USC JOURNAL OF LAW AND SOCIETY

THE UNIVERSITY OF SOUTHERN CALIFORNIA

VOLUME XIII | SPRING 2021

THE USC JOURNAL OF LAW AND SOCIETY
VOLUME XIII

MISSION STATEMENT

The University of Southern California Journal of Law and Society is a student-run, interdisciplinary Journal that promotes outstanding undergraduate scholarship. The Journal provides a print and online forum to publish exceptional undergraduate papers by students at the University of Southern California and around the world. The Journal seeks to publish papers from a wide range of disciplines that reflect diverse viewpoints. Guided by top faculty members at the University of Southern California, papers selected for publication undergo a rigorous editing process by undergraduate students at USC to ensure that each paper is of the highest quality. The USC Journal of Law and Society strives to promote greater awareness and understanding of the legal field and aims to become the preeminent journal of its kind.

Contents

Executive Board

Samantha Huang
Editor-in-Chief

Rachel Heil
Lead Editor & Director of Public Relations

Lauren Mattice
Lead Editor

Vanessa Nguyen
Lead Editor & Director of Finance

Rinsoluwa Oisaghie
Lead Editor

Echo Tang
Lead Editor

Associate Editors

Ololade Akinlade
Christopher Aranda
Nayeli Camacho
Grace Soojin Chong
Michael Coury
Finley Davis
Nell Fredericks
Chynna Hinrichsen
Elaine Huang
Nicole Levi
Hana Li
Bianca McCloud
Tiffany Morris-Holm
Erica Noll
Zoe Peach-Riley
Malik Price
Gabbie Santos
Victoria Valenzuela
Megan Woldstad
Isabel Woods

Letter From The Editor

Samantha Huang
Editor-in-Chief

The USC Journal of Law and Society is pleased to continue its tradition of publishing outstanding undergraduate papers with the Spring 2021 Edition of the Journal.

We have been so fortunate to be able to continue our operations during the COVID-19 pandemic and I would like to thank all the authors and Associate Editors for their patience and support as we experienced delays in our schedule as a result.

This publication would not have been possible without the leadership demonstrated by our Lead Editors: Rachel Heil, Lauren Mattice, Vanessa Nguyen, Rinsoluwa Oisaghie, and Echo Tang, who were instrumental in the successful execution of this publication. I would also like to thank our Associate Editors for all of their hard work and dedication preparing these papers for publication. Lastly, I would like to extend my thanks towards our faculty advisor, Professor Alison Renteln, for her invaluable support and counsel.

We were fortunate to receive more qualified submissions than we were capable of publishing. The following papers were carefully selected on the basis of their quality, content, and subject matter. Volume XII features the work of students from the University of San Diego, Duke University, Columbia University, the University of Wisconsin-Madison, and our own University of Southern California. The topics discussed range from litigating discrimination cases for incarcerated transgender individuals to the social, economic, and political role of women in North Korea.

Finally, I would like to thank the authors of the papers for their contribution to this publication. It has been wonderful working with these talented writers throughout the editing process. We thank all authors and staff for their participation in the Journal this year.

Enjoy!

THE ATROPHY OF JUDICIAL INDEPENDENCE IN U.S. IMMIGRATION COURTS: NEED FOR AN ARTICLE I COURT AND "PROPHYLACTIC" PROTECTIONS AGAINST EXECUTIVE ENCROACHMENT

Hannah E. Hallman
University of San Diego
Class of 2021

This article examines the current state of disrepair in which the immigration court system finds itself. It analyzes (1) the structural inadequacies of the current system as administered by the Executive Office for Immigration Review, (2) the multifarious encroachments on the independence of immigration judges by the political branches, (3) the adaptation of other parties (namely, immigration attorneys) to those unremitting encroachments, and (4) the enduring solution offered by an independent Article I court. Through a robust review of the literature pertaining to judicial independence and analysis of interview data, this article hypothesizes that the prophylaxis which American legal scholar Martin H. Redish elevates as the foremost contribution of American governance to political theory is precluded from being supplied to the immigration court system by its present structure. This article concludes that the burgeoning case backlog confronting immigration judges across the United States is intractable and that the only enduring solution to this conundrum is offered by an independent Article I Immigration Court.

Acknowledgments

I would like to express my sincerest thanks to Dr. Del Dickson of the University of San Diego, without whose assiduous mentorship this paper would have been an insurmountable undertaking. Of the handful of treasured mentors I've been blessed with, Dr. Dickon's joviality and appetite for knowledge remain unparalleled. I also wish to express my gratitude to David Neal for his invaluable insight and refreshing candor, both of which were instrumental in discerning the nuanced relationship between the judicial and political branches in the immigration context. I must also thank Benjamin Johnson of the American Immigration Lawyers Association for sharing his extensive knowledge of immigration law and policy and for making that knowledge accessible to the general public.

A special thanks to Mimi Tsankov for speaking on behalf of the National Association of Immigration Judges and for simultaneously relaying her own unique experience as an immigration judge. Thanks to Hassan Ahmad for advocating on behalf of each and every one of his clients so that they may have the opportunity to share their stories.

I am forever indebted to the faculty at the College of Arts and Sciences of the University of San Diego for encouraging me to think analytically, question unremittingly, and most importantly, to pursue every endeavor with a heart of compassion.

I. INTRODUCTION

At present, 520 immigration judges across the United States are confronted with a backlog of approximately 1,308,327 active cases—a figure double that of cases pending before the nation's immigration courts in January 2017 when President Trump assumed office.[1] In its most recent attempt to curtail the rapidly proliferating backlog, the Executive Office for Immigration Review (EOIR) devoted considerable resources to the recruitment of new judges into its immigration judge corps.[2] Despite EOIR's investiture of new judges, there remain insufficient personnel to oversee the unprecedented case backlog that overwhelms immigration courts. This article identifies and examines the factors that have contributed to the twofold increase of the immigration court backlog in just under four years. Despite the apparent heterogeneity of the factors responsible for the backlog's proliferation, this article hypothesizes that all factors are derived from—and intimately related to—the progressive curtailment of judicial independence in immigration courts. A thorough review of the literature surrounding judicial independence in the federal courts is applied to the idiosyncrasies of the immigration court system for the sake of discerning the relationship between judicial independence and the ballooning backlog. This relationship cannot be comprehensively understood without first identifying two themes that critics of the current system overlook in their demands for comprehensive reform. The first relates to the imminent threat that the present system poses to a countermajoritarian Constitution.[3] The second comprises an overwhelming indifference toward the consequences—both immediate and subsidiary—imparted on other courtroom parties via the abatement of judicial independence.

This study employs a qualitative research design in the form of a case analysis informed by semi-structured interviews with four seasoned and respected immigration practitioners: (1) Judge Mimi E. Tsankov, Eastern Region Vice President of the National Association of Immigration Judges (NAIJ), (2) David L. Neal, former Chairman of the Board of Immigration Appeals (BIA) and adjunct professor at the Georgetown University Law Center, (3) Benjamin Johnson, Esq., Executive Director of the American Immigration Lawyers Association (AILA), and (4) Hassan M. Ahmad, Esq., Managing Attorney at the HMA Law Firm. Interviews commenced in October 2020 and ranged from thirty minutes to one hour on Zoom. Each interview was guided by a list of questions

---

[1] "Immigration Court Backlog Tool," Transactional Records Access Clearinghouse Immigration, accessed December 5, 2020, https://trac.syr.edu/phptools/immigration/court_backlog/. TRAC is an independent and nonpartisan research center affiliated with Syracuse University; "Immigration Court Backlog Surpasses One Million Cases," Transactional Records Access Clearinghouse Immigration, November 6, 2018, https://trac.syr.edu/immigration/reports/536/. When President Trump took office, the backlog comprised 542,411 pending cases. It has since doubled.

[2] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges); "Adjudication Statistics: Immigratio Judge (IJ) Hiring," Executive Office for Immigration Review, U.S. Department of Justice, accessed October 7, 2020, https://www.justice.gov/eoir/page/file/1242156/download. Since FY 2016, the Immigration Judge Corps has nearly doubled from 289 members to 520 members.

[3] Martin H. Redish, *Judicial Independence and the American Constitution: A Democratic Paradox* (Palo Alto: Stanford University Press).

tailored to the practitioner's experience and, in some cases, their published research and statements for the record in congressional hearings.

This article will first and foremost assert the necessity of an independent judiciary for the preservation of our constitutional democratic system.[4] The assertion will be followed by an analysis of the structural inadequacies that impair the current immigration court system and their foundation in a history of plenary congressional power over immigration.[5] The article will then explore how the aforementioned structural inadequacies enable the executive branch to deprive immigration judges of their decisional independence. Next, the article will attempt to provide a more robust understanding of courtroom dynamics in the immigration context through an exploration of the pressures imparted on immigration attorneys to adapt to adjudicators' waning independence. Ultimately, the article will conclude that transitory, or band-aid, solutions intended to redress the inadequacies of the immigration court system are incapable of restoring the backlog to a manageable volume. The only enduring solution consists of extracting the organizational structure of the immigration courts from the executive branch and transferring it to an independent Article I "United States Immigration Court."[6]

II. A COUNTERMAJORITARIAN CONSTITUTION AND DIGNITARY DUE PROCESS: IMMIGRATION CONTEXT

A review of the literature yields an overwhelming consensus that the immigration court system in its present form has fallen into disrepair; the Trump administration's utter disregard for procedural due process eviscerated any trace of the fairness required of immigration proceedings and ultimately perpetuated the intractability of the backlog.[7] Only a systemic overhaul is capable of resolving the multifaceted problems that encumber immigration courts. Despite this consensus and the abundance of scholarship to accompany it, there emerges a seismic gap between the dialectic appraisals of decisional independence and demands for an enduring solution to address the burgeoning backlog. On the one hand, legal scholars and practitioners have amassed an extensive repertoire of both written and oral material examining the usurpation of judicial independence by the political branches.[8] On the other hand, numerous solutions—both transitory and

---

[4] Redish, *Judicial Independence*, 37.

[5] Anna O. Law, *The Immigration Battle in American Courts* (Cambridge: Cambridge University Press, 2010), 47. The plenary power doctrine refers to a policy of judicial deference to Congress with respect to immigration policy.

[6] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges) at 12. Also see Part V.

[7] Jefferson Beauregard Sessions III to The Executive Office for Immigration Review, memorandum, "Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest," December 5, 2017, The U.S. Department of Justice, https://www.justice.gov/eoir/file/1041196.

[8] Russell Wheeler, "Amid turmoil on the border, new DOJ policy encourages immigration judges to cut corners," *Brookings Institution*, June 18, 2018, https://www.brookings.edu/blog/fixgov/2018/06/18/amid-turmoil-on-the-border-new-doj-policy-encourages-immigration-judges-to-cut-corners/; Mimi Tsankov, "Judicial Independence Sidelined: Just One More Symptom of an Immigration Court System Reeling," *California Western Law Review* 56, no. 1 (2020): 36.

enduring—have been proposed for the purpose of restoring judicial independence to the immigration courts.[9] What the scholarship largely overlooks, however, is the impossibility of reconciling the present immigration court system with the very essence of American constitutionalism.[10]

The framers of the American Constitution went to great lengths to protect minority rights.[11] A leading scholar and theorist on the topic of judicial independence, Martin H. Redish identifies the great paradox of American constitutionalism: the cornerstone of our majoritarian government is an insulated, politically unaccountable judiciary.[12] Much like a routine vaccination protects the body from infection by supplying its cells with antibodies, an independent judiciary insulates minority rights from majoritarian usurpation by ensuring the latter undergoes frequent checks on its power. Redish suggests that an independent judiciary supplies our democratic system with *prophylaxis*—that is, prevention—against tyranny.[13] He establishes the provocative yet well-founded claim that a "prophylactically insulated judiciary" is America's foremost contribution to political theory.[14] Following from the Aesculapian language that Redish employs, we can begin to envisage individual judges as white blood cells—numerically inconsequential in comparison to other government actors yet capable of wielding the most potent prophylaxis among them. Their greatest responsibility is that of protecting the flesh of the Constitution from the virulent whims of the majority. *But what about immigration judges?* Unlike Article III judges, immigration judges do not enjoy the benefit of "hold[ing] their office during good behavior,"[15] nor do they enjoy the salary protections provided to Article III judges. Although Article I judges are not afforded the same institutional protections as their Article III counterparts,[16] they nonetheless remain insulated from the executive branch.[17] Immigration judges, on the other hand, enjoy no such protections on account of their placement in a law enforcement agency.[18] The denial of prophylaxis to immigration judges is so acute that they do not enjoy the privilege of a line-item budget. Should they want pencils for their courtroom or tissues on the counsel table for crying respondents, it is their responsibility to finance those items out-of-pocket.[19] If adjudicators cannot expect institutional protections then it is hardly surprising

---

[9] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges); Stephen H. Legomsky, "Restructuring Immigration Adjudication," Duke Law Journal 59, no. 8. (2010): 1635. https://scholarship.law.duke.edu/dlj/vol59/iss8/3.

[10] Redish, *Judicial Independence.*

[11] Redish, *Judicial Independence*, 18.

[12] Redish, *Judicial Independence*, 37.

[13] Redish, *Judicial Independence*, 18.

[14] Redish, *Judicial Independence*, 8.

[15] U.S. Const. art. III, § I.

[16] Redish, *Judicial Independence*, 202.

[17] U.S. Const. art. I.

[18] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges) at 2-3.

[19] Mimi E. Tsankov (Eastern region Vice President, National Association of Immigration Judges), in discussion with the author, October 28, 2020.

that respondents are utterly defenseless against the bureaucratic callousness of the immigration courts.

The immigration court system is devoid of justice; it sacrifices fairness in the name of expediency,[20] and the measures that serve to reinforce expediency have only made a mockery of due process.[21] A "dignitary theory" of due process is therefore critical for the restoration of justice to the immigration court system.[22] Jerry L. Marshaw, Professor Emeritus of Law at Yale Law School, is responsible for coining the dignitary theory of due process, which posits that the legitimacy of public decision-making should be properly assessed not in terms of its substantive outputs but rather in terms of its altruistic inputs.[23] It follows that the restoration of dignity to due process requires public decision-makers to acknowledge the humanity of respondents—to recognize "the emotional, eclectic, and intuitive" elements of their personalities.[24] Absent recognition of these unique elements, decision-making takes the form of an assembly line that serves only to manufacture (in the consciousness of respondents) a sense of self-loathing and bewilderment. Marshaw offers three values that provide for the restoration of respondents' self-respect in relation to public decision-making processes: predictability, transparency, and rationality.[25] When respondents—referred to as "participants" by Marshaw—are not afforded decisions based on these values, "self-hatred" evolves into the lens through which they interpret the decisions imparted on them by adjudicators:

> They know only that they seem to be involved in an important decision concerning their lives. But they have no idea what is relevant to the decision, who will make it, and, in the extreme case, what precisely the decision is about. Perhaps the only thing that becomes clear in such a process is that if and when a decision is made, the participants will not be given any understandable reasons for it… The process implicitly defines the participants as objects, subject to infinite manipulation by "the system." To avoid contributing to this sense of alienation, terror, and ultimately, self-hatred, a decisional process must give participants adequate notice of the issues to be decided, of the evidence that is relevant to those issues, and of how the decisional process itself works.[26]

Respondents in immigration courts are arguably the *most* alienated from public decision-making processes. They epitomize the "extreme case" that Marshaw refers to: hearings are frequently

---

[20] Paul Wickham Schmidt, "The 5-4-1 Plan for Due Process in Immigration Court," Association of Deportation Defense Attorneys, June 8, 2019, https://www.adda-ny.org/post/the-5-4-1-plan-for-due-process-in-immigration-court.
[21] Hassan M. Ahmad (Esq. managing attorney, HMA Law Firm), in discussion with the author, October 29, 2020.
[22] Jerry L. Marshaw, "Administrative Due Process: The Quest for a Dignitary Theory," *Boston University Law Review* 61, no. 4 (1981): 885.
[23] Marshaw, "Administrative Due Process," 886.
[24] Marshaw, "Administrative Due Process," 902.
[25] Marshaw, "Administrative Due Process," 901.
[26] Marshaw, "Administrative Due Process."

rescheduled without notice,[27] language interpreters are scantily provided to non-English-speaking respondents,[28] and the sheer velocity with which decisions are issued makes it impossible to decipher "what precisely the decision is about."[29] Meaningful immigration reform must restore predictability, transparency, and rationality to immigration jurisprudence.[30] Absent these values, the liberal democratic tradition of American constitutionalism is helplessly diluted.[31]

III. STRUCTURAL INADEQUACIES AND THE PLENARY POWER DOCTRINE

The immigration court system is administered by the Executive Office for Immigration Review (EOIR), a sub-agency of the U.S. Department of Justice (DOJ).[32] EOIR comprises nearly seventy administrative immigration courts across the United States nestled under the authority of the administrative appellate body known as the Board of Immigration Appeals (BIA, or simply the "Board").[33] Dialogue surrounding judicial independence cannot be entertained without first recognizing the inherent conflict of interest emerging from the placement of a court of law under the purview of a law enforcement agency.[34] Judge Tsankov, in her NAIJ capacity, makes a critical distinction with respect to the type of independence that is conferred on immigration judges under this structure: immigration judges, she argues, do not enjoy the benefits of structural independence, but they *do*, in theory, have decisional independence.[35] "In theory" cannot be overemphasized. Under 8 C.F.R. § 1003.10(b), immigration judges are required by law to "exercise their independent judgment and discretion and may take any action consistent with their authorities under the [Immigration and Nationality] Act."[36] In practice, however, immigration judges are finding their decisional independence increasingly diminished. Like other judges, they listen to witness testimony, rule on the admissibility of evidence, and make findings of fact and conclusions of law.[37] On the other hand, immigration judges are also employees of the DOJ,[38] and their paychecks are issued by

---

[27] Ahmad, discussion.
[28] See Part IV. C.
[29] Marshaw, "Administrative Due Process," 901.
[30] Marshaw, "Administrative Due Process."
[31] Redish, *Judicial Independence.*
[32] "About the Office," Executive Office for Immigration Review, U.S. Department of Justice, accessed November 12, 2020, https://www.justice.gov/eoir/about-office.
[33] "EOIR Immigration Court Listing," Executive Office for Immigration Review, U.S. Department of Justice, accessed November 12, 2020, https://www.justice.gov/eoir/eoir-immigration-court-listing.
[34] Tsankov, "Judicial Independence Sidelined"; *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges).
[35] Tsankov, "Judicial Independence Sidelined," 39.
[36] 8 C.F.R. § 1003.10(b) (2017).
[37] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges) at 2.
[38] Benjamin Johnson (Esq. executive director, American Immigration Lawyers Association), in discussion with the author, October 30, 2020.

the attorney general.[39] The political pressures that emerge out of this structure infringe upon the decisional independence of immigration judges.[40]

The usurpation of judicial independence by the political branches is no new phenomenon; it is undergirded by over a century of plenary congressional power over immigration.[41] The plenary power doctrine refers to a policy of judicial deference to Congress with respect to immigration policy.[42] The doctrine emerged out of a consensus that immigration matters necessarily implicate foreign policy.[43] As decisions involving foreign policy are considered political questions, it follows that immigration matters preclude judicial review (or rather, they warrant limited judicial review).[44] Concurring in *Harisiades v. Shaughnessy*, Justice Frankfurter went so far as to insist that *even if* immigration laws "may have reflected xenophobia in general… the responsibility [of immigration] belongs to Congress."[45] A doctrine of unequivocal deference to Congress becomes harmful when legislators ultimately relinquish much of their authority to the executive branch.[46] Speaking on behalf of AILA, Executive Director Benjamin Johnson concedes that "in [AILA's] estimation, they [Congress] have exceeded their delegation authority."[47] The most egregious usurpations of congressional power by the executive branch almost always occur under the reigns of EOIR and its progenitor, the attorney general.

The attorney general possesses the authority to refer cases pending appellate review of the BIA to himself or herself.[48] Commonly referred to as self-certification, this power bestows upon the attorney general, the nation's chief federal prosecutor, the unilateral authority to cherry-pick cases pending appellate review and adjudicate them in accordance with his or her partisan agenda.[49] Under the eight-year duration of the Obama administration, attorneys general exercised this power four times,[50] whereas attorneys general under the Trump administration exercised it nearly thirty times in

---

[39] Ahmad, discussion.

[40] Redish, *Judicial Independence*, 200-201. Martin H. Redish defines decisional independence as "the judiciary's ability to decide individual suits, free from control or usurpation by the political branches." This is not to be confused with lawmaking independence, which "refers to the ability to fashion generally applicable law." This distinction becomes especially important for understanding the authority of the BIA and the Attorneys General to issue binding decisions.

[41] Stephen H. Legomsky, "Immigration Law and the Principle of Plenary Congressional Power," *The Supreme Court Review* 1984 (1984); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[42] Law, *The Immigration Battle*.

[43] Legomsky, "Immigration Law," 262.

[44] Arizona v. United States, 567 U.S. 387, 397 (2012); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952).

[45] *Harisiades*, 342 U.S. at 597.

[46] D. Bruce Janzen, Jr., "First Impressions and Last Resorts: The Plenary Power Doctrine, the Convention Against Torture, and Credibility Determinations in Removal Proceedings," Emory Law Journal 67, no. 6 (2018).

[47] Johnson, discussion.

[48] 8 C.F.R. § 1003.1(h)(1) (2008). Commonly referred to as the "referral and review" mechanism or simply "self-certification," § 1003.1(h)(1) confers upon the United States Attorney General the power to refer cases pending appellate review of the BIA to him or herself.

[49] Laura S. Trice, "Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions," *New York University Law Review* 85, no. 5 (2010): 1766.

[50] New York City Bar Association, *Report on the Independence of the Immigration Courts*, (New York: Association of the Bar of the City of New York, October 2020, https://s3.amazonaws.com/documents.nycbar.org/files/2020792-IndependentImmigrationCourts.pdf.

a short span of four years.[51] Why the exponential increase in case certifications? Former BIA Chairman David L. Neal contends that before the Trump administration, self-certification authority was exercised "sparingly" and generally without regard to the administration's ideological import.[52] What's more, self-certification, says Neal, was utilized for the adjudication of discreet, narrow issues over which the circuit courts were divided or where unsettled law was involved.[53] This practice took a sharp turn under the Trump administration where attorneys general demonstrated an alarming (and unbridled) tendency to invoke their certification authority for the purpose of overturning BIA precedent that conflicted with the administration's prevailing ideology. Where BIA decisions *did* accord with the administration's ideology, an entirely different threat emerged: decisions issued on ideological grounds that are at odds with administrative law—or with fundamental fairness—are likely to be overturned by one or more circuit courts, simultaneously increasing caseload for the higher courts and souring the Board's reputation in the process. Neal warns that the Board's reputation is teetering precariously on the edge of Ashcroft-esque disrepute.[54] Whether the Board will back away from this ledge under the Biden administration is still uncertain—especially when one considers the rapid transformation of its ideological composition under the Trump administration.[55]

In one particularly contentious certified decision, former Attorney General Jeff Sessions stripped immigration judges of the authority to administratively close cases.[56] Administrative closure is an essential docket management tool exercised by immigration judges. It allows judges and the Board to temporarily remove a case from the active docket while awaiting the completion of applications pending before other government bodies, such as U.S. Citizenship and Immigration Services.[57] In *Matter of Castro-Tum*, Sessions revoked the authority of immigration judges and Board members to administratively close cases "except where a previous regulation or settlement agreement has expressly conferred it."[58] Without a previous regulation or settlement agreement, immigration judges and Board members would be required to recalendar all administratively closed cases.[59] This decision came as a blow to the BIA.[60] Six years prior, its members had voted to expand

---

[51] "Comprehensive List of AG-Certified Opinions in Trump Administration To Date," ImmigrationProf Blog, November 9, 2020, https://lawprofessors.typepad.com/immigration/2020/11/comprehensive-list-of-ag-certified-opinions-in-trump-administration-to-date.html.

[52] David Neal (former chairman, Board of Immigration Appeals), in discussion with the author, November 6, 2020.

[53] Neal, discussion.

[54] Neal, discussion.

[55] Neal, discussion. EOIR expanded the number of Board members from seventeen to twenty-three after Trump took office. What's more, many members retired shortly after Neal only to have their positions backfilled with Trump appointees.

[56] Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018).

[57] New York City Bar Association, *Report*, 10; "The Life and Death of Administrative Closure," Transactional Records Access Clearinghouse Immigration, September 10, 2020, https://trac.syr.edu/immigration/reports/623/#:~:text=Contrasting%20Obama%20and%20Trump%20on%20Administrative%20Closure&text=Often%20administrative%20closure%20is%20used,and%20Immigration%20Services%20(USCIS).

[58] Matter of Castro-Tum, 27 I&N Dec. 271, 283 (A.G. 2018).

[59] Matter of Castro-Tum, 27 I&N Dec. 271, 283 (A.G. 2018) at 272.

[60] Neal, discussion.

the availability of administrative closure as a docket management tool for immigration judges.[61] By unilaterally revoking an essential docket management tool, Sessions effectively re-opened 300,300 cases and set the already-burgeoning docket ablaze overnight.[62]

IV. JUDICIAL INDEPENDENCE CURTAILED

A. *Individual Case Completion Quotas and Time-Based Deadlines*

On December 6, 2017, then-Attorney General Jeff Sessions issued a memorandum to all EOIR employees addressing the approximately 650,000 cases that encumbered immigration courts.[63] Sessions insisted that, contrary to popular belief, the backlog was not intractable and expeditious case management would curtail its rapid proliferation.[64] Sessions outlined several principles that immigration judges would thenceforth be expected to adopt in furtherance of the timely administration of justice.[65] Sessions concluded his memorandum with an ominous reminder that the Director of EOIR may issue further guidance consistent with these principles. 8 C.F.R. § 1003.0(b)(1)(ii) confers on the Director of EOIR the authority to "direct the conduct of all EOIR employees to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases."[66] EOIR Director James McHenry arguably exceeded that authority when, on October 1, 2018, he subjected sitting immigration judges to individual case completion quotas and time-based deadlines.[67] To achieve a satisfactory rating under these metrics, immigration judges are expected to complete seven hundred cases per year, have a remand rate of no more than 15 percent for their appealed cases, and meet at least half of six benchmarks.[68] Failure to obtain a satisfactory rating may result in discipline or termination of employment.[69]

Performance measures are not unprecedented in immigration courts (or in any court for that matter). Russell Wheeler, a visiting fellow at the Brookings Institution, affirms that, "Performance measures are key ingredients in promoting effective, efficient tribunals by encouraging peer and public pressure to meet them."[70] Since judges are theoretically insulated from *political* accountability,[71]

---

[61] Matter of Bakavan Avetisyan, 25 I&N Dec. 688 (BIA 2012).
[62] " 'Gonzo Apocalypto' Slammed: Unanimous Panel of 4th Cir. Rejects Matter of Castro-Tum," Immigration Courtside, accessed November 12, 2020, https://immigrationcourtside.com/category/department-of-justice/executive-office-for-immigration-review-eoir/board-of-immigration-appeals-bia/matter-of-castro-tum/.
[63] Sessions to The Executive Office for Immigration Review, December 5, 2017.
[64] Sessions to The Executive Office for Immigration Review, December 5, 2017.
[65] Sessions to The Executive Office for Immigration Review, December 5, 2017.
[66] 8 C.F.R. § 1003.0(b)(1)(ii) (2020).
[67] "AILA Policy Brief: Restoring Integrity and Independence to America's Immigration Courts," American Immigration Lawyers Association, last modified January 24, 2020, https://www.aila.org/infonet/aila-calls-for-independent-immigration-courts.
[68] Katherine H. Reilly, "Immigration Judge Performance Measures Overview," (American Immigration Lawyers Association, July 30, 2018), https://www.aila.org/infonet/eoir-legal-training-prgm-ij-performance-measures.
[69] Reilly, "Immigration Judge Performance Measures Overview."
[70] Wheeler, "New DOJ policy."
[71] Redish, *Judicial Independence*, 37.

it is critical that judicial independence be counterbalanced by measures to enforce *judicial* accountability.[72] Performance measures offer the most effective modality to balance independence against accountability. For over two decades,[73] immigration courts across the United States have been subjected to case completion goals.[74] Historically, case completion goals conferred a number of benefits on the courts: master calendar hearings were effortlessly penciled in,[75] court resources were comfortably allocated, and the backlog was expertly reigned in during moments of unforeseen crisis.[76] Therefore, when it came time to announce the new metrics that would be ushered in with the start of FY 2018,[77] Director McHenry sought to market individual case completion quotas and time-based deadlines as a natural extension of tried and true case completion goals. He offered the half-hearted assurance that "using metrics to evaluate performance is neither novel nor unique to EOIR."[78] Director McHenry failed to address the existence of a fundamental, substantive distinction between case completion goals and individual performance evaluations: the former assess court-wide performance whereas the latter "[pit] the judge's personal livelihood against the interests [of] both the DHS and the respondent,"[79] effectively giving immigration judges a financial stake in the cases over which they preside.[80]

The Supreme Court ruled nearly a century ago in *Tumey v. Ohio* that judges are disqualified to adjudicate a case in which they have a "direct, personal, pecuniary interest in convicting the defendant."[81] In this particular case, the defendant was arrested and charged for unlawful possession of intoxicating liquor in violation of the Ohio Prohibition Act. The defendant was convicted in a mayor's court and fined one hundred dollars.[82] The defendant appealed his conviction, alleging he was denied due process of law because the mayor had a direct, pecuniary interest in his conviction.

---

[72] Redish, *Judicial Independence.*

[73] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges) at 7.

[74] Michael J. Creppy to all immigration judges and all court administrators, memorandum, "Case Completion Goals," April 26, 2002, American Immigration Lawyers Association, https://www.aila.org/infonet/ocij-describes-case-completion-goals; Daniel Kantsroom and M. Brinton Lykes, ed., The New Deportations Delirium: Interdisciplinary Responses (New York: New York University Press), 89-112.

[75] New York City Bar Association, Report on the Independence of the Immigration Courts, (New York: Association of the Bar of the City of New York, October 2020).

[76] Michael J. Creppy to all immigration judges and all court administrators, April 26, 2002.

[77] James McHenry to all of judges (EOIR), memorandum, "Immigration Judge Performance Metrics," March 30, 2018, American Immigration Lawyers Association, https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics.

[78] James McHenry to all of judges (EOIR), March 30, 2018.

[79] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges) at 8.

[80] "Ashley Tabaddor on Immigration Court Hearing Backlog," filmed July 19, 2019, video, 39:45, https://www.c-span.org/video/?462701-5/washington-journal-ashley-tabaddor-discusses-backlog-immigration-court-hearings.

[81] Tumey v. Ohio, 273 U.S. 510, 523 (1927).

