

TRANSCRIPTS

BLACK WOMEN'S VOTER EMANCIPATION IN SLAVERY'S AFTERLIFE

INTRODUCTION

On March 1, 2024, the *University of Richmond Law Review* hosted a symposium entitled *Vestiges of the Confederacy: Reckoning with the Legacy of the South*. Professor Carla Laroche¹ delivered the presentation transcribed below, which has been edited for clarity and cohesion.² The *University of Richmond Law Review* was honored to host her and is thrilled to publish her engaging discussion on Black women's voter emancipation.

Professor Carla Laroche: Good afternoon, hello. Thank you for attending my discussion of Black women's voter emancipation and slavery's afterlife. I am honored to be here. This Symposium has been lovely. Shout out to Zoë and the whole team for putting this all together. It's been so well organized.

My scholarship and work analyze the barriers people with criminal convictions face when trying to access justice and their civil rights. In this presentation, I apply Saidiya Hartman's afterlife of slavery—the idea that the Thirteenth Amendment's abolishment of slavery did not end Black people's oppression and subjugation—

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2. Italics indicate paraphrased language. Where possible, direct quotes are provided in footnotes.

to the experiences of Black women today. Hartman asks, *What does it mean to exist between no longer enslaved and not yet free?*³ My analysis answers her question. More specifically, I argue that Black women's resistance to voter exclusion because of criminal convictions and denial of voting power today serves as another example of the afterlife of slavery's shadow.

I start with Pamela Moses.⁴ Pamela Moses is a cofounder of the Black Lives Matter chapter in Memphis, Tennessee. She had a desire to represent her community and sought to run for election as mayor in Memphis. Ms. Moses satisfied the requirements and filed her paperwork with the elections office. And then the elections office, as I imagine, then said, *No, no, no, you're not eligible to vote. You are still on probation.* According to the elections office, serving probation on a prior criminal conviction made Ms. Moses ineligible to vote, and, if she was ineligible to vote, she was also ineligible to run for office.

Pamela Moses, familiar with the bureaucracy and mismanagement of records, said, *No, no, I'm done with my probation. Y'all are complicating things for no reason. I'm going to go to the judge of my most recent case.* The judge said, *You are under probation.* She said, *That is incorrect. I'm going to go directly to probation and get a certificate from them indicating that I can vote.*

Tennessee has a very complicated "disenfranchisement maze" you must navigate to restore your vote if you have been convicted of a criminal offense. You can go to court and get a certificate saying you are eligible; you've met all the requirements. Or you can go to probation and get the certificate. Depending on when you were convicted of your crime and what type of crime you were convicted of, you could either be eligible to vote immediately or you may have to go through this maze. And Ms. Moses went through the maze, went to probation, gave the form to the probation officer, the officer went back to his desk, reviewed Ms. Moses's files, said, *She is eligible*, and signed the paperwork indicating Ms. Moses could vote.

3. Saidiya Hartman, *The Hold of Slavery*, N.Y. REV. BOOKS (Oct. 24, 2022), https://www.nybooks.com/online/2022/10/24/the-hold-of-slavery-hartman/?lp_txn_id=1537281 [<https://perma.cc/XKA3-LRX2>] ("What did it mean to exist between the 'no longer' enslaved and the 'not yet' free?").

4. See Sam Levine, *The Untold Story of How a US Woman Was Sentenced to Six Years for Voting*, GUARDIAN (Dec. 27, 2022, 2:00 AM), <https://www.theguardian.com/us-news/2022/dec/27/pamela-moses-voting-rights-mistake-jail> [<https://perma.cc/4TF8-RDNW>].

