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# **BLACK MOTHERS MATTER: THE SOCIAL, POLITICAL AND LEGAL DETERMINANTS OF BLACK MATERNAL HEALTH ACROSS THE LIFESPAN**

ELIZABETH TOBIN TYLER\*

## ABSTRACT

Black maternal health disparities have existed for decades. But with America’s recent “racial reckoning,” the public health and medical communities are increasingly focused on understanding the pathways that lead to higher rates of Black maternal morbidity and mortality, and policymakers are exploring legal and policy approaches to reducing inequities. While most of the attention is on reducing racial disparities in mortality during pregnancy, childbirth and postpartum, this article investigates the problem from a life course perspective. Applying public health and medical literature that details the role of allostatic load and weathering in adult and maternal health, this article examines how multiple compounding and intersecting social, political, and legal structures drive poor health outcomes for Black mothers. These structures include the particular social status of Black mothers in American history and society, the political disempowerment and scapegoating of Black mothers that has shaped harmful public policies, and the poorly designed and enforced laws and systems that not only fail to protect Black mothers from discrimination but, at times, exacerbate it. This article reviews and assesses current state and federal proposals for legal and policy reform aimed at addressing the Black maternal health crisis and subsequently proposes the need for a comprehensive multisectoral approach.

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*“Black motherhood as an institution is both dynamic and dialectical. An ongoing tension exists between efforts to mold the institution of Black motherhood to benefit systems of race, gender and class oppression and efforts by African-American women to define and value our own experiences with motherhood.”*<sup>1</sup>

## I. INTRODUCTION

America’s current “racial reckoning” is shining a light on centuries-old racial health inequities that have plagued the U.S. since its founding.<sup>2</sup> In 2020, the American Public Health Association declared structural racism a public health crisis, citing both historical forces and current events.<sup>3</sup> In addition to the disproportionate death toll for Black Americans caused by COVID-19 and police violence,<sup>4</sup> another public health crisis has loomed for decades, mostly in the shadows: Black mothers die at 3.2 times the rate of White mothers,<sup>5</sup> and their babies are more than 2.4 times as likely to die in their first year of life.<sup>6</sup> Until very recently, the voices of Black women and their public health allies calling for attention to this injustice have gone unheeded.

Recent international comparisons of maternal mortality show that the U.S. ranks last among its peer nations and has more than double the rate of mortality of other wealthy countries.<sup>7</sup> These results seem to have finally put this crisis on policymakers’ radars, with new legislation being introduced at the federal and state levels that focuses on improving maternal health care and reducing

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1. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT* 176 (2d ed. 2000).

2. Ashley Quarcoo & Medina Husakovi, *Racial Reckoning in the United States: Expanding and Innovating on the Global Transitional Justice Experience* 3 (Carnegie Endowment for Int’l Peace, Working Paper, 2021).

3. *Structural Racism is a Public Health Crisis: Impact on the Black Community*, AM. PUB. HEALTH ASS’N (Oct. 24, 2020), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2021/01/13/structural-racism-is-a-public-health-crisis> (“The confluence of COVID-19’s devastating impact in the United States—disproportionately borne by people of color, especially Black individuals, who have the highest death rate of all racial/ethnic groups—and the viral videos of private and state violence against Black bodies has sparked massive public demands for racial justice. While racism oppresses all people of color, the unique 400-year history and ongoing perpetuation of Black racial subjugation in the United States is the undeniable focus of our country’s most recent social awakening.”).

4. *See id.* (describing the disproportionate impact of both COVID-19 and police violence on the Black community).

5. Emily E. Petersen et al., *Racial/Ethnic Disparities in Pregnancy-Related Deaths—United States, 2007–2016*, 68 *MORBIDITY & MORTALITY WKLY. REP.* 762, 762 (2019).

6. James W. Collins, Jr. & Richard J. David, *Racial Disparity in Low Birth Weight and Infant Mortality*, 36 *CLINICS IN PERINATOLOGY* 63, 63 (2009).

7. Roosa Tikkanen et al., *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, THE COMMONWEALTH FUND (Nov. 18, 2020), <https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries>.

disparities.<sup>8</sup> The Black Mamas Matter Alliance (BMMA), an organization that advocates for “Black maternal health, rights and justice,” aptly refers to the racial inequities in maternal health as more than a public health crisis; it is a “human rights crisis.”<sup>9</sup> Naming it as such is vital because, as writer Isabel Wilkerson says, “[y]ou cannot fix what you do not know; you cannot repair what you cannot name.”<sup>10</sup>

As the medical and public health communities seek to understand the pathways that lead to higher rates of Black maternal morbidity and mortality, and policymakers begin to seek legislative solutions, the human rights framing, suggested by BBMA, is particularly valuable because it requires accountability from government and elected officials and helps to name the societal structures that facilitate and perpetuate disparities in Black maternal health outcomes.<sup>11</sup> Indeed, the decades of societal indifference to the health of Black women and their children emphatically implicates politics, policy and law.

To map the pathways between and among individual health, interpersonal relationships, community influences, institutional practices, and public policy, public health scholars have long employed a social ecological framework.<sup>12</sup> This framework has been a critical tool in demonstrating the linkages between racial and other types of health inequities to upstream policy decisions and institutional practices. However, this paradigm can be abstract in that it sometimes obscures the specific means by which politics, policy, and the law harm the health of individuals and certain populations. For Black women, the combined roles of racial, gender and class discrimination make mapping the policy to a health pathway even more complex. Identifying how laws and policies contribute directly to racial and gender health inequities is further complicated by laws that are facially neutral, but have a disparate impact on different groups based on

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8. Maggie Clark, *Federal and State Policymakers Must Address Alarming High Maternal Mortality Rates and Racial Disparities*, GEO. UNIV. HEALTH POL’Y INST. CTR. FOR CHILD. AND FAMILIES (Sept. 13, 2021), <https://ccf.georgetown.edu/2021/09/13/federal-and-state-policymakers-must-address-alarming-high-maternal-mortality-rates-and-racial-disparities/>.

9. See BLACK MAMAS MATTER ALL., <https://blackmamasmatter.org/about> (last visited Sept. 10, 2021) (describing how Black Mamas Matter Alliance members convened to “tackle the crisis of maternal health”).

10. Donna Shryer, *No Time to Waste*, CONF. INSIDER (May 3, 2021), <https://conferenceinsider.us/apa2021/no-time-to-waste/> (quoting Isabel Wilkerson at the 2021 American Psychiatric Association virtual Annual Meeting’s opening session, Our Racial Moment of Truth).

11. See Donay Currie, *Black Mamas Matter: Maternal deaths a ‘human rights crisis’*, PUB. HEALTH NEWSWIRE (Nov. 6, 2017, 10:00PM), <http://publichealthnewswire.org/?p=black-mamas-matter-2017> (describing how the organization is developing policies and toolkits on how to provide Black mothers with the resources they need to thrive, before and after pregnancy).

12. See Donna Jo McCloskey et. al, *Community Engagement: Definitions and Organizing Concepts from the Literature*, in PRINCIPLES OF COMMUNITY ENGAGEMENT 20–21 (2d ed. 2011), [https://www.atsdr.cdc.gov/communityengagement/pdf/PCE\\_Report\\_508\\_FINAL.pdf](https://www.atsdr.cdc.gov/communityengagement/pdf/PCE_Report_508_FINAL.pdf) (explaining the four levels of the social ecological model that affect health: individual, relationship, community and society).

historical, cultural and social structures that imbed racial bias within systems such as health care, employment, housing and criminal justice. Applying an interdisciplinary approach, this article draws on medical and public health research and analyzes the sociological, political, and legal contexts that shape and perpetuate the Black maternal health crisis. While most of the current discussion of Black maternal health disparities focuses on maternal mortality and morbidity surrounding childbirth, this article takes a broader perspective on the health of Black mothers across the life course to probe the multiple ways in which their health is influenced by these larger contexts.

Although there is overlap among the social, political and legal determinants of Black maternal health, each of these three terms have distinct meanings and effects. The *social determinants of health*, often described as the “conditions in the environments in which people are born, live, learn, work, play, worship, and age that affect a wide range of health, functioning, and quality-of-life outcomes and risks,”<sup>13</sup> help to explain the pathways between environmental exposures, economic inequality, access to basic needs and services, and social interactions that influence health. Exploring and exposing the *political determinants of health* allows us to move further upstream to analyze how systems structure relationships, distribute resources and administer power which, in turn, either advance or undermine health equity.<sup>14</sup> The political process results in laws—or, *legal determinants of health* (such as statutes, regulations, court decisions)—that give rise to public policies which structure the daily and lifelong experiences, exposures, resources, power, and health of individuals and populations.<sup>15</sup>

This article explores how the social, political, and legal determinants of health converge for Black maternal health and how they are intricately intertwined and mutually reinforcing. Part II discusses the historical origins and structural roots of Black maternal health disparities by highlighting the distinct status of Black mothers in the U.S., informed by the intersection of race, gender, and class, as well as the unique historical and cultural treatment of Black women during slavery and Jim Crow.<sup>16</sup> Part II then documents the current disease burden experienced by Black mothers and the important role that stress, induced by marginalization, plays in disparate health outcomes.<sup>17</sup> Part III explores the structural barriers to accessing quality, accountable health care and the role of American health care law, policy, and practice in perpetuating Black maternal

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13. *Social Determinants of Health*, HEALTHY PEOPLE 2020, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-of-health> (last visited Sept. 10, 2021).

14. DANIEL E. DAWES, *THE POLITICAL DETERMINANTS OF HEALTH* 44 (2020).

15. Lawrence O. Gostin et al., *The Legal Determinants of Health: Harnessing the Power of Law for Global Health and Sustainable Development*, 393 LANCET 1857, 1859 (2019).

16. See *infra* Part II.

17. See *infra* Part II.

health inequities.<sup>18</sup> Part IV illustrates the multiple compounding social and economic stressors that influence Black maternal health across the lifespan, including: Black women’s experiences of workplace discrimination and pay inequity; the loss of their children to the child welfare and criminal justice systems; and their disproportionate exposure to unsafe and unstable housing.<sup>19</sup> Each of these stressors are undergirded by social, political and legal structures that reinforce racism and gender inequality in ways that disparately affect Black women, particularly Black mothers.<sup>20</sup> Throughout these sections, I analyze the interrelated social, political, and legal determinants that structure these experiences and offer legal and policy recommendations that support equity and justice.<sup>21</sup> Finally, Part V explores a socio-political-legal approach to improving Black maternal health and emphasizes the ways in which Black women are “defining and valuing” their own experiences as mothers and influencing law and policy changes.<sup>22</sup>

## II. ORIGINS OF BLACK MATERNAL HEALTH DISPARITIES

### A. *The Historical Construction of the Black Mother in American Culture, Medicine, and the Law*

Being Black is its own signifier of caste in America;<sup>23</sup> being a Black mother carries a complex web of oppression that links history to present day treatment in medicine, law, and American culture.<sup>24</sup> Thus, any discussion of current health disparities and health care needs of Black mothers must be rooted in the unique history and cultural stereotypes that have shaped their experiences.<sup>25</sup> Both Black motherhood and Black maternal health are undergirded by hundreds of years of baggage stemming from structural racism. Legal scholar Dorothy Roberts explains this linkage:

Black women experience various forms of oppression simultaneously, as a complex interaction of race, gender, and class that is more than

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18. *See infra* Part III.

19. *See infra* Part IV.

20. *See infra* Part IV.

21. *See infra* Part IV.

22. *See infra* Part V.

23. *See* ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS*, 24 (Random House ed., 2020) (highlighting an anecdote where Martin Luther King realized that he and every other Black person in America were part of a caste system).

24. Cynthia Prather et al., *Racism, African American Women, and Their Sexual and Reproductive Health: A Review of Historical and Contemporary Evidence and Implications for Health Equity*, 2 *HEALTH EQUITY* 249, 250 (2018).

25. *See id.* (explaining that due to racism and attitudes that marginalize African American women, a historical analysis might shed light on sexual and reproductive health outcomes for African American women).

the sum of its parts. It is impossible to isolate any one of the components of this oppression or to separate the experiences that are attributable to one component from experiences attributable to the others...Their devaluation as mothers...has its roots in the unique experience of slavery and has been perpetuated by complex social forces.<sup>26</sup>

Scholars have compellingly demonstrated how the legacy of slavery—which legally sanctioned sexual and reproductive exploitation of enslaved women—and the long history of nonconsensual gynecological experimentation and compulsory sterilization of Black women led directly to the considerable racial disparities in maternal health today.<sup>27</sup>

During the Jim Crow era, state laws did not protect Black women from rape or afford them access to reproductive health care.<sup>28</sup> On the contrary, government-supported Eugenics programs targeted Black women for sterilization to reduce the “undesirable” Black population.<sup>29</sup> Even after the Civil Rights movement, Black mothers were threatened with termination of welfare benefits and loss of medical care if they refused sterilization or contraception methods that were often dangerous.<sup>30</sup> Given this history, it is unsurprising that many Black mothers lack trust in the medical care system.

Present day legal and medical treatment of Black mothers is based on stereotypes that have been perpetuated over generations. Biases against Black mothers are “rooted in racialized, classed, and gendered-controlling images of Black motherhood as neglectful and dependent on the state (branded ‘the welfare queen’), aggressive and domineering (branded ‘the Black Matriarch’), and superstrong (branded ‘the strong Black woman’).”<sup>31</sup> These stereotypes often manifest in the implicit biases of health care providers and fuel notions that Black women feel less pain and need less care.

Pregnant Black women are often viewed as “non-compliant” or aggressive when questioning or refusing treatment such as a Caesarean section, while White

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26. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1424 (1991) [hereinafter *Roberts I*].

27. See Prather et al., *supra* note 24, at 249 (explaining that both a history of inadequate healthcare and social determinants of health associated with institutionalized and interpersonal racism may lead to disparate sexual and reproductive health outcomes in African American women); see also Deirdre Cooper Owens & Sharla M. Fett, *Black Maternal and Infant Health: Historical Legacies of Slavery*, 109 AM. J. PUB. HEALTH 1342, 1342–43 (2019) (discussing how the legacy of slavery has impacted contemporary structural racism and resulted in “disproportionate maternal and infant death among African Americans”).

