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Black Women and Maternal Health: Racism, Class and the New Jim Crow

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I. Introduction

Shortly after giving birth to her daughter, world-famous tennis superstar Serena Williams began to experience sharp pains and shortness of breath.[1] These symptoms were all too familiar for she had experienced this kind of pain in the past, but it also meant that she understood the proper treatment that could help save her life. Her attending nurse, however, thought she was overdramatizing her symptoms:

> "I need to have a CAT scan of my lungs bilaterally, and then I need to be on my heparin drip."
>
> "I think all this medicine is making you talk crazy."
>
> "No, I'm telling you what I need: I need the scan immediately. And I need it to be done with dye...I'm telling you this is what I need."[2]

In 2018, Serena Williams nearly died after childbirth because the medical professionals around her did not take her concerns seriously. In fact, Black women are three to four times more likely than White women to die after childbirth.[3] Her nurse dismissed her pain and implied that the "medicine is making you talk crazy", even though she struggled to breathe, experienced intense coughs from the lack of air, and had sharp leg pain. Serena Williams was suffering from a pulmonary embolism, which is a sudden blockage in the pulmonary arteries and usually occurs when a blood clot in the veins in the legs breaks off and travels up the lungs.[4] This condition

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[1] Serena Williams, *How Serena Williams Saved Her Own Life*, ELLE MAG (Apr. 5, 2022), https://www.elle.com/life-love/a39586444/how-serena-williams-saved-her-own-life/.
[2] Id.
[3] *Preventing Pregnancy-Related Deaths*, Ctr. for Disease Control, (last visited Apr. 1, 2023), https://www.cdc.gov/reproductivehealth/maternal-mortality/preventing-pregnancy-related-deaths.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Freproductivehealth%2Fmaternalinfanthealth%2Fpregnancy-relatedmortality.htm.
[4] Penn Medicine, https://www.pennmedicine.org/for-patients-and-visitors/patient-information/conditions-treated-a-to-z/pulmonary-embolus#:~:text=A%20pulmonary%20embolism%20is%20a,body%20is%20called%20an%20embolus (last visited Apr. 2, 2023).

nearly killed her in 2011, so it is safe to say that she was able to recognize the symptoms and was beyond aware of its potentially fatal consequences if left untreated. Thanks to her own advocacy, the nurse eventually called the doctor to order a CAT scan as she had been requesting which led to the discovery of the blockage. Serena Williams is the number one tennis player in the world, instantly recognizable and wealthy- but that did not prevent her from being ignored and almost becoming part of the 69.9 out of 100,000 maternal mortality rate (MMR) for Black women in 2021; this is 2.6 times the rate of that of non-Hispanic White women.[5] Unfortunately, many women's calls for medical attention during childbirth go unheeded and they die as a result.

Recounting Serena's experience is not intended to minimize the incredibly demanding and intricate work of any medical professional, as they save lives every day under high-pressure situations. Instead, her experience shows that there is much to be done to ensure that Black women receive adequate maternal healthcare.

While it is true that women of color who have class and economic privilege are somewhat insulated from the worst excesses of the healthcare system's racist logics, they are still vulnerable to it.[6] This health disparity is rooted in systemic, structural, and societal racism leaving Black people with the overall worst health outcomes; this deep rooted racism and disparities can also be seen in the legacy of the New Jim Crow. In *The New Jim Crow*, Michelle Alexander explains that mass incarceration is a type of New Jim Crow in that it is systemically designed to regulate people of color to a second-class citizenship, similar to the objectives of the "old" Jim Crow. [7] Then, the systems of oppression were driven by explicitly racist agendas.

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[5] *Maternal Mortality Rates in the US*, Ctr. for Disease Control, (Last visited Mar. 30, 2023), https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2021/maternal-mortality-rates-2021.pdf 2021.htm#:~:text=In%202021%2C%20the%20maternal%20mortality,for%20White%20and%20Hispanic%20women.

[6] Khiara Bridges, *Racial Disparities in Maternal Health, in* Critical Race Theory: A Primer (2019).

[7] Khiara M. Bridges, *The Criminal Legal System*, *in* Critical Race Theory: A Primer (2019).

Today, the New Jim Crow, according to Alexander, uses crime and criminality as a pretext for marginalizing people of color.[8] In this system, people of color suffer and White people often gain from it. While this account of the New Jim Crow is generally accepted, Professor James Forman Jr. challenges the theory on the ground that "class privilege works to safeguard an individual from becoming entangled in the criminal justice system" and from the New Jim Crow.[9] He explains that the New Jim Crow is inherently different from the "old" Jim Crow era because in the latter, "affluence did not allow a Black person an exit from second-class citizenship."[10] While Forman's theory primarily focuses on the criminal justice system, this paper argues that the poor health outcomes in the maternal health context that Black women experience regardless of their class privilege suggests that there is more truth to Alexander's *The New Jim Crow* account than Forman has credited. The legacy of systemic racism in the New Jim Crow is equally observed in the disparate treatment of Black women in the health care system. Specifically, the goal of this paper will argue that structural and institutional racism, implicit biases, and the healthcare system's racist historical context have perpetuated deep-rooted maternal health disparities that disproportionately affect Black women, regardless of socioeconomic status. Namely, class does not insulate them from maternal health disparities and the New Jim Crow continues to have negative implications for the maternal health of Black women.