Ms. Moses filed that paperwork with the elections office. And a few months later, she was convicted of voter fraud, registering to vote illegally, and was sentenced to six years in prison. She indicated that she did not know she was ineligible to vote; Ms. Moses thought she was eligible, and she had the probation officer's certification to support her belief. She was held between eighty and ninety days pending a sentencing hearing. At the hearing, she testified on her own behalf and said, *I did not know I was ineligible*. The video that is on YouTube from a news channel indicates that the judge yelled at her, *You tricked probation!* with no evidence to support the judge's claim.⁵ Simply, *You tricked probation and because of your actions, you are going to be sentenced. You must serve six years. With good behavior, you might serve less, but you are going to serve prison time.*

People thought it seemed unfair that someone who legitimately did not know she was ineligible to vote and who was told by a government official that she was eligible would get six years in prison.⁶ Ms. Moses's case went viral after local and national newspapers reported on it. Guardian reporter Sam Levine submitted a Freedom of Information Act ("FOIA") request and received all this paperwork about Ms. Moses's case, including an email exchange that included the internal investigation of probation. The review concluded expressly and explicitly that it was a probation officer's fault that Ms. Moses received an inaccurate certificate that indicated she was eligible to vote. The review confirmed that the probation officer missed a step in their verification process and did not see that Ms. Moses still had a few months of probation left. That email exchange contained material and exculpatory information regarding Ms. Moses case, yet the government had not turned it over to Ms. Moses before the trial. That was the first time, through this FOIA request, that her defense attorney and Ms. Moses learned that this information existed that showed that the probation office had conducted this review and deemed her not responsible.

Based on that and some other material evidence, Ms. Moses filed a motion for a new trial. The judge granted it. The judge who

5. *Memphis Woman Faces Sentencing in Voter Fraud Case*, WREG NEWS, at 1:00–1:10 (Jan. 26, 2022), <https://www.youtube.com/watch?v=Jqaxe66Uz0I> [<https://perma.cc/7AJU-AU6A>].

6. Levine, *supra* note 4.

blamed her for tricking probation said, essentially, *My bad, you were right*. Ms. Moses was freed.

When the District Attorney (“DA”) Amy Weirich found out about this evidence, she said, *Just to be clear, that was not my office*. In making that statement, DA Weirich sought to assert that her office was not to blame for Ms. Moses’s improper conviction and incarceration. Further, DA Weirich noted that it was Ms. Moses’s fault for not pleading guilty to a misdemeanor in the first place. After claiming that the time Ms. Moses served between the conviction and the granting of a new trial was enough punishment, DA Weirich announced that the DA’s office would not recharge Ms. Moses.

Ms. Moses, with all of that information, filed an affirmative lawsuit, claiming malicious prosecution.⁷ She filed it against the former DA Weirich, who lost her reelection campaign, and against the newly elected DA, who was a former Memphis law school professor. Ms. Moses’s lawsuit was dismissed. She has recently filed an appeal. She’s still trying to get justice, to hold people accountable.

Ms. Moses wanted to run for office. They told her that she did not have the right to do so because her criminal convictions and term of probation made her ineligible. And then the government punished her for trying to access the same rights that other people have. In doing so, the new conviction would result in excluding Ms. Moses from political participation in Tennessee yet again.

My reason for talking about Ms. Moses, talking about voting, and talking about seeking access to things that people without convictions can access more easily is that for Black women like Ms. Moses, there is a shadow of slavery’s afterlife that keeps them unable to vote, unable to access, again, the same things that other people can. Ms. Moses navigates within the same shadow of slavery as Harriet Tubman. Harriet Tubman was known as the “Moses of her people.” She was an enslaved Black woman who navigated the Underground Railroad to get to freedom and then turned back

7. Sam Levine, *Pamela Moses Sues Officials After Voter Fraud Conviction Overturned*, GUARDIAN (Oct. 25, 2022, 4:48 PM), <https://www.theguardian.com/us-news/2022/oct/25/pamela-moses-sues-voter-fraud-conviction-overturned-tennessee> [https://perma.cc/DGU9-ZP AQ].

around and led other people to freedom as well. She made a larger impact.

The afterlife of slavery is a concept that Saidiya Hartman coined to talk about slavery's shadow;⁸ that the ending of slavery, and the emancipation that Black people were to experience, was a non-event. Emancipation was a fallacy. Just like the release of individuals from incarceration and the completion of their imposed sentences are simply nonevents. There are too many consequences and connections that remain to that conviction for there not to be this afterlife.

The first part of my discussion is about slavery for Black women and its afterlife. Next, I will talk about the resistance, not only by Ms. Moses but other Black women who are resisting in different forms, whether that was in slavery or now in our afterlife of slavery. Then, I will discuss ideas about how we get towards true voter emancipation. True emancipation was promised so long ago, and yet we are still in slavery's afterlife.

