

M-READ MEMORANDUM

To: Articles Committee
From: Tashrima Hossain
Date: February 28, 2024
Re: M-Read S-21524 — *The Shadow Defendants*

I. RECOMMENDATION

I recommend this article **advance to C-Read**.

I have mixed opinions on this piece. On one hand, *The Shadow Defendants* pays much-needed attention to a real-world phenomenon of the criminal legal system: women who support system-involved men. Its intersectional focus and pragmatic solutioning reflects the potential to tangibly shift the dynamic for a growing community of shadow defendants. It is clearly structured, well-written, and engaging throughout. Furthermore, this article is one of the few critical race theory pieces to reach the M-Read stage, and it is written by a Black, early career, non-T14 female professor with a background in public defense. On the other hand, the solutions section (Part IV.B) left me wanting more, there is limited engagement with potential counterarguments, and the premise of the piece may be gender exclusive in nature. I also wonder if this work is sufficiently legal, as it highlights a feature of the criminal legal system but largely focuses on non-legal responses. These challenges are highly fixable through workshopping, as the piece has good bones. Those good bones are what ultimately lead me to recommend this article, as I think it could benefit from further discussion.

II. SYNOPSIS

Please see the accompanying Rotopool for a more in-depth summary. This article highlights the overlooked role of women who support system-involved men. Describing these women as “invisible actors in the criminal legal system,” the goal of this piece is to (1) identify how the criminal legal system creates a group of people in need of caretaking, (2) describe the labor performed by invisible actors as a form of reproductive labor, and (3) acknowledge the burdens suffered by invisible actors. Ultimately, it contends that these invisible actors, or “shadow defendants,” are subjected to “secondary criminalization” through which they suffer many of the same consequences of the criminal legal system. Against the backdrop of a critical race theory framework, the author discusses the disproportionate representation of Black women and women of color as “shadow defendants” and advocates for reforms to ameliorate this issue.

More specifically, Part I delves into how the criminal legal system generates a need for caretaking, emphasizing the societal expectation placed on women to fulfill these roles. It depicts the social organization of caring, the specific needs created by the legal system’s impact on families and introduces the concept of the “fourth shift” — the additional labor women perform to support system-involved individuals. Part II explores theoretical frameworks to understand this phenomenon. Secondary criminalization describes the experiences of women who, through their support roles, face similar consequences to system-involved men. Critical race theory is used to analyze the disproportionate impact on Black women and women of color. Part III details the burdens shouldered by women (e.g., economic consequences, deprivations of liberty and privacy, health consequences, and the impact on relationships). These women’s efforts, while crucial for the defendants’ legal battles

and wellbeing, often go unrecognized. Part IV delves into the significance of acknowledging the role of shadow defendants and proposes a path forward, including reforms such as eliminating cash bail and reducing the costs associated with incarceration. In sum, the author calls for a comprehensive approach to reform that acknowledges the support provided by these shadow defendants.

III. ANALYSIS

a. Positives

Innovative perspective. The paper shines a light on a largely underexplored area — the indirect impact of the criminal legal system on women who support incarcerated or criminally charged men. By focusing on these “shadow defendants,” it fills a significant gap in criminal justice and gender studies literature.

To the extent that we care about real-world impact — something the articles committee has posited as a shared value — this article has relevance and offers practicable solutions. The author launches the piece with lessons learned from her own experiences as a public defender (“It is conventional wisdom among public defenders that when you meet a client, you ask for their contact information *and* phone numbers for family members . . . I began to specifically request the contact information for the closest woman.”¹) and uses vignettes from her practice throughout the piece.² Furthermore, by advocating for systemic reforms, such as eliminating cash bail, the author connects theoretical insights to practical solutions, enhancing the article’s relevance to policymakers and practitioners alike.

Underrepresented author and subject matter. Hinds is a Black female professor from a non-T14 school. She is early in her legal career, having just graduated from Stanford Law School in 2014. Finally, she has an extensive practitioner background, including as an attorney at The Bronx Defenders and The Public Defender Service for the District of Columbia. This article is also one of the few critical race theory pieces that has advanced to the M-Read stage, and I have not seen a gender-focused piece this articles season (though I am sure there are others).

