[Dear workshop participants, thank you for taking the time to read an early draft of this project. As you will note, I am still in the process of developing some of the core ideas within the piece, particularly the applicability of reproductive justice frameworks to the carceral setting. I look forward to your thoughts and feedback.]

_Incapacitating Motherhood_

Priscilla A. Ocen*

**ABSTRACT**

Incapacitation, the removal of dangerous people from society, is one of the most significant penal rationales in the United States. Historically, 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 through incarceration. 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 70 percent were the primary caretakers of small children at the time of their arrest and approximately 80 percent are of reproductive age. Notwithstanding these alarming trends, the gendered dimensions of incapacitation have largely been underexplored in the scholarly literature.

This Article aims to bridge this discursive gap by highlighting the specific ways in which incapacitation and incarceration have 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 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 is more protective of the reproductive capacities of incarcerated women.

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Simply put, we know that when we incarcerate a woman
We often are truly incarcerating a family,
In terms of the far reaching effect on her children,
her community and her entire family network.

- Lorretta Lynch, former Attorney General of the United States1

INTRODUCTION

Ms. Jones2 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.3 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 legal visit arranged by the California Coalition for Women Prisoners4 and the San Francisco Lawyers’ Committee for Civil Rights.5 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.

Ms. Jones explained that she was four months pregnant when she was sentenced to 16 months in prison for a property offense. Accessing prenatal care was difficult. Nevertheless, she did everything she could to

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2 Client’s name has been changed to preserve privacy and confidentiality.
4 The California Coalition for Women Prisoners is a “grassroots social justice organization, with members inside and outside of the prison, that challenges the institutional violence imposed on women, transgender people, and communities of color by the prison industrial complex.” See California Coalition for Women Prisoners, About Us, available at http://womenprisoners.org/ (accessed Jan. 23, 2016).
5 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 Lawyers Committee for Civil Rights of the San Francisco Bay Area, “Mission & Values,” available at http://www.lccr.com/who-we-are/mission-values/ (accessed Jan. 24, 2016)
make sure she had a healthy pregnancy: she fought for necessary food and nutritional supplements, she exercised when she could and she 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. While she was on the table and sedated, the prison doctor 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 24 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. 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.

For over a year, I remained on the legal visiting team. I continued to speak 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 shackling during labor. Months later, the doctor who wanted to perform the sterilization on Ms. Jones was found to have performed 150 questionable sterilizations on people in California women's prisons.

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6 Ms. Jones’s fear of the termination 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, Ajay Khashu Timody Ross and Mark Warnsley, Patterns of Criminal Conviction and Incarceration Among Mothers of Foster Care Children in New York City, Vera Institute for Justice (2003). 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 15 of the most recent 22 months. This is a particularly challenging standard for incarcerated women as the average length of a sentence is 18 months. See 42 U.S.C. § 675(5)(E).

7 See supra note 4.

8 I occasionally use the phrase “people in women’s prisons” to reflect the fact 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.

9 Justice Now, an anti-incarceration human rights organization, engaged in a documentation project that found individuals in women’s prisons were targeted for sterilization, often without informed consent. See Justice Now, Letter to Loni Hancock, Chair, Select Committee on California Department of Corrections and Rehabilitation – Women’s Issues, March 13, 2012 available at http://www.jnow.org/downloads/JusticeNow.3.15.BudgetTestimony.FemaleOff.pdf. Justice Now’s findings were later confirmed by a study by the Center for Investigative Reporting, which discovered that over 150 women were sterilized in California Women’s Prisons over a span of 4 years. See Corey G. Johnson, Female Inmates Sterilized in California Prisons Without Approval, Jul. 7, 2013, Ctr Investigative Reporting, available at
Ms. Jones and the other women at VSPW, however, are not alone in their experience of reproductive harm while incarcerated. Over the last forty years, women have become the fastest growing prison population in the United States.\footnote{ACLU, Facts about the Over-Incarceration of Women available at https://www.aclu.org/facts-about-over-incarceration-women-united-states} Between 1970 and 2010, the number of women in prison and jail rose from 15,000 to approximately 203,000, an increase of over eight hundred percent.\footnote{Heather C. West and William J Sabol, Prisoners in 2007, Bureau of Justice Statistics (2008), available at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=903} 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.\footnote{Michelle Ye He Lee, Does the United States Really Have Five Percent of the World’s Population and One Quarter of the World’s Prisoners?, WASH. POST, Apr. 30, 2015 available at 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/} Nearly seventy percent of incarcerated women are parents of small children and nearly ninety percent are of reproductive age.\footnote{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); 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., 2002).} 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. These trends, while flatly troubling, reveal deeper insights about the nature of women’s prisons. As this Article will contend, these trends highlight they ways in which women’s incarceration functions as a means regulate the reproductive capacity of women deemed unfit for procreation. Through imprisonment, women who are deemed to be 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 the ways in which it has been used 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.\footnote{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); Kim White, Women in Federal Prison: Pathways in, Progress Out, 14 WM. & MARY J. WOMEN & L. 305, 309-10 (2008); Beth Rich, COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN (1996).} As members of these devalued populations, they are deemed propagators of disorder and social depravity. Because of their

\url{http://cironline.org/reports/female-inmates-sterilized-california-prisons-without-approval-4917}
ability to procreate, such women are viewed as dangers to society. For example, the prison doctor who recommended a tubal ligation for Ms. Jones later justified the use of state funds on 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.” The doctor’s 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 in a variety of ways. First, the state incapacitates motherhood through the direct criminalization of women’s conduct while pregnant or parenting. Second, motherhood is incapacitated through the imposition of criminal liability for behaviors that mark women as unfit for procreation or parenting and thus women are separated from their children. Third, the state incapacitates the reproductive capacities of women through conditions of confinement in women’s prisons. For example, pregnant prisoners are exposed to humiliating, degrading or negligent treatment, including the use of shackles during labor and delivery. Moreover, the procreative capacities of women who are of reproductive age are circumscribed by practices like coerced sterilizations. Taken together, incapacitation in prison results in women’s temporary or permanent inability to procreate or parent their children.

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. Much of the scholarship and

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15 Johnson, supra note 4.
17 See supra note 8.
19 Johnson, supra note 4.
20 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 is used as a means of promoting procreation among women whose reproduction is seen as desirable. Policies that incapacitate agency include limitations on access to contraception and barriers to abortion.
advocacy on mass incarceration posit that the surveillance, criminalization, and incarceration of Black men assist in the maintenance of the prevailing racial order. Accordingly, the use of the incarceration and incapacitation as an instrument of racial power experienced by communities of color is framed in gender exclusive terms.