Let's talk, first, about why Ms. Moses could not vote, and about Tennessee's winding disenfranchisement maze. This exclusion exists not only in Tennessee, but in jurisdictions across the nation. And it's called, as you know it, felony disenfranchisement. However, in certain states, one can be disenfranchised with a misdemeanor conviction. Here is already this incorrect conception of what this "felony disenfranchisement" is. Words and how we label certain concepts matter. When I started to learn more information about schemes excluding people with convictions from the ballot box across the nation, I didn't understand what disenfranchisement meant. It's a big word that has such power and was hard to grapple with.

I wondered, Why not call it what it is? It is voter exclusion based on someone's conviction. That is what I have decided to call it, instead of felony disenfranchisement.

The contours of voter exclusion depends on what state you're in, whether you can vote notwithstanding your incarceration—as is

8. *See generally* SAIDIYA HARTMAN, *LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE* (2006).

the case in Vermont and Maine, D.C., and Puerto Rico⁹—or whether you must wait until you're released from incarceration, as in certain states, like New York.¹⁰ Or, if you're in Tennessee, for example, depending on the year and your conviction, you can vote either immediately or you must wait and go through the maze.

In 2018, led by the Florida Rights Restoration Coalition, Florida voters passed Amendment 4. This state constitutional amendment was supposed to restore people's right to vote automatically after they had completed their sentences, including periods of incarceration, probation, or parole.¹¹ Amendment 4 was a huge victory. It passed overwhelmingly. Then, the state legislature came in and said, *Once you've completed your incarceration and your probation and parole, we're adding the requirement that you must pay your fines, fees, and restitution.*¹² The imposition of paying legal financial obligations complicated the restoration process for so many people who thought they would be able to vote.

I founded and used to direct the Gender and Family Justice Clinic at Florida State University College of Law, where I created the Collateral Consequences Project. We wrote a brief to the Florida Supreme Court to indicate how the requirement for financial obligations also harms families, which is especially connected to the history of excluding Black families. We also worked on individual cases to figure out whether people owed any legal financial obligations that would keep them from registering to vote. And as my motivated students worked on these cases, they would become frustrated. They explained, *We're really smart, we know how to do legal research, and we have no idea how much this person owes in legal financial obligations.* There's this maze that is still continuing, even if the words are simple.

9. See Nicole Lewis, *In Just Two States, All Prisoners Can Vote. Here's Why Few Do.*, MARSHALL PROJECT (June 11, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/11/in-just-two-states-all-prisoners-can-vote-here-s-why-few-do> [<https://perma.cc/PYF5-TW6P>] (describing the jurisdictions in which prisoners can vote).

10. N.Y. CORRECT. LAW § 75 (McKinney 2021).

11. *Florida Amendment 4, Voting Rights Restoration for Felons Initiative (2018)*, BALLOTPEdia, [https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_\(2018\)](https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_(2018)) [<https://perma.cc/9WPR-MTQ4>]; FLA. CONST. art. VI, § 4.

12. FLA. STAT. § 98.0751 (2023).

The simplicity of the words also hides the racist aspects within this voting exclusion. Carter Glass, a white Virginian who led the development of Virginia's 1902 Constitution, said of voter exclusion at the time, *Discrimination! Why that is exactly what we propose. To remove every Black voter who can be gotten rid of, legally, without impairing the numerical strength of the white electorate.*¹³ This explicitly racist voter exclusion was done not only in Virginia but across the South where states held these constitutional conventions and were explicit about what they were doing. They were trying to exclude Black men from the vote, since women could not vote at that time.

The Supreme Court didn't take up this issue until 1974 in *Richardson v. Ramirez*,¹⁴ where it held that the states could ban people with convictions and not violate the Fourteenth Amendment. They looked at Section Two of the Fourteenth Amendment, which includes language about not denying people access to the ballot box, except people who "participated in rebellion, or other crime."¹⁵ They interpreted "other crime" to mean that you can exclude somebody from voting, and it would not violate the Fourteenth Amendment.