This paper has six parts. Part II discusses the discriminatory and racist history of both vesicovaginal fistula surgery and birth control pill testing and how its legacies continue to negatively affect Black women seeking medical treatment. Part III discusses regional access to maternal healthcare for Black women and its connection to the New Jim Crow. Part IV will

[8] Id.
[9] Id.
[10] Id.

analyze how anti-abortion laws across the country, specifically after the overturning of Roe v. Wade, have created abortion deserts and continue to marginalize Black women.[11] Part V will examine medical malpractice issues relating to birth complications and how difficult it can be for Black women to have a successful medical malpractice claim. Finally, Part VI will advocate for critical race theory-based policy changes that will ideally improve the gap in maternal health disparities.

II. "The Father of Gynecology" and Birth Control Testing on Puerto Rican Women

a. James Marion Sims and the Racist History Behind Vesicovaginal Fistula Surgery

To demonstrate the stark racial disparities in maternal healthcare in the United States, it is critical to examine the history of medicine and its legacy on Black women. In 2018, the statute of James Marion Sims was removed from New York City's Central Park. Many rejoiced about the statue's removal because of what it signified: the removal of the statue of a doctor who advanced gynecological techniques and equipment through unmedicated, excruciating experiments on three enslaved women between 1845 and 1849.[12] Sims is credited with the first successful operation for the cure of vesicovaginal fistula, "a catastrophic complication of childbirth in which a hole develops between a woman's bladder and her vagina and leads to constant, unremitting, and uncontrollable urinary incontinence."[13] He was able to perform these types of surgeries by practicing on a group of women he had enslaved; one of them, Anarcha, underwent thirty of these experiments without anesthesia before he was to successfully close the hole

[11] *U.S. Supreme Court Takes Away The Constitutional Right to Abortion*, Center for Reproductive Rights (last visited Mar. 30, 2023), https://reproductiverights.org/case/scotus-mississippi-abortion-ban/.
[12] L.L. Wall, *The Medical Ethics of Dr. J. Marion Sims: A Fresh Look At the Historical Record*, (Aug. 30, 2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2563360/pdf/346.pdf.
[13] Id.

between her bladder and vagina.[14] Sims opted not to use anesthesia as he, and many others, believed that Black people did not feel pain the way White people did and thus, did not need any pain-relief treatment.[15] Yet, anesthesia was already available to the general public during this time period.[16]

This origin story reflects all too well the repeated history of both violence against Black women and misleading assumptions about their health and pain tolerance. This history sets part of the foundation for structural, institutional, and societal racism that grows the gap of maternal health disparities for Black women. Much like how Serena William's attending nurse did not believe her post-natal pain and blamed it on her medicine that was "making [her] talk crazy", Black women are often deemed to be incapable of self-diagnosing pain or even feeling high levels of pain; this kind of false narrative hurts Black women, their families, and their communities. This myth did not stop after Sims perfected the vesicovaginal fistula surgery; it continues to poison the medical field and punishes Black women who seek reproductive treatment.

b. Birth Control Pill Testing on Puerto Rican Women

Another site where we can witness the racist tradition of the provision of healthcare in the United States is in the development of the birth control pill. Today, many women use a form of contraception to prevent pregnancy, ease menstruation or endometriosis symptoms, help improve acne, and a plethora of other reasons.[17] The most common form of contraception is the oral birth control pill which requires its users to take the pill at around the same time every day for a set of weeks, take a hormonal-free placebo pill for another week, and then repeat the cycle the next

[14] Id.
[15] Id.
[16] Id.
[17] Planned Parenthood, https://www.plannedparenthood.org/learn/birth-control, (last visited May 1, 2023).

month. However, what we know as the typical oral birth control pill today contains less hormones than the world's first birth control pill, Enovid.[18] Enovid was first experimentally tested on Puerto Rican women in the island's densely populated and impoverished area of Rio Piedras.[19] According to Dr. Gregory Pinchus and Planned Parenthood Founder Margaret Sanger, Puerto Rico was the perfect place to conduct a massive experiment on the pill's effectiveness because the country was in the middle of a population boom, poverty was rampant, and thousands of women were involuntarily sterilized due to local politics; this combination provided for the "ideal" set of candidates for Pinchus' trial.[20] While the women, who wanted to avoid pregnancy or avoid a hysterectomy, knew that the pill was meant to prevent pregnancy, they did not know that the pill was experimental nor were they given enough safety information to make a fully informed choice about starting the medication.[21] Upon taking the medication, many women reported nausea, headaches, blood clots, and dizziness but their symptoms were largely dismissed by Pinchus and his team.[22] In fact, three women died within the course of taking the birth control pills. But it is unknown whether or not the pills caused their death because their deaths were never investigated nor were any autopsies performed.[23]

Today, birth control has been incredibly useful to women around the world, but it also came at the cost of this large-scale experiment. This is not the first time that Black and Brown women were either unknowingly subjects of medical experiments or felt that they had no choice but to participate in the experiments. For example, Dr. Gey, a prominent cancer researcher, kept a sample of Henrietta Lacks' unique cervical cancer cells to conduct research; today, the "HeLa"

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[18] Erin Blakemore, *The First Birth Control Pill Used Puerto Rican Women as Guinea Pigs,* (Mar. 11, 2019) https://www.history.com/news/birth-control-pill-history-puerto-rico-enovid.
[19] Id.
[20] Id.
[21] Alison M. Whelan, Unequal Representation: Women in Clinical Research, 106 Cornell U. L. Rev. (2021).
[22] Id.
[23] Id.