Moreover, the experiences of women like Ms. Jones did 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. “Choice” is often informed by the experiences of white, middle-class, heterosexual women who have material resources which allow them to make the kinds of choices regarding reproduction and childrearing that are unavailable to marginalized women. Within this framing of reproductive autonomy, the right not to be a parent is often presented as the primary reproductive harm confronted by women. Most significantly, seldom are the stories of incarcerated women such as Ms. Jones used by advocates or theorists to link mass incarceration and reproductive abuses as part of a comprehensive system of gendered racialized social control.


22 Id.

23 See, e.g., Kimberle 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.”).


26 Zakiya Luna and Kristin Luker, Reproductive Justice, 9 ANNUAL REV. LAW & SOC. 327, 330 (2013) (arguing that the mainstream reproductive rights movement has focused its strategies and resources on protecting the abortion right articulated in Roe v. Wade).

27 Notable exceptions include Deborah Ahrens, Incarcerated Childbirth and Broader "Birth Control": Autonomy, Regulation, and the State, 80 MO. L. REV. 1, 2 (2015); Rachel Roth and Sarah L. Ainsworth, "If They Hand You a Paper You Sign It:" A Call to End Sterilization in Women’s Prisons, 26 HASTINGS WOMEN’S L.J. 7 (2013); Dorothy Roberts, Prisons, Faster Care and the Systemic Punishment of Black Mothers, 59 UCLA L. REV. 1474 (2012); Priscilla A. Ocen, Punishing Pregnancy Race, Gender and the Shackling of Pregnant Prisoners, 100 CAL. L. REV. 1239 (2012); Rachel Roth, Obstructing Justice: Prisons as Barriers to Medical Care for Pregnant Women, 18 UCLA Women’s L.J. 79 (2010); The Human Rights Project at Justice Now, Prisons as a Tool of Reproductive Oppression, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 309 (2009); Dorothy
This Article challenges these traditional accounts and connects these often disparate discourses by contending that incarceration is both gendered and racialized. Indeed, it begins by highlighting the ways in which women’s prisons have long been used as mechanisms of reproductive control. For example, in the late nineteenth and early twentieth centuries, women’s prisons were designed to regulate and discipline sexually deviant or gender nonconforming women.28 This legacy continues to be reflected in contemporary practices in women’s prisons. Women prisoners 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 reveals 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. Indeed, although the Supreme Court has stated that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,”29 this is all too often a hollow proclamation when it comes to the reproductive autonomy of incarcerated women.30 Instead, the reproductive rights of incarcerated women are undermined by the fact of incarceration. For example, under Turner v. Safley, federal courts are required to apply a less searching inquiry of what would otherwise be considered fundamental rights subject to strict scrutiny.31 Under this less exacting standard, courts across the country have held that the fundamental right to procreate does not survive incarceration.32 In line with this jurisprudence, states across the
country have been free to enact statutes that establish long-term incarceration as basis for the termination of parental rights.34

Even when courts have occasionally provided relief to women who have been denied medical care during labor or experienced shackling during childbirth, such rulings are often ignored by prison officials.35 For example, in *Nelson v. Correctional Medical Services*, the Court of Appeals for the Eighth Circuit found that the use of shackles on pregnant women during delivery is cruel and unusual punishment in violation of the Eighth Amendment.36 Notwithstanding this significant judicial victory and other decisions like it, women across the country continue to be shackled during labor and childbirth.37 When subsequent violations occur, incarcerated women are often unable to vindicate their rights due to administrative and financial barriers to courts.38 As a result, incarcerated women are vulnerable to profound forms of reproductive abuse that incapacitate their ability to procreate or parent.

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 in order to resist the incapacitation of motherhood specifically and the use of incarceration to manage social problems associated with poor women more generally. Indeed, alternative frameworks such as reproductive justice that deploy law in concert with social movements may serve as a framework that can move beyond the incapacitation of motherhood to liberate it.

Over the last several decades, women of color have articulated the concept of reproductive justice, a framework that speaks to the myriad of

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ways that women experience reproductive harms and places affirmative obligations on the state to ensure that women can exercise their reproductive capacities in safety and with dignity. As Zakiya Luna and Kristen Luker have noted, 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 and human flourishing for all.” Moving beyond the “choice” framework that has typically been preoccupied by right to not to have children, reproductive justice contests the various structural impediments to procreation and parenting that include poverty, housing, healthcare, childcare, education, employment and access to affordable and nutritious food. As legal scholar Dorothy Roberts notes, “this framework repositioned reproductive rights in a political context of intersecting race, gender, and class oppressions.”

The intersecting oppressions confronted by marginalized women lead not only to reproductive subordination, they also serve as the pathways to incarceration, which this Article asserts is itself a form of reproductive harm. Women who are viewed as unfit mothers, those who experience racial inequality, poverty, homelessness, mental illness and drug addiction are also subject to incarceration and incapacitation rather than receiving treatment or other non-punitive interventions from social service or public health providers. To the extent that the reproductive justice framework contests the structural inequalities that subordinate the reproductive capacities of women, it not only expands reproductive autonomy it also fundamentally contests mass incarceration. The robust deployment of a reproductive justice framework would demand a turn away from mass incarceration and incapacitation as a means of social and reproductive control and a turn toward social policies that promote human flourishing. For Ms. Jones, the embrace of reproductive justice means a shift from the incapacitation of motherhood to the liberation of a motherhood that is rooted in safety and human dignity.

This Article will proceed as follows: In Part II, I will discuss incapacitation as a theory of social control that justifies the physical removal of individuals who are deemed to be dangers to public order. Traditionally used as a means of punishment, this Part will note the ways in which incapacitation was used in the context of early women’s prisons as a means to regulate normative constructs of femininity, reproduction and motherhood. In Part III, I argue that mass incarceration has come to supplant these early mechanisms of reproductive control. In particular, I

39 Zakiya Luna & Kristin Luker, Reproductive Justice, 9 ANN. REV. L. & SOC. SCI. 327, 328 (2013)
40 Id.
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 criminalization of women for conduct during pregnancy and 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 IV, 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 V, will argue for the adoption of a reproductive justice framework that places affirmative obligations on the state to provide the resources and support necessary to liberate motherhood. By the liberation of motherhood, I refer to resources and support 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 can 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.

II. 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. Indeed, punishment, by its very nature, inflicts “[s]uffering, the experience of pain or loss of pleasure.” Given the evils inherent in criminal punishment, it must be justified in order to be inflicted in the name of the state and on behalf of the people. As Franklin Zimring and Gordon Hawkins have noted, "the positive functions achieved by [criminal punishment must] outweigh the negative elements inherent in the policies." Theorists have justified criminal

42 JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 4 (1988).
43 Id. at 170. 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."
punishment on retributivist (i.e., just deserts for blameworthy conduct) and utilitarian (i.e., imposing punishment for wrongdoing 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 that is designed to remove “a convicted offender from the community, usually through imprisonment, to prevent the offender from committing further crimes.” Incapacitation prevents harm to society by predicting the future dangerousness posed by a particular individual and removing them from society so that the potential danger does not occur. As one scholar noted, “[t]he 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 that they have actually committed but for crimes anticipated or assumed they will commit.” Incarceration is a primary example of incapacitation as it physically removes people who are deemed to be a danger to society and locks them away to prevent future harm.