Clear, structured, and well-written. Like many of the pieces that reach M-Read, this piece is already stylistically close to publishable. Uniquely, the signposting is excellent; the author uses topic sentences, paragraph summaries, and explanations of what is coming in the following section.

b. Negatives

Underdeveloped Section IV.B. From my perspective, Section IV.B is the most important section of the piece though it is the least developed. While the article proposes some policy reforms, it might benefit from a broader exploration of solutions. Given the potential publication of this piece in a *law* review, the author might suggest solutions for lawyers, judges, or other stakeholders in the *legal* ecosystem. The author might also expand on non-legal solutions: community-based support systems, mental health resources, and educational programs. Expanding the scope of proposed solutions could provide a more holistic approach to the issue, leveraging the piece’s strong real-world focus. This is likely something that is fixable at the P-Read stage.

¹ PTAN 1.

² *See, e.g.*, TAN 232.

Theoretical nature. The article relies heavily on theoretical frameworks and qualitative observations. There is a significant focus on empirics in Part I, namely regarding women's involvement in caretaking³ and the impacts of mass incarceration on men (often from communities of color).⁴ Incorporating more empirical evidence, such as statistical data or case studies, could strengthen Hinds' arguments and provide a more solid foundation for her conclusions. Furthermore, while the work comments on a phenomenon that is clearly in the legal system, it is unclear whether the article itself is sufficiently legal in nature. Nevertheless, I recognize that this theoretical grounding is common to critical race theory and is not necessarily something that needs to be changed.

Substantive engagement with counterarguments. While the paper effectively highlights the challenges faced by shadow defendants, it could benefit from a more detailed engagement with counterarguments or alternative perspectives. Addressing potential criticisms or alternative views could strengthen the article's arguments and appeal to a wider audience. This can also be fixed at P-Read, perhaps with the addition of a paragraph addressing counterarguments in Part IV or the Conclusion.

Gender inclusivity. *The Shadow Defendants* focuses on women who support incarcerated men but could do more work to embrace the variety of gender dynamics that may be at play in the secondary criminalization of those in caretaking roles for system-affected individuals (i.e., nonbinary individuals, homosexual relationships, system-involved women, etc.). Of course, Hinds substantiates her focus on women: "society's gendered ethics of care assigns women the duty of fulfilling unmet caretaking needs before turning to an examination of how the criminal legal system disproportionately impacts certain populations."⁵ Even still, it would be interesting and likely fruitful to see her explore other gender dynamics that may arise for shadow defendants.

IV. PRELIMINARY LITERATURE REVIEW

Given Hinds is so early in her career, there is limited literature to review. There are three publications listed on her CV, none of which seem to preempt *The Shadow Defendants*:

- Susan Bennet et. al., *New Clinician Perspectives on Social Justice Lawyering and Clinical Teaching, The Danger Zone: Client-Centered Representation and Clinical Pedagogy*, AM. U. J. GENDER SOC. POL'Y & L. (forthcoming). This article hasn't been released yet, but it appears to focus more on pedagogy than realities of the criminal legal system.
- Mariam Hinds & John Butler, Note, *Solitary Confinement: Can the Courts Get Inmates Out of the Hole?*, 11 STAN. J. C.R. & C.L. 331 (June 2015). This piece differs significantly in scope from the article at issue, as it centers on the need for legislative and executive reforms as a solution to solitary confinement. It applies lessons from Maine, New York, and Colorado to the California context.
- Joan Petersilia et. al., *Voices From The Field: How California Stakeholders View Public Safety Realignment*, STAN. CRIM. JUST. CTR. (2014),

³ TAN 33 - 37.

⁴ TAN 39 - 60.

⁵ PTAN 10.

<http://ssrn.com/abstract=2395498>. Once again, this work differs significantly from the article at issue. It summarizes the results of interviews conducted with stakeholders responsible for implementing California's Public Safety Realignment Act (AB 109), which initiated the most sweeping correctional experiment in recent history.

Upon a cursory review, most of the criminal law literature pertaining to women centers on their direct involvement in the carceral system or "the impact that the criminal justice system has on families and communities with system-involved loved ones."⁶ On my read, there is less literature focused on women who may experience secondary criminalization due to their roles supporting system-involved men, and Hinds coined "secondary criminalization" as a new concept. However, a more substantive literature review is needed to confirm my hypothesis.

⁶ TAN 4.