cells "are used to study the effects of toxins, drugs, hormones, and viruses on the growth of cancer cells without experimenting on humans."[24] Henrietta Lacks was a low-income, Black woman and Dr. Gey kept her cell samples without her knowledge or consent.[25] Today, her family is still fighting to keep her legacy alive and seek justice for her and others who did not consent to medical experiments.[26] This kind of trauma does not go unnoticed; many of the Puerto Rican women who took the higher hormonal-dose birth control pills report that while they are happy they were able to prevent unwanted pregnancies, they could not help but feel like they could not properly consent and that some form of autonomy was taken away from them because of it.[27] The distrust continues to grow and leaves many Black and Brown women feeling that their options are limited. Once again, this is a narrative many Black and Brown women know all too well: feeling pressure to participate in a certain procedure, having doctors sweep our side effects under the rug, and feeling as if we cannot voice our concerns. And sometimes if you want to advocate for yourself, you may not be able to find the words to do. Of course, this experiment started out in an under-resourced area in Puerto Rico, but its legacy continues for many Black and Brown women regardless of their socioeconomic status.[28]

III. Regional Access to Maternal Healthcare in the U.S. and Socioeconomic Status

While accessing medical care across different areas of the United States should instinctively be the same process, anyone who has tried to do so knows that the process can be dramatically

[24] Johns Hopkins Medicine. *The Legacy of Henrietta Lacks*, (last visited Apr. 20, 2023), https://www.hopkinsmedicine.org/henriettalacks/.
[25] Id.
[26] Id.
[27] Id.
[28] This argument recognizes how both Black and Brown women of all income levels face the negative effects rooted in the New Jim Crow, such as systemic racism and implicit bias. These barriers similarly manifest as negative effects on their maternal healthcare treatment. This paper also recognizes that many Latinas identify as Afro-Latina and its implications for data. In order to narrow the focus of this argument, I will primarily be focusing on the disparate effects that systemic racism and implicit bias have on Black women and also include the history of birth control pill testing on Puerto Rican women because it is a critical part of maternal health history.

different depending on the location. Between calling your insurance provider to see which doctors are within your particular network plan to attempting to see an OB-GYN specialist, the process can be arduous, lengthy, and complicated. Adding structural, societal, and institutional racism into this convoluted system can make successful access and treatment feel out of arm's reach, and even more so depending on the region. For example, in Khiara Bridge's article, *Racial Disparities in Maternal Health*, she references a study from 2006-2010 that found that the maternal mortality rate (MMR) in New York City was 56.3 for Black women while the rate was 4.7 for White women.[29] In Chicksaw County, Mississippi,

> 595 Black women die from pregnancy-related causes for every 100,000 live births- a statistic reveals that Black women in the county would have a better chance at surviving birth if they lived in Kenya or Rwanda- poor, underdeveloped nations where the MMR is 400 and 320, respectively.[30]

Of course, it is critical to note that access to care and socioeconomic status are important factors in explaining racial disparities in maternal health, but they only paint part of the picture. These statistics affect all Black women, not just low-income or wealthier Black women. As such, racism in this medical context helps to better explain the disparities across different socioeconomic statuses.

Time and time again, Black women continue to rank highest in terms of severe maternal morbidity (SMM), which "includes unexpected outcomes of labor and delivery that result in significant short- or long-term consequences to a woman's health."[31] This reigns true even in New York City, one of the most populous cities in the country with relatively more opportunities to seek healthcare compared to regions of the South. A 2012 report from the New York City

[29] Khiara Bridges, *Racial Disparities in Maternal Health, in* Critical Race Theory: A Primer (2019).
[30] Id.
[31] *Severe Maternal Morbidity in the United States*, Ctr. for Disease Control, (last visited Apr. 1, 2023), https://www.cdc.gov/reproductivehealth/maternalinfanthealth/severematernalmorbidity.html#:~:text=Severe%20maternal%20morbidity%20(SMM)%20includes,consequences%20to%20a%20woman's%20health.

Department of Health and Mental Hygiene showed that Black-non Latinas suffered a higher level of severe maternal morbidity across the education board than White women and women of other racial groups.[32] This included groups of women who did not finish high school, high school graduates, those who attended some college, and college graduates. [33] Effectively, this means that a college-educated Black woman had a higher chance of suffering severe maternal morbidity than a White woman who did not finish high school.[34] Of course, it is not to say that college education or class should protect one from disparate health effects; instead, it follows "several studies that show people of color have poorer health outcomes even when one controls for class."[35] As Khiara Bridges explains, "at times, racial disparities in health do not only persist as one moves up the socioeconomic ladder, but these disparities actually *increase*."[36] If access to maternal healthcare services still negatively plagues Black women the most in New York City and other large metropolitan areas with more medical facilities, then how will it compare to other regions in the United States with a fewer number of facilities?

In Texas, Nakeenya Wilson almost lost her life while giving birth to her son in 2016 as he became stuck in her pelvis.[37] Upon arriving at the hospital, the staff continued to forget her name and delayed a scheduled induction.[38] A nurse subsequently gave her medication to stop excessive bleeding without informing her first, which then led to a spike in blood pressure.[39] When Nakeenya later found out she was pregnant again, she could not help but think of this terrifying

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[32] NEW YORK CITY DEPT. OF MENTAL HEALTH AND HYGIENE: SEVERE MATERNAL MORTALITY IN NEW YORK CITY 2008-2012 (last visited Mar. 25, 2023).
[33] Id.
[34] Id.
[35] Khiara Bridges, *Racial Disparities in Maternal Health, in* Critical Race Theory: A Primer (2019).
[36] Id.
[37] Mary Tuma, *It's Dangerous for Black Women to Give Birth in Texas, and It Could Be About To Get Worse* (Mar. 17, 2023), https://www.theguardian.com/global-development/2023/mar/17/texas-black-women-maternal-healthcare-crisis-medicaid.
[38] Id.
[39] Id.

