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# Incapacitating Motherhood

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*Incapacitation, the removal of dangerous people from society, is one of the most significant penal rationales in the United States. Mass incarceration emerged as one of the most striking applications of this theory, as policy makers shifted from rehabilitative efforts toward incapacitation in jails and prisons across the country. Women have been uniquely devastated by this shift toward incapacitation. Indeed, the United States is home to the largest and fastest growing women's prison population in the world. Of the women incarcerated in jails and prisons, nearly seventy percent were the primary caretakers of small children at the time of their arrest and approximately eighty percent are of reproductive age. Notwithstanding these alarming trends, the gendered dimensions of incapacitation have largely been underexplored in the scholarly literature. Rather, women's incarceration has been theorized as an unintended consequence of the punitiveness directed toward Black men.*

*This Article aims to bridge this discursive gap by highlighting the specific ways in which incapacitation has been used as a means to regulate the bodies and reproductive capacities of marginalized women. The Article advances this claim in three ways. First, by mapping the historical function of women's prisons as a mechanism to restore and regulate "fallen women" who deviated from traditional norms associated with femininity and motherhood. Second, by examining the ways in which contemporary women's prisons similarly regulate women's identities as*

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mothers. Instead of attempting to rehabilitate women, however, contemporary women's prisons incapacitate women who engage in behavior or possess characteristics that diverge from traditional maternal norms. Indeed, through what the Article terms the "incapacitation of motherhood," women prisoners are alienated from their children, denied reproductive care, humiliated during pregnancy and postpartum recovery, and in some cases, sterilized. Lastly, contesting these practices and the incapacitation of motherhood, this Article calls for the use of a robust legal framework, informed by the principles of reproductive justice that are more protective of the reproductive capacities of incarcerated women.

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#### INTRODUCTION

Ms. Jones<sup>1</sup> was a tall African-American woman in her late thirties. She was incarcerated at the Valley State Prison for Women (“VSPW”) in rural Chowchilla, California.<sup>2</sup> Her short haircut and oversized blue and white prison uniform, however, made her look much younger. Ms. Jones asked to meet with me as part of a legal visit arranged by the California Coalition for Women Prisoners<sup>3</sup> and the San Francisco Lawyers’ Committee for Civil Rights.<sup>4</sup> According to her intake form, she was concerned about issues related to the treatment of pregnant women and custody of her newborn son. When we sat down to talk, she was quiet and pensive. “I just had a baby boy. I went through so much and I need to make sure I don’t lose him,” she whispered, seemingly trying to wrest as much privacy and dignity as she could muster in the cavernous visiting room. Ms. Jones went on to describe the joys and pains of her birthing process as well as her anxieties surrounding her child’s wellbeing.

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<sup>1</sup> Client’s name has been changed to preserve privacy and confidentiality.

<sup>2</sup> *Valley State Prison*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Valley\\_State\\_Prison](https://en.wikipedia.org/wiki/Valley_State_Prison) (last visited Oct. 26, 2017).

<sup>3</sup> The California Coalition for Women Prisoners is a “grassroots social justice organization, with members inside and outside prison, that challenges the institutional violence imposed on women, transgender people, and communities of color by the prison industrial complex.” *About Us*, CAL. COAL. FOR WOMEN PRISONERS, <http://womenprisoners.org/?cat=8> (last visited Jan. 23, 2016).

<sup>4</sup> Lawyers’ Committee for Civil Rights of the San Francisco Bay Area is a legal civil rights organization that “works to advance, protect and promote the legal rights of communities of color, and low-income persons, immigrants, and refugees. Assisted by hundreds of pro bono attorneys, LCCR provides free legal assistance and representation to individuals on civil legal matters through direct services, impact litigation and policy advocacy.” *See Mission & Values*, LAWYERS’ COMM. FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, <http://www.lccr.com/who-we-are/mission-values/> (last visited Jan. 24, 2016) [hereinafter *Mission & Values*].

Ms. Jones explained that she was four months pregnant when she was sentenced to sixteen months in prison for a property offense. Accessing prenatal care was difficult. Nevertheless, she did everything she could to make sure she had a healthy pregnancy: she fought for necessary food and nutritional supplements, exercised when she could and read stories to her yet-to-be born child. She arranged for a family to take temporary custody of her child until she was released from prison. Ms. Jones felt powerless, however, when it came to the birth of her son. Prison officials scheduled a caesarian delivery without prior notice or inquiry regarding her birthing preferences. She was shackled as she was transported to the hospital and during labor.<sup>5</sup> While she was on the table and sedated, the prison physician asked her if she wished to be sterilized. Alarmed, she emphatically stated that she did not want the procedure. Despite the confusion surrounding the birth, Ms. Jones had a healthy baby boy. She was elated to witness her child take his first breath. Less than twenty-four hours later, her elation gave way to sorrow as the child was removed from her care and Child Protective Services took custody despite her prior arrangement. She was scared. She was concerned that her parental rights would be terminated.<sup>6</sup> She wanted to be able to have children in the future. She sought answers to the deeply troubling questions raised by the reproductive care provided to people in women's prisons.<sup>7</sup>

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<sup>5</sup> See generally Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239 (2012) (examining the practice of shackling pregnant incarcerated women during labor and childbirth).

<sup>6</sup> Ms. Jones's fear of the termination of her parental rights was not unfounded. Incarcerated mothers are far more likely than their non-incarcerated counterparts to lose their rights to their children. See, e.g., MIRIAM EHRENSAFT ET AL., VERA INST. OF JUSTICE, PATTERNS OF CRIMINAL CONVICTION AND INCARCERATION AMONG MOTHERS OF FOSTER CARE CHILDREN IN NEW YORK CITY 26 (Dec. 2003), <https://www.vera.org/publications/patterns-of-criminal-conviction-and-incarceration-among-mothers-of-children-in-foster-care-in-new-york-city>. The challenges that incarcerated mothers face are exacerbated by the adoption timelines established by the federal Adoption and Safe Families Act which provides for the termination of parental rights if a child has been in the foster care system for fifteen of the most recent twenty-two months. See 42 U.S.C. § 675(5)(E) (2018). This is a particularly challenging standard for incarcerated women as the average length of a sentence often exceeds those timelines. For example, in the federal system, the average length of a sentence is sixty months for women convicted of an offense carrying a mandatory minimum and seventeen months for those serving a non-mandatory minimum sentence. U.S. SENTENCING COMM'N, QUICK FACTS: WOMEN IN THE FEDERAL OFFENDER POPULATION (2013), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Female\\_Offenders.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Female_Offenders.pdf).

<sup>7</sup> See Rachel Roth, *Obstructing Justice: Prisons as Barriers to Medical Care for Pregnant Women*, 18 UCLA WOMEN'S L.J. 79, 79-80 (2010).

For over a year, I remained on the legal visiting team. I continued speaking to women about conditions at VSPW, one of the largest women's prisons in the world. I continued to hear stories of various forms of reproductive abuse ranging from failure to provide adequate prenatal care to loss of parental rights. Months later, the doctor who wanted to perform the sterilization on Ms. Jones was among several under contract with the California Department of Corrections and Rehabilitation found to have performed at least 148 questionable sterilizations on people<sup>8</sup> in California women's prisons.<sup>9</sup>

Ms. Jones and the other women at VSPW are not alone in their experience of reproductive harm while incarcerated. Over the last thirty years, women have become the fastest growing prison population in the United States.<sup>10</sup> Between 1980 and 2014, the number of women in prison and jail rose from 26,378 to approximately 215,000, an increase of over eight hundred percent.<sup>11</sup> As a result of these trends, the United States is now home to nearly one-third of the world's incarcerated women, despite representing less than five percent of the world's population.<sup>12</sup> Nearly sixty-five percent of

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<sup>8</sup> I occasionally use the phrase "people in women's prisons" to reflect that not all who are housed in women's prisons identify as women. Transgender men and gender non-conforming people are also housed in women's institutions and have been subject to reproductive abuses.

<sup>9</sup> See Corey G. Johnson, *California Lawmakers Seek Legislation to Prevent Prison Sterilization Abuse*, CENT. FOR INVESTIGATIVE REPORTING: REVEAL (Aug. 13, 2013), <https://www.revealnews.org/article/calif-lawmakers-seek-legislation-to-prevent-prison-sterilization-abuse> [hereinafter *California Lawmakers*]; Corey G. Johnson, *Female Inmates Sterilized in California Prisons Without Approval*, CENT. FOR INVESTIGATIVE REPORTING: REVEAL (July 7, 2013), <https://www.revealnews.org/article-legacy/female-inmates-sterilized-in-california-prisons-without-approval> [hereinafter *Female Inmates Sterilized*].

<sup>10</sup> See *Facts About the Over-Incarceration of Women*, ACLU, <https://www.aclu.org/facts-about-over-incarceration-women-united-states> (last visited Jan. 23, 2018).

<sup>11</sup> THE SENTENCING PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS (2015), <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf>.

<sup>12</sup> Neil McCarthy, *Nearly a Third of All Female Prisoners Worldwide Are Incarcerated in the United States*, FORBES (Sept. 23, 2014), <https://www.forbes.com/sites/niallmccarthy/2014/09/23/nearly-a-third-of-all-female-prisoners-worldwide-are-incarcerated-in-the-united-states-infographic/#35b355b010af>; Michelle Yee Hee Lee, *Does the United States Really Have 5 Percent of the World's Population and Nearly a Quarter of the World's Prisoners?*, WASH. POST (Apr. 30, 2015), [https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/?utm\\_term=.2d4f2eef5ba2](https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/?utm_term=.2d4f2eef5ba2) (finding that the United States has five percent of the world's population, twenty-two percent of the world's prison population, and the highest rate of incarceration in the world).

women housed in state prison<sup>13</sup> and nearly eighty percent of women in jails are parents.<sup>14</sup> Indeed, “[s]ince 1991, the number of children with a mother in prison has more than doubled, up 131%.”<sup>15</sup> This means that tens of thousands of mothers are incarcerated in jails and prisons. Like Ms. Jones, these women are separated from their children for extended periods of time and receive inadequate reproductive care while incarcerated. Moreover, approximately eighty-five percent of women in prison are of reproductive age.<sup>16</sup> These trends, while flatly troubling, reveal deeper insights about the nature of women’s prisons. As this Article will contend, these trends highlight the ways in which women’s incarceration functions as a means to regulate the reproductive capacity of women viewed as unfit for procreation. Through imprisonment, women who are deemed deviant are incapacitated, removed from society, separated from their children, and prevented from reproducing.

Ms. Jones and incarcerated women like her experience what this Article refers to as the “incapacitation of motherhood.” Although incapacitation has long been understood as a justification for punishment, this Article examines how it has been utilized as a means of reproductive control and gender subordination. Indeed, while ostensibly imprisoned for criminal offenses, incarcerated women are placed on the path to imprisonment as a result of poverty, racial inequality, mental illness, and homelessness.<sup>17</sup> As members of these devalued populations, they are seen as propagators of disorder and social depravity.<sup>18</sup> Due to their ability to procreate, such women are

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<sup>13</sup> See LAUREN E. GLAZE & LAURA M. MARUSCHAK, PARENTS IN PRISON AND THEIR MINOR CHILDREN, BUREAU OF JUSTICE STATISTICS 2 (2010), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf>; Antoinette Greenaway, *When Neutral Policies Aren't So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African-American Women*, 17 NAT'L BLACK L.J. 247, 255 (2004); see Beth E. Richie, *The Social Impact of Mass Incarceration on Women*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 139 (Marc Mauer & Meda Chesney-Lind eds., 2003).

<sup>14</sup> ALEKS KAJSTURA, WOMEN'S MASS INCARCERATION: THE WHOLE PIE 3 (2017), [https://www.aclu.org/sites/default/files/field\\_document/womenprisonreport\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/womenprisonreport_final.pdf).

<sup>15</sup> GLAZE & MARUSCHAK, *supra* note 13, at 2.

<sup>16</sup> Human Rights Project at Justice Now, *Prisons as a Tool of Reproductive Oppression*, 5 STAN. J.C.R. & C.L. 309, 331 (2009).

<sup>17</sup> See BETH E. RICHIE, COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN 4 (1996); George Lipsitz, “*In an Avalanche Every Snowflake Pleads Not Guilty*”: *The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. REV. 1746, 1769 (2012).

<sup>18</sup> As Dorothy Roberts notes, poor Black women are viewed as “pathological,” and through their reproduction they produce the “urban poor family from which all ills

viewed as dangers to society.<sup>19</sup> For example, the prison physician who recommended a tubal ligation for Ms. Jones later justified the use of state funds for such sterilizations by suggesting that the costs of such procedures were minimal “compared to what you save in welfare paying for these unwanted children — as they procreated more.”<sup>20</sup> His comment reflects the ways in which incarcerated women’s reproduction is seen as a threat to state coffers and the broader social order. For these women, imprisonment functions to manage the social problems associated with them and the communities from which they emerge. Moreover, the sterilizations undertaken by this doctor shed light on how prison operates as a site where reproductive autonomy is incapacitated and the right to procreate is under assault.

The incapacitation of motherhood is accomplished through a variety of methods. First, motherhood is incapacitated largely through the removal of women from the ability to procreate or parent via incarceration and the conditions of confinement they confront while serving their custodial sentences. For example, pregnant prisoners are exposed to humiliating, degrading, or negligent treatment, including the use of shackles during labor and delivery.<sup>21</sup> These humiliating practices punish women for procreating and discourage further childbearing. Second, the procreative capacities of women who are of reproductive age are circumscribed by practices and policies like lengthy sentences, coerced sterilizations, and accelerated timelines for the termination of parental rights.<sup>22</sup> Taken together, the individual and collective acts of incapacitation in prison result in women’s temporary or permanent inability to procreate or parent their children.<sup>23</sup>

The incapacitation of motherhood is premised on the notion that incarcerated women forfeit their right to procreate or parent by virtue of their lawbreaking and imprisonment. At base, this view suggests that a criminal conviction necessarily means that an individual is

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flow; a monster creating crack dealers, addicts, muggers, and rapists.” See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* 18 (1989).

<sup>19</sup> *Id.* at 17.

<sup>20</sup> See Johnson, *Female Inmates Sterilized*, *supra* note 9.

<sup>21</sup> Ocen, *supra* note 5, at 1243.

<sup>22</sup> See Johnson, *Female Inmates Sterilized*, *supra* note 9.

<sup>23</sup> The effects of the incapacitation of motherhood, however, are not limited to incarcerated women. Rather, the incapacitation of motherhood for incarcerated women serves as a corollary to the incapacitation of agency for non-incarcerated women. Incarceration and incapacitation are used as a means to promote procreation among women whose reproduction is seen as desirable. Policies that incapacitate agency include limitations on access to contraception and barriers to abortion.

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presumptively unfit to parent, that they lack any value in the lives of their children. This view ties the notion of deservingness to reproduction in a manner that harkens back to the eugenics era, a notion that the Supreme Court firmly rejected in *Skinner v. Oklahoma*.<sup>24</sup> Indeed, given the disparities inherent in the criminal justice system, such notions of fitness and deservingness would target individuals for reproductive forfeiture based on race, gender, class, and disability. Furthermore, suggesting that women forfeit the right to parent inflicts punishment that is wildly disproportionate and disconnected to crimes committed by incarcerated women.

In particular, the incapacitation of motherhood functionally circumscribes the exercise of the fundamental human right to procreate and parent. It separates women from their children and stigmatizes the reproductive capacities of women who wish to have children. It undermines the bodily integrity and basic dignity of women subject to practices such as sterilization and shackling. Moreover, the incapacitation of motherhood undermines the life chances of children who are left behind, often consigned to overburdened foster care systems.<sup>25</sup>

Despite the important human rights at stake, the concept of the incapacitation of motherhood and the stories of women like Ms. Jones do not, however, fit neatly into existing frameworks regarding mass incarceration or reproductive autonomy. Indeed, mass incarceration has been theorized as a system of racialized control that primarily targets Black men.<sup>26</sup> Much of the scholarship and advocacy on mass incarceration posit that the surveillance, criminalization, and incarceration of Black men assist in the maintenance of the prevailing racial order.<sup>27</sup> Accordingly, the use of the incarceration and

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<sup>24</sup> See *Oklahoma v. Skinner*, 316 U.S. 535, 541-42 (1942).