28. Prather et al., *supra* note 24, at 251–52.

29. See *id.* at 252 (highlighting that “eugenic programs emerged to control the size of the Black population”).

30. *Id.*

31. Sinikka Elliott & Megan Reid, *Low-Income Black Mothers Parenting Adolescents in the Mass Incarceration Era: The Long Reach of Criminalization*, 84 AM. SOCIO. REV. 197, 200 (2019).

women may be perceived as more health-literate.<sup>32</sup> Negative biases against Black mothers have also shaped welfare law, triggered disparate prosecutions of pregnant Black women for using drugs, and supported differential treatment by the child welfare system.<sup>33</sup>

*B. Persistent, Unrelenting Disparities in Black Maternal Health*

Recent studies on the persistent disparities in maternal mortality and morbidity highlight the higher rates of chronic disease among Black women. Chronic diseases are more prevalent in U.S. women than for women in other high income countries.<sup>34</sup> Hypertensive disorders leading to preeclampsia/eclampsia have risen significantly in the past two decades.<sup>35</sup> The rate of preeclampsia/eclampsia among Black women is 60% higher than for White women.<sup>36</sup> Black women are also more likely to have worse outcomes, including progression to eclampsia and in some cases, death.<sup>37</sup> The CDC reports that the pregnancy related mortality rate (PRMR) for Black women is 2.8–3.3 times higher than for White women.<sup>38</sup>

Among all pregnant women with comorbid chronic conditions (such as diabetes, obesity, and hypertension) and mental health problems, Black women are at the greatest risk of severe morbidity.<sup>39</sup> In seeking reasons for higher rates of hypertension and preeclampsia/eclampsia among Black women in the U.S., some researchers have compared outcomes for U.S.-born Black mothers against foreign-born Black mothers.<sup>40</sup> One study found higher rates of hypertension

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32. Laura B. Attanasio & Rachel R. Hardeman, *Declined Care and Discrimination During the Childbirth Hospitalization*, 232 SOC. SCI. & MED. 270, 272, 275 (2019).

33. See generally DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* (Random House ed., 1997) [hereinafter ROBERTS II] (discussing how racial injustice targeting Black women bears on laws and policies which attempt to control Black women's reproduction and deny benefits to children born to poor Black women).

34. Roosa Tikkanen et al., *What Is the Status of Women's Health and Health Care in the U.S. Compared to Ten Other Countries?*, THE COMMONWEALTH FUND (Dec. 19, 2018), <https://www.commonwealthfund.org/publications/issue-briefs/2018/dec/womens-health-us-compared-ten-other-countries>.

35. Kathryn R. Fingar et al., *Delivery Hospitalizations Involving Preeclampsia and Eclampsia, 2005–2014*, AGENCY HEALTHCARE RES. & QUALITY, April 2017, at 2.

36. *Id.* at 2, 10.

37. *Id.*

38. Petersen et al., *supra* note 5, at 762.

39. See Lindsay K. Admon et al., *Racial and Ethnic Disparities in the Incidence of Severe Maternal Morbidity in the United States, 2012–2015*, 132 OBSTETRICS & GYNECOLOGY 1158, 1160, 1165, (2018) (explaining that there are high incidences of severe maternal morbidity among non-Hispanic Black women with comorbid conditions).

40. See generally Carla L. DeSisto et al., *Deconstructing a Disparity: Explaining Excess Preterm Birth Among U.S.-Born Black Women*, 28 ANNALS EPIDEMIOLOGY 225 (2018) (explaining a study comparing excess preterm birth rates between U.S.-born Black women and both foreign-born Black women and U.S.-born White women when one of the variables was hypertension); see generally Hui-Ju Tsai et al., *Differential Effects of Stress and African Ancestry on Preterm Birth and Related Traits Among*

among U.S.-born Black mothers who experienced pre-term birth, suggesting that the experience of living in the U.S. increases a Black mother's risks and supersedes genetic explanations.<sup>41</sup>

Black women are also more likely to experience maternal morbidities, including hemorrhage, infection, renal failure, acute myocardial infarction, and embolism, suggesting that quality of maternity care does play an important role in preventing poor outcomes.<sup>42</sup> Yet, higher rates of maternal mortality and morbidity are often blamed on Black women's behavior and underlying health conditions, theories of genetic differences, and/or lack of access to prenatal care.<sup>43</sup> Blaming individual Black mothers for exhibiting higher rates of chronic diseases such as obesity, diabetes, and hypertension obscures the unjust social, economic, and environmental conditions created by generational inequality (like, for instance, segregated neighborhoods with poor access to health care, healthy food options, employment opportunities, and safe schools for children).

Although still accepted in some circles, genetic differences as an explanation for racial disparities have been widely rejected by scientists and scholars,<sup>44</sup> who increasingly point to the ways in which genetic arguments have been employed since the time of slavery to justify systems of oppression.<sup>45</sup> While access to prenatal care does play a role, public health researchers have demonstrated that disparities persist across the socioeconomic spectrum: the CDC reports that a Black woman with a higher education is 1.6 times as likely to die a pregnancy-related death as a White woman with less than a high school diploma.<sup>46</sup>

Thus, Black mothers' poor health outcomes stem from a constellation of factors across the life course, generated by deeply rooted social inequality and racism that manifests most starkly in higher rates of maternal death, severe illness, higher rates of preterm birth, and infant mortality. Laws and policies, shaped by political and cultural assumptions and priorities, have laid the

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*US Born and Immigrant Black Mothers*, 96 *MED.*, no. 5, 2017 (discussing a study comparing preterm birth rates between U.S. born and immigrant Black women where a consideration was preeclampsia and eclampsia).

41. DeSisto et al., *supra* note 40, at 229.

42. See Admon et al., *supra* note 39, at 1159, 1162–64 (explaining that deliveries to Black women had higher incidences of morbidities).

43. See Owens & Fett, *supra* note 27, at 1343 (discussing that Black pregnant women's underlying health conditions and lack of prenatal care negatively affect pregnancy-related conditions and maternal mortality).

44. See Michael Yudell et al., *Taking Race Out of Human Genetics*, 351 *SCIENCE* 564, 564 (2016) (highlighting the need to stop using race as a variable in genetic research).

45. DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* 308 (2011) [hereinafter ROBERTS III] (“[R]econfiguration of race in genetic terms provides a mechanism for legitimating the oppressive politics of race.”).

46. Petersen et al., *supra* note 5, at 763.

groundwork for the disparate treatment of Black mothers in society. This disparate treatment is at the heart of Black maternal health disparities.

*C. The Effects of a Lifetime of Discrimination and Toxic Stress on Black Mothers' Health*

A wealth of recent research has detailed the role of toxic stress in causing and exacerbating chronic disease and mental illness.<sup>47</sup> A prolonged elevation of stress hormones, or “allostatic load,” weakens the immune system, increases cardiovascular disease, damages memory cells, and induces inflammation.<sup>48</sup> Chronic stress from social disadvantage may explain many socioeconomic health disparities.<sup>49</sup> The mean lifetime allostatic load score of Black women is significantly higher than the score for White women, regardless of age.<sup>50</sup> Greater exposure to childhood trauma and adversity also play a significant role. Black girls are more likely than other girls to live in poverty, to experience sexual violence, to have “acting-out” behavior criminalized, and to lack access to mental health treatment.<sup>51</sup> Studies on the role of adverse childhood experiences in adult health demonstrates that Black and Latinx children are more likely to experience adversity.<sup>52</sup> In particular, Black children are nearly three times as likely as White children to lose a parent, twice as likely to have a parent who is incarcerated, nearly twice as likely to witness violence in their neighborhood, and almost eight times as likely to experience unfair treatment due to their race.<sup>53</sup>

Researchers describe the effects of racism over the life course as “weathering,” which adversely affects long-term health and well-being.<sup>54</sup> Recent studies documenting Black women’s experiences underscore the prevalence of chronic stress in their physical and mental health:

In their day to day lives, [B]lack women are five times more likely than [W]hite women to report experiencing a headache, upset stomach, tensing of muscles, or a pounding heart because of how they were treated in society based on their race in the past month. Black women are also five times more likely to report emotional distress

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47. See generally Bruce S. McEwen, *Neurobiological and Systemic Effects of Chronic Stress*, 1 CHRONIC STRESS, 2017 (describing how stress can cause an imbalance in neural circuitry that, in turn, affects systemic physiology).

48. DONALD A. BARR, HEALTH DISPARITIES IN THE UNITED STATES 64, 68–69 (3d ed. 2019).

49. See *id.* at 64 (discussing research that suggests that chronic stress is a possible source for the poor health associated with a position of social disadvantage).

50. Arline T. Geronimus et al., “Weathering” and Age Patterns of Allostatic Load Scores Among Blacks and Whites in the United States, 96 AM. J. PUB. HEALTH 826, 830 (2006).

51. JUDITH WARNER, CTR. AM. PROGRESS, THE UNEQUAL TOLL OF TOXIC STRESS 2, 9 (2017), <https://www.americanprogress.org/issues/women/reports/2017/11/17/443028/unequal-toll-toxic-stress/>.

52. Natalie Slopen et al., *Racial Disparities in Child Adversity in the U.S.: Interactions with Family Immigration History and Income*, 50 AM. J. PREV. MED. 47, 52 (2016).

53. *Id.*

54. Geronimus et al., *supra* note 50, at 826.

because of how they were treated based on their race in the past month.<sup>55</sup>

The concept of weathering confronts centuries-old notions in the medical community that health disparities are the result of race-based genetic differences.<sup>56</sup> The stress research points to the complex interaction between social experience and biology.<sup>57</sup> The confluence of racism, gender discrimination, and social and economic inequality places Black women at the center of multiple stressors. For example, a recent study underscores the compounding factors of social adversity, experiences of discrimination, and poor sleep to explain higher rates of hypertension—a precursor to preeclampsia/eclampsia, and early death—in young Black women.<sup>58</sup> Another study found a higher prevalence of placenta pathology associated with inflammation among Black mothers, further suggesting that stress may be implicated in maternal health.<sup>59</sup>

Legal and policy responses to the Black maternal health crisis require confronting the ways in which Black women and girls have historically been and continue to be marginalized, the burden of the allostatic load that they carry, and their treatment by the medical and legal systems.

### III. THE HEALTH CARE SYSTEM: STRUCTURAL BARRIERS TO ACCESS TO QUALITY, ACCOUNTABLE HEALTH CARE

#### A. *The Role of Politics and Law in Undermining Access*

Lack of access to quality health care for Black mothers is directly attributable to the legacy of legalized racial discrimination in the U.S. Most notably, the Hill-Burton Act, passed in 1946, which authorized the use of federal funds to build new hospitals, allowed for the building of separate facilities for different populations, “if the plan makes equitable provision on the basis of need for facilities and services like quality for each such group.”<sup>60</sup> Political leaders knew that separate facilities for Black Americans would not provide equitable

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55. Danyelle Solomon, *Racism: The Evergreen Toxin Killing Black Mothers and Infants*, CTR. FOR AM. PROG. (April 18, 2018), [https://cdn.americanprogress.org/content/uploads/2018/04/18054703/BlackMaternalHealth-issuebrief1.pdf?\\_ga=2.114187015.1052389328.1633885164-1152023097.1632019947](https://cdn.americanprogress.org/content/uploads/2018/04/18054703/BlackMaternalHealth-issuebrief1.pdf?_ga=2.114187015.1052389328.1633885164-1152023097.1632019947).

56. See Roland J. Thorpe et al., *Accelerated Health Declines among African Americans in the USA*, 93 J. URBAN HEALTH: BULL. NY ACAD. OF MED. 808, 809 (2016) (discussing the effects of weathering among Black people likely to engage in high-effort coping).

57. *Id.* at 809.

58. Jewell Scott et al., *Social Adversity, Sleep Characteristics, and Elevated Blood Pressure Among Young Adult Black Females*, 4 HEALTH EQUITY 421, 427 (2020).

59. Nana Matoba et al., *Racial Differences in Placental Pathology Among Very Preterm Births*, 83 PLACENTA 37, 39 (2019).

60. Title VI, ch. 958 § 601, § 2, 60 Stat. 1041 (1946) (current version at 42 U.S.C. § 291).

access to quality care. This “separate but equal” approach to health care, like in the context of education, intentionally placed under-resourced, lower quality health facilities in segregated neighborhoods. This part of the law survived until 1963 when it was found unconstitutional by the U.S. Court of Appeals for the Fourth Circuit in *Simkins v. Moses H. Cone Memorial Hospital*; the Supreme Court denied certiorari in 1964.<sup>61</sup>

The Civil Rights Act of 1964 aimed to erase the ugly history of racial segregation in health care and prohibit discrimination. But protections afforded under Title VI of the Civil Rights Act, which prohibits discrimination on the basis of race, color or national origin by health care programs receiving federal funding, have proven to be toothless.<sup>62</sup> To demonstrate disparate treatment, an individual must show that there was intentional discrimination, which is often exceedingly difficult to prove.<sup>63</sup> Nonetheless, the regulations implementing Title VI also make “disparate impact,” a violation of the law; even if a health care provider or entity’s conduct is unintentional, it may be held accountable if its actions have a discriminatory impact on minority groups.<sup>64</sup>

However, in 2001, the U.S. Supreme Court severely limited an individual’s right to bring a discrimination claim by making the disparate impact provision enforceable only by the federal government, meaning that individuals may not sue a health care entity for discrimination unless they can demonstrate intent.<sup>65</sup> The Court’s decision accomplished two things: First, it cynically reinforced the idea that racism and discrimination in health care only occur in overt ways (such as a health care provider uttering a racial slur or refusing to provide treatment to a patient based on race), and second, it made a claim of disparate impact, for which intent cannot be proven, reliant on a government agency’s enforcement discretion.<sup>66</sup>

The history of segregation in health care, combined with the aforementioned enforcement difficulties, are foundational barriers to Black mothers’ abilities to access high quality health care. Coupled with legal barriers, U.S. health care policy’s failure to ensure universal access to health insurance coverage disproportionately harms Black mothers, who are more likely to be uninsured.

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61. 323 F.2d 959 (4th Cir. 1963) (cert denied).

62. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7.

63. *Title VI Legal Manual: Proving Discrimination – Intentional Discrimination*, U.S. DEPT. OF JUST., <https://www.justice.gov/crt/fcs/T6Manual6> (last visited Nov. 21, 2021).