hospital experience; unfortunately, many Black women seeking maternal healthcare in Texas have similar stories.[40] A 2019 report compiled by the Texas Department of State Health Services showed that Black women are disproportionately affected by severe maternal morbidity rates related in-hospital deliveries within the state. [41] The report also showed three key features: (1) demographic and geographic disparities in severe maternal morbidity rates related to in-hospital deliveries persist (2) Non-Hispanic Black women experienced the highest rates of severe maternal morbidity and (3) North Central Texas and Southeast Texas along the Gulf Coast had the highest rates.[42]

While the report specifically refers to SMM, it echoes the effects of systemic racism across the board for Black women seeking maternal health care.[43] As slavery and racism were deeply ingrained in the South's economy and society, its legacy continues to disproportionately effect Black women and access to maternal health in Southern regions of the United States. Of course, slavery existed in the Northeast, including New York City, so this should not read that slavery and racism were unique to the South. Instead, Part III draws on the history of both regions, particularly the South, to demonstrate direct legacies of slavery, racism, and violence against Black women. All three legacies left Black women as the "bottom of society's totem pole" in conjunction with discrimination and implicit biases in the healthcare system.[44] The New Jim

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[40] Id.
[41] TEXAS HEALTH AND HUMAN SERVICES: TEXAS MATERNAL MORTALITY AND MORBIDITY REVIEW COMMITTEE AND DEPT. OF STATE HEALTH SERVICES JOINT BILLENIAL REPORT (last visited Mar. 20, 2023).
[42] Id.
[43] Part IV specifically discusses abortion desserts, so this section will discuss other aspects of access to maternal healthcare.
[44] Implicit bias describes how we subconsciously think and feel about certain groups of people. With respect to race, it often describes what happens when "racial stereotypes and assumptions creep into our minds and effects our actions." In the medical field, these implicit biases may affect the way medical professionals treat Black women and other people of color. For example, they might assume that a Black mother delivering her fourth child in a public hospital may be abusing the welfare system; this implicit bias arises from the narrative that has permeated society that Black women have multiple children with the goal of receiving government financial assistance. Jenée

Crow has plagued Black women, particularly in the South, with similar legacies to deal with daily. Khiara Bridges provides that one explanation for racial disparities in health is stress:

> If stress, does indeed compromise health, then there is a possibility that it may contribute to racial disparities in health. This would be true if racial minorities endure more stress in their daily lives, or over the course of their lives, than their White counterparts. Many scholars have been willing to make that argument, and they have identified several sources of stress that disproportionately, or uniquely, impact racial minorities.[45]

One of the sources of stress is racism for racial minorities across all income levels.[46] Some examples of stress rooted in racism, specifically physiological and psychological responses, include but are not limited to being passed over for employment opportunities, promotions, and raises, being followed around the store while shopping, and "assumed to be the underserving beneficiaries of affirmative action programs in the education institutions that they attend and at the jobs they secure."[47]

As one may be able to imagine, facing microaggressions and direct racial aggressions across the board is both physically and emotionally exhausting. Slavery and racism are not unique to the South and as such, stress rooted in racism is also not unique to the South. In examining regional access to maternal healthcare for Black women, this section focuses on the legacies of how the South relied heavily on the exploitation of enslaved people, how Jim Crow era laws solidified violence against African Americans in the 19th and 20th Centuries, and how the legacy of systemic racism in the New Jim Crow can be observed in the disparate treatment Black women receive in the healthcare system. As a result, the aforementioned results of stress and the effects on access to maternal health for Black women are multigenerational. It is stressful

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Desmond- Harris, *Implicit Bias Means We're All Probably At Least a Little Bit Racist* (Aug. 15, 2016), https://www.vox.com/2014/12/26/7443979/racism-implicit-racial-bias.

[45] Khiara Bridges, *Racial Disparities in Maternal Health, in* Critical Race Theory: A Primer (2019).

[46] Id.

[47] Id.

that the nearest hospital that can provide maternal care is understaffed in urban cities. It is stressful to get that gnawing feeling in your inner being that your doctor is treating you differently because you have multiple children. It is stressful that all these implicit biases have now delayed your healthcare treatment in the hospital because the medical team did not take your concerns seriously. Black women, and other racialized minorities, are then forced to bear the burden of this stress and its negative physical and mental manifestations.

Disparate maternal health treatment negatively impacts Black women across all income levels. A Black woman cannot waive her diploma in her doctor's face and expect him to automatically treat her better, though having a college degree should not indicate that one is more deserving of better treatment over someone without a college degree. A Black woman cannot read her doctor's mind and wonder if he is going to treat her better because she runs a multimillion-dollar business, though having more money should not indicate that one is more deserving of better treatment over someone with fewer resources. Even Serena Williams could not get the nurse to listen to her plea for a CAT scan the first time around. Much like mass incarceration and the criminal legal system, Black people also have the worst outcomes in the healthcare system. However, one critical difference is that class is much less relevant in the healthcare system for people of color and does not insulate them from any negative effects. This analysis is designed to show that socioeconomic status does not shield Black women from the legacy of the New Jim Crow and what that can mean for their reproductive health. These negative effects are complex and multifaceted, meaning that their solutions will be just as complex and multifaceted. To tackle issues of regional access to maternal healthcare through a critical race theory framework, it is vital to place Black women at center stage to help create policies that will help alleviate this strain. That may look like creating a pipeline program for

college graduates to enter graduate school programs that center on policy work with the guarantee of secured employment in a hospital after graduation. Policymakers and healthcare providers must stop failing Black mothers and Black women of reproductive age and instead, have their voices amplified to reduce the widespread effects of the New Jim Crow.