<sup>25</sup> See generally DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2003).

<sup>26</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 13 (2012); PAUL BUTLER, *LET'S GET FREE: A HIP HOP THEORY OF JUSTICE* 36-37 (2009); ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* 3 (2014); KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME AND THE MAKING OF MODERN URBAN AMERICA* 1 (2010); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 966-68 (2002) (noting that the article's "specific aim is to illustrate how the Supreme Court's construction and reification of race in Fourth Amendment cases legitimizes and reproduces racial inequality in the context of policing"); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 23-25 (2012); Bruce Western & Christopher Wildeman, *Punishment, Inequality, and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 852-53 (2009).

<sup>27</sup> See sources cited *supra* note 26.



incapacitation as an instrument of racial power experienced by communities of color is framed in gender exclusive terms.<sup>28</sup>

Moreover, the experiences of women like Ms. Jones do not square with traditional theorizing and advocacy regarding reproductive rights. While this literature has thoroughly interrogated the scope of constitutional guarantees of privacy, dignity, and liberty, it has done so largely through the prism of issues related to abortion and contraception.<sup>29</sup> “Choice” is often informed by the experiences of white, middle-class, heterosexual cis-gendered women who have material resources which allow them to make the kinds of choices regarding reproduction and childrearing that are largely unavailable to incarcerated women.<sup>30</sup> Within this framing of reproductive autonomy, the right not to be a parent is often presented as the primary reproductive harm confronted by women.<sup>31</sup> Most significantly, advocates or theorists seldom center incarcerated women such as Ms. Jones to link mass incarceration and reproductive abuses as part of a comprehensive system of gendered racialized social control.<sup>32</sup>

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<sup>28</sup> See, e.g., Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Race, Gender and Social Control*, 59 UCLA L. REV. 1418, 1422 (2012) (“[S]ome of the dominant frames pertaining to mass incarceration reveal little about how women are situated as objects of social control and are not analytically attentive to the dynamics that contribute to this particular population’s vulnerability to incarceration.”).

<sup>29</sup> See, e.g., David B. Cruz, “The Sexual Freedom Cases”? *Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 302-03 (2000); Sujatha Jesudason & Tracy Weitz, *Eggs and Abortion: “Women-Protective” Language Used by Opponents in Legislative Debates over Reproductive Health*, 43 J.L. MED. & ETHICS 259, 259-60 (2015); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1694 (2008); Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1123 (2002); Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1200-01 (2010).

<sup>30</sup> See Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1412 (2009).

<sup>31</sup> Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327, 330 (2013) (arguing that the mainstream reproductive rights movement has focused its strategies and resources on protecting the abortion rights articulated in *Roe v. Wade*).

<sup>32</sup> Notable exceptions include the following pieces of literature. See Deborah Ahrens, *Incarcerated Childbirth and Broader “Birth Control”: Autonomy, Regulation, and the State*, 80 MO. L. REV. 1, 1-2 (2015); Ocen, *supra* note 5, at 1239-40; Dorothy E. Roberts, *Prisons, Foster Care and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1476 (2012) [hereinafter *Systemic Punishment*]; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1419, 1419 (1991) [hereinafter *Punishing Drug Addicts*]; Rachel Roth, *Obstructing Justice: Prisons as Barriers to Medical Care for Pregnant*

Contrary to this trend, the work of legal scholars such as Dorothy Roberts, Michele Goodwin, and Kaaryn Gustafson have made such significant linkages between reproductive harm and criminalization.<sup>33</sup> In particular, their work examines the ways in which mass incarceration burdens the procreative and parental rights of poor women of color. This Article extends the important insights of this work into the prison itself, a space that is often left underexamined by a focus on criminalization (i.e., the front end of mass incarceration). In prisons, women are alienated from their children, denied the possibility of having children during long sentences, and humiliated during pregnancy and postpartum recovery. As such, women have little control over their own bodies, their access to “privacy” is limited, and their ability to “choose” is constrained. Examination of these and other facets of incarcerated women’s experiences reveal the ways in which imprisonment and reproductive subordination are overlapping and mutually reinforcing phenomena.

Moreover, the broader framing embedded within the concept of the incapacitation of motherhood demonstrates the ways in which the reproductive harms experienced by incarcerated women are facilitated rather than limited by constitutional doctrine that often enables reproductive abuses by deferring to prison officials. Given the limitations of constitutional doctrine as a vehicle for protecting the reproductive capacities of incarcerated women, this Article suggests that scholars and advocates must look beyond formal doctrine to resist the incapacitation of motherhood specifically and the use of incarceration to manage social problems generally associated with poor women. Indeed, alternative frameworks, such as reproductive justice, that deploy law in concert with social movements may serve as a schema that can move beyond the incapacitation of motherhood to liberate it.<sup>34</sup>

This Article will proceed as follows: In Part I, I will discuss incapacitation as a theory of social control that justifies the physical removal of individuals who are deemed dangers to public order. Traditionally used as a means of punishment, this Part will note how

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*Women*, 18 UCLA WOMEN’S L.J. 79, 79-80 (2010); Rachel Roth & Sarah L. Ainsworth, “If They Hand You a Paper You Sign It:” A Call to End the Sterilization of Women in Prison, 26 HASTINGS WOMEN’S L.J. 7, 9-10 (2015); Human Rights Project at Justice Now, *supra* note 16, at 311-13.

<sup>33</sup> See KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 62-63 (2011); Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1664 (2008); Roberts, *Systemic Punishment*, *supra* note 32.

<sup>34</sup> See LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 9-10 (2017).

incapacitation was used in the context of early women's prisons to regulate normative constructs of femininity, reproduction, and motherhood. In Part II, I argue that mass incarceration has come to supplant these early mechanisms of reproductive control. In particular, I highlight the ways in which women's prisons and jails operate to target women who are deemed incompetent or unfit mothers through criminalization, custodial sentences, and conditions of confinement. Policies such as the sterilization of individuals in state prisons are the clearest example of the continuity from earlier eras of reproductive suppression and the incapacitation of motherhood. These examples, however, are part of a broader dynamic in which incarceration functions to incapacitate motherhood.

In Part III, I assert that formal constitutional doctrine has been inadequate to the task of protecting the reproductive capacities of individuals incapacitated in women's prisons. Part IV will argue for the adoption of a reproductive justice framework that places affirmative obligations on the state to provide the necessary resources and support to liberate motherhood. Liberation of motherhood entails resources, such as housing, employment, education, childcare, and healthcare, that will enable marginalized women to provide for themselves and their families and to parent with dignity. Such an approach would fundamentally contest the punitive approach that all too often lands marginalized women in prison where their ability to parent or procreate is incapacitated. Instead, women and mothers who are in crises, who struggle with poverty, homelessness, mental illness, domestic violence, or drug addiction, can access non-punitive state interventions that would place them on the pathway to productivity and dignity rather than incarceration and incapacitation. Understood in this way, reproductive justice can function not only as a means of protecting the reproductive autonomy of the most marginalized women, but also as a means of resisting and dismantling mass incarceration.

#### I. CAPTURING MOTHERHOOD: INCAPACITATION AND EARLY EFFORTS TO REGULATE REPRODUCTION

Criminal punishment is violent; it is degrading to the human personality; and it is deeply unpleasant.<sup>35</sup> Indeed, punishment, by its very nature, "is a grand machine for the generation and administration

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<sup>35</sup> See David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1655 (2010) (citing John Bronsteen, Christopher Buccafusco, & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1037 (2009)).

of 'subjective disutility,' principally in the form of suffering."<sup>36</sup> Given the evils inherent in criminal punishment, its justification for infliction in the name of the state and on behalf of the people is necessary.<sup>37</sup> As Franklin Zimring and Gordon Hawkins have noted, "the positive functions achieved by [criminal punishment must] outweigh the negative elements inherent in the policies."<sup>38</sup> As such, theorists have justified criminal punishment on retributivist (i.e., just deserts for blameworthy conduct) and utilitarian (i.e., imposing punishment as a means of promoting the greater good) grounds. These theories seek to punish the wrongdoer for past conduct or to deter wrongdoing in the future.

Incapacitation is one of several utilitarian justifications for criminal punishment, one that seeks to deter future punishment. According to the National Institute for Justice, incapacitation is a forward-looking theory of punishment designed to remove "a convicted offender from the community, usually through imprisonment, to prevent the offender from committing further crimes."<sup>39</sup> Incapacitation prevents harm to society by predicting the future danger posed by a particular individual and removing them from society so that said potential danger does not occur.<sup>40</sup> As one scholar noted, the "punishment [incapacitation] is justified by the risk individuals are believed to pose to society in the future. As a result, individuals can be punished for 'hypothetical' crimes. In other words, they can be incarcerated, not for crimes they have actually committed but for crimes it is *anticipated* or *assumed* they will commit."<sup>41</sup> Incarceration is a primary example of

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<sup>36</sup> *Id.* at 1620.

<sup>37</sup> See JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 170 (1988). According to Bentham, "[a]ll punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil." *Id.*

<sup>38</sup> FRANKLIN ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND RESTRAINT OF CRIME* 5 (1995).

<sup>39</sup> *Id.* at 44; see also PETER W. GREENWOOD & ALLAN ABRAHAMSE, *SELECTIVE INCAPACITATION* 88-94 (1982) (arguing that selective incapacitation of individuals who account for a disproportionate amount of crime may be a policy option to consider).

<sup>40</sup> See ZIMRING & HAWKINS, *supra* note 39, at viii.

<sup>41</sup> Alana Barton, *Incapacitation Theory*, in *ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES* 463 (Mary Bosworth ed., 2005). "The second strategy, selective incapacitation, is concerned with identifying 'risk' and predicting 'dangerousness.' This strategy emphasizes the proactive nature of incapacitative sentences. The aim is to incarcerate selectively those individuals who would pose a serious risk to the public if left within, or released back to, the community." *Id.* at 464.

incapacitation as it physically removes people who are deemed a danger to society and locks them away to prevent future harm.<sup>42</sup>

Over the last forty years, incapacitation has served as a central justification for criminal punishment, as exemplified by the enactment of mandatory minimums, three strikes, the reinstatement of the death penalty, and the abolition of rehabilitative programs in jails and prisons across the country. This shift toward incapacitation facilitated the massive expansion in prison populations and the criminal justice system more broadly. Indeed, the management of the risk of crime through incapacitation has cohered into what Malcolm Feeley and Jonathan Simon call “the new penology.”<sup>43</sup> According to Simon and Feeley, the new penology is dominated by the “language of probability and risk” and “target[s] offenders as an aggregate.”<sup>44</sup> In this context, individuals convicted of crime are viewed as “risky subject(s)” and crime is constructed as a “calculable, avoidable, governable risk.”<sup>45</sup> According to Feeley and Simon, “the new penology is markedly less concerned with responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender. Rather, it is concerned with techniques to identify, classify, and manage groupings sorted by dangerousness.”<sup>46</sup> In turn, new institutional tools that look at offense/offender characteristics, such as mandatory minimum sentencing and correctional classification schemes, justify the incarceration bodies that are disproportionately black for long periods of time in harsh penal environments.

Incapacitation is predicated on notions of risk of harm and future dangerousness. Such assessments of risk of harm and dangerousness are used to determine the propriety of punishments that can incapacitate individuals so as to prevent future harm. Assessments of risk of harm and dangerousness are not, however, neutral or objective. Rather, they are often informed by racial and gender stereotypes.<sup>47</sup> For example, Black women have been viewed as an omnipresent danger through designation as sexually promiscuous, incompetent mothers and welfare queens who threaten society<sup>48</sup> while Black men are

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<sup>42</sup> Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *CRIMINOLOGY* 449, 450, 458 (1992).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 450.

<sup>45</sup> Kelly Hannah-Moffat, *Criminogenic Needs and the Transformative Risk Subject: Hybridizations of Risk/Need in Penalty*, 7 *PUNISHMENT & SOC'Y* 29, 30, 34 (2005).

<sup>46</sup> Feeley & Simon, *supra* note 43, at 452.

<sup>47</sup> See MUHAMMAD, *supra* note 26, at 8-10.

<sup>48</sup> See generally ROBERTS, *supra* note 18.

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perceived as violent criminals.<sup>49</sup> These stereotypes of Black women and men undergird evaluations of dangerousness and enhance the likelihood of incapacitation through incarceration.<sup>50</sup> As one scholar noted, given the ways in which racial and gender stereotypes inform notions of risk and dangerousness, “incapacitative sentences . . . maintain and legitimize structural divisions within society.”<sup>51</sup>

Little, however, has been said about the gendered effects of incapacitation. In this section, I highlight the ways in which incapacitation has long stood at the heart of women’s incarceration as it was used to remove women from society who posed a risk to prevailing gender norms. As such, this section will describe the ways women’s imprisonment, a particular form of incapacitation, has historically been predicated on the social construction of motherhood and built on a terrain of racial and gender inequality. This section highlights how the treatment of women in prison is emblematic of state attempts to suppress or punish reproduction of “unfit” or “deviant” women.

Indeed, for Black women, and women more generally, dangerousness and risk of harm are deeply gendered. Women are viewed as dangerous or harmful to society when they fail to adhere to gender norms such as domesticity, submissiveness, piety, and sexual purity. Deviation from these gender norms is perceived as a signal that women are unregulated by patriarchal values, sexually immoral, and will produce children who will become burdens on society due to their poor mothering skills. Thus, women’s incapacitation has functioned to reinforce and police the normative boundaries of gender, motherhood, and reproduction.

#### A. *Motherhood as a Biological Imperative*

Control over women’s reproduction has been fundamental to maintaining both gendered and racial stratification in the United States. Through ideological norms associated with reproduction, women are reduced to their biological functions and assigned specific reproductive obligations and incapacities that facilitate their subordination. As legal scholar, Reva Siegel, has observed, “[i]deological norms and institutional practices pertaining to reproduction play a central part in defining women’s status, the

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<sup>49</sup> See generally *id.*

<sup>50</sup> See *id.*

<sup>51</sup> Barton, *supra* note 41, at 436-37.

dignity they are accorded, the degradations to which they are subjected, and the degree of autonomy they are allowed or dependency they must suffer.”<sup>52</sup> Indeed, social constructs of female identity are rooted in notions of the biological imperative to reproduce and mother offspring.<sup>53</sup> Women are expected to serve as vessels for procreation; when pregnant, they are to provide an ideal gestational environment; as mothers they are to be self-sacrificing, “altruistic and intensive, which includes the assumption of primary care of their children,” and to submit to patriarchal control.<sup>54</sup>

Race and class animate views about reproduction and shape perceptions about the line between “good” and “bad” motherhood. In particular, the identities of women of color are contrasted against the Victorian ideal of “True Womanhood,” which is often viewed as synonymous with motherhood.<sup>55</sup> The Victorian ideal required strict adherence to a code of “piety, purity, submissiveness and domesticity” — virtues believed to be inherent in feminine nature.<sup>56</sup> Women of color, however, have historically been cast in opposition to these normative standards of femininity.<sup>57</sup> As one legal scholar noted, “the black body is culturally, socially, and legally hyper-surveyed . . . because the black female body is inscribed and engraved with particular gendered and racialized cultural meanings”<sup>58</sup> such as hyper-sexuality.

Black women’s bodies have been associated with sexual deviance, poverty, crime and a host of other social ills. Native American women have been cast as the intergenerational propagators of corrupt cultural practices. For example, the early writings on African and Native women helped to entrench notions of their suitability for enslavement and colonization by depicting their “physical strength and emotional indifference.”<sup>59</sup> Specifically, these writings asserted that African

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<sup>52</sup> Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 340 (1992).

<sup>53</sup> See *id.* at 267.

<sup>54</sup> See generally Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151, 153 (1966).

<sup>55</sup> See *id.* at 162 (discussing how a woman’s place is in the home as a wife and mother).

<sup>56</sup> *Id.* at 152.

<sup>57</sup> See *id.* (explaining that the nineteenth-century American woman had a “solemn responsibility” to “uphold the pillars of the temple with her frail white hand”).