As I will describe in this section, incapacitation has both racial and gendered dimensions that are underexplored in the scholarly literature on the subject. As noted above, incapacitation is predicated on notions of risk of harm and future dangerousness. The assessment of risk of harm and dangerousness are in turn used to determine the propriety of punishments that can incapacitate individuals so as to prevent future harm. Such assessments of risk of harm and dangerousness are not, however, neutral or objective. Rather, they are often informed by racial and gender stereotypes. For example, Black women have been viewed as an omnipresent danger as they have been deemed sexually promiscuous,

44 FRANKLIN ZIMRING AND GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND RESTRAINT OF CRIME 18, 44 (1997); See also PETER W. GREENWOOD, AND ALLAN ABRAMASHE, SELECTIVE INCAPACITATION (1982) (arguing for the selective incapacitation of individuals who account for a disproportionate amount of crime).
45 Zimring and Hawkins, supra note 44, at 18.
46 Alana Barton, Incapacitation Theory IN ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES 435 (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, released back to, the community.
47 Id. Other examples of incapacitation include “dismemberment, physical or chemical castration, restriction of movement through ankle monitoring or other devices, curfews.”; Zimring and Hawkins, infra note 44, at 27.
incompetent mothers and welfare queens who threaten social order.49 Black men are perceived as violent criminals.50 These stereotypes of Black women and men undergird evaluations of dangerousness and enhance the likelihood of incapacitation through incarceration.51 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."52

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, incapacitation has functioned to reinforce and police the normative boundaries of gender, motherhood and reproduction. 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.

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 dignity they are accorded, the degradations to which they are subjected, and the degree of autonomy they are allowed or dependency they must suffer.”53 Indeed, social constructs of female identity are rooted in notions of the biological imperative to reproduce and mother offspring.54 Women are expected to serve as vessels for procreation; when pregnant, they are to provide an ideal gestational environment; as mothers they are to

49 Id.
50 Id.
51 Id.
52 Barton, supra note 46, at 435.
53 Siegel, supra note 14, at 340.
54 Id.
be self-sacrificing, “altruistic and intensive, which includes the assumption of primary care of their children,” and to submit to patriarchal control.55

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 “[t]he Victorian ideal of true womanhood,” which is often viewed as synonymous with motherhood.56 “The Victorian ideal required strict adherence to a code of piety, purity, submissiveness and domesticity—virtues believed to be inherent in feminine nature.”57 Women of color, however, have historically been constructed in opposition to these normative standards of femininity.58 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 a particular gendered and racialized cultural meaning”59 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.”60 Specifically, the writings asserted that African women experienced painless childbirth and seeming indifference to their children after birth.61 As a result, their reproductive labor could be easily exploited to support the system of chattel slavery.62 As I’ve 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.”63 More recently, Black women have been stereotyped as

55 Id.
57 Id.
58 Id.
60 JENNIFER L. MORGAN, LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY 28, 40 (2004).
61 Id. at 18.
62 These depictions appeared not only in writing, but in visual renderings of African women. As Jennifer Morgan notes, “[i]n 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 well-being of her child. 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.
63 Ocen, supra note 18, at 1259. See also ANGELA Y. DAVIS, WOMEN, RACE & CLASS 329 (1981) (“[judg][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.”)
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. Stated differently, the bodies of Black and Brown women constitute the physical embodiment of 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 generally and the development of the women’s prison particularly. 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 views 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. Black women were not considered women at all, but property, sub-human and available for various forms of exploitation.65 The labor of Black women was too valuable to be wasted within the confines of a prison or workhouse. As such, 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 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 punishment 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.66 The few women who were

65 Enslaved Black people could, however, be punished for conduct that was deemed to be threatening to the institution of slavery. The punishments could be as severe as death. Angela Y. Davis, Are Prisons Obsolete? 29 (2014).
66 See, e.g., Mara L. Dodge, One Female Prisoner Is of More Trouble than Twenty Males: Women Convicts in Illinois Prisons, 1835-1896, 32. J. Soc. Hist. 907, 920 (1999) (over a twenty-eight-year period only 50 women were sent to prison in Illinois as compared to 3,000 men).
convicted of such crimes and sent to custodial institutions were deemed to have traversed gendered boundaries and were therefore understood to be “unnatural women.” 67 Women were perceived to possess an inherent moral superiority over men, “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.” 68 Incarcerated women deviated from their normative roles as pious wives and good mothers. These women “[n]ot only . . . offended against the state; she has also offended against her femininity.” 69 Incarcerated women were therefore considered “doubly deviant.” In line with this status, incarcerated white women did not 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. 70 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, 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 new born infant. 71

i. Establishment of Women’s Prisons

After the Civil War, the number of women arrested for and convicted of criminal offenses increased dramatically. 72 During this era, the women’s prison as an institution developed and 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

68 Id.
69 Id. at 41.
70 Dodge, supra note 66, at 321.
72 Id.
[and] venereal disease.” 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.74

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 the failure to perform under employment contracts.”75 Individuals convicted of such crimes were often sentenced to hard labor at convict lease camps or on local chain gangs. The 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 1869.76 Women housed in these reformatories were generally poor and convicted of petty or misdemeanor offenses, particularly morals offenses. Such convictions punished non-normative behavior by women that was considered inconsistent with prevailing notions of womanhood. Women who were housed in reformatory institutions were often given indeterminate sentences that were designed to promote good behavior and compliance with penal objectives.77 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 . . . .”78 As such, “reformatories extended government control over working-class women not previously vulnerable to

73 Id.
75 Ocen, supra note 18, 1260.
76 Joanne Belknap, Offending Women: A Double Entendre, 100 J. OF CRIMI. L. & CRIMINOLOGY 1061, 1067 (2010) Between 1900 and 1935, twenty prisons for women were founded from Maine to California, Nebraska through Arkansas. Id.
77 ESTELLE B. FREEDMAN, THEIR SISTERS’ KEEPERS: WOMEN’S PRISON REFORM IN AMERICA, 1830-1930 98 (1981)
78 Id. at 148.
state punishment” and enabled the state to “correct women for moral offenses for which adult men” were not incarcerated.79