IV. Black Women are Negatively Impacted by Abortion Clinic Deserts

The summer 2022 decision in Dobbs v. Jackson Women's Health Organization, which took away the constitutional right to abortion outlined in Roe v. Wade, shook the United States in more ways than one.[48] What once felt like feasible access to abortion for those of reproductive age soon became a crime in many parts of the country. Before Roe was overturned, abortion clinics across the country were already under attack by local governments trying to prevent the procedure beyond a certain gestational period or prevent it in general.[49] For many, these clinics are already miles from their homes and the nearest one could be another state or two over if their "local" clinic was shut down. Dobbs created more abortion deserts, where those seeking care must travel miles to get to a clinic, potentially take time off work, spend money at a hotel if needed, and escape their local laws where abortion is now illegal.[50] The growth of abortion deserts particularly adversely affects Black women as they most often live within these abortion deserts. It is not forgotten that low-income Black women likely must jump through more hoops and cross more hurdles to get an abortion. For example, can they afford to take a day or two off work? Do they have enough money for gas to travel to a clinic? These are important narratives to remember and should not be taken lightly. However, Black women across all income levels are

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[48] *U.S. Supreme Court Takes Away The Constitutional Right to Abortion*, Center for Reproductive Rights (last visited Mar. 30, 2023), https://reproductiverights.org/case/scotus-mississippi-abortion-ban/.
[49] Id.
[50] Id.

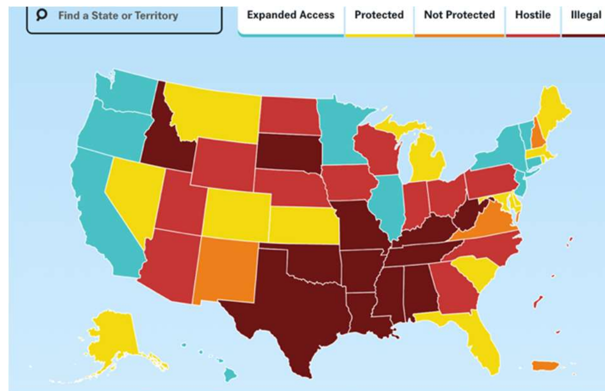
being negatively impacted, and often, their higher income or higher- education degree does not insulate them from the negative effects of the law.

According to an article in Vox, the majority of women seeking legal abortion services in states with abortion bans are Black. [51] The article also reported the following information:

> In Mississippi, the state that filed Dobbs, Black women got 74% of abortions provided in 2019. In Alabama, where an abortion ban went into effect the day the decision came down, it was 62%; in Georgia, where abortions after six weeks may soon be banned if a judge grants the state's request to allow a 2019 law to take effect, 65%.[52]

Most of the states with these bans are located in the South, where almost half of the country's Black population lives.[53] To see the stark effect of these new abortion deserts, the Center for Reproductive Rights created an interactive map that highlights states according to different metrics including those with expanded abortion access, those where abortion is protected, where it is not protected, where getting an abortion done can be hostile, and where abortion is outright illegal. [54] Zooming in specifically on Mississippi, which again is the context in which Dobbs arose, essentially bans abortion in just about all situations; this is in comparison to a state like New York where the state enacted more protections for abortion providers and helpers post Dobbs. [55] Below is an image displaying the interactive map.

[51] Fabiola Cineas, *Black Women Will Suffer the Most Without Roe* (Jun. 29, 2022), https://www.vox.com/2022/6/29/23187002/black-women-abortion-access-roe.
[52] Id.
[53] Id.
[54] *After Roe Fell: Abortion Laws by State*, Ctr. for Reproductive Rights (last visited Apr. 2, 2023), https://reproductiverights.org/maps/abortion-laws-by-state/.
[55] Id.



[56]

It is abundantly obvious that Black women living in the South face the dangerous reality of narrow access to abortion care because of these laws. In 2019, the CDC reported that Black women have the highest abortion rate of 23.8 per 1,000 women and make up the largest percentage of all abortions.[57] Just as this discussion of the root of racial disparities in maternal health is complex, the reasons why Black women get abortions at elevated rates in the United States are similarly complex. Some of these reasons include a lack of employment opportunities, societal barriers that contribute to increased complications during pregnancy, and systemic racism. [58] The latter will be the focus of this section.

[56] Id.
[57] *Abortion Surveillance- United States*, Ctr. for Disease Control (last visited Apr. 1, 2023), https://www.cdc.gov/mmwr/volumes/70/ss/ss7009a1.htm.
[58] While Black women have historically constituted a large portion of the labor market, there is a lack of tangible data on racial discrimination causing lack of employment opportunities. Black women face both gender-based, racial and ethnic discrimination, meaning that they are at a higher risk of being discriminated against in the workplace on multiple fronts. Research has shown that many Black women are discriminated against before the interview process even begins; many Black women are often passed over for having names that are too "Black" or ethnic. Discrimination and workplace-bias often causes Black women to be passed over for higher-paying jobs and employment opportunities. In 2021, on average, it took Black women twenty-one and a half months to make what the average White, non-Hispanic man made; Black women made sixty-four cents for every dollar a White, non-Hispanic man earned that same year. Together, being passed up for employment opportunities because of workplace discrimination contributes to the pay-gap and can lead to financial insecurity. Financial insecurity is often one of the many reasons that Black women choose to have an abortion because of the financial strain of having a child. Another reason Black women have elevated rates of abortion across the country is because of societal barriers that lead to higher level of complications during pregnancy. It is important to clarify that Black women do not inherently have more pregnancy complications for that would insinuate that this is a biological issue unique to Black women. Instead, systemic racism, financial insecurity and stress rooted in discrimination, inadequate medical treatment, and ignoring Black women's medical concerns are some of the leading factors that contribute to higher levels of pregnancy complications. Ignoring Black women's health concerns increases the chance of ignoring crucial parts of their medical history that can negatively impact their pregnancy. For many Black women who experience pregnancy