<sup>58</sup> Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 CARDOZO WOMEN’S L.J. 303, 319 (2005).

<sup>59</sup> JENNIFER L. MORGAN, LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY 30-31 (2004).

women experienced painless childbirth and detachment from their children after birth.<sup>60</sup> As a result, their reproductive labor could be easily exploited to support the system of chattel slavery.<sup>61</sup> As I have noted elsewhere, “[t]o the extent that Black women were dehumanized and distinguished from prevailing values of white womanhood, these constructs of Black women specifically were imputed as confirmation of the inferiority of Blacks generally.”<sup>62</sup> More recently, Black women have been stereotyped as lacking in maternal instincts and as sources of intergenerational cultural pathology. Similar dynamics apply to Native American women, who have been portrayed in the American imagination as both animalistic and sexually deviant.<sup>63</sup> In sum, the bodies of Black and Brown women constitute the physical embodiment of maternal deviance as a result of social meanings projected on to those bodies.

### B. *Early Women’s Prisons and the Regulation of Motherhood*

Prisons and the management of deviant motherhood have a long and troubled history. State interest in reproduction and the regulation of motherhood shaped the development of policies and social structures, including the criminal justice system in general and the development of the women’s prison in particular.

Prior to the Civil War, women were rarely sent to prisons in the United States. For white women, imprisonment was seen as incompatible with the prevailing view of “true womanhood” and its attendant characteristics of whiteness, domesticity, vulnerability, and submissiveness. White women were viewed as too delicate for the horrific environments that prevailed in prisons across the country.

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<sup>60</sup> *Id.* at 36, 40.

<sup>61</sup> *Id.* at 40. These depictions appeared not only in writing, but also in visual renderings of African women. *Id.* at 40-42. As Jennifer Morgan notes, “In Peter Kolb’s 1773 narrative of the Cape of Good Hope, the ‘Hottentot’ woman sits smoking marijuana while her nursing child peers over her shoulder.” *Id.* at 42. Prescient of subsequent associations with African American mothers and drug use, the picture suggests a mother that is unconcerned with the wellbeing of her child. *See id.* These writings and images were used as a basis to present Africans and Native Americans as subhuman and savage, respectively, and functioned to racially differentiate African and Native women from European women. *Id.* at 40-42.

<sup>62</sup> Ocen, *supra* note 5, at 1259; *see also* ANGELA Y. DAVIS, *WOMEN, RACE & CLASS 5* (1981) (“[J]udg[ing] by the evolving nineteenth-century ideology of femininity, which emphasized women’s roles as nurturing mothers and gentle companions and housekeepers for their husbands, Black women were practically anomalies.”).

<sup>63</sup> *See* Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 *ARIZ. ST. L.J.* 299, 319 (2002).



Black women were not considered women at all, but property, sub-human and available for various forms of exploitation.<sup>64</sup> The labor of Black women was too valuable to be wasted within the confines of a prison or workhouse. As such, the systematic diversion of white and Black women out of prison and into private forms of punishment reinforced racialized and gendered constructs.

That is not to say, however, that women were not punished. In a society where white male ownership of women was the norm, women were subject to differential forms of private punishment that were fundamentally shaped by race. While incarceration was seen as incompatible with white womanhood, white women were subject to private forms of retribution and abuse at the hands of their fathers and husbands for alleged transgressions. Although Black women did not benefit from prevailing constructs of womanhood, in all but a few cases, Black women's status as property rendered them ineligible for punishment by the state. Instead, enslaved Black women were physically abused and sexually assaulted by whites who claimed ownership over their bodies.

Occasionally, women were convicted of violent crimes, such as murder, that resulted in custodial sentences.<sup>65</sup> The few women who were convicted of such offenses and sent to custodial institutions traversed gendered boundaries and were therefore understood to be "unnatural women."<sup>66</sup> Women were perceived to possess an inherent moral superiority over men, thus "the woman who dared to stray or fell from her elevated pedestal was regarded as having fallen a greater distance than a male, and hence as being beyond any possibility of reformation."<sup>67</sup> A woman who found herself detained "[n]ot only . . . offended against the state; she has also offended against her femininity."<sup>68</sup> Incarcerated women were therefore considered "doubly deviant." In line with this status, incarcerated white women did not

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<sup>64</sup> See ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 25 (2003), [https://www.feministes-radicales.org/wp-content/uploads/2010/11/Angela-Davis-Are\\_Prisons\\_Obsolete.pdf](https://www.feministes-radicales.org/wp-content/uploads/2010/11/Angela-Davis-Are_Prisons_Obsolete.pdf). Enslaved Black people could, however, be punished for conduct that was deemed threatening to the institution of slavery. See *id.* at 25. The punishment could be as severe as death.

<sup>65</sup> E.g., L. Mara Dodge, "One Female Prisoner Is of More Trouble than Twenty Males": *Women Convicts in Illinois Prisons, 1835-1896*, 32 J. SOC. HIST. 907, 909, 917 (1999) (over a twenty-eight-year period only fifty-nine women were sent to prison in Illinois as compared to 3,000 men).

<sup>66</sup> See JODY RAPHAEL, FREEING TAMMY: WOMEN, DRUGS AND INCARCERATION 33 (Claire Renzetti ed., 2013).

<sup>67</sup> Dodge, *supra* note 65, at 908.

<sup>68</sup> RAPHAEL, *supra* note 66, at 34.

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have separate facilities and were instead housed in men's prisons and supervised by male guards.

Moreover, pregnancy and motherhood served as sites of racial and gendered differentiation in antebellum carceral regimes. Indeed, pregnancy was generally cited as a justification for the exclusion of white women from male custodial institutions. For example, Illinois state officials routinely pardoned pregnant white women rather than send them to male prisons or workhouses.<sup>69</sup> In the case of Black women, actions to terminate a pregnancy could be the basis for incarceration as such conduct was deemed a threat to the reproduction of the system of chattel slavery. In *Still in Chains: Black Women in Western Prisons, 1865-1910*, historian Anne Butler describes the story of a fifteen-year-old Black girl named Nelly who was enslaved in the state of Missouri. Nelly, who was described as "mentally retarded," was incarcerated in 1846 for murdering her newborn infant.<sup>70</sup>

#### 1. Establishment of Women's Prisons

After the Civil War, the number of women arrested for and convicted of criminal offenses increased dramatically.<sup>71</sup> During this era, incapacitation in women's carceral institutions was deployed to manage anxieties surrounding women's sexuality and childbearing, often along segregated lines. White women, particularly those who lost husbands and fathers during the Civil War, were increasingly arrested for crimes rooted in poverty. As the country moved toward industrialization and urbanization following the Civil War, social anxieties about immigration and white women's sexuality prompted rigorous enforcement of morality and public offenses. Women were incarcerated for "unladylike" crimes such as "lewd and lascivious conduct, fornication, serial premarital pregnancies, adultery [and] venereal disease."<sup>72</sup> Because of limited space for women at custodial institutions, white women convicted of such crimes were typically held for very short sentences at the county jail or subject to "mild rebukes" outside of the custodial setting.<sup>73</sup>

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<sup>69</sup> See Dodge, *supra* note 65, at 916-17, 924.

<sup>70</sup> Anne M. Butler, *Still in Chains: Black Women in Western Prisons, 1865-1910*, 20 *W. HIST. Q.* 18, 21 (1989).

<sup>71</sup> See *id.* at 22.

<sup>72</sup> STACY L. MALLICOAT & CONNIE ESTRADA IRELAND, *WOMEN AND CRIME* 270 (2013).

<sup>73</sup> See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 117 (2006).

In addition to these kinds of petty offenses and morality crimes, Black women were targeted by the state for regulation under a racialized system of criminal law known as the Black Codes, which criminalized a wide range of activities thought to be disproportionately committed by newly freed Blacks. The Black Codes criminalized “vagrancy, absence from work, the possession of firearms, insulting gestures or acts, job or familial neglect, reckless spending and disorderly conduct. Blacks were also prosecuted for failure to perform under employment contracts.”<sup>74</sup> Individuals convicted of such “crimes” were often sentenced to hard labor at convict lease camps or in local chain gangs. This system of criminalization and exploitation functioned to enhance the revenues generated by public authorities and to replace the lost labor of newly freed slaves.

The increased number of women convicted of crimes overwhelmed the criminal justice system’s ability to house them in local jails or male prisons. In light of the increasing prevalence of women’s incarceration and perceived need for specialized programming for women, progressive era advocates pushed for separate women’s reformatories. The first of such reformatories was opened by the state of Indiana in 1873.<sup>75</sup> Women who were incapacitated in these reformatories were generally poor and convicted of petty or misdemeanor crimes, particularly morals offenses. Such convictions punished non-normative behavior by women that was considered inconsistent with prevailing notions of womanhood. Women housed in reformatory institutions were often given indeterminate sentences designed to promote good behavior and compliance with penal objectives.<sup>76</sup> For example, in *State v. Heitman*, the Kansas Supreme Court upheld longer indeterminate sentences for women convicted of crimes that would have sent a similarly situated man to jail for a short, fixed term. This outcome was premised on the belief that women “were the more reformable sex . . .”<sup>77</sup> As such, “reformatories extended government control over working-class women not previously vulnerable to state

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<sup>74</sup> Ocen, *supra* note 5, at 1262.

<sup>75</sup> See Joanne Belknap, *Offending Women: A Double Entendre*, 100 J. CRIM. L. & CRIMINOLOGY 1061, 1074 (2010). Between 1900 and 1935, twenty prisons for women were founded from Maine to California, Nebraska through Arkansas. Nicole Hahn Rafter, *Gender, Prisons, and Prison History*, 9 SOC. SCI. HIST. 233, 234 (1985).

<sup>76</sup> ESTELLE B. FREEDMAN, *THEIR SISTERS’ KEEPERS: WOMEN’S PRISON REFORM IN AMERICA, 1830-1930*, at 98 (1981).

<sup>77</sup> *Id.* at 148.

punishment” and enabled the state to “correct’ women for moral offenses for which adult men” were not incarcerated.<sup>78</sup>

In contrast to the sprawling, male dominated state institutions, the women’s reformatories were located on smaller, cottage-style campuses and staffed primarily by women.<sup>79</sup> Incarceration of women in reformatories was designed to rehabilitate rather than punish “fallen women,” to restore domesticity, repress deviant sexuality, and to prepare them to take on the role of mother.<sup>80</sup> Women took classes on hygiene, cooking, sewing, and other domestic tasks. As one scholar noted, “[t]he reformatory became a place embodying attempts by society to control the autonomy of women — to punish the wayward behaviors and instill women with appropriate morals and values of society.”<sup>81</sup>

Indeed, the promotion of “appropriate” female sexuality and “good” motherhood were core objectives of women’s reformatories. As noted above, poor women were sent to reformatories after being convicted of crimes that separated them from prevailing norms of femininity and motherhood.<sup>82</sup> In addition to morals crimes such as lewdness, stubbornness, disorderly conduct, fornication, or venereal disease, women were sent to reformatories for attempting to control their reproductive capacities through abortion, which was deemed a “crime against person[s].”<sup>83</sup> In one case, a “woman who claimed to have miscarried and disposed of the fetus had been convicted of murdering her illegitimate child.”<sup>84</sup> By virtue of these expressions of independence, sexuality, and reproductive autonomy, women were deemed to be deviant women and bad mothers in need of correction.

Early reformatories utilized incapacitation to enforce norms regarding femininity and motherhood in a variety of ways ranging from benevolent to the barbaric. In Illinois, for example, white women often asserted motherhood as a basis for a sentence commutation.<sup>85</sup> In

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<sup>78</sup> NICOLE HAHN RAFTER, *PARTIAL JUSTICE: WOMEN, PRISONS, AND SOCIAL CONTROL* 158 (2d ed. 1992).

<sup>79</sup> See Belknap, *supra* note 75, at 1073.

<sup>80</sup> See Rafter, *supra* note 75, at 233, 236, 240 (“Women’s reformatories . . . emphasized domesticity and training in femininity, on the theory that what was basically wrong with female criminals was their failure to be ‘true’ women.”).

<sup>81</sup> Nancy Kurshan, *Behind the Walls: The History and Current Reality of Women’s Imprisonment*, in *CRIMINAL INJUSTICE: CONFRONTING THE PRISON CRISIS* 136 (Elihu Rosenblatt ed., 1996).

<sup>82</sup> See Rafter, *supra* note 75, at 238-39.

<sup>83</sup> See FREEDMAN, *supra* note 76, at 13-14.

<sup>84</sup> Kurshan, *supra* note 81, at 146.

<sup>85</sup> See Dodge, *supra* note 65, at 915.

addition, facilities such as the Massachusetts Reformatory Prison for Women in Framingham included infant nurseries and on-site hospitals to meet the needs of women and their children.<sup>86</sup> In at least one reformatory, however, white women were subject to horrific gynecological experiments that prevented procreation. In other institutions, doctors engaged in medical procedures to prevent women from experiencing sexual pleasure. For example, from 1873 to 1888, a doctor at the Indiana women's reformatory performed oophorectomies on women prisoners as a means to "cure nymphomania and masturbation."<sup>87</sup>

## 2. Race, Reformatories, and the Redemption of "Fallen Women"

Reformatories, however, were largely reserved for white women. As Nicole Rafter notes, "these institutions were established to rescue and reform, to restore fallen women to true womanhood. Those who spearheaded campaigns for the establishment of women's reformatories, like most of those who later superintended such institutions, simply did not consider Black women to be worthy of their rehabilitative efforts."<sup>88</sup> Either by explicit policy or informal practice, white women were sent to reformatories while Black women were placed in men's custodial institutions such as prisons or chain gangs, or subject to work farms where they were leased to private industries as a part of a policy that came to be known as convict leasing.<sup>89</sup> The harsh sentences imposed on Black women in these institutions were justified by the fact that they were not seen as women. At the same time, Black women were believed to pose a reproductive threat to the very fabric of society. The perception of Black women as a reproductive threat was exemplified by one prison administrator who remarked, "[d]o you want immoral women to walk

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<sup>86</sup> See FREEDMAN, *supra* note 76, 68-69. For a more contemporary account of the prison, see CHRISTINE RATHBONE, *A WORLD APART: WOMEN, PRISON AND LIFE BEHIND BARS* (2006).

<sup>87</sup> Michelle Jones, *Women's Prison History: The Undiscovered Country*, PERSP. ON HIST. (Feb. 2015), <https://www.historians.org/publications-and-directories/perspectives-on-history/february-2015/womens-prison-history>.

<sup>88</sup> Rafter, *supra* note 75, at 240.

<sup>89</sup> *Id.* at 240-41 ("The three southern reformatories (in Arkansas, North Carolina and Virginia) explicitly excluded black women."). If they were assigned to reformatories in the North, Black women were held in segregated units, where they did not benefit from the reformist ethic that animated the treatment of white women. See, e.g., PAULA C. JOHNSON, *INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON* 28, 32-34 (2003).

our streets, pollute society, endanger your households, menace the morals of your sons and daughters? Do you think the women here described [are] fit to become mothers of American citizens?”<sup>90</sup>

As a result of this segregated system of justice, Black women became the majority of women housed in state prisons and for less serious crimes than their white counterparts.<sup>91</sup> For example, from 1865 to 1906, the Kansas State Prison housed approximately 200 women. Of that number, roughly 150 were Black.<sup>92</sup> Similar disparities existed in Louisiana. As historian Ann Butler notes, “[b]etween 1866 and 1872, sixty-seven women entered the Louisiana state prison system. Black and mulatto women accounted for sixty-four of those women.”<sup>93</sup> As historian Sarah Haley observes, in Georgia, Black women and girls as young as twelve were imprisoned or sentenced to hard labor for petty offenses such as selling whiskey, stealing coal, “arguing or using profanity,” or “dumping dirty water in the street.”<sup>94</sup> The few white women who were housed in these institutions were typically convicted of violent crimes such as murder, kept separate from Black women, and assigned lighter work duties.<sup>95</sup>

In these custodial settings, Black women routinely experienced physical and sexual abuse; degradation of their identities as mothers was the norm. For example, “[d]uring an investigation into punishments at the Kansas State Penitentiary, matrons of the female ward testified that as late as 1910 strait jackets, handcuffs, and gags were routinely used to restrain female prisoners.”<sup>96</sup> Moreover, Black women were often raped by male inmates or prison staff. Pregnancies would frequently result from these sexual assaults. Notwithstanding their status as expectant mothers, Black women were often treated harshly, sent to chain gangs, and ordered to perform hard labor despite being pregnant.<sup>97</sup> Black women were provided little to no

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<sup>90</sup> Jenni Vainik, *The Reproductive and Parental Rights of Incarcerated Mothers*, 46 *FAM. CT. REV.* 670, 673 (2008).