64. *Id.*

65. DAYNA BOWEN MATTHEW, JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTH CARE 203–04 (2015).

66. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

*B. Barriers to Insurance Coverage*

While the Affordable Care Act (ACA) appreciably improved access to health insurance coverage for Black women, they still remain more likely than White women to be uninsured and are twice as likely to be Medicaid recipients.<sup>67</sup> Medicaid expansion is associated with a slight reduction in disparities in low birthweight and preterm births for African Americans and has improved access to postpartum care in expansion states.<sup>68</sup> However, Black Americans are more likely than any other group to fall into the coverage gap, living in states that have not expanded Medicaid.<sup>69</sup>

Medicaid now covers 66% of all births to Black women,<sup>70</sup> making its coverage rules indispensable for access to quality maternity care. Federal rules require that Medicaid cover maternal care for at least sixty days postpartum.<sup>71</sup> While new mothers in expansion states maintain a pathway to coverage, low-income women in non-expansion states are more likely to become uninsured after sixty days.<sup>72</sup> In 2018, 47% of new mothers who were uninsured reported that they lost Medicaid or their medical plan stopped after pregnancy.<sup>73</sup> Covered services vary by state, influencing access to supportive services, such as midwives, doula care, and home visiting, which have been shown to reduce disparities in outcomes.<sup>74</sup> Black communities have a long history of midwifery and community members supporting women during birth.<sup>75</sup> But these supports were severely undermined by the Sheppard-Towner Act of 1921, which enacted

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67. *Women's Health Insurance Coverage*, KAISER FAM. FOUND. (Jan. 12, 2021), <https://www.kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage/>.

68. *Id.*

69. Samantha Artiga et al., *Health Coverage by Race and Ethnicity, 2010-2019*, KAISER FAM. FOUND. (July 16, 2021), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/health-coverage-by-race-and-ethnicity/>.

70. MEDICAID AND CHIP PAYMENT AND ACCESS COMM'N (MACPAC), *MEDICAID'S ROLE IN FINANCING MATERNITY CARE* (January 2020), <https://www.macpac.gov/wp-content/uploads/2020/01/Medicaid%E2%80%99s-Role-in-Financing-Maternity-Care.pdf>.

71. See generally Usha Ranji et al., *Expanding Postpartum Medicaid Coverage*, KAISER FAM. FOUND. (Mar. 9, 2021), <https://www.kff.org/womens-health-policy/issue-brief/expanding-postpartum-medicoid-coverage/> (discussing the federal rules for Medicaid eligibility for pregnancy and postpartum care).

72. *Id.*

73. STACEY MCMORROW ET AL., *URB. INST, UNINSURED NEW MOTHERS' HEALTH AND HEALTH CARE CHALLENGES HIGHLIGHT THE BENEFITS OF INCREASING POSTPARTUM MEDICAID COVERAGE* 8 (2020), [https://www.urban.org/sites/default/files/publication/102296/uninsured-new-mothers-health-and-health-care-challenges-highlight-the-benefits-of-increasing-postpartum-medicoid-coverage\\_0.pdf](https://www.urban.org/sites/default/files/publication/102296/uninsured-new-mothers-health-and-health-care-challenges-highlight-the-benefits-of-increasing-postpartum-medicoid-coverage_0.pdf).

74. EVA H. ALLEN & SARAH BENATAR, *MATERNITY CARE FINANCING: CHALLENGES AND OPPORTUNITIES HIGHLIGHTED BY THE COVID-19 PANDEMIC* (Robert Wood Johnson Found., Oct. 2020), [https://www.urban.org/sites/default/files/publication/103127/maternity-care-financing-challenges-and-opportunities-highlighted-by-the-covid-19-pandemic\\_4.pdf](https://www.urban.org/sites/default/files/publication/103127/maternity-care-financing-challenges-and-opportunities-highlighted-by-the-covid-19-pandemic_4.pdf).

75. See generally Johana-Marie E. L. K. Williams, *The Midwife Problem: The Effect of the 1921 Sheppard-Towner Act on Black Midwives in Leon County, FL*. A.&M. UNIV., Feb. 2014 (describing the history of Black women using midwives to facilitate childbirth).

2022]

BLACK MOTHERS MATTER

61

onerous regulatory barriers, including education and licensure requirements that shifted power over births from mothers and communities to the medical establishment.<sup>76</sup>

Medicaid policy levers that have the potential to reduce maternal health disparities, especially for Black mothers, include: extending postpartum coverage to a full year; expanding benefits to include evidence-based supports, such as doulas, midwives, and home visiting; and implementing value-based payment models and managed care contracts that reward providers for reducing disparities in outcomes among racial and ethnic groups.<sup>77</sup> The American Rescue Plan, passed by the Congress and signed by President Biden on March 11, 2021, includes a new option for states to expand Medicaid eligibility from sixty days to twelve months postpartum through either a 1115 waiver or by using state funds.<sup>78</sup> States that exercise this option must also provide full Medicaid benefits to pregnant and postpartum women instead of the narrower scope of benefits previously required by Medicaid for pregnant women.<sup>79</sup>

While this state option opens the door to longer coverage, it is not a federal mandate and there is no guarantee that states will implement this change. Sustaining coverage after pregnancy (and beyond) will not only reduce maternal mortality and morbidity, but will also demonstrate that the U.S. values maternal health. Such a policy would move the country one step closer toward recognizing the worth and dignity of Black mothers who have long been devalued. As of January 6, 2022, waivers for five states have been approved, fifteen states have enacted legislation to seek a waiver, and two states have pending waivers.<sup>80</sup> The waivers vary by coverage period, eligible populations and/or benefits.<sup>81</sup>

Black mothers are increasingly seeking out prenatal care and birthing options where they feel valued and supported. COVID-19 and concerns about bias in hospitals have driven some Black women to use birthing centers, doulas, and midwives in their own communities.<sup>82</sup> But Medicaid coverage for doulas and midwives varies significantly by state. Only a few states currently cover doula

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76. *See id.* at 1 (highlighting how the decline in midwifery care in Florida affected Black women's self-care).

77. Priti Khanal, *Improving Maternal Health Outcomes: State Policy Actions and Opportunities*, CTR. FOR HEALTH CARE STRATEGIES (Mar. 5, 2021), <https://www.chcs.org/news/improving-maternal-health-outcomes-state-policy-actions-and-opportunities/>.

78. Usha Ranji et al., *Postpartum Coverage Extension in the American Rescue Plan Act of 2021*, KAISER FAM. FOUND. (Mar. 18, 2021), <https://www.kff.org/policy-watch/postpartum-coverage-extension-in-the-american-rescue-plan-act-of-2021/>.

79. *Id.*

80. *Medicaid Postpartum Coverage Extension Tracker*, KAISER FAM. FOUND. (last visited Jan. 6, 2022), <https://www.kff.org/medicaid/issue-brief/medicaid-postpartum-coverage-extension-tracker/>.

81. *Id.*

82. Alice Proujansky, *Why Black Women Are Rejecting Hospitals in Search of Better Births*, N.Y. TIMES (Mar. 11, 2021), <https://www.nytimes.com/2021/03/11/nyregion/birth-centers-new-jersey.html>.

services or have passed legislation to do so.<sup>83</sup> Even in those states, however, low reimbursement rates and training, registration, and credentialing requirements create obstacles for many women of color.<sup>84</sup> While in all 50 states, certified nurse midwives (CNMs) may practice in hospitals and are covered by Medicaid coverage, community-based midwives who practice in homes and birthing centers are subject to regulatory hurdles such as scope of practice rules, including requirements that they work under physician-supervision.<sup>85</sup> These legal barriers serve to not only disempower Black mothers in their own birth experiences, but also to deepen their alienation from a health care system that, for decades, has dismissed their voices. Yet, there is evidence that doulas improve outcomes and convey a return on investment to states by reducing preterm birth and cesarean rates.<sup>86</sup>

*C. Quality Care: The Roles of Institutional and Health Care Provider  
Racism*

Of course, access to health insurance does not guarantee access to quality care. The legacy of segregated hospitals, further perpetuated by the history of the Hill-Burton Act,<sup>87</sup> is that Black women are more likely to live in segregated communities with poor-performing hospitals. One study of obstetric care found that hospitals that primarily serve Black patients performed worse on twelve of fifteen quality indicators for delivery-related care than predominantly Hispanic and White-serving hospitals.<sup>88</sup> Additionally, hospitals with maternity wards in low-income Black neighborhoods have been closing their doors amid the pandemic, making access to care even more challenging.<sup>89</sup> Nevertheless, while they are under-resourced, community hospitals in Black neighborhoods tend to

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83. See Cara B. Safon et al., *Doula Care Saves Lives, Improves Equity, And Empowers Mothers. State Medicaid Programs Should Pay For It*, HEALTH AFFS. (May 26, 2021), <https://www.healthaffairs.org/doi/10.1377/hblog20210525.295915/full/> (identifying four state Medicaid programs that cover doula services—namely, New Jersey, Oregon, Indiana, and Minnesota—and 21 other states that are considering including doula services as a Medicaid benefit).

84. *Id.*

85. Nora Ellman, *Community Based Doulas and Midwives: Key to Addressing the U.S. Maternal Health Crisis*, CTR. FOR AM. PROG. (Apr. 14, 2020, 9:08 AM), <https://www.americanprogress.org/issues/women/reports/2020/04/14/483114/community-based-doulas-midwives/>.

86. K. B. Kozhimannil et al., *Modeling the Cost-Effectiveness of Doula Care Associated with Reductions in Preterm Birth and Cesarean Delivery*, 43 BIRTH 20, 26 (2016).

87. Hill-Burton Act, 42 U.S.C. §§ 291–291o (1976).

88. A. A. Creanga et al., *Performance of Racial and Ethnic Minority-Serving Hospitals on Delivery-Related Indicators*, 211 AM. J. OBSTETRICS & GYNECOLOGY 647, e5 (Dec. 2014).

89. Kelly Glass, *When Maternity Wards in Black Neighborhoods Disappear*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/parenting/coronavirus-black-maternal-mortality.html>.

employ more Black providers, where women are less likely to encounter racial bias.<sup>90</sup>

Some studies suggest that racial and gender concordance between patients and providers improves patient experiences.<sup>91</sup> A 2020 study by Brad Greenwood, Rachel Hardeman and colleagues found that racial concordance between Black newborns and their physicians significantly reduces infant mortality, effectively cutting the Black infant “mortality penalty” in half.<sup>92</sup> Yet, Black physicians make up only 5% of the workforce, while Black Americans make up 13% of the overall population in the U.S.<sup>93</sup> Systemic barriers to educational opportunity and entrance into the medical profession continue to perpetuate the underrepresentation of Black Americans in medicine.<sup>94</sup>

As described earlier, long held stereotypes about Black women, especially Black mothers, translates into an insensitive medical system that labels them non-compliant or difficult, further alienating them from their providers and putting their health at risk. Though explicit bias exists, scholars suggest that implicit anti-Black biases in health care are more prevalent and pernicious in causing harm:

The empirical evidence that race and ethnicity influence physicians to make harmful distinctions in how they treat and interact with [W]hite patients versus patients of color is overwhelming . . . Physicians’ implicit biases lead to unintentional and in some cases, unconscious discrimination. The resulting biased behavior may directly contradict the physician’s sincerely held, explicit beliefs and intentions to provide excellent care to all patients regardless of their race or ethnicity.<sup>95</sup>

When gender and racial stereotypes converge, the experience of provider bias may lead to avoidance of care. A 2017 poll found that 22% of Black women said they avoided going to the doctor due to a concern that they would be

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90. See generally *id.* (concerning the impact of the loss of maternity wards in Black neighborhoods).

91. E.g., Junko Takeshita et al., *Association of Racial/Ethnic and Gender Concordance Between Patients and Physicians with Patient Experience Ratings*, 3 JAMA NETWORK OPEN, no. 11, Nov. 2020, at 1, 1–2, <https://doi.org/10.1001/jamanetworkopen.2020.24583>.

92. Brad N. Greenwood & Rachel Hardeman., *Physician–Patient Racial Concordance and Disparities in Birthing Mortality for Newborns*, 117 PNAS 21194–95 (Sep. 1, 2020).

93. *Diversity in Medicine: Facts and Figures 2019*, ASS’N AM. MED. COLLS. (2019), <https://www.aamc.org/data-reports/workforce/report/diversity-medicine-facts-and-figures-2019>; see also Vijaya Rao & Glenn Flores, *Why Aren’t There More African-American Physicians? A Qualitative Study and Exploratory Inquiry of African-American Students’ Perspectives on Careers in Medicine*, 99 J. NAT’L. MED. ASS’N 986, 988–89 (Sept. 2007), <https://pubmed.ncbi.nlm.nih.gov/17913107> (discussing financial constraints, insufficient exposure, and lack of encouragement, role models and peer pressure leading to underrepresentation among Black Americans in the physician workforce).

94. See *Addressing the Challenges to a Diverse Physician Workforce*, ASSOCIATED MED. SCHS. N. Y., Feb. 2020, at 1 (identifying the barriers that underrepresented medical students face as they pursue careers in medicine); Rao & Flores, *supra* note 93.

95. MATTHEW, *supra* note 65, at 39.

discriminated against because they are women; 22% of Black Americans said they avoided care due to concern about racial discrimination.<sup>96</sup> Implicit biases related to maternity care for Black women are especially important in provider-patient encounters due to the long history of stereotyping, dismissing, and devaluing Black mothers. A 2018 research study, *Listening to Mothers*, found that Black women were more likely than White and Latinx women to claim discrimination during maternity care and birthing experiences.<sup>97</sup> Many Black women also report being disbelieved when they are in pain.<sup>98</sup> A 2018 study found that Black and Hispanic women are less likely to receive opioid pain medication post-partum than are White women.<sup>99</sup> Pervasive bias in health care may lead some providers to dismiss legitimate symptoms and concerns, affecting treatment, causing trauma, and disempowering Black women at a crucial moment in their lives. This treatment is a form of institutional discrimination which is “perpetuated through policies and practices that unwittingly reproduce dynamics of inclusion and exclusion, or exploitation and privilege.”<sup>100</sup>

#### D. Accountability: Confronting Racial and Gender Discrimination

Greater attention to racial health disparities and to systemic racism in law enforcement has generated calls for health care providers to undergo implicit bias and antiracism training.<sup>101</sup> Some medical schools have adopted anti-bias curricula.<sup>102</sup> To have real impact, though, “the trainings should also be substantive, process-oriented and ongoing, as opposed to a ‘check-the-box’ training that is fulfilled once in the continuum of a person’s career in health care.”<sup>103</sup> Furthermore, training and education should include specific discussion

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96. DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF AMERICAN WOMEN; DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF AFRICAN AMERICANS 1 (Robert Wood Johnson Found., Nat’l Pub. Radio & Harvard T.H. Chan School of Pub. Health 12, Dec. 2017).