In my most recent publication, "Black Women and Voter Suppression,"¹⁶ I argue that voter exclusion based on criminal convictions is another way of excluding Black women from voting access. I start with the United States's inception, where Black people couldn't vote. Then, after the Civil War, Black men get the right to vote. During the Suffrage Movement and the push of the Nineteenth Amendment, which sought to ban voting discrimination based on gender, Black women were excluded and devalued by white women. This exclusion occurred even though Black women

13. 2 COMM. ON PRINTING DEBATES, REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA: HELD IN THE CITY OF RICHMOND JUNE 12, 1901, TO JUNE 26, 1902, at 3076 (1906); *see also* Complaint at 19, *King v. Youngkin*, No. 3:23-cv-00408 (E.D. Va. Mar. 18, 2023), https://www.acluva.org/sites/default/files/field_documents/2023.06.26_-_complaint_and_exhibit_a.pdf [<https://perma.cc/RME5-B6JK>] ("Discrimination! Why, that is precisely what we propose; that, exactly, is what this Convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every [Black] voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate.")

14. 418 U.S. 24 (1974).

15. U.S. CONST. amend. XIV, § 2.

16. Carla Laroche, *Black Women and Voter Suppression*, 102 B.U. L. REV. 2431 (2022).

worked towards voting access for all women and expected, once the Nineteenth Amendment passed, that they would be able to vote. That was not the case with Jim Crow. Black women were denied the vote, yet again.

And we see the Civil Rights Movement, where women were part of the movement and sought the right to vote, but, at so many steps, were excluded from either leadership or from the publicity and recognition for the work that they did. In the 1960s and 70s, Black people gained access to the ballot box, including through the Voting Rights Act of 1965, yet the use of disenfranchisement schemes based on criminal convictions to bar people from voting was left in place.

Then came mass incarceration, where Black men were put into cages in exorbitant numbers. Now, the highest rate of incarceration of individuals has been of Black women. Recently, the rate of incarceration of Black women has decreased, but it's still disproportionate to their actual population in the United States. As a result of voter exclusion, Black families are disconnected from access to policy, access to laws, and access to systems; they are excluded from participation in the political process. As such, my recommendation is to abolish voter exclusion, but also to recognize the intersectionality of the excluded.

Consider the Florida lawsuits filed by Rosemary McCoy and Sheila Singleton on behalf of women of color in Florida who could not afford the legal financial obligations required to restore their voting rights after Amendment 4.¹⁷ Their pleadings indicated, and the data showed, that women of color who had felonies, especially Black women, do not have the same access to income or jobs as other individuals. Along with other arguments, McCoy and Singleton made an intersectionality argument about the harm, contending that the legal financial obligation requirement was a violation of the Nineteenth Amendment. The trial court found that the Florida law—requiring the legal fines—was a poll tax, but, because there are more men in the system, the impact was actually greater on men than women. The trial court held as such, even though the data and experts showed that financially, women of color, especially Black women, did not have the same wealth. The judge

17. See *Jones v. Governor of Fla.*, 15 F.4th 1062 (11th Cir. 2021).

looked at the raw numbers as opposed to the actual impact. When the case went to the Eleventh Circuit Court of Appeals, the judges held that the legal financial obligation requirement was not a poll tax. And also, they were not convinced by the intersectionality argument in the Nineteenth Amendment.

Now, consider the gendered and racial targeting of Black women during slavery. You probably know about the *Dred Scott*¹⁸ case, but more than likely have not heard about a case that came out two years later, *United States v. Amy*,¹⁹ authored by the same architect of *Dred Scott*, Chief Justice Roger B. Taney. Chief Justice Taney was riding circuit, because, at that time, the Justices would travel the actual circuit, and in Virginia, he heard this case. Amy was an enslaved woman who was charged with stealing federal mail. Prosecutors wanted to incarcerate her for doing so. Her attorney argued, if you incarcerate her in the United States, that is a taking under the Fifth Amendment. As such, her enslaver was supposed to receive reasonable compensation from the government for taking the enslaver's "property."²⁰

Taney said, *Yes, yes, yes, Black people are property, however, they are humans for purposes of punishment. We can punish them, they're legal humans for that aspect. They have two statuses; they are property for profit and people for punishment.* Hartman talks about this, noting that white people only recognized slaves' free will in terms of the criminal legal system, and not their actual humanity.²¹

Because I kept reading these cases about enslaved individuals, especially Black women, which is what I work on, I kept wondering, How did Amy have an attorney? This case was before *Gideon*,²² the U.S. Supreme Court case that held that the government must provide individuals with attorneys if they can't afford them in

18. *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (enslaved party).