<sup>91</sup> NICOLE HAHN RAFTER, *PARTIAL JUSTICE: WOMEN IN STATE PRISONS, 1800–1935*, at 132-33 (1985).

<sup>92</sup> Butler, *supra* note 70, at 30.

<sup>93</sup> *Id.* at 22.

<sup>94</sup> SARAH HALEY, *NO MERCY HERE: GENDER, PUNISHMENT AND THE MAKING OF JIM CROW MODERNITY* 30-31 (2016); Sarah Haley, “*Like I Was a Man*”: *Chain Gangs, Gender, and the Domestic Carceral Sphere in Jim Crow Georgia*, 39 *SIGNS* 53, 65 (2013).

<sup>95</sup> See Rafter, *supra* note 75, at 241 (“These authorities perceived white women as unfit for incarceration in custodial prisons, except in extreme cases where offense type indicated the contrary.”).

<sup>96</sup> Butler, *supra* note 70, at 31.

<sup>97</sup> Ocen, *supra* note 5, at 1260.

medical care during pregnancy and childbirth. At times, they were separated from their newborns as punishment for engaging in a sexual act with an inmate or member of the prison staff.<sup>98</sup> As I have noted elsewhere, the treatment of Black women at sentencing and during incarceration “served to devalue [them] as mothers and center their reproductive capacities as a cause for racial subordination.”<sup>99</sup>

*C. Decline of Women’s Prisons as an Explicit Form of Reproductive Control*

Following the steep increase in the women’s prison population in the late nineteenth and early twentieth centuries, women’s incarceration rates leveled off in the late 1930s and remained relatively constant for another forty-five years. The number of women in prison averaged around 6,000, or 7 per 100,000 women.<sup>100</sup> In addition, courts limited explicit forms of reproductive control in prisons, such as sterilization,<sup>101</sup> and women were largely diverted out of jails and prisons.

In its wake, other systems and institutions of control emerged to regulate women’s sexuality, reproduction, and identities as mothers. Indeed, the sexual and reproductive autonomy of economically and racially marginalized women were circumscribed by the emergent social welfare state, de jure segregation, and pervasive state regulation of family life. Nevertheless, the women’s prison continued to serve as a powerful symbol of state control of women’s bodies and attempts to discipline gendered norms regarding sexuality and motherhood throughout the twentieth century.

II. INCAPACITATING MOTHERHOOD: MASS INCARCERATION AS A CONTEMPORARY MEANS OF CONTROLLING DANGEROUS MOTHERS

In the last four decades, incarceration has reemerged as one of the most significant means of social regulation and control of populations considered deviant.<sup>102</sup> As historian Khalil Gibran Muhammad notes,

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<sup>98</sup> *Id.* at 28.

<sup>99</sup> Ocen, *supra* note 5, at 1268.

<sup>100</sup> Mary Ziegler, *Reinventing Eugenics: Reproductive Choice and Law Reform After World War II*, 14 *CARDOZO J.L. & GENDER* 319, 336 (2008).

<sup>101</sup> *See id.* at 324.

<sup>102</sup> *See, e.g.,* Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 *BERKELEY J. CRIM. L.* 259, 260-61 (2011) (arguing that prison facilitates “the exclusion from the shared public space of those deemed a threat to public order and security, and the exercise of state control to keep those marked out for such exclusion separate

the prison population grew “larger than at any time in the history of the penitentiary anywhere in the world.”<sup>103</sup> As part of this trend, the number of women, particularly Black women, in jails and prisons surged.<sup>104</sup> Indeed, women are the fastest growing prison population in the United States.<sup>105</sup> Between 1980 and 2014, the number of women in prisons and jails rose from 26,000 to approximately 215,000, an increase of over ninety percent.<sup>106</sup> As a result of these trends, the United States is now home to over one-third of the world’s incarcerated women, despite representing less than five percent of the world’s population.<sup>107</sup>

Although the size and scope of the contemporary women’s prison is without historical precedent, it nevertheless maintains many of the central features of its founding. For example, the women’s prison population in the United States is concentrated in the Northeast and the South, where women’s prisons and reformatories were initially established. Like their historical counterparts, women’s prisons are disproportionately comprised of Black women. This is not coincidental. As one scholar noted, the population of Black women increased “in the Northeast and Midwest, where the reformatory movement had concentrated, and Progressive-era reformers gave way to a generation of ‘corrections officials,’ whose attitude toward incarcerated women was fast becoming . . . [t]here’s nothing we can do about them.”<sup>108</sup> Like their counterparts at the turn of the twentieth century, women are largely incarcerated for non-violent and petty offenses, such as property and drug-related crimes.

Like early women’s prisons and reformatories, contemporary women’s prisons disproportionately incarcerate women who are mothers. Indeed, nearly eighty percent of individuals incarcerated in women’s jails and sixty-five percent of women in prison were the primary caretakers of minor children at the time of their incarceration. These women are separated from their children and often lose their parental rights during periods of incarceration. In prisons, women are

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and apart from society for the duration of their sentences”).

<sup>103</sup> MUHAMMAD, *supra* note 26, at 1.

<sup>104</sup> See *Facts about the Over-Incarceration of Women*, *supra* note 10.

<sup>105</sup> *Id.*

<sup>106</sup> *Fact Sheet: Incarcerated Women and Girls*, THE SENTENCING PROJECT (2015), <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf>.

<sup>107</sup> See sources cited *supra* note 12.

<sup>108</sup> Sarah Yager, *Prison Born*, ATLANTIC (July 2015), <http://www.theatlantic.com/magazine/archive/2015/07/prison-born/395297>.



subject to degrading and demeaning conditions of confinement — such as sterilization and shackling — that burden their reproductive capacities. In sum, by virtue of their incapacitation in prisons, their ability to mother or have children is incapacitated and their identity as deviant mothers is reinforced.

Contrary to the early history of women's prisons, the justifications for punishing women — and limiting of their ability to mother and parent as a result — are not rooted in biological determinism or deviance from biologically ingrained gender roles. Rather, the incapacitation of motherhood is rooted in perceived cultural pathology of incarcerated women and their families. As largely poor single mothers (and poor women of reproductive age), they are deemed to be bad mothers whose poor child rearing will inevitably lead to offspring who commit crimes and threaten public order. As such, their reproductive capacities are deemed to be the source of crime, dependency, and disorder.

The collision of the discourse of traditional maternal roles and cultural pathology in Black communities is probably best exemplified by the federal report authored by Daniel Patrick Moynihan entitled *The Negro Family: The Case for National Action*. In assessing the familial disintegration and racial inequality experienced by African Americans, Moynihan cited the role of African American women in the family structure as their primary cause:

In essence, the Negro community has been forced into a matriarchal structure which, because it is out of line with the rest of the American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male and, in consequence, on a great many Negro women as well.<sup>109</sup>

In sum, the report suggested that Black women as mothers were responsible for a “tangle of pathology” that engulfed the African American community, spawning unemployment, criminality, out of wedlock births, poverty, and the like.

The Moynihan report concludes that Black maternal pathology emerged as a potent explanation for social problems such as crime.<sup>110</sup> Indeed, it's central thesis was reproduced and reinforced in other

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<sup>109</sup> DANIEL P. MOYNIHAN, U.S. DEPT. OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 29 (1965), <https://web.stanford.edu/~mrosenfe/Moynihan%27s%20The%20Negro%20Family.pdf>.

<sup>110</sup> See generally ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016).

federal reports, including the landmark study on law enforcement entitled *The Challenge of Crime in a Free Society*, a document that called for greater investment in law enforcement to combat crime.<sup>111</sup> In particular, the report found that “families are failing” and are “not operating effectively in the inner city.”<sup>112</sup> Commission relied upon and legitimized a study that found that female headed households lacked discipline and created what it called “premature autonomy,” and a consequent resentment of authority figures such as police and teachers.<sup>113</sup> As such, single motherhood in “urban” communities, and by extension the reproductive capacities of poor Black women, were blamed for broader social problems such as crime and thus became legitimate target for the criminal justice system.

As legal scholar Jonathan Simon notes, “Social problems ranging from welfare dependency to educational inequality have been reconceptualized as crimes, with an attendant focus on assigning fault and imposing consequences.” The focus on treating social problems as criminal obscures the broader structural issues — such as poverty, housing or education — that account for their existence. Treating social inequality as a law enforcement matter individualizes the problem and lays responsibility for such problems at the feet of the poor rather than other institutional actors that actually have the power to change social outcomes. This is particularly true of women of color who are more likely than their white counterparts to be “blamed for social problems, [and to be] presented as bad mothers.”<sup>114</sup> Indeed, racial stereotypes and anti-black bias play a central role in the public’s unwillingness to fund social programs that address poverty or mental illness and its willingness to support harsh criminal justice policy.<sup>115</sup> Through the criminalization of poor women, a host of structural social problems are reduced to the individual and perceived individual choice. As a result of linking social problems such as crime with poor

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<sup>111</sup> THE PRESIDENT’S COMM’N ON LAW ENF’T & THE ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 111-23 (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>.

<sup>112</sup> *Id.* at 59.

<sup>113</sup> *Id.* at 63.

<sup>114</sup> See Kristen W. Springer, *The Race and Class Privilege of Motherhood: The New York Times Presentations of Pregnant Drug-Using Women*, 25 *SOC. F.* 476, 490-91 (2010).

<sup>115</sup> See, e.g., MARTIN GILLEN, *WHY AMERICANS HATE WELFARE: RACE, MEDIA AND THE POLITICS OF ANTIPOVERTY POLICY* 71 (1999) (“[P]erceptions of blacks continue to play the dominant role in shaping the public’s attitude toward welfare.”); Joshua J. Dyck & Laura S. Hussey, *The End of Welfare as We Know It? Durable Attitudes in a Changing Information Environment*, 72 *PUB. OPINION Q.* 589, 590 (2008) (welfare opinions tied to views of the work ethic of Black people).

Black mothers, motherhood itself became a target of law enforcement actors and a talking point in rhetoric of “law and order,” which came to undergird the massive expansion of the criminal justice system.

This section will describe how this period of mass incarceration has deployed incapacitation as a means to regulate maternal unfitness within the criminal justice system in ways that are analogous to earlier regimes. Women who would have been incarcerated as “irredeemable” in men’s custodial institutions in the late nineteenth century are now housed in sprawling women’s prisons. In this section, I describe how the incapacitative power of the criminal law has been used to directly and indirectly regulate deviant motherhood. Specifically, I highlight and specify how conditions of confinement limit the ability of women to exercise their right to parent and procreate. These conditions of confinement include lack of access to gynecological care, sterilization, shackling during labor or childbirth and the termination of parental rights. These practices function to prevent women from becoming parents in the future and remove them from their children’s lives in the present. Such forms of regulating motherhood not only burden women’s exercise of reproductive autonomy, the imposition of such practices signals the general marginalized and stigmatized status of women prisoners and their children.

#### A. *Incapacitating Motherhood through Medical Neglect*

Per estimates by the Department of Justice, approximately six percent of women are pregnant when admitted to prison or jail.<sup>116</sup> Concretely, this means nearly 10,000 women are pregnant at some point during their incarceration. Although estimates vary due to uneven reporting by state and local agencies, one 1998 national study found that over 1,400 births occur in prisons and jails annually.<sup>117</sup> For these prisoners, pregnancy serves as a basis for specific forms of punitive treatment that targets their reproductive capacities and identities as mothers. Indeed, while incarcerated, pregnant prisoners are often subject to various forms of degrading and humiliating treatment such as cavity searches prior to transport to external

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<sup>116</sup> See Ginette Gosselin Ferszt, *Giving Birth in Shackles: It’s Time to Stop Restraining Pregnant Inmates During Childbirth*, 110 AM. J. NURSING 11, 11 (2010) (citing Bureau of Justice Statistics). Other studies, however, estimate that between six to ten percent of incarcerated women are pregnant. Jennifer G. Clarke et al., *Reproductive Health Care and Family Planning Needs Among Incarcerated Women*, 96 AM. J. PUBLIC HEALTH 834, 834 (2006).

<sup>117</sup> U.S. GEN. ACCOUNTING OFFICE, *WOMEN IN PRISONS: ISSUES AND CHALLENGES CONFRONTING U.S. CORRECTIONAL SYSTEMS* 55 (1999).

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medical facilities and inadequate nutrition or denied medical attention all together.<sup>118</sup>

Studies have found that “among women who were pregnant at admission to jail, less than half had received an obstetric exam since admission, and roughly one-third had received other pregnancy care.”<sup>119</sup> The failure to provide obstetric care for women can be catastrophic, as “these women are at increased risk of miscarriages, stillbirths, and ectopic pregnancies.”<sup>120</sup> For example, in *Clifton v. Eubank*, a woman incarcerated at a Colorado state prison sued the facility after prison staff ignored multiple requests for medical assistance when she went into labor.<sup>121</sup> The fetus was delivered stillborn.<sup>122</sup> In a particularly harrowing case, a woman complained of contractions and was placed in a solitary confinement cell where she writhed in pain for hours. Ultimately, she delivered the baby herself, alone in the jail cell. The baby did not survive due to the lack of medical care during delivery.

Similarly, in *Doe v Gustavus*, a pregnant prisoner was denied medical care during labor and delivery.<sup>123</sup> Throughout her labor, the plaintiff was accused of her the pregnancy to manipulate the staff. Instead of being given aid, she was placed in a segregated unit. The plaintiff was called “a ‘dumb bitch’” by guards and told that she “would have to clean up her own vomit if she got sick again.”<sup>124</sup> Ultimately, the plaintiff gave birth to her child in the segregation unit, without medical assistance. Following the delivery, guards accused her of “push[ing] that baby out on purpose, just to get out of segregation.”

After giving birth, women have reported denial of essential tools such as breast pumps to express milk, which can cause significant pain and discomfort. In one instance, a woman named Catherine, housed in Los Angeles County’s Central Regional Detention Facility (“CRDF”) “recounted her experience and that of her pregnant cellmate. At the time of Catherine’s arrest, she had a five-month old daughter whom she was breastfeeding. When Catherine arrived at CRDF, Deputies

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<sup>118</sup> *Id.*

<sup>119</sup> ELIZABETH SWAVOLA ET AL., *OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM* 17 (2016).

<sup>120</sup> *Id.*

<sup>121</sup> *Clifton v. Eubank*, 418 F. Supp. 2d 1243, 1243-44 (D. Colo. 2006).

<sup>122</sup> *Id.* at 1243.

<sup>123</sup> *Doe v. Gustavus*, 294 F. Supp. 2d 1003, 1005 (E.D. Wis. 2003).

<sup>124</sup> *Id.* at 1006.

denied her access to a breast pump. This forced her to use her hands to express her breast milk over the communal toilet in her cell.”<sup>125</sup>

In each of these cases, the failure to provide appropriate medical care or to render aid during labor and delivery reflect the ways in which women’s status as pregnant persons subjected them to unique punishments and dignitary harms. Collectively, medical neglect and the degrading treatment experienced by incarcerated women operates as a form of the incapacitation of motherhood as they discourage women from exercising their reproductive capacities and stigmatize incarcerated women’s identities as mothers.