97. Carol Sakala, et. al, *Listening to Mothers in California: A Population-Based Survey of Women’s Childbearing Experiences*, NAT’L P’SHIP FOR WOMEN AND FAMS. (September 2018), <https://www.chcf.org/wp-content/uploads/2018/09/ListeningMothersCAFullSurveyReport2018.pdf>.

98. Jennifer M. Haley & Sarah Benatar, *Improving Patient and Provider Experiences to Advance Maternal Health Equity*, URBAN INST., Oct. 2020, at 2.

99. Nevert Badreldin et al., *Racial Disparities in Postpartum Pain Management*, 134 OBSTETRICS & GYNECOLOGY 1147, 1150–51 (2019).

100. Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 785 (2020).

101. See Amy J. Zeidan et. al., *Implicit Bias Education and Emergency Medicine Training: Step One? Awareness*, 3 AEM EDUC. & TRAINING 81, 82 (Jan. 2019) (explaining that there is still a lack of progress in implicit bias training among healthcare professionals).

102. Swapna Reddy et al., *Implicit Bias Curricula in Medical School: Student and Faculty Perspectives*, HEALTH AFFS (Jan. 15, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200110.360375/full/>.

103. Jamila K. Taylor, *Structural Racism and Maternal Health Among Black Women*, 48 J.L. MED. & ETHICS 506, 514 (2020).

of the historical treatment and stereotyping of Black mothers in medicine as well as emphasis on shared decision-making.

However, training, even if effective, will take time to change medical culture. There must be accountability for current providers and systems since health care providers are increasingly employed by hospitals or large health care systems. This presents an opportunity for lawmakers to hold systems accountable for individual and systemic discriminatory treatment that leads to racially disparate outcomes.<sup>104</sup> Accountability requires health systems to collect and publicize relevant data by race, and create actionable enforcement for standards of acceptable conduct. In many communities, existing data—collected by providers, health care systems, health departments, and payers—on maternal health outcomes is not sufficiently disaggregated by race and ethnicity to inform changes in policy and practice.<sup>105</sup> Doing so requires cross sector collaboration.<sup>106</sup>

Insufficient data also makes it more difficult for individuals and government agencies to detect and demonstrate the disparate impact of health systems' policies and practices on Black mothers. Experiences of discrimination in the health care system have been independently reported through surveys, but most health care systems do not ask questions in patient satisfaction questionnaires about these experiences.<sup>107</sup> Routinely collecting this information, linking it to federal quality metrics and/or value-based payment mechanisms, and requiring transparency to the public will help to incentivize hospitals and health care systems to change their practices.<sup>108</sup>

As discussed earlier, Title VI, which is intended to protect patients from racial discrimination, no longer affords individuals the right to sue unless they can demonstrate that the discrimination was intentional. For Title VI to address subtle forms of discrimination, it must be amended to restore the individual right to sue for disparate impact.<sup>109</sup> As Professor Dayna Matthew argues, merely focusing on individual provider-to-patient discrimination conceals how health inequity is “determined by systemic ways in which powerful health institutions, including providers, insurers, and the state, interact with groups of underclass

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104. See e.g., Sarah Benatar & Kimá Joy Taylor, *The Pandemic Has Increased Demand for Data and Accountability to Decrease Maternal Health Inequity* (Robert Wood Johnson Foundation, November 2020), <https://www.urban.org/research/publication/pandemic-has-increased-demand-data-and-accountability-decrease-maternal-health-inequity> (explaining that after viewing the maternal health outcome data, California developed a Birth Equity Collaborative to promote implicit bias training).

105. *Id.*

106. *Id.*

107. See Paige Nong et al., *Patient-Reported Experiences of Discrimination in the US Health Care System*, 3 JAMA NETWORK OPEN, Dec. 15, 2020, at 2 (describing a survey that collected data on patient discrimination in the health care system).

108. Sara N. Bleich et al., *Addressing Racial Discrimination in US Health Care Today*, 2 JAMA HEALTH F., no. 3, Mar. 2021, at 1, 1.

109. See *supra* text accompanying notes 63–65.

patients as populations, not merely as individuals.”<sup>110</sup> Accountability for interpersonal and systemic discrimination is crucial to restoring the dignity and voice of Black mothers who are often disempowered in their encounters with the health care system.

In addition to holding health care systems accountable, states, which play a large role in health care policy and implementation through Medicaid programs should also be held accountable for Black maternal health disparities. The Center for Health Care Strategies and the Commonwealth Fund have begun tracking state maternal health policies across three domains: (1) coverage and benefits, (2) care delivery transformation, and (3) data oversight (including whether the state collects race-stratified data).<sup>111</sup> Comparing state maternal health laws and policies may help to hold state policymakers more accountable for Black maternal health disparities.

#### IV. THE MULTIPLE, COMPOUNDING STRESSORS AFFECTING BLACK MATERNAL HEALTH ACROSS THE LIFESPAN

Most of the current policy discussion about Black maternal mortality and morbidity focuses on expanding access to insurance during the perinatal period and improving access to quality health care.<sup>112</sup> While access to quality pre- and post-natal care is critically important to reducing maternal mortality and morbidity, it will not alone bridge the racial gap in outcomes. In fact, by the time of their first prenatal visit, the impact of a lifetime of racism- and sexism-related stressors predisposes many Black women to preeclampsia/eclampsia and other pregnancy complications.<sup>113</sup> Political discourse and decision-making that is undergirded by racist and gender-based stereotypes perpetuate indifference to Black mothers’ experiences of bias and discrimination. Indeed, facially neutral antidiscrimination laws frequently offer little protection to Black women in their interactions with employers and government officials. Below I describe how discriminatory and stress-inducing interactions with government systems, as well as day-to-day encounters, contribute to poor health across the life course for Black women, especially mothers.

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110. MATTHEW, *supra* note 65, at 229.

111. *State Policies to Improve Maternal Health Outcomes*, THE COMMONWEALTH FUND (Nov. 2020), [https://www.commonwealthfund.org/sites/default/files/2021-03/State\\_Policies\\_Maternal\\_Health\\_Outcomes\\_Comparison\\_TABLE\\_030821.pdf](https://www.commonwealthfund.org/sites/default/files/2021-03/State_Policies_Maternal_Health_Outcomes_Comparison_TABLE_030821.pdf).

112. *See e.g.*, Priti Khanal, Tricia McGinnis, & Laurie Zephyr, *Tracking State Policies to Improve Maternal Health Outcomes*, THE COMMONWEALTH FUND (Nov. 19, 2020), <https://www.commonwealthfund.org/blog/2020/tracking-state-policies-improve-maternal-health-outcomes> (discussing an overview of the state maternal health policies).

113. Mary E. Coussons-Read, *Effects of prenatal stress on pregnancy and human development: mechanisms and pathways*, 6 OBSTETRIC MED. 52, 55 (2013) (“Increasing data suggest that racial stress is a contributor to the persistently higher rates of LBW, infant mortality and small for gestational age infants observed in African American women compared with [W]hite women.”).

*A. Work: Employment Discrimination and Chronic Stress*

Among American women, Black women have had the longest history of labor market participation whether single, married or mothers.<sup>114</sup> Since slavery, Black women have often been viewed as laborers for whom maternal responsibilities are secondary.<sup>115</sup> Through most of American history, Black women served as caretakers for White families.<sup>116</sup> Due to racial discrimination, Black women were excluded until the 1960s from government support for low-income families, including the Aid to Families with Dependent Children Program.<sup>117</sup> Black mothers were scapegoated during the welfare reform era of the late 1980s and early 1990s as “welfare queens,” who were portrayed as unwilling to work, and as leaching off the government while having babies only to increase the size their welfare checks.<sup>118</sup> White women were generally viewed as better mothers if they took time to stay at home with their children, while Black women were seen as lazy and selfish when unemployed.<sup>119</sup> Work requirements included in the Personal Responsibility and Work Opportunity Act of 1993, the major overhaul of the U.S. welfare system, was not inconspicuously targeted at stereotyped and undervalued Black mothers.<sup>120</sup>

Black mothers continue to experience employment discrimination, regardless of their socioeconomic status. Nearly 29% of all pregnancy discrimination claims filed between 2011 and 2015 were brought by Black women, even though they make up only 14% of childbearing-aged workers.<sup>121</sup> Fifty percent of Black women report having experienced discrimination in how they are paid or considered for promotions based on their gender, while 57% of

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114. Nina Banks, *Black Women's Labor Market History Reveals Deep-Seated Race and Gender Discrimination*, ECON. POL. INST.: WORKING ECON. (Feb. 19, 2019, 2:11 PM), <https://www.epi.org/blog/black-womens-labor-market-history-reveals-deep-seated-race-and-gender-discrimination/>.

115. *Id.*

116. *Id.*

117. *Id.*

118. See Xandi McMahon, *The Non-Consensual Identity Politics of the “Welfare Queen,”* COMPASS: THE GALLATIN RSCH. J. (Nov. 13, 2018), <https://wp.nyu.edu/compass/2018/11/13/the-non-consensual-identity-politics-of-the-welfare-queen/> (noting that during the Reagan era, welfare was politicized as a “Black problem” even though welfare went to predominantly White women).

119. *Id.*

120. *Major Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193)*, U.S. Dep’t of Health & Hum. Servs. (Dec. 16, 1996), <https://www.acf.hhs.gov/ofa/policy-guidance/major-provisions-welfare-law>.

121. *By the Numbers: Women Continue to Face Pregnancy Discrimination in the Workplace*, NAT’L. P’SHIP. FOR WOMEN & FAMS., Oct. 2016, at 3, <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/by-the-numbers-womencontinue-to-face-pregnancy-discrimination-in-the-workplace.pdf>.

Black Americans report this type of employment discrimination based on their race.<sup>122</sup>

Although the pay gap for Black women has narrowed over time, it remains significant: in 1967, the average Black woman made forty-three cents to every dollar made by a White man; today she makes sixty-seven cents.<sup>123</sup> This wide gap has serious economic consequences for Black mothers and their families. Because 68% of Black women are their families' breadwinner (compared with 36.8% of White women and 41% of Latinx women),<sup>124</sup> differential pay may take a substantial toll on family health and well-being.

Employment discrimination and structural racism have diverted Black women into low-wage jobs, most often service sector jobs such as waitressing, cleaning, childcare, and home health care, significantly affecting Black women's health.<sup>125</sup> Black women are less likely to have access to health insurance, paid family leave, or sick leave.<sup>126</sup> Although nine states offer some type of paid family and medical leave,<sup>127</sup> the only federally protected leave available to American workers comes through the Family and Medical Leave Act of 1993 (FMLA). FMLA provides only unpaid leave, limits its protections to those who work for

122. DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF AMERICAN WOMEN; DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF AFRICAN AMERICANS, *supra* note 96, at 1. It is important to note that these polls asked Black women to distinguish between perceived discrimination based on gender or based on race. *Id.* at 9. This either/or approach undermines the intersectional experiences of Black women who may encounter unjust treatment based on some combination of race, gender, class and/or LGBT status. *Id.*

123. Ruqaiijah Yearby, *The Impact of Structural Racism in Employment and Wages on Minority Women's Health*, 43 ABA HUM. RIGHTS MAG., no. 3, 2018, at 1, 22, [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-state-of-healthcare-in-the-united-states/state-of-healthcare/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/state-of-healthcare/) [hereinafter *Yearby I*].

124. Sarah Jane Glynn, *Breadwinning Mothers Continue to be the U.S. Norm*, CTR. FOR AM. PROG. (May 10, 2019, 5:17 PM), <https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm/>. *Fact Sheet*, NAT'L P'SHIP FOR WOMEN (Mar. 2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/african-american-women-wage-gap.pdf> (“[I]f the wage gap were eliminated, on average, a Black woman working full time, year-round would have enough money for... 156 more weeks of food for her family (three years' worth)...and twenty-two more months of rent.”).

125. *Yearby I*, *supra* note 123, at 22.

126. See Ruqaiijah Yearby, *Protecting Workers that Provide Essential Services*, PUB.HEALTH L. WATCH, Aug. 2020, at 193, [https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f445e5ca7b21825e9add2b3/1598316124697/Chp26\\_COVIDPolicyPlaybook-Aug2020.pdf](https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f445e5ca7b21825e9add2b3/1598316124697/Chp26_COVIDPolicyPlaybook-Aug2020.pdf) [hereinafter *Yearby II*] (explaining that as the COVID-19 pandemic has illuminated, women, particularly Black women, are more likely to be “essential workers”). Women make up 76% of workers in health care and food agriculture. *Id.* The pandemic has exposed the enormous disparities between workers who have the option to work from home (and simultaneously care for their children when schools closed) and those workers in jobs that have failed to provide protection from the virus and that carry few benefits. *Id.*

127. *Paid Family and Sick Leave in the U.S.*, KAISER FAM. FOUND. (Dec. 14, 2020), [https://www.kff.org/womens-health-policy/fact-sheet/paid-family-leave-and-sick-days-in-the-u-s./](https://www.kff.org/womens-health-policy/fact-sheet/paid-family-leave-and-sick-days-in-the-u-s/).

large employers, and excludes part-time workers.<sup>128</sup> The huge gap in access to paid leave for American workers, especially those in low wage jobs, is acute for Black mothers.<sup>129</sup> Fewer than one third are “both eligible for and able to afford to take unpaid leave under the federal Family and Medical Leave Act. ...[They] are more likely to quit and/or be fired from their jobs after giving birth than [W]hite women, or return to work before they are healthy enough to do so.”<sup>130</sup>

As medical and public health researchers continue to study the physiological and psychological impacts of chronic stress, the toll on mothers, especially single mothers, in managing work-family conflict requires further exploration.<sup>131</sup> Work-family conflict and stress have lifelong health implications for Black mothers, who are more likely to be single mothers working low-wage jobs, are more often subject to employment discrimination, and are less likely to have access to paid sick time, paid family leave, and health insurance.<sup>132</sup> Failure to protect Black women from gender- and race-based employment discrimination, compounded by policymakers’ refusal to expand support, continues to relegate Black women to the lower rung of society and contributes to the unrelenting health disparities that lead to their lifelong disabilities and early deaths.<sup>133</sup>

Like Title VI of the Civil Rights Act, which has been watered down by court decisions rendering it toothless,<sup>134</sup> Title VII—which makes it illegal for an employer to discriminate based on race, color, religion, sex, or national origin—also presents significant barriers to successful claims by Black women alleging

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128. *Fact Sheet #28: The Family and Medical Leave Act*, U.S. DEPT. OF LABOR, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28.pdf>.