Even when Black women can receive some sort of medical attention to begin the abortion process, they continue to face the same issues of systemic racism and medical professionals not believing them or shaming them for considering or proceeding with an abortion. [59] And if a Black woman lives in one of the abortion deserts described in the Center for Reproductive Rights interactive map, this only means that their health will continue to be at risk should she have to continue longer into the pregnancy before she can get an abortion in an abortion-protected state or have no choice but to continue with the pregnancy.[60] And perhaps traveling to another state is putting her health at risk because she has a high-risk pregnancy. Or perhaps she goes to her doctor for advice and they subtly, but surely critique her for getting pregnant and no longer wanting to continue her pregnancy. Or perhaps her doctor does not prescribe her medication post-unsafe abortion because they assume she has used drugs in the past. These effects of systemic racism cannot be ignored and forces society to re-examine what it means to be a Black woman seeking an abortion in the United States.

As Michelle Alexander explained, class and socioeconomic status do not insulate Black people from the effects of the New Jim Crow. Systemic racism-rooted mass incarceration has broad health implications for Black women and particularly for those who live in abortion deserts. The criminal legal system and health disparities both disproportionately affect Black people, but class does not insulate Black people from the latter. As seen in the discussion of

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complications, abortion is the most logical option to save their lives. Salma Elakbawy and Lucie Prewitt, *The Wage Gap for Black Women by State* (Sept. 19, 2022), https://iwpr.org/media/in-the-lead/the-wage-gap-for-black-women-by-state/; *Why Are Black Women at Such High Risk of Dying From Pregnancy Complications?* Am. Heart Ass'n. News (Feb. 20, 2019), https://www.heart.org/en/news/2019/02/20/why-are-black-women-at-such-high-risk-of-dying-from-pregnancy-complications.

[59] P.R. Lockhart, *The Untold Story About Black Women and* Abortions (Oct. 6, 2016), https://www.motherjones.com/politics/2016/10/true-stories-hard-choices-documentary-abortion-black-women/.

[60] *After Roe Fell: Abortion Laws by State*, Ctr. for Reproductive Rights (last visited Apr. 2, 2023), https://reproductiverights.org/maps/abortion-laws-by-state/.

access to maternal healthcare in Part III, a college-educated Black woman has a higher likelihood of suffering from severe maternal morbidity compared to a White woman who did not finish high school; this translates to a college-educated Black woman facing similar effects with very limited or no access to abortion care.[61] Having a college degree or wealth should not be a ticket to better healthcare access, but this disparity demonstrates that Dobbs will affect every and all Black women regardless of class or socioeconomic status.[62] This begs the question: what comes next? It is difficult to say what the legal landscape for abortion access will look like in a year's time, even in two years' time. What is certain is that this decision will disproportionately affect women of color and will not stop abortions but rather increase the health consequences of unsafe abortions. Many are donating to pro-choice organizations to increase reproductive health and abortion care access across the country; in fact, many of these organizations, including the Abortion Care Network and The Mariposa Fund, have seen an amazing increase in donations since May 2022.[63] In addition to financial donations, it is critical to expand access to medication abortion which is at the heart of the abortion debate post-Dobbs as many restrictive states are attempting to criminalize ordering these pills from websites like Aid Access.[64] Notably, many legal scholars have stressed the importance of having a pro-abortion or pro-choice presence in the White House in order to gain control of the federal government in 2024.[65] Ideally, this would

[61] NEW YORK CITY DEPT. OF MENTAL HEALTH AND HYGIENE: SEVERE MATERNAL MORTALITY IN NEW YORK CITY 2008-2012 (last visited Mar. 25, 2023).
[62] *U.S. Supreme Court Takes Away The Constitutional Right to Abortion*, Ctr for Reproductive Rights (last visited Apr. 20, 2023), https://reproductiverights.org/case/scotus-mississippi-abortion-ban/.
[63] Maxine Wally, Where To Donate in the Fight for Abortion Rights (Jun. 24, 2022) https://www.wmagazine.com/life/donate-abortion-fund-roe-v-wade-how-to-help.
[64] *U.S. Supreme Court Takes Away The Constitutional Right to Abortion*, Ctr for Reproductive Rights (last visited Apr. 20, 2023), https://reproductiverights.org/case/scotus-mississippi-abortion-ban/; Rachel Cohen, The New Front in the Right's War on Abortion (Jan. 9, 2023), https://www.vox.com/policy-and-politics/2023/1/9/23540562/abortion-pills-medication-dobbs-roe-mifepristone.
[65] Rachel Cohen, The New Front in the Right's War on Abortion (Jan. 9, 2023), https://www.vox.com/policy-and-politics/2023/1/9/23540562/abortion-pills-medication-dobbs-roe-mifepristone.

increase the chance of broadening abortion access across the country and particularly in areas where it is currently completely outlawed. As shown in the interactive map created by the Center for Reproductive Rights, banning this kind of care leaves Black women undoubtedly compromised.[66] Black women are disproportionately affected by abortion deserts, and it is critical to expand abortion laws to save the lives of Black mothers and their families.