[82] *Tumey*, 273 U.S. at 515.

The alleged pecuniary interest amounted to a twelve-dollar premium awarded to the mayor for each conviction sustained (he would not be paid for his services as a judge absent a conviction).[83] The Supreme Court reversed the judgment, finding that the practice was violative of the Fourteenth Amendment because it deprived the defendant of due process of law.[84] Inconspicuously embedded into the closing remarks of Chief Justice Taft's opinion for the majority was a test wherein the Court deemed that "every procedure which would offer a possible temptation to the average man [or woman] as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."[85]

The multifarious encroachments on the independence of immigration judges by the political branches go beyond a possible temptation and create an *actual temptation* to the average person as a judge to forego due process of law in adjudicating immigration cases.[86] If the Taft Court sustained that a twelve-dollar premium was sufficient to introduce a "direct, personal, pecuniary interest in convicting the defendant,"[87] certainly a conviction that puts a premium on a vulnerable human life is antithetical to the very essence of due process as embodied in the Fourteenth Amendment. Judge A. Ashley Tabaddor in her capacity as President of the NAIJ affirms, "It is difficult to imagine a more profound financial interest than one's very livelihood being at stake with each and every ruling on a continuance or need for additional witness testimony which would delay a completion."[88] In any other court of law, a ruling on a request for continuance or any decision that otherwise extends the duration of the trial is, relatively speaking, inconsequential. In immigration courts, however, judges are burdened with the anxiety-provoking awareness that their employment is jeopardized with each decision that extends the duration of a trial.

As though individual case completion quotas and time-based deadlines were not tempting enough on their own, EOIR accompanied the new metrics with a software known as the IJ Performance Dashboard which tracks judges' case completions and adherence to the six aforementioned benchmarks with the innocuous colors of a stoplight.[89] When an immigration judge logs into his or her computer every morning, a dashboard not unlike a "speedometer on a car" glares back at them.[90] Judges meticulously monitor their dashboards, which consist of eight "speedometers,"[91] for any sign that a dial might be creeping from green into yellow, or worse, red.

---

[83] *Tumey*, 273 U.S. at 531.
[84] *Tumey*, 273 U.S. at 523.
[85] *Tumey*, 273 U.S. at 273.
[86] *Tumey*, 273 U.S. 510.
[87] *Tumey*, 273 U.S. at 523.
[88] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges) at 7.
[89] Reilly, "Immigration Judge Performance Measures Overview."
[90] "Federal Immigration Court System," C-SPAN, September 21, 2018, https://www.c-span.org/video/?451809-1/federal-immigration-court-system.
[91] C-SPAN, "Federal Immigration Court System."

Granting one continuance or having one case remanded might just mean that a judge's dashboard is sufficiently compromised to warrant disciplinary action (or termination of employment) from EOIR. Immigration judges are confronted daily with the dilemma of deciding between their financial wellbeing and the due process rights of respondents.[92] A decision of this nature that confronts the average person as a judge eclipses the possible temptation standard announced in *Tumey*.[93] It becomes apparent that any "nice, clear and true" balance between the State—in this case, ICE attorneys—and the respondent is foreclosed, creating lopsided incentives for immigration judges to preserve their financial wellbeing at the expense of due process considerations.

B. *Additional Encroachments on Judicial Independence by the Executive*

The curtailment of judicial independence is not restricted to individual performance metrics; it is perpetuated by the near elimination of personal capacity speaking engagements for immigration judges,[94] their inability to exercise the congressionally mandated contempt authority,[95] unrelenting attempts on the part of EOIR to decertify the NAIJ,[96] incessant docket shuffling with the intent to further partisan goals of the administration,[97] and politicized hiring practices, among others.[98] If left unchecked, EOIR's sustained attack on judicial independence will undoubtedly transform independent adjudicators into "deportation commissioners" if it has not done so already.[99]

C. *Attorneys Adapt: Interviews Elucidate a Secondary Perspective on Judicial Independence*

The judicial independence dialogue naturally amplifies adjudicators' voices and their concern for the due process rights of the respondents who enter their courtrooms. But what about the third player in the courtroom? The second portion of this study is dedicated to gathering the perspectives of immigration lawyers with respect to judicial independence in hopes of developing a more contoured discourse on the topic. The following section displays the questions that were verbally administered to interviewees:

---

[92] Redish, *Judicial Independence*, 113.
[93] Northern Mariana Islands v. Kaipat, 94 F.3d 574 (9th Cir. 1996).
[94] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges) at 6.
[95] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges) at 4.
[96] "Featured Issue: FLRA Strips Immigration Judges of Collective Bargaining Rights," American Immigration Lawyers Association, November 9, 2020, https://www.aila.org/advo-media/issues/all/doj-move-decertify-immigration-judge-union.
[97] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges) at 3.
[98] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges).
[99] Ahmad, discussion.

(1) In its recently-published "Report on the Independence of the Immigration Courts," the New York City Bar alludes to the DOJ's decision to cancel diversity and inclusion training for its employees. Can you speak to the importance of diversity and inclusion training for immigration judges?
(2) What are the repercussions of individual case completion quotas and time-based deadlines on representing your clients?
(3) What are the greatest procedural due process concerns raised by these performance metrics?
(4) How adversarial is the courtroom environment? What has been your experience interacting with ICE attorneys?
(5) ICE attorneys regularly show up to court without file in hand, they skate around evidentiary standards, and they frequently engage in *ex parte* communications with DOJ employees. Can you speak on judges' inability to exercise contempt authority and how that has affected your representation of clients?

The responses garnered from these interviews suggest the profound emotional and psychological toll that principles of expediency and needless hostility take on immigration attorneys and their clients. Attorney Hassan M. Ahmad lamented that he can no longer provide the sense of assurance to his clients that they so desperately crave:

> Gone are the days that we would be able to tell our clients, "This is how the case is going to go." From a practitioner's standpoint, not being able to tell our clients what's going to happen in a case, or how long it's going to take, or who the judge is going to be, or even what law is going to apply—it's an offensive use of chaos [on the part of the DOJ]. Most clients come to us for a sense of security, and we are less able to give that to them than we were in the past.[100]

The pressures placed on immigration judges to process cases expeditiously creates a sense of bewilderment for both lawyer and client (in addition to witnesses who appear on behalf of the client). AILA Executive Director Benjamin Johnson stated that bewilderment can derail a case almost instantaneously.[101] For example, the slightest miscommunication may compel a judge to issue an adverse credibility finding, which is the death knell of a case in immigration court:

> [It] is almost impossible to overcome. On appeal, you aren't taking the case *de novo*; you have to accept the finding of the judge with regard to credibility, and if the judge is getting it

[100] Ahmad, discussion.
[101] Johnson, discussion.

> wrong because they don't understand the person on the witness stand, your whole record on appeal is [spoiled].[102]

Ease of communication in immigration court is problematic; 78 percent of respondents do not speak English and require a language interpreter.[103] To make matters worse, EOIR has taken successive measures to reduce the availability of in-person interpreters, such as replacing them with video recordings at master calendar hearings in several courts across the country.[104] Johnson expressed that, before taking on an administrative role at AILA, many of the clients he represented faced not only verbal communication barriers with immigration judges but also nonverbal *cultural* communication barriers.[105] Johnson emphasized that a stoic composure, lack of eye contact, or the absence of tears while giving an emotional testimony is in no way indicative of a lack of credibility on the part of the respondent; rather, it can be due to cultural differences: "[immigration judges] are judging credibility [according to] American ethnocentric cultural perceptions."[106] These remarks serve to reinforce the exceptional importance of diversity and inclusion training for immigration judges; they begin the process of bridging communication gaps to ensure that respondents' due process rights are protected.

With respect to questions (2) through (5), interviewees alluded to an insurmountable imbalance of power in the courtroom when asked to describe the nature of their relationships with ICE attorneys. Ahmad conceded that to describe the courtroom environment in immigration proceedings as "adversarial" necessarily implies that ICE attorneys and immigration attorneys are on a level playing field. The playing field is, however, entirely lopsided; Ahmad described the relationship between himself and ICE attorneys as "David vs. Goliath."[107] Johnson mirrored this sentiment, affirming that "the fundamental tenet of an independent judiciary is that both parties come to the table with equal access, equal power, and a neutral arbiter, and that doesn't happen in an immigration court."[108] In any court of law, noted Johnson, there are frequent "perks" provided to prosecutors that defense lawyers do not enjoy. For example, prosecutors' offices are oftentimes housed in the same building as judicial chambers, so prosecutors are well acquainted with judicial clerks. Johnson stated that, while these perks are bothersome to defense lawyers in the criminal context, they are loathsome and, in fact, "one thousand times worse" in immigration court.[109] Interestingly, interviewees did not express strong opinions with regard to case completion quotas

---

[102] Johnson, discussion.
[103] "Case Backlogs in Immigration Courts Espand, Resulting Wait Times Grow," Transactional Records Access Clearinghouse Immigration, June 18, 2009, https://trac.syr.edu/immigration/reports/208/.
[104] Hamed Aleaziz, "Immigration Judges Are Railing Against A Plan to Replace Court Interpreters With Videos," Buzzfeed News, July 12, 2019, https://www.buzzfeednews.com/article/hamedaleaziz/immigration-judges-court-interpreters-videos.
[105] Johnson, discussion.
[106] Johnson, discussion.
[107] Ahmad, discussion.
[108] Johnson, discussion.
[109] Johnson, discussion.

and time-based deadlines; they generally regarded them as a nuisance if and when required to appear in court before a case is ripe,[110] but they did not express the same fervor as that expressed by judges (likely because their caseload remains constant despite pressures that EOIR places on judges to process their cases expeditiously). The interview data collected from immigration lawyers provides for a more robust understanding of courtroom dynamics in addition to communicating the emotional and psychological toll that is exerted on lawyers and their clients as a result of EOIR's disregard for due process.

V. IN CONCLUSION: THE NEED FOR AN ARTICLE I COURT

Any form of prophylaxis is precluded from being supplied to the immigration court system by its present structure.[111] The need for an independent Article I Immigration Court is acute. Our nation is approaching a crossroads: as the administration of the federal government undergoes a period of transition, we are urged to consider the humanitarian crisis at the southern border and its exacerbation by a system of assembly line justice that values expediency over fairness.[112] Scholars and practitioners alike have proposed both transitory and enduring solutions to the immigration court conundrum. Proposed transitory solutions include, among others, amending the Immigration and Nationality Act or, alternatively, adding immigration judges to the list of federal employees whose performance is exempt from evaluation.[113] Band-aid solutions and temporary antidotes,[114] however, fail to address the inherent structural flaw introduced by the court's placement within a law enforcement agency.[115]

Any enduring solution to address the overwhelming immigration court backlog requires a systemic overhaul in which immigration court functions are extracted from the law enforcement priorities of the DOJ and transferred to an independent Article I tribunal outside of the executive branch.[116] Proposals urging the creation of an Article I tribunal are neither new nor novel; in fact, advocacy for systemic reform has been percolating for over thirty-five years.[117] In 1981, the Select Commission on Immigration and Refugee Policy submitted its final report before Congress urging

---

[110] Johnson, discussion.
[111] Redish, *Judicial Independence*, 18.
[112] Schmidt, "The 5-4-1 Plan."
[113] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges) at 10-11.
[114] Reilly, "Immigration Judge Performance Measures Overview."
[115] Kantsroom and Brinton, *The New Deportations Delirium*, 108.
[116] U.S. Const. art. III, § I; Tsankov, "Judicial Independence Sidelined," 66. Article I courts are legislative courts (as opposed to constitutional courts under Article III). Article III judges "hold their office during good behavior" and are protected from diminution of their salaries, whereas Article I judges are not afforded the same protections.
[117] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges) at 12.

the creation of an Article I Immigration Court not unlike the U.S. Tax Court.[118] In 2010, the American Bar Association (ABA) submitted a 510-page report to Congress urging the same reform that the Commission had endorsed thirty years prior.[119] That same year, the Federal Bar Association (FBA) voted to create a proposal for the establishment of an Article I court.[120] In 2017, it produced model legislation consistent with said proposal. The legislation was endorsed the following year by the NAIJ. Under the FBA model, presidentially-nominated and Senate-confirmed appellate judges would take the place of the Board and immigration judges would subsequently be appointed by those appellate judges.[121] Aside from restructuring the judicial appointment process, the organizational structure of the immigration court system would remain intact, and the Department of Homeland Security would retain its authority over immigration enforcement.[122]

The time for immigration reform is now. The system in its present state is broken beyond repair: it is costing the United States unnecessary money, and more importantly, it is costing the United States its standing in this world.[123] There is overwhelming consensus among scholars, practitioners, and non-governmental organizations alike that the immigration court backlog is intractable and that the only enduring solution is offered by an independent Article I Immigration Court.[124] Judge Tsankov recognizes that "[t]he creation of an Article I Immigration Court is not the *deus ex machina* which would definitively solve all of the immigration challenges facing the U.S."[125] It is, however, a promising start, and more importantly it is critical for the restoration of dignity to a system that has become increasingly void of it.

---

[118] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges).
[119] Julia Preston, "Lawyers Back Creating New Immigration Courts," New York Times, February 8, 2010, https://www.nytimes.com/2010/02/09/us/09immig.html.
[120] "Briefing: FBA Model Bill to Establish an Article I U.S. Immigration Court," (Federal Bar Association, 2019), https://www.fedbar.org/wp-content/uploads/2019/10/FBA-Model-Article-I-Proposal-Briefing-07162019-pdf-1.pdf.
[121] *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigration Subcomm*, 115th Cong. 1-13 (2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges) at 13.
[122] "Federal Immigration Court," C-SPAN, filmed September 21, 2018, video, 59:51, https://www.google.com/policies/privacy/.
[123] Ahmad, discussion.
[124] Sessions to The Executive Office for Immigration Review, December 5, 2017.
[125] Tsankov, "Judicial Independence Sidelined," 68.

Works Cited

Aleaziz, Hamed. "Immigration Judges Are Railing Against A Plan To Replace Court Interpreters With Videos." Buzzfeed News, July 12, 2019. https://www.buzzfeednews.com/article/hamedaleaziz/immigration-judges-court-interpreters-videos.

American Immigration Lawyers Association. "AILA Policy Brief: Restoring Integrity and Independence to America's Immigration Courts." Last modified January 24, 2020. https://www.aila.org/infonet/aila-calls-for-independent-immigration-courts.

American Immigration Lawyers Association. "Featured Issue: FLRA Strips Immigration Judges of Collective Bargaining Rights." November 9, 2020. https://www.aila.org/advo-media/issues/all/doj-move-decertify-immigration-judge-union.

"Ashley Tabaddor on Immigration Court Hearing Backlog." Filmed July 19, 2019. Video, 39:45. https://www.c-span.org/video/?462701-5/washington-journal-ashley-tabaddor-discusses-backlog-immigration-court-hearings.

"Briefing: FBA Model Bill to Establish an Article I U.S. Immigration Court." Federal Bar Association, 2019. https://www.fedbar.org/wp-content/uploads/2019/10/FBA-Model-Article-I-Proposal-Briefing-07162019-pdf-1.pdf.

"Comprehensive List of AG-Certified Opinions in Trump Administration to Date." ImmigrationProf Blog, November 9, 2020. https://lawprofessors.typepad.com/immigration/2020/11/comprehensive-list-of-ag-certified-opinions-in-trump-administration-to-date.html#.

Creppy, Michael J. Michael J. Creppy to all immigration judges and all court administrators, memorandum, "Case Completion Goals," April 26, 2002. American Immigration Lawyers Association. https://www.aila.org/infonet/ocij-describes-case-completion-goals.

C-SPAN. "Federal Immigration Court System." Filmed September 21, 2018. Video, 59:51. https://www.c-span.org/video/?451809-1/federal-immigration-court-system.

" 'Gonzo Apocalypto' Slammed: Unanimous Panel of 4th Cir. Rejects Matter of Castro-Tum." Immigration Courtside. Accessed November 12, 2020, https://immigrationcourtside.com/2020/06/27/jeff-gonzo-apocalypto-sessions-illegally-stripped-immigration-judges-of-authority-to-close-cases-7th-cir-shreds-white-nationalist-former-ags-bogus/

Janzen, D. Bruce, Jr. "First Impressions and Last Resorts: The Plenary Power Doctrine, the Convention Against Torture, and Credibility Determinations in Removal Proceedings." *Emory Law Journal* 67, no. 6 (2018): 1237-71. https://scholarlycommons.law.emory.edu/elj/vol67/iss6/7/.

Kantsroom, Daniel, and M. Brinton Lykes, ed. *The New Deportations Delirium: Interdisciplinary Responses*. New York: New York University Press, 2015.

Law, Anna O. *The Immigration Battle in American Courts*. Cambridge: Cambridge University Press, 2010.

Legomsky, Stephen H. "Immigration Law and the Principle of Plenary Congressional Power." *The Supreme Court Review* 1984 (1984): 255-307. https://www.jstor.org/stable/3536942.

Legomsky, Stephen H. "Restructuring Immigration Adjudication." *Duke Law Journal* 59, no. 8 (2010): 1635-1721. https://scholarship.law.duke.edu/dlj/vol59/iss8/3.

Marshaw, Jerry L. "Administrative Due Process: The Quest for a Dignitary Theory." *Boston University Law Review* 61, no. 4 (July 1981): 885-932. https://heinonline.org/HOL/LandingPage?handle=hein.journals/bulr61&div=35&id=&page=.

McHenry, James. James McHenry to all of judges (EOIR), memorandum, "Immigration Judge Performance Metrics," March 30, 2018. American Immigration Lawyers Association. https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics.

New York City Bar Association. *Report on the Independence of the Immigration Courts* New York: Association of the Bar of the City of New York, October 2020. https://s3.amazonaws.com/documents.nycbar.org/files/2020792-IndependentImmigrationCourts.pdf.

Preston, Julia. "Lawyers Back Creating New Immigration Courts." New York Times, February 8, 2010. https://www.nytimes.com/2010/02/09/us/09immig.html.

Redish, Martin H. *Judicial Independence and the American Constitution: A Democratic Paradox*. Palo Alto: Stanford University Press, 2017.

Reilly, Katherine H. "Immigration Judge Performance Measures Overview." American Immigration Lawyers Association. July 30, 2018. https://www.aila.org/infonet/eoir-legal-training-prgm-ij-performance-measures.

Sessions, Jefferson Beauregard, III. Jefferson Beauregard Sessions III to The Executive Office for Immigration Review, memorandum, "Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest," December 5, 2017. The U.S. Department of Justice. https://www.justice.gov/eoir/file/1041196.

Schmidt, Paul Wickham. "The 5-4-1 Plan for Due Process in Immigration Court." Association of Deportation Defense Attorneys, June 8, 2019. https://www.adda-ny.org/post/the-5-4-1-Plan-for-due-process-in-immigration-court.

Transactional Records Access Clearinghouse Immigration. "Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow." June 18, 2009. https://trac.syr.edu/immigration/reports/208/.

Transactional Records Access Clearinghouse Immigration. "Immigration Court Backlog Surpasses One Million Cases." November 6, 2018. https://trac.syr.edu/immigration/reports/536/.

Transactional Records Access Clearinghouse Immigration. "The Life and Death of Administrative Closure." September 10, 2020. https://trac.syr.edu/immigration/reports/623/#:~:text=Contrasting%20Obama%20and%20Trump%20on%20Administrative%20Closure&text=Often%20administrative%20closure%20is%20used,and%20Immigration%20Services%20(USCIS).

Transactional Records Access Clearinghouse Immigration. "Immigration Court Backlog Tool." Accessed November 12, 2020. https://trac.syr.edu/phptools/immigration/court_backlog/.

Trice, Laura S. "Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions."*New York University Law Review* 85, no. 5 (November 2010): 1766-1800. https://www.nyulawreview.org/issues/volume-85-number-5/adjudication-by-fiat-the-need-for-procedural-safeguards-in-attorney-general-review-of-board-of-immigration-appeals-decisions/.

Tsankov, Mimi. "Judicial Independence Sidelined: Just One More Symptom of an Immigration Court System Reeling." *California Western Law Review* 56, no. 1 (2020): 36-68. https://scholarlycommons.law.cwsl.edu/cwlr/vol56/iss1/12/

U.S. Department of Justice. "About the Office." Executive Office for Immigration Review. Accessed November 12, 2020. https://www.justice.gov/eoir/about-office.

U.S. Department of Justice. "Adjudication Statistics: Immigration Judge (IJ) Hiring." Executive Office for Immigration Review. Accessed October 7, 2020. https://www.justice.gov/eoir/page/file/1242156/download.

U.S. Department of Justice. "EOIR Immigration Court Listing." Executive Office for Immigration Review. Accessed November 12, 2020. https://www.justice.gov/eoir/eoir-immigration-court-listing.

Wheeler, Russell. "Amid turmoil on the border, new DOJ policy encourages immigration judges to cut corners." *Brookings Institution*, June 18, 2018. https://www.brookings.edu/blog/fixgov/2018/06/18/amid-turmoil-on-the-border-new-doj-policy-encourages-immigration-judges-to-cut-corners/.

IDEAL VICTIMS: RACE AND CREDIBILITY IN SEX-CRIME PROSECUTION

Chasia Elzina Jeffries
University of Southern California
Class of 2021

This paper analyzes the current day implications of historical and social perceptions of race and gender on the credibility of Black female survivors of sexual assault and gender-based violence. Recent sociological studies examining victim credibility and demographics such as race consider racially gendered stereotypes but ignore their greater historical context or ability to alter victim believability by police officers and prosecutors. This perceived culpability would affect which cases are prosecuted and if Black women report sexual assault. This paper argues that the history of dehumanizing and sexuality violating Black women with little legal accountability and the unique socio-historical position of Black women affects Black female survivors' perceived credibility. This paper considers the stereotypes produced in this historical context, specifically those of the dominant "Matriarch" who could not be coerced into non-consensual sex, and the hypersexual "Jezebel," who is responsible for her assault. This paper critiques the use of the "Matriarch" stereotype as a framework for sociological work. It suggests an alternate focus on the stereotypes of the unbreakable "Strong Black Woman" and the overweight, dark-skinned, asexual "Mammy" who was deemed unrapable. These stereotypes make claims of sexual assault unbelievable because of Black women's emotional and physical presentations and performances. This paper argues that fewer cases of sexual assault of Black women are prosecuted because of this historical context and these stereotypes, which alter the perceived credibility of the Black female victim and produce a social understanding that their cases are less attractive or "winnable" for prosecutors.

Acknowledgments

This paper was written on land that is the traditional unceded homeland of the Chumash and Tongva People, the true stewards of the land known as Los Angeles, California. It is essential to acknowledge that this land, and quite probably the land you read from, is colonized indigenous territory that has been constructed upon by the forced labor of enslaved African people. It is our collective responsibility to interrogate the history and afterlives of this violence and to honor, protect, and sustain this land.

For their constant love, guidance, support, and sacrifice, I'd like to thank God, my ancestors, and my family, both chosen and blood, both living and passed. There are too many to name, but I'd like to thank a few people in particular. Thank you to my parents, Rodney Jeffries and Dessie Senegal-Jeffries, and two younger sisters, Chanya and Chaiya Jeffries. Thank you to my uncles Alex Senegal, Donald Lee Senegal, and Anthony Jeffries, and godmother Dr. Sonja Wiley. Thank you to my grandparents, Alex Senegal, Morris Jeffries, Dessie Senegal, and Earnestine Jeffries. I love you all, and thank you for loving me.

I also want to thank USC's Mellon Mays Program, My Mellon Mays Cohort and Community, and USC Faculty & Staff, especially Dr. Theo Fowles & my Mellon Mays mentor and thesis advisor, Dr. Alaina Morgan, for their constant support and encouragement of my research.

I wrote this paper during my year interning with the Post Conviction Review Unit and the Sex Crimes Unit of the Los Angeles County District Attorney's Office. Thank you, Deputy District Attorneys Bobby Grace, Martha Carrillo, and Jessica Goulden, for the amazing opportunity and for trusting me with such important work. I'd also like to thank the Leonard D. Schaeffer Fellows in Government Service Program, especially Mr. Leonard Schaeffer, Dr. Erica Lovano McCann, and Willa Erickson, along with USC's Department of Gender and Sexuality Studies, specifically Jeanne Weiss and Dr. Diana Blaine. Thank you for allowing me to receive funding and course credit for my work with the DA's office, which included completing this research project.

Finally, this work, and all my future work, is dedicated to Victor McElhaney.

I. INTRODUCTION

When discussing the historical effects of race on current sex crime prosecution, significant emphasis is placed on the false criminalization of Black men, especially in light of the success of Ava DuVernay's cinematic retelling of the 1989 Central Park jogger case in *When They See Us,* and critique of the criminal justice system in the *13th*. While the construction of Black criminality has relied on myths of the "Black Brute" and the false claims of white women since the Jim Crow Era, sexual violence against Black women has been ignored. For example, a week before the infamous Central Park jogger crime, a Black woman in Manhattan was raped and murdered. This crime nearly mirrored the subsequent case, albeit with very little media attention.[1] While current sociological studies looking at victim demographics and perceived responsibility for rape address some of the historical construction of this chasm between believable white victims and responsible Black victims, there is insufficient examination and classification of these perceptions.

Further, in focusing on media and social construction of stereotypes, less consideration is given to the unfortunate historical reality that the devaluing of the lives and position of Black women in society plays a significant role in their credibility [2] and whether or not a sex crimes case is prosecuted. Finally, current sociological studies focus on the believability of victims by the general public and do not consider believability by police officers and prosecutors. They also fail to consider the effect that said culpability has on which cases are prosecuted and, in turn, whether Black women report sexual assault. By looking at historical and social perceptions, I theorize as to the current day implications of these social understandings and historical realities on the credibility of Black female survivors and which cases the District Attorney's office decides to prosecute, concluding that race plays a significant role in which cases are selected for prosecution because Black women are seen as less credible victims in sex-crime cases today than our white counterparts.

This paper focuses on the experiences of Black and white cis-gender women specifically. Based on a review of academic literature, there is insufficient evidence to make conclusions on the perceptions and treatment of Black or white transwomen and non-binary folks in relation to their cis counterparts of both races. Most studies are also heavily focused on African-American women and white women in their analysis of race. Because of different histories and social experiences, it would be inaccurate and harmful to apply studies to communities they do not actually speak of in the name of inclusivity. Findings from these studies and conclusions made in this paper would likely be different if they included individuals of other races. This paper seeks to prioritize the experience of Black women who are frequently criminalized and ignored in society today and whom I believe are heavily affected today by our unique historical treatment and perception. This paper seeks to address the unique experience of Black women, not to the exclusion of other individuals or experiences and not as a universal answer, but as an essential intervention in the myth of legal objectivity. In the words of political theorist Dr. Iris Marion Young, "I claim to speak neither for everyone, to everyone, nor about everything."[3] If you feel so called to fill in gaps produced between this work and current legal understandings, please do as it is much needed.

---

[1] Barbara Ransby, "The Gang Rape of Anita Hill and the Assault Upon All Women of African Descent," *The Black Scholar* 22, no. 1–2 (1992): 84, https://doi.org/10.1080/00064246.1992.11413017.
[2] Ransby, "The Gang Rape of Anita Hill," 84.
[3] Iris Marion Young, *Justice and the Politics of Difference*(Princeton: Princeton University Press, 2011), 13.

II. SOCIOLOGICAL FINDINGS ON RACE & VICTIM CULPABILITY

A study conducted in 1992 by psychologist Dr. Cynthia Willis-Esqueda sought to examine the relationship between victim and defendant race and victim culpability amongst a participant population of white people. She found that Black victims of sexual assault were blamed more often and were less believable than white victims, especially if they were in a dating relationship with their assailant.[4] A study published in 2019 found:

> victim-blaming appeared to be exacerbated by race/ethnicity, specifically participant responses geared towards the African American and Latina hypothetical survivor . . . were harsher, judgmental, and accusatory, when compared to responses for the white hypothetical victim . . . suggest[ing] that African American, white, and Latina victims of sexual assault may be perceived differently in terms of the causes of their sexual assault experience [and] their "responsibility" for the assault.[5]

Psychologists Dr. Erin C. Dupuis & Jason A. Clay conducted a similar study on victim culpability in 2013, focusing on victim and defendant race, as well as notions of respectability. Dupuis & Clay utilized eight different vignettes that were all modeled after an actual legal case in Louisiana. The vignettes were modeled to look like a criminal case docket which included identifying information, like race, gender, hair & eye color, age, and height, for both the victim and perpetrator, and contained the testimonies of the victim, perpetrator/defendant, and witnesses. Each of the 241 participants in the survey received one vignette then completed a questionnaire rating how strongly, on a Likert scale of 1 being strongly disagree to 7 strongly agree, they agreed with 22 statements regarding victim and perpetrator responsibility. The only differences between the vignettes were the victim's and perpetrator's race and gender, presented in the identifying information and levels of respectability. The defendant's statement introduced respectability, either describing the victim as a "'party girl' whom he had seen pick up numerous men in bars or stating he was confused that she would accuse him given her 'sweet nature' [and that she] really never dated much and never went to bars." [6] In all the vignettes, the circumstances were the same:

> The victim described walking down a street, meeting the defendant along the way, and being dragged into a building and raped. It was revealed that the victim had previously, and only briefly, dated the defendant but had not seen him in a year. Officer testimony indicated that the officer had, in fact, seen a man coming out a building and leaving quickly before noticing the victim who looked disheveled and was crying. A witness for the defense claimed that she was with the defendant when he received a call from the victim and that, in her presence, the

---

[4] Cynthia E. Willis, "The effect of sex role stereotype, victim and defendant race, and prior relationship on rape culpability attributions" *Sex Roles* 26 (March 1992): 224, https://doi.org/10.1007/BF00289708.

[5] Kaleea R. Lewis et al., "Differential perceptions of a hypothetical sexual assault survivor based on race and ethnicity: Exploring victim responsibility, trauma, and need for social support," *Journal of American College Health*67, no. 4 (2019): 314–15, https://doi.org/10.1080/07448481.2018.1472096.

[6] Erin C. Dupuis and Jason A. Clay, "The Role of Race and Respectability in Attributions of Responsibility for Acquaintance Rape," *Violence and Victims* 28, no. 6 (December 2013): 1088, https://doi.org/10.1891/0886-6708.vv-d-12-00013.

> victim and defendant had met up and left together. Finally, the defendant's testimony . . . stated that the victim had called him and had asked why he did not call her. The defendant admitted that the two of them had sex, but claimed it was consensual. [7]

The survey found highly respectable Black female victims were more likely to be believed than Black female victims with lower respectability. When respectability was controlled (either both high or both low respectability), Black women were less likely to be believed than white women.[8] The introduction of a history of respectability politics in evaluating the positionality of Black women is important.