129. *Paid Family and Medical Leave: A Racial Justice Issue and Opportunity*, NAT’L P’SHIP FOR WOMEN AND FAMS., Apr. 2018, at 1, <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/paid-family-and-medical-leave-racial-justice-issue-and-opportunity.pdf>.

130. *Black Women’s Maternal Health: A Multifaceted Approach to Addressing Persistent and Dire Health Disparities*, NAT’L P’SHIP FOR WOMEN AND FAMS., Apr. 2018, at 4, <https://www.nationalpartnership.org/our-work/resources/health-care/maternity/black-womens-maternal-health-issue-brief.pdf>.

131. Laura Wheeler Poms et. al., *Work–Family Conflict, Stress, and Physical and Mental Health: A Model for Understanding Barriers to and Opportunities for Women’s Well-Being at Home and in the Workplace*, 8 WORLD MED. & HEALTH POL. 444, 445 (2016).

132. Jocelyn Frye, *Valuing Black Women’s Work*, CTR. FOR AMER. PROG. (Aug. 7, 2018), <https://www.americanprogress.org/issues/women/news/2018/08/07/454508/valuing-black-womens-work/>; see also Banks, *supra* note 114.

133. See Jamila Taylor, *Racism, Inequality, and Health Care for African Americans*, THE CENTURY FOUND. (Dec. 19, 2019), <https://tcf.org/content/report/racism-inequality-health-care-african-americans/?session=1> (examining how racism and the lack of health care coverage for Black Americans has led to higher rates of infirmity and lower life expectancy in the Black population).

134. *Title VI, Civil Rights Act of 1964*, U.S. DEP’T OF LABOR, <https://www.dol.gov/agencies/oasam/regulatory/statutes/title-vi-civil-rights-act-of-1964> (last visited Nov. 28, 2021).

employment discrimination.<sup>135</sup> Most significantly, courts generally require that an employee alleging discrimination do so under one protected status instead of a combination of protected categories.<sup>136</sup> Kimberly Crenshaw first coined the term “intersectionality” more than twenty years ago to explain the legal “Catch 22” experienced by Black women alleging discrimination.<sup>137</sup> Rather than acknowledging that Black women carry more than one identity affecting their status in society, they are boxed into choosing one over another. For example, Black women must choose between race *or* gender discrimination.<sup>138</sup>

Legal scholars who study Title VII cases have found that women of color are less likely to win their cases than other protected groups; those who bring intersectional claims are only 50% as likely to succeed as other groups.<sup>139</sup> Some courts have been willing to apply an intersectional approach. For example, the Federal District Court in *Jeffers v. Thompson* allowed a Black woman to sue based on both race and gender, acknowledging that Black women face unique stereotypes and biases different from those faced by Black men or White women.<sup>140</sup> However, the court still applied a “sex-plus” analysis which privileged gender over race, thus failing to fully embrace the complex dynamics between gender and race.<sup>141</sup> Most courts have not entertained an intersectional approach at all.<sup>142</sup> Courts’ failure to recognize the intersectional experiences of Black women reinforces their marginalization, further exacerbating the stress generated by the inability to remedy injustice.

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135. *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964> (last visited Nov. 28, 2021).

136. *Title VI Legal Manual: Identifying the Protected Class*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/fcs/T6Manual7#H> (last visited Nov. 28, 2021).

137. See Kimberlé Crenshaw on *Intersectionality, More than Two Decades Later*, COLUM. L. SCH. (June 8, 2017), <https://www.law.columbia.edu/news/archive/kimberle-crenshaw-intersectionality-more-two-decades-later>. Crenshaw explains that “[i]ntersectionality is a lens through which you can see where power comes and collides, where it interlocks and intersects. It’s not simply that there’s a race problem here, a gender problem here, and a class or LGBTQ problem there. Many times that framework erases what happens to people who are subject to all of these things...If someone is trying to think about how to explain to the courts why they should not dismiss a case made by [B]lack women, just because the employer did hire [B]lacks who were men and women who were [W]hite, well, that’s what the tool was designed to do.” *Id.*

138. *Id.*

139. Yvette N. A. Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 U. PENN. J.L. & SOC’L CHANGE 1, 9 (2019); see also Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. CHICAGO L. F. 139 (1989).

140. *Jeffers v. Thompson*, 264 F. Supp. 2d 314, 326 (D. Md. 2003).

141. See *id.* at 326 (analyzing the presence of gender discrimination before considering the presence of racial discrimination).

142. See generally Pappoe, *supra* note 139, at 22 (arguing that this barrier for women of color could be addressed by a Supreme Court decision that resolves the split in court decisions, providing an intersectional framework for courts to apply).

Compounding workplace discrimination are the wholly inadequate employment protections and supports for parents, especially mothers.<sup>143</sup> Universal policies that support work-family balance and reduce stress for all workers will disproportionately benefit Black mothers and their children. In this case, “targeted universalism,” an equity framework that “provides benefit to both the dominant and the marginal groups but pays particular attention to the situation of the marginal group,” is appropriate.<sup>144</sup> Policymakers often consider legislation on employment, public benefits, and health care in siloes without appreciation for the interrelationships among employment discrimination, work and family supports, and individual and public health inequities, such as maternal health. Indeed, understanding these relationships is the only way the U.S. may begin to chip away at Black maternal health disparities.

*B. Too Many Ways to Lose a Child: Infant Mortality, the Carceral State and the Child Welfare System*

In *Beloved*, Nobel prize winning novelist, Toni Morrison, portrayed the brutality of the slave master’s control over slave mothers’ children: “What she called the nastiness in life was the shock she received upon learning that nobody stopped playing checkers just because the pieces included her children.”<sup>145</sup> Black mothers’ lack of control over their reproduction and their children’s well-being has morphed over time but continues to be a source of disempowerment and grief for many. During the time of slavery, Black mothers’ children were routinely taken from them. During Jim Crow and beyond, some Black mothers were forcibly sterilized and thus robbed of the ability to determine whether and when to have children.<sup>146</sup> Today, Black mothers are disproportionately likely to have an infant die at birth or within the first year of life, to lose a child through removal by the child protection system (CPS), or to experience loss of an adolescent or adult child to the carceral state (i.e., to prison or to death at the hands of the police).<sup>147</sup> Black mothers are also more likely than other mothers to experience

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143. As the only country among 41 countries studied by the Organization for Economic Cooperation and Development (OECD) that offers no paid parental leave, no mandated sick leave, and of course, does not have universal access to health care, U.S. policy is harmful to the health of all workers. See Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RSCH. CTR. (Dec. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/>. But these policy failures disproportionately burden women of color, especially Black mothers. *Id.*

144. John A. Powell, *Poverty and Race Through a Belongingness Lens*, 5 POL’Y MATTERS 2, 20 (Mar. 2012), [https://www.law.berkeley.edu/files/PolicyMatters\\_powell\\_V4.pdf](https://www.law.berkeley.edu/files/PolicyMatters_powell_V4.pdf).

145. TONI MORRISON, *BELLOVED* 27 (New American Library, 1988).

146. See *supra* 7.

147. See *Child Welfare Practice to Address Racial Disproportionality and Disparity*, CHILD’S BUREAU (Apr. 2021), [https://www.childwelfare.gov/pubpdfs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf) (noting that Black families are overrepresented in reports to CPS); Gabriel L. Schwartz & Jaquelyn L. Jahn, *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities 2013-*

the premature death of their children from gun violence in depressed urban communities, where there is a long history of social inequality.<sup>148</sup>

Black mothers' loss of their children, whether by death or through state action, is a devastation that has, until recently, been met with indifference. The Black-White gap in infant mortality, which has persisted for decades, is beginning to garner more attention, particularly as research on preterm births<sup>149</sup> and infant mortality<sup>150</sup> have shown that disparities persist even when controlling for socioeconomic status. Black women who are immigrants are less likely to experience infant loss than Black women born in America. Researchers posit that allostatic load and weathering likely explain these persisting disparities.<sup>151</sup> Indeed, fetal death related to maternal preconception health is higher for Black women than White women, further suggesting that a lifetime of stress may make Black mothers more susceptible to poorer outcomes.<sup>152</sup>

While disparities in infant mortality have gained more consideration in recent years, less attention has been paid to the multiple ways in which Black mothers are likely to lose their children and the toll that this experience takes on their physical and mental health.<sup>153</sup> Furthermore, grief is not limited to the individual mother who has lost a child; it may affect the whole community.<sup>154</sup> As Rochaun Meadows-Fernandez expresses in her article entitled, *The Grief of Black Mothers*: "When one of us loses a child, all of us feel that hurt; vicarious trauma is an integral aspect of Black motherhood."<sup>155</sup> The disproportionate loss of life in Black communities from COVID-19 has only exacerbated this communal grief.

The vicarious trauma caused by the carceral state has community-wide health impacts on Black Americans. While just over 13% of the U.S. population is Black, 28% of people killed by police in 2020 were Black.<sup>156</sup> Furthermore, studies have shown that increased police surveillance in minority communities

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2017, HARV. T.H. CHAN SCHOOL OF PUB. HEALTH (June 24, 2020) (explaining that Black people were 3.23 times more likely to be killed during police contact compared to White people).

148. Ruby Mendenhall, *The Medicalization of Poverty in the Lives of Low-Income Black Mothers and Children*, 46 J. L. MED. ETHICS 644, 645 (2018).

149. Paula A. Braveman et al., *The Role of Socioeconomic Factors in Black-White Disparities in Preterm Birth*, 105 AM. J. PUB. HEALTH 694, 694 (2015).

150. Collins & David, *supra* note 6.

151. Geronimus et al, *supra* note 50, at 826.

152. Petersen et al., *supra* note 5, at 764.

153. A. Rochaun Meadows-Fernandez, *The Unbearable Grief of Black Mothers*, VOX (May 28, 2020, 11:00 AM), <https://www.vox.com/first-person/2020/5/28/21272380/black-mothers-grief-sadness-covid-19>.

154. *See id.* (highlighting the vicarious trauma Black mothers feel from the loss of children).

155. *See id.* (noting the disproportionate loss of life in Black communities from COVID-19 has only exacerbated this communal grief).

156. Samuel Sinyangwe, *Police Violence Map*, MAPPING POLICE VIOLENCE (Sept. 7, 2021), <https://mappingpoliceviolence.org/>.

is correlated with adverse health outcomes such as high blood pressure and diabetes,<sup>157</sup> and that there are spillover effects of police killings for the mental health of Black Americans but not for White Americans.<sup>158</sup> Black mothers and children are particularly at risk of harm from this trauma. A 2021 study in California found that exposure to fatal police violence increased the risk of pre-term birth.<sup>159</sup> The authors of this study note that acute stress from police violence, combined with higher levels of chronic stress among Black women, may explain this linkage:

Evidence suggests that the physiologic impacts of acute stressors may vary based on chronic stress levels; therefore, given the potential for both greater potency of fatal police violence as a stressor and higher chronic stress levels for Black people, there may be differential impacts of police violence by race/ethnicity.<sup>160</sup>

Black mothers also disproportionately experience the loss of their children to the child welfare and carceral systems.<sup>161</sup> Roughly one quarter of children in foster care are Black,<sup>162</sup> while less than 15% of U.S. children are Black.<sup>163</sup> Black children are likely to be removed from their mother's care based on charges of neglect associated with poverty and structural inequality,<sup>164</sup> while White families reported to authorities for abuse or neglect are more likely to be offered services in the home, even when the children may be at greater risk of physical harm.<sup>165</sup>

157. Abigail A. Sewell & Kevin A. Jefferson, *Collateral Damage: The Health Effects of Invasive Police Encounters in New York City*, 93 J. URB. HEALTH (SUPP. 1) 542, 548 (2016).

158. Jacob Bor et al., *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 LANCET 302, 308 (2018).

159. Dana E. Goin et al., *Occurrence of Fatal Police Violence During Pregnancy and Hazard of Preterm Birth in California*, 35 PAEDIATRIC & PERINATAL EPIDEMIOLOGY 469 (2021).

160. *Id.*

161. Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1477 (2012) [hereinafter *Roberts IV*].

162. CHILD WELFARE INFORMATION GATEWAY, FOSTER CARE STATISTICS 2019, at 9 (2021), <https://www.childwelfare.gov/pubs/factsheets/foster/>.

163. THE ANNE E. CASEY FOUND., *Child Population by Race in the United States*, KIDS COUNT DATA CTR., <https://datacenter.kidscount.org/data/tables/103-child-population-by-race#detailed/1/any/false/574,1729,37,871,870,573,869,36,868,867/68,69,67,12,70,66,71,72/423,424> (Sept. 2021).

164. *Roberts IV*, *supra* note 161, at 1486.

165. See Stephanie L. Rivaux et al., *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, 87 CHILD WELFARE 151, 157–63 (2008) (describing research considering race, income, and risk in decisions about child protection services and removal); Alan J. Dettlaff et al., *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare*, 33 CHILD. & YOUTH SERVS. REV. 1630, 1635 (2011) (discussing the relationship between race, lower income, and higher risk assessment scores in child protection decisions); *Roberts IV*, *supra* note 161, at 1484 (“This state intrusion is typically viewed as necessary to protect maltreated children from parental harm. But the need for this intervention is usually linked to poverty, racial injustice, and the state’s approach to caregiving, which addresses family economic deprivation with child removal rather than services and financial resources.”).

The U.S. system of mass incarceration, which disproportionately criminalizes and punishes Black adolescents and adults, particularly boys and men, similarly produces fear amongst Black mothers that they will lose their children. Black mothers are often blamed for their children's criminal justice involvement: "Long constructed as unfit mothers, Black women face heightened scrutiny and punitive treatment related to their parenting and children's actions in a variety of institutional contexts, making their motherhood status contested and precarious."<sup>166</sup> Furthermore, Black mothers' health is negatively affected from internalizing discriminatory treatment of their children.<sup>167</sup> A 2020 study found that self-rated health was more likely to decline between the ages of forty and fifty for mothers whose children reported recurrent experiences of discrimination.<sup>168</sup>

The state perpetuates discriminatory practices through unequal scrutiny of Black mothers and removal of their children by the child welfare system and through a criminal justice system that sanctions disproportionate police presence and violence in Black communities and that locks up one in three Black men.<sup>169</sup> These practices serve as structural pathways to deeply imbedded racial maternal health disparities. Improving maternal health outcomes across Black women's lives requires confronting how biases, based on longstanding stereotypes, shape how laws, policies, and practices are applied differently to Black Americans. Facially neutral laws that govern systems like child protection and criminal justice provide enormous discretion to the state agents who enforce them (such as agency caseworkers and police officers in low-income Black communities).<sup>170</sup> This discretion leaves Black mothers and their families vulnerable to unaccountable agency rules and police misconduct.<sup>171</sup>

Hence, current federal and state civil rights laws have failed to address the daily indignities and abuses Black mothers experience. Accountability for the child welfare and criminal justice systems requires that government agencies provide transparent data and information about their processes (such as how decisions about removal are made in the child welfare system). It also requires that leadership is held accountable for the disparate impacts of these systems on

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166. Elliott & Reid, *supra* note 31, at 198 (citations omitted).