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.80 Incarceration of women in reformatories was designed to rehabilitate rather than punish “fallen women,” to restore domesticity, repress deviant sexuality and to prepare them take on the role of mother.81 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.”82

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.83 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 persons.”84 In one case, “a woman who claimed that she miscarried and disposed of the fetus had been convicted of murdering her illegitimate child.”85 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 enforced norms regarding femininity and motherhood in a variety of ways ranging from benevolent programs to keep mothers with their children to barbaric involuntary sterilizations. In Indiana, for example, motherhood was often asserted by white women as a basis for a sentence commutation.86 Early reformatories such as the Massachusetts Correctional Facility in Farmington included infant nurseries

80 Belknap, supra note 76, at 1063.
81 Nicole Hahn Rafter, Gender, Prisons, and Prison History. 9 SOC. SCI. HIST. 233, 236. (1985) (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”).
83 Rafter, supra note 81, at 236.
84 Freedman, supra note 77, at 13.
86 Dodge, supra note 66, at 322.
and on-site hospitals to meet the needs of women and their children. In at least one reformatory, however, white women were subject to barbaric gynecological experiments that prevented procreation. 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." 

**ii. Race, Reformatories and the Redemption of “Fallen Women”**

This reformist agenda, however, was 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." 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, 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.

As a result of this segregated system of justice, Black women became the majority of women housed in state prisons. For example, from 1865-1906, the Kansas State Prison housed approximately 200 women. Of that number, roughly 150 were Black. Similar disparities existed in Louisiana. As historian Ann Butler notes, "between 1866 and 1872, sixty-seven women entered the Louisiana state prison system. Black and mulatto women accounted for sixty-four of those women." Black women and girls ranging from the ages twelve to seventy were sentenced to years of imprisonment or hard labor for petty offenses such as selling whiskey, theft of items such as a coat or a pair of stockings. The few white women who were housed in these institutions were typically convicted of violent crimes such as murder, kept separate from Black

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89 Rafter, *supra* note 81, at 240.

90 *Id.* ("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.


93 *Id.*

women and assigned lighter work duties. While Black women were held in separate institutions from white women, incarceration was similarly used to manage perceived deviance from norms associated with womanhood and motherhood.

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.” Moreover, Black women were often raped by male inmates or prison staff. Pregnancies would often 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. Black women were provided little to no 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. As I’ve noted elsewhere, the treatment of Black women at sentencing and during incarceration served to devalue Black women as mothers and center their reproductive capacities as a cause for racial subordination.

C. Eugenics and the Incapacitation of Bad Mothers in Women’s Prisons

While the women’s prison was emerging as a racialized means of disciplining deviant women in the late nineteenth century, eugenicist pseudo-science came to justify racist public policy regarding the reproductive rights of women. Adherents of "eugenics" described it as "the science which deals with all influences that improve the inborn qualities of the race . . . [and] develop them to the utmost advantage." In particular, eugenicists were concerned with the biological quality of whites in the United States and the biological threat represented by poor whites, immigrants and people of color. As one scholar noted, eugenicists were preoccupied with the idea that “[t]he best classes of people within the Caucasian race were not producing enough children whereas the inferior classes were producing too many offspring. A clear implication was that the

95 Rafer, supra note 81, 241 (“These authorities perceived white women as unfit for incarceration in custodial prisons, except in extreme cases where offense type indicated the contrary.”)
96 Butler, supra note 71, at 31.
97 Id.
98 Ocen, supra note 18, at 1235.
upper classes must be encouraged to have more children and that the lower
classes must somehow be compelled to have fewer.”

Under the prevailing eugenicist understandings of the time, such people were seen as possessing negative traits that were biological, immutable and transferrable from one generation to the next. “Undesirable” individuals—people of color, the disabled, the incarcerated or the institutionalized—were thought to possess negative biological traits that caused “pauperism, criminality, feeblemindedness, insanity, and homosexuality.” To neutralize the biological threat posed by undesirable populations to white racial purity, advocates and policymakers advocated segregation “during their fertile years” or sterilization “to rid society of their kind, permanently and humanely.” In other words, like women who were deemed to deviate from gendered norms in the context of imprisonment, those deemed to be undesirable were targeted for reproductive incapacitation.

Driven by the central claims that undesirables polluted the American populace through reproduction and heredity as a cause for criminality, eugenics was embraced by advocates and policymakers across the ideological spectrum, including the progressive architects of prison reform. As such, “[a] nationwide plan of mandatory, long-term custodial care” was proposed by prominent eugenicists and their allies to incapacitate and segregate individuals with undesirable and dangerous biological traits.

During the late nineteenth and early-twentieth century prisons, and the people housed within them, were used as testing grounds for research on the genetic transmission of undesirable traits. Prisoners, who were largely poor, uneducated and unskilled, represented the deviance from and displacement of “pure whiteness” that was believed to be at the core of the

102 Freedman, supra note 77, at 116. Madeline Henley, The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Neoplatonist, 41 Buff. L. Rev. 703, 713 (1993) (noting that “traits thought capable of intergenerational transmission included not only mental illness or retardation, but also “character traits” such as “dishonesty, criminality, and laziness”).
103 Henley, supra note 102, at 713.
105 Freedman, supra note 77, at 110.
107 Cynkar, supra note 100, at 1428.
108 Freedman, supra note 77, at 110.
American enterprise. Women prisoners, as individuals deemed to be “doubly deviant” as a result of their criminality and gender non-conformity, were particularly attractive research subjects given their perceived ability to degrade the American populace through procreation. As Estelle Freedman notes, “[d]uring the heyday of mental testing of criminals, women’s prisons were becoming centers for research of female criminality.”

D. Decline of Women’s Prisons as Explicit Form 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. In addition, courts limited explicit forms of reproductive control in prisons, such as sterilization, and women 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 deemed to be deviant. As historian Khalil Gilbran Muhammad notes, the prison population grew “larger than at any time in the history of the penitentiary anywhere in the world.” As part of this trend, the number of

110 Freedman, supra note 77, at 116.
112 Id. at 327.
113 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 and apart from society for the duration of their sentences”)
114 See generally Muhammad, supra note 48.
women, particularly Black women, in jails and prisons surged. Indeed, women are the fastest growing prison population in the United States. 

Between 1970 and 2010, the number of women in prisons and jails rose from 15,000 to approximately 203,000, an increase of over eight hundred percent. 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.

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.’” 

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 80 percent of individuals incarcerated in women’s prisons 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 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, the ability of women to mother or have children is incapacitated and their identity as deviant mothers is reinforced.