V. Systemic Racism, Black Women, and Medical Malpractice Claims

Perhaps an expectant mother's worst nightmare is a birth complication resulting in a fatal injury to her child. But for some, this is a reality. And particularly so for expectant Black women whose concerns are pushed aside by their medical providers. For many, the next possible route is to file a medical malpractice claim against the doctor and the hospital. But medical malpractice suits can be particularly tricky and complicated because of how tedious and often elusive it can be to prove the medical malpractice elements. To do so, the patient must show the following: (1) a professional duty owed to the patient; (2) breach of such duty; (3) injury caused by the breach; and (4) resulting damages.[67] Was the baby born with a disease that resulted in their death? Or is birth just simply unpredictable? Did the doctors breach their duty to take reasonable care when the mother complained of sharp leg pain? Even more so, such claims usually prioritize fetal harm and dismiss harm to the mother; this divide is incredibly harmful because it can leave the mother with little remedy should she seek to try to file a claim.[68] Even if a Black woman or her family wanted to file a claim, where would they even start? Filing a claim like this is not an easy task,

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[66] *After Roe Fell: Abortion Laws by State*, Ctr. for Reproductive Rights (last visited Apr. 2, 2023), https://reproductiverights.org/maps/abortion-laws-by-state/.
[67] B. Sonny Bal, *An Introduction to Medical Malpractice in the United States* (Nov. 26, 2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628513/#:~:text=To%20do%20so%2C%20four%20legal,such%20as%20pain%20and%20suffering.

[68] Jamie R. Abrams, *Distorted and Diminished Claims for Women*, *34 L. REV. 1955, (2013)*.

certainly if you do not have any experience with the legal system. Attempting a medical malpractice claim is even more tricky, complicated, and elusive for Black women and is another example of how Black women continue to be systematically oppressed by the law and systemic racism, just as they are negatively affected by the legacies of the New Jim Crow.

This was the case for Charles Johnson IV when he filed a medical malpractice claim in May 2022 against Cedar-Sinai Medical Center for the death of his wife, Kira Dixon Johnson. [69] Kira Johnson died twelve hours after a scheduled cesarian section (C-Section) that was performed in seventeen minutes, a procedure that many health care providers, the head of obstetrics, and the head of labor and delivery at Cedar-Sinai all claimed was done quickly.[70] Despite hours of internal bleeding and her husband's pleas to the medical team, she was not admitted into the operating room until it was too late.[71] The nurse told Charles Johnson that his wife was not a priority.[72] Even Angelique Washington, a Black surgical technologist with more than thirty years of experience, said that "patient safety was out the door" when Kira Johnson entered the operating room and that she even says an extra prayer when Black patients come to the hospital because of the risk they face due to racism.[73]

Stories like Kira Johnson's are all too familiar and begs the question: why is it exceptionally harder to prove a medical malpractice claim both for and by a Black woman of all income levels? Three reasons ring similar throughout the discussion of racial disparities in maternal health: implicit biases on behalf of medical staff that lead to delayed care or no care at all, structural racism in health care and the law at large, and hard-to-find and read data. Time and

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[69] *Lawsuit Says a Black Patient Bled to Death Because of a Hospital's Culture of Racism*, Nat'l Pub. Radio (May 5, 2022), https://www.npr.org/2022/05/05/1096833756/racism-lawsuit-cedars-sinai-medical-center-wife-death.
[70] Id.
[71] Id.
[72] Id.
[73] Id.

time again, Black women report that doctors ignore their complaints or believe that they are inflating their symptoms; these implicit biases leave little room to debate if the doctors were ignoring their complaints because they are Black or if they were trusting their professional instinct and pursuing another course. If the nurse ignored Serena Williams when she complained of sharp leg pain and difficulty breathing, then it is difficult to say that her fame and wealth prevented her from receiving disparate maternal health treatment. Her own self-advocacy finally pushed the nurse to tell the doctor to perform the CAT scan and administer the IV drip. If she brought a medical malpractice claim forward, perhaps the hospital would say that the nurse followed the best course possible, was following standard hospital procedures, and that they did not breach their duty of care to her because they eventually provided her with medical treatment.

On top of weaving implicit bias into a medical malpractice claim, structural racism in the medical context further complicates a successful claim. Namely, many Black women may not trust the legal system or their doctors because of the very racial disparities they are trying to avoid, because of historical discrimination against Black women seeking medical treatment, and because of the overall discriminatory treatment of Black people by the law. As previously mentioned, the historical degradation of Black women in the medical context, such as Sim's experiment on enslaved women, may serve as a starting point of distrust of doctors and of medical professionals. Black women do not necessarily have to look too far back to see examples of medical mistreatment in their communities: they may be able to look back to their mothers, aunts, grandmothers or even great-grandmothers. This experience reigns pervasively true for the older generation who may have given birth in a segregated hospital with low-quality care or who

also had to travel far from their homes to see their OB-GYN throughout their pregnancy. [74] Combining distrust in doctors with distrust of the legal system can make it incredibly difficult for a Black woman or her family to pursue a medical malpractice claim. In a 2019 Pew Research Center survey, around nine out of ten Black people, or about 87%, said that Black people "are generally treated less fairly by the criminal justice system than Whites, a view shared by a much smaller majority of White adults (61%)."[75] Although this statistic describes the criminal justice system, it is not outlandish to see why Black people, and Black women specifically, may not even want to pursue a medical malpractice claim for fear they will not be taken seriously, may receive little in damages, or face immense legal roadblocks along the way.

Despite data showing the number of Black women who died during or soon after childbirth, there is still a lack of data on the exact links between negative treatment and medical malpractice claims. As previously described, successfully pursuing a medical malpractice claim can be extremely difficult to prove, and proving the causation element may be the most difficult part. Essentially, plaintiffs must show "a direct relationship between the alleged misconduct and a subsequent injury. Alternatively, the patient can show a legally sufficient relationship between the breach of duty and the injury; this concept is referred to as proximate causation."[76] Commenting on Kira Johnson's death, Professor Brietta Clark of Loyola Law School, said that the presiding judge identified the weak evidence as general statements rather than specifically

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[74] Verónica Zaragovia, *Trying to Avoid Racist Health Care, Black Women Seek Out Black Obstetricians* (May 28, 2021), https://www.npr.org/sections/health-shots/2021/05/28/996603360/trying-to-avoid-racist-health-care-black-women-seek-out-black-obstetricians.
[75] John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System* (May 21, 2019), https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/.
[76] B. Sonny Bal, *An Introduction to Medical Malpractice in the United States* (Nov. 26, 2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628513/#:~:text=To%20do%20so%2C%20four%20legal,such%20as%20pain%20and%20suffering.

showing a pattern of discrimination.[77] Since then, Charles Johnson's attorney, Nicholas Rowley, has gathered additional depositions to compile information on the number of Black women that have died at Cedar-Sinai; this data will hopefully strengthen their medical malpractice claim and help the Johnson family find justice for the loss of their loved one.