167. Cynthia G. Colen et al., *The Intergenerational Transmission of Discrimination: Children's Experiences of Unfair Treatment and Their Mothers' Health at Midlife*, 60 J. HEALTH & SOC. BEHAV. 474, 486 (2019).

168. *Id.*

169. *Criminal Justice Facts*, SENT'G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Sept. 16, 2021).

170. See Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the Floyd Decision?: A Comparison of Stop-and-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124, 132–33 (2019) (describing the "unfettered discretion" of caseworkers in CPS agencies).

171. See *id.* at 133 (describing the disproportionate burden placed on Black and Brown families by the police and the child welfare system in New York City).

communities of color. Rooting out and confronting embedded structural racism in these systems is extremely challenging, as evidenced by failed attempts at police reform.

Yet, the murder of George Floyd has led to national calls for criminal justice reforms.<sup>172</sup> While police departments are governed at the local and state levels, federal lawmakers are proposing legislation to strengthen oversight and the Biden Administration is demanding that the Department of Justice (DOJ) hold police departments accountable.<sup>173</sup> The George Floyd Justice in Policing Act of 2020, spearheaded by Representative Karen Bass of California, would, among other measures, condition the receipt of federal funds by states and localities on the following requirements: creating a National Police Misconduct Registry; weakening qualified immunity for police officers who have long been protected from facing legal consequences for their actions while on-duty; strengthening oversight by the DOJ; requiring police departments to submit annual use-of-force reporting; and demonstrating that their policies prohibit racial profiling.<sup>174</sup> While the House of Representatives has passed the Bill twice, the Senate has failed to take any action on it.<sup>175</sup> Even if significant police reform legislation is signed into federal law, real change in local and state police departments will depend on significant culture change. Furthermore, for police reform to be effective in reducing traumatizing police violence in Black communities, it must be intertwined with legal reforms aimed at decriminalization and decarceration. Unfortunately, the criminal justice system continues to incentivize and propagate over-policing and imprisonment as a response to social problems like poverty, inequality, substance use disorders, and mental health problems.<sup>176</sup>

Similar challenges exist with attempts to reform the child protection system. CPS agencies continue to perpetuate entrenched policies and practices based on racist stereotypes in order to exert state surveillance and intervention onto Black families and communities.<sup>177</sup> Health care providers, as mandatory reporters of child abuse and neglect, serve as perhaps the most important gatekeepers to the child welfare system. Pregnant Black women are more likely to be screened for drug and alcohol use during prenatal care or at birth and to be

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172. Brad Brooks, *Citizens Lead the Call for Police Reform Since George Floyd's Death*, REUTERS (Apr. 13, 2021), <https://www.reuters.com/world/us/protesting-shaping-police-reform-citizens-lead-way-since-george-floyds-death-2021-04-13/>.

173. Katie Brenner, *Justice Dept. Opens Broad Inquiry into Minneapolis Police*, N.Y. TIMES (Apr. 21, 2021), <https://www.nytimes.com/2021/04/21/us/politics/justice-department-minneapolis-police.html>.

174. George Floyd Justice in Policing Act, H.R. 1280, 117th Cong. (2021).

175. Li Zhou, *The Uncertain Prospects for Police Reform in the Senate, Explained*, VOX (Apr. 22, 2021, 9:00 AM), <https://www.vox.com/22388199/george-floyd-police-reform-bill-senate-explained>.

176. Elizabeth Tobin-Tyler & Bradley Brockmann, *Returning Home: Incarceration, Reentry, Stigma and the Perpetuation of Racial and Socioeconomic Health Inequity*, 45 J.L. MED. & ETHICS 545, 547 (2017).

177. Burrell, *supra* note 170, at 126–27.

reported to CPS, despite the fact that they use substances at the same rate as White women.<sup>178</sup> There is a long history of overreporting pregnant Black women to both law enforcement and CPS, which not only threatens the loss of their children, but also exacerbates the lack of trust they have in the health care system.<sup>179</sup>

The issue of disparate drug screening and reporting of pregnant Black women to law enforcement was tested in *Ferguson v. Charleston* in the early 2000's.<sup>180</sup> The Supreme Court found in favor of the women who challenged the hospital's policy, but did so based on its finding that the no-consent testing violated the Fourth Amendment.<sup>181</sup> However, the lower courts did consider the disparate impact claim.<sup>182</sup> The District Court found that the plaintiffs' proposed alternative—requiring the hospital to implement universal drug and alcohol screening—was “prohibitively expensive” and held that there was no civil rights violation under Title VI.<sup>183</sup> Despite strong evidence that a hospital's policy of screening pregnant women for cocaine use without their knowledge and reporting those who tested positive to law enforcement for prosecution was targeted at Black women, the Fourth Circuit Court of Appeals similarly rejected the Title VI claim.<sup>184</sup> The Court held that the plaintiffs had not shown “the existence of a means of accomplishing the goals of the policy that would have been equally effective while imposing a less disparate impact on African Americans.”<sup>185</sup> The case demonstrated, once again, the difficulty of using Title VI to remedy discrimination against Black mothers without direct evidence of intent.

Like police reform, attempts to change state child protection agency practices and health system approaches to reporting Black mothers to the authorities implicate larger systemic changes, including surveillance and reporting of families by health care providers and police. Universal screening as part of prenatal care, combined with universal access to drug treatment, may help to reduce discriminatory testing and reporting.<sup>186</sup> Changes in rules and

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178. Sarah C. M. Roberts & Amani Nuru-Jeter, *Universal Screening for Alcohol and Drug Use and Racial Disparities in Child Protective Services Reporting*, 39 J. BEHAV. HEALTH SERV. & RSCH. 3, 4 (2012) (citations omitted).

179. See generally *Roberts I*, *supra* note 26 (discussing the history of over-reporting and prosecuting pregnant Black women suspected of using drugs).

180. *Ferguson v. City of Charleston*, 532 U.S. 67, 70 (2001).

181. *Id.* at 83-84.

182. *Ferguson v. City of Charleston*, 186 F.3d 469, 479-82 (4th Cir. 1999) (rev'd, 532 U.S. 67, 83-84 (2001)).

183. *Id.* at 481-82.

184. *Id.* at 482.

185. *Id.*

186. See Hayley R. Price et al., *Screening Pregnant Women and Their Neonates for Illicit Drug Use: Consideration of the Integrated Technical, Medical, Ethical, Legal, and Social Issues*, 9 FRONTIERS PHARMACOLOGY 1, 3-6 (2018) (discussing the medical and ethical benefits of universal screening).

requirements for reporting may also help. With the surging opioid crisis, advocates and some state legislatures are focusing on these requirements.<sup>187</sup> About half of all states require providers to report perinatal substance use, while four only require reporting if the provider believes the substance use is connected to child maltreatment.<sup>188</sup> But most state reporting laws are overly broad and leave enormous discretion to providers, allowing for implicit bias to taint decision-making.<sup>189</sup> Hence, it is not clear that universal screening policies will change discriminatory practice; instead, they could simply lead to increased reporting.

### C. Home: Eviction and Health-Harming Housing Conditions

The COVID-19 pandemic has illuminated the longstanding housing affordability crisis in the U.S., particularly the frequency of evictions for low-income tenants who are evicted when they are unable to pay their rent. Black women are almost two times as likely to spend 50% or more of their monthly income on housing as White women,<sup>190</sup> and the eviction filing rate against Black women is twice as high as against White women.<sup>191</sup> A study by Matthew Desmond, who has researched eviction extensively, found that in Milwaukee, Black women accounted for 30% of all evictions even though they make up just under 10% of the population.<sup>192</sup>

Eviction carries stigma and legal ramifications that make it difficult to find a new place to live when displaced. Desmond notes that in low-income Black neighborhoods, “[e]viction is to women what incarceration is to men: incarceration locks men up, while evictions lock women out.”<sup>193</sup> Furthermore, Black women who have a history of incarceration, or who live with someone who does, may be further barred from housing due to the “collateral

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187. *Id.* at 3.

188. Marian Jarlenski et al., *Characterization of U.S. State Laws Requiring Health Care Provider Reporting of Perinatal Substance Use*, 27 *WOMAN’S HEALTH ISSUES* 264, 266–67 (2017).

189. *See id.* at 266–67 (describing the differences in levels of discretion and reporting laws between states).

190. David R. Williams, *Racial/Ethnic Variations in Women’s Health: The Social Embeddedness of Health*, 92 *AM. J. PUB. HEALTH* 588, 592 (2002).

191. Gracie Himmelstein & Matthew Desmond, *Association of Eviction with Adverse Birth Outcomes Among Women in Georgia, 2000 to 2016*, 175 *JAMA PEDIATRICS* 494, 498 (2021).

192. MATTHEW DESMOND, MACARTHUR FOUND., *POOR BLACK WOMEN ARE EVICTED AT ALARMING RATES, SETTING OFF A CHAIN OF HARDSHIP* 1–2 (2014), [https://www.macfound.org/media/files/hhm\\_research\\_brief\\_poor\\_black\\_women\\_are\\_evicted\\_at\\_alarming\\_rates.pdf](https://www.macfound.org/media/files/hhm_research_brief_poor_black_women_are_evicted_at_alarming_rates.pdf). The most important factor creating this disparity, according to Desmond, was that Black women are more likely to be single mothers. *Id.* Because they support and care for children, they not only carry a larger financial burden, but also are more vulnerable to discrimination and hostility from landlords. *Id.*

193. *Id.* at 1.

consequences” of incarceration, including housing restrictions that exclude people with criminal records from living in, or even visiting the premises.<sup>194</sup>

Studies investigating the health consequences of housing instability and cost burden borne by mothers and children find significant linkages. A 2021 study by Himmelstein and Desmond that investigated the potential connection between eviction and poor birth outcomes among more than 88,000 births in Georgia found that babies born to women who were evicted during their second and third trimesters had an increased risk of low birth weight and prematurity.<sup>195</sup> Because Black mothers are more likely to be evicted, they were represented at a rate of 2.5 to 1 of White mothers in the sample.<sup>196</sup> Given the persistent disparities in infant mortality and low birth weight among Black babies, eviction should be considered a significant social and legal determinant of maternal health. A 2018 study of caregivers and children correlating housing instability and health found that Black mothers were more likely than Latina or White mothers to be behind on rent, experience multiple moves, or become homeless.<sup>197</sup> Each of these factors were “individually associated with increased risk of adverse caregiver and child health status and household material hardship.”<sup>198</sup>

Furthermore, housing instability and eviction lead to poor bargaining power for tenants. Low-income tenants often settle for substandard housing that is harmful to health because it is better than homelessness.<sup>199</sup> Black families are 1.7 times more likely to live in substandard housing than the rest of the population.<sup>200</sup> While the Flint, Michigan water crisis may have exposed the gross racial inequity in childhood lead poisoning, most children are exposed to lead in their homes through deteriorating paint.<sup>201</sup> Black children experience a disproportionate burden of lead poisoning;<sup>202</sup> they are more likely than White and Latinx children to be exposed to lead and to have higher blood lead levels.<sup>203</sup> The toxic effects

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194. Tobin-Tyler & Brockmann, *supra* note 176, at 550.

195. Himmelstein & Desmond, *supra* note 191, at 496.

196. *Id.* at 498.

197. Megan Sandel et al., *Unstable Housing and Caregiver and Child Health in Renter Families*, 141 PEDIATRICS, Feb. 2018, at 5.

198. *Id.* at 7.

199. See Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants*, 24 GEO. J. ON POVERTY L. & POL'Y 59, 69 (2016) (discussing the relationship between eviction, homelessness, downward moves, and settling for substandard housing).

200. DAYNA BOWEN MATTHEW ET AL., BROOKINGS INST., TIME FOR JUSTICE: TACKLING RACE INEQUALITIES IN HEALTH AND HOUSING (2016), <https://www.brookings.edu/research/time-for-justice-tackling-race-inequalities-in-health-and-housing/>.

201. Beata Mostafavi, *Study Examines Blood Lead Levels of Flint Children*, UNIV. MICH. HEALTH LAB: BODY WORK (Mar. 26, 2018, 7:00 AM), <https://labblog.uofmhealth.org/body-work/study-examines-blood-lead-levels-of-flint-children>.

202. Vanessa Sacks & Susan Balding, *The United States Can and Should Eliminate Childhood Lead Exposure*, CHILD TRENDS (Feb. 2, 2018), <https://www.childtrends.org/publications/united-states-can-eliminate-childhood-lead-exposure>.

203. SOCIAL INJUSTICE AND PUBLIC HEALTH 94 (Barry S. Levy & Victor W. Sidel eds., 2d ed. 2013).

of lead on children's neurobehavioral development—leading to cognitive impairment and behavioral issues such as ADHD—exacerbates maternal stress as mothers struggle to find appropriate health care, educational, and social services for their children.<sup>204</sup>

Black adults and children are also 40% more likely to have asthma and three times more likely to die from asthma-related causes than their White counterparts; Black children are five times more likely to be hospitalized for asthma than White children.<sup>205</sup> Housing-related hazards such as pests, mold, and lack of heat are common asthma triggers.<sup>206</sup> Rather than tackling the root causes of these preventable diseases through laws and policies that support affordable, safe housing, the U.S. has medicalized the problem. The CDC estimates asthma medical costs, absenteeism and mortality cost the U.S. nearly \$82 billion a year.<sup>207</sup> Annual per person medical costs are roughly \$3200,<sup>208</sup> nearly one third of per capita spending on health care in the U.S. Meanwhile, housing safety laws are grossly underenforced in low-income neighborhoods of color due to lack of political will to address the problem.<sup>209</sup>

Living in homes with mold, lead, broken windows, dysfunctional plumbing, insufficient and overly expensive energy sources, and the consequential chronic illness for mothers and children increases allostatic load and worsens mental health.<sup>210</sup> Since asthma is exacerbated by stress, this can lead to a vicious cycle for mothers and their children, perpetuating absenteeism from work and school and widening economic inequality.<sup>211</sup> A 2008 study in Chicago captured the role of maternal stress in asthma outcomes for children living in poor neighborhoods; it found that children were twice as likely to experience

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204. *Intelligence and Neurobehavioral Abilities of Children*, 10 THEORETICAL BIOLOGY & MED. MODELING, 2013, at 4.