19. *United States v. Amy*, 24 F. Cas. 792 (Taney, Circuit Justice, C.C.D. Va. 1859) (enslaved party).

20. Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 17–18 (1995).

21. See generally SAIDIYA HARTMAN, SCENES OF SUBJECTION (1997) [hereinafter SCENES OF SUBJECTION]; Saidiya Hartman, *Seduction and the Rules of Power*, 19 CALLALOO 537, 540 (1996).

22. *Gideon v. Wainwright*, 375 U.S. 335 (1963).

criminal cases. Through my research and through an article by Leon Higginbotham and Anne Jacobs,²³ I learned that Virginia had a law in the 1700s that required enslavers either to pay for an attorney or to represent an enslaved person during a criminal trial so that they could ensure that their property was protected.

The attorney in Amy's case was part of the continuation of Black people as property; they were representing the enslaved person for the profit of and to protect the enslaver. The attorney's actions were aimed at making sure that the owner got their money. That's why it's a takings issue.

In other cases where Black women have killed their slave owners, the defense attorney would also talk about the value of the Black woman. In those cases, if the jury found the enslaved person guilty of a capital offense, their conviction would also include a number. That number was what the state owed the enslaver's estate because the state was going to kill the enslaved person and the state was reimbursing the estate for the "loss property."²⁴ The attorney was not protecting the enslaved person's rights, but protecting their amount, their property value.

I explore how Black women experienced gendered racial violence during slavery, and I show how that same gendered racial targeting exists today. Because of my research focus, I have often gotten the question, *Why Black women?* Like the judge in the Florida case, people wonder, *Since there are so many more Black men who are incarcerated, why focus on Black women within the criminal legal system?* These questions highlight the need to continue emphasizing the efforts of Black women and their targeting by society.

For one, I reject the idea that I can only talk about a topic unless it is considered enough of a harm to certain people. But also, there are many reasons for highlighting the intersectional experiences of Black women within the law and society. For example, we have so many narratives about Black women. Angry Black women. Mammies. Jezebels. These are incorrect narratives and caricatures of

23. A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The Law Only as an Enemy: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1011–12 (1992).

24. See *id.* at 1011–12; Bernard E. Harcourt, *Imagery and Adjudication in the Criminal Law: The Relationship Between Images of Criminal Defendants and Ideologies of Criminal Law in Southern Antebellum and Modern Appellate Decisions*, 61 BROOK. L. REV. 1165, 1186–87 (1995).

Black women that demean our identities and whole selves within society. Ignoring the gendered and racial targeting Black women face treats us as one dimensional and unworthy of discussion.

As I mentioned previously, the rate of the incarceration of Black women has grown exponentially the past few decades. And, even if they're not incarcerated, they are not free because of their convictions. There are over one million women under probation. For many states, if you're under probation, you cannot vote. Again, Saidiya Hartman has asked, *What does it mean to exist between no longer enslaved and not yet free?*²⁵ Because nonincarceration does not mean freedom for Black women, their stories should be told.

Black women have tried to access their rights for their families, for their communities, and for themselves, and have been criminalized simply because they sought the same rights as everybody else. Black women were for profit or for punishment and are not allowed to seek the same justice system and justice.

In response to the lack of recognition of Black women in the criminal legal system and the harms they endured through the actions of the police came the hashtag #SayHerName. Professor Kimberlé Crenshaw led the call for recognition and has raised awareness of this issue.²⁶ In a 2016 TEDWomen presentation, Crenshaw listed the names of Black women who have been killed by the police, asking everyone in the audience to stand until they heard an unfamiliar name.²⁷ Fairly quickly, only a handful, if any, of the audience remained standing. But we know the names of many Black men who police have killed. There are more Black men, but there are also Black women who are being harmed and who were not recognized by society. Part of the reason we have to talk about Black women is because people have ignored our experiences while expecting Black women to fight for justice for all.