Coined in 1993 by African American Studies and History Professor Dr. Evelyn Brooks Higginbotham, the term "politics of respectability" was used to describe how Black women conformed to dominant standards of femininity typically placed upon wealthy white women in the 20th century.[9] Higginbotham notes both the assimilationist and neoliberal leanings of these politics of respectability but argues their importance to countering racist images and structures, which resulted in policing negative practices in their communities.[10] Assimilation to white upper-class standards challenged societal ideas of Black women as savages, unemployable, or hypersexual. Respectable Black women were seen as closer to whiteness and therefore were able to shake or contradict the stereotypes that often condemned Black women. Consequently, it is essential to consider the historical implications of these stereotypes and their effects on current sociological findings.

Criminal Justice Professor Dr. Shana Maier also conducted a study with significant legal ramifications. Maier interviewed sexual assault advocates, individuals who supported survivors throughout their trials. Maier found that victims who were not "real" victims — those who did not fit the stereotypical expected victimhood model — were often blamed, stigmatized, and revictimized by doctors, police officers, and attorneys.[11] Maier notes:

> Police may engage in aggressive questioning of the victim because of the demand that probable cause be established before an arrest is made . . . Prosecutors pressure law enforcement to be aggressive in obtaining physical evidence and conducting "good" interviews with victims, in short to "build a good case."[12]

While this credibility and evidence are important to building a strong case, it often harms victims because police officers and prosecutors cannot conduct completely objective analyses. The

---

[7] Dupuis and Clay, "The Role of Race," 1088.
[8] Dupuis and Clay, "The Role of Race," 1092.
[9] Mikaela Pitcan, Alice E. Marwick, and Danah Boyd, "Performing a Vanilla Self: Respectability Politics, Social Class, and the Digital World," *Journal of Computer-Mediated Communication*23, no. 3 (May 2018): 164, https://doi.org/10.1093/jcmc/zmy008.
[10] Evelyn Brooks Higginbotham, *Righteous Discontent: The Women's Movement In the Black Baptist Church, 1880-1920* (Cambridge: Harvard University Press, 1994), 187.
[11] Shana L. Maier, " 'I Have Heard Horrible Stories . . .': Rape Victim Advocates' Perceptions of the Revictimization of Rape Victims by the Police and Medical System," *Violence Against Women* 14, no. 7 (2008): 787, https://doi.org/10.1177%2F1077801208320245.
[12] Maier, "Rape Victim Advocates' Perceptions," 789.

biases of officers and prosecutors affect which questions they ask and of whom.[13] In addition to a general distrust of police officers and medical systems in Black communities, these biases lead to less successful prosecutions of sex crimes against Black victims. A study conducted by Dr. Tara Emmers-Sommer also concluded that a mock jury had increased levels of "victim blame in revictimization conditions." [14] If a mock jury is more likely to blame a victim in revictimization situations, and Black women are more likely to be revictimized by legal and medical systems, it is expected that there will be increased victim-blame of Black women in general amongst jurors. As criminal cases often rely on juries, and prosecutors want to win cases, their biases likely affect which victims they find credible and which cases are winnable or convictable. These biases are well understood by those involved in the reporting and investigating process. An example is the case of Daniel Holtzclaw, a police officer in Oklahoma who "specifically targeted [and sexually violated] low-income Black women because he thought they were less likely to be believed."[15] The 2016 US Justice Department report on the violation of the rights of Black citizens of Baltimore by police officers reveals victim-blaming of Black female survivors of sexual assault by both police officers and prosecutors:

> a police culture deeply dismissive of sexual assault victims . . . Baltimore officers sometimes humiliated women who tried to report sexual assault, often failed to gather basic evidence, and disregards some complaints filed by prostitutes. Some officers blamed victims or discouraged them from identifying their assailants . . . And the culture seemed to extend to prosecutors, investigators found. In one email exchange, a prosecutor referred to a woman who had reported a sexual assault as a 'conniving little whore.' A police officer . . . wrote back: 'Lmao! I feel the same.'[16]

A study conducted by Criminal Justice Professors Dr. Dawn Beichner and Dr. Cassia Spohn in 2005 further explains the impact that these biases and understandings play in ideas of credibility and on which cases are prosecuted. They argue:

> Prosecutors rely on stereotypes about appropriate behavior; they attribute credibility to victims "who fit society's stereotypes of who is credible: older, White, male, employed

[13] Maier, "Rape Victim Advocates' Perceptions," 789.
[14] Tara M. Emmers-Sommer, "College Student Perceptions of Hypothetical Rape Disclosures: Do Relational and Demographic Variables Pose a Risk on Disclosure Believability?," *Sexuality & Culture* 21, no. 3 (September 2017): 2847, https://doi.org/10.1007/s12119-017-9411-4.
[15] Maya Finoh and Jasmine Sankofa, "The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence," American Civil Liberties Union, January 28, 2019, https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/legal-system-has-failed-black-girls-women-and-non.
[16] Sheryl Gay Stolberg and Jess Bidgood, "Some Women Won't 'Ever Again' Report a Rape in Baltimore," The New York Times, August 12, 2016, https://www.nytimes.com/2016/08/12/us/baltimore-police-sexual-assault-gender-bias.html.

> victims." Victims who exhibit behavior extraneous to traditional societal norms of female behavior or who engage in "precipatory behavior" are deemed less credible." [17]

Beichner and Spohn's study illustrates the role that respectability politics and, therefore, performances and perceptions of race play on victim culpability and case selection. The historical realities and perceptions of Black women have created a prosecutorial understanding that cases of sex crimes against Black women are less convictable, which then results in more speculation regarding the credibility of a Black victim.

III. HISTORICAL PERCEPTIONS OF BLACK WOMEN

Current sociological research and Black feminist legal theory prioritize the role of stereotypes in quantifiable differences between Black and white victims of sexual violence. Lecturer in gender studies Dr. Audrey K. Miller describes stereotyping as a form of structural racism that is "rooted in America's history of slavery wherein rape of Black women by White owners were justified."[18] Most of these stereotypes, especially in the context of the mass incarceration and lynching of Black men throughout history, are focused on the "Black Brute," an animalistic Black man destroying innocent neighborhoods and raping white women. Today, incarceration is often punishment in place of the spectacle of lynching. An example of this "Black Brute" defense today is the trial and conviction of Mike Tyson in 1992. Attorney Darci E. Burrell describes that the prosecution portrayed Tyson as a:

> specter of a wild African-American man, a beast, incapable of controlling his animal urges . . . our worst nightmare—a vulgar, socially inept, sex-obsessed black athlete. And any woman who would voluntarily enter a hotel suite with him must have known what she was getting into. In other words, both principals were animals — the black man for the crudity of his sexual demands, the black woman for eagerly acceding to them . . . the flip side of the image of the sexually savage African-American man: the image of the "chronically promiscuous" African-American woman.[19]

This myth has been transformed and bled into ideas of victim culpability. Interestingly, victims of assault by Black men were perceived to be more responsible for their assault because of the socially understood dangers of "fraterniz[ing] with Black men."[20] The reality of gender-based violence that Black women have faced has been minimized because of this stereotype. Author Hazel Carby articulated this minimization of Black feminine existence: "The institutionalized rape of black

---

[17] Dawn Beichner and Cassia Spohn, "Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit," *Criminal Justice Policy Review* 16, no. 4 (December 1, 2005): 465, https://doi.org/10.1177/0887403405277195.

[18] Audrey K. Miller, "'Should Have Known Better than to Fraternize with a Black Man': Structural Racism Intersects Rape Culture to Intensify Attributions of Acquaintance Rape Victim Culpability," *Sex Roles* 81, no. 7 (October 2019): 429-30, https://doi.org/10.1007/s11199-019-1003-3.

[19] Darci E. Burrell, "Myth, Stereotype, and the Rape of Black Women," *UCLA Women's Law Journal* 4, no. 1 (1993): 89, https://escholarship.org/uc/item/0nf4x7g7#main.

[20] Miller, "Structural Racism," 430.

women has never been as powerful a symbol of black oppression as the spectacle of lynching."[21] An example of this is Emmett Till's murder serving as a significant spark in the Civil Rights Movement, but not the brutal kidnapping and gang rape of Recy Taylor, the details of which this paper will not provide. Emmett Till is a collective, public memory. Recy Taylor, despite her bravery in speaking up, the firebombing of her home, multiple trials and no convictions, and the legal support of the NAACP and field investigator Rosa Parks, is missing from common public knowledge. Her vocalization of the reality of many women was ignoredboth by the legal system and by history.

White men violated both Taylor and Till for something they didn't do. Both were victims of the extralegal justice that enslavement and the Jim Crow South justified. The legal system failed both. Both were symbols of white violence against Black bodies, which motivated the Civil Rights Movements, and both became spectacles.[22] But whereas Till and other "Strange Fruit" are iconic in the cultural imagination and historical narrative of the United States, Taylorand the many other Black women who experienced sexual violence are not. However, unlike Till, the unique racialized gender that Black women experience regarding rape results from our social history and a unique set of stereotypes. The rape and sexual assault of Black women was a frequently utilized and normalized feature of the psychological and physical containment and control of enslaved Black women. Black women were sexually violated by white owners and forced to reproduce at absurd rates to increase the number of bodies able to perform physical labor. This assault went unreported and untried because Black women were property to use at the owner's will and their sexual violation was not a crime.

Further, Black women didn't have the legal standing to sue, neither when enslaved nor after abolition. The entitlement of nearly everyone to the Black woman's body but herself, as articulated by Fannie Lou Hamer, was verified in the courts' failure to prosecute countless cases of abduction and sexual assault of Black women and girls by white men during the Jim Crow Era.[23] This social perception is still at work today. Attorney and legal theorist Kimberle Crenshaw explains:

> When Black women were raped by white males, they were being raped not as women generally, but as Black women specifically: Their femaleness made them sexually vulnerable to racist domination, while their Blackness effectively denied them any protection. This white male power was reinforced by a judicial system in which the successful conviction of a white man for raping a Black woman was virtually unthinkable. In sum, sexist expectations of chastity and racist assumptions of sexual promiscuity combined to create a distinct set of issues confronting Black women. [24]

---

[21] Darlene Clark Hine, "Rape and the Inner Lives of Black Women in the Middle West," *Signs* 14, no. 4 (1989): 912, http://www.jstor.org/stable/3174692.

[22] Danielle L. McGuire, *At the Dark End of the Street :Black Women, Rape, and Resistance--a New History of the Civil Rights Movement, from Rosa Parks to the Rise of Black Power*, 1st ed. (New York: Alfred A. Knopf, 2010), xv–xix.

[23] McGuire, *Black Women, Rape, and Resistance*, xviii–xix.

[24] Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum*1989, no. 1 (1989): 158–59, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf.

In their study on Black female culpability, psychologist and Professor of Psychology Dr. Roxanne Donovan and Professor of Global and Community Health Dr. Michelle Williams explain that the relationship between stereotypes and racial history result in Black women being more vulnerable to sexual assault, though nearly incapable of accusing and prosecuting the assailants.[25] Because of our unique social position as both Black and woman, current legal and social analysis has failed to dedicate serious attention to the historical and social constructions of Black womanhood concerning rape. This paper seeks to begin to rectify this ignorance, beginning with stereotypes specific to the perception of Black women and moving into the historical realities faced by Black women. While by no means complete or universal, an attempt to reconsider the intersections of race and gender as racialized gender through the experiences of Black women can drastically change legal and sociological understandings of sexual assault. As a result, prosecutorial methods, accountability, and repair in situations where Black women are sexually assaulted can also be transformed.

While sociologists shouldn't limit their focus concerning sexualized race on stereotypes of Black women's sexuality, it is important to address these stereotypes. Through stereotypes, the otherization of folks has cemented these myths as a symbol that works to fuel hegemonic power structures and justify mass violence and oppression. Language and discourse are a tool that has been welded against Black bodies globally for centuries. Cultural theorist Stuart Hall claims, "meaning is a social production, a practice. The world has to be made to mean. Language and symbolization are the means by which meaning is produced."[26] Semiotic theory argues that the way society operates, in all ways but most notably concerning social hierarchies, is founded in words and their connotations.[27] The terms used to describe Black women in particular, but also white women, have lasting effects, particularly regarding vulnerability to sexual assault, victim credibility, and the likelihood of prosecution. Different scholars group these understandings differently. The usual pattern is a dichotomy: the hypersexual Jezebel and unbreakable Matriarch. This dichotomy is inaccurate. First, the Matriarch stereotype is rooted in racially sexist policy and should be rejected. Second, this category should be divided into the Strong Black Woman and the Mammy. Third, dichotomies should be interrogated as the categorization of opposites is harmful to intersectional analysis and a lasting remnant of colonialism. These stereotypes and Black women's inability to fit notions of white femininity have lasting effects on the culpability of Black female victims of sexual assault.

IV. THE JEZEBEL

The most frequently cited symbol of Black feminine sexuality, and therefore the lack of believability of Black victims in sociological studies, is that of the hypersexual Jezebel. A study conducted in 1998 found that myths of the hypersexuality, looseness, and "unrapability" of Black women that are characteristic of the Jezebel stereotype played a significant role in victim

[25] Roxanne Donovan and Michelle Williams, "Living at the Intersection: The Effects of Racism and Sexism on Black Rape Survivors," *Women & Therapy* 25, no. 3–4 (2002): 97, https://doi.org/10.1300/J015v25n03_07.
[26] Stuart Hall, "The Rediscovery of 'Ideology: The Return of the Repressed in Media Studies," in *Culture, Society and the Media*, ed. Michael Gurevitch (London: Routledge, 2005), 65.
[27] Hall, "The Return of the Repressed," 65.

believability.[28] Birthed during enslavement and cemented in the American landscape during the Jim Crow Era, this myth painted:

> African-American women [as] sexually immoral [and] justified the institutional sexual abuse of female slaves and the complete lack of possible penalty for raping African-American Women . . . The belief that African-American women are less virtuous and therefore deserve sexual abuse persists, continuing to excuse the sexual violation of these women. The image of the sexually voracious African-American woman has also affected whether or not African-American women will be believed when they come forward with charges of sexual abuse.[29]

This Jezebel image was a rationalization for the rape of enslaved African women, which allowed white men to see Black women as temptresses, "sexually available and deviant,"[30] rather than victims and, therefore, to blame for their assault. While the blatancy of such beliefs may be more subtle today, stereotypes and misconceptions of Black feminine sexuality are still present in lies of differences in puberty and development that are still seen in sexual assault cases today. In their study examining judicial decision making in cases of sexual assault, psychologists Dr. Rebecca L. Fix, Dr. John Michael Falligant, and Dr. Apryl A. Alexander present the following claim regarding the sexual assault of a Black girl:

> Stereotypes . . . involve precociousness, particularly with sexual behavior, which may stem from possible differences in the age of onset of puberty or sexual behavior among Black and White Americans . . . One such stereotype is that Black Americans are more sexually promiscuous and deviant . . . which may implicitly lead jurors to view Black survivors of sexual abuse as less believable than White survivors.[31]

This stereotype is also often internalized, with Black women blaming themselves and their "looseness" for their assault, leading to revictimization, which has significant legal ramifications as described above.[32] In a report on how the legal system continues to fail Black women, girls, and non-binary survivors of gender-based violence, the ACLU comments on the many Black female victims of artist R. Kelly being described as "fast" in the Lifetime docuseries, "Surviving R. Kelly" and therefore responsible for their assault. Despite the many victim testimonies, jurors acquitted Kelly because they "did not believe testimony from Black women because of how they dressed and

---

[28] Lewis et al., "Differential perceptions," 162.
[29] Burrell, "Myth, Stereotype, and the Rape of Black Women," 92–93.
[30] Donovan and Williams, "Living at the Intersection," 97–98.
[31] Rebecca L. Fix, John Michael Falligant, and Apryl A. Alexander, "Simulated judicial decision-making for African and European American adolescents with illegal sexual behavior: The impact of medical data and victim race/ethnicity," *Behavioral Sciences & the Law* 38, no. 1 (2020): 52–53, https://doi.org/10.1002/bsl.2431.
[32] Helen A. Neville et al., "General and Culturally Specific Factors Influencing Black and White Rape Survivors' Self-Esteem," *Psychology of Women Quarterly*28, no. 1 (2016): 91–92, https://doi.org/10.1111%2Fj.1471-6402.2004.00125.x.

'the way they act.'"[33] What was initially designed to control enslaved Black women's bodily autonomy, deeming them unrapable, is still very prevalent. While this is an important bias to consider—that ideas of consent and blameworthiness of the victim are dependent on the sexualized perception and "fastness" of Black girls and women—this is not the only racial stereotype with a lasting impact on the legal system and lives of Black women. Victim blaming attitudes—that we were acting too "grown" or "fast," that we were "asking for it" through our existence and therefore consented to the assault— may no longer be explicitly expressed by police officers, juries, and prosecutors. Still, these understandings shift which cases they feel are strongly supported and convictable and which victims are credible enough for trial.

V. THE MATRIARCH, STRONG BLACK WOMEN, & MAMMY

The second area of focus in sociological evaluations is the idea of the Matriarch, which should likewise be abandoned. This label was coined in the notorious Moynihan Report, which argued that Black people were to blame for our subordination. The report focused on the "questionable morality and overly dominant Black women . . . play[ing] up the myth of the emasculating Black matriarch and how we never gave our men a chance."[34] It was inaccurate in its analysis of Black women in 1965 and remains so today. In examining this Black matriarchy, professor and historian Dr. Barnard Ransby argues:

> We have seen the racist and sexist theory . . . resurrected . . . Some claim only to be concerned with the desperate plight of young African American men, yet in the process . . . effectively minimize the equally desperate plight of black women . . . blaming black women for our own oppression and that of our families and children. At one end . . . black women are stereotyped as egotistical career climbers, better paid, better educated and more socially mobile than our male counterparts and thus not worthy of any special treatment as victims of oppression. At the other end . . . we are portrayed as lazy, promiscuous welfare frauds, who leave our children unsupervised to roam the streets.[35]

Rather than reusing this flawed terminology and analysis, which emulates the emasculation of men or a refusal to adhere to traditional femininity, Donovan & Williams claim that contemporary stereotypes have been reconfigured into the "Strong Black Woman" persona which is taken on with pride and for survival. While this resilience is historical and admirable, its pervasiveness has led to the silencing of Black sexual assault survivors and the social minimization of the violence enacted upon them.[36]

Sociology and African American Studies professor Dr. C. Shawn McGuffey describes this symbol as the "The Black Superwoman" who is:

---

[33] Finoh and Sankofa, "The Legal System."
[34] Kellee Terrell, "Without Consent Confronting the Rape of Black Women and Girls," *Ebony* 71, no. 6–7 (2016): 3.
[35] Ransby, "The Gang Rape of Anita Hill," 82.
[36] Donovan and Williams, "Living at the Intersection," 99–100.

> emotionally impervious, independent, and highly resilient . . . African American cultural norms put a high value on suffering, especially for . . . women, as a way to adjust to ongoing adversity . . . Black women are expected to be able to "handle anything life throws at them—whether rape . . . violence against us within our own communities, or sexual abuse."[37]

Personal interpretations of this cultural myth-turned-reality prevent the jury and prosecutors from seeing Black women as victims of assault. Also, the internalization of this defining characteristic of Black femininity makes the performance of a Black survivor illegible by the institutions she seeks support and redress from. Maier argues, "medical students are more likely to . . . blame a . . . victim who does not fit the cultural stereotype of a real rape victim—that is, someone raped by a stranger who appears to be emotionally distressed on arrival at the emergency room."[38] One advocate interviewed described police officers "hav[ing] their own idea of how the situation should be and how the survivor should be acting and basically expressing to the survivor, 'If you were really raped you'd be crying right now. You should be beat up.'"[39] Because Black women may not cry or be emotionally distraught, because we have been socio-culturally trained not to display emotions that could be perceived as weakness, [40] it is more likely that investigators will not believe us, and there will not be sufficient evidence or culpability for the case to proceed and be convictable in a trial. This embodied mythology also makes revictimization more likely,[41] which, as stated earlier, is crucial to case convictability and victim culpability.

It is also important to consider the implications of the Mammy stereotype, which plays a significant role in victim culpability concerning race. The Mammy is the asexual, maternal, undesirable Black woman.[42] She is non-threatening to the white family she works for because she is dark, overweight, and overdressed; her sexuality is nonexistent,[43] and therefore her sexual assault impossible to believe. A study conducted in 2007 by Dr. Roxanne Donovan found when operating under the understanding of a jezebel and matriarch stereotype, significantly fewer Black women were perceived to be the sexual assault victims of white men.[44] This difference cannot be adequately explained by the stereotypes previously presented or current research on issues of victim culpability. The stereotype of the Mammy can explain them. Very little work has been done on examining the connection between sexual assault and the mammy figure, mainly because color-blind ideas of preference have made it politically incorrect for the jury or society to articulate their internalized belief that a white man could not have sexually assaulted black women because she is overweight or unattractive.

---

[37] C. Shawn McGuffey, "Rape and Racial Appraisals: Culture, Intersectionality, and Black Women's Accounts of Sexual Assault," *Du Bois Review* 10, no. 1 (Spring 2013): 112. https://doi.org/10.1017/S1742058X12000355.
[38] Maier, "Rape Victim Advocates' Perceptions," 789.
[39] Maier, "Rape Victim Advocates' Perceptions," 793.
[40] Brittany C. Slatton and April L. Richard, "Black Women's experiences of sexual assault and disclosure: Insights from the margins," *Sociology Compass* 14, no. 6 (2020): 5, https://doi.org/10.1111/soc4.12792.
[41] Slatton and Richard, "Black Women's experiences," 6.
[42] Shweta Nanda, "Re-Framing Hottentot: Liberating Black Female Sexuality from the Mammy/Hottentot Bind," *Humanities* 8, no. 4 (October 2019): 2, https://doi.org/10.3390/h8040161.
[43] Nanda, "Re-Framing Hottentot," 4.
[44] Roxanne A. Donovan, "To blame or not to blame: influences of target race and observer sex on rape blame attribution," *Journal of Interpersonal Violence*22, no. 6 (2007): 737, https://doi.org/10.1177/0886260507300754.

VI. WHITE FRAGILITY

It is also important to consider the impact of the "Black Brute" stereotype on Black women because of our inability to align with white ideals of femininity, negatively affecting the culpability of Black female victims. When Black men are painted as "possess[ed by] an exaggerated sexuality and are plagued by 'irresistible, and animal-like urges,'"[45] white women are painted as the innocent targets of the crime in question. Crenshaw explains:

> Rape statutes . . . maintain a property-like interest in female chastity . . . and . . . reflect . . . white male regulation of white female sexuality. Historically, there has been absolutely no institutional effort to regulate Black female chastity . . . Because of the way the legal system viewed chastity, Black women could not be victims of forcible rape . . . chastity could not be possessed by Black women. Thus, Black women's rape charges were automatically discounted . . . A judge in 1912 said: "This court will never take the word of a n* against the word of a white man [concerning rape]." . . . Since rape of a white woman by a Black man was "a crime more horrible than death," . . . The lynching of Black males . . . was legitimized by the regulation of white women's sexuality . . . the historical fact that the protection of white female sexuality was often the pretext for terrorizing the Black community . . . Black women are caught between ideological and political currents that . . . create and . . . bury Black women's experiences.[46] (brackets in original, * added censorship)

Black women face a unique challenge with regard to social stereotypes. If one is to take a genuinely intersectional and productive analysis on the perception of Black women and sexual assault, it is also essential to examine how treating Black women as a sum of her parts produces ineffective analysis. The relationship of Black women to race is different than that of Black men. The relationship of Black women to gender, especially in terms of being allowed access to ideas of traditional femininity and protected against gender-based violence, is remarkably different than that of our white counterparts.

VII. CONCLUSION

It is also important to note that these stereotypes were not arbitrarily made in a vacuum but are intimately tied to the historical control of the physical bodies and reproductive power of Black women. That Black women could exercise autonomy and make claims on the status of our bodies was unbelievable then and still is now. In her analysis on rape and the migration of freed Black women, Professor of African American History Dr. Darlene Clark Hines notes that nearly every documented slave narrative features rape prominently.[47] Hines argues that the motivating force for the escape of Black women from the South and enslavement was the potential for reproductive autonomy and ownership over their children.[48] She also references the deliberate work done by the National Association of Colored Women. This work focused on the protection and independence of

[45] Burrell, "Myth, Stereotype, and the Rape of Black Women," 91.
[46] Crenshaw, "Demarginalizing the Intersection of Race and Sex," 156–60.
[47] Hine, "Rape and the Inner Lives of Black Women," 912.
[48] Hine, "Rape and the Inner Lives of Black Women," 914.

Black women and challenging the aforementioned stereotypes, describing them as obsessed with the security of women.[49] The historical prevalence and societal ignorance of the sexual assault and rape of Black women have resulted in an understanding that the assault of Black women is less serious, that it does not matter, that it is not convictable, and that we do not matter. Burrell explains how little has changed since times of enslavement, when the rape of Black women was not a crime, to today, where the rape of Black women is not tried with the same intensity as the assault of white women.[50] If we hope to change this reality, it is of utmost importance to consider the historical and social positionality of Black women rather than hide behind the myth of objectivity within the law. The disparity between victim credibility regarding race has been measured. Its origins have been explained, though more work is needed. Now, something must be done to change this reality for justice to be possible.

[49] Hine, "Rape and the Inner Lives of Black Women," 918.
[50] Burrell, "Myth, Stereotype, and the Rape of Black Women," 93–94.

Works Cited

Beichner, Dawn, and Cassia Spohn. "Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit." *Criminal Justice Policy Review* 16, no. 4 (December 1, 2005): 461-98. https://doi.org/10.1177/0887403405277195.

Burrell, Darci E. "Myth, Stereotype, and the Rape of Black Women." UCLA Women's Law Journal 4, no. 1 (1993): 87-99. https://escholarship.org/uc/item/0nf4x7g7#main.

Crenshaw, Kimberle. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics." *University of Chicago Legal Forum* 1989, no. 1 (1989): 139-67. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf.

Donovan, Roxanne A. "To blame or not to blame: influences of target race and observer sex on rape blame attribution." *Journal of InterpersonalViolence* 22, no. 6 (2007): 722–36.

Donovan, Roxanne, and Michelle Williams. "Living at the Intersection: The Effects of Racism and Sexism on Black Rape Survivors." *Women & Therapy* 25, no. 3–4 (2002): 95–105.

Dupuis, Erin C., and Jason A. Clay. "The Role of Race and Respectability in Attributions of Responsibility for Acquaintance Rape." *Violence and Victims* 28, no. 6 (December 2013): 1085–96. https://doi.org/10.1891/0886-6708.vv-d-12-00013.

Emmers-Sommer, Tara M. "College Student Perceptions of Hypothetical Rape Disclosures: Do Relational and Demographic Variables Pose a Risk on Disclosure Believability?" *Sexuality & Culture* 21, no. 3 (2017): 664–79. https://doi.org/10.1007/s12119-017-9411-4.

Finoh, Maya, and Jasmine Sankofa. "The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence." American Civil Liberties Union. January 28, 2019. https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/legal-system-has-failed-black-girls-women-and-non.

Fix, Rebecca L., John Michael Falligant, and Apryl A. Alexander. "Simulated judicial decision-making for African and European American adolescents with illegal sexual behavior: The impact of medical data and victim race/ethnicity." *Behavioral Sciences & the Law* 38, no. 1 (2020): 51–65. https://doi.org/10.1002/bsl.2431.

Hall, Stuart. "The Rediscovery of 'Ideology: The Return of the Repressed in Media Studies." In *Culture, Society and the Media*, edited by Michael Gurevitch, 61–95. London: Routledge, 2005.

Higginbotham, Evelyn Brooks. *Righteous Discontent: The Women's Movement In the Black Baptist Church, 1880-1920*. Cambridge: Harvard University Press, 1993.

Hine, Darlene Clark. "Rape and the Inner Lives of Black Women in the Middle West." *Signs* 14, no. 4 (1989): 912–20. https://www.jstor.org/stable/3174692.

Lewis, Kaleea R., Alyssa Robillard, Deborah Billings, and Kellee White. "Differential perceptions of a hypothetical sexual assault survivor based on race and ethnicity: Exploring victim responsibility, trauma, and need for social support." *Journal of American College Health*67, no. 4 (2019): 308–17. https://doi.org/10.1080/07448481.2018.1472096

Maier, Shana L. " 'I Have Heard Horrible Stories . . .': Rape Victim Advocates' Perceptions of the Revictimization of Rape Victims by the Police and Medical System." *Violence Against Women* 14, no. 7 (2008): 786–808. https://doi.org/10.1177%2F1077801208320245

McGuire, Danielle L. *At the Dark End of the Street :Black Women, Rape, and Resistance--A New History of the Civil Rights Movement, from Rosa Parks to the Rise of Black Power* New York: Alfred A. Knopf, 2010.

McGuffey, C. Shawn. "Rape and Racial Appraisals: Culture, Intersectionality, and Black Women's Accounts of Sexual Assault." *Du Bois Review* 10, no. 1 (Spring 2013): 109–30. https://doi.org/10.1017/S1742058X12000355.

Miller, Audrey K. "'Should Have Known Better than to Fraternize with a Black Man': Structural Racism Intersects Rape Culture to Intensify Attributions of Acquaintance Rape Victim Culpability." *Sex Roles* 81, no. 7 (2019): 428–38. https://doi.org/10.1007/s11199-019-1003-3.

Nanda, Shaweta. "Re-Framing Hottentot: Liberating Black Female Sexuality from the Mammy/Hottentot Bind." *Humanities* 8, no. 4 (October 2019): . https://doi.org/10.3390/h8040161.

Neville, Helen A, Euna Oh, Lisa B. Spanierman, Mary J. Heppner, and Mary Clark. "General and Culturally Specific Factors Influencing Black and White Rape Survivors' Self-Esteem." *Psychology of Women Quarterly*28, no. 1 (2004): 83–94. https://doi.org/10.1111%2Fj.1471-6402.2004.00125.x.

Pitcan, Mikaela, Alice E. Marwick, and Danah Boyd. "Performing a Vanilla Self: Respectability Politics, Social Class, and the Digital World." *Journal of Computer-Mediated Communication*23, no. 3 (May 2018): 163–79. https://doi.org/10.1093/jcmc/zmy008.

Ransby, Barbara. "The Gang Rape of Anita Hill and the Assault Upon All Women of African Descent." *The Black Scholar* 22, no. 1–2 (1992): 82–85. https://doi.org/10.1080/00064246.1992.11413017.

Slatton, Brittany C., and April L. Richard. "Black Women's experiences of sexual assault and disclosure: Insights from the margins." *Sociology Compass* 14, no. 6 (2020): 1-12. https://doi.org/10.1111/soc4.12792.