### B. Incapacitating Motherhood Through Degrading Treatment

In addition to medical neglect, motherhood is incapacitated through the denigration of incarcerated women’s reproductive functions and capacities. Such reproductive care is a significant concern to incarcerated women. As the United Nations Population Information Network notes, “[r]eproductive health is a crucial part of general health and a central feature of human development . . . [and although] [r]eproductive health is a universal concern, . . . [it] is of special importance for women particularly during the reproductive years.”<sup>126</sup> Notwithstanding the integral role of reproductive care in the lives of incarcerated women, prisons subordinate and incapacitate women’s potential to become mothers through degrading reproductive care. Indeed, incarcerated women’s reproductive functions serve as sites of humiliation inside of jails, prisons, and detention centers. These forms of degradation and humiliation reinforce the notion that incarcerated women are undeserving of reproduction or procreation and discourage them from becoming parents.

In many carceral settings, women are denied routine reproductive hygiene products such as sanitary napkins. This denial is designed to both humiliate and punish indigent female prisoners who are unable to afford such necessities while incarcerated. Indeed, the use of reproductive functions like menstruation to punish incarcerated women was highlighted in a study of a Los Angeles County jail, one of the largest women’s jails in the country. In the study, respondents

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<sup>125</sup> Alejandro Caceres-Monroy et al., *Breaking the Silence: Civil and Human Rights Violation Resulting from Medical Neglect and Abuse of Women of Color in Los Angeles County Jails*, at 17 (Aug. 5, 2014), [http://dignityandpowernow.org/wp-content/uploads/2015/07/breaking\\_silence\\_report\\_2015.pdf](http://dignityandpowernow.org/wp-content/uploads/2015/07/breaking_silence_report_2015.pdf) [hereinafter *Breaking the Silence*].

<sup>126</sup> *Guidelines on Reproductive Health*, U.N. INTER-AGENCY TASK FORCE ON THE IMPLEMENTATION OF THE ICPD PROGRAMME OF ACTION (Sept. 11, 1995), <http://www.un.org/popin/unfpa/taskforce/guide/iatfrehp.gdl.html>.

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reported that Sheriff's Deputies "forced menstruating women to pull out tampons or remove sanitary napkins, spread their vaginal lips, turn around, spread the cheeks of their buttocks and cough. Deputies then required these women to stand up, turn around and put their soiled hands in their mouths as Deputies inspected them."<sup>127</sup>

For pregnant women, the various forms of humiliation and punishment that send signals regarding reproductive fitness can be many. However, shackling is one of the most harrowing kinds of punitive practices that reinforces notions of maternal deviance and disincentivizes reproduction. Indeed, in facilities across the country, pregnant women prisoners are routinely shackled at the legs, hands, stomach, and ankles in prisons and jails across the country.<sup>128</sup> Pregnant prisoners are shackled during doctor's visits, while in labor, during delivery, and while in recovery. Prison or jail guards often apply such restraints as a matter of course, regardless of the pregnant woman's behavior or offense history. Indeed, shackles are routinely used on pregnant women who have not been convicted of a crime, such as immigration and pretrial detainees. Shackles are routinely used on pregnant women who have been convicted of non-violent drug or property crimes. They are routinely used on pregnant women during active labor, when women are the least likely to pose a flight risk or a danger to themselves or others.

The harms associated with shackling during labor, delivery, and postpartum recovery go well beyond physical injury. The use of shackles during pregnancy sends a symbolic message that the bodies of women prisoners are devalued, degraded, and dehumanized.<sup>129</sup> Shackles signal that women are undeserving of motherhood or a dignified child birthing process. The symbolic effect of shackling during labor, delivery, and recovery is well understood by women themselves and causes lasting emotional harm. For example, after her release from prison, a woman who was subject to shackling during childbirth stated, "I felt like I was being punished for being in prison and being pregnant."<sup>130</sup> Tina Reynolds, co-founder of WORTH, a formerly incarcerated women's advocacy group, expressed similar

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<sup>127</sup> Caceres-Monroy et al., *Breaking the Silence*, *supra* note 125, at 17.

<sup>128</sup> See, e.g., EVAN FEINAUER ET AL., INT'L HUM. RTS. CLINIC, UNIV. OF CHICAGO SCH. OF LAW, *THE SHACKLING OF INCARCERATED PREGNANT WOMEN: A HUMAN RIGHTS VIOLATION COMMITTED REGULARLY IN THE UNITED STATES* 3 (2013).

<sup>129</sup> Ocen, *supra* note 5, at 1285.

<sup>130</sup> RH Reality Check RHRC, *In Labor and In Chains*, YOUTUBE (OCT. 5, 2009), <https://www.youtube.com/watch?v=CWjluHdxnt8> (describing her experience of being shackled during child birth at 00:1:44).

feelings about the shackling she experienced during childbirth: “I felt dehumanized and unworthy to be treated in such a way.”<sup>131</sup> Latiana Walton, a former detainee who was shackled at the Cook County Jail, also describes the shame felt by pregnant women who are shackled during labor or childbirth: “I can’t talk about giving birth to my second son because it was just so degrading. I was treated like I wasn’t human.”<sup>132</sup>

### C. *Incapacitating Motherhood Through Separation from Children*

Many women incarcerated in prisons are prevented from parenting or maintaining their rights to parent their children. For these women, incarceration not only functions to incapacitate their physical bodies, but their ability to be mothers to their children and to be present in their families. Given that prisons are often located in rural communities, far from the cities in which they reside, the families of incarcerated women are often unable to afford the cost of or the time to take long trips for short visits. Those women who are simply isolated from their children are the lucky ones. For the unlucky, incarceration can result in their children’s placement in the foster care system and the termination of their parental rights. In these cases, incarceration plays a significant role in marking these women as “unfit” parents. Stated differently, imprisonment can mean the permanent incapacitation of motherhood for incarcerated women.

The incapacitation of motherhood experienced by incarcerated women is part of a broader trend of parental separation from children due to incarceration. One 2007 study found that 1.7 million children had a parent in prison, three-quarters of whom were children of color. The impact of parental incarceration affects Black children most acutely, as over one quarter of Black children born after 1990 have had a parent incarcerated at some point in their lives.<sup>133</sup> Overall, the rate of

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<sup>131</sup> Meghan Rhoad, *Giving Birth in Shackles*, HUFFPOST (May 25, 2011), [http://www.huffingtonpost.com/meghan-rhoad/giving-birth-in-shackles\\_b\\_208268.html](http://www.huffingtonpost.com/meghan-rhoad/giving-birth-in-shackles_b_208268.html) (quoting Tina Reynolds, founder and Executive Director, Women on the Rise Telling HerStory (WORTH)).

<sup>132</sup> Anthony Ponce, *\$4.1M Settlement Reached for Pregnant Inmates Who Said They Were Shackled*, NBC CHICAGO (May 23, 2012, 8:37 PM), <http://www.nbcchicago.com/news/health/41-Million-Settlement-Reached-for-Shackled-Mothers-153326405.html> (quoting Latiana Walton).

<sup>133</sup> See SARA WAKEFIELD & CHRISTOPHER WILDEMAN, *CHILDREN OF THE PRISON BOOM: MASS INCARCERATION AND THE FUTURE OF AMERICAN INEQUALITY* 41 (2013).

children with a parent who has been incarcerated at some point in their lives has increased by eighty percent between 1991 and 2007.<sup>134</sup>

Because women are more likely to be the primary caretakers of children, their isolation is all the more jarring and disruptive to their children. As Dorothy Roberts notes, “[i]ncarcerated mothers are much more likely than incarcerated fathers to be living with their children when they are sent to prison.”<sup>135</sup> A 2004 study found that approximately half of the women surveyed were single-parents and primary caretakers of their children, as compared to four percent of men who reported being the primary caretakers of children in a separate study.<sup>136</sup>

The isolation from children and incapacitation of women’s ability to mother begins early in the criminal process, well before a determination of guilt. Indeed, women have reported that they are often not informed of the whereabouts of their children when they are arrested. The lack of information about their children makes it difficult to arrange for childcare and much more likely that Child Protective Services will intervene to ensure the wellbeing of the children, even if women will be in jail for only short periods of time. One study of Los Angeles County’s women’s jail, the largest in the country, found that jail protocols did not include family visitation plans. According to the study, “[w]omen . . . reported that Deputies gave them no opportunity at time of and during their incarceration to make arrangements for the care of their children.”<sup>137</sup>

In addition to custodial arrangements, imprisonment presents significant barriers to regular visitation, preventing women from mothering their children. Facilities are significant distances from cities, reducing the likelihood of children making the trek to visit their mothers.<sup>138</sup> Indeed, fifty-eight percent of women prisoners report that they did not have any in-person visits with their children. When in-person visits can be arranged, visitation policies often prohibit physical contact between mothers and their children. One formerly

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<sup>134</sup> THE SENTENCING PROJECT, FACT SHEET: PARENTS IN PRISON 1 (2012), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Parents-in-Prison.pdf>.

<sup>135</sup> Roberts, *Systemic Punishment*, *supra* note 32, at 1495.

<sup>136</sup> *See id.*

<sup>137</sup> Caceres-Monroy et al., *Breaking the Silence*, *supra* note 125, at 18.

<sup>138</sup> Martha L. Raimon et al., *Sometimes Good Intentions Yield Bad Results: ASFA’s Effect on Incarcerated Parents and Their Children*, in INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 125 (2009), <https://www.cssp.org/publications/child-welfare/top-five/intentions-and-results-a-look-back-at-the-adoptions-and-safe-families-act.pdf>.



incarcerated woman described the difficulty she had with maintaining contact with her children: “My oldest daughter was 12 when I started my incarceration, on the brink of adolescence. And I just wasn’t there . . . I was breast-feeding my five-month-old baby boy, and you can’t do that when you are in prison. It was a six-hour round trip drive for them to come visit me.”<sup>139</sup> Even calls to children are difficult to make as the cost of such calls are often prohibitive. Moreover, erratic mail delivery presents barriers to regular contact with attorneys or foster parents. Policies and practices that make it difficult to maintain contact between women and their children persist despite proof that “visitation can help sustain the connection between an incarcerated mother and her children — and correlates with a decrease in violence and reduced recidivism . . . .”<sup>140</sup>

The barriers to visitation and contact with children are especially high for the thousands of women who give birth while incarcerated. For these women, prison personnel act almost immediately to remove their children from their custody. Following childbirth, incarcerated women are often separated from their newborn infants within twenty-four hours of delivery.<sup>141</sup> Prisons across the country maintain such policies for infants born to incarcerated women even though studies have found that physical bonding with their mothers is critical to infant health. Once separated from their newborns and sent back to prison to serve the remainder of their sentences, women are seldom provided psychological support to address the trauma of separation. As such, incarceration functions to incapacitate motherhood for imprisoned women by depriving them of contact with their children while leaving the experience’s trauma unchecked.

#### *D. Incapacitating Motherhood Through Termination of Parental Rights*

In addition to separating incarcerated women from their children, imprisonment incapacitates their ability to mother by increasing the likelihood that their parental rights will be terminated. Although it is unclear how many children in foster care have an incarcerated parent, studies estimate that the figure falls between 29,000 and 51,000.<sup>142</sup>

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<sup>139</sup> Susan Bittenwieser, *The High Cost of Incarcerating Women*, WOMEN’S MEDIA CTR. (Dec. 3, 2015), <http://www.womensmediacenter.com/news-features/the-high-cost-of-incarcerating-women>.

<sup>140</sup> SWAVOLA ET AL., *supra* note 119, at 18.

<sup>141</sup> Ocen, *supra* note 5, at 1257.

<sup>142</sup> Raimon et al., *supra* note 138, at 122.

Another study found that approximately fifteen to twenty percent of children in foster care had a parent that was currently incarcerated.<sup>143</sup>

Indeed, women are far more likely than their male counterparts to have a child in foster care due to incarceration. According to the U.S. Department of Justice, in 2004, eleven percent of mothers incarcerated in state prison reported that their children were in the care of a foster home, agency, or institution, five times the rate reported by fathers.<sup>144</sup> A separate study found that of the children in foster care because of a parental arrest, approximately ninety percent were as a result of maternal incarceration,<sup>145</sup> which far outpaces the representation of women in prison, who constitute approximately seven percent of the overall prison population.<sup>146</sup> Studies have also found that maternal incarceration was a significant driver of the increased number of children in foster care between 1985 and 2000.<sup>147</sup> A study of mothers with children in the New York State foster care system, handling the second largest foster care population in the country,<sup>148</sup> found that over one-third “experienced an arrest that led to a conviction . . . [and] over a fifth experienced detention in jail or prison.”<sup>149</sup> For most of the mothers in the study, incarceration occurred after the child was placed in foster care.<sup>150</sup> According to the authors, “[c]hild removal appears to accelerate criminal activity among the study group’s mothers.”<sup>151</sup>

When children of incarcerated parents are placed in foster care, the chances that parental rights will be terminated increase significantly due to timelines mandated by federal policy. Under the federal

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<sup>143</sup> Denise Johnston, *Children of Criminal Offenders & Foster Care*, 22 FAM. & CORRECTIONS NETWORK REP., Oct. 1999.

<sup>144</sup> *Id.*

<sup>145</sup> See SUSAN D. PHILLIPS & JAMES P. GLEESON, WHAT WE KNOW NOW THAT WE DIDN’T KNOW THEN ABOUT THE CRIMINAL JUSTICE SYSTEM’S INVOLVEMENT IN FAMILIES WITH WHOM CHILD WELFARE AGENCIES HAVE CONTACT: FINDINGS FROM A LANDMARK NATIONAL STUDY 2 (2007), <http://www.f2f.ca.gov/res/pdf/WhatWeKnowNow.pdf>; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-863, CHILD WELFARE: MORE INFORMATION AND COLLABORATION COULD PROMOTE TIES BETWEEN FOSTER CHILDREN AND THEIR INCARCERATED PARENTS 16 (2011), <http://www.gao.gov/assets/590/585386.pdf>.

<sup>146</sup> *Inmate Gender*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_gender.jsp](https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp) (last updated Feb. 24, 2018).

<sup>147</sup> Christopher A. Swann & Michelle Sheran Sylvester, *The Foster Care Crisis: What Caused Caseloads to Grow?*, 43 DEMOGRAPHY 309, 323 (2006).

<sup>148</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 145, at 14.

<sup>149</sup> TIMOTHY ROSS ET AL., HARD DATA ON HARD TIMES: AN EMPIRICAL ANALYSIS OF MATERNAL INCARCERATION, FOSTER CARE, AND VISITATION 6 (2004), [https://www.prisonpolicy.org/scans/vera/245\\_461.pdf](https://www.prisonpolicy.org/scans/vera/245_461.pdf).

<sup>150</sup> *Id.* at i.

<sup>151</sup> *Id.*

Adoption and Safe Families Act (“ASFA”), states institute proceedings to terminate parental rights if a child has been in foster care for fifteen of the previous twenty-two months.<sup>152</sup> As one author noted, “[d]ue to the tension between the timeframes driving the termination of parental rights and the average length of prison sentences, children of incarcerated parents are more likely to become legal orphans than other children in foster care.”<sup>153</sup>

While there are significant risks of parental termination for incarcerated parents generally, ASFA greatly increases the chances that parental rights of incarcerated mothers will be terminated.<sup>154</sup> First, women are sentenced, on average, to twenty-four months of imprisonment, two months longer than the ASFA timeline. Second, the mere factor of incarceration inhibits a woman’s ability to comply with court-ordered steps to reunify with their children. While these dynamics impact both men and women, incarceration is more threatening to the parental rights of women because they are five times as likely as incarcerated men to have a child in foster care. Indeed, as was noted above, women are more likely to be single parents prior to incarceration while men often leave their children in the care of their children’s mother during the period of incarceration. Since 1997, incarcerated women have become less likely to receive visits necessary to maintain the bonds of parental attachment that courts weigh in favor of maintaining parental rights.<sup>155</sup> Indeed, recent studies have found that “children in foster care whose mothers were incarcerated

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<sup>152</sup> The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103, 111 Stat. 2115-18 (1997) (“[I]n the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child’s parents . . . .”); Marne L. Lenox, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280, 299-300 (2011).

<sup>153</sup> Raimon, *supra* note 138, at 122-23.

<sup>154</sup> See SWAVOLA ET AL., *supra* note 119, at 18; STEVE CHRISTIAN, NAT’L CONFERENCE OF STATE LEGISLATURES, CHILDREN OF INCARCERATED PARENTS 5 (2009).