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115 ACLU, *Facts about the Over-Incarceration of Women* available at https://www.aclu.org/facts-about-over-incarceration-women-united-states

116 Id.


The incapacitation of motherhood is part of a broader process of what sociologist Beth Richie calls “gender entrapment.” By this Richie refers to the ways in which women are incarcerated for crimes of survival that are driven by poverty or trauma. Studies have found, for example, that approximately 75 percent of incarcerated women have experienced some form of sexual or physical abuse prior to the age of 18. For many women, physical abuse by an intimate partner precipitated contact with the criminal justice system. Instead of being provided social services or health care for the trauma that results in drug use or other criminal conduct, the state chooses to punish women.

Contrary to the early history of women’s prisons, the justifications for punishing women—and limiting their ability to mother and parent as a result—are not rooted in biological determinism or deviance or deviance from biologically ingrained gender roles. Rather, the incapacitation of women is rooted in perceived cultural pathology of incarcerated women and their families. As legal scholar Jonathan Simon notes, “[s]ocial 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. This is particularly true of women of color are more likely to than their white counterparts to “blamed for social problems, characterized as bad mothers, and linked with foster care issues”\(^\text{120}\) Indeed, racial stereotypes and biases play a central role in the public’s willingness to punish the poor, and its unwillingness to fund social programs that address poverty or mental illness.\(^\text{121}\) Through the criminalization of poor women, a host of structural social problems are reduced to the individual and individual choice. Consequently, mothering abilities and mothering choices become an appropriate concern for the criminal justice system.

This section will describe the ways in which 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 or labeled “unfit for procreation” in the early twentieth century are now housed in sprawling women’s prisons. In this section, I describe how the

\(^{120}\) Springer, supra note 45, at 491.

incapacitative power of the criminal law has been used to regulate deviant motherhood both direct and indirect ways. In particular, I highlight the ways in which criminalization and conditions of confinement function to limit the ability of women to exercise their right to parent and procreate. These direct and indirect forms of regulating motherhood not only burden women’s exercise of reproductive autonomy, the imposition of such practices signal the marginalized and stigmatized status of women prisoners and their children more generally.

A. Direct Incapacitation of Motherhood

The criminal law directly regulates women deemed unfit for procreation by criminalizing women for behaviors during pregnancy or while parenting. As I note in the subsection that follows, women are punished for allegedly harming fetal life, child neglect when they fail to monitor their children and fraud when they seek to utilize public services on behalf of their children. The punishment of these women obscures the broader structural determinates that limit their choices and their ability to care for themselves and their children. Moreover, the imposition of criminal liability stigmatizes these mothers, labeling them negligent, incompetent, and removes from them from their families and communities through incarceration.

a. Punishing Pregnant Women for Fetal Harm

Despite the relatively low rate of drug use among pregnant women, over the last thirty years, states have increasingly used the criminal justice system to prosecute pregnant women for engaging delivering drugs in utero. Moreover, jurisdictions have gone beyond prosecuting pregnant drug users to punish pregnant women for broader behaviors that are alleged to have been harmful to fetal health and life. Although comprehensive figures are not available, a study conducted by the National Advocates for Pregnant Women found that there have been 663 reported cases of prosecutions, arrests or detentions of pregnant women since 1973. A recent Pro Publica report found that another 459 pregnant women have been prosecuted in the state of Alabama alone. Taken together, over 1,000 women have been impacted by such policies, with one-third of the cases arising in the last ten years. The most common charge pursued in these cases is child endangerment and the most serious is first degree murder.

122 Paltrow, supra note 3.
123 Martin, supra note 17.
124 Id. at 321. The study’s authors, however, note that this figure may underrepresent the number of women subject to prosecution as many more cases have gone unreported. Id. at 304-305. (noting hundreds of additional cases reported in news various news outlets around the country).
Women have been prosecuted for drug use, despite giving birth to otherwise healthy children and despite the fact that recent studies have found that drug use during pregnancy devastating to fetal health as once believed and is less dangerous than prescription drugs or alcohol.\(^\text{125}\) In one instance, an Alabama woman was arrested for fetal chemical endangerment after she smoked marijuana, despite the fact that it was not known whether she was pregnant.\(^\text{126}\) In most instances, healthcare and social service providers were enlisted in this effort.\(^\text{127}\) In some cases, women came to the attention of law enforcement through separate investigations ranging from sexual assault to check fraud.\(^\text{128}\) These prosecutions occurred notwithstanding the fact that the vast majority of women who were charged with these crimes gave birth the healthy children.

The majority of the women prosecuted were African American or Latina, with African Americans being significantly overrepresented.\(^\text{129}\) Almost eighty percent were low income.\(^\text{130}\) Such racially disproportionate prosecutions were likely driven by media accounts of poor, uneducated, and non-white women who used drugs during pregnancy. Indeed, one study of media on drug use during pregnancy found that more than half of cocaine users were depicted as poor\(^\text{131}\) and African American despite the fact that drug use is relatively consistent across racial groups.\(^\text{132}\) Additionally, Native American women were disproportionately depicted as pregnant alcohol abusers.\(^\text{133}\) Taken together, these prosecutions reinforce the "unfit" and "irresponsible" status of these women and enables the criminal law to remove such women from their families and society through incarceration.


\(^\text{126}\) It turned out that she was not pregnant.

\(^\text{127}\) Paltrow, supra note 123, at 310-11. Lisa C. Ikemoto, The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law, 53 OHIO ST. L.J. 1205, 1269-70 (1992); Brosh and Miller, supra note 50, at 443 ("[i]n 1999, at least thirteen states required public hospitals to test pregnant women who were suspected of drug abuse, and to report results to social services or the police.").


\(^\text{129}\) Id.

\(^\text{130}\) Paltrow & Flavin, supra note 17, at 311.

\(^\text{131}\) Springer, supra note 45, at 490. The class divide in the kinds of women drugs deemed to harmful and benign is also reflected in the perception of women who take drugs as part of fertility treatments run the risk of multiple births and preterm labor, yet this kind drug use is excluded from media depictions of maternal substance use. See Linda C. Fentiman, Pursuing the Perfect Mother: Why America’s Criminalization of Maternal Substance Abuse is Not the Answer—A Comparative Legal Analysis, 15 MICH. J. GENDER & L 389, 397 (2009). This is likely because wealthier, whiter, better educate women are associated with these kinds of fertility treatments. Nanette R. Elster, ART for the Masses: Racial and Ethnic Inequality in Assisted Reproductive Technologies, 9 DEPAUL J. HEALTH CARE L. 719 (2005)


b. Criminalization of Poor Mothers

In addition to the incapacitation of mothers during pregnancy, the state has extended its scope to directly regulate the parenting decisions of poor women, particularly Black women, perceived as negligent and therefore unfit. Indeed, mothers have been targeted for criminalization and incarceration based on their attempts to parent in difficult circumstances like poverty or homelessness. These mothers navigate a labyrinth of surveillance by public actors like teachers and social workers as well as private actors like neighbors and bystanders. As a result of these forms of supervision and regulation, poor Black women are referred to law enforcement for arrest and prosecution.