Stolberg, Sheryl Gay, and Jess Bidgood. "Some Women Won't 'Ever Again' Report a Rape in Baltimore." The New York Times. August 12, 2016. https://www.nytimes.com/2016/08/12/us/baltimore-police-sexual-assault-gender-bias.html .

Terrell, Kellee. "Without Consent Confronting the Rape of Black Women and Girls." *Ebony* 71, no. 6–7 (2016): 114. https://bit.ly/3dSlFr4.

Willis, Cynthia E. "The effect of sex role stereotype, victim and defendant race, and prior relationship on rape culpaility attributions." *Sex Roles* 26 (March 1992): 213–26. https://doi.org/10.1007/BF00289708.

Young, Iris Marion. *Justice and the Politics of Difference* Princeton: Princeton University Press, 2011.

A CONTEMPORARY ANALYSIS BETWEEN THE BRACERO AND FRANCO-ALGERIAN ACCORDS

Miriham Antonio
University of Southern California
Class of 2020

This paper makes a contemporary analysis between the U.S.-Mexican guest worker program of 1942 to 1964, also known as the Bracero Program, and the official Franco-Algerian guest worker accord of 1964 to 1973. The striking similarities between these programs are a testament to the neo-imperialistic practices of Western countries in the twentieth century. The emigration of French-Algerian and Algerians to France and Mexicans to the U.S. was encouraged and accelerated in the early to mid-twentieth century when these western countries began recruiting temporary workers in times of their respective labor shortages caused by World War I and World War II. The history of mass Algerian emigration to France and Mexican emigration to the U.S. historically mirrored a type of boom and bust cycle. Historically, workers have been brought in during times of economic development and disposed of during times of economic uncertainty. In both cases, these early worker recruitment patterns have had long-lasting, unintended consequences on the demographics of the receiving countries. By elucidating and understanding the similarities and differences between these labor recruitment accords and systems, this paper aims to demonstrate how these two guest worker programs benefited the receiving countries, France and the U.S., more than the sending countries, Algeria and Mexico. In both of these guest worker programs, it is clear that there was an unequal bargaining power between the sending and receiving countries, with the former having a political advantage. As a result, the guest workers of both programs suffered greatly. Any potential new guest worker program should take history into account in order to avoid repeating such unfair and unjust guest worker programs like the ones discussed in this paper.

Acknowledgments

I would like to express my sincerest thanks to Dr. Jorge N. Leal from the University of California, Riverside, and Dr. Mariam Habibi from the American Graduate School of Paris who mentored and guided me throughout my research. I would not have been able to write this paper without having been introduced to the material that you taught me in your classes.

In addition, I would like to acknowledge my great grandfather Juan Garcia Hernandez, and his father Juan Bautista Ramos who were Braceros until 1954 and 1958. My great-great-grandfather Juan Bautista Ramos died in 1954 while fulfilling his duties as a Bracero picking cotton in Brownsville, Texas. This paper has been a homage to them and to all the immigrant guest workers who endured great amounts of hardship during these guest worker programs.

I am my ancestors' wildest dreams. Si se puede!

I. INTRODUCTION

Between 1942 and 1946, the United States recruited a little over five million Mexican men to work on U.S. railroads and agricultural fields.[1] These men were referred to as braceros because they did hard labor with their *brazos*, arms. Seventy-four percent of the *braceros* worked in the agricultural fields, while 26 percent of the braceros worked in the railroads.[2] This recruitment was part of a bilateral contract between the U.S. and Mexico, where Mexico agreed to provide men to help address the so-called shortage of labor in the U.S. that had resulted from WWII. Prior to the Bracero Program, the U.S. had already recruited large numbers of Mexican workers during WWI, but that program was short lived, lasting only four years.

Like the U.S., France began recruiting workers from its Algerian colony at the onset of WWI and then again after WWII.[3] After Algerian independence from France in 1962, Algerians continued emigrating to France for work but this time as guest workers. In 1964, France and Algeria signed their official guest worker accord which lasted until 1973. During this period, Algeria workers were recruited to work in France's growing manufacturing sector. This paper will explore and compare some of the main components of these guest worker programs including the recruitment process, housing accommodations, and contract negotiations.

This paper seeks to create a contemporary comparative analysis between the Bracero and Franco-Algerian guest worker program by focusing on the recruitment process, experiences of the workers in the receiving countries—as it relates to their lives as guest workers—as well as some of the long lasting consequences these programs created. Both the Algerian and Mexican workers suffered a great deal of discrimination and exploitation while abroad—it is worth examining these experiences in order to avoid any such gross negligence in any future guest worker programs. This paper is a preliminary step for broader works of descriptive analysis for the two cases and other guest worker programs.

II. INDIVIDUAL AND GOVERNMENTAL MOTIVES

It is important to begin by asking why these guest worker programs were created in the first place. The rationale given by both France and the U.S. are similar; both countries argued that they needed the extra labor force. France began recruiting large numbers of organized labor from French Algeria right after WWII to help revamp their economy, but it was not until 1964 that the newly independent nation of Algeria and colonial France actually signed an official labor recruitment accord.[4] Meanwhile, the U.S. began recruiting large numbers of organized labor from Mexico at the onset of WWII with the implementation of the Bracero Accord in 1942.[5] These guest labor programs were touted as symbiotically beneficial to all parties, yet the reality was a different one. In

[1] Kitty Calavita, Inside The State: The Bracero Program, Immigration, and the I.N.S. (New Orleans, LA: Quid Pro Books, 2010), 1.
[2] Thomas Guiler and Lee Penyak, "Braceros and Bureaucracy: Mexican Guest Workers on the Delaware, Lackawanna and Western Railroad During the 1940s," *Pennsylvania History* 76, no. 4 (October 4, 2009): 1.
[3] Stephen Adler, *Migration and International Relations: The Case of France and Algeria*(Cambridge, MA: Migration and Development Study Group, Center for International Studies, Massachusetts Institute of Technology, 1977), 4.
[4] Marcel Maussen, "Constructing Mosques: The Governance of Islam in France and the Netherlands" (Ph.D. diss. Amsterdam Institute for Social Science Research, 2009), 107.
[5] Calavita, *Inside the State*, 23.

both cases, it was France and the U.S. that benefited the most from these guest worker programs.[6] Both of these countries were able to benefit from fast and cheap labor at the expense of the guest workers.[7]

There are two main reasons why countries recruited these specific workers. For one, natives did not want to do the jobs that the guest workers were willing to do for low wages. It is important to note that when the Franco-Algerian guest worker accord was signed in 1964, France had just received an influx of repatriated white colons—also known as *pied noirs*—who had been living in the former colony. Yet, these repatriates were not willing to take low-paying manufacturing jobs,[8] and this was also the case with Americans who were not willing to work in the agricultural and railroad sectors.[9] They saw those jobs as unworthy for citizens and reserved for immigrants. Meanwhile, because the immigrant profile for both Mexican and Algerians consisted of those from low socioeconomic backgrounds,[10] these immigrants were more willing to take low-paying jobs.[11]

One might question how Mexico and Algeria could agree to sign a guest worker program that placed their workers at the hands of exploitation and discrimination, and indeed, their motives are complicated. Both Mexico and Algeria benefited from allowing their men to work abroad because of the remittances that the workers sent back home to their families. For Algeria, this was especially important because when they signed the guest worker accord with France, Algeria had just undergone the War of Independence which left their economy in severe damage. During this time, the remittances sent by the some 460,000 Algerian immigrants in France were able to help sustain a large portion of the population in Algeria.[12] As a result, the Algerian government had a huge incentive to organize labor to work in France. However, there was some opposition from progressives who regarded the guest worker accord with France as a form of neo-colonial exploitation.[13] Despite these concerns, the Algerian government prioritized the financial needs of the country.

As for Mexico, the ability to maintain a diplomatic relationship with their neighboring country was very important. Like Algeria, Mexico benefited from the considerable remittances workers sent back.[14] While both Mexico and Algeria tried to protect their workers by placing protective clauses in the bilateral contracts, the reality of implementing those protections was very difficult. In both cases, the governments of the sending countries lacked almost any real oversight over the worker's experiences and treatment.

---

[6] Mahfoud Bennoune, "Maghribin Workers in France," *MERIP Reports*. no. 34 (January 1975): 4.
[7] Daniel Martinez, "The Impact of the Bracero Program on A Southern California Mexican-American Community" (M.A. Thesis, Claremont Graduate School, 1958), 31.
[8] Jennifer Hunt, "The Impact of the 1962 Repatriates from Algeria on the French Labor Market," I*ndustrial & Labor Relations Review* 45, no.3 (April 1992): 557-558, https://doi.org/10.2307/2524278.
[9] George Kuempel and Howard Swindle, "Ex-Chief Recalls Bracero Slavery," *The Dallas Morning News*, 30 April 1980, 1.
[10] "Teaching," Bracero History Archive, accessed April 15, 2021, http://braceroarchive.org/items/show/1593.
[11] Bennoune, "Maghribin Workers," 4.
[12] Mark J. Miller, "Reluctant Partnership: Foreign Workers in Franco-Algerian Relations, 1962-1979," *Journal of International Affairs* vol. 33, no. 2, (Fall/Winter 1979): 222.
[13] Miller, "Reluctant Partnership," 222.
[14] Jeffery Smith, "The Impact of Transnational Migration and Remittances on Quality-of-Life in Chalchihuites, Zacatecas," *Journal of Latino-Latin American Studies*vol. 3, no. 1 (2008): 104. https://doi.org/10.18085/llas.3.1.g94641632317511r.

Finally, the workers themselves had significant reasons to go abroad. They saw the opportunity of working abroad as a chance to advance their social and economic status. Most of the workers hoped to save enough money to be able to buy land and livestock or to set up a business back home.[15] It is important to note that the majority of the men partaking in these guest worker programs came from severely destitute communities, with the majority of them not even owning land. Unfortunately, in both cases the dreams of saving enough money to buy land or set up a business faded away with time for these immigrant workers. For Algerian and Mexican workers, the expenses of surviving in a foreign country like France and the U.S., given their low wages, made it very difficult to save enough money to achieve their original economic goals.[16]

III. EARLIER ORGANIZED LABOR MIGRATION

Most historians pinpoint the root of Mexican emigration to the U.S. to the start of the 1910 Mexican Revolution. However, studies have shown that this migration actually had its roots in the economic expansion of U.S. corporations and investors into northern Mexico in the late nineteenth century. Emigration from Mexico to the U.S. began prior to the Bracero Program,[17] but it was not until the onset of WWI that organized recruitment of Mexican workers to the U.S. began.

The first bracero guest worker program was created in 1917 as a result of strong pressure from growers who argued that WWI had created a shortage of labor in the agriculture field. In May 1917, a temporary farmworker program for unskilled Mexican workers was put in place.[18] The program allowed around 83,000 Mexican workers to temporarily enter the U.S. for work in the agricultural fields.[19] Most of these workers worked in the cotton and sugar beet industry.[20] However, the program only lasted until 1921. When the program ended, many workers stayed in the U.S. because they did not have enough money to travel back home and their employers refused to pay for their transportation home. Many of them continued working in the fields long after the end of the program but were repatriated to the U.S. at the onset of the Great Depression because they were seen as a threat to American workers.[21]

Very similar parallels can be drawn with the migration patterns that occurred between France and French Algeria—and later Algeria. Algerian migration to France occurred in two main interlude periods, the first roughly lasted from 1914 to 1929 and the second from 1946 to the 1970s.[22] Yet, the main difference between Mexican and Algerian migration is that Algeria was a French colony up until 1962.[23] That being said, the official Franco-Algerian guest worker program

---

[15] Stephen Castles, "The Guest Worker in Western Europe-An Obituary," *The International Migration Review* 20, no. 4 (Winter 1986), 770.
[16] Bennoune, "Maghribin Workers," 6; Elizabeth W. Mandeel, "The Bracero Program 1942-1964." American International Journal of Contemporary Research 4, no. 1 (January 2014): 170.
[17] Gilbert G. Gonzalez, *Guest Workers or Colonized Labor? Mexican Labor Migration to the United States*, (New York: Routledge, 2015), 73.
[18] Gonzalez, *Guest Workers or Colonized Labor*, 23.
[19] Gonzalez, *Guest Workers or Colonized Labor*, 23.
[20] Etan Newman, *No Way To Treat A Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers* (Washington, D.C.: Farmworker Justice), 12.
[21] Newman, *No Way To Treat A Guest*, 12.
[22] Gonzalez, *Guest Workers or Colonized Labor*, 42.
[23] Gonzalez, *Guest Workers or Colonized Labor*, 27.

only lasted from 1964 to 1973.[24] Like Braceros, French-Algerian workers were also recruited to work in France during World War I.[25] The recruitment of colonial workers was administered through the Service des Travailleurs Coloniaux (Colonial Worker Services), which was created under the aegis of the Ministry of War in 1916 and constituted one of the first official guest labor programs in Europe.[26] However, as with the case of the Mexican workers during the Great Depression, as soon as France began undergoing its economic depression in the 1930s, French-Algerian workers and many other foreigners were were dismissed; like the Mexican braceros, many of the Algeria workers were also repatriated back to their homeland at the end of WWI as result of economic uncertainty.[27] The management of colonial worker emigration from Algeria to France became increasingly strict and was carried out by specialized institutions such as the Service de L'Organisation des Travailleurs Coloniaux (SOTC).[28] It was not until after WWII that France began to recruit colonial workers once again as a result of their labor shortage.

IV. THE BRACERO PROGRAM

The Bracero Program was a bilateral agreement between Mexico and the U.S. that allowed for the organized labor recruitment of Mexican workers into the U.S.[29] The agreement was originally signed on April 4, 1942, but was officially endorsed by Congress and authorized as Public Law 45 on April 29, 2943.[30] The program was originally unveiled as a solution to the labor shortage that resulted from WWII.[31] However, the program continued past the end of the war and was renewed several times until 1964.[32] Its effects are seen to this day, as the U.S. still receives temporary guest workers from Mexico and other Latin American countries under the federally supervised H2-A visa program. This new guest worker visa program is less systematic than the Bracero Program, but the essence of worker exploitation is the same. The H2-A program brings approximately 43,000 workers into the U.S. annually.[33] However, unlike the Bracero Program, the H2-A visa program is merely overseen by the U.S. Department of Labor (DOL), and it is up to U.S. employers to recruit workers.[34]

The bracero agreement of 1942 was largely negotiated by the U.S. Department of State and jointly operated by the State Department, the Department of Labor, and the Immigration and Naturalization Services (INS) in the Department of Justice. However, the INS was the main agency in charge of this program because they managed entries and departures of individuals.[35] The bilateral agreement for this guest worker program was supposed to reflect fair working conditions for the Mexican bracero workers and ostensibly it did so. The contract asserted that braceros were to be

[24] Adler, *Migration and International Relations*, 12.
[25] Adler, *Migration and International Relations*, 4.
[26] Adler, *Migration and International Relations*, 3-4.
[27] Adler, *Migration and International Relations*, 4.
[28] Maussen, "Constructing Mosques," 109.
[29] Calavita, *Inside the State*, 2.
[30] *Washington, DC: Library of Congress, Public Laws-Ch.117-June 4, 1943, 126*.
[31] Calavita, *Inside the State*, 20.
[32] Calavita, *Inside the State*, 1-3.
[33] Gonzalez, *Guest Workers or Colonized Labor*, 48.
[34] U.S. Citizenship and Immigration Services. "H-2A Temporary Agricultural Workers." Last modified January 12, 2021. https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers.
[35] Calavita, *Inside the State*, 1.

paid fair wages, receive adequate housing accommodations, access to health care, and roundtrip transportation from the U.S. processing center at the border to their employers and vice versa.[36] Additionally, the contract stated that the braceros would work in the agricultural fields, and it was not until a year later that the contract was modified to include railroad work as well. Yet, 74 percent of the bracero work mainly consisted of agricultural work concentrated in cotton, sugar beets, fruits, and vegetables.[37]

V. INTERNAL RECRUITMENT AND QUOTAS

The most intricate part of this entire program was the recruitment system. The United States Employment Service was responsible for certifying labor shortages,[38] and when one was established, the U.S. forwarded a request of a specific number of workers to Mexico's Gobernacion, roughly the equivalent to the U.S. Department of the Interior, which then established a quota for particular states and informed the state's governors.[39] The governors of each state then assigned their own quotas to certain villages, and towns throughout different regions of the state.[40] The local authorities of the villages and towns served as the first phase of the selection process by granting *permisos*. The men who wanted to become braceros had to get a *permiso*, or a permit, that served as proof of a clean criminal record.[41] However, not all *permisos* were fairly distributed—corruption occurred frequently—with some workers being asked to pay a bribery fee for the *permisos*.[42] The men who received *permisos* were then responsible for their own transportation to the main recruitment center. Originally, the main recruitment center was located in Mexico City, with another subsequently built in Empalme.[43] As a result of having to pay for their own transportation, many braceros ironically ended up incurring debt in order to become braceros. Worse yet, not every candidate who went through the recruitment process was able to secure a spot as a bracero, so many had to go back home without a job and face their incurred debt.[44]

The processing centers in Mexico City and Empalme served as the main gatekeepers to the Bracero Program. It was in these processing centers that many bracero prospects were weeded out.[45] It was also at this phase of recruitment that the prospect braceros suffered the most. Not only did they have to wait weeks or months before being called into the processing center, but many men had to deal with hunger and sleep deprivation as a result of not having enough money to eat and pay for housing.[46] Only a few hundred prospect braceros were called in each week to undergo invasive and severe medical and health inspection.[47] Only those who lacked an education, and showed signs of

[36] "Bracero Agreement 1942." Latin American Studies , n.d. http://www.latinamericanstudies.org/immigration/bracero-agreement-1942.pdf.
[37] Calavita, *Inside the State*, 22.
[38] Calavita, *Inside the State*, 21.
[39] Gonzalez, *Guest Workers or Colonized Labor*, 59.
[40] Calavita, *Inside the State*, 59.
[41] Gonzalez, *Guest Workers or Colonized Labor*, 61.
[42] Gonzalez, *Guest Workers or Colonized Labor*, 62.
[43] Gonzalez, *Guest Workers or Colonized Labor*, 66.
[44] Gonzalez, *Guest Workers or Colonized Labor*, 77.
[45] Gonzalez, Guest Workers or Colonized Labor, 77.
[46] Gonzalez, Guest Workers or Colonized Labor, 61.
[47] Gonzalez, Guest Workers or Colonized Labor, 76.

being strong workers were selected. They were made to show their hands to the inspectors and were judged by the callousness on their hands, which was an indicator of manual labor experience.[48]

Those who did not meet the qualifications were not selected to proceed to the final phase of the selection process. In 1952, a total of 31,999 men were rejected at the processing centers in Mexico, compared to 21,000 in 1954 and 44,411 in 1955.[49] There are many accounts of men who would go days without eating and sleep on the floor outside of the center until their names were called. Some prospect braceros died from starvation while they waited or as a result of being stranded in these cities with no money after being rejected.[50] In two different cases, two prospective braceros were found dead from starvation in Empalme; in one case, one had eaten nothing but banana skins in order to try to survive.[51] In the other case, the man had eaten nothing but paper.[52] Those who were selected at Empalme would then be transferred to the border for another final screening.[53] By the time they got to the U.S. border center, their health had already deteriorated from everything they had to undergo to get there.

VI. U.S. PROCESSING CENTER

The Farm Security Administration (FSA), and later the War Food Administration conducted the recruitment and finalized contracts at the border centers. Upon arriving at the border center, the prospect braceros were immediately subjected to more examinations. They were ordered to strip naked and undergo pesticide fumigations in large empty chambers without masks.[54] After being fumigated, they were again closely examined by employers based on how strong and able-bodied they seemed for the type of work they were needed for.

This practice of worker examination has a dark history of usefulness in colonial system of indentured labor and slavery. One example is Britain's use of Indian indentured workers. Beginning in 1825, Britain began using indentured workers from India. Official British recruiters would set stations in Indian villages and inspect potential workers the same way as slaves and Bracerso; they also checked their muscles and inspected their hands for signs of callousness.[55] These practices were also used by France when recruiting Algerian workers.[56] Hopeful braceros who made it through all the additional health screenings were then photographed and offered a contract to work for a specific employer. They were given three days to make a decision, but the majority of them signed immediately without even reading the contract because many of them could not read.[57] After signing

---

[48] Gonzalez, Gilbert G., "Harvest of Loneliness," YouTube Video, 4:00-4:06, April 7, 2009, https://www.youtube.com/watch?v=l1QGw5Bs6V4&t=42s.
[49] Gonzalez, *Guest Workers or Colonized Labor*, 73.
[50] Gonzalez, *Guest Workers or Colonized Labor*, 67.
[51] Gonzalez, *Guest Workers or Colonized Labor*, 67.
[52] Jessica Ordaz, *The Shadow of El Centro: A Historyof Migrant Incarceration and Solidarity*(Chapel Hill: The University of Northern Carolina Press, 2021), 30.
[53] Gonzalez, *Guest Workers or Colonized Labor*, 73.
[54] Gonzalez, Guest Workers or Colonized Labor, 76.
[55] Sunanda Sen, "Indentured Labour from India in the Age of Empire," *Social Scientist* 44, no. 1/2, (January-February 2016): 53.
[56] Benguigui Yamina, "Mémoires D'Immigrés L'héritage Maghrébin," YouTube Video, 1:00-1:55, June 20, 2014, https://youtu.be/9zqWQpROlVQ.
[57] Gonzalez, *Guest Workers or Colonized Labor*, 76.

their contracts they were then transported to their place of work. It was not uncommon for some bracero prospects to be rejected and sent back to Mexico. Each year, one of every six men that made it to the border center was dismissed for a variety of reasons, usually as a result of deteriorated health conditions.[58] Those who were rejected were sent back with only enough bus fare to return to Empalme and many of them ended up stranded in Empalme because they had no means to return back home to their villages.[59]

VII. CONTRACTS PROVISIONS AND HOUSING, FOOD, AND WAGE VIOLATIONS

Braceros had the option of signing work contracts between two to six months. These contracts promised the Mexican workers access to adequate housing, medical, and sanitary services at no cost to them.[60] The contract also stated that braceros were not to be paid less than domestic workers doing similar work and in no case were to be paid less than thirty cents an hour. Additionally, at the insistence of official Mexican government negotiators, a subsistence wage of three dollars per day was to be paid to braceros who were unemployed for more than 25 percent of the contract period.[61] However, the reality was completely different; employers often ignored contract provisions because there was no real oversight.[62] Many braceros later recounted instances of unmet minimum wages, late payments, or poor housing conditions that failed to meet the minimum standards required by their contracts.[63] Braceros lived in large camps that often housed more than a thousand men at a time. The housing camps were usually located in the same terrain as the fields or the railroads that the braceros worked and they resembled army barracks.[64]

The great majority of workers who became braceros had no real grasp of what they were in for until they arrived at their sites of employment. Several braceros recalled their experience as braceros through the Bracero Archive Project. Manuel Mendez recalled his experience as follows:

> I was 14 years old when I came to work here as a bracero. They exploited us as they wished. You could say they robbed us of our dignity in that program, not just me but all who partook in it. We had no fixed hours. We had to be on call for as long as they needed us. They told us that the U.S. federal government would take 10% of our checks and give it back to us once we returned to Mexico but I never saw that money, and I don't know that anybody did. We were not allowed to leave the camp except on Sundays.[65]

---

[58] Najar, Alberto. "La Desconocida Historia De Los Braceros Mexicanos Que Murieron Por Esperar Un Empleo En Estados Unidos." BBC News Mundo. October 1, 2016. https://www.bbc.com/mundo/noticias-america-latina-37528106.
[59] Gonzalez, *Guest Workers or Colonized Labor*, 77.
[60] "Bracero Agreement 1942." Latin American Studies , n.d. http://www.latinamericanstudies.org/immigration/bracero-agreement-1942.pdf.
[61] Calavita, *Inside the State*, 20.
[62] Calavita, *Inside the State*, 25.
[63] Calavita, *Inside the State*, 25.
[64] Rigoberto Garcia Perez, "The Story of a Bracero," interview by David Bacon, *Transnational Working Communities*, Stories by David Bacon, December 2, 2001, http://dbacon.igc.org/TWC/b01_Bracero.htm.
[65] "Oral Histories," Center for History and New Media, n.d., http://braceroarchive.org/items/show/3298.

U.S. employers and officials knew that they could get away with providing dire living conditions. Many defenders of the program argued that because braceros continued coming to the U.S., the program's conditions could not possibly be as bad.[66] One Congressman went as far as to say that, "Many of these people who come up into our country to work during the summertime never had a roof over them until they came. They have lived outdoors. In other words, now they have a roof, regardless of space, they should be happy."[67] Such relativist defences were common among defenders of this program,[68] contributing to the persistence of these conditions.

VIII. SURVEILLANCE AND INTIMIDATION TACTICS

Braceros were legally allowed to file complaints detailing this exploitation to the Mexican Consuls, yet hardly any did.[69] Workers feared employer retaliation and deportation to Mexico if they complained about contract violations. This fear heightened when employers began to use the Cold War as an excuse to intimidate their workers from advocating for themselves. McCarthyism or paranoia about an internal communist threat—also referred to as the Red Scare—was used as a pretext to control braceros who tried to unionize or advocate for better treatment during this time.[70] In 1954, Commissioner of Immigration and Naturalization Services Joseph M. Swing introduced a system to track braceros' performances as a way to keep braceros from causing "trouble."[71] Through this system, employers rated braceros at the end of their contract through their I-100 cards, designating them with a "satisfactory" or "unsatisfactory" rating. After this system was implemented, those with unsatisfactory cards were not allowed back as braceros. Thus, cards were essentially implemented to keep the braceros as docile as possible.[72] In addition to the strict scrutiny that the workers underwent by their employers, many braceros also experienced harassment and discrmination by police and immigration officers, who often stopped workers on the streets when they attempted to go out on their days off.[73]

IX. HOW MEXICO ADVOCATED FOR ITS BRACEROS

The Mexican government made several attempts to protect its workers through contract negotiations, one of which was excluding Texas from recruiting braceros during the first few years of the Bracero Program. Mexican negotiators cited a history of discrimination and abuse of Mexican workers in the state and wanted to avoid further discrimination of these men.[74] It was not until 1947 when Braceros finally began going into Texas.[75] Public Law 45 expired in 1947 before the Mexican

---

[66] Gonzalez, G*uest Workers or Colonized Labor*, 100.
[67] Gonzalez, G*uest Workers or Colonized Labor*, 101.
[68] Gonzalez, G*uest Workers or Colonized Labor*, 100-103.
[69] Calavita, *Inside the State*, 45.
[70] Calavita, *Inside the State*, 86.
[71] Calavita, *Inside the State*, 94.
[72] Gonzalez, G*uest Workers or Colonized Labor*, 94-97.
[73] Gonzalez, G*uest Workers or Colonized Labor*, 95.
[74] Calavita, *Inside the State*, 20.
[75] Robert S. Robinson, "Creating Foreign Policy Locally: Migratory Labor and the Texas Border, 1943-1952," (PhD diss., Ohio State University, 2007).

and the U.S. government could come to a new Bracero agreement. As a result, the U.S. unilaterally switched from government-sponsored contracts to employer-sponsored contracts without any type of oversight or approval from Mexico.[76]

Mexican officials fought to return to government-to-government contracts and in the Winter of 1951, Mexican officials finally gave the U.S. an ultimatum: unless a bill was introduced in Congress to re-establish government sponsorship of the bracero system, Mexico would officially terminate the bilateral agreement.[77] The U.S. government agreed to the ultimatum, and on July 12, 1951, the U.S. Congress signed Public Law 78, which transferred the power of contracting workers back to the US government.[78] However, even with the transfer of power, the problem of contract violations continued. As a result of Mexico's weak negotiation position and the U.S. government's lack of concern for imported workers, Mexican braceros continued to suffer. The sending state is rarely in a strong position to negotiate and the receiving countries often take advantage of this and allow the exploitation of the guest workers.

X. FRANCO-ALGERIAN GUEST WORKER ACCORDS

France began recruiting organized colonial labor from the region that is now Algeria as early as the onset of WWI. But just like the braceros, many then French-Algerians were repatriated back home after the war.[79] It was not until the end of WWII that France again began recruiting French-Algerian colonial workers in great numbers. As a result of the influx of colonial guest workers after WWII, in 1956 France created the L'Office Algérien de la Main d'Oeuvre (The Algerian Man Power Office), which was in charge of overseeing and studying French-Algerian immigration.[80] After Algeria's independence, France replaced OFAMO with the L'Office Nationale Algérien de la Main d'Oeuvre (The Algerian Board of Manpower) in 1962.[81] The ONAMO was the main office in charge of screening potential Algerian guest workers and granting guest worker permits.[82] Emigration of French-Algerian workers to France increased during the final years of Algeria's struggle for independence. However, it was not until after Algeria gained its independence that France and Algeria officially created and signed a formal guest worker accord in 1964.

XI. GOVERNMENTAL AGENCIES INVOLVED, QUOTES, AND RECRUITMENT

In 1962, Algeria and France signed the Evian Accords, which officially granted Algeria its independence.[83] The accords laid the framework for the post-colonial relationship between France and Algeria. Among several things, they provided a legal basis for the continuation of Algerian

---

[76] Calavita, *Inside the State*, 27-28.
[77] Calavita, *Inside the State*, 46.
[78] Agricultural Act, 1949, amendment, Pub. L. No. 78, 63 Stat. 1051 (1951).
[79] Adler, Migration and International Relations, 4.
[80] Adler, Migration and International Relations, 11.
[81] Rafik Bouklia-Hassane, "Migration pour le travail décent, la croissance économique et le développement: le cas de l´Algérie," *Cahier des Migrations Internationales*, no. 104 (April 12, 2010): 41, https://www.ilo.org/wcmsp5/ groups/public/---ed_protect/--- protrav/---migrant/doc uments/ publication/wcms_179662.pdf.
[82] Phillip Chiviges Naylor, *France and Algeria: A History of Decolonization and Transformation*(Gainesville: University of Florida Press, 2000), 84.
[83] Naylor, *France and Algeria*, 18.

employment in France.[84] One specific provision in the Evian Accords directly refers to Algerian workers in France, stating: "Algerian national residents in France and notably workers will have the same rights as French nationals with the exception of political rights."[85] In April 1964, two years after the signing of the Evian Accords, France and Algeria signed the Franco-Algerian Guest Worker Accord.[86] Under this agreement Algerians could be recruited to work in France only to the extent that France needed them. From this point on, Algerians were no longer coming in as French colonial workers but as Algerian nationals.