205. *Asthma and African Americans*, U.S. DEP'T HEALTH. & HUM. SERVS., OFF. MINORITY HEALTH, <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=15> (last visited Sept. 17, 2021).

206. James Krieger, *Home is Where the Triggers are: Increasing Asthma Control by Improving the Home Environment*, 23 PEDIATRIC ALLERGY, IMMUNOLOGY & PULMONOLOGY 139, 139 (2010).

207. Tursynbek Nurmagambetov et al., *The Economic Burden of Asthma in the United States*, ANNALS OF AM. THORACIC SOC'Y 1, 14 (2017).

208. *Id.*; *National Health Expenditure Data*, CTRS. FOR MEDICARE & MEDICAID SERVS. (last modified Dec. 1, 2020), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical>.

209. See Elizabeth Tobin-Tyler, *When Are Laws Strictly Enforced? Criminal Justice, Housing Quality, And Public Health*, HEALTH AFFS. (Nov. 5, 2015), <https://www.healthaffairs.org/doi/10.1377/hblog20151105.051649/full/> (pointing out that many municipalities and states fail to equitably enforce housing safety standards for low-income tenants).

210. See James Krieger & Donna L. Higgins, *Housing and Health: Time Again for Public Health Action*, 92 AM. J. PUB. HEALTH 758, 759 (2002) (linking poor living conditions with negative mental and physical health).

211. Edith Chen et al., *Chronic Traffic-Related Air Pollution and Stress Interact to Predict Biologic and Clinical Outcomes in Asthma*, 116 ENV. HEALTH PERSP. 970, 971 (2008).

moderate to severe asthma if their caregivers reported high levels of stress and exposure to crime and violence in their neighborhood.<sup>212</sup>

Mothers and children of color are also exposed to a range of hazardous environmental conditions in greater numbers than other populations. One study found that children living in neighborhoods with high density traffic were hospitalized or visited the emergency room at three times the rate of other children with asthma. Black children were twice as likely as White children to live in these neighborhoods and Latinx children were two and a half times as likely.<sup>213</sup> Studies have documented how landfills, incinerators, waste treatment plants and electrical power stations are more likely to be placed in minority neighborhoods, exposing residents to multiple health hazards.<sup>214</sup> Furthermore, a recent systematic review of studies on prenatal exposure to environmental conditions linked to climate change, such as high temperatures and air pollution, found a significant association with adverse outcomes: low birthweight, premature and stillborn babies.<sup>215</sup> At highest risk were Black mothers and people with asthma.<sup>216</sup> Black mothers are more likely to live in urban neighborhoods that are hotter, referred to as “heat islands,” and, as described above, to be exposed to pollution.<sup>217</sup>

It is no accident that Black families are more likely to live in segregated neighborhoods with substandard housing and disparate exposure to environmental hazards.<sup>218</sup> The law has instilled racial segregation into the fabric of America’s housing structures and systems.<sup>219</sup> The legacy of redlining by lending institutions—in which people in certain “high risk” neighborhoods were denied “access to capital investment which could improve the housing and economic opportunity of residents”<sup>220</sup>—helped fortify underinvestment in

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212. *Id.* (connecting the social and environmental factors of poor neighborhoods to asthma in children); *Living in a High Crime Neighborhood May Worsen Children’s Asthma*, AM. ACAD. OF PEDIATRICS 1, 1 (2010).

213. YING-YING MENG ET AL., UCLA CTR. FOR HEALTH POL’Y RSCH., LIVING NEAR HEAVY TRAFFIC INCREASES ASTHMA SEVERITY 1 (2006), <http://healthpolicy.ucla.edu/publications/search/pages/detail.aspx?PubID=247>.

214. Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 ENV. L. 371, 378–79 (2008).

215. Christopher Flavelle, *Climate Change Tied to Pregnancy Risks, Affecting Black Mothers Most*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/climate/climate-change-pregnancy-study.html>.

216. *Id.*

217. *Id.*

218. David E. Jacobs, *Environmental Health Disparities in Housing*, 101 AM. J. OF PUB. HEALTH S115, S115 (Supp. 1, 2011).

219. See BRUCE MITCHELL & JUAN FRANCO, HOLC “REDLINING” MAPS: THE PERSISTENT STRUCTURE OF SEGREGATION AND ECONOMIC INEQUALITY, NAT’L CMTY. REINV. COAL. 1, 5 (2018) (explaining that redlining was legally practiced in nearly every American city, not just the cities associated with Jim Crow Laws).

220. *Id.* at 4.

racially segregated neighborhoods. This underinvestment is now poisoning the health of low-income minorities, particularly Black families. A 2015 settlement between The U.S. Department of Housing and Urban Development (HUD) and Associated Bank in Wisconsin suggests that redlining is not just a problem of the past; Black and Latinx borrowers alleged widespread discrimination by the bank in its lending practices.<sup>221</sup> Public housing, which was initiated under the New Deal and expanded after World War II, also remains highly segregated. Even after the Civil Rights movement, HUD and city housing authorities intentionally placed public housing in low-income, predominantly Black neighborhoods, then called “ghettos.”<sup>222</sup> In some cities, Black Americans who were eligible for public housing were assigned to project-based housing while Whites were given vouchers to use in the private market, further perpetuating segregation.<sup>223</sup>

The Fair Housing Act of 1968, intended to mitigate the effects of discriminatory housing and lending practices, prohibited discrimination in the rental, sale, and financing of housing based on race, national origin, sex, religion, disability, and familial status.<sup>224</sup> However, enforcement by the Federal Housing Administration (FHA) has been lax at best.<sup>225</sup> A report by the National Fair Housing Alliance found that, in 2017, HUD processed less than 5% of the total complaints brought under the Fair Housing Act, while non-profit fair housing organizations managed 71% of complaints.<sup>226</sup> The DOJ, the chief federal agency charged with enforcing the Act, brought only 41 cases.<sup>227</sup>

In 2015, the Obama Administration promulgated a rule interpreting the “Affirmatively Furthering Fair Housing” provisions of the Fair Housing Act, which requires the federal government “to take proactive steps to address longstanding patterns of segregation, discrimination, and disinvestment.”<sup>228</sup> The rule created a framework for state and local governments and public housing authorities to study and respond to barriers to fair housing.<sup>229</sup> The Trump

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221. Emily Badger, *Redlining: Still a Thing*, WASH. POST (May 28, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/05/28/evidence-that-banks-still-deny-black-borrowers-just-as-they-did-50-years-ago/>.

222. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 33–37 (W. W. Norton & Company, Inc., 2017).

223. *Id.*

224. *The Fair Housing Act (2016)*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/fair-housing-act-1>; Fair Housing Act, 42 USC §§ 3601–3619 (1968).

225. See SHANTI ABEDIN ET AL., NAT’L FAIR HOUS. ALL., *MAKING EVERY NEIGHBORHOOD A PLACE OF OPPORTUNITY: 2018 FAIR HOUSING TRENDS REPORT 1*, 35–36 (2018), [https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report\\_4-30-18.pdf](https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report_4-30-18.pdf) (demonstrating the inconsistent application of the AFH under HUD).

226. *Id.* at 60.

227. *Id.* at 50.

228. *Affirmatively Furthering Fair Housing*, NAT’L HOUS. L. PROJECT, <https://www.nhlp.org/initiatives/fair-housing-housing-for-people-with-disabilities/affirmatively-furthering-fair-housing/> (Aug. 2021).

229. *Affirmatively Furthering Fair Housing*, 24 C.F.R. §§ 5, 91, 92, et al. (2015).

Administration terminated the 2015 rule in 2020, saying it was too burdensome to states and localities and replaced it with a rule entitled, “Preserving Community and Neighborhood Choice.”<sup>230</sup> The Biden Administration may reinstitute the Obama-era Rule, but it will likely take time, long-term commitment, and devotion of resources for a proactive approach to bring about significant change.

Jurisdiction over health and safety standards for housing is primarily at the state and municipal levels.<sup>231</sup> In the case of rental housing, safety codes provide explicit requirements for property owners for property maintenance. Typically, if property owners fail to abate housing safety code violations, they are subject to fines, liens, and in some cases, jail time.<sup>232</sup> However, these codes are chronically under-enforced in low-income neighborhoods.<sup>233</sup> Underenforcement occurs for several reasons. As mentioned earlier, low-income tenants have poor bargaining power due to the incongruity between supply and demand of affordable housing and the threat of eviction. Thus, low-income tenants may be afraid to complain about substandard conditions.<sup>234</sup> Furthermore, many low-income tenants, including mothers, are unaware of their rights to safe housing and/or are too overwhelmed with health problems, work, caretaking, and other burdens to assert their rights.<sup>235</sup> Finally, many local housing code enforcement agencies fail to address complaints in a timely manner because they are under-resourced and/or poorly managed.<sup>236</sup> Congressional appropriations for grants to states and municipalities to reduce lead poisoning and proactively address housing hazards, such as those related asthma triggers, have been too inconsistent to fully address these issues.<sup>237</sup>

The primary federal legal lever to address environmental racism is Title VI of the Civil Rights Act which prohibits any entity receiving funding from the Environmental Protection Agency (EPA) from discriminating based on race,

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230. Press Release, U.S. Dep’t of Health and Urban Dev., Secretary Carson Terminates 2015 AFFH Rule (July 23, 2020), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/hud\\_no\\_20\\_109](https://www.hud.gov/press/press_releases_media_advisories/hud_no_20_109).

231. *State Housing Codes*, NAT’L CTR. FOR HEALTHY HOUS., <https://nchh.org/information-and-evidence/healthy-housing-policy/state-and-local/healthy-housing-codes/by-state/> (last visited Nov. 28, 2021).

232. See e.g. PRINCE GEORGE’S COUNTY, MD., HOUSING AND PROPERTY STANDARDS § 13–111 (2011) (codes imposing fines and short prison sentences are normal across many local jurisdictions).

233. Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants’ Rights*, XXVII GEO J. ON POVERTY L. & POL’Y 97, 99–100 (2019); see also Tobin-Tyler, *supra* note 209, at 2 (explaining that codes are under-enforced in low-income neighborhoods).

234. See *supra* Part IV.

235. See *supra* Part IV.

236. See *supra* Part IV.

237. *Federal Appropriations for Healthy Homes*, NAT’L CTR. FOR HEALTHY HOMES, <https://nchh.org/information-and-evidence/healthy-housing-policy/national/current-nchh-work/federal-appropriations/> (Apr. 2019).

ethnicity, or national origin.<sup>238</sup> But the *Sandoval* decision severely curtailed enforcement of Title VI and other recent U.S. Supreme Court decisions have further limited legal action against discrimination.

In the wake of these [Supreme Court] decisions, plaintiffs must rely on government actors in order to exercise their rights, leaving no recourse when those actors are disinclined to enforce the law. Even when government agencies do take action to enforce civil rights laws, the range of evidence they may introduce is limited. For example, in the apparent belief that racial discrimination is a thing of the past, the Court has recently prevented government actors, including school districts and Congress, from relying on evidence of historical discrimination in the implementation of race-conscious remedies.<sup>239</sup>

In 1994, President Clinton signed an executive order requiring federal agencies to “make achieving environmental justice part of [their] mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”<sup>240</sup> But in 2016, a Commission charged with evaluating the EPA’s enforcement of Title VI found that the EPA failed to take action to protect communities of color most burdened by environmental injustice.<sup>241</sup> In 2019 the Government Accountability Office (GAO) found that little progress had been made since 2011 in implementing Executive Order 12898.<sup>242</sup> In October, 2020, a federal court ruled in favor of community groups from five states who had filed complaints with the EPA between 1992 and 2003, alleging racial discrimination by state and regional agencies in permitting the pollution from facilities.<sup>243</sup> The EPA had taken no

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238. *Title VI and Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice/title-vi-and-environmental-justice> (Jan. 11, 2021).

239. Harris & Pamukcu, *supra* note 100, at 801–02.

240. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

241. U.S. COMM. ON C.R., ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY’S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898 (Sept. 2016), [https://www.usccr.gov/pubs/2016/Statutory\\_Enforcement\\_Report2016.pdf](https://www.usccr.gov/pubs/2016/Statutory_Enforcement_Report2016.pdf) (“First, EPA continues to struggle to provide procedural and substantive relief to communities of color impacted by pollution. EPA’s deficiencies have resulted in a lack of substantive results that would improve the lives of people living in already overly-burdened communities. Second, EPA does not take action when faced with environmental justice concerns until forced to do so. When they do act, they make easy choices and outsource any environmental justice responsibilities onto others.”).

242. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-543, ENVIRONMENTAL JUSTICE: FEDERAL EFFORTS NEED BETTER PLANNING, COORDINATION, AND METHODS TO ASSESS PROGRESS (2019) <https://www.gao.gov/assets/gao-19-543.pdf> (explaining that, although most agencies have environmental justice strategic plans, the majority of agencies do not update their plans nor do they report or assess their progress regularly).

243. Jeronimo Nisa, *Federal Court Still Requires EPA to Enforce Civil Rights*, EARTHJUSTICE (Oct. 2, 2020), <https://earthjustice.org/news/press/2020/federal-court-requires-epa-to-enforce-civil-rights>.

action on their complaints. The court found that the EPA violated the requirement that it complete an investigation after accepting the complaint within 180 days.<sup>244</sup>

The legacy of redlining and legally sanctioned segregation, ineffective (and indifferent) federal, state, and local government bureaucracies, and the failure to initiate long-term strategies to address segregation and to develop safe, affordable housing, has dire consequences for Black mothers' health and their children's futures. Proactive, targeted cross-sector policy and investment, aggressive enforcement of protective housing laws, and accountability for government actors are needed to improve Black maternal and child health and to reduce housing-related racial health disparities. Yet, most low-income people lack access to legal advocates who are effectively able to hold government officials accountable; roughly 20% of the need for free legal services is being met by existing legal aid programs.<sup>245</sup> For several years, legal aid organizations as well as the American Bar Association have been advocating for "Civil Gideon," a right to pro bono counsel in civil cases that implicate basic human needs such as housing, safety, health, and child custody.<sup>246</sup> Such a right could significantly benefit low-income Black mothers, as well as others, who have been marginalized by the legal system.