<sup>155</sup> See SARAH SCHIRMER ET AL., THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN, TRENDS 1991–2007, at 9 (2009), [http://www.sentencingproject.org/doc/publications/publications/inc\\_incarceratedparents.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_incarceratedparents.pdf).

were more likely than other children to be assigned a placement goal of adoption.”<sup>156</sup>

For women with children in the foster care system, incarceration operates as a means of incapacitating their ability to mother, as it plays a critical role in determining whether a woman will maintain her parental rights. Indeed, for many women, incarceration ensures that they will experience “the family law equivalent of the death penalty in a criminal case.”<sup>157</sup> In a majority of states, parental incarceration is the determinative factor in determining parental fitness and may trigger the termination of parental rights.<sup>158</sup> As Desiree Kennedy notes, “[m]ore than twenty states permit parental rights to be terminated absent proof of parental wrongdoing that places the child in danger. These states have adopted an ‘impliedly bad parent’ approach, which regards parents as unfit as a result of factors primarily related to their imprisonment as opposed to behavior or conduct directly related to parenting.”<sup>159</sup>

For example, under Illinois state law, a parent is deemed unfit if “the parent is incarcerated at the time the petition or motion for termination of parental rights is filed, the parent has been repeatedly incarcerated as a result of criminal convictions, and the parent’s repeated incarceration has prevented the parent from discharging his or her parental responsibilities for the child.”<sup>160</sup> Under Texas law, parents are deemed to be unfit if they are sentenced to two or more year of imprisonment.<sup>161</sup> In these states, courts rely on incarcerated or incarceration-related limitations as justification for the termination of parental rights, notwithstanding strong familial bonds and a lack of evidence of abuse or neglect.<sup>162</sup> Additionally, incarceration may be cited as a justification for limiting reunification efforts, which is a necessary precursor to parental termination proceedings.<sup>163</sup>

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<sup>156</sup> Charlene Wear Simmons & Emily Danker-Feldman, *Parental Incarceration, Termination of Parental Rights and Adoption: A Case Study of the Intersection Between the Child Welfare and Criminal Justice Systems*, 7 JUSTICE POL’Y J. 1, 6 (2010).

<sup>157</sup> *In re N.G.*, No. 09CA15, 2009 WL 2986188, at ¶ 12 (Ohio Ct. App. Sept. 11, 2009).

<sup>158</sup> Desiree A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 98 (2011).

<sup>159</sup> *Id.*

<sup>160</sup> 750 ILL. COMP. STAT. § 50/1(D)(s) (2017).

<sup>161</sup> See Tex. Fam. Code § 161.001(b)(1)(Q)(ii) (2017).

<sup>162</sup> See Jean C. Lawrence, *ASFA in the Age of Mass Incarceration: Go to Prison-Lose Your Child?*, 40 WM. MITCHELL L. REV. 990, 998 (2014).

<sup>163</sup> See *id.* at 1000; see also Raimon, *supra* note 138, at 125; U.S. Children’s Bureau, *Grounds for Involuntary Termination of Parental Rights*, CHILD WELFARE INFO. GATEWAY,

Following this statutory guidance, courts across the country have terminated the parental rights of incarcerated mothers based on the fact that a mother would be incarcerated for more than eighteen months.<sup>164</sup> Incarcerated women have also lost the rights to their children because they were not able to attend parenting classes, undertake substance abuse treatment, or visit with their children as required by dependency court-mandated reunification plans.<sup>165</sup> When women attempt to prevent the termination of their parental rights upon release from custody, their inability to obtain secure housing or employment because of their conviction histories is often used as a basis for finding parental unfitness.<sup>166</sup> Thus, incapacitation leaves women vulnerable to being legally defined as an “unfit parent” and therefore undeserving of motherhood.

#### E. Incapacitating Motherhood Through Sterilization

Conditions and practices within women’s prisons function to physically incapacitate the reproductive capacities of the individuals within them. Sterilization of incarcerated women is one of the most pernicious of these practices. Although comprehensive figures regarding the pervasiveness of this practice are unavailable, a recent report by the Center for Investigative Reporting found that “[d]octors under contract with the California Department of Corrections and Rehabilitation sterilized nearly 150 female inmates from 2006 to 2010 without required state approvals.”<sup>167</sup> A separate study by the California State Auditor found that another 539 women underwent hysterectomies from 2005 to 2013.<sup>168</sup> Through sterilization, by either tubal ligation or hysterectomy, incarcerated women are permanently prevented from reproducing. As such, prison sterilization practices

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at 2 (Jan. 2013), <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf> (detailing grounds for the termination of parental rights).

<sup>164</sup> See, e.g., *In re N.G.*, No. 09CA15, 2009 WL 2986188, at ¶ 1 (Ohio Ct. App. Sept. 11, 2009); *Christy C. v. Arizona Dep’t of Econ. Sec.*, 153 P.3d 1074, 1077, 1080 (Ariz. Ct. App. 2007); *State Dep’t of Children’s Servs. v. V.N.*, 279 S.W.3d 306, 322-23 (Tenn. Ct. App. 2008).

<sup>165</sup> See Lawrence, *supra* note 162, at 1005-06.

<sup>166</sup> See *id.* at 999.

<sup>167</sup> Johnson, *Female Inmates Sterilized*, *supra* note 9. These findings were later confirmed by an independent investigation conducted by the California State Auditor. See CAL. STATE AUDITOR, REPORT 213-120, STERILIZATION OF FEMALE INMATES 1 (June 2014), <https://www.auditor.ca.gov/pdfs/reports/2013-120.pdf>.

<sup>168</sup> CAL. STATE AUDITOR, *supra* note 167, at 36.

function to physically incapacitate women from becoming mothers in the future.

Women in a California prison were targeted for sterilizations based on characteristics that have been associated with maternal unfitness such as sexual promiscuity, deviance from gender norms, criminality, and low educational attainment. Indeed, women who were subject to reproductive incapacitation via sterilization were perceived to be sexually promiscuous or deviant as reports on the practice found that doctors routinely targeted women with three or more children for sterilization.<sup>169</sup> Moreover, nearly all of the women who were sterilized had been imprisoned on one or more occasions, thus deviating from feminine norms. Women with less than a high school education constituted approximately ninety percent of those who were sterilized, perhaps reflecting the subjective judgment of prison officials that the women should not bear children due to intellectual deficits. Unsurprisingly, the women affected by California's sterilization practices were of reproductive age, between twenty-six and forty years of age.<sup>170</sup>

The physician who performed the sterilizations believed he was doing the public a great service in preventing unfit mothers from producing children who would likely be a "drain on society." When confronted about the sterilizations and the costs associated with them, the prison doctor defended the practice, stating that, "[o]ver a 10-year period, that isn't a huge amount of money . . . compared to what you save in welfare paying for these unwanted children — as they procreated more."<sup>171</sup> Not only did the doctor who performed the sterilizations understand that the function of the practice was to prevent "undesirable women" from reproducing, impacted women felt deeply stigmatized. One woman who worked in the prison infirmary and often overheard conversations about sterilizations remarked, "[t]hat's not right . . . [prison doctors] think they're animals, and they don't want them to breed anymore?"<sup>172</sup> Another woman who was pressured into sterilization was traumatized by the event: "Being treated like I was less than human produced in me a despair."<sup>173</sup>

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<sup>169</sup> Sarah Brightman et al., *State-Directed Sterilizations in North Carolina: Victim-Centredness and Reparations*, 55 *BRIT. J. CRIMINOLOGY* 474, 478 (2014).

<sup>170</sup> CAL. STATE AUDITOR, *supra* note 167, at 37.

<sup>171</sup> Bill Chappell, *California's Prison Sterilizations Reportedly Echo Eugenics Era*, NPR (July 9, 2013, 3:06 PM), <https://www.npr.org/sections/thetwo-way/2013/07/09/200444613/californias-prison-sterilizations-reportedly-echoes-eugenics-era>.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

III. OVERINCARCERATED AND UNDERPROTECTED: HOW  
CONSTITUTIONAL DOCTRINE FACILITATES THE INCAPACITATION OF  
MOTHERHOOD

The incapacitation of motherhood experienced by incarcerated women does not occur in a vacuum. Rather, as I argue in this section, the incapacitation of motherhood is facilitated by a constitutional regime that has narrowed the scope of women's rights while at the same time overlooking the interests of populations vulnerable to the effects of criminalization and imprisonment. Indeed, this section notes that the incapacitation of motherhood is facilitated by the use of legal principles that are deferential to prison officials<sup>174</sup> and the narrow reading of constitutional doctrines such as substantive due process and the Eighth Amendment prohibition against cruel and unusual punishments. Instead of serving as a bulwark against state abuse of women's bodies, courts have undermined reproductive rights and legitimized the expanded use of the criminal law to incapacitate populations that are perceived to be deviant.

Moreover, as this section describes, even when courts have granted legal victories to criminalized or incarcerated women who allege that their reproductive rights have been violated, such victories seldom extend beyond individual litigants as courts are loathe to engage in long term supervision of the necessary reforms. Taken together, these dynamics result in the underprotection of the reproductive rights of incarcerated women and reinforce perceptions of maternal unfitnes.

A. *Constitutional Deference and the Incapacitation of Motherhood*

The incapacitation of motherhood is facilitated by the deferential posture taken by courts *vis à vis* prison conditions. Indeed, although the Supreme Court once pronounced that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,”<sup>175</sup> it has also taken the position that “courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.”<sup>176</sup> The prevailing doctrine of deference to prison officials has meant, as Sharon Dolovich notes, “the mere mention of ‘deference’ has emerged as a catch-all justification for curtailing both the burden on prison officials to ensure constitutional

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<sup>174</sup> Cf. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 369-70 (1992) (arguing that the judicial use of abstract principles often masks subjective judgments that harm Black people).

<sup>175</sup> *Turner v. Safley*, 482 U.S. 78, 84 (1987).

<sup>176</sup> *Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)).

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prisons and prisoners' prospects for recovery even for arguably meritorious claims."<sup>177</sup> Consequently, courts often fail to rigorously examine the safety or administrative rationales put forward by prison officials as justification for problematic and harmful conditions of confinement and the claims of prisoners are often disregarded as a result.<sup>178</sup>

*Turner v. Safely* is a primary example of the deferential approach undertaken by courts regarding the enforcement of constitutional rights in prison that inure to the detriment of women prisoners. In *Turner*, the Supreme Court determined that the complexities of prison administration and its lack of institutional competence regarding the penal environment required "a lesser standard of scrutiny" for "determining the constitutionality of the prison rules."<sup>179</sup> Given their lack of institutional competence, the *Turner* Court applied a relaxed standard of review, finding that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."<sup>180</sup>

In assessing whether a prison regulation is reasonably related to legitimate penological interests, the *Turner* Court described a test that considers whether there is a "valid, rational connection" between the policy and the state's interest. Under this test, "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational."<sup>181</sup> In essence, the court has described a "prison exception," one that mirrors rational basis review, the lowest and least protective form of constitutional scrutiny. The standard of review announced in *Turner* privileges the administrative interests of prison officials over the constitutional rights of imprisoned people, which stands in stark contrast to the traditional strict scrutiny that views the right of the individual as paramount in the face of policies that burden fundamental rights. This inverted standard of review has resulted in fewer protections for incarcerated women regarding reproduction and

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<sup>177</sup> See Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 245 (2012).

<sup>178</sup> *Id.* at 249.

<sup>179</sup> *Safley*, 482 U.S. at 81, 85.

<sup>180</sup> *Id.* at 89.

<sup>181</sup> *Id.* at 89-90. In addition, the Court also emphasized consideration of alternative means of expressing the challenged right, the cost of the expression of the right, and whether there are alternatives that do not conflict with the prison's penological interests in determining whether a constitutional violation has occurred. See *id.* at 89.



parenting and has thus facilitated the indirect incapacitation of motherhood.

For incarcerated women, the deferential posture taken by the Supreme Court has meant that constitutionally protected reproductive liberties and the right to be free from cruel and unusual punishment often ring hollow, as they experience various forms of degradation or outright denial of their reproductive choices. For these women, the Constitution is often an abstract notion, without real grounding in their everyday existence. Contrary to the Court's pronouncement regarding the Constitution's applicability in carceral settings, incarcerated women all too often find that prison walls separate women not only from their children, but from the ability to make choices regarding their reproductive destinies. Stated differently, the incapacitation of the reproductive autonomy of woman prisoners is facilitated by failure of courts to rigorously apply constitutional protections in the prison context.

### *B. Due Process and the Incapacitation of Motherhood*

#### 1. Substantive Due Process and the (Nonexistent) Right to Procreate

While the Constitution protects the fundamental right of individuals to procreate<sup>182</sup> and parent<sup>183</sup> without undue interference from the state, incarcerated women are often unable to vindicate these rights due to judicial deference to prison officials and administrative hostility toward their reproductive capacities. Indeed, prisoners who wish to have children despite their incarcerated status routinely have such claims rejected by courts that cite administrative efficiency and the penological interests of prisons as a basis for denial. For example, in *Gerber v. Hickman*, an *en banc* panel considered a petition by a California state prisoner who was serving a life sentence. The petitioner and his wife desired to have children and could only do so via artificial insemination as the petitioner was not permitted to have

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<sup>182</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541-43 (1942).

<sup>183</sup> *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (recognizing that parents have a fundamental right to "make decisions concerning the care, custody, and control of their children"); *see also* *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that the right to raise one's children is "essential").

familial visitation.<sup>184</sup> The petitioner stipulated that he and his wife would bear the full cost of the process and had arranged for their attorney to transport the petitioner's semen out of the prison for use during the insemination procedure.<sup>185</sup>

Applying the deferential standard articulated in *Turner v. Safley*, the *en banc* court noted: “[i]ncarceration, by its very nature, removes an inmate from society”<sup>186</sup> separating “the prisoner from his spouse, his loved ones, his friends, family, and children.”<sup>187</sup> The court asserted that prisoners have no right to conjugal visits or privacy given the basic nature of incarceration. For similar reasons, the court concluded that procreation was incompatible with the objectives of imprisonment (i.e., retribution and incapacitation) and thus does not survive incarceration.<sup>188</sup> In reaching this conclusion, the *en banc* panel privileged the minor administrative costs to the state over the significant infringement on Gerber's reproductive rights.

In trivializing the burdens on the reproductive concerns of incarcerated persons, this decision reflects on not only the extreme deference given to prison officials by courts, but the hostility of prison officials toward the reproductive capacities of prisoners. For example, as Judge Kozinski noted in his dissenting opinion, prisoners routinely engage in the kinds of activities involved in the artificial insemination process sought by Gerber for non-procreative purposes. Indeed, prisoners may send biological materials to be tested for exonerating purposes or other medical care. They may mail packages to their attorneys or make arrangements for their attorneys to pick up materials from the prison. Given the similarities between the permitted activities and the reproductive activities that the prison prohibited, Judge Kozinski concluded that the reproductive prohibition was “nothing more than the ad hoc decision of prison authorities that Gerber may not procreate.”<sup>189</sup> Judge Kozinski noted that the prison's reproductive policy was punitive in nature as “prison authorities have enhanced Gerber's punishment beyond that authorized by statute” and went on to condemn the reproductive prohibition, saying “[t]hese are rights far too important to be abrogated based on nothing more than the personal opinion of prison

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<sup>184</sup> Gerber v. Hickman, 291 F.3d 617, 619 (9th Cir. 2002).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 620 (applying the test established in *Turner v. Safley*).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 621.

<sup>189</sup> *Id.* at 631 (Kozinski, J., dissenting).