Like the Bracero Program, the Franco-Algerian guest worker program also consisted of a quota system that was determined based on the labor shortage of the receiving country. [87] The French Ministry of Labor would certify a labor shortage and determine a quarterly quota that was then submitted to the Algerian government.[88] During the first few years, roughly 12,000 Algerian workers were admitted to France annually.[89] However, unlike the Bracero Program, which was only overseen by U.S. bureaucracies, the Franco-Algerian guest worker accord was overseen by an official mixed Franco-Algerian commission.[90] The accord was renewed in 1968, at which time the quota was increased to 35,000 for a three year period as long as the status of Algerians remained "privileged" in contrast to the restrictions placed on other foreign workers in France.[91]

ONAMO was in charge of granting identity cards known as ONAMO cards that served as the equivalence of a Mexican *permiso*.[92] Just as with the Mexican *permisos*, these cards were given to those who provided proof of a clean criminal record, and good standing health conditions.[93] Prospective guest workers had to obtain full clearance before receiving an ONAMO card.[94] At the recruiting center, prospective workers underwent a medical examination by French missionary doctors. If they passed the health examination they were then given a medical certificate. Like the braceros, former Algerian guest workers also recall being examined based on their potential to serve as hard workers. Many recall being asked to show their hands for signs of work toil.[95]

In addition to passing the criminal and medical background checks, the workers also had to provide proof of "caution money," amounting to 150 francs, as a guarantee of their ability to pay for their eventual return to Algeria.[96] Unlike the braceros, Algerian workers were not provided transportation back to Algeria under the accord. However, it is important to note that although braceros were guaranteed transportation back to a recruiting site in Mexico, they were not guaranteed transportation back to their villages. Once Algerian workers obtained an ONAMO permit, they were authorized to enter France as temporary workers. However, unlike the Bracero

[84] Miller, "Reluctant Partnership," 221.
[85] Adler, *Migration and International Relations*, 20.
[86] Adler, *Migration and International Relations*, 22.
[87] Adler, *Migration and International Relations*, 24.
[88] Adler, *Migration and International Relations*, 24.
[89] Miller, "Reluctant Partnership," 223.
[90] Adler, *Migration and International Relations*, 24.
[91] Miller, "Reluctant Partnership," 24.
[92] Adler, *Migration and International Relations*, 26
[93] Adler, *Migration and International Relations*, 6.
[94] Adler, *Migration and International Relations*, 27.
[95] Benguigui Yamina, "Mémoires D'Immigrés L'héritage Maghrébin."
[96] Adler, *Migration and International Relations*, 6.

Program, the Algerian guest workers were not directly assigned to an employer. It was up to them to find a job once they got to France.[97] They were given a nine month period to find employment and if they were successful, they were then granted a renewable five-year residence permit upon being employed.[98] The certificate of residence was issued to control Algerian immigrants, while still adhering to the Evian principle of free circulation between Algeria and France. If workers could not find a job after nine months, they were deported back to Algeria.[99] The majority of the Algerian guest workers worked in industrial jobs which no French proletariat was willing to take as a result of low pay and deteriorating working conditions.[100] Like the braceros, Algerian workers were also exploited for their labor and were used for jobs that no native wanted.

XII. CONTRACTS PROVISIONS, FOOD, AND HOUSING ACCOMODATIONS

By the time Algerian guest workers arrived in France after 1962, there were already many institutions in place to accommodate North African Maghreb workers.[101] Algerian guest workers were accommodated in communal housing called *foyers*.[102] These foyers were established before the Franco-Algerian guest worker program. Many were created in the early 1950s when France began recruiting Maghreb colonial workers. In 1956, the French government passed a law that created the National Company for the Construction of Housing for French-Algerian Workers (SONACOTRAL). This national housing company was in charge of financing, constructing, and managing housing for Algerians who came to work in France. The foyers were thus designed as communal housing.[103]

Residents shared rooms and had access to a number of common spaces such as kitchens, dining rooms, and sanitary facilities.[104] These foyers had strict housing rules and were severely supervised. The residents were subjected to a strict discipline, based on the regulations set forth by the foyers. Some of these regulations stipulated that residents had to pass a medical exam every six months, they could not receive female visitors, and were not allowed to hold political meetings or distribute pamphlets.[105] Like Algerian workers, braceros were also not allowed to bring women to their camps. In 1976, Ben Jelloun, a French psychologist, published a novel based on his research, *La Réclusion solitaire*[106] (*Solitaire*), about the loneliness and sexual misery that Maghreb guest workers underwent in France. In the novel he argues that France turned its back on the personality, dignity, and sexuality of its workers, while exploiting their work.[107] The same argument can be made for bracero workers in the U.S. However, it must be noted that the overall conditions of the foyers in

---

[97] Adler, *Migration and International Relations*, 27.
[98] Adler, *Migration and International Relations*, 27.
[99] Naylor, *France and Algeria*, 84.
[100] Bennoune, "Maghribin Workers," 4.
[101] Barbara Daly Metcalf, ed., *Making Muslim Space in North America and Europe (*Berkeley, CA: University of California Press, 1996), 75.
[102] Maussen, "Constructing Mosques," 111.
[103] Metcalf, *Making Muslim Space,* 75.
[104] Maussen, "Constructing Mosques," 113.
[105] Maussen, "Constructing Mosques," 113.
[106] Tahar Ben Jelloun, *La réclusion solitaire* (Paris: Denoël, 1976).
[107] Nicola Mai and Russell King, "Love, Sexuality and Migration: Mapping the Issue(s)," *Mobilities* 4, no. 3 (December 2009): 296, https://doi.org/10.1080/17450100903195318.

which the Algerian guest workers lived were in slightly better conditions than the makeshift camps in which the braceros lived. Nonetheless, they shared similar experiences in regard to strict supervision, communal living, and the isolation from their female companions.

XIII. MISTREATMENT AND HARASSMENT OF WORKERS ABROAD

Algerian workers, much like the Braceros, experienced racism, discrmination, and harassment. Although Algerian workers were not subject to severe surveillance during the length of the Franco-Algerian Guest worker Accord, it is important to note that many Algerians workers did indeed face strict surveillance in France during the Algerian War of Independence.[108] In the same way that braceros were strategically kept from unionizing during the Cold War for fear of being labeled a communist, French-Algerian workers during the Algerian War were also intimidated into not unionizing or holding political meetings for fear of being labeled as an extremist sympathizers of the Front de Libération Nationale (FLN), the main Algerian nationalist political group.[109] In both cases, the consequence of being labeled a communist or a sympathizer of the FLN led to the worker's inability to continue working in the receiving country.

From 1962 to 1973, Algerian workers nonetheless continued to experience some level of disproportionate surveillance by French police and their workers of the foyers. Additionally, many Algerian workers experienced severe harassment and racism at the start of the oil crisis in 1971.[110] In 1971, the Algerian nationalization of French oil companies sparked an immediate wave of racism against the Arba community in France.[111] Even the French government retaliated against this action by decreasing the quota allotted of Algerian workers from 35,000 to 25,000.

As a result, the late 1970s witnessed a long series of bombings of Algerian institutions, as well as assaults and murders against the Arab community in France, such as the Marseille incident in 1973. On December 14, 1973 there was a bomb explosion at the Algerian consulate in Marseilles which resulted in the death of four Algerians and seriously injured many other foreign Maghreb workers. This specific incident led to the eventual termination of the guest worker accord.[112]

XIV. HOW ALGERIA ADVOCATED FOR ITS WORKERS

Like the Mexican government, the Algerian government made attempts to protect its workers who went to work abroad in France. When racial tension began to grow in France as a result of the nationalization of Algerian oil, Algeria asked France to protect its Algerian workers. However, the concerns of the Algerian government were not met.[113] In fact, conditions worsened for Algerians and other Maghreb immigrants in France after August 1973 when a disturbed Algerian stabbed a bus driver to death in Marseilles.[114] The other passengers on board severely attacked the

---

[108] Mai and King, "Love, Sexuality and Migration," 120.
[109] Mai and King, "Love, Sexuality and Migration," 112.
[110] Mai and King, "Love, Sexuality and Migration," 114.
[111] Miller, "Reluctant Partnership," 225.
[112] Miller, "Reluctant Partnership," 226.
[113] Miller, "Reluctant Partnership," 226.
[114] Edward R. F. Sheehan,"The Immigrés Do What the French Won't," *New York Times*, December 9, 1973, https://www.nytimes.com/1973/12/09/archives/europes-hired-poor-the-immigres-do-what-the-french-wont.html.

Algerian man, and for several days racial and civil unrest erupted in Marseilles. A week later, eleven Maghreb immigrants were lynched in the Marseilles region.[115] This led the Algerian government to unilaterally stop the organized immigration to France in September of that year—they referenced the recent attacks against Algerians and other Maghrebs and stated that Algerians were no longer safe in France.[116] The Algerian government accused the French authorities of failing to protect Algerian immigrant workers against racist attacks.[117] However, even after the end of the guest worker accord, many Algerians stayed and others continued to immigrate to France through family reunification laws.

XV. CONTEMPORARY ALTERNATIVES TO GUEST WORKER PROGRAMS

Since the terminations of the Bracero Guest Worker Program in 1964 and the Franco-Algerian Guest Worker Accord in 1973, the programs have not again been renewed.
France ended all forms of temporary guest worker programs in 1973 without ever replacing such type of organized labor again. Although both the U.S. and France stopped receiving guest workers in the mid-twentieth century, immigrants from the sending countries nonetheless continued immigrating to these countries.[118] In both cases, the result of ending the guest worker programs without putting in place an alternative state-run guest worker program led to an increase in unauthorized immigration.[119] Although temporary guest worker programs do provide an alternative to workers who might otherwise cross unauthorized, these past guest worker programs should not be used as an aspiring model for future state-sponsored programs. As we have seen, both the Bracero and Franco-Algerian Guest Worker Program resulted in the mistreatment and exploitation of its guest workers. Instead, state officials should use the lessons of these historic guest worker programs to avoid committing the same mistakes in the future.

Mexican President Andrés Manuel López Obrador expressed his desire to propose a new Bracero-style guest worker program to President Joe Biden's administration in February of 2020. Obrador has suggested that he wants annual guest worker permits for about 600,000 to 800,00 Mexican and Central American immigrants to legally work in the U.S.[120] The aim behind this proposal is to help deflect central and Mexican immigration to the U.S.[121] As benevolent as this new guest worker program sounds, it is critical that Mexico and the U.S. carefully review the previous Bracero Program to avoid any future gross violation of the rights of the workers.

Currently, in the case of Mexico and the U.S., the closest alternative to a guest worker program is the issuance of H-2A visas. In 1986, the Immigration Reform and Control Act (IRCA)

---

[115] Sheehan, "The Immigrés."
[116] Maussen, "Constructing Mosques," 114.
[117] Adler, *Migration and International Relations*, 18.
[118] Helen Chapan Metz, ed., "Migration," Country Studies. Accessed April 14, 2021. http://countrystudies.us/algeria/49.htm.
[119] Alex Nowrasteh, "Enforcement Didn't End Unlawful Immigration in 1950s, More Visas Did," *Cato Institute*, January 21, 2021, https://www.cato.org/blog/enforcement-didnt-end-unlawful-immigration-1950s-more-visas-did.
[120] Joreglina Do Rosario, "Mexico's AMLO Expected to Propose Guest Worker Program to Biden," *Bloomberg*, February 27, 2021, https://www.bloomberg.com/ news/articles/2021-02-28/mexico-s-amlo-expected-toproposeguest-worker-programtobiden.
[121] Zolan Kanno-Youngs and Michael D. Shear, "Biden Seeks Help on Border From Mexican President," *New York Times*, last modified March 4, 2021, https://www.nytimes.com/ 2021/03/01/us/politics/bidenamlomexico.html.

implemented the H-2A visa for temporary agricultural workers.[122] The H-2A visa program allows qualified U.S. employers and U.S. agents to bring foreign nationals to the U.S to fill temporary agricultural jobs.[123] The main difference between the H-2A visa system and the

Bracero Program is that the Bracero Program was a bilateral agreement exclusively between Mexico and the U.S, and the H-2A visa program is not. H-2A visas are open to not just Mexican nationals but to about 80 nationalities.[124] However, as of 2018, 93 percent of H-2A workers were Mexican nationals, 2 percent were from Jamaica and the rest were from Canada, Guatemala, and South Africa.[125] In addition, the process to recruit an H-2A visa worker is much less streamlined than the process that was in place during the Bracero Program. Unlike the Bracero Program, the H-2A program is an employer-sponsored temporary worker program, meaning that farmers initiate the process; it is up to them to find potential H-2A workers to sponsor.[126] As a result of being employer-sponsored, there is less oversight with this visa program; workers have continually reported violations of their rights under this program. In 2019, the U.S. Department of Labor saw a 150 percent increase in H-2 A employer violations since 2014; the agency found about 12,000 violations, with nearly 5,000 workers cheated out of their wages.[127] Hence, the main common attribute between the H-2 A visa program and the Bracero Program is the repeated pattern of mistreatment and contract violations.[128]

Unlike the U.S., France does not have a visa program available for its former Algerian guest workers. As a result, after the suspension of the Franco-Algerian guest worker accord, Algerians continued to "illegally" migrate to France.[129] However, as unauthorized immigration began to increase, France began creating stricter immigration laws. In July 1976, France passed a law that created an administrative penalty for employers that hire immigrants without a legal status, requiring them to pay high fines, and face potential imprisonment.[130] This was followed by a series of stricter immigration policies, known as the Pasqua laws, which were imposed in 1986 and 1993 to tighten the qualifications for visa recipients and overall reduce immigration from non-European countries. These laws disproportionately affected Algerian immigrants who had previously enjoyed relatively free movement between France and Algeria.

---

[122] Önel, Gülcan and Derek Farnsworth, "Guest Workers: Past, Present and the Future," *Citrus Industry Magazine*, September 21, 2016. https://citrusindustry.net/2016/10/04/guest-workers-past-present-future/.
[123] "H-2A Temporary Agricultural Workers," U.S. Citizenship and Immigration Services, last modified January 12, 2021, https:// www.uscis.gov/working-in-theunitedstates/temporary-workers/ h-2a-temp orary-agriculturalworkers.
[124] "DHS Announces Countries Eligible for H-2A and H-2B Visa Programs." United States Citizenship and Immigration Services. January 12, 2021.
https://www.uscis.gov/news/alerts/dhs-announces-countries-eligible-for-h-2a-and-h-2b-visa-programs.
[125] David J. Bier, "H-2A Visas for Agriculture: The Complex Process for Farmers to Hire Agricultural Guest Workers," *Cato Institute*, March 10, 2020, https:// www.cato.org/publications/ immigration-research-policybrief/ h-2a-visas-a griculturecomplexprocess-farmershire# h-2a-program-rules.
[126] Bier, "H-2A Visas."
[127] Suzy Khimm and Daniella Silva, "H-2A Visa Program for Farmworkers Is Surging under Trump - and so Are Labor Violations," *NBC News*, July 29, 2020,
https://www.nbcnews.com/specials/h2a-visa-program-forfarmworkerssurging-un dertrumpand-labor-violations/.
[128] Calavita, *Inside the State*, 25.
[129] Metz, "Migration."
[130] Mark J. Miller and Malcolm R. Lovellon, "Employer Sanctions in Europe," Center for Immigration Studies, April 1, 1987, https://cis.org/Report/Employer- Sanctions-Europe.

The number of visas issued to Algerians gradually began decreasing in the late 1980s. Visas issued to Algerians by France dropped significantly from 900,000 visas in 1989 to 47,000 visas in 1996.[131] Immigration from Algeria to France briefly increased in the 1990s as a result of Algeria's civil war; many Algerians were able to receive asylum in France during this time.[132] However, the process for asylum is very different from the visa process. After Algeria's civil war, most Algerians had to once again apply through the traditional visa process, which to this day is very restricted. The majority of visas granted to Algerians in France are either student visas or family reunification visas.[133] However, over the years, the number of French visas granted to Algerians has continued to gradually decrease. Between 2017 and 2018, the number of visas granted to Algerians significantly decreased from 413,976 to 297,104—a decrease of twenty-eight percent.[134]

There are two factors that might explain why France has not considered another Franco-Algerian guest worker accord since the end of the program in 1973. Since the end of the Franco-Algeran Guest Worker Accord, the European Union has gradually increased from six member states to twenty-eight member states, with many Eastern European countries joining after the fall of the Berlin Wall in 1989.[135] The addition of new member states has resulted in a new diverse labor pool. One can argue that Eastern Europeans have essentially replaced inexpensive labor from Algeria in France.[136]

Over the years, many Western European companies have subcontracted workers from low wage-paying European Union states and posted them in more labor costly countries like France, Britain, Austria, and the Netherlands.[137] In 2017, French Prime Minister Emmanuel Macron began speaking out on this issue more publicly. During an interview in June Macron said, "Do you think I can explain to the French that businesses are closing in France to move to Poland while construction firms in France are recruiting Polish workers because they are cheaper? This system is not working."[138] Macron's comment reflects the second explanation to why France has not renewed a new Algerian guest worker-like program since 1973—the French labor market simply cannot afford

---

[131] Michael Collyer, "Moving Targets: Algerian State Responses to the Challenge of International Migration," *Revue Tiers Monde* 210, no. 2 (2012): 111, https://doi.org/10.3917/ rtm.210.0107.

[132] Julia R. Enyart, "Sovereignty at Stake: The Rise of Algerians in France and Transnationalism in the French Republic" (BA thesis, University of Pennsylvania, 2010).

[133] Farida Souiah, "My Visa Application Was Denied, I Decided to Go Anyway: Interpreting, Experiencing, and Contesting Visa Policies and the (Im)mobility Regime in Algeria," *Migration and Society: Advances in Research* 2, no. 1 (2019): 78. https://doi.org/10.3167/arms.2019.020107

[134] "L'essentiel De L'immigration Chiffres Clefs." La Direction générale - Immigration - Ministère de l'Intérieur, January 15, 2019,
https://www.immigration.interieur.gouv.fr/content/download/114413/915650/file/EM-2019-27-La-delivrance-de-visas-aux-etrangers-au-15-janvier-2019.pdf.

[135] "The History of the European Union," European Union, accessed April 15, 2021,
https://europa.eu/europeanunion/ about-eu/history_en.

[136] Liz Alderman, "France's Macron Looks to Confront Eastern Europe Over Low-Cost Workers," *New York Times*, August 23, 2017,
https://www.nytimes.com/2017/08/23/business/economy/france-emmanuel-macron-eastern-europe.html.

[137] Alderman, "France's Macron."

[138] Alderman, "France's Macron."

to recruit more competing labor. Unemployment in France has gradually risen from an all time low 3 percent in 1975 to 8 percent in 2020.[139]

In spite of all of these differences between contemporary French and U.S. immigration labor laws, both France and the U.S. nonetheless share a common guest worker history that, to this day, is reflected in the makeup of their immigrant communities. Mexicans still make up the largest immigrant community in the U.S.[140] and Algerians continue to make up the largest immigrant group in France.[141]

XVI. CONCLUSION

The parallels between the Bracero Program of 1942 to 1964 and the Franco-Algerian guest worker program of 1964 to 1973 are striking. Both the U.S. and France organized imported labor from Mexico and Algeria when they most needed it and halted it when they no longer did. Both programs used similar recruitment processes and quota systems to recruit workers. Additionally, the experiences of these workers in their respective receiving countries are comparable. Although the experiences of the guest worker programs were confined by contract provisions, there was hardly any real oversight of these programs. As a result, Mexican and Algerian guest workers universally suffered a great deal of hardship and harassment in the countries where they worked.

It is no coincidence that these receiving countries have also previously contributed to the destabilization of their sending countries' economies. The U.S. and France are examples of dominant countries from the global-north who used their power to exploit the workers of countries in the global-south. In both cases the receiving countries caused and perpetuated many of the horrific conditions that led these guest workers to leave their home countries in the first place. Guest worker programs like these often have unintended consequences such as the inevitable permanent settlement of guest workers in the receiving countries. Therefore, many of the immigration issues experienced by the U.S. and France are a direct result of their own doing.

Hence, future guest worker programs should consider these past programs and acknowledge the great hardships of former guest workers as a result of ineffective oversight and unequal bargaining power.

---

[139] "France Unemployment Rate," CEIC, accessed April 15, 2021, https://www.ceicdata.com/en/indicator/france/unemployment-rate#:~:text=France%20Unemployment%20Rate%20is%20updated,of%203.00%20%25%20in%20Mar%201975.

[140] Abby Budiman, "Key findings about U.S. immigrants," *Pew Research Center*, August 20, 2020, https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/.

[141] "L'essentiel Sur... Les Immigrés Et Les Étrangers." Insee institut national de la statistique et des études économiques, https://www.insee.fr/fr/statistiques/3633212.

WORKS CITED

Adler, Stephen. *Migration and International Relations: The Case of France and Algeria* Cambridge, MA: Migration and Development Study Group, Center for International Studies, Massachusetts Institute of Technology, 1977.

Alderman, Liz. "France's Macron Looks to Confront Eastern Europe Over Low-Cost Workers." *New York Times*, August 23, 2017. https://www.nytimes.com/2017/08/23/business/economy/france-emmanuel-macron-eastern-europe.html.

Bennoune, Mahfoud. "Maghribin Workers in France." *MERIP Reports*, no. 34 (January 1975): 1-12, 30. https://doi.org/10.2307/3011470.

Bier, David J. "H-2A Visas for Agriculture: The Complex Process for Farmers to Hire Agricultural Guest Workers." *Cato Institute*. March 10, 2020. https://www.cato.org/publications/immigration-research-policy-brief/h-2a-visas-agriculture-complex-process-farmers-hire#h-2a-program-rules.

"Bracero Agreement 1942." Latin American Studies , n.d. http://www.latinamericanstudies.org/immigration/bracero-agreement-1942.pdf.

Bouklia-Hassane, Rafik. "Migration pour le travail décent, la croissance économique et le développement: le cas de l´Algérie." *Cahier des migrations internationales*, no. 104 (April 12, 2010): 1-60. https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_179662.pdf.

Budiman, Abby. "Key findings about U.S. immigrants." *Pew Research Center*, August 20, 2020. https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/.

Calavita, Kitty. *Inside the State: The Bracero Program, Immigration, and the I.N.S*. New Orleans: Quid Pro Books, July 12, 2010.

Castles, Stephen. "The Guest-Worker in Western Europe - An Obituary." *The International Migration Review* 20, no. 4 (Winter 1986): 761-78. https://doi.org/10.2307/2545735.

Metz, Helen Chapan, ed. "Migration." Country Studies. Accessed April 14, 2021. http://countrystudies.us/algeria/49.html.

Collyer, Michael. "Moving targets: Algerian state responses to the challenge of international migration." *Revue Tiers Monde* 210, no. 2 (2012): 111. https://doi.org/10.3917/rtm.210.0107.

"DHS Announces Countries Eligible for H-2A and H-2B Visa Programs." United States Citizenship and Immigration Services. January 12, 2021. https://www.uscis.gov/news/alerts/dhs-announces-countries-eligible-for-h-2a-and-h-2b-visa-programs.

Do Rosario, Jorgelina. "Mexico's AMLO Expected to Propose Guest Worker Program to Biden." *Bloomberg*, February 27, 2021. https://www.bloomberg.com/news/articles/2021-02-28/mexico-s-amlo-expected-to-propose-guest-worker-program-to-biden.

Drew, Allison. "The land and its conquest." In *We are no longer in France: Communists in colonial Algeria*. Manchester, England: Manchester University Press, November 1, 2014. https://doi.org/10.7765/9781847799210.00010.

Enyart, Julia R. "Sovereignty at Stake: The Rise of Algerians in France and Transnationalism in the French Republic." BA thesis, University of Pennsylvania, 2010.

"Franco-Moroccan MP Urges Govt to Facilitate Visa Applications Procedures for Africans." *Schengen Visa Info*, January 20, 2021. https://www.schengenvisainfo.com/news/franco-moroccan-mp-urges-govt-to-facilitate-visa-applications-procedures-for-africans/.

CEIC. "France Unemployment Rate." Accessed April 14, 2021. https://www.ceicdata.com/en/indicator/france/unemployment-rate#:~:text=France%20Unemployment%20Rate%20is%20updated,of%203.00%20%25%20in%20M%20ar%2015.

Gonzalez, Gilbert G. *Guest Workers or Colonized Labor?: Mexican Labor Migration to the United States*. New York: Routledge, 2015.

Gonzalez, Gilbert G. "Harvest of Loneliness." YouTube video. 5:45. April 7, 2009. https://www.youtube.com/watch?v=l1QGw5Bs6V4&t=42s.

Gonzalez, Gilbert G., and Raul E. Fernandez. "Empire and the Origins of Twentieth-Century Migration from Mexico to the United States." In *A Century of Chicano History: Empire, Nations, and Migrations*. New York: Routledge, 2003.

Guiler, Thomas A., and Lee M. Penyak. "Braceros and Bureaucracy: Mexican Guest Workers on the Delaware, Lackawanna and Western Railroad During the 1940s." *Pennsylvania History* 76, no. 4 (2009): 422-45.

U.S. Citizenship and Immigration Services. "H-2A Temporary Agricultural Workers." Last modified January 12, 2021. https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers.

History.com. "Treaty of Guadalupe Hidalgo." Last modified September 28, 2020. https://www.history.com/topics/mexican-american-war/treaty-of-guadalupe-hidalgo.

Hunt, Jennifer. "The Impact of the 1962 Repatriates from Algeria on the French Labor Market." *Industrial & Labor Relations Review* 45, no. 3 (April 1992): 556–572. https://doi.org/10.2307/2524278.

Jelloun, Tahar Ben. *La réclusion solitaire.* Paris, France: Denoël, 1976.

Kanno-Youngs, Zolan, and Michael D. Shear. "Biden Seeks Help on Border From Mexican President." *New York Times,* last modified March 4, 2021. https://www.nytimes.com/2021/03/01/us/politics/biden-amlo-mexico.html.

Khimm, Suzy, and Daniella Silva. "H-2A Visa Program for Farmworkers Is Surging under Trump—and so Are Labor Violations." *NBC News*. July 29, 2020. https://www.nbcnews.com/specials/h2a-visa-program-for-farmworkers-surging-under-trump-and-labor-violations/.

Kirszbaum, Thomas, Yaël Brinbaum, and Patrick Simon. "The children of immigrants in France: The emergence of a second generation with the collaboration of Esin Gezer Special Series on Children in Immigrant Families in Affluent Societies." *UNICEF Innocenti Research Centre.* October 2009. https://halshs.archives-ouvertes.fr/halshs-01098473/document.

Kuempel, George, and Howard Swindle. "Ex-Chief Recalls Bracero Slavery." *The Dallas Morning News*, 30 April 1980.

Kuempel, George, and Howard Swindle. "Ex-chief recalls bracero 'slavery.' " *The Dallas Morning News*, April 30, 1980.

"L'essentiel De L'immigration Chiffres Clefs." La Direction générale - Immigration Ministère de l'Intérieur. January 15, 2019. https://www.immigration.interieur.gouv.fr/content/download/114413/915650/file/EM-2019-27-La-delivrance-de-visas-aux-etrangers-au-15-janvier-2019.pdf.

"L'essentiel sur... Les immigrés et les étrangers ." Insee institut national de la statistique et des études économiques. https://www.insee.fr/fr/statistiques/3633212.

Mai, Nicola, and Russell King. "Love, Sexuality and Migration: Mapping the Issue(s)." *Mobilities* 4, no. 3 (December 2009): 295–307. https://doi.org/10.1080/17450100903195318.

Mandeel, Elizabeth W. "The Bracero Program 1942-1964." *American International Journal of Contemporary Research* 4, no. 1 (January 2014): 171-183. https://www.aijcrnet.com/journals/Vol_4_No_1_January_2014/17.pdf.

Martinez, Daniel. "The Impact of the Bracero Program on a Southern California Mexican-American Community." M.A. thesis., The Claremont Graduate School, 1958.

Maussen, Marcel. "Constructing Mosques: The Governance of Islam in France and the Netherlands." Ph. D diss., Amsterdam Institute for Social Science Research, January 2009.

Metcalf, Barbara Daly, ed. *Making Muslim Space in North America and Europe*. Berkeley, CA: University of California Press, 1996.

Miller, Mark J., and Malcolm R. Lovellon. "Employer Sanctions in Europe." Center for Immigration Studies. April 1, 1987. https://cis.org/Report/Employer-Sanctions-Europe.

Miller, Mark J. "Reluctant Partnership: Foreign Workers in Franco-Algerian Relations, 1962-1979." *Journal of International Affairs*33, no. 2 (Fall/Winter 1979): 219-37. http://www.jstor.org/stable/24356282.

Nadel, Leonard. "An official checks a bracero's hands for calluses during processing at the Monterrey Processing Center, Mexico." Bracero History Archive. http://braceroarchive.org/items/show/1593

Najar, Alberto. "La Desconocida Historia De Los Braceros Mexicanos Que Murieron Por Esperar Un Empleo En Estados Unidos." BBC News Mundo. 1 October, 2016. https://www.bbc.com/mundo/noticias-america-latina-37528106.

Naylor, Phillip Chiviges. *France and Algeria: A History of Decolonization and Transformation.*Gainesville: University of Florida Press, 2000.

Newman, Etan. *No Way to Treat A Guest: Why the H-2 Agricultural Visa Program Fails U.S. and Foreign Workers*. Washington, D.C.: Farmworker Justice.

Nowrasteh, Alex. "Enforcement Didn't End Unlawful Immigration in 1950s, More Visas Did." *Cato Institute*. November 11, 2015. https://www.cato.org/blog/enforcement-didnt-end-unlawful-immigration-1950s-more-visas-did.

Önel, Gülcan, and Derek Farnsworth. "Guest Workers: Past, Present and the Future." *Citrus Industry Magazine*, September 21, 2016. https://citrusindustry.net/2016/10/04/guest-workers-past-present-future/.

"Oral Histories," Center for History and New Media, n.d., http://braceroarchive.org/items/show/3298.

Ordaz, Jessica. *The Shadow of El Centro: A Historyof Migrant Incarceration and Solidarity.*Chapel Hill: University of North Carolina Press, 2021.

Perez, Rigoberto Garcia. "The Story of a Bracero." Interview by David Bacon. *Transnational Working Communities*, Stories by David Bacon, December 2, 2001. http://dbacon.igc.org/TWC/b01_Bracero.htm.

Porter, Eduardo, and Karl Russell. "Migrants Are on the Rise Around the World, and Myths About Them Are Shaping Attitudes." *New York Times*. June 20, 2018. https://www.nytimes.com/interactive/2018/06/20/business/economy/immigration economic-impact.html.

"McCarthyism and the Red Scare." Miller Center. University of Virginia. Accessed April 15, 2021. https://millercenter.org/the-presidency/educational-resources/age-of-eisenhower/mcarthyism-red-scare.