25. Hartman, *supra* note 3.

26. Homa Khaleeli, #SayHerName: Why Kimberlé Crenshaw Is Fighting for Forgotten Women, *GUARDIAN* (May 30, 2016, 10:02 AM), <https://www.theguardian.com/lifeandstyle/2016/may/30/sayhername-why-kimberle-crenshaw-is-fighting-for-forgotten-women> [<https://perma.cc/YW8J-SE3R>].

27. Kimberlé Crenshaw, *The Urgency of Intersectionality*, TEDWOMEN (Oct. 2016), http://www.ted.com/talks/kimberle_crenshaw_the_urgency_of_intersectionality [<https://perma.cc/S7UF-P6K4>].

In “Black Women and Voter Suppression,” I examined how the media talked about Black women voting to save democracy after the 2020 presidential election.²⁸ Yet, Black women’s intersectional exclusion is disregarded. What are Black women’s choices? Should Black women sit out of elections and not vote? Do they say, *We’re going to vote for somebody who may not have our interests at heart?* What do Black women do?

After establishing these intersectional harms during chattel slavery and today, I move on to resistance in slavery. The way that I define resistance is the way Hartman does.²⁹ It does not only encompass public conduct by Black women; it can be everyday practices that show their resistance to their subjugation. For instance, a Black woman who is enslaved, who slows down her work in the field. That was resistance. Someone who refuses to heat up the bath for their enslaver and they go in cold. That was resistance. They were trying to recognize that they had some agency, some control over this sexist slave regime and racism. The other option may be death, *Either I die because I can no longer take this control, this racism, this sexism, this exclusion, or I kill my owner.*

There are stories of Black women killing those who try to own them. Rebecca Hall has a graphic novel where she describes Black women who were engaged in slave revolts.³⁰ Because there was very little narrative about it, and there are assumptions that Black women did not engage in slave revolts, Hall sought to fill in that gap. The erasure of that resistance is also erasure of history.³¹

After reviewing resistance in the past, I analyze the resistance in the afterlife, today. Along with Ms. Moses, we have Ms. Mason in Texas.³² Ms. Mason had been convicted of fraud in a federal

28. Laroche, *supra* note 16.

29. SCENES OF SUBJECTION, *supra* note 21.

30. REBECCA HALL, *WAKE: THE HIDDEN HISTORY OF WOMEN-LED SLAVE REVOLTS* (2022).

31. Julianne McShane, *New Graphic Novel Reveals Black Women’s Hidden Role in Slave Revolts*, NBC NEWS (Aug. 3, 2021, 3:18 PM), <https://www.nbcnews.com/news/nbcblk/new-graphic-novel-reveals-black-womens-hidden-role-slave-revolts-rcna1573> [https://perma.cc/88NH-F4RR] (“When you create a situation where a people’s history is erased, then that is an extreme form of violence’ ‘That history of resistance is a threat to existing political order, and so it needs to be actively reclaimed.’”).

32. See Sam Levine, *Crystal Mason on a Ruling that Could Change Her Life: ‘I Know this Is Not Over,’* GUARDIAN (May 12, 2022, 10:00 AM), <https://www.theguardian.com/us-news/2022/may/12/crystal-mason-texas-court-ruling-fight-to-vote> [https://perma.cc/9KLS-BLU3].

court, had served her sentence, had been released, and she had promised her mother that she would vote in the 2016 election. Ms. Mason had been released a few months before the election. She went to her polling place and tried to vote. Her name was not on the rolls. She said, *I will vote provisionally*. By voting through a provisional ballot, the state would review its record to find out whether Ms. Mason had been removed from the voting rolls improperly. If she was eligible to vote, the state would count Ms. Mason's vote. If she was ineligible, her vote would not count.

It turns out that Ms. Mason, because she was still on federal probation, was ineligible to vote, just like Ms. Moses. Her vote was not counted. Yet in 2018, the prosecutor filed a voter fraud case against Ms. Mason.

The language of the statute under which she was prosecuted reads: "a person commits an offense if the person votes or attempts to vote in an election in which the person knows the person is not eligible to vote."³³ Ms. Mason did not know she was ineligible to vote. In a bench trial that lasted a few hours, the judge found her guilty of voting while ineligible and sentenced her to five years in prison, nonetheless.