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bureaucrats that we would be better off as a society if the Gerbers were prevented from parenting an offspring.”<sup>190</sup>

The court’s decision in *Gerber* reflects judicial hostility toward the reproductive capacities of incarcerated people generally and incarcerated women in particular. While women prisoners were not party to the *Gerber* litigation, their reproductive capacities and the possibility of pregnancy loomed large in the proceedings. Indeed, the court’s opinion in *Gerber* relied heavily on *Goodwin v. Turner*, an Eighth Circuit opinion that also upheld a ban on the use of artificial insemination by male prisoners and their wives, finding that their right to procreation does not survive incarceration.<sup>191</sup> In reaching that conclusion, the *Goodwin* court relied heavily on the fact that if male prisoners were allowed to procreate in prison, women prisoners would be entitled to the same right, producing a significant strain on prison resources.<sup>192</sup> Thus, the rejection of the right to procreate in the prison context was deeply rooted in fears of irresponsible reproduction by undeserving women prisoners and the corresponding cost to the state.

This construct of “irresponsible” women prisoners stands in stark contrast to the dominant doctrinal framework regarding reproductive rights, wherein the rights bearing subject is deemed competent to make important decisions about her childbearing and reproductive destiny. Incarcerated women, however, are constructed as just the opposite: incompetent, irresponsible, and therefore undeserving of choice or autonomy in reproductive matters.

## 2. Substantive Due Process and the Limited Right to Familial Visitation

The Supreme Court has repeatedly held that individuals have the right to freedom of association<sup>193</sup> and to the care and custody of their children.<sup>194</sup> This encompasses the right to direct the upbringing of their offspring, including educational and moral values. For

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<sup>190</sup> *Id.* at 632.

<sup>191</sup> *Id.* at 620-22 (majority opinion); *Goodwin v. Turner*, 908 F.2d 1395, 1396 (8th Cir. 1990).

<sup>192</sup> *Goodwin*, 908 F.2d at 1400 (“The significant expansion of medical services to the female population and the additional financial burden of added infant care would have a significant impact on the allocation of prison resources generally and would further undercut the Bureau’s limited resources for necessary and important prison programs and security.”).

<sup>193</sup> *Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1989); *see also* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-19 (1984); *Bates v. Little Rock*, 361 U.S. 516, 522-23 (1960).

<sup>194</sup> *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

incarcerated women, however, this right exists largely on paper. Rather, as I noted in the previous section, the ability of women to mother is often undermined by barriers to ongoing contact with their children.

Indeed, prison officials and the regulations that they promulgate dictate whether women will have an opportunity to visit with their children. When prisoners have challenged the restriction or elimination of visitation, courts have held that prisoners have no constitutional right to contact or conjugal visits.<sup>195</sup> For example, in *Kentucky Department of Corrections v. Thompson*, the Supreme Court found that incarcerated people did not possess a liberty interest in visitation where prison regulations granted officials broad discretion in determining whether visitors were permitted to see a particular prisoner.<sup>196</sup> As Justice Marshall noted in dissent, “[a]s a result of today’s decision, correctional authorities at the Kentucky State Reformatory are free to deny prisoners visits from parents, spouses, children, clergy members, and close friends for any reason whatsoever, or for no reason at all.”<sup>197</sup>

More recently, relying on *Thompson*, the Supreme Court upheld prison regulations that restricted the ability of incarcerated persons to visit with their children. In *Overton v. Bazzetta*, the restrictions at issue prohibited visits from children unless they were accompanied by an immediate family member or guardian and barred visits by children if parental rights had been terminated.<sup>198</sup> In particular, the Court found that “the regulations bear a rational relation to MDOC’s valid interests in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury.”<sup>199</sup> While some courts have held that once visitation rights are extended a

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<sup>195</sup> See *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 463-65 (1989); see also *Evans v. Johnson*, 808 F.2d 1427, 1427-28 (11th Cir. 1987) (“A convicted prisoner has no absolute constitutional right to visitation, such privilege being subject to the discretion of prison authorities, provided the visitation policies of the prison meet legitimate penological objectives.”); *Block v. Rutherford*, 468 U.S. 576, 587 (1984) (finding that the prohibition of contact visits to pretrial detainees is connected to a legitimate penological interest in safety and security of jail facility). Courts have also held that incarcerated persons do not have a right to conjugal visits. *Hernandez v. Coughlin*, 18 F.3d 133, 134-35 (2d Cir. 1994) (no constitutional right to conjugal visits).

<sup>196</sup> *Thompson*, 490 U.S. at 465; see also *Evans*, 808 F.2d at 1427-28 (holding there is no constitutional right to visitation, and that prison authorities have discretion provided the policies meet legitimate penological objectives).

<sup>197</sup> *Thompson*, 490 U.S. at 465-66 (Marshall, J., dissenting).

<sup>198</sup> *Overton v. Bazzetta*, 539 U.S. 126, 129-30 (2003).

<sup>199</sup> *Id.* at 133.

liberty interest is established,<sup>200</sup> the weight of authority follows the lead of *Thompson* and its progeny, granting prison officials wide latitude to determine whether and to what extent visitation will be offered to imprisoned people.<sup>201</sup>

Courts have upheld restrictions or limitations on visitation over the objections of incarcerated people and their advocates, despite the tenuous penological justifications for such policies. Indeed, denial or reduction of visitation may in fact undermine the penological goals of safety and the rehabilitation for incarcerated individuals and their families. As one scholar noted, “frequent, high-quality visitation can reduce prison violence, maintain family bonds, break the intergenerational cycle of incarceration, and smooth the reentry process, thereby reducing recidivism rates.”<sup>202</sup> Moreover, there “seems to be no logical connection between the goal of incapacitation, detaining an offender so that he or she cannot commit another crime, and family visitation programs.”<sup>203</sup> Restricting visitation does, however, facilitate the removal of unfit individuals from their families and most importantly, from their children.

### C. *The Eighth Amendment and Incapacitation of Motherhood*

The Eighth Amendment prohibits the infliction of cruel and unusual punishment. This prohibition extends to the treatment individuals

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<sup>200</sup> Thus, in *Patchette v. Nix*, 952 F.2d 158, 161 (8th Cir. 1991), the court held that Iowa visiting rules created a liberty interest in weekend visiting which prison officials could not modify without providing due process, the court issued an injunction preventing the shortening of weekend visits. In *Long v. Norris*, 929 F.2d 1111, 1117 (6th Cir. 1991), the court held that Tennessee prison rules created a due process liberty interest in being able to visit which included the length of visits, visiting hours, and that the strip searches of visitors and prisoners would only be conducted if there was good cause to suspect a rule violation had occurred. The *Long* court explained, “Because the plaintiff’s visitation rights were mandatory and could not be removed without good cause under the Tennessee prison regulations, they were liberty entitlements under the fourteenth amendment. Threats to remove this visitation right, in retaliation for the visitors’ refusal to submit to an illegal strip search, violated clearly established law.” *Id.*

<sup>201</sup> See, e.g., *Dunn v. Castro*, 621 F.3d 1196, 1205 (9th Cir. 2010) (concluding that “the right of a prisoner to receive visits from his children” is not a clearly established fundamental right).

<sup>202</sup> Chesa Boudin et al., *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL’Y REV. 149, 151-52 (2013); see also Grant Duwe & Valerie Clark, *Blessed Be the Social Tie that Binds: The Effects of Prison Visitation on Offender Recidivism*, 24 CRIM. JUST. POL’Y REV. 271, 277 (2013).

<sup>203</sup> Kacy Elizabeth Wiggum, *Defining Family in American Prisons*, 30 WOMEN’S RTS. L. REP. 357, 366 (2009).

receive while they are incarcerated.<sup>204</sup> As the Court noted in *Estelle v. Gamble*, the Eighth Amendment requires the government “to provide medical care for those whom it is punishing by incarceration.”<sup>205</sup> Under this standard, prison officials may not be deliberately indifferent to the serious medical needs of prisoners.<sup>206</sup>

For incarcerated women, medical care includes reproductive and pregnancy care. Were this constitutionally mandated medical care provided to pregnant prisoners, they would receive adequate prenatal services, quality obstetric care during labor and delivery, and a dignified birthing process. Moreover, incarcerated women would have access to gynecological services to ensure their reproductive health if jails, prisons, and detention centers were committed to meeting their constitutional obligations. Instead, uneven enforcement of the Eighth Amendment allows prison officials to flout these regulations, frustrating women’s ability to have healthy pregnancies and facilitating broader forms of reproductive incapacitation in women’s prisons.

Indeed, women have sued prisons, both individually and as a class, alleging violation of their Eighth Amendment right to medical care.<sup>207</sup> In some instances, courts have found constitutional violations and granted the remedies sought. These victories, however, often fail to translate into broader systemic change in the provision of reproductive or pregnancy care. For example, in *Shumate v. Wilson*, women incarcerated in California prisons alleged that the state failed to provide sufficient medical care in violation of the Eighth Amendment.<sup>208</sup> The parties entered into a consent decree that required systemic reform of medical care within women’s prisons. Notwithstanding this consent decree, women continued to complain of inadequate medical treatment, including the failure to provide reproductive and pregnancy care.<sup>209</sup>

Additionally, courts often fail to enforce the demands of the Eighth Amendment when women allege that they have been denied reproductive or pregnancy care. For example, in *Mendiola-Martinez v.*

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<sup>204</sup> *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

<sup>205</sup> *Id.* at 103.

<sup>206</sup> *Id.* at 104.

<sup>207</sup> Kelly Parker, *Pregnant Women Inmates: Evaluating Their Rights and Identifying Opportunities for Improvements in Their Treatment*, 19 J.L. & HEALTH 259, 274 (2005).

<sup>208</sup> Complaint at 18, *Shumate v. Wilson*, No. CIV-S-95-619, PC-CA-0011-0001, (E.D. Cal. Apr. 4, 1995), <https://www.clearinghouse.net/detail.php?id=582>.

<sup>209</sup> See MELISSA GOODMAN ET AL., REPRODUCTIVE HEALTH BEHIND BARS IN CALIFORNIA: A REPORT FROM THE ACLU OF CALIFORNIA 4 (2016), [https://www.aclunc.org/sites/default/files/Reproductive%20Health%20Behind%20Bars%20in%20California\\_1.pdf](https://www.aclunc.org/sites/default/files/Reproductive%20Health%20Behind%20Bars%20in%20California_1.pdf).

*Arpaio*, an Arizona District Court rejected a claim by an undocumented woman who alleged that Maricopa County jail officials shackled her during labor and postpartum recovery.<sup>210</sup> In rejecting Mendiola-Martinez's claim, the court held that the right to be free of shackles during labor, delivery, and post-partum recovery was not a clearly established right.<sup>211</sup> In such cases, prison officials are not held accountable, which sends a message to both incarcerated women and prison officials that pregnant prisoners and their children are unworthy of care.

#### IV. LIBERATING MOTHERHOOD: RESISTING REPRODUCTIVE INCAPACITATION THROUGH REPRODUCTIVE JUSTICE

*There is something drastically wrong with a conception of reproductive freedom that allows [the] wholesale exclusion of the most disadvantaged from its reach.*<sup>212</sup>

While prevailing constitutional regimes have been inadequate in combatting policies that incapacitate the reproductive autonomy of incarcerated women, this section argues that movement-based approaches may yield broader protections for incarcerated women. Such movement-based approaches go beyond constrained notions of choice and the negative rights framework that characterize prevailing doctrinal approaches to reproductive autonomy. Indeed, this section calls for a new approach to safeguarding the reproductive capacities of incarcerated women, one that draws upon the principals of reproductive justice to fashion a set of interventions that can disrupt the degradation and devaluation of the reproductive capacities of incarcerated women.

In particular, I argue that reproductive justice is a framework that can provide support to marginalized women during pregnancy and while parenting. This approach focuses on programs that divert women away from the criminal justice system and toward programs that address the root causes of what leads to contact with the criminal justice system. If women must be held in prison, reproductive justice requires that the state provide resources for women to maintain contact and custody of their children. This approach calls for quality medical and prenatal care for incarcerated women. In sum, this

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<sup>210</sup> *Mendiola-Martinez v. Arpaio*, No. CV11-02512-PHX-DGC, 2014 WL 231962, at \*4 (D. Ariz. Jan. 22, 2014).

<sup>211</sup> *Id.*

<sup>212</sup> ROBERTS, *supra* note 18, at 294.

approach gives women, rather than prisons, control of their reproductive capacities and the destinies of their families.

#### A. Reproductive Justice

Reproductive justice is a concept that was developed in the 1990s by Black feminist scholars and activists who were frustrated by the marginalization they experienced in the mainstream reproductive rights community.<sup>213</sup> In particular, they argued that the focus on abortion and contraception centered on the experiences of middle class, heterosexual, white women and obscured the experiences of women of color who may have formal access to the right to abortion and contraception but did not have the material resources to make a meaningful “choice” regarding their reproductive destinies.<sup>214</sup> As Kimberly Mutcherson notes, “choice rhetoric describes the ways rights become important primarily as a vehicle that allows a person to choose available options.”<sup>215</sup>

In addition, proponents of reproductive justice contested the ways in which reproductive rights were largely focused on the pronatal politics exemplified by restrictions on access to abortion and contraception.<sup>216</sup> Women of color, however, were concerned about both the choice not to become a parent and ability to parent children with dignity.<sup>217</sup> For adherents, reproductive justice calls for

the complete physical, mental, spiritual, political, economic, and social well-being of women and girls, [which] will be achieved *when women and girls have the economic, social and political power and resources to make healthy decisions about our*

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<sup>213</sup> Roberts, *supra* note 18; see Loretta J. Ross, *The Color of Choice: White Supremacy and Reproductive Justice*, in COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 62-63 (2016); Zakiya Luna, *From Rights to Justice: Women of Color Changing the Face of Reproductive Rights Organizing*, 4 SOCIETIES WITHOUT BORDERS 343, 349-50 (2009).

<sup>214</sup> See Ross, *supra* note 213, at 63.

<sup>215</sup> Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER RACE & JUST. 187, 193 (2013); see also RICKIE SOLINGER, BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES 21-22 (2001) (arguing that “poor and/or culturally oppressed women in the United States and abroad may lack the money to ‘choose’ abortion”).

<sup>216</sup> See Loretta Ross, *Understanding Reproductive Justice*, TRUST BLACK WOMEN 3 (Mar. 2011), <https://www.trustblackwomen.org/our-work/what-is-reproductive-justice/9-what-is-reproductive-justice>.

<sup>217</sup> See *id.* at 4.



*bodies, sexuality and reproduction for ourselves, our families and our communities in all areas of our lives.*<sup>218</sup>

This description highlights how reproductive justice embodies an expansive view of the reproductive concerns of women, extending beyond pregnancy and parenting to include access to resources as well as the ability to express one's sexual and gender identities.

The choice critique leveled by reproductive justice proponents is part of a broader resistance to the court centered and rights based approach undertaken by mainstream reproductive rights advocates. Indeed, as the litigation surrounding the rights of incarcerated women demonstrates, protection for reproduction is largely grounded in constitutional framework that limits governmental intervention in women's lives. Indeed, the negative right associated with reproductive autonomy is centered on the individual and predicated on the right to be let alone. It assumes that the rights-bearing subject is fully autonomous and well-resourced, seeking unfettered access to the marketplace of options. In this context, the assertion of a reproductive right means that the individual has "no moral duty [to make] a procreative choice, and that other persons have a duty not to interfere with that choice."<sup>219</sup> As Robin West notes, this choice frame has "ill served not only progressive politics broadly conceived, but also [has] ill served women, both narrowly, in terms of our reproductive lives and needs, and more generally."<sup>220</sup>

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<sup>218</sup> ASIAN CMTYS. FOR REPROD. JUSTICE, A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE 1 (2005), <http://strongfamiliesmovement.org/assets/docs/ACRJ-A-New-Vision.pdf>. In addition to these principles, SisterSong, a reproductive justice organization that focuses on the needs and concerns of Black women, argues that reproductive justice must ensure that a woman has the ability to "[d]ecide if and when she will have a baby and the conditions under which she will give birth[;] decide if she will not have a baby and her options for preventing or ending a pregnancy[; and] parent the children she already has with the necessary social supports in safe environments and healthy communities, and without fear of violence from individuals or the government." Ross, *supra* note 213, at 3.

<sup>219</sup> JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 23 (1994); *see also* Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1398 (2009) (arguing that "[i]ndividual, negative, constitutional rights . . . run the risk of legitimating the injustices we sustain in the insulated privacy so created; they denigrate the democratic processes that might generate positive law that could better respond to our vulnerabilities and meet our needs; and they truncate our collective visions of law's moral possibilities").