Purnell, Jennie. "With All Due Respect: Popular Resistance to the Privatization of Communal Lands in Nineteenth-Century Michoacan." *Latin American Research Review* 34, no. 1 (1999): 85–121. https://www.jstor.org/stable/2503927.

Robinson, Robert S. "Creating Foreign Policy Locally: Migratory Labor and the Texas Border, 1943-1952." PhD diss., Ohio State University, 2007.

Sartre, Jean-Paul. *Colonialism and Neocolonialism*. Oxfordshire, England: Routledge, 2006.

Sheehan, Edward R. F. "The Immigrés Do What the French Won't." *New York Times*. December 9, 1973. https://www.nytimes.com/1973/12/09/archives/europes-hired-poor-the-immigresdo-what-the-french-wont.html.

Smith, Jeffrey. "The Impact of Transnational Migration and Remittances on Quality-of-Life in Chalchihuites, Zacatecas." *Journal of Latino/LatinAmerican Studies* 3, no. 1 (2008): 104–21. https://doi.org/10.18085/llas.3.1.g94641632317511r.

Souiah, Farida. "My Visa Application Was Denied, I Decided to Go Anyway: Interpreting, Experiencing, and Contesting Visa Policies and the (Im)mobility Regime in Algeria." *Migration and Society* 2, no. 1 (2019): 68-80. https://doi.org/10.3167/arms.2019.020107.

Sunanda, Sen. "Indentured Labour from India in the Age of Empire." *Social Scientist* 44, no. 1/2 (January-February 2016): 35-74. https://www.jstor.org/stable/24890231.

"Teaching." Bracero History Archive. Accessed April 15, 2021. http://braceroarchive.org/items/show/1593.

"The History of the European Union." European Union. Accessed April 15, 2021. https://europa.eu/european-union/about-eu/history_en.

Yamina, Benguigui. "Mémoires D'Immigrés L'héritage Maghrébin." YouTube Video, 5:33. June 20, 2014. https://youtu.be/9zqWQpROlVQ.

THE IMPLICATIONS OF BOSTOCK V. CLAYTON COUNTY ON RELIGIOUS GROUPS

Rianna Mukherjee
University of Wisconsin–Madison
Class of 2023

This paper examines the implications of *Bostock v. Clayton County*, a 2020 Supreme Court case that clarified the word "sex" to explicitly include both sexual orientation and gender identity. This distinction affects the interpretation of many anti-discrimination laws, notably the Civil Rights Act of 1964, to which some religious groups have exemptions. However, many religious institutions, colleges and universities, and organizations condemn homosexuality and sex reassignment surgery. In understanding the need to uphold both religious liberties and LGBTQ+ liberties, this piece aims to uncover how *Bostock v. Clayton County* affects these religious groups in different ways and how they are treated under Supreme Court precedent.

Acknowledgments

Special thank you to Dr. Robert John Burton for mentoring me through the planning and writing of this piece. Your passion for legal theory has fostered my interest in research.

I. INTRODUCTION

Supreme Court Justices often clash over constitutional interpretation of the law when there are religious freedoms involved. These clashes occur because Supreme Court precedent regarding this issue is rooted in "the wall of separation between church and state."[1] While the Free Exercise Clause of the First Amendment guarantees protections for people's right to practice religion without government infringement, controversy still exists when religious liberties conflict with LGBTQ+ liberties. In situations where someone has a "sincere and meaningful belief" that directly contradicts another person's civil rights, conflict arises.[2] For example, many Christian denominations believe that homosexuality and sex reassignment surgeries are sinful. However, both of these actions may be fundamental to a life of fulfillment and truth for LGBTQ+ individuals. The question of balance between religious liberties and LGBTQ+ liberties was addressed in the 2020 case *Bostock v. Clayton County*. In a 6-3 decision in favor of the plaintiffs, the Court ruled that discrimination based in part on "sex," as defined in the Civil Rights Act of 1964, includes sexual orientation and gender identity. Justice Samuel Alito, as well as several amicus briefs from religious groups, such as the Council of Christian Colleges & Universities, outlines the potential employment consequences for Christian institutions, universities, and non-profit organizations. In this analysis, it is important to consider how to protect religious liberties while allowing LGBTQ+ individuals to enjoy their rights to public accommodations and everyday services. In accordance with the ruling that "homosexuality and transgender status are inextricably bound up with sex" in *Bostock v. Clayton*, this analysis explores the ruling's implications on religious institutions, universities, and non-profit organizations and the degree to which exceptions that have an impact on LGBTQ+ people's liberties should be made.[3] I argue that religious organizations and businesses should only receive the same protections as religious institutions if they are entities owned by religious institutions. Otherwise, they must comply with anti-discrimination laws in serving LGBTQ+ individuals, despite the businesses and non-profit organizations' objections due to religious beliefs. Religious colleges and universities should only be exempt from anti-discrimination laws to the extent that some employees instruct, preach or represent a religion.

I. BACKGROUND

The Free Exercise Clause of the First Amendment was written to protect Americans' right to exercise religion without government involvement; the Court has narrowed what constitutes a violation of the Free Exercise Clause over time. In the 1963 case *Sherbert v. Verner*, the Court established that standards that restrict the Free Exercise Clause must be narrowly tailored as much as possible to achieve the compelling state interest. The Court overturned aspects of *Sherbert* when it

[1] James Hutson, " 'A Wall of Separation' FBI Helps Restore Jefferson's Obliterated Draft," Library of Congress, 1998, www.loc.gov/loc/lcib/9806/danbury.html.
[2] United States v. Seeger, 380 U.S. 163 (1965).
[3] Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

ruled in *Employment Division v. Smith* that any generally applicable law "is not subject to strict scrutiny, even if it burdens a religious practice."[4]

Additionally, the Court may treat strongly held religious beliefs as a person's way of life. For example, the 1972 ruling in *Wisconsin v. Yoder* provided exceptions to the Amish to take their kids out of school early, because throughout history the Amish have established "the interrelationship of belief with their mode of life."[5] As a result of the Court's historical treatment of religious beliefs, the balance between religious liberties and LGBTQ+ liberties poses difficult questions for the supremacy of the Free Exercise Clause over other laws.

The Religious Freedom Restoration Act (RFRA) was enacted by Congress in 1993 in response to the decision in *Employment Division v. Smith* to protect religious liberties under the Free Exercise clause. Scholars point to an unprecedented ruling in *Smith*, where two members of the Native American Church lost their jobs and were denied unemployment benefits for the religious use of illegal peyote. Critics dismissed the ruling because "the Court had effectively overturned a century of case law, including decisions in *Wisconsin v. Yoder* and *Sherbert v. Verner*, which held that courts should use strict scrutiny to examine laws that restrict the religious acts of individuals."[6] In *Boerne v. Flores* (1997), the Court struck down provisions that make RFRA applicable to the states. In response to the decision in *Boerne*, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to protect federal land use regulation and institutionalized peoples.[7] The Court ruled in *Cutter v. Wilkinson* (2005) on whether RLUIPA violated the Free Exercise clause in burdening the practice of minority religions in prison. Justice Ginsburg, for the Court's unanimous decision, argued that RLUIPA is "a permissible legislative accommodation of religion that is not barred by the Establishment Clause . . . She emphasized, however, that safety in prisons could serve as a compelling governmental interest that might outweigh some claims of religious exercise."[8] Consequently, RFRA or RLUIPA could be challenged by the Court, where an assertion is made that protecting LGBTQ+ rights is a compelling governmental interest.

Title VII of the Civil Rights Act of 1964 is a federal anti-discrimination law that pertains to the ruling in *Bostock*. The Act prohibits employment discrimination because of a person's "race, color, religion, sex, or national origin."[9] Employers of a "religious corporation, association, educational institution, or society" are exempt from compliance with this subchapter regarding employment of "individuals of a particular religion to perform work connected with the carrying on by such

---

[4] Ronald Steiner, "Compelling State Interest," The First Amendment Encyclopedia, accessed March 22, 2021, https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest.
[5] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[6] David Schultz, "Religious Freedom Restoration Act of 1993 (1993)," The First Amendment Encyclopedia, accessed March 22, 2021, https://www.mtsu.edu/first-amendment/article/1092/religious-freedom-restoration-act-of-1993.
[7] John R. Vile, "Cutter v. Wilkinson (2005)," The First Amendment Encyclopedia, accessed March 22, 2021, https://www.mtsu.edu/first-amendment/article/744/cutter-v-wilkinson.
[8] Vile, "Cutter v. Wilkinson (2005)."
[9] "Title VII of the Civil Rights Act of 1964," U.S. Equal Employment Opportunity Commission, accessed March 22, 2021, https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964.

corporation, association, educational institution, or society of its activities."[10] In short, employers may discriminate against a potential employee's "race, color, religion, sex, or national origin" if the job that the employee would do is connected to the "carrying on" of the religious group.[11] This exemption was written into law so that anti-discrimination laws that govern employment cannot conflict with religious groups' beliefs, preventing them from inherently "carrying on" their religion. I argue that there are different degrees to which these religious bodies are exempt, namely religious institutions, religious organizations, religious businesses, and religious colleges and universities.

II. ANALYSIS OF *BOSTOCK V. CLAYTON COUNTY*

Bostock v. Clayton County accounts for several scenarios where individuals were fired by both private and public employers on the basis of their sexual orientation or transgender status. First, Gerald Bostock worked for Clayton County, Georgia, and was fired shortly after joining a gay recreational softball league. Second, Altitude Express, a skydiving facility, fired Donald Zarda after Zarda shared he was gay. Third, R. G. & G. R. Harris Funeral Homes fired Aimee Stephens, who was hired when she presented as male but later proclaimed that she intended to "live and work full-time as a woman."[12] All of the plaintiffs charged that discrimination based on sexual orientation or transgender identity was a direct violation of sex-based discrimination under the Civil Rights Act of 1964. Justice Neil Gorsuch authored the opinion of the Court, in which he describes a nuanced analysis of discrimination "because of sex."[13] He concludes that "for an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex."[14] He makes his case by analyzing the ordinary meaning of Title VII. Justice Gorsuch acknowledges the conflict of clashing religious and LGBTQ+ liberties, but states that protections exist for religious groups, including the Civil Rights Act's exemption for religious groups and RFRA. He goes as far as to argue that "because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."[15]

Separately, Justice Samuel Alito wrote in his dissenting opinion that this ruling was an overreach of the Court. He argues that in doing so the Court has created legislation, which is the job of Congress. Nevertheless, Justice Alito lists out what he believes to be some of the potential effects of this ruling, including the employment of people whose "acts" do not align with a religious organization's beliefs of condemning homosexuality.[16] For example, a Church cannot be legally expected to hire a gay person whose lifestyle is viewed as sinful by the Church. This form of

[10] U.S. Equal Employment Opportunity Commission, "Title VII of the Civil Rights Act of 1964."
[11] U.S. Equal Employment Opportunity Commission, "Title VII of the Civil Rights Act of 1964."
[12] *Bostock*, 140 S. Ct. 1731.
[13] *Bostock*, 140 S. Ct. 1731.
[14] *Bostock*, 140 S. Ct. 1731.
[15] *Bostock*, 140 S. Ct. 1731.
[16] *Bostock*, 140 S. Ct. 1731.

discrimination is protected by the Civil Rights Act of 1964's exemption for religious groups. The Court has not yet established clear guidelines for other religious groups that are less inherently tied to a religious institution, like a religious charity, a gap which this text aims to address. Finally, Justice Kavanaugh dissents because he believes the Court has amended Title VII. He states that sexual orientation discrimination differs from sex discrimination through language and historical application of the Civil Rights Act of 1964.[17]

III. DISTINCTIONS BETWEEN RELIGIOUS GROUPS AND ANALYSIS

Government exemptions that exist to protect religious liberties may vary by groups based on the services they provide. A group of religious institutions and organizations wrote an amicus brief regarding *Bostock v. Clayton County*. For this analysis, it is important to separate implications for religious institutions and organizations. This paper defines religious institutions as bodies of worship, while religious organizations may provide public accommodations to people outside of their faith. Often, however, religious institutions run religious organizations. This analysis separates religious organizations owned by religious institutions from religious organizations owned by religious individuals.

Religious institutions often raise the concern that *Bostock v. Clayton County* may interfere with employment.[18] In the past, the Court has not outlined clear guidelines but has held that such decisions are mostly left to the discretion of the house of worship on a case-by-case basis. A U.S. District Court decision from 1971, *McClure v. Salvation Army*, sets the stage with three foundational questions. The Salvation Army is traditionally known as a charitable organization; the District Court establishes that "regardless of its lack of traditional houses of worship . . . The Salvation Army has been referred to as a body which practices religion."[19] Thus, the decision outlines the minimum criterion for being a religious institution as the practice of religion, regardless of supplemental acts of service. The District Court also begins to define the "ministerial exemption," which addresses questions on employment discrimination within religious institutions. The District Court has said that "Title VII does not apply to the relationship between ministers and the religious organizations that employ them, even where the discrimination is alleged on the basis of race or sex."[20] Lastly, the Court defines "religious activity" as an activity not of "purely religious function," but one which may carry out activities of a religious institution.[21] Two examples of "religious activity" are the relationships between a nun teaching at a parochial school or an unpaid volunteer that performs administrative

---

[17] *Bostock*, 140 S. Ct. 1731.

[18] "Brief for Amici Curiae Council for Christian Colleges & Universities, the Catholic University of America, Brigham Young University, and 39 Additional Religious Colleges and Universities in Support of the Employers," The Supreme Court of the United States, accessed March 22, 2021, https://www.supremecourt.gov/DocketPDF/17/17-1618/113464/20190823152930018_17-1618%2017-1623%2018-107bsacCouncilForChristianCollegesUniversities.pdf.

[19] McClure v. Salvation Army, 323 F. Supp. 1100 (N.D., Ga., 1971).

[20] Petruska v. Gannon University, 462 F.3d 294 (3d Cir. 2006).

[21] *McClure*, 323 F. Supp. 1100.

work for a church.[22] In *Petruska v. Gannon University* from 2006, the Supreme Court ruled that it would adopt the "ministerial exemption" precedent of lower courts.[23] In *Herx v. Diocese of Fort Wayne-South Bend* (2014), the United States Court of Appeals upheld that the "ministerial exemption" does not apply to the plaintiff as "a lay language-arts teacher with no role in religious education at St. Vincent."[24]

Still, the Supreme Court did not rule on employment regarding religious institutions until *Smith* and *Hosanna-Tabor*. In *Hosanna-Tabor*, a school teacher at the Hosanna-Tabor Evangelical Lutheran Church and School was dismissed for taking disability leave. She consequently charged the school with violating the Americans with Disabilities Act (ADA), a federal anti-discrimination law. The Court upheld discrimination against the plaintiff for disability status, because "*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself."[25] The Court's ruling in *Hosanna-Tabor* contradicted its ruling in *Smith* to distinguish a church's internal affairs from an individual's religiously motivated choices. Thus, the Court has defined that the "ministerial exemption" applies to situations that involve the internal affairs of a religious institution under First Amendment protections. Despite some clarity in defining the "ministerial exemption," gray areas exist when employment and public accommodations involve religious organizations. Reasonably, houses of worship may only want to hire people who adhere to their faith and share the same commitment to their religious mission, especially regarding positions in charge of spiritual practices. The problem arises when houses of worship reject viable job applicants to do a job that has a traditionally secular purpose. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos* (1986), the Court "affirmed an exemption from anti-discrimination provisions of the Civil Rights Act of 1964 for the nonprofit activities of religious organizations, not just their religious ones."[26] This reflects the consistent "hands-off" approach that the Court has taken in matters concerning the internal affairs of religious institutions. Some nonprofit and for-profit organizations are run by a church, and others are run by a religious individual, where their organization has no official affiliation with the church.

Religious institutions have rules about their involvement in business so as not to jeopardize their tax-exempt status. The IRS prohibits the personal benefit of church insiders from a Church's private business.[27] However, churches are automatically considered non-profit organizations. This

---

[22] *McClure*, 323 F. Supp. 1100.
[23] Petruska v. Gannon University, 462 F.3d 294 (3d Cir. 2006).
[24] Herx v. Diocese of Fort Wayne-South Bend, Inc., 772 F.3d 1085 (7th Cir. 2014)
[25] Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 565 U.S. 171 (2012).
[26] Dennis Miles, "Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos (1987)," The First Amendment Encyclopedia, accessed March 22, 2021, https://www.mtsu.edu/first-amendment/article/1092/religious-freedom-restoration-act-of-1993.
[27] "Tax Guide for Churches & Religious Organizations," Internal Revenue Service, accessed March 22, 2021, https://www.irs.gov/pub/irs-pdf/p1828.pdf

means that they are subject to the same rules as other non-profit organizations and could lose their tax-exempt status if they are not careful. Yet, greater protections exist for churches that start businesses and non-profit organizations, because they are entities of the church. Therefore, these businesses and non-profit organizations enjoy the same exceptions from anti-discrimination laws as the church itself.

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), a baker refused to make a wedding cake for a gay couple because of his religious beliefs. This case addresses whether owners of public accommodations are required to provide services with objection due to religious beliefs. While the Court ruled in favor of the baker, the decision was due to the Colorado Civil Rights Commission's conduct which violated the Free Exercise Clause.[28] Looking at the language to understand that the Court has an interest in protecting the civil liberties of LGBTQ+ people is important. In the opinion of the Court, Justice Kennedy writes: "When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion."[29] This objection by the clergy is logical as the Court protects religious institutions' rights to discriminate, which includes members of the clergy. On the other hand, Kennedy writes that "it is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."[30] Kennedy attempts to outline the need for a scale of exemptions for religious groups, as described in this analysis, to protect LGBTQ+ rights. Thus, "states are empowered to pass anti-discrimination laws that apply to public accommodations . . . and those laws apply to all businesses even if those businesses have religious objections to complying with those laws."[31] Importantly though, the Civil Rights Act is a federal anti-discrimination law that requires compliance of both public and private entities, regardless of state anti-discrimination laws.[32] This means that when a religious institution starts a business or non-profit organization, anti-discrimination laws do not apply. However, when a business or non-profit organization that is not an entity of a religious institution objects to providing services, anti-discrimination laws do apply. With this distinction in mind, the ruling in *Bostock* would require businesses and non-profit organizations started by religious individuals to service LGBTQ+ people, regardless of objections on religious grounds.

---

[28] Masterpiece Cakeshop v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018).
[29] *Masterpiece*, 138 S. Ct. 1719.
[30] *Masterpiece*, 138 S. Ct. 1719.
[31] Joseph William Singer, "Religious exemption to public accommodation laws rejected by Supreme Court while those laws cannot be administered in a way that demonstrates hostility to religion or that unfairly discriminates among religious beliefs," Harvard University, last modified June 9, 2018, https://scholar.harvard.edu/jsinger/blog/religious-exemption-public-accommodation-laws-rejected-supreme-court-while-those-laws.
[32] "Title VII of the Civil Rights Act", Justia, last modified April, 2018, https://www.justia.com/employment/employment-discrimination/title-vii/.

Furthermore, in *Burwell v. Hobby Lobby* (2014), the Court ruled in a 5-4 decision that closely-held corporations, or ones with a limited number of stakeholders, are not required to provide contraception as mandated by the Affordable Care Act because it violates the RFRA.[33] This case elevates an important distinction between the RFRA's relationship to contraception access and discrimination against LGBTQ+ individuals. Contraception access is important to many individuals' lives, but is not intrinsic to a person's identity and the civil liberties to which they are entitled. Anti-discrimination practices may burden businesses owned by religious individuals, but they are essential to protecting LGBTQ+ individuals' rights to access all services in the marketplace, including those of closely-held corporations. There is a compelling governmental interest to protect LGBTQ+ people in the face of discrimination even if it burdens the exercise of religion. A scale of protections is needed in which religious institutions have the greatest protections compared to other religious groups to uphold Supreme Court precedent. Yet, when it comes to public accommodations and the private sector, LGBTQ+ individuals are entitled to the same goods and services as anyone else, regardless of conflicting religious beliefs.

Equally important, a group of over 40 religious colleges and universities submitted an amicus brief outlining their concerns with *Bostock v. Clayton County,* many of which pertain to this analysis. One concern is the likely implications for student housing standards, in which religious universities and colleges do not want to provide housing to same-sex couples or provide "women's housing" for a transgender woman.[34] Another concern is the involvement of affiliated hospitals and clinics that may abstain from performing sex reassignment surgeries. It is likely that the RFRA—passed by Congress to protect providers at religious hospitals who do not wish to provide abortive services—would protect affiliated hospitals and clinics from performing sex reassignment surgeries in the same way. Furthermore, the issue of a university's tax-exempt status is a justified concern due to the history of the qualifications and vaguely defined reasons for being revoked. In *Bob Jones University v. United States* (1983), the Court ruled in favor of the State for revoking a tax-exempt status upon Bob Jones University in violating updated policy on racial discrimination, because the State had a compelling interest to adhere to a "fundamental national public policy." The IRS's policy followed a district court decision, where tax-exempt statuses would not be provided to universities that practice racial discrimination.[35] Thus, it is clear that religious colleges and universities, which do not adapt to or comply with widely accepted norms because of their beliefs, risk losing their tax-exempt status. These schools also state that the ruling in *Bostock* could be used as a justification to disregard their religious beliefs, including their missions. However, the Higher Education Act provides protections under a mandate for religious missions. The representatives of these schools contend that discrimination against LGBTQ+ individuals is warranted on the basis of religious beliefs. They hold that schools affiliated with the Council for Christian Colleges & Universities (CCCU) are important to

[33] Burwell v. Hobby Lobby, 573 U.C. 682 (2014).

[34] The Supreme Court of the United States, "Council for Christian Colleges & Universities."

[35] Bob Jones University v. United States, 461 U.S. 574 (1983).

the community, because they provide educational opportunities to people in our society and add to the diversity of American higher education.[36] The difficulty arises when religious colleges and universities educate students who are LGBTQ+ individuals but maintain that their actions in alignment with their LGBTQ+ identity are sinful. Thus, the biggest overall concern is the idea of separating action from belief, which may be fundamental to a devout individual's beliefs concerning homosexuality. Yet, the very nature of this idea conflicts with an LGBTQ+ person's ability to live a fulfilling life as their true self. Furthermore, it is important to consider the varying levels of constitutional scrutiny regarding religious colleges and universities as well as religious institutions.

Given precedent and existing protections for religious institutions, these institutions are exempt from anti-discrimination laws, including the Civil Rights Act of 1964. Religious organizations and businesses should only receive the same protections as religious institutions if they are entities owned by religious institutions. If religious organizations and businesses are owned by religious individuals, they must comply with anti-discrimination laws in serving LGBTQ+ individuals despite objections on the ground of religious beliefs. Therefore, the expansion of sex-based discrimination to include sexual orientation and gender identity in *Bostock v. Clayton County* prohibits businesses and non-profit organizations from refusing to hire LGBTQ+ people, despite religious objections. Nevertheless, religious colleges and universities continue to pose a difficult dilemma because they are arguably in between a religious institution and a non-profit organization that provides public accommodations. Thus, the costs of whether religious colleges and universities should be included in the Civil Rights Act's religious exemption must be weighed separately.

It is important to consider how the "ministerial exception" as established in *Hosanna* is applied to employees of religious universities. Most recently, the Court narrowed the application of the "ministerial exemption" in *Our Lady of Guadalupe School v. Morrissey-Berru* (2020). The ruling explains four relevant circumstances that led to the ruling in *Hosanna*, but none are necessarily essential. First, Perich, the dismissed teacher in *Hosanna*, was given the title of Minister and had special religious duties, unlike other "lay" teachers. Second, her position was offered to her after she completed in-depth religious training with the school. Third, Perich considered herself a minister of the Church and received tax benefits for it. Fourth, Perich's job expectations included "conveying the Church's message and carrying out its mission."[37] Do these criteria apply to instructors at religious colleges and universities? Not necessarily. They apply to employees of religious colleges and universities that instruct, preach, or represent the religion. For example, a university chaplain preaches to students, but a physics professor likely does not. Therefore, the "ministerial exemption" does not apply to *all* employees of religious colleges and universities. Post-*Bostock*, this means that a tax-exempt status may be revoked for discriminating against an employee's sexual orientation or gender identity unless the "ministerial exemption" applies.

---

[36] The Supreme Court of the United States, "Council for Christian Colleges & Universities."
[37] Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

Other consequences for religious colleges and universities include the implications of Title IX, which "generally prohibits a recipient institution from excluding, separating, denying benefits to, or otherwise treating students differently on the basis of sex in its educational programs or activities."[38] As a result of *Bostock v. Clayton County*, sex-based discrimination is considered to include sexual orientation and gender identity.[39] Religious colleges and universities may still apply for a Title IX exemption by submitting a written request to the U.S. Department of Education's Office of Civil Rights. Religious colleges and universities are not required to submit a request and can proceed with condemning homosexuality or denying a transgender person's housing request. However, this decision does not guarantee legal protections if the school is sued for a Title IX violation.[40] If the school does not address the Title IX violation, it could risk losing federal funding.

IV. CONCLUSION

Past court cases and federal anti-discrimination laws have ensured some protections for religious groups. Religious institutions or houses of worship enjoy the greatest protections, as the Court has consistently ruled that it cannot make decisions on employment issues about the internal affairs of a church. Meanwhile, religious colleges and universities are protected if they qualify for Title XI exemptions. These schools may also discriminate employee positions that fall under the "ministerial exemption." This exemption is not clearly defined, but is broadly understood as an employee who instructs, preaches, or represents a religion. Finally, religious businesses and non-profit organizations can discriminate in employment if they are owned by a religious institution. Alternatively, businesses or non-profit organizations that are owned by religious individuals must comply with federal and state anti-discrimination laws regardless of any religious objections. This neutral application of the law at hand has created a scale of protections for both religious groups and LGBTQ+ individuals. Both groups would likely be unsatisfied with this scale of protections because they would favor total protections for their own groups. Yet, it is essential to apply the law using precedent and maintain existing constitutional exemptions for religious groups in discrimination practices, despite the ruling in *Bostock*. It is not surprising that the Court has expanded anti-discrimination protections for LGBTQ+ individuals, as scholars have predicted this moment for decades. Thus, it is also time that the complexity of these issues is resolved for both religious bodies and LGBTQ+ individuals to enjoy their respective constitutional rights.

---

[38] "Exemptions from Title XI," U.S. Department of Education, last modified March 8, 2021, https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html.
[39] *Bostock*, 140 S. Ct. 1731.
[40] U.S. Department of Education, "Exemptions."

Works Cited

"Exemptions from Title XI." U.S. Department of Education. Jan 15, 2020. www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html.

Hutson, James. " 'A Wall of Separation' FBI Helps Restore Jefferson's Obliterated Draft." Library of Congress. Accessed March 22, 2021. www.loc.gov/loc/lcib/9806/danbury.html.

Miles, Dennis. "Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos (1987)." The First Amendment Encyclopedia. 2009. https://www.mtsu.edu/first-amendment/article/38/corporation-of-the-presiding-bishop-of-the-church-of-jesus-christ-of-latter-day-saints-v-amos.

Schultz, David. "Religious Freedom Restoration Act of 1993." The First Amendment Encyclopedia. 2017. https://www.mtsu.edu/first-amendment/article/1092/religious-freedom-restoration-act-of 1993.

Singer, Joseph William. "Religious Exemption to Public Accommodation Laws Rejected by Supreme Court While Those Laws Cannot Be Administered in a Way That Demonstrates Hostility to Religion or That Unfairly Discriminates among Religious Beliefs." Harvard University. June 9, 2018. https://scholar.harvard.edu/jsinger/blog/religious-exemption-public-accommodation-laws-rejected-supreme-court-while-those-laws.

Steiner, Ronald. "Compelling State Interest." The First Amendment Encyclopedia. 2009. https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest.

"Tax Guide for Churches and Religious Organizations." Internal Revenue Service. Accessed March 22, 2021. https://www.irs.gov/pub/irs-pdf/p1828.pdf.

The Supreme Court of the United States. "Brief amicuscuriae of Christian Colleges & Universities, The Catholic University of America, Brigham Young University, and 39 Additional Religious Colleges and Universities." Accessed March 22, 2021. https://www.supremecourt.gov/DocketPDF/17/17-1618/113464/20190823152930018_17 -1618%2017-1623%2018-107bsacCouncilForChristianCollegesUniversities.pdf.

The Supreme Court of the United States. "Brief amicus curiae of National Association of Evangelicals; Church of God in Christ Inc.; American Islamic Congress; The Church of Jesus Christ of Latter-Day Saints; General Conference of Seventh-Day Adventists; Agudath Israel of America; Lutheran Church-Missouri Synod; Christian Legal Society; Jewish Coalition for Religious Liberty; Orthodox Church in America; and The Christian and Missionary Alliance." Accessed March 22, 2021. https://www.supremecourt.gov/DocketPDF/17/17-1618/113408/20190823135252781_Bostock%20Amicus%20Brief%20Final%20Version%20CORRECTED.pdf.

"Title VII of the Civil Rights Act of 1964." U.S.Equal Employment Opportunity Commission. Accessed March 22, 2021. www.eeoc.gov/statutes/title-vii-civil-rights-act-1964.

"Title VII of the Civil Rights Act." Justia, April, 2018, www.justia.com/employment/employment-discrimination/title-vii/.

Vile, John. "Cutter v. Wilkinson (2005)." The First Amendment Encyclopedia. 2009. https://mtsu.edu/first-amendment/article/744/cutter-v-wilkinson.

THE PARADOXICAL ROLE AND STATUS OF NORTH KOREAN WOMEN

Seungmin (Helen) Lee
Columbia University
Class of 2021

North Korean women are frequently subject to injustice and abuse, but there is a deeper paradox to their status and role in North Korea, China, and South Korea. North Korean women are discriminated against and mistreated, and yet are empowered with economic and political powers. They are the homemakers and yet the breadwinners. They are the economic backbone of the North Korean regime and yet the challengers of authoritarianism. They are dependent marriage partners and yet independent political participants. This phenomenon seems to apply to both North Korean women and female refugees. The juxtaposition of mistreatment and emancipation shows that while there has been social change, more work is necessary. In examining this phenomenon, this report will first look at the ideological status of North Korean women, then examine the four juxtapositions listed above, and finally recommend policy initiatives.

Acknowledgments

A special thank you to Professor Stephen Noerper for his teaching and guidance, particularly for his openness to questions regarding North and South Korea. His course "Korean Politics" fostered and encouraged my research, writing, and publication.

