimination and instability due to anti-trans bias. 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. 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. 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.

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. Another vital component of a gender transition is living in one’s gender through clothing, hairstyles, name and pronoun use, and wider societal acceptance. As scientific research confirms, transition-related healthcare is a survival necessity for peo-

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60. James et al., supra note 14, at 176.


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 Transsexual, 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. Trans people who are able to access transition-related healthcare experience vast improvements to their mental and physical well-being. In contrast, trans people who lack access to transition-related healthcare are prone to depression, anxiety, suicidality, substance abuse, and even death.

Nonetheless, trans people face immense barriers accessing transition-related healthcare nationwide. Challenges even persist in instances where trans people have health insurance through an employer. Private insurance policies are often issued with language that categorically excludes transition-related healthcare from the scope of coverage. Trans people who qualify for Medicaid based on disability or poverty are often subject to similar coverage exclusions in many states. 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.

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


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).


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. 73 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. 74 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. 75 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. 76

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. 77 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. 78 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. 79

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 Gworls is an example of a mutual aid collective that raises funds for trans people seeking healthcare. See Welcome to For the Gworls, https://www.forthegworls.party/home (last visited Aug. 1, 2022).
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F. Anti-Trans Violence, Legislation, and the Worsening Political Climate

Discrimination against trans people often takes lethal forms.80 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.81 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.82

Trans people are currently facing an unprecedented backlash that has the potential to make these trends worse.83 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.84 The 2023 legislative session has been the worst session yet, producing nearly 300 anti-trans bills and counting, a grim first.85 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.86 These political machinations have also ignited a broader wave of discrimination.

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, 1012–16 (2016).

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).
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).

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.\footnote{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).} 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.\footnote{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).} 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.\footnote{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).}

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.\footnote{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).} 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.\footnote{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, 2022).} Ky Peterson, a Black trans man from Georgia, was sentenced to twenty years in prison for killing, in self-defense,
the man who was raping him.\textsuperscript{93} 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.\textsuperscript{94}

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.\textsuperscript{95} 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.\textsuperscript{96} 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.\textsuperscript{97} Trans people of color experience unemployment at four times the rate of the general population, and at twice the rate of white trans people.\textsuperscript{98} Trans people of color also experience astronomical rates of poverty—four times higher than the general population.


\textsuperscript{94} See, e.g., Ijoma, supra note 91; Lee, supra note 80; Fields, supra note 91.

\textsuperscript{95} See infra Sections II.A and II.B.

\textsuperscript{96} See infra Sections II.C, II.D, and III.


\textsuperscript{98} James et al., supra note 14, at 6, 141.
and twice as high as white trans people. 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. Trans people who are rejected by their families of origin experienced greater levels of poverty and financial insecurity. 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.

B. Trans Homelessness and Discrimination and Bias in Shelters

Trans people’s rates of homelessness also vastly exceed the national average. Trans people were eight times more likely to have a recent experience of homelessness than their straight, cisgender counterparts. Rates of trans homelessness have also increased year after year, with an eighty-eight percent increase observed between 2016 and 2019. The experiences of trans women of color are even more stark. 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.

Trans youth also face jaw-dropping rates of homelessness, largely driven by their experiences of family rejection, as noted above. Trans and LGBTQ+ 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, 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 175.

102. 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. 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. 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.

Deepening these challenges, homeless shelters are rarely a safe option for trans people experiencing homelessness due to anti-trans bias. 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. 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.

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.

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.


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).


113. James et al., supra note 14, at 181.


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.\textsuperscript{116} One trans woman was denied entry into the city’s intake shelter for women and was forced to sleep on the streets instead.\textsuperscript{117} 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.\textsuperscript{118} 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.\textsuperscript{119}

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.\textsuperscript{120} 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.\textsuperscript{121}

\textbf{C. The Criminalization of Survival}

\textit{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.\textsuperscript{122} 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

\textsuperscript{116.} Materials on file with author.  
\textsuperscript{117.} Materials on file with author.  
\textsuperscript{118.} Materials on file with author.  
\textsuperscript{119.} Materials on file with author.  
\textsuperscript{120.} \textit{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); \textit{Samantha Batko, Alyse D. Oneto & Aaron Shroyer, Urb. Inst., Unsheltered Homelessness: Trends, Characteristics, and Homeless Histories} 16 (2020), \url{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); \textit{see also} Reed Christian & Anya Mukarji-Connolly, \textit{What’s Home Got to Do with It? Unsheltered Queer Youth}, 10 \textit{Scholar & Feminist Online} (Fall 2011/Spring 2012), \url{https://sfonline.barnard.edu/whats-home-got-to-do-with-it-unsheltered-queer-youth/} (discussing experiences of unsheltered youth).  
\textsuperscript{121.} \textit{James et al., supra} note 14, at 176.  
\textsuperscript{122.} \textit{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); \textit{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. 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.

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. 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.

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. 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.

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. 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.

124. JAMES ET AL., supra note 14, at 159; see also Trans Voices Amicus Br., supra note 8, at 28–32.

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.