<sup>220</sup> West, *supra* note 219, at 1396. For example, Asian Communities for Reproductive Justice alternatively described "three main frameworks for fighting reproductive oppression: [1] Reproductive Health, [2] Reproductive Rights, and [3]

Indeed, under this rights-based framework, the state is under no obligation to correct the structural inequality that limits reproductive choice for marginalized women or to provide resources necessary for the expression of reproductive autonomy. The failure of the rights framework to mandate resources that make the right to reproductive choice real is particularly salient for women whose choice is constrained by the fact of incarceration. For these women, the right to procreate is suspended and the right to parent is severely burdened by prison practices and state policies regarding the termination of parental rights. As such, reproductive rights in prison exist largely in principle rather than in practice.

While reproductive justice takes a broader view of reproductive autonomy that eschews exclusive reliance on an individual, choice-based, reproductive rights frame, this should not be taken to mean that it rejects reliance on legal doctrine. Instead, the reproductive justice framework calls for an integrated approach that draws on constitutional protections and movement-based policy strategies.<sup>221</sup> In addition, reproductive justice calls for the material resources necessary for women and their children to live full and healthy lives.<sup>222</sup> In other words, as Zakiya Luna and Kristen Luker note, reproductive justice “simultaneously demands a negative right of freedom from undue government interference and a positive right to government action in creating conditions of social justice.”<sup>223</sup>

In sum, reproductive justice advances a praxis that is rooted in the theoretical insights of intersectionality and the lived experiences of marginalized women. As such, centering the reproductive experiences of marginalized women broadens the scope of institutions and actors that undermine the reproductive destinies of women. Through an intersectional examination of concerns of the most marginal women, the reproductive justice framework identifies interlocking systems of subordination and their relationship to reproductive limits imposed on women and girls.<sup>224</sup> In contrast to the rights-based framework, reproductive harms are conceptualized at the level of the collective

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Reproductive Justice.” ASIAN CMTYS. FOR REPROD. JUSTICE, *supra* note 218, at 1.

<sup>221</sup> See ASIAN CMTYS. FOR REPROD. JUSTICE, *supra* note 218, at 3.

<sup>222</sup> See, e.g., FARAH DIAZ-TELLO & LYNN M. PALTROW, BIRTH JUSTICE AS REPRODUCTIVE JUSTICE 2-3 (Jan. 2010), <http://advocatesforpregnantwomen.org/BirthJusticeasReproRights.pdf> (calling for broad reproductive support for women, including pregnancy, childbirth, and childrearing).

<sup>223</sup> Luna & Luker, *supra* note 31, at 328.

<sup>224</sup> See Dean Spade, *Intersectional Resistance and Law Reform*, 38 SIGNS 1031, 1035-37 (2013).

rather than the individual. Such harms are not viewed as discrete incidents but rather as part of a larger and historically continuous project of “selectively controlling the destiny of entire communities through the bodies of women and individuals.”<sup>225</sup> The structural analysis provided by the reproductive justice framework recognizes the ways in which the women’s prison has operated as a part of the larger history of population control through the regulation of women’s bodies. Indeed, reproductive control was a central justification for early women’s prisons.

The echoes of the past are present in contemporary moment as women’s prisons punish and incapacitate women who are among the most vulnerable to reproductive subordination and control. The women’s prison population is disproportionately Black and Brown. Indeed, the vast majority of women in prison are poor, with an average income of roughly “\$600.00 per month, well below the federal poverty level” prior to incarceration.<sup>226</sup> Two-thirds of incarcerated women have experienced sexual or physical abuse before the age of eighteen. Despite the various forms of structural inequality confronted by these women, they are nevertheless labeled “bad mothers” and punished for behavior that is rooted in larger structural dynamics that are beyond their control. When incarcerated, women receive inadequate gynecological and obstetric care. They are separated from their children for extended periods of time, often permanently. Women prisoners are subject to degrading and dehumanizing practices such as sterilization and shackling during labor and childbirth. Thus, as Rachel Roth notes, “Imprisonment is a critical issue for people who care about reproductive justice, because it endangers women’s health, jeopardizes women’s right to motherhood, and takes a disproportionate toll on poor women and women of color.”<sup>227</sup>

#### *B. From the Incapacitation of Motherhood to Reproductive Justice*

The women’s prison and its effect on the reproductive autonomy of marginalized women is fundamentally at odds with reproductive justice.<sup>228</sup> Indeed, the application of a reproductive justice frame

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<sup>225</sup> Ross, *supra* note 213, at 3.

<sup>226</sup> See Carole Schroeder & Janice Bell, *Doula Birth Support for Incarcerated Women*, 22 PUB. HEALTH NURSING 53, 54 (2005).

<sup>227</sup> Rachel Roth, *Incarcerated Women and Reproductive Justice*, PRO-CHOICE EDUC. PROJECT, <http://www.protectchoice.org/article.php?id=137> (last visited Jan. 15, 2018).

<sup>228</sup> See Spade, *supra* note 224, at 1031 (“Intersectional resistance practices aimed at dismantling population control take as their targets systems of legal and administrative governance such as criminal punishment, immigration enforcement,

challenges the women's prison as currently constituted and requires a radical redistribution of resources away from punitive institutions and toward marginalized communities. While the negative reproductive rights framework requires government to "keep out" of women's reproductive lives, reproductive justice goes further, demanding that government provide resources necessary for women, their families, and their communities to thrive. Instead of locating deficiencies in marginalized women and their mothering abilities, reproductive justice necessitates a broader examination of the structural deficiencies that contribute to poverty, drug addiction, homelessness, violence, and mental illness. Rather than punishing women who experience these problems, the state would have an obligation to provide resources to ensure that women can make healthy decisions regarding their families and themselves, including pregnancy and parenting. The state's obligation to provide resources necessary for healthy decision-making would include housing, healthcare, employment, childcare, and transportation. If women had all the resources they needed for their "complete physical, mental, spiritual, political, economic, and social well-being," they would not be incapacitated in jails and prisons at the unprecedented rate of the last three decades.

The radical vision for reproductive justice is obviously a project that will be negotiated over a significant period of time. In the interim, vulnerable women continue to be subject to criminalization and incarceration. Adherents of reproductive justice must press prisons and jails to institute reforms that challenge the incapacitation of motherhood. A handful of states and non-profit entities have already developed modest reform models which provide support to women who encounter the criminal justice system. These programs, which largely rely on decriminalization and diversion, have reduced the number of women in prison and increased the number of intact families.

For example, in the state of California advocates have been successful in pushing two reform measures that moderately advance the objectives of reproductive justice for incarcerated women. The first is Proposition 47, which reduced certain drug and property crimes from felonies to misdemeanors.<sup>229</sup> Marijuana use and possession has

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environmental regulation, child welfare, and public benefits."); see also Luna & Luker, *supra* note 31 at 341.

<sup>229</sup> Marisa Gerber et al., *Prop. 47 Brings a Shift to Longer Time Spent Behind Bars*, L.A. TIMES (Jan. 28, 2015, 5:00 AM), <http://www.latimes.com/local/crime/la-me-early-release-20150128-story.html>; STANFORD JUSTICE ADVOCACY PROJECT, *Proposition 47 Progress Report: Year One Implementation 2* (2015).

been decriminalized entirely.<sup>230</sup> Given that poor women of color are disproportionately incarcerated for drug and property crimes,<sup>231</sup> these measures will likely have the effect of reducing the number of women who are locked down and locked out of the opportunity to procreate or parent.<sup>232</sup>

In addition to these reform strategies, the state of California has adopted what has come to be known as the “Alternative Custody Program.”<sup>233</sup> This program permits “nonviolent female inmates, pregnant inmates, and male primary caregivers to be released to home, or to authorized residential drug treatment or transitional care facilities so long as they are monitored by a global position system (“GPS”) and have less than two years left to serve on their sentence.”<sup>234</sup> The Alternative Custody Program allows pregnant and parenting women to be free of custodial restraint and to reside in their own communities. Although women remain tethered to the criminal justice system, they are better able to obtain quality healthcare, particularly prenatal care. Most significantly, the program gives women more control of their reproductive lives and broader opportunities to parent their children.

While advocacy regarding decriminalization and diversion is tremendously important to ensuring reproductive justice for incarcerated women, attention must be paid the inhumane and inadequate conditions that prevail in women’s prisons. Although it is difficult to square reproductive justice with women’s prisons, at a minimum reproductive justice requires programs that facilitate regular

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<sup>230</sup> Kory Grow, *California Passes Recreational Marijuana Bill Prop 64*, ROLLING STONE (Nov. 8, 2016), <http://www.rollingstone.com/culture/news/california-passes-recreational-marijuana-bill-prop-64-w448877>.

<sup>231</sup> THE WOMEN’S FOUND. OF CAL., *BIAS BEHIND BARS: DECREASING DISPROPORTIONATE RATES OF INCARCERATED WOMEN IN CALIFORNIA AND NATIONWIDE FOR LOW-LEVEL OFFENSES* 8 (2014), <https://www.issueab.org/resource/bias-behind-bars-decreasing-disproportionate-rates-of-incarcerated-women-in-california-and-nationwide-for-low-level-offenses.html>.

<sup>232</sup> Viet Nguyen & Ryken Grattet, *Women in Jail*, PUB. POL’Y INST. CAL. BLOG (Nov. 3, 2016), [http://www.ppic.org/main/blog\\_detail.asp?i=2159](http://www.ppic.org/main/blog_detail.asp?i=2159) (noting that the female jail population saw greater reductions than the male jail population after the passage of Proposition 47).

<sup>233</sup> CAL. PENAL CODE § 1170.05(a) (2018); CAL. CODE REGS. tit. 15, § 3078.1 (2017) (establishing the Alternative Custody Program); see also Julie Small, *More California Women Inmates Serving Time at Home*, KPCC (Dec. 29, 2011), <http://www.scpr.org/news/2011/12/29/30564/how-alternative-custody-californias-women-inmates->.

<sup>234</sup> Myrna S. Raeder, *Special Issue: Making a Better World for Children of Incarcerated Parents*, 50 FAM. CT. REV. 23, 27 (2012).

and ongoing contact with children and child welfare policies that take incarceration into account when constructing reunification plans or termination timelines. Reproductive justice inside of prisons necessitates the abolition of sterilization, shackling, and the elimination of other forms of violence against women. To staunch assaults on the reproductive capacities of incarcerated women, prisons must provide comprehensive reproductive care, particularly for pregnant women. As Jeanne Flavin notes, “[c]omprehensive reproductive health care includes breast exams, prenatal care, and measures designed to prevent, identify, and treat gynecologic cancers.”<sup>235</sup>

Few states have been receptive to the demands for conditions of confinement that are more protective of the reproductive interests of incarcerated women. Approximately twenty-two states have outlawed shackling<sup>236</sup> and an even smaller number have amended laws regarding termination of parental rights to better protect incarcerated parents.<sup>237</sup> A handful of states, including New York, allow incarcerated women to retain custody of their children for up to two years after giving birth.<sup>238</sup> Prisoner’s rights and reproductive justice organizations, however, have had more success in challenging the reproductive burdens confronted by incarcerated women. For example, organizations such as the Prison Birth Project and the Birth Justice Project have implemented doula programs in states like Massachusetts, Minnesota, and Washington.<sup>239</sup> Legal Services for

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<sup>235</sup> JEANNE FLAVIN, *OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN’S REPRODUCTION IN AMERICA* 124 (2008).

<sup>236</sup> See 55 ILL. COMP. STAT. § 5/3-15003.6 (2018); N.Y. CORRECT. LAW § 611 (2016); ARIZ. REV. STAT. ANN. § 31-601 (2017); DEL. CODE ANN. tit. 11, § 6603 (2018); FLA. STAT. § 944.241(3) (2017); LA. STAT. ANN. § 15:744.3 (2017); COLO. REV. STAT. § 17-1-113.7 (2017); HAW. REV. STAT. § 353-122 (2017); IDAHO CODE § 20-902 (2018); NEV. REV. STAT. § 211.155 (2017); 42 R.I. GEN. LAWS § 42-56.3-3 (2017); 61 PA. CONS. STAT. ANN. § 1104 (2018); WASH. REV. CODE ANN. § 72.09.651 (2017); W. VA. CODE § 25-1-16 (2010); N.M. STAT. ANN. § 33-1-4.2 (2009); TEX. GOV’T CODE ANN. § 501.066 (2009); TEX. LOC. GOV’T CODE ANN. § 361.082 (2009); CAL. PENAL CODE § 5007.7 (2006); CAL. PENAL CODE § 3423 (2006); VT. STAT. ANN. tit. 28, § 801a (2005); 730 ILL. COMP. STAT. § 125/17.5 (2000).

<sup>237</sup> See Alison Walsh, *States Help Families Stay Together by Correcting a Consequence of the Adoption and Safe Families Act*, PRISON POL’Y INST. (May 24, 2016), <https://www.prisonpolicy.org/blog/2016/05/24/asfa/> (highlighting changes made by Washington and New York).

<sup>238</sup> See, e.g., Yager, *supra* note 108; Hendrik DeBoer, *Prison Nursery Programs in Other States*, CONN. GEN. ASSEMBLY (2012), <https://www.cga.ct.gov/2012/rpt/2012-R-0157.htm> (finding that eight states provide nurseries for women in prison).

<sup>239</sup> Priscilla A. Ocen & Julia Chinyere Oparah, *Beyond Shackling: Prisons, Pregnancy*

Prisoners with Children operates a program that enables children to visit incarcerated parents in prisons hours from their homes.<sup>240</sup>

These and other reforms promulgated by state governments and advocacy groups are partial and inadequate to be sure. They maintain the state's role in regulating women's bodies and restrict women in ways that are deeply intrusive. Moreover, these approaches continue to mask structural dynamics that render women vulnerable to criminalization and incarceration in the first place. Nevertheless, these reforms are a step in the right direction inasmuch as they remove women from the custodial setting and enable them to maintain their relationships with their families and communities. Most importantly, the reforms advance the broader project of the elimination of the incapacitation of motherhood and the promotion of reproductive justice, which require an end to "all forms of oppression so that women and girls are able to thrive, to gain self-determination, to exercise control over our bodies, and to have a full range of reproductive choices."<sup>241</sup>

#### CONCLUSION

*We are volcanoes. When we women offer our experience as our truth, as human truth, all the maps change. There are new mountains.*<sup>242</sup>

I think about Ms. Jones quite a bit in the years since I last saw her. I think about the ways in which imprisonment restricted her ability to have a healthy pregnancy, to control her birthing process, to maintain custody of her son and threatened her ability to have children in the future. By virtue of her imprisonment, Ms. Jones joined tens of thousands of women whose identities as mothers were incapacitated by mass incarceration. I think about how prevailing legal frameworks failed to protect her and how courageous she was to speak out against the reproductive oppression she experienced. In speaking out, she joined hundreds of thousands of marginalized women who were

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*and the Struggle for Birth Justice*, in *BIRTHING JUSTICE: BLACK WOMEN, PREGNANCY, AND CHILDBIRTH 196-97* (Alicia D. Bonaparte & Julia Chinyere Oparah eds., 2016).

<sup>240</sup> *Family Unity Network Bus Trip to Pelican Bay State Prison*, LEGAL SERVS. FOR PRISONERS WITH CHILDREN, <http://www.prisonerswithchildren.org/our-projects/family-unity-project/family-unity-bus-trip-to-pelican-bay-state-prison/> (last visited Mar. 20, 2018).

<sup>241</sup> ASIAN CMTYS. FOR REPROD. JUSTICE, *supra* note 218 at 1.

<sup>242</sup> URSULA K. LE GUIN, *DANCING AT THE EDGE OF THE WORLD: THOUGHTS ON WORDS, WOMEN, PLACES* 160 (1989).

calling for reproductive justice that would enable women to have control over their reproductive destinies. Through reproductive justice, incarcerated women like Ms. Jones can offer their truths to demand fundamental reform to the operation of women's prisons that liberate rather than incapacitate motherhood.