I. INTRODUCTION

Almost 30 percent of women worldwide are victims of physical and/or sexual abuse, making domestic violence a prominent global issue.[1] The situation can be dire for women residing in North Korea due to the country's deeply and historically entrenched patriarchal beliefs and worse for women in post-socialist societies. Studies have shown that post-socialist societies such as Hungary and Poland have a general trend of women having "more rights, less power"–while the general population escapes poverty in a transition to democracy, women's quality of life and economic position have decreased because women bear "a disproportionate burden of the [post-communist] economic transition."[2] As North Korea is a post-socialist society, the country is a perfect mixture for an environment unjust towards women. Statistics seem to support this conclusion as well: North Korean female refugees are frequently subjected to domestic violence victimization, 80 to 90 percent of them are kidnapped for forced marriages, prostitution, and sexual slavery, and approximately 70 percent of women in North Korea are routinely abused by their husbands.[3]

However, North Korean women occupy a paradoxical position: North Korea's cultural, ideological, and political environment discriminates against women, while also economically and politically empowering them. They simultaneously embody the traditional homemaker role and act as the economic providers of their households. They are the economic base of the regime but also the challengers of *juche* ideology. The mistreatment yet simultaneous empowerment of women shows that there has been social change from complete misogyny and sexism, but it is insufficient. In examining this phenomenon, this paper will first analyze the ideological status of women in North Korea, then examine the juxtapositions listed above, and finally review and recommend policy initiatives.

II. BACKGROUND: NORTH KOREAN IDEOLOGY AND STATE

Heavily influenced by Marxist-Leninist philosophy, the national ideology *juche* rules North Korea.[4] Under *juche,* women are supposedly equal to men and self-reliant as they have been "liberated from heavy household chores."[5] Article 62 of the 1972 North Korean Constitution states that "women are accorded an equal social status and rights with men . . . The State shall provide all conditions for women to play a full role in society." Such conditions include maternity leave, reduced working hours for mothers, and maternity hospitals. Furthermore, social status seems to transfer by lineage even to females.[6] This tradition places some women at higher ranks or social status than their husbands, as depicted in the story of Il-cheol and Yeonhee from "Record of a Defection" in Bandi's *The Accusation: Forbidden Stories from Inside North Korea,* an anonymously authored book smuggled out

[1] Mee Young Um, Hee Jin Kim, and Lawrence A. Palinkas, "Correlates of Domestic Violence Victimization Among North Korean Refugee Women in South Korea," *Journal of Interpersonal Violence*, 33, no. 13 (2018): 2038. https://doi.org/10.1177/0886260515622297.
[2] Andrei Lankov and Kim SeokHyang, "Useless Men, Entrepreneurial Women, and North Korea's Post-Socialism: Transformation of Gender Roles Since the Early 1990s," *Asian Journal of Women's Studies*20, no. 2 (2014): 68–69.
[3] Um, Kim, and Palinkas, "Correlates of Domestic Violence," 2038-9.
[4] Kyungja Jung and Bronwen Dalton, "Rhetoric Versus Reality for the Women of North Korea: Mothers of the Revolution," *Asian Survey* 46, no. 5 (2006): 746. https://doi.org/10.1525/as.2006.46.5.741.
[5] Jung and Dalton, "Rhetoric Versus Reality," 747.
[6] Jung and Dalton, "Rhetoric Versus Reality," 747.

of North Korea. Because Il-cheol's family had a history of possibly being "antirevolutionary," his wife Yeonhee, who is from a party loyalist family, is of higher status.[7] This story also implies that women have the power to marry whomever they wish: Yeonhee chose to marry someone of lower status, considered to be a "hostile element."[8]

Kwan-li-so and *Kyo-hwa-so*, which are political penal labor colonies and long-term prison labor facilities, now also imprison female defectors, subjecting women to similar punishments as men. In 2008, *Kyo-hwa-so* no. 12 expanded to include a female section after China sent back a drastically increased number of *"*refouled*"*–forcibly repatriated–female refugees. In *Kyo-hwa-so*, women carry out forced labor by cutting trees and logs, participating in agricultural production, performing animal husbandry, cooking, and producing wigs and eyelashes.[9] Ideologically, North Korean women are equal to men as they are both theoretically liberated and self-reliant, and it appears that women exercise the same political freedoms and experience the same political punishments.

III. DISCRIMINATION AND OPPRESSION

The appearance of equality arises from surface-level observations. Closer inspection shows that women are discriminated against and abused in North Korea. North Korea violates multiple articles of the U.N. Convention on the Elimination of Discrimination Against Women (CEDAW), to which it acceded in 2001. The U.N. General Assembly adopted the CEDAW in 1979 and delineated "what constitutes discrimination against women and sets up an agenda for national action to end such discrimination."[10] Article 1 of CEDAW claims that the discrimination against women includes inequality on the basis of sex. Women should have "equal access to, and equal opportunities in, political and public life . . . as well as education, health and employment."[11] CEDAW also "affirms the reproductive rights of women" and fights against the exploitation and trafficking of women."[12] Because North Korea signed onto the CEDAW, the country is required to implement policies:

> (1) incorporating the principle of equality of men and women in their legal system, abolishing all discriminatory laws and adopting appropriate ones prohibiting discrimination, (2) establishing tribunals and other public institutions to ensure the effective protection of women against discrimination, and (3) ensuring elimination of all acts of discrimination against women by persons, organizations or enterprises.[13]

---

[7] Bandi, *The Accusation: Forbidden Stories from Inside North Korea*, trans. Deborah Smith (New York: Grove Press, 2016), 27.
[8] Bandi, *The Accusation: Forbidden Stories from Inside North Korea*, 27.
[9] David R. Hawk, "VI. The Expansion of Kyo-Hwa-So No. 12 Jongo-Ri: Wrongful Imprisonment and the Oppression of North Korean Women," in *The Hidden Gulag IV: Gender Repression & Prisoner Disappearances* (Washington D.C.: U.S. Committee for Human Rights in North Korea, 2015), 11-17.
[10] Paolo Cammarota et al,, *Legal Strategies for Protecting Human Rights in North Korea* (Skadden, Arps, Slate, Meagher & Flom LLP and U.S. Committee for Human Rights in North Korea, 2007), 69-70.
[11] Cammarota et al,, *Legal Strategies for Protecting Human Rights in North Korea*, 69-70.
[12] Paolo Cammarota et al,, *Legal Strategies for Protecting Human Rights in North Korea* (Skadden, Arps, Slate, Meagher & Flom LLP and U.S. Committee for Human Rights in North Korea, 2007), 69-70.
[13] Cammarota, *Legal Strategies*, 69.

Despite having accepted the articles of CEDAW, women held only 17.6 percent of the seats in the national government in 2019;[14] the succession of the North Korean leadership has also been patriarchal, passing down from father to son, since the end of the Korean War. Refouled female refugees are subject to forced abortion in detention centers, and prison guards and political figures regularly sexually abuse female prisoners. Unlike male prisoners, female prisoners often lack access to basic needs such as showers, demonstrating the extent of discrimination against women by North Korean legal and political systems.

Traditional gender roles are ingrained in North Korean society, and wives are perceived as subordinates to their husbands, leading women to "view domestic violence as normal and acceptable to marital relationships and that it is a wife's responsibility to maintain harmony in the family."[15] Not only are they subject to domestic violence, they are also sexually exploited by government officials in order to "maintain the nation's regime": pleasing political leaders and being punished through sexual means such as rape.[16] The idea that women need to sacrifice and obey men or other figures of authority is established on a family and institutional level as political leaders publicly express the position of women as subordinates.

Not only are North Korean women abused in their own country, they are abused beyond its borders in China and South Korea as well. Most North Korean women unknowingly take on the risk of being trafficked in attempting to flee their country. As they cross the border into China, marriage and sex traffickers prey on them, pretending to help them in their journey and selling them to Chinese men in poor rural areas such as Jilin Province and Heilongjiang for marriage.[17] Sixty percent of North Korean female refugees are kidnapped, prostituted, forced into marriage, or sold as sex slaves.[18] While some North Korean women choose to cohabitate with Chinese males for survival, many are abducted into forced marriages.[19] Roughly 80 to 90 percent of North Korean women in China are abducted or forced into marriage or prostitution.[20] In China, North Korean refugees become dependent on other males primarily by force.

In these forced marriages, North Korean women are subject to injustice and abuse. Despite the frequency of these forced marriages, the government of China does not legally recognize the marriages and reserves the right to send the women back to North Korea for forced repatriation.[21] Annually, China returns 6,000 North Korean refugees to North Korea.[22] While China has policies to combat trafficking such as the National People's Congress's Decision on the Severe Punishment of Criminals Engaged in Trafficking and Abducting Children and Women, the policy adopted a "view

---

[14] "Share of seats in parliament (% held by women)," United Nations Development Programme, Human Development Reports, accessed April 15, 2021, http://hdr.undp.org/en/indicators/31706.
[15] Um, Kim, and Palinkas, "Correlates of Domestic Violence," 2039.
[16] Um, Kim, and Palinkas, "Correlates of Domestic Violence," 2039.
[17] *Lives for Sale: Personal Accounts of Women FleeingNorth Korea to China* (Washington D.C.: Committee for Human Rights in North Korea, 2009), 19.
[18] Erin Engstran, Caitlin Flynn, and Meg Harris, "Gender and Migration from North Korea," *Journal of Publicand International Affairs,* https://jpia.princeton.edu/news/gen der-and-migration-north-korea.
[19] Lankov and Kim, "Useless Men, Entrepreneurial Women," 76.
[20] Um, Kim, and Palinkas, "Correlates of Domestic Violence," 2039.
[21] Lee, *Lives for Sale*, 10-20.
[22] Engstran, Flynn, and Harris, "Gender and Migration."

to severely [punish] criminals who abduct and traffic in or kidnap women or children,"[23] demonstrating that "its policies are focused on punishing traffickers and keeping illegal immigrants out rather than protection for the victims of trafficking."[24] Even in China, North Korean women are heavily mistreated and live in fear or forced repatriation and abuse, demonstrating at least the first part of the paradox to be true–North Korean women undergo heavy oppression and injustices.

Discrimination against and social isolation of North Korean women occurs in South Korea as well. First in South Korea, some North Korean female refugees become dependent on their husbands as a result of cultural barriers.[25] Furthermore, "North Korean refugee women report rates of domestic violence that are two to three times higher than their South Korean counterparts."[26] The 2010 study "Correlation of Domestic Violence Victimization Among North Korean Refugee Women in South Korea," showed that out of the sample of 180 North Korean women in South Korea, 38.9 percent were physically abused, 31.7 percent were economically abused, 60.0 percent were emotionally abused, and 25.6 precent were sexually abused in between 2009 and 2010. In comparison, among South Korean women, 15.3 percent were physically abused, 33.6 percent were emotionally abused, and 9.3 percent were sexually abused.[27] One explanation for the high rates of abuse is the lack of cultural adaptation as female refugees experience a language, education, and employment barrier which subjects them to an increased dependency on their husbands.[28] The husbands "in turn may exert more control over his wife" through abuse. Barriers also "discourage abused North Korean refugee women from seeking professional help because of the fear of being discriminated against by South Korean police."[29] Studies also show that the trauma experienced by North Korean female refugees as they flee to South Korea causes them to be more prone to social isolation and fear reporting problems to figures of authority or leaving their homes.[30]

IV. EMPOWERMENT PARADOX

Yet, just looking at the oppression they suffer seems to miss the mark in explaining North Korean female status because women are simultaneously being empowered economically in North Korea. After a detrimental famine from 1996 to 1999, North Korean women became the breadwinners by participating in the illegal, free market. North Korea has been emphasizing "the traditional role of woman as a mother, wife, and housekeeper" since the 1960's which gives them the "right to be unemployed."[31] This right gave women freedom from the surveillance and the

[23] Decision of the Standing Committee of the National People's Congress Regarding the Severe Punishment of Criminals who Abduct and Traffic in or Kidnap Women or Children (promulgated by the Standing Comm. Nat'l People's Cong., September 4, 1991, effective September 4, 1991) http://www.asianlii.org/cn/legis/cen/laws/dotscotnpcrtspocwaatiokwoc1424/.
[24] Lee, *Lives for Sale,* 54.
[25] Um, Kim, and Palinkas, "Correlates of Domestic Violence," 2040.
[26] Um, Kim, and Palinkas, "Correlates of Domestic Violence," 2039.
[27] Um, Kim, and Palinkas, "Correlates of Domestic Violence," 2051.
[28] Um, Kim, and Palinkas, "Correlates of Domestic Violence," 2040-2045.
[29] Wonjung Ryu and Sun Park. "Post-Traumatic Stress Disorder and Social Isolation among North Korean Refugee Women in South Korea: The Moderating Role of Formal and Informal Support," *Sustainability*, 10, no. 4 (April 2018), 1246.
[30] Ryu and Park. "Post-Traumatic Stress Disorder and Social Isolation among North Korean Refugee Women in South Korea: The Moderating Role of Formal and Informal Support," 1246.
[31] Lankov and Kim, "Useless Men, Entrepreneurial Women," 68–96.

constraints of the state since "surveillance mechanisms in North Korea have been based on the assumption that every able-bodied North Korean. . . has to have a permanent official job at a state-managed enterprise, where he or she is indoctrinated and watched by authorities."[32] As the regime considers women as full-time housewives or mothers, women do not have to engage in "the troublesome and time-consuming obligation of attending their non-functioning factories for a meaningless pay."[33] Lacking formal employment, women are able to engage in illegal free trade and economic activities which bring in a larger share of a household's income: 78 percent of average North Korean family income is from the informal, non-state, market economy.[34] This phenomenon "has led to a dramatic overrepresentation of women among market vendors"in North Korea and China.[35] About 75 percent of market vendors were women in the North Korean cities of Hoeryong, Musan, and Hamheun. Furthermore, if women are to hold jobs regulated by the North Korean state, they are automatically assigned "unmanly" roles in the clerical, administrative, education, retail, and medical sectors.[36] These jobs are considered white-collar jobs in the West, with higher wages and reputations.[37]

In this paradoxical economic role, North Korean women are simultaneously challenging and economically holding up the North Korean regime. North Korean women's participation in free trade is a circumvention of state rules and surveillance and poses a challenge to authoritarian rule. The breadwinner role of women has also led to an increased sense of individualism which challenges *juche's* idea of national autonomy over all else. Free trade has also resulted in "women's increased access to information about the outside world. . . [which] also poses serious challenges to the regime"[38] as such information can reveal to the North Korean people the terrible and unfair state of their regime. Simultaneously, women are the support base of the regime. As females run the unofficial markets, the regime is able to invest its limited resources and funds elsewhere instead of channelling it to providing basic needs–such as food–and social services. Female traders prevent the North Korean regime from experiencing a complete economic collapse through supporting the private retail economy–clothing, footwear, tobacco, consumption goods, agriculture.

Even outside their own country, female defectors exhibit the same paradox. North Korean female refugees in South Korea are simultaneously dependent marriage partners and independent political participants. Hoi Ok Jeong, a professor of political science at Myongji University, conducted a survey of 49 male and 151 female North Korean defectors, and the results showed that North Korean female defectors were "oriented toward participatory politics" as 56.3 percent of female defectors were willing to vote and 50.3 percent were willing to join civic organization.[39] Given that a majority of female North Korean defectors in South Korea participate in politics, there is no doubt

[32] Lankov and Kim, "Useless Men, Entrepreneurial Women," 68–96.
[33] Lankov and Kim, "Useless Men, Entrepreneurial Women," 68–96.
[34] Lankov and Kim, "Useless Men, Entrepreneurial Women," 68–96.
[35] Lankov and Kim, "Useless Men, Entrepreneurial Women," 68–96.
[36] Lankov and Kim, "Useless Men, Entrepreneurial Women," 68–96.
[37] Lankov and Kim, "Useless Men, Entrepreneurial Women," 68–96.
[38] Kyungja Jung, Bronwen Dalton, and Jacqueline Willis, "From patriarchal socialism to grassroots capitalism: The role of female entrepreneurs in the transition of North Korea," *Women's Studies International Forum* 68 (May-June 2018): 19–27.
[39] Hoi Ok Jeong and Yoon Sil Kim, "North Korean Women Defectors in South Korea and Their Political Participation," *International Journal of Intercultural Relations*55 (2016), https://doi.org/10.1016/j.ijintrel.2016.07.008.

that North Korean female defectors are independent political participants outside their country as well.

V. REASONS FOR THE PARADOX

One way in which to explain this paradox is to understand that the status of North Korean women has been improving over time due to economic and social changes. Past research shows that increased economic power allows women to "learn about their new rights and feel secure" through information gained from business activities and financial independence, which become protection from domestic violence in North Korea as well as foreign countries.[40] Males try to reassert their dominance over their wives through domestic violence when their wives' economic powers increase,[41] but even this trend is on the decline: since the 1990's, there has been a growing number of divorces and couples not cohabitating in North Korea. This reversal shows that "women have become more independent and less willing to tolerate and support abusive or '[economically] incapable' husbands."[42] Furthermore, while couples and elders of North Korean families have traditionally wanted sons in order to carry on the lineage, there has been a "dissipation of the preference for sons" as the "recognition that females are playing a financially beneficial role in the emerging economy" of North Korea has led to a trend called "daughter fever."[43] Likewise, while there has been an emphasis on "marrying a good husband" in the past, currently, "men are inclined to think about 'marrying the right woman,' where the 'right woman' is a woman who can conceivably run a successful market operation."[44] It is evident that North Korean women's social and economic statuses have been elevated compared to their past positions.

However, the paradox exists because this kind of elevation has been insufficient to combat sexual and domestic violence, and further steps to completely free them from their discrimination and oppression is necessary. The present empowerment of women are the results of North Korean women's actions, not necessarily instated change. The international community has been pressuring North Korea to follow the five human right treaties it has ratified, including the CEDAW. North Korea's state report on human rights is more than a decade overdue, and it has not acknowledged the human rights violations–including rape, forced abortion, enslavement, and other forms of sexual violence–levied against them in the 2014 United Nations Commission of Inquiry. As of December 2017, the UN Security Council proclaimed North Korea a threat to international peace and security due to these human rights violations for the fourth consecutive year. The lack of a "reliable and factual state report makes it difficult for the CEDAW Committee to monitor North Korea's progress in protecting the rights of women."[45] The international community has been adopting policies to condemn North Korea for its human rights abuses against females, but the resolutions

[40] Um, Kim, and Palinkas, "Correlates of Domestic Violence," 2039-2040.
[41] Um, Kim, and Palinkas, "Correlates of Domestic Violence," 2039-2040.
[42] Jung, Dalton and Willis, "Patriarchal socialism," 24.
[43] Jung, Dalton and Willis, "Patriarchal socialism," 24.
[44] Lankov and Kim, "Useless Men, Entrepreneurial Women," 76.
[45] Cammarota, *Legal Strategies*, 71.

have yielded little results as 70 percent of North Korean women continue to be routinely abused by their husbands.[46]

Individual countries have not taken sufficient action either. The 2016 North Korean Human Rights Act requires South Korea to execute the policy initiatives recommended by the COI report, to help North Korean refugees and South Korean nationals detained in North Korea, and to publish more status reports on North Korean human rights conditions. Yet, South Korea has not executed any of these requirements nor has it created an organization to investigate the abuses. Although attitudes towards women and their capabilities have changed on an individual level, systematically there has been no institutional change to combat the oppression of women. The Moon administration has taken few actions regarding North Korean human rights abuses and has been avoiding the issue in meetings with Kim Jong-Un. The United States has been and continues to impose human rights-related sanctions on North Korean officials including Kim Jong-Un. However, President Trump–like President Moon–avoided discussion about human rights abuses in his meetings with Kim Jong-Un by focusing mostly on denuclearization, sanctions, and trade.[47] The Biden administration has not made a clear decision regarding North Korea policy; however, in mid-April 2021, eleven human rights groups drafted a letter for President Biden, urging the president to incorporate human rights abuses into security issues.[48] Finally, China–the most influential international actor in North Korea–refuses to pressure North Korea on human rights.[49]

VI. POLICY RECOMMENDATIONS

Given that the international community and actors have been ineffective in resolving human rights abuses against North Korean women due to the nature of the regime, it seems that little can be done to help North Korean women in North Korea. In this regard, it may be beneficial to focus on North Korean female refugees. There are five actions that would help in this endeavor: (1) publicize and bring awareness to discrimination against North Korean women, (2) provide formal and informal support for North Korean female human rights, (3) provide sexual education and cultural education that destroys traditional gender roles, (4) allow smoother assimilation into South Korea and other foreign countries. The four recommendations are not necessarily direct actions or policies because there are few precedents of policies and international actions being effective in resolving abuses against North Korean women.[50] However, precisely because few grand-scaled, international, instituted efforts have worked, local efforts, educational and awareness programs, and NGO activity will be helpful in furthering North Korean women's rights.

---

[46] Um, Kim, and Palinkas, "Correlates of Domestic Violence," 2038-2039.
[47] Michael E. O'Hanlon, "What Donald Trump should have done with North Korea – and what the next president should do," *Brookings,* September 3, 2020, https://www.brookings.edu/blog/order-from-chaos/2020/09/03/what-donald-trump-should-have-done-with-north-korea-and-what-the-next-president-should-do/.
[48] "North Korea: US Should Refocus on Rights Concerns," *Human Rights Watch,* April 15, 2021, https://www.hrw.org/news/2021/04/15/north-korea-us-should-refocus-rights-concerns#.
[49] "World Report 2019: North Korea," January 12, 2019, www.hrw.org/world-report/2019/country-chapters/north-korea.
[50] Um, Kim, and Palinkas, "Correlates of Domestic Violence," 2047-2052.

First, the international community's awareness about North Korean human rights abuses against women must be raised. The CEDAW Committee "provides a useful avenue for an NGO interested in publicizing the plight of women in North Korea," therefore, cooperation with this organization can help publicize abuses and encourage other organizations to investigate North Korea's human rights crimes.[51] Since the CEDAW Committee submits country reports every four years,[52] NGOs should make use of the reports to emphasize North Korean female oppression to garner support from international actors and organizations. In effect, there will be a higher chance of success for direct mechanisms to change North Korea's state of affairs.

Second, international actors must provide formal and informal social support for North Korean female defectors. Formal support entails psychological support provided by support staff of human rights organizations or the government of foreign countries while informal support would be from neighbors, acquaintances, and friends. A study done by Yonsei University proved that formal and informal social support helps North Korean female refugees cope with their PTSD and overcome barriers that cause social isolation.[53] Given this result, governments of countries inhabited by North Korean female defectors must invest more funding and resources into psychological and social support and services. Currently, there are only 800 protection officers–formal support–in South Korea to handle about 31,000 North Korean refugees. The ratio of officers to refugees is one to thirty, with many officers lacking expertise.[54] The raised awareness from the first recommendation would also assist in mobilizing the people of these foreign countries to become informal social support for female defectors.

Third, cultural education to eliminate traditional gender roles is required. Um et. al's "Correlates of Domestic Violence Victimization Among North Korean Refugee Women in South Korea" explains that domestic violence is associated with traditional beliefs about gender roles, a history of abusive experiences, and the lack of sociocultural adaptation in foreign countries. Some North Korean female refugees are not even aware of the abuse they experience and cannot "identify emotional and economic abuse, and marital rape . . . as abusive acts."[55] Educational programs about domestic violence, common signs of abusive behavior, legal services available to victims, and sexual education to raise awareness of abuse among North Korean female refugees would be effective in decreasing abuse. The programs must teach women "that they are not subordinates of their husbands and that domestic violation cannot be justified."[56] It would be most practical for national governments to fund local organizations and governments to have a significant impact.

Fourth, North Korean female refugees need assistance in assimilating into South Korea and other foreign countries. As mentioned before, the lack of sociocultural adaptation into foreign countries is directly correlated with domestic violence and abuse as the lack of adaptation presents a social barrier. Programs that provide long-term language education, lessons in financial management, and job skills training can help North Korean women adapt into foreign societies and

[51] Cammarota, *Legal Strategies*, 74.
[52] "Frequently Asked Questions (FAQ) about CEDAW," UNWomen, Asia and the Pacific, accessed April 15, 2021, https://asiapacific.unwomen.org/en/focus-areas/cedaw-human-rights/faq#whatstateparties.
[53] Ryu and Park, "Post-Traumatic Stress Disorder," 1246.
[54] Ryu and Park, "Post-Traumatic Stress Disorder," 1246.
[55] Um, Kim, and Palinkas, "Correlates of Domestic Violence," 2051.
[56] Um, Kim, and Palinkas, "Correlates of Domestic Violence," 2051.

build their confidence.[57] Cultural adaptation is a prerequisite to assisting North Korean female refugees to become independent.[58] Policies for adaptation assistance would also welcome female refugees' political participation.

VII. CONCLUSION

North Korean women seem to only be discriminated against and oppressed when viewed from afar, but such a simple conclusion dismisses the paradoxical role of North Korean women. North Korean women experience domestic abuse and sexual punishments in North Korea and violence, PTSD, social isolation in foreign countries. At the same time, they are empowered economically and politically as breadwinners and support bases of the North Korean regime and political actors in South Korea. The simultaneous oppression and empowerment of North Korean women show that there has been great social change since the 1960's in the attitudes towards women. However, the status quo is insufficient, and more work must be done as North Korean women are still facing domestic abuse and sexual punishments today. In order to fully emancipate North Korean women and allow them to be fully independent, individuals and international actors should take into account the four initiatives recommended in this paper.

[57] Um, Kim, and Palinkas, "Correlates of Domestic Violence," 2047-2051.
[58] Jeong and Kim, "North Korean Women Defectors," 29.

Works Cited

Bandi. *The Accusation: Forbidden Stories from Inside North Korea*. Translated by Deborah Smith. New York: Grove Press, 2016.

Cammarota, Paolo, Joe Crace, Kim Worly, and Haim Zaltzman. *Legal Strategies for Protecting Human Rights in North Korea*. Skadden, Arps, Slate, Meagher & Flom LLP and U.S. Committee for Human Rights in North Korea, 2007.

Engstran, Erin, Caitlin Flynn, and Meg Harris. "Gender and Migration from North Korea." *Journal of Public and International Affairs*, https://jpia.princeton.edu/news/gender-and-migration-north-korea.

UN Women. "Frequently Asked Questions (FAQ) about CEDAW." Asia and the Pacific. Accessed April 15, 2021. https://asiapacific.unwomen.org/en/focus-areas/cedaw-human-rights/faq#whatstateparties .

Hawk, David R. "VI. The Expansion of Kyo-Hwa-So No. 12 Jongo-Ri: Wrongful Imprisonment and the Oppression of North Korean Women." *The Hidden Gulag IV: Gender Repression & Prisoner Disappearances*. Washington D.C.: U.S. Committee for Human Rights in North Korea, 2015.

"North Korea: US Should Refocus on Rights Concerns," *Human Rights Watch,* April 15, 2021, https://www.hrw.org/news/2021/04/15/north-korea-us-should-refocus-rights-concerns#.

Lankov, Andrei and SeokHyang Kim, "Useless Men, Entrepreneurial Women, and North Korea's Post-Socialism: Transformation of Gender Roles Since the Early 1990s," *Asian Journal of Women's Studies* 20, no. 2 (2014): 68-96. https://doi.org/10.1080/12259276.2014.11666182.

Lives for Sale: Personal Accounts of Women FleeingNorth Korea to China. Washington D.C.: Committee for Human Rights in North Korea, 2009.

Jung, Kyungja and Bronwen Dalton. "Rhetoric Versus Reality for the Women of North Korea: Mothers of the Revolution." *Asian Survey* 46, no. 5 (2006): 741-60. https://doi.org/10.1525/as.2006.46.5.741.

Jung, Kyungja, Bronwen Dalton, and Jacqueline Willis, "From patriarchal socialism to grassroots capitalism: The role of female entrepreneurs in the transition of North Korea." *Women's Studies International Forum* 68 (May-June 2018): 19-27. https://doi.org/10.1016/j.wsif.2018.02.003.

Jeong, Hoi Ok and Yoon Sil Kim, "North Korean women defectors in South Korea and their political participation," *International Journal of Intercultural Relations* 55 (2016): 20-31. https://doi.org/10.1016/j.ijintrel.2016.07.008.

O'Hanlon, Michael E. "What Donald Trump should have done with North Korea – and what the next president should do." *Brookings*, September 3, 2020. https://www.brookings.edu/blog/order-from-chaos/2020/09/03/what-donald-trump-should-have-done-with-north-korea-and-what-the-next-president-should-do/.

"World Report 2019: North Korea," *Human Rights Watch*, January 17, 2019. www.hrw.org/world-report/2019/country-chapters/north-korea.

United Nations Development Programme. "Share of seats in parliament (% held by women)." Human Development Reports. Accessed April 15, 2021. http://hdr.undp.org/en/indicators/31706.

Um, Mee Young, Hee Jin Kim, and Lawrence A. Palinkas. "Correlates of Domestic Violence Victimization Among North Korean Refugee Women in South Korea." *Journal of Interpersonal Violence* 33, no. 13 (2018): 2037-58. https://doi.org/10.1177/0886260515622297.

Ryu, Wonjung, and Sun Won Park. "Post-Traumatic Stress Disorder and Social Isolation among North Korean Refugee Women in South Korea: The Moderating Role of Formal and Informal Support." *Sustainability* 10, no. 4 (April 2018). https://doi.org/10.3390/su10041246.

TRANSGENDER PEOPLE AND INCARCERATION: LEGAL AVENUES FOR LITIGATING DISCRIMINATION CASES

Liyu Woldemichael
Duke University
Class of 2022

While incarcerated, transgender people are particularly vulnerable to experiencing violence and they lack a clear set of legal protections. In particular, they face discrimination in terms of cell placement, lack adequate access to needed health care services, and have an increased risk of being sexually assaulted and harassed. This paper explores two competing legal frameworks for guaranteeing protections for transgender people in carceral facilities: the Equal Protection Clause (EPC) and the 8th Amendment. To compare the effectiveness of both strategies, this paper examines Supreme Court precedents regarding people's rights during their incarceration, focusing on cases that deal with transgender people's presence in the American carceral system. Unlike other anti-discrimination cases that use the conventional EPC framework, incarcerated trans people have historically most effectively leveraged the 8th Amendment, as gender identity is not federally recognized as a protected class. Though the 8th Amendment has granted more success in litigating LGBT+ discrimination cases, such as in *Farmer v. Brennan*, this strategy should be used as a steppingstone towards federal anti-discrimination laws that include gender identity and sexual orientation as protected classes. The Supreme Court's decision in *Bostock v. Clayton County* and support for the Equality Act by the House of Representatives shows promise for expanded protections that will allow for more effective legal avenues to be taken.

Acknowledgements

This project would not be possible without the organizers who have supported me and invited me to join a community of collective healing and resistance. Thank you, Southerners on New Ground and each space that challenged me to grow in these ways. For the fight for a better, more just world, we continue to hope.