Recently, I presented the same language to my Tulane Law School students in a Criminal Law class as they learned about mens rea, or the "guilty mind" a person must have to be found guilty of a criminal offense. As you know, the presumption is that there is a mens rea requirement for every material element of a crime. My students put in a "knowing" requirement at the beginning: "that a person commits an offense if the person knowingly votes." However, the trial court said that the knowing requirement was met if Ms. Mason knew she was on probation, not that she knew that her being on probation made her ineligible to vote. The judge then convicted her and sentenced Ms. Mason to five years in prison. Ms. Mason appealed to the Second Court of Appeals, which affirmed the trial court's conviction. In 2021, Texas changed the statute relevant to Ms. Mason's case and said that it needs to be

33. TEX. ELEC. CODE ANN. § 64.012(a)(1) (2016).

read so that a person had to knowingly or intentionally vote while ineligible.³⁴

The legislative history indicates that the legislature implemented this change because of Ms. Mason, because her story went viral. During the legislative hearings, they mentioned her case.³⁵ They even added another provision to the statute that said if you vote provisionally, it was not enough for conviction. And the change should be applied retroactively.

Ms. Mason appealed her case and included arguments related to the retroactive new law. In 2022, however, the highest criminal court in Texas agreed with Ms. Mason in part.³⁶ It held that because the Texas legislature made the change retroactive, the revised statute applied to Ms. Mason, but that provisional ballot protection didn't actually apply to her case. It was not enough, even as they recognized that the legislature made the change for her. But they did say that the appellate court got it wrong. Knowing she was on probation was not enough to say she knew she was ineligible to vote. The government needed to prove that she intended to violate the statute when she submitted her provisional ballot. As a result, her case went back to the appellate court in 2023. Last year in April, there was an oral argument in this case again. We are now in 2024, she voted in 2016, and, at any point, Ms. Mason can get a phone call finding out whether her conviction was affirmed and potentially serve more time away from her family, or whether she's free from caging and capture by the state.³⁷

Ms. Mason said that had she known that she was going to be away from her kids again, she never would have voted. She has also said that because of this process, she has leaned more into

34. TEX. ELEC. CODE ANN. § 64.012(a)(1) (2021).

35. See *Mason v. State*, 663 S.W.3d 621 (Tex. Crim. App. 2022) (citing S.B. 1, 87th Leg. (Tex. 2022)).

36. See *id.*

37. The Texas Court of Appeals acquitted Ms. Mason on March 28, 2024, over seven years after she cast her provisional ballot. The court finally held that the evidence was insufficient to prove Ms. Mason knew she was ineligible to vote. *Mason v. State*, No. 02-18-00138-CR, 2024 Tex. App. LEXIS 2223 (Tex. Ct. App. Mar. 28, 2024); Karen Brooks Harper, *Texas Appeals Court Overturns Crystal Mason's Conviction, 5-Year Sentence for Illegal Voting*, TEX. TRIBUNE (Mar. 28, 2024, 9:00 PM), <https://www.texastribune.org/2024/03/28/texas-illegal-voting-conviction-crystal-mason/> [https://perma.cc/2WWQ-VGJG].

supporting the right to vote and the need to resist this exclusion of individuals from the ballot box.

What do Ms. Moses and Ms. Mason's cases mean? What are the implications? Ms. Moses is, unapologetically, trying to get the state to recognize that they're not doing enough. She recently filed to run for U.S. Senate in Tennessee. She was indicating, and continues to indicate, *You'll hear me. I represent the community. I am here. I am not going away.* We have her type of resistance.

People have asked whether Ms. Mason's case is also resistance, and I say, Yes. Her desire to simply say to the courts, *Get this right,* is resistance. Ms. Mason's unwillingness to plead guilty and let the state sweep this injustice under the rug is resistance.

There are examples of individuals who knowingly voted twice, cheated, using fake signatures for their own campaigns, who've gotten probation, who've gotten three months, one of them in Ms. Mason's own county. The year before Ms. Mason voted, a woman pled guilty to having her son impersonate his father and try to vote. But the father had already voted, and the state realized that there was something illegal going on. That woman received an alternative to incarceration sentence the year before Ms. Mason was sentenced to five years in prison. Ms. Mason's resistance is, *I am here and I'm not going away. Like Ms. Moses, I refuse. I recognize that I'm going to be risking caging, but I am not letting you ignore my struggle.* The court allowed her, pending appeal, to be released. Ms. Mason served some time incarcerated but has been waiting for a final decision.