In several high profile cases, poor Black women have been prosecuted for what has come to be known as “theft of educational services.” Tanya McDowell, a poor, thirty-four-year-old Black single mother living in Brookside, Connecticut, was one such case. McDowell was homeless and living in a van with her son in Brookside, one of the poorest communities in the state. In an effort to ensure that her son received the best possible education, she sent him to school in Norwalk, a neighboring, largely white, affluent school district utilizing her babysitter's address. Because the babysitter lived in public housing, her information was subject to numerous audits by public housing officials. During one of these audits, housing authorities discovered that there was a discrepancy between the information provided on the babysitter’s lease and the information provided to the school district. Public Housing officials notified school district officials and McDowell was charged with and convicted of falsifying records and grand theft of over $15,000 in educational resources, both of which are felonies. She was sentenced to 12 years of imprisonment. As Kaaryn Gustafson notes, “[t]he cases that have been brought in states without statutes specifically addressing school enrollment show prosecutors stretching criminal statutes to ensnare poor mothers.” Preexisting law is stretched and leveraged to punish for poor Black mothers for failing to

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137 Kaaryn Gustafson, Degradation Ceremonies and the Criminalization of Low-Income Women, 3 UC Irvine L. Rev. 297, 322 (2013)
138 Id. at 329-30.
adhere to normative standards of motherhood and for “[s]etting bad examples for their children.”

Shanesha Taylor, a homeless black woman, was similarly criminalized for attempting to parent her children in the face of unrelenting poverty. Taylor was arrested on charges of criminal child neglect after she left her two children in her car, where they were unharmed, while she participated in a job interview. Taylor was arrested and charged with two counts of felony child endangerment. Her children were removed from her custody and placed in foster care. Despite pleas to dismiss the charges, the state pursued its case against Taylor, ultimately securing a sentence of 18 years of supervised probation. The presiding judge imposed the sentence despite the fact that Taylor had complied with all of the court’s orders and the terms mandated by the state’s Department of Child Safety. In announcing Taylor’s sentence, the presiding judge found that Taylor used "criminally poor judgment."

Another poor Black woman was prosecuted for making a difficult parenting decision. Debra Harrell was a 46-year-old black woman and a single mother. She worked a minimum wage job at a local McDonald’s in North Augusta, South Carolina to support her and 9-year-old daughter. Because she could not afford child care, Harrell typically took her daughter to work with her and allowed her to play games on a laptop. However, after the laptop was stolen, Harrell allowed her daughter to play at a local park during the day when approximately 40 other children and their parents were present. Harrell also gave her daughter a phone in case she encountered any trouble. Alarmed, parents at the park called police when they discovered that little girl was unattended. Harrell was arrested for “unlawful conduct towards a child,” a felony that carries a penalty of up to 10 years in prison. Her daughter was removed from her custody by Child Protective Services. As a result of this surveillance, criminalization and incapacitation, the women’s status as unfit mothers is cemented.

B. Indirect Incapacitation

In addition to the direct incapacitation of motherhood through criminalization, motherhood is similarly incapacitated through the

conditions of confinement women confront when incarcerated. In what this subsection refers to as the indirect incapacitation of motherhood, incarcerated women encounter barriers to the exercise of their reproductive autonomy. These barriers include lack of access to gynecological care, sterilization, shackling during labor or childbirth and the termination of parental rights. These practices function to prevent them from becoming parents in the future and remove them from their children’s lives in the present.

a. Incapacitating Motherhood through Medical Neglect

Per estimates by the Department of Justice, approximately 4 to 5 percent of women are pregnant when admitted to prison or jail.\(^{143}\) 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, studies suggest that between 1,400 and 5,000 births occur in prisons and jails annually.\(^{144}\) 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 medical facilities and inadequate nutrition or denied medical attention all together.\(^{145}\)

Indeed, studies have found that “among women who were pregnant at admission to jail, less than half had had received an obstetric exam since admission, and roughly one-third had receive other pregnancy care.”\(^{146}\) The failure to provide obstetric care for women can be catastrophic, as “women are placed at increased risk of miscarriages, stillbirths and ectopic pregnancies.”\(^{147}\) For example, in Clifton v. Eurbank, a women incarcerated at a Colorado State Prison sued the facility after prison staff ignored multiple requests for medical assistance when she went into labor due to the failure to provide adequate obstetric care.\(^{148}\)


\(^{144}\) WOMEN IN PRISONS: ISSUES AND CHALLENGED CONFRONTING U.S. CORRECTIONAL SYSTEMS, UNITED STATES GENERAL ACCOUNTING OFFICE 55 (1999).

\(^{145}\) Id.

\(^{146}\) Elizabeth Swavola et al., Overlooked: Women and Jails in the Era of Reform 17 (2016).

\(^{147}\) Id.
The fetus was delivered stillborn. 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 woman prisoner was denied medical care during labor and delivery. Throughout her labor, the plaintiff was accused of manipulating the staff with the pregnancy. 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.” Ultimately, the plaintiff gave birth to her child in the segregation unit, without medical assistance. Following the delivery, she was accused by guards of “push[ing] that baby out on purpose, just to get out of segregation.” In each of these cases, the failure to provide appropriate medical care or to render aid during labor and delivery reflects the ways in which women’s status as pregnant persons subjected them to unique punishments and dignitary harms.

After giving birth, women have reported denial of essential tools such as breast pumps to express milk, which can cause significant pain and discomfort. “Catherine 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 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.”

### b. Incapacitating Motherhood through Degrading Treatment

In addition to medical neglect, motherhood is indirectly 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.” Notwithstanding the integral role of reproductive care in the lives of incarcerated women, prisons

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149 Id.
151 Id.
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 women 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 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.”

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 reinforce notions of maternal deviance and disincentivize 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. Pregnant prisoners are shackled during doctor’s visits, while in labor, during delivery and while in recovery. Such restraints are often applied by prison or jail guards as a matter of course, regardless of the behavior or offense history of a pregnant woman. 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. Shackles 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. Shackles signal that

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154 Dignity and Power Now, supra note 155, at 32.
156 Ocen, supra note 18, at 1267.
women are undeserving of motherhood or a dignified childbirthing 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 that “I felt like I was being punished for being in prison and being pregnant.” Tina Reynolds, co-founder of the WORTH, a formerly incarcerated women’s advocacy group, expressed similar feelings about the shackling she experienced during childbirth: "I felt dehumanized and unworthy to be treated in such a way.” 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.”