I. INTRODUCTION

Transgender people are disproportionately represented in the U.S. criminal justice system. While cisgender people have a 5.1 percent lifetime likelihood of being incarcerated, transgender men face a 16 percent likelihood of incarceration and transgender women have a 21 percent likelihood.[1] The risk of incarceration is even greater for Black transgender people, who have a 47 percent likelihood.[2] Incarcerated transgender individuals in particular are more at risk for receiving inadequate health care services, not being housed in a safe cell placement that affirms their gender identity, and are especially vulnerable to experiencing abuse, assault and other forms of violence.[3]

Since federal laws do not explicitly include gender identity as a protected class, most states have been given freedom to determine the extent of their protection for sex-based discrimination. Even today, 27 states do not have explicit gender identity or sexual orientation protections, permitting pervasive housing and employment discrimination for the LGBT+ community.[4] Consequently, transgender people, both inside and outside of the criminal justice system, have historically had significant barriers when litigating discrimination cases. In civil rights law, the traditional route for anti-discrimination cases has historically been the EPC. As a part of the 14th Amendment, the EPC guarantees "any person within its jurisdiction the equal protection of the laws."[5] However, as the level of scrutiny differs based on a group's classification, there has been a dire need for federal laws that universally apply protections throughout the country and are inclusive of LGBT+ people.

Due to the absence of federally mandated protections, the 8th Amendment has been the most successful anti-discrimination framework used to guarantee certain protections for transgender people while under carceral custody. The 8th Amendment states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[6] Recent developments, though, have expanded the scope of anti-discrimination law. These actions show promise for other necessary steps to strengthen protections for the LGBT+ community, including those incarcerated.

II. MASS INCARCERATION OF LGBT+ PEOPLE

It is important to understand how systemic inequalities lead to a disproportionate number of transgender people being incarcerated, beginning first with the challenges faced prior to their sentencing. Transgender people experience disproportionate poverty, homelessness, discrimination, and law enforcement bias.[7] According to a survey of nearly 28,000 transgender and gender non-conforming people in the U.S., transgender people are twice as likely to be living at or below the

---

[1] Jaime M. Grant, et al., *Injustice at Every Turn: A Report of the National Transgender DiscriminationSurvey* (Washington D.C.: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011).
[2] *Injustice at Every Turn: A Report of the NationalTransgender Discrimination Survey*.
[3] *LGBT People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights* (Washington D.C.: National Center for Transgender Equality, 2018), 4-6.
[4] "LGBTQ Americans Aren't Fully Protected From Discrimination in 29 States," Freedom for All Americans, accessed March 25, 2021, https://freedomforallamericans.org/states/.
[5] U.S. Const. amend. XIV, § 2
[6] U.S. Const. amend. VIII.
[7] Grant, *Injustice at Every Turn: A Report of the NationalTransgender Discrimination Survey*, 163.

poverty line than their cisgender counterparts.[8] While 30 percent of transgender people reported being financially vulnerable, around 40 percent of Latinx, Indigenous, and Black transgender people live in poverty, and 48 percent stated that they "experienced police misconduct, including unjustified arrest, use of excessive force and entrapment."[9] Law enforcement's profiling of LGBT+ people is supported by zero-tolerance policing, aggressive anti-prostitution statutes, stop-and-frisk policies, and other protocols that increase contact with police.[10] These interactions with police are heightened as transgender and gender non-conforming people are more frequently "victims of violent crime," experience houselessness at alarming rates, and profiled without cause.[11] As a result of socioeconomic vulnerabilities and law enforcement profiling, LGBT+ people are overrepresented in the criminal justice system.

III. ISSUES FACING TRANS PEOPLE WHILE INCARCERATED

A. *Ramifications of Unsafe Cell Placements*

U.S. prisons have adopted two main practices when determining cell placement for trans people: sex segregation and solitary confinement. While incarcerated, trans people are 13 times more likely to be sexually assaulted than non-trans people in prison.[12] In response to persistent rape and assault cases in carceral facilities, the Prison Rape Elimination Act (PREA) was passed in 2003 to "provide for the analysis of the incidence and effects of prison rape in federal, state, and local institutions and to provide information, resources, recommendations and funding to protect individuals from prison rape."[13] Despite federal resources being directed to combat pervasive violence, the majority of prisons have continued to employ binary categories for classifying people as either male or female and assigning them to a facility based on this determination. This policy, known as sex segregation, uses genitalia or assigned gender at birth as its standard of sex classification.[14] When prison officials deem an individual as being at high-risk of experiencing violence, they move them to solitary confinement, placing them in isolation which is typically reserved as a form of punishment. Some facilities, including those in Chicago, have begun placing people in cells based on their gender identity rather than their sex, but this protocol has not been instituted widely as of yet.[15]

These housing policies have negative implications on the health and safety of incarcerated trans individuals. When people are put in cells that do not match their gender identity or are put into isolation, there are not only psychological burdens but safety risks as well. There is an abundance of

---

[8] Sandy E. James, et al., *The Report of the 2015 U.S. Transgender Survey*(Washington, D.C.: National Center for Transgender Equality, 2016), 5.
[9] Christy Mallory, Amira Hasenbush, and Brad Sears, *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community* (Los Angeles, CA: The Williams Insitute, 2015), 4.
[10] Grant, *Injustice at Every Turn: A Report of the NationalTransgender Discrimination Survey*, 158.
[11] Grant, *Injustice at Every Turn: A Report of the NationalTransgender Discrimination Survey*, 158.
[12] National Prison Rape Elimination Commission Report (Washington D.C.: National Prison Rape Elimination Commission, 2009), https://www.ojp.gov/pdffiles1/226680.pdf.
[13] Prison Rape Elimination Act, 34 U.S.C. Ch. 303 (2003).
[14] Heath Fogg Davis, "Sex-Classification Policies as Transgender Discrimination: An Intersectional Critique," *Perspectives on Politics* 12, no. 1 (2014): 47–50, www.jstor.org/stable/43281101.
[15] Jae Sevelius and Valerie Jenness, "Challenges and opportunities for gender-affirming healthcare for transgender women in prison," *International Journal of PrisonerHealth* 13, no. 1 (2017): 32.

research that points to solitary confinement having negative health impacts, particularly on mental health. According to the American Psychological Association, these risks include elevated rates and severity of "anxiety, panic, insomnia, paranoia, aggression and depression."[16] Trans individuals are already at increased risk experiencing suicidal ideations and other life-threatening mental health issues, as an estimated 41 percent of trans people have reported attempted suicide.[17] Solitary confinement only exacerbates this issue. The conditions of confinement include: "extensive surveillance and security controls, the absence of ordinary social interaction, abnormal environmental stimuli, often only three to five hours a week of recreation alone in caged enclosures, and little, if any, educational, vocational, or other purposeful activities."[18]

Such extreme isolation is not a sustainable solution to ensuring protections for trans persons, as the impacts of confinement intensify with the duration. Due to limited medical visits, trans people's ability to receive adequate health care is also hindered, primarily blocking access to hormones and other necessary treatments. Solitary confinement also restricts a person's access to education, work, and program opportunities that are offered as a part of prisons' restorative practice. Since education and work programs are often essential to achieving shorter sentencing, LGBT+ people placed in solitary confinement are less likely to be paroled or released early.[19] Title IX presents one angle that can be used to counter the use of solitary confinement for LGBT+ incarcerated individuals. For one, most education programs in prisons are supported by the federal government. Since they are federally funded, they are subject to federal regulations. Title IX, a part of the Education Amendment, extends protections to people who are denied or limited access to prison programs and resources because of their gender identity or sexual orientation.[20] All incarcerated people must have equal access to "libraries, educational programs, the internet, and corresponding resources."[21]

B. *Denial of Healthcare Services*

Trans people in prison are often denied necessary health care. The National Gay and Lesbian Task Force of Transgender People found that "12 percent of people who had been in jails or prisons reported denial of routine health care and 17 percent (and 30 percent of Black respondents) reported denial of hormones."[22] For many trans individuals, hormone therapy "improves quality of life, reduces substance use, suicidality and symptoms of depression and anxiety."[23] Many departments have employed a "freeze frame" policy to hormone therapy, which stipulates that care

---

[16] Kirsten Weir, "Alone, in 'the Hole'," May 2012, https://www.apa.org/monitor/2012/05/solitary, 2.
[17] Justin Tanis, "The power of 41%: A glimpse into the life of a statistic," American Journal of Orthopsychiatry86, no.4 (2016): 373, https://psycnet.apa.org/doi/10.1037/ort0000200.
[18] Jeffrey L. Metzner and Jamie Fellner, "Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics," *Journal of the American Academy ofPsychiatry and the Law* 38**,** no**.** 1 (March 2010): 104. http://jaapl.org/content/38/1/104
[19] "LGBT People Behind Bars" 12.
[20] "LGBT People Behind Bars," 12.
[21] "LGBT People Behind Bars," 12.
[22] "Jails and Prisons," *Mental and Physical Disability Law Reporter* 28, no. 1 (January February 2004): 66–67, www.jstor.org/stable/20786301.
[23] Sevelius and Jenness, "Challenges and opportunities," 32.

to hormone therapy relies on whether a person was receiving treatment before their incarceration.[24] Prison officials argue that documentation of treatment prior to incarceration is key to ensuring that the health care services are only offered to those with a real need and not those exploiting the system. Treatment is thus "frozen" at the level of hormones a person was already receiving before incarceration. However, around 31 percent of trans people in the U.S. do not have access to regular health care and are either uninsured or underinsured.[25] In addition, other trans people find extra-legal methods outside of the medical establishment that would not be recognized by the prison system, including through support networks that share medical resources. With the freeze-frame statue, many trans people are not able to access therapy while incarcerated.

Challenges to the freeze-frame policy have seen much success in the last decade. In 2011, Vanessa Adams' suit against the Federal Bureau of Prisons resulted in the termination of this policy for all people diagnosed with Gender Identity Disorder (GID).[26] In Missouri, the state's Department of Corrections free frame was ruled as unconstitutional by a federal court with *Hicklin v. Precythe*, ordering MDOC's contracted provider (Corizon LLC) to provide "medically necessary, doctor-recommended health care."[27] While similar actions have shifted state policy, many states still employ restrictions on who can access care and what level of treatment is available.

IV. CASE PRECEDENTS

A few cases are particularly important for understanding the legal standards used to litigate for trans people while incarcerated. In *Estelle v. Gamble* (1975), the Supreme Court ruled that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' prescribed by the Eighth Amendment."[28] In this specific case, the prison officials knew Gamble injured his back during a labor assignment but subjected him to solitary confinement for refusing to continue to work. Though Gamble received pain medication, he was not given extensive enough care given his injury, despite multiple requests for further treatment. The court ultimately found that denying adequate medical care to incarcerated individuals is a violation of the 8th Amendment. However, the question of which services are deemed necessary was not clearly defined, nor did the court clearly establish criteria for the deliberate indifference standard.

In *Farmer v. Brennan*, the Supreme Court ruled that a prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the cruel and unusual punishment clause of the 8th Amendment.[29] In this particular case, Dee Farmer, a trans woman, was placed in the men's

---

[24] "Developments in the Law: SEXUAL ORIENTATION & GENDER IDENTITY," *Harvard Law Review* 127, no. 6 (2014): 1680–1814, www.jstor.org/stable/23741987.

[25] Neda Ulaby, "Health Care System Fails Many Transgender Americans," *NPR*, November 21, 2017, https://www.npr.org/sections/health-shots/2017/11/21/564817975/health-care-system-fails-many-transgender-americans

[26] Adams v. Federal Bureau of Prisons, 716 F. Supp. 2d 107 (D. Mass. 2010).

[27] "Victory! Federal Court Strikes Unlawful Policy That Denied Health Care to Incarcerated Missouri Transgender Woman," *Lambda Legal*, May 23, 2018, https://www.lambdalegal.org/blog/20180523_victory-incarcerated-transgender-woman.

[28] Jonathan Simon, "From Health to Humanity: Re-Reading Estelle v. Gamble after Brown v. Plata," Federal Sentencing Reporter 25, no. 4 (2013): 276, www.jstor.org/stable/10.1525/fsr.2013.25.4.276.

[29] Cheryl Bell et al., "Rape and Sexual Misconduct in the Prison System: Analyzing America's Most 'Open' Secret," *Yale Law & Policy Review* 18, no. 1 (1999): 208, www.jstor.org/stable/40239519.

prison unit and was repeatedly assaulted, ultimately resulting in her contraction of HIV.[30] *Farmer* was significant because it was the first major case involving an incarcerated trans person seen by the Supreme Court and dealt with the issue of sexual violence. The court found that prison officials are responsible for guaranteeing the safety of those incarcerated and that deliberate indifference extends beyond medical neglect. Establishing specific standards, the court clearly defined deliberate indifference through two criteria:

1) The prison official knows that inmates face a substantial risk of serious harm;
2) The prison official disregards that risk by failing to take reasonable measures to abate it.[31]

Expanding medical rights in the context of LGBTQ+ health, the Supreme Court in *Manning v. Carter* (1979) affirmed the constitutional protection of medical treatment for trans health and related procedures. Specifically, the Supreme Court held that "deliberate indifference to [the] serious medical needs of prisoners' violates the 8th Amendment and its protection against cruel and unusual punishment."[32] This established that deprivation of hormone therapy and sex reassignment surgery may qualify as unconstitutional under the 8th Amendment when a person has received medical advisement to proceed with such measures. This case affirmed gender dysphoria as a serious medical condition that necessitates care to be provided for by the state. However, the extent of services that should be offered to trans individuals has remained open to debate in the courts. As a result, the minimal level of care that must be provided has varied by state.

In *Kosilek v. Spencer (Kosilek II)* (1994), the United States District Court for the District of Massachusetts granted an injunction in favor of the plaintiff Michelle Kosilek, a trans woman, requiring the Massachusetts Department of Corrections (MDOC) to provide her with sex reassignment surgery.[33] In this case, the court held that "the cost of adequate medical care is not a legitimate reason for not providing such care to a prisoner."[34] This was because other equally or more expensive medical procedures had been provided by the MDOC before.[35] In addition, Justice Anthony Kennedy argued:

> It has long been well-established that it is cruel for prison officials to permit an inmate to suffer unnecessarily from a serious medical need. It is unusual to treat a prisoner suffering severely from a gender identity disorder differently than the numerous inmates suffering from more familiar forms of mental illness. It is not permissible for prison officials to do so

[30] Bell,"Rape and Sexual Misconduct," 208-209.
[31] Bell,"Rape and Sexual Misconduct," 208-209.
[32] Wendy Daknis, "Manning v. Carter: Implications for Transgender Policy," *The Army War College Review* 2, no. 2 (May 2016), www.jstor.org/stable/resrep11942.7.
[33] Sarah Halbach, "Framing a Narrative of Discrimination Under the Eighth Amendment in the Context of Transgender Prisoner Health Care," *The Journal of Criminal Lawand Criminology* 105, no. 2 (2015): 485–486, www.jstor.org/stable/26402454.
[34] Halbach, "Framing a Narrative," 478.
[35] Halbach, "Framing a Narrative," 491.

> just because the fact that a gender identity disorder is a major mental illness is not understood by much of the public and the required treatment for it is unpopular.[36]

Justice Kennedy's dissent concludes that public opposition and procedure cost is not a legitimate reason to deny trans individuals' medical care. Kennedy's argument cited *United States Department of Agriculture v. Moreno*, in which the Supreme Court stated "that a bare…desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[37]

While *Kosilek II* rejected state arguments that used cost or social unpopularity as a reason to withhold medical care, Wisconsin and other states responded by arguing that these actions were necessary to maintain safety and order in their facilities. In *Fields v. Smith* (2005), the U.S. District Court for the Eastern District of Wisconsin reviewed the state's Inmate Sex Change Prevention Act that prohibited prisons from providing hormone therapy to people on the grounds that "hormone therapy alters a person's secondary sex characteristics such as breast size and body hair" and "that hormones feminize inmates and make them more susceptible to inciting prison violence."[38] Specifically, the law forbade "the payment of any federal funds…to provide or to facilitate the provision of hormonal therapy or sexual reassignment surgery."[39] Since those incarcerated in Wisconsin facilities are only allowed to receive care from physicians provided by the state prison system and paid by federal funds, this effectively banned those treatments, as outside care cannot be sought. The court ultimately rejected the rationale of prison security as a legitimate reason to deny medically necessary care. This represented a key victory for prison and trans activists who had been pushing the courts to clarify the services that are deemed as necessary for those experiencing gender dysphoria.

V. COMPETING LEGAL FRAMEWORKS

A. *The EPC and LGBTQ+ discrimination cases*

The carceral system has widely failed to guarantee protection to the LGBTQ+ community under the EPC, which should enforce that "no State shall deny to any person within its jurisdiction the equal protection of the laws."[40] The EPC is a multi-tiered protection framework under the 14th Amendment that offers stricter judicial review for certain classifications and looser protections for others. The Court applies the highest level of scrutiny to those laws that burden a fundamental right of a "suspect class."[41] Since 1977, there have been five suspect classifications that receive this heightened scrutiny: race, national origin, alienage, sex, and nonmarital parentage.[42] Gender identity

---

[36] Halbach, "Framing a Narrative," 491.
[37] Halbach, "Framing a Narrative," 489.
[38] "Constitutional Law — Eighth Amendment — Seventh Circuit Invalidates Wisconsin Inmate Sex Change Prevention Act. — Fields v. Smith, 653 F.3d 550 (7th Cir. 2011)," *Harvard Law Review* 125, no. 2 (December 2011): 654, www.jstor.org/stable/41306736.
[39] "Constitutional Law," 650.
[40] U.S. Const. amend. XIV, § 2
[41] Halbach, "Framing a Narrative," 470.
[42] Ren-Yo Hwang, "Accounting for Carceral Reformations: Gay and Transgender Jailing in Los Angeles as Justice Impossible," *Critical Ethnic Studies Association* 2, no. 2 (2016): 82. https://doi.org/10.5749/jcritethnstud.2.2.0082.

and sexual orientation, however, have not been considered a suspect classification and received the same protections.

Courts in cases involving discrimination on the basis of gender identity and sexual orientation most often have applied the rational basis standard of review, which is considered the minimum level of judicial scrutiny. To ensure the law isn't struck down as constitutional, the state must only prove that its statute is related to a "legitimate governmental interest" rather than being related to a "compelling government interest" as would be required under "strict scrutiny," which also requires that the lawmakers have "narrowly tailored the law in the least restrictive measure."[43] Although the two have not been concretely defined by the court, the key difference between the two is that there is less burden in proving a legitimate state interest than a compelling interest. Under strict scrutiny, state interest alone cannot justify the means.[44] The vast majority of compelling state interests are upheld since the state imposes very little burden in the case. Under this review, it is very difficult for trans individuals to successfully litigate discrimination cases, as under the rational basis review standard the plaintiff must prove:

1) The defendant intentionally treated them differently from similarly situated individuals...
2) The differential treatment was because of their membership in a class.
3) The differential treatment was not rationally related to a legitimate governmental interest.[45]

In July 2020, the Supreme Court reviewed three cases (*Bostock v. Clayton County*, *Zarda v. Altitude,* and *R.G. & G.R. Funeral Homes v. EEOC*) and in a 6-3 decision ruled that Title VII of the Civil Rights Act of 1964's prohibition against employment discrimination "because of . . . sex" includes discrimination based on an individual's sexual orientation and gender identity.[46] The 6th and 11th Circuits had previously argued that discrimination towards trans employees qualifies as a violation of sex stereotyping under Title VII of the Civil Rights Act of 1964.[47] While these cases confront employment-based discrimination, the broader implications of the ruling show that the Supreme Court finds it "impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[48] This decision has potential to advance LGBT+ legal avenues in a range of other civil rights frameworks, including the 14th Amendment's EPC, the Fair Housing Act, the Affordable Care Act (ACA), and Title IX.[49]

Although the *Bostock* decision affirmed that gender identity and sexual orientation are inseparable from sex discrimination, this does not mean that trans individuals will be identified as a suspect class. While these recent developments have the potential to have wide reaching impacts,

---

[43] Halbach, "Framing a Narrative," 470.
[44] Halbach, "Framing a Narrative," 470.
[45] Halbach, "Framing a Narrative," 470-471.
[46] Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964).
[47] Sharita Gruberg, "Beyond Bostock: The Future of LGBQ Civil Rights," *Center for American Progress*, August 26, 2020, https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/.
[48] Bostock v. Clayton County, 140 S. Ct. 1731 (2020).
[49] Gruberg, "Beyond Bostock."

applying the *Bostock* ruling to different cases is another difficult battle, as the decision applied to the Civil Rights Acts jurisdiction. While President Biden's January 2021 executive order directed federal agencies to align their anti-discrimination protection with the *Bostock* decision, enforcement is another challenge. In addition, the Supreme Court left a religious exemption clause, which maintains barriers to full protection. Each application of sex in different legal contexts will require litigation without explicit classification of LGBT+ people as a suspect class. Until these actions are taken, it will remain challenging to utilize *Bostock* beyond employment-based discrimination, espcially with the possibilities of shifts in political power, as many lower courts continue to apply an "intermediate level of scrutiny."[50]

B. *The 8th Amendment as an Anti-discrimination Framework*

Why is it that the 8th Amendment has been successful where the EPC has fallen short? Until the *Bostock* ruling, the Supreme Court had not directly ruled on the extent in which sex-based discrimination can be applied. As a result, prison advocates have had to find different avenues when litigating cases for LGBT+ individuals. Although the 8th Amendment was not designed to address discrimination, the courts in *Fields* and *Kosilek II* used the 8th Amendment's deliberate indifference framework as established in *Estelle v. Gamble* and adopted very similar language that is seen in other civil rights frameworks, most notably the 14th Amendment. The Court's reference to similarly situated prisoners also draws another parallel to the traditional anti-discrimination arguments. In *Kosilek*, the plaintiff was treated differently than individuals with more familiar medical needs and that differential treatment was due to the specific medical care sought.[51] The Court considered the stigma associated with gender dysphoria as a bias that results in differential treatment to those seeking hormone therapy or sex-reassignment surgeries. While the case ultimately relied on the 8th Amendment, the argument is parallel to the logic in the EPC. Since medical professionals are those with expertise to determine what is necessary care, lawmakers must not inject their political biases in such matters. If lawmakers ban incarcerated people's access to care, they are violating the cruel and unusual standard of the 8th Amendment.

VI. THE PATH AHEAD

Vulnerabilities that transgender people face are exacerbated through mass incarceration and under current prison policies. Although the 8th Amendment can serve as a valuable basis in arguing for the rights and protections of incarcerated transgender people, there is an eventual need for federal-level laws to be established that enforce gender identity as a protected class. Until these protections are universally applied, trans people in prison will continue to be denied necessary health care, face inadequate cell placement, and will experience disproportionate levels of abuse, assault and other forms of violence.

Each of these frameworks have their own limitations. While sex-discrimination has been read more inclusively by the court, LGBT+ people are not federally recognized as a suspect class. Without this classification, those seeking to raise gender identity or sexuality discrimination cases do

[50] Halbach, "Framing a Narrative," 470.
[51] Halbach, "Framing a Narrative," 470.

not get the advantage of the court applying strict scrutiny. Instead, they must take on additional burden in the case. Since some states consider LGBT+ people as a suspect class and others do not, there is a state-by-state difference in the way these cases are handled.

In addition, when administrations change, regulation practices do as well. The federal government has "the power to interpret whether LGBTQ people are protected by sex discrimination protections in laws passed by Congress."[52] Under the Obama administration, the federal government took steps to read sex discrimination as encompassing gender identity as well, urging federal regulators to follow such a protocol. For instance, Obama pushed for schools to increase protections for trans students and directed for federal resources to be levied for the cause. However, the Trump administration reversed many of these regulations. In 2017, the administration revoked the transgender student guidance plan.

Now under the Biden presidency, the House of Representatives passed the Equality Act, which "prohibits discrimination based on sex, sexual orientation, and gender identity in a wide variety of areas including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system."[53] Though the vote must be confirmed by the Senate to actualize these goals, this act would give LGBTQ+ people a stronger stature in anti-discrimination cases. However, these changes between administration show that political control significantly alters the landscape for LGBT+ litigation. With different people in power, governmental oversight changes. For LGBT+ incarcerated individuals, this would mean differential regulations based on who heads the Department of Justice and other regulatory bodies.

When it comes to using the 8th Amendment, it has historically been the most useful constitutional framework for incarcerated LGBT+ individuals. However, it is important to recognize that there has been a burden in having to use an unconventional anti-discrimination strategy. The plaintiff has to litigate very strategically, and the deliberate indifference standard must be carefully executed. The only sustainable solution is for LGBT+ people to be codified as a fully protected class by the federal government, mandating that states follow suit. This requires the federal government to include gender identity and sexuality as part of the highest class of anti-discrimination law. While litigation is a valuable tool for expanding protections for those in the prison system, fighting for LGBT+ rights requires combatting mass incarceration and dismantling the inhumane, punitive prison system that disproportionately policies and imprisons the most marginalized communities. Until these systemic changes are made, current law is limited in altering the institutional discrimination that persists in the criminal justice system and beyond.

---

[52] Selena Simmons-Duffin, " 'Whiplash' of LGBTQ Protections and Rights, From Obama to Trump," *NPR*, March 2, 2020,
https://www.npr.org/sections/health-shots/2020/03/02/804873211/whiplash-of-lgbtq-protections-and-rights-from-obama-to-trump.

[53] Equality Act, HR 5, 116th Congress, 2019.

WORKS CITED

Bell, Cheryl, Martha Coven, John P. Cronan, Christian A. Garza, Janet Guggemos, and Laura Storto. "Rape and Sexual Misconduct in the Prison System: Analyzing America's Most 'Open' Secret." *Yale Law & Policy Review* 18, no. 1 (1999): 195–223. www.jstor.org/stable/40239519.

"Constitutional Law — Eighth Amendment — Seventh Circuit Invalidates Wisconsin Inmate Sex Change Prevention Act. — Fields v. Smith, 653 F.3d 550 (7th Cir. 2011)." *Harvard Law Review* 125, no. 2 (December 2011): 650–57. www.jstor.org/stable/41306736.

Daknis, Wendy. "Manning v. Carter: Implications for Transgender Policy." *Army War College Review* 2, no. 2 (May 2016): 48-52. https://www.jstor.org/stable/resrep11942.7.

Davis, Heath Fogg. "Sex-Classification Policies as Transgender Discrimination: An Intersectional Critique." *Perspectives on Politics* 12, no. 1 (March 2014): 45–60. www.jstor.org/stable/43281101.

"Developments in the Law: SEXUAL ORIENTATION & GENDER IDENTITY." *Harvard Law Review* 127, no. 6 (2014): 1680–1814. www.jstor.org/stable/23741987.

Freedom for All Americans. "LGBTQ Americans Aren't Fully Protected From Discrimination in 29 States." Accessed March 25, 2021. https://freedomforallamericans.org/states/.

Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of the NationalTransgender Discrimination Survey*. Washington, D.C.: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011.

Gruberg, Sharita. "Beyond Bostock: The Future of LGBQ Civil Rights." *Center for American Progress*, August 26, 2020. https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/.

Halbach, Sarah. "Framing a Narrative of Discrimination Under the Eighth Amendment in the Context of Transgender Prisoner Health Care." *The Journal of Criminal Law and Criminology* 105, no. 2 (2015): 463–97. https://scholarlycommons.law.northwestern.edu/jclc/vol105/iss2/5.

Kirsten Weir, "Alone, in 'the Hole'," May 2012, https://www.apa.org/monitor/2012/05/solitary
Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of theNational Transgender Discrimination Survey*. Washington, D.C.: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011.

"Jails and Prisons." *Mental and Physical Disability Law Reporter* 28, no. 1 (January February 2004): 66–67. www.jstor.org/stable/20786301.

James, Sandy E., Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet, Ma'ayan Anafi. *The Report of the 2015 U.S. Transgender Survey* Washington, D.C.: National Center for Transgender Equality, 2016.

"Victory! Federal Court Strikes Unlawful Policy That Denied Health Care to Incarcerated Missouri Transgender Woman." *Lambda Legal*, May 23, 2018. https://www.lambdalegal.org/blog/20180523_victory-incarcerated-transgender-woman.

Mallory, Christy, Amira Hasenbush, and Brad Sears. *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*. Los Angeles, CA: The Williams Institute, 2015. https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-by-Law-Enforcement-Mar-2015.pdf.

Metzner, Jeffrey L. and Jamie Fellner. "Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics." *Journal of the American Academy of Psychiatry and the Law*38, no. 1 (March 2010): 104-108. http://jaapl.org/content/38/1/104.

LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights. Washington D.C.: National Center for Transgender Equality, 2018. https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf.

National Prison Rape Elimination Commission Report. Washington D.C.: National Prison Rape Elimination Commission, 2009. https://www.ojp.gov/pdffiles1/226680.pdf.

Jenness, Valerie, Cheryl L. Maxson, Kristy N. Matsuda, and Jennifer Macy Sumner. "Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault." Irvine, CA, May 16, 2007.

Oswald, Ramona Faith, and Elizabeth G. Holman. *Rainbow Illinois: How downstate LGBT communities have changed (2000-2011).* (Urbana-Champaign: University of Illinois, 2013).

Hwang, Ren-Yo. "Accounting for carceral reformations: gay and transgender jailing in Los Angeles as justice impossible." *Critical Ethnic Studies Association* 2, no. 2 (Fall 2016): 82-103. https://doi.org/10.5749/jcritethnstud.2.2.0082.

Sevelius, Jae, and Valerie Jenness, "Challenges and opportunities for gender-affirming healthcare for transgender women in prison." *International Journal of Prisoner Health*13, no. 1 (2017): 32-40. https://doi.org/10.1108/IJPH-08-2016-0046.

Simon, Jonathan. "From Health to Humanity: Re-Reading Estelle v. Gamble after Brown v. Plata." *Federal Sentencing Reporter* 25, no. 4 (2013): 276–280. www.jstor.org/stable/10.1525/fsr.2013.25.4.276.

Simmons-Duffin, Selena. " 'Whiplash' of LGBTQ Protections and Rights, From Obama to Trump." *NPR*, March 2, 2020. https://www.npr.org/sections/health-shots/2020/03/02/804873211/whiplash-of-lgbtq-protections-and-rights-from-obama-to-trump.

Ulaby, Neda. "Health Care System Fails Many Transgender Americans." *NPR*, November 21, 2017. https://www.npr.org/sections/health-shots/2017/11/21/564817975/health-care-system-fails-many-transgender-americans.

Vitulli, Elias. "Racialized Criminality and the Imprisoned Trans Body: Adjudicating Access to Gender-Related Medical Treatment in Prisons." *Social Justice* 37, no. 1 (2010): 53–68. https://www.jstor.org/stable/41336935.

Tanis, Justin. "The power of 41%: A glimpse into the life of a statistic." *American Journal of Orthopsychiatry* 86, no. 4 (2016): 373–377. https://doi.org/10.1037/ort0000200.