129. See JAMES ET AL., supra note 14, at 163.
sexual assault.\textsuperscript{130} Trans women of color, particularly immigrants, face increased risks related to human trafficking.\textsuperscript{131}

Unfortunately, the abuse of trans sex workers also extends to law enforcement.\textsuperscript{132} 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.\textsuperscript{133}

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.\textsuperscript{134} 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.”\textsuperscript{135} 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.\textsuperscript{136} A trans Latina woman married to a cis-
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.\footnote{137} 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.\footnote{138}

Not only do these biased police encounters lead to cases of false arrest—arrests that can also be catastrophic for immigrants, as discussed below—\footnote{139}—they facilitate incidents of abuse and sexual coercion by law enforcement as detailed above.\footnote{140} 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.\footnote{141}

\section*{D. Additional Challenges Unique to Trans Immigrants}

Trans people who are immigrants to the United States also have unique and complex experiences with criminalization.\footnote{142} 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.\footnote{143} While asylum is theoretically a path to United States residency and citizenship, it is subject to strict time limits and evidentiary requirements.\footnote{144} The Trump Administration introduced a barrage of new policies

\footnote{137. Materials on file with author.}
\footnote{139. See infra Section II.D.}
\footnote{140. See, e.g., \textit{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., \textit{supra} note 133; As It Happens, \textit{supra} note 133 (trans activist recounting her own experiences of being profiled and sexually abused by police).}
\footnote{141. \textit{James et al.}, \textit{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-one percent incidence rates among Black and Asian trans people respectively in the year prior to the survey).}
\footnote{142. For an in-depth exploration of this topic, see Gehi, \textit{supra} note 134.}
and restrictions that turned the asylum process into a legal minefield in ways that the Biden Administration is still working to undo. 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.

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. 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.

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.


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

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. 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.

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.

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. Forty-seven percent of Black


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.


152. See Jaclyn 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.153 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.154 Trans people are frequently incarcerated for their participation in criminalized economies and for survival-related offenses, like theft.155 Research has also confirmed the link between trans people’s experiences of discrimination and their incarceration rates.156

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.157 Trans people face rates of sexual abuse that are ten times higher than the general population in prisons and jails.158 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.


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

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.160 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.161 Adding on to these dire circumstances, prison officials are notoriously indifferent to the sexual abuse claims of trans prisoners.162 Oftentimes, the only relief from sexual abuse that trans prisoners receive comes from paying other incarcerated people for protection with money or favors.163

Incarcerated trans people also face systemic challenges accessing transition-related health care.164 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 2015.165 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.166

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-


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.


166. James et al., supra note 14, at 193.
tody without legal advocates.\textsuperscript{167} 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.\textsuperscript{168} 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.\textsuperscript{169}

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.\textsuperscript{170} 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.\textsuperscript{171} While trans people incarcerated in Georgia are now able to access hormone therapy, thanks to Ashley Diamond’s advocacy, other consti-


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

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.”173

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.174 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.175 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.176

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-

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).
tional violations.\textsuperscript{177} 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.\textsuperscript{178} 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.\textsuperscript{179}

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.\textsuperscript{180} 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.\textsuperscript{181}

\textsuperscript{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.

\textsuperscript{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).


\textsuperscript{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).

\textsuperscript{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.182 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.183 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.184

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.185 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.186 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.

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.\(^{187}\) 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.\(^{188}\)

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.\(^{189}\) 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.\(^{190}\)

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.\(^{191}\) Advocates should also push for an end to immigration detention facilities, as discussed further below,\(^{192}\) and to the broader regime that treats unauthorized border crossings as a criminal offense in a manner that inflicts clear, racialized harms.\(^{193}\) Given how discrimination can lead trans people of color, includ-

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\(^{190}\) See White Hughto 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., Garcia, Supreme Court Rules, supra note 146; Ward & Lemire, supra note 146.

\(^{192}\) See infra Section III.A.4.

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.  

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. 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. 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.

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. 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.


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).


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. 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.

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. 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. 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.


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).


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. 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.

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. Legal professionals should also advocate for legislation that eradicates the doctrine of qualified immunity so that constitutional violations stop going unremedied.

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. Advocates seeking to reduce the collateral consequences of convic-
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.210

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.211 Similar initiatives can be launched in the realm of housing, where restrictions on the use of criminal history information remain rare or poorly implemented.212

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.213

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).


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.\(^{214}\) This includes ensuring that attorney and judicial codes of conduct prohibit discrimination or discourtesy towards trans and LGBQ+ people so they do not suffer secondary harms, such as misgendering, in connection with court processes.\(^{215}\) 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.\(^{216}\) 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.\(^{217}\)

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.\(^{218}\) 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.


\(^{217}\) 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. Advocates can also push back on attempts to establish a religious right to discriminate against trans and LGBQ+ 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. 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. 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. 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.


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.224 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.225 This can be achieved by affirming the importance of Section 1557 in rulemaking processes and bringing affirmative litigation pursuant to its provisions.226

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.227 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.228

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/edicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/.


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.229

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.230 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.231 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 LGBQ+ identified people as a safety option can be properly accommodated.232 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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address the trans homelessness crisis by providing safe and affirming alternatives to congregate shelters.  

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. 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. Advocates can also bring legal challenges in states that completely bar trans people from updating their identity documents or that make surgery a prerequisite.

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. 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. Though useful in the short term,


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).


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.239 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.240

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.241 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.242 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.243 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.244

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

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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).
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.\textsuperscript{245}

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.\textsuperscript{246} 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.\textsuperscript{247} 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.\textsuperscript{248} 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-


\textsuperscript{248}. See, e.g., Elise Viebeck, \textit{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/; \textit{Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box}, \textit{supra} note 246.
ties. 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. 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.

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. To effectuate a course correction, minority voters must actively participate in primaries and screen for candidates who will prioritize their concerns. 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.

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. 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.


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.


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).
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. Ashley was unable to find employment due to bias she experienced as a Black trans woman with a criminal record. She continued to face invidious discrimination due to her identities, and even became targeted by the Ku Klux Klan. 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. 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. 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.

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 hurled into a discrimination-to-incarceration pipeline that is as pernicious as it is pre-
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. 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. 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.

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.