Additionally, Professor Clark also explains why it can be difficult to simultaneously prove a civil rights violation on top of a medical malpractice claim: showing discrimination usually must be intentional in order to prove a civil rights violation in health care.[78] She explains, "Compared to when civil rights laws were enacted, a lot of the kind of unequal treatment we see in health care today does not seem to be explicit…It does not seem to be conscious."[79] Since the law favors and requires hard, concrete evidence, it is likely evident to most students of the law that gathering this type of information can feel almost impossible short of the doctor explicitly saying, "I am not going to provide the proper medical treatment because you are Black." Successfully wining this type of claim can feel just as hard as trying to win a medical malpractice claim, particularly when trying to recover for damages if the judge feels that the evidence is weak.

The legacies of the New Jim Crow, including structural racism and implicit biases, continue to be pervasive in the barriers to successful medical malpractice claims. While the law can feel very rigid, there is room to make the process more holistic so that Black women can successfully file a medical malpractice claim should they choose to do so. In an ideal world, Black women would not even have to consider filing such a claim because they will not experience a birth complication that could be traced to medical malpractice. However, if they choose to do so, there

[77] National Public Radio, *Lawsuit Says a Black Patient Bled to Death Because of a Hospital's Culture of Racism* (May 5, 2022), https://www.npr.org/2022/05/05/1096833756/racism-lawsuit-cedars-sinai-medical-center-wife-death.
[78] Id.
[79] Id.

must be a better system to be able to prove all the elements. For example, having Black expert witnesses could be helpful in proving an insight into this complex issue and also able to provide a level of cultural competency in their testimony. Diversifying the medical review board who will examine these kinds of cases is also critical as they are the ones who will help determine if the claim is valid or not and it is critical to have a diverse board who reflects the population they are serving. Filing or successfully winning a medical malpractice claim will likely never be an easy process, but implemented these suggestions can help bring justice for Black women who have suffered unnecessarily.

VI. Conclusion and Recommendations

Contrary to Forman's argument that *The New Jim Crow* falls short because of the claim that class provides a shield to the effects of the New Jim Crow, this paper concludes that this theory is not entirely true. If class completely insulated Black women from maternal health disparities, then we likely would not hear stories like Serena Williams and her near-death experience in the media. Nor would we hear stories where Black women are not being administered pain-relieving medication because their medical teams feels that they can probably tolerate the pain. Nor would the MMR rate continue to be higher for Black women across income levels in the United States compared to that of White women. These are all preventable tragedies, and it is vital to recognize how disproportionate these numbers are.

There is no quick-fix solution to such a complex problem. Racial disparities in maternal health have spanned multiple generations of women, therefore it is critical to examine the history of systemic racism, implicit bias, and violence against Black women in the medical field to come up with tangible solutions for the future. Racial disparities in healthcare usually do not begin at a Black woman's first OB-GYN appointment; if this were the case, then it would be simple to

pinpoint the beginning of a Black pregnant woman's disparate maternal health treatment to the day she walks into the doctor's office for her first appointment. Instead, both the problem and solutions lay within examining legacies of medical experiments, such as Sim's vesicovaginal fistula surgeries, implicit bias training, restructuring the healthcare system as we know it, investing money into a new healthcare system, and believing Black women when they have medical concerns.

A possible path of healing this gap includes further investments into building more hospitals with sufficient staffing in areas that are highly populated by Black communities as maternal health affects both expectant mothers and their families. The financial investment can look like building more hospitals with modern technology and incorporating upgraded technology into existing hospitals. As mentioned, one of the reasons that Black women tend to have more complicated pregnancies is because some of the underlying medical issues may go undiagnosed for some time, either because the doctors are ignoring their complaints or because they may need to travel to another town to get access to more modern technology. Of course, money alone will not solve health disparities, but investing in and providing hospitals that predominantly serve Black women with more modern technology can begin to shrink the health disparities and help Black women have healthy pre- and post-natal care.

Healing the gap can also look like easing travel concerns for Black women who seek an abortion and cannot get one in their residential state.[80] Telemedicine access for abortion care continues to be get attacked and narrowed down, but it is these services that provide Black women of all income levels with support leading up to and after having an abortion. Abortion deserts will not prevent abortion procedures but will only increase the number of unsafe

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[80] In an ideal world, Dobbs would not have been overturned and there would be fewer abortion clinic deserts, but that is an argument that deserves its own paper.

abortions across the country; expanding these kinds of services are not a threat to society, but rather a tool to ensure Black women can remain healthy. Finally, healing the gap must include promoting more Black women into policy leadership roles because creating any policy changes without listening to those who will be directly affected by them would only enhance New Jim Crow effects. These policies can include expanding Medicaid, advocating for health insurances to cover longer post-natal and doula services, and partnering with local community organizations who support Black mothers as they know how to best serve the local population. By advocating for policies that have a critical race theory-based foundation, that is acknowledging how structural racism has played and continues to play a prominent role in society, it is possible for the maternal health disparities gap to close for the next generation of Black mothers.