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

157 RH Reality Check, In Labor and In Chains available at https://www.youtube.com/watch?v=CWj1uHdxm8
incarcerated at some point in their lives. Overall, the rate of children with a parent who has been incarcerated at some point in their lives has increased by 82 percent since 1991.

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.” A 2004 study found that approximately half of the women surveyed were single-parents and primary caretakers of their children, as compared to 4 percent of men who reported being the primary caretakers of children in a separate study.

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.” One respondent to study named Catherine claimed that, “[i]n large part because Deputies delayed her ability to contact family to arrange for the care of her child, child services placed Catherine’s daughter into foster care. After her release, it took Catherine five months to regain custody of her child . . .”

In addition to custodial arrangements, imprisonment presents significant barriers to regular visitation, preventing women from mothering their children. Facilities are away from cities, reducing the likelihood of children making the trek to visit their mothers. Indeed, 58 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 women and their children. Even calls to children are difficult to make as the cost of such calls are often prohibitive. Moreover, erratic mail presents barriers to regular contact with women.

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161 Id.
163 Id.
164 Dignity and Power Now, *supra* note 155, at 37.
165 Raimon, 122.
attorneys or foster parents. One formerly incarcerated women 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.”

Policies and practices that make it difficult to maintain contact between women and their children persist despite the fact that “visitation can help sustain the connection between an incarcerated mother and her children—and correlates with a decrease in violence and reduced recidivism—jails do not often have policies or practices that encourage visits.”

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 24 to 48 hours of delivery. 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 seldom are 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.

d. Incapacitation of 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. Another study found that approximately 15-20 percent of children in foster care had a parent that was currently incarcerated. Most strikingly, the same study found estimated that nearly seventy percent of children in foster care had a parent that was incarcerated at some point during their placement in foster care.

166 Dignity and Power Now, supra note 155, at 38.
167 Swavola, supra note 149, at 18.
168 Ocen, supra note 18, at 1239.
169 Raimon, 122.
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, 11 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. The same study found that of the children in foster care with an incarcerated parent, approximately one-third were as a result of maternal incarceration, which far outpaces the representation of women in prison, who constitute approximately 5 percent of the overall prison population. Studies have also found that maternal incarceration was a significant driver of the increase of the number of children in foster care between 1985 and 2000. A study of mothers with children in the foster care system in New York State, the second largest foster care population in the country, found that one-third “experienced an arrest that led to a conviction and more than one-fifth had been imprisoned.” Unsurprisingly, increased maternal incarceration has been associated with higher number of children in the foster care system.

When children of incarcerated parents are placed in foster care, the chances that parental rights will be terminated increases significantly due to timelines mandated by federal policy. Under the federal Adoption and Safe Families Act, states institute proceedings to terminate parental rights if a child has been in foster care for 15 of the previous 22 months. 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.” These finding were confirmed in a study of Los Angeles County’s Department of Child and Family Services.

171 Id.
175 Roberts, supra note 163, 1493-94.
176 Ramiro, supra note 87, at 122.
177 The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, §103, 111 Stat. 2118-20 (codified as amended at 42 U.S.C. §§675(5)) (“[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 . . . .”). See also Marne L. Lenox, Neutralizing the Gendered Collateral Consequences of the War on Drugs, 86 N.Y.U. L. REV. 280, 299–300 (2011).
178 Ramiro, supra note 87, at 122-23.
which found that 40 percent of cases involving incarcerated parents end in permanent removal of children.\textsuperscript{179}

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.\textsuperscript{180} First, women are sentenced, on average, to 24 months of imprisonment, 2 months longer than the AFSA timeline. Second, the mere fact 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 children’s mother during period of incarceration. Moreover, incarcerated women are less likely to receive visits necessary to maintain the finds of parental attachment that courts weigh in favor of maintaining parental rights.\textsuperscript{181}

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 their parental rights. Indeed, for many women incarceration ensures that they will experience “the family law equivalent of the death penalty in a criminal case.”\textsuperscript{182} In a majority of states, parental incarceration is the determinative factor in determining parental unfitness and may trigger the termination of parental rights.\textsuperscript{183} 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.”\textsuperscript{184}

For example, under Wisconsin 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...

\textsuperscript{182} In re NG, 2009 Ohio 4915, p. 12.
\textsuperscript{183} Raimiro, \textit{supra} note 87, at 125.
Incarceration has prevented the parent from discharging his or her parental responsibilities for the child." Under Texas law, a parent is deemed to be unfit if they are sentenced to two or more year of imprisonment. 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. Additionally, incarceration may be cited as a justification for limiting reunification efforts, which a necessary precursor to parental termination proceedings.

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 18 months. 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. 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 a finding parental unfitness.

While the parental rights of incarcerated mothers terminated, children often languish in foster care, with no adoption prospects in sight. As Myrna Raeder notes, “[m]any older children placed in foster care linger in the system until they age out, which is not surprising since statistics indicate that 110,000 foster children currently await adoption.” Indeed, Black children, who are more likely to both be in foster care and to have an incarcerated parent, are less likely to be adopted than their white

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185 1(D)(s) of the Adoption Act (750 ILCS 50/1(D)(s) (West 2002)),
186 [cite]
187 [cite]
190 Lawrence, supra note 189.
counterparts. As Dorothy Roberts notes, the combination of the loss of a parent due to incarceration and long-term foster care has intergenerational implications. Such children run a significant risk of physical or sexual abuse while in the foster care system and are more likely to end up in the juvenile or adult criminal justice system themselves. These children, like their mothers, run a very significant risk of being incarcerated as adults and experiencing the incapacitation on their ability to procreate as a consequence of imprisonment.

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.” A separate study by the California State Auditor found that another 539 women underwent hysterectomies during that same period. Through sterilization, by either tubal ligation or hysterectomy, incarcerated women are permanently prevented from reproducing. In other words, prison sterilization practices function to physically incapacitate women from becoming mothers in the future.

Women 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. Moreover, nearly all of the women who

194 Id.
195 Roberts, supra note 163.
197 Id. (eighty-seven percent of female prisoners who spent their childhood in foster care or institutions reported being physically or sexually abused).
198 Johnson, supra note 6. These findings were later confirmed by an independent investigation conducted by the California State Auditor https://www.auditor.ca.gov/pdfs/reports/2013-120.pdf
199 Id.
were sterilized had been imprisoned on one or more occasions, thus deviating from feminine and maternal norms. Women with less than a high school education constituted approximately 90 percent of those who were sterilized, perhaps reflecting the subjective judgement 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 26 and 40 years-old.\textsuperscript{201}

The doctor 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.” 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 “[u]niformed, and prison doctors think they’re animals, and they don’t want them to breed anymore?” 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.”