#### V. NO SILVER BULLET: A SOCIO-POLITICAL-LEGAL APPROACH TO IMPROVING BLACK MATERNAL HEALTH

The complexity of the social, political and legal forces that shape Black maternal health makes eliminating disparities extremely challenging. The systems that perpetuate inequity and injustice—such as health care, employment, criminal justice, child welfare, housing, environmental protection, and others not discussed here, such as education—implicate a wide range of practices, policies and laws that require close examination and reform. Given the existing political climate, entrenched institutional practices, and civil rights enforcement landscape, lasting systemic change requires a multisector, multipronged, "long game" approach. While there are many obstacles to law and policy reform, there are some promising signs that change is possible.

##### A. *The Promises and Limits of the Law*

Law is the primary tool for protecting individuals from disparate treatment based on race, gender, and/or other protected statuses. Unfortunately, the Courts' insistence that, to bring a successful claim of discrimination, the offended party

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244. *Id.*

245. *The Unmet Need for Legal Aid*, LEGAL SERVS. CORP., <https://www.lsc.gov/what-legal-aid/unmet-need-legal-aid> (last visited Sept. 29, 2021).

246. Robert J. Derocher, *Access to Justice: Is Civil Gideon A Piece of the Puzzle?*, 32 BAR LEADER, no. 6, 2008, [https://www.americanbar.org/groups/bar\\_services/publications/bar\\_leader/2007\\_08/3206/gideon/](https://www.americanbar.org/groups/bar_services/publications/bar_leader/2007_08/3206/gideon/).

must prove intentional discrimination, obscures structural discrimination which “is embedded in institutions and processes, like housing markets, employment decisions, and medical research and treatment.”<sup>247</sup> Challenging the practices of institutions is exceedingly difficult without robust commitment from the federal agencies charged with enforcement. Recent actions by the Biden Administration to commit resources and focus on civil rights, especially police violence in communities of color, are encouraging.<sup>248</sup> But, even with a renewed focus on enforcement, there are limits to what the federal government can accomplish. Indeed, overcoming the aforementioned barriers would require Congressional action, which is unlikely given the current political atmosphere.

Furthermore, many laws that perpetuate inequality and harm Black maternal health are implemented and enforced at the state or local level (such as Medicaid, employment protections and support, child protection, eviction, and housing safety). Uprooting structural racism, economic inequality, and bureaucratic indifference requires not just enforcement of existing laws and development of new ones, but also investment in systems and services that support health across the life course. A glimmer of hope comes from the fact that many state and local governments are beginning to focus on intersectoral approaches to reducing health inequities. Most promising are state and local laws that are influencing federal policymakers to take a broader approach. Some examples include state and local \$15 hour minimum wage laws that have influenced similar federal legislation,<sup>249</sup> increasing state and local paid family and medical leave legislation,<sup>250</sup> and state and local government and advocacy groups’ push for the federal eviction moratorium during the COVID-19 pandemic.<sup>251</sup>

As described earlier, state policy leaders and policy think tanks are developing statewide plans to address the maternal mortality crisis and are implementing policies that promote better access to community-based providers, expand post-partum insurance coverage, ensure data monitoring of maternal

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247. Harris & Pamukcu, *supra* note 100, at 787.

248. *FACT SHEET: The Biden-Harris Administration Advances Equity and Opportunity for Black People and Communities Across the Country*, THE WHITE HOUSE (Oct. 19, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/19/fact-sheet-the-biden-harris-administration-advances-equity-and-opportunity-for-black-people-and-communities-across-the-country/>.

249. Drew DeSilver, *When it comes to raising the minimum wage, most of the action is in cities and states, not Congress*, PEW RSCH. CTR. (Mar. 12, 2021), <https://www.pewresearch.org/fact-tank/2021/03/12/when-it-comes-to-raising-the-minimum-wage-most-of-the-action-is-in-cities-and-states-not-congress/>.

250. *Paid Family and Sick Leave in the U.S.*, KAISER FAM. FOUND. (Dec. 14, 2020), <https://www.kff.org/womens-health-policy/fact-sheet/paid-family-leave-and-sick-days-in-the-u-s/>.

251. Christopher Davis & Monique King-Viehland, *With Limited State and Local Protections, the End of the Federal Eviction Moratorium Puts Millions of Renters at Risk*, URBAN INST.: URBAN WIRE (Aug. 30, 2021), <https://www.urban.org/urban-wire/limited-state-and-local-protections-end-federal-eviction-moratorium-puts-millions-renters-risk>.

outcomes by race, and implement accountability mechanisms for health care systems.

Law is also helping to define and name the problem of racism and its impact on health. In the wake of the COVID-19 pandemic and the unrelenting police killings of Black people, states and cities have declared racism a public health crisis.<sup>252</sup> Senator Elizabeth Warren, Representative Ayana Pressley, and Representative Barbara Lee proposed legislation to create a National Center for Anti-Racism and National Violence Prevention Program at the CDC, noting that “physical and psychological violence perpetuated by law enforcement results in deaths, injuries, trauma, and stress, and disproportionately affects marginalized populations.”<sup>253</sup> Naming structural racism as a public health crisis and focusing the CDC’s attention on the pathways between racism and health disparities will not solve centuries-old injustices perpetuating Black maternal mortality and morbidity; but enacting laws and policies that target the injustices that perpetuate disparities could begin to build some accountability and drive action.

*B. Cross-Sector Partnership—Playing the “Long Game” for Human Rights*

Until recently, the separation of public health from civil rights and poverty lawyers meant that advocates for change, though driving in the same direction, drove in separate lanes and pursued distinct agendas. Lawyers have traditionally focused on vindicating individual clients’ rights and advocating for legislative changes that benefit their clients’ interests.<sup>254</sup> Public health advocates have researched and measured health disparities, proposed individual and community-based interventions, and recommended policy changes to support environmental conditions conducive to health.<sup>255</sup> But recently, the public health and legal communities are joining forces in a budding health justice movement that is taking many shapes, but is fundamentally centered on reducing health disparities by addressing structural inequality, perpetuated by law and policy.<sup>256</sup>

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252. Eliza Fawcett, *A New Bill Aims to Declare Racism a Statewide Public Health Crisis in Connecticut. Here’s What That Means*, HARTFORD COURANT (Mar. 25, 2021), <https://www.courant.com/politics/hc-pol-racism-public-health-crisis-bill-20210325-72d75ycf2vg3hc73yehxejwuyu-story.html>.

253. Press Release, Elizabeth Warren, United States Senate, Warren, Pressley, Lee Introduce Legislation to Confront the Public Health Impacts of Structural Racism (Sept. 3, 2020), <https://www.warren.senate.gov/newsroom/press-releases/warren-pressley-lee-introduce-legislation-to-confront-the-public-health-impacts-of-structural-racism>.

254. Elizabeth Tobin Tyler, *Aligning Public Health, Health Care, Law and Policy: Medical-Legal Partnership as a Multilevel Response to the Social Determinants of Health*, 8 J. HEALTH & BIOMED. L. 211 (2012).

255. *Id.*

256. See generally, Emily A. Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 AM. U. L. REV. 275, 277 (2015) (highlighting the link between structural inequality and disparate health outcomes in marginalized communities);

One of the chief objectives of this movement is to locate health disparities in a human rights framework that seeks to hold the systems, government officials, and politicians that enable health injustice, accountable. Federal policymakers are increasingly recognizing that health equity requires investment in comprehensive economic and social structures that promote health, not just health care reform. One example is the House Ways and Means Committee's Racial Equity Initiative, which will seek to address "the role of racism and other forms of discrimination in perpetuating health and economic inequalities in the United States" and will promote legislative priorities and investments that take a broad-based approach to health equity.<sup>257</sup>

Congressional leaders are also pursuing a comprehensive law aimed at reducing Black maternal mortality.<sup>258</sup> Although individual bills addressing different aspects of the crisis have been in the pipeline for a number of years, the most comprehensive approach thus far is the Momnibus Act of 2021. This Act was first introduced by Representative Lauren Underwood of Illinois, who along with Representative Alma Adams, launched the Black Maternal Health Caucus in 2019.<sup>259</sup> The Act is a package of bills that includes: investing in community health organizations; expanding support for different types of health workers, such as doulas and midwives; improving data collection to inform evidence-based policy change; expanding maternal mental health and substance use disorder treatment; and extending postpartum coverage under Medicaid to one year.<sup>260</sup> One of the bills included in the Act focuses specifically on making investments aimed at the social determinants of health, including housing, nutrition, and transportation.<sup>261</sup>

These policy developments demonstrate that advocates for Black maternal health are having an impact, not just by gaining the attention of policymakers, but also by helping to elect Congressional leaders, many of whom are Black women. Sustainable change will only come with persistent collective action that

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ELIZABETH TOBIN-TYLER & JOEL TEITELBAUM, *ESSENTIALS OF HEALTH JUSTICE: A PRIMER* (Jones & Bartlett Learning, 2019); Harris & Pamukcu, *supra* note 100 (discussing the relation between subordination and public health disparities).

257. Richard Neal, *The Time for Change: Prioritizing Health and Economic Equity in the 117th Congress and Beyond*, HEALTH AFFS. (Apr. 9, 2021), <https://www.healthaffairs.org/doi/10.1377/hblog20210408.792412/full/>.

258. *See generally About the Black Maternal Health Momnibus Act of 2021*, BLACK MATERNAL HEALTH CAUCUS, <https://blackmaternalhealthcaucus-underwood.house.gov/Momnibus> (last visited Sept. 29, 2021).

259. *Id.* (providing an outline of the comprehensive nature of the proposed bill); Press Release, Alma Adams, House of Representatives, Adams and Underwood Launch Black Maternal Health Caucus (April 9, 2019), <https://adams.house.gov/media-center/press-releases/congresswomen-adams-and-underwood-launch-black-maternal-health-caucus> (explaining the origins and goals of the Momnibus bill).

260. Black Maternal Health Momnibus Act of 2021, H.R.959, 117th Cong. (2021).

261. *About the Black Maternal Health Momnibus Act of 2021*, *supra* note 258.

centers the voices of Black women and speaks to their experiences across multiple sectors and systems.

*C. Giving Voice to Black Mothers: The Power of Collective Action and Self-Determination*

Structural inequality, imbedded in the fabric of American politics, policy, and law has historically stifled the voices of Black women, particularly their ability to articulate their own experiences as mothers. But recently, Black women's voices seem to be breaking through and commanding attention. For example, the BMMA, “a Black women-led cross-sectoral alliance” that “center[s] Black mamas to advocate, drive research, build power, and shift culture for Black maternal health, rights, and justice,”<sup>262</sup> has been a powerful voice and a strong advocate for the Momnibus Act. SisterSong, a reproductive justice organization “formed in 1997 by sixteen organizations led by women of color from four mini-communities (Native American, African American, Latina, and Asian American) who recognized that [minority women] have the right and responsibility to represent [them]selves and [their] communities, and the equally compelling need to advance the perspectives and needs of women of color” has given a voice to Black women and their allies seeking accessible, respectful and supportive reproductive health care.<sup>263</sup>

Stacie Abrams, a Georgia lawyer and politician, demonstrated in the 2020 election the power of increasing civic engagement among historically disenfranchised communities of color.<sup>264</sup> From a public health perspective, empowerment, community engagement, and collective action not only play an important role in shifting politics and pushing policy reform; they may also, in-and-of themselves, improve the health of marginalized groups.<sup>265</sup> Lack of control over one's destiny is directly connected to allostatic load.<sup>266</sup> Indeed, research shows that a sense of control over one's plight and collective voice are critical to health.<sup>267</sup> Current assaults on voting rights in Republican-led states, however,

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262. BLACK MAMAS MATTER ALL., *supra* note 9, at 1.

263. *Our History*, SISTERSONG, <https://www.sistersong.net/mission> (last visited Sept. 16, 2021).

264. Kevin Powell, *The Power of Stacey Abrams*, WASH. POST (May 14, 2020), <https://www.washingtonpost.com/magazine/2020/05/14/stacey-abrams-political-power/>.

265. See Jenny Popay, *Community Empowerment and Health Equity*, GLOB. PUB. HEALTH (April 26, 2021) (“[F]rom a health equity perspective community empowerment is understood as sociopolitical processes that engage with power dynamics and result in people bearing the brunt of social injustice exercising greater collective control over decisions and actions that impact their lives and health. There is growing evidence that increased collective control at the population level is associated with improved social determinants of health and population health outcomes.”).

266. See Bruce S. McEwen & Peter J. Gianaros, *Central Role of the Brain in Stress and Adaptation: Links to Socioeconomic Status, Health, and Disease*, 1186 ANNALS N.Y. ACAD. SCI. 190, 190 (2010) (highlighting the link between environmental stress and allostatic load).

267. See Lois Catherine Orton, et al., *What is the Evidence That Differences in ‘Control Over Destiny’ Lead to Socioeconomic Inequalities in Health? A theory-led systematic review of high-quality longitudinal*

continue to threaten the political power of marginalized groups, especially Black Americans.<sup>268</sup> Thus, perhaps the most important factor in improving Black maternal health in the coming years will be preserving the political rights of Black mothers and their allies.

## VI. CONCLUSION

The human rights crisis in Black maternal health is perpetuated by decades of social, political, and legal building blocks that must be knocked down. Doing so requires confronting head-on the ways in which structural racism, gender inequality, and the unique subordination of Black women in America function in undermining health. Medical and public health research increasingly emphasize the role of racism, sexism, and other kinds of subordination in allostatic load, which is borne heavily by Black women, especially Black mothers.<sup>269</sup> Many of the systems and encounters that lead to Black maternal stress can be reformed through law, policy, and system accountability. Ultimately, improving Black maternal health (and the health of other marginalized groups), requires redistribution of power, influence, and resources; Black mothers' voices must shape policy change. Most importantly, law, policy, and the systems they facilitate and shape must dignify, value, and cherish Black mothers and their children.

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*studies on pathways in the living environment*, 73 J. EPIDEMIOLOGY CMTY. HEALTH 929, 933 (2019) (linking a low sense of control to overall health outcomes).

268. Amy Gardner et al., *How GOP-Backed Voting Measures Could Create Hurdles for Tens of Millions of Voters*, THE WASHINGTON POST (Mar. 11, 2021), <https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states/>.

269. *See supra* note 11.