Ms. Mason is taking care of her family and her brother's family at the same time. And she's saying, *I will not be captured. I want you to find me innocent. Until you actually admit and reckon with that injustice, I'm going to be here.* That is resistance.

What is the harm targeted by these laws? What was the danger of Ms. Moses and Ms. Mason when they didn't even know they were ineligible to vote? Besides the fact of trying to target Black women for the right to vote and the idea of expressing their community voice or their community perspective through the ballot box. Some might say there is this risk of voter fraud, but that didn't play out with the other examples I gave you. Because those individuals were all white. And Ms. Mason and Ms. Moses were Black and

trying to get the community voice out there, their perspective out there. Their existence is resistance.

While Black women with convictions have been targeted and criminalized, allies have also sought to resist and change the discriminatory systems. The podcast *Branded*³⁸ came out last fall that notes two such Black women. The first is Virginia Senator Yvonne Miller who was the first Black person to serve in Virginia's General Assembly. She was elected in 1983 to the House of Delegates, then in 1987 to the Senate, the first Black woman in both chambers. Every year she would introduce a bill or introduce something to change Virginia's constitution to allow people with convictions to vote. The second person noted by the podcast is Senator Mamie Locke, she's in Hampton. She came into the General Assembly in 2004. And since Senator Miller died in 2012, Locke has taken up the charge and filed a similar bill to change the law every single year. These are Black women who don't have felony convictions, and yet they are stepping up and have said, *We are in solidarity, we think this voter exclusion is wrong.*

Part of the argument that I make in "Black Women and Voter Suppression,"³⁹ and here, is that we should abolish voter exclusion based on criminal convictions. Not only for people who are released, but for people who are incarcerated. They're still part of the community. Their vote, their decisions, and their experiences, as Ms. Moses continues to emphasize, matters for the community. The assumption that one should just automatically know how to navigate the disenfranchisement maze seems incorrect, especially when states have so many steps to their maze. Unless somebody has an advocate or a lawyer going through the process with them, people are bound to misstep and risk criminal prosecution as a result. But even my law students, our future lawyers, said, *I don't feel comfortable telling this person any number because I don't know how much they owe in legal financial obligations.*

There is also the problem of notice. It's easy to prove that somebody voted twice. And we all know we can't vote twice. But most of us don't know whether we're in a state where we can vote

38. See *Branded: The Fight to Restore Voting Rights*, WVTF (2023), <https://www.wvtf.org/branded-the-fight-to-restore-voting-rights> [<https://perma.cc/LRK9-4VLX>].

39. Laroche, *supra* note 16.

automatically or must go through the maze because of a criminal conviction.

In terms of the legal representation and voter advocacy, when I think of Amy and that question of how did she have a lawyer and where did this lawyer come from, I also think about the cases where lawyers step in and represent individuals pro bono in these cases. Further, public interest lawyers⁴⁰ could support and increase the number of people who represent individuals, especially Black women in this argument, on these matters. It is not stopping the system, but it's supporting those we know are being targeted for what they represent and not actually what they did.

I have gotten this question: *What would have happened if Ms. Moses and Ms. Mason could have voted? What would that look like in terms of the legislative change?* Ms. Moses would have been able to run for mayor, and Ms. Mason's 2016 vote would have counted. That said, even if they could vote, they would still be in the afterlife of slavery. They would still be in the shadow and still would have to deal with the consequences of criminal convictions on their record. I recognize that true voter emancipation is one that requires addressing the afterlife of slavery in the first place. True voter emancipation is really the release from enslavement altogether. And that won't happen only by allowing somebody to vote. It's a larger question, larger opportunity to talk about what the afterlife in this country is and what we can do together.

I thank you all for sticking with me, and I really welcome questions and comments—and compliments. [*laughter and applause*]

40. See Rachel Kincaid, *Law Schools: Want to Help Bend the Arc of the Moral Universe Toward Justice? Hire Law Professors with Public Service Experience*, 58 U. RICH. L. REV 605 (2024).