III. Overincarcerated and Underprotected: How Constitutional Doctrine Facilitates the Incapacitation of Motherhood

The direct and indirect 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. Rather than 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 are seldom extended beyond individual litigants as courts are loathe to engage in long term supervision of the necessary reforms.\textsuperscript{202}

A. Constitutional Avoidance, Judicial Deference and the Incapacitation of Motherhood

\textsuperscript{201} Id.
\textsuperscript{202} [cite]
a. Constitutional Avoidance

When women are prosecuted for their behavior during pregnancy or for their mothering choices, courts have been uneven in their application of both statutory and constitutional law. In many instances, courts have engaged in constitutional avoidance, largely resolving such cases on statutory grounds. In other cases, courts have affirmed the conviction of women for engaging in fetal harm, resulting in significant penalties. This unevenness and constitutional avoidance renders women vulnerable to criminalization and the incapacitation of their ability to mother, as legislatures and prosecutors are left with wide discretion in determining whether to prosecute mothers and on what grounds without the constraints of constitutional law or clear statutory guidance.

For example, in *New Mexico v. Martinez*, the defendant, Cynthia Martinez, was charged with felony child abuse under a statute the prohibits allowing “a child under 18 years of age to be placed in a situation that may endanger the child's life or health. . .” Martinez was prosecuted under a theory that the term “child” as used in the state included fetuses. In reviewing the defendant’s appeal, a New Mexico intermediate court ruled that the statutory language did not extend to fetal life. In so concluding, the court noted that it was in accord with jurisdictions across the country that examined similar questions.

While courts have generally used various forms of statutory construction to find that state’s lack authority to prosecute women for harming fetal life while pregnant, there have been notable exceptions. Indeed, in *State v. McKnight*, one of the first instances of a woman being prosecuted for murder because of a fetal loss, the South Carolina Supreme Court held that the term “child” as used in the State’s homicide by child abuse statute extended to viable fetal life. As a result, the court upheld the murder conviction of Regina McKnight, a poor Black woman suffering

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204 Id. (“Other jurisdictions with similar child abuse statutes have concluded that such statutes do not apply to an unborn fetus. See People v. Morabito, 151 Misc.2d 259, 580 N.Y.S.2d 843, 846–47 (N.Y.City Ct.1992) (holding that mother could not be charged with criminal endangering the welfare of her child based upon prenatal acts of smoking cocaine); State v. Gray, 62 Ohio St.3d 514, 584 N.E.2d 710, 713 (1992) (holding that mother may not be prosecuted criminally for child endangerment for prenatal substance abuse); Reinstein v. Superior Court of Ariz., 182 Ariz. 190, 894 P.2d 733, 737 (Ct.App.1995) (holding that mother could not be prosecuted under child abuse statute for prenatal use of heroin); State v. Dunn, 82 Wash.App. 122, 916 P.2d 952, 956 (1996) (dismissing charge of second-degree criminal mistreatment of a child, holding that a fetus was not a child within the meaning of criminal mistreatment statute where mother continued to ingest cocaine while pregnant); State v. Deborah J.Z., 228 Wis.2d 468, 596 N.W.2d 490, 496 (Ct.App.1999) (holding that fetus was not a human being for purposes of attempted first-degree intentional homicide and first-degree reckless injury statutes).
from drug addiction. More recently, the Alabama Supreme Court ruled that the word “child” as used in Alabama’s chemical endangerment statute extended to fetal life at any point after conception. Through this sweeping opinion, the court affirmed the convictions of numerous women who were convicted of crimes based on pregnancy outcomes. In each of these cases, the courts looked only to statutory law and cannons of construction, overlooking invitations from advocates to examine the applicability of the Eighth and Fourteenth Amendments.

b. Constitutional Deference

With respect to conditions of confinement, the incapacitation of motherhood is facilitated by the deferential posture taken by courts vis a vis prisons. 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,” it has also taken the position that “courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.” The prevailing doctrine of deference to prison officials has meant, as Sharon Dolovich notes, that “the mere mention of ‘deference’ has emerged as a catch-all justification for curtailing both the burden on prison officials to ensure constitutional prisons and prisoners’ prospects for recovery even for arguably meritorious claims.” As a result, 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.

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.

206 Ex parte Hicks, 153 So. 3d 53, 57 ( Ala. 2014).
208 Id.
209 Id.
210 Id.
Turner v. Safley 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 combined with its lack of institution competence regarding such complexities to necessitate “a lesser standard of scrutiny” for “determining the constitutionality of the prison rules.”211 According to the Turner Court, “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”212 In assessing whether a prison regulation is reasonably related to legitimate penological interests, the Court described a test which 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.”213 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 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 outside of the prison context. This inverted standard of review has resulted in fewer protections for incarcerated women regarding reproduction and parenting and has thus facilitated the indirect incapacitation of motherhood.

B. Due Process and the Incapacitation of Motherhood

a. Substantive Due Process and The Nonexistent Right to Procreate

While the Constitution protects the fundamental right of individuals to procreate214 and parent215 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

211 Turner v. Safley, 482 U.S. at 85.
212 Id. at 89.
213 Turner v. Safley, 482 U.S. 78, 89-90 (1987) 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.
215 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.” (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)); see, e.g., 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”).
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 of the 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 familial visitation. 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 purposes of the insemination procedure.

Applying the deferential standard articulated in *Turner v. Safley*, the *en banc* court noted that “[i]ncarceration, by its very nature, removes an inmate from society” separating “the prisoner from his spouse, his loved ones, his friends, family, and children.” The court noted 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. In reaching this conclusion, the *en banc* panel privileged the minor administrative costs to the state over the significant burden 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 exoneration purposes or other medical purposes. 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.” 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

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216 *Gerber v. Hickman*, 291 F.3d 617, 619 (9th Cir. 2002)
217 *Id.* at 629-30.
219 *Id.*
220 *Turner*, 482 U.S.
221 *Gerber*, 291 F.3d. at 631.
than the personal opinion of prison bureaucrats that we would be better off as a society if the Gerbers were prevented from parenting an offspring.\textsuperscript{222}

The court’s decision in Gerber is 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 \textit{v. Turner}, an Eighth Circuit opinion that also upheld a ban on the use of artificial insemination by male prisoners and their wives and found that procreation does not survive incarceration.\textsuperscript{223} 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.\textsuperscript{224} 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 “irresponsible” construct of 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.

\textit{b. 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\textsuperscript{225} and to the care and custody of their children.\textsuperscript{226} This includes the right to direct the upbringing of their offspring, including educational and moral values. For incarcerated women, however, this right exists only on paper. Rather, as I noted in the previous section, the ability of women to mother is often incapacitated because of their inability to have 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,

\begin{itemize}
\item\textsuperscript{222} Id.
\item\textsuperscript{223} \textit{Goodwin v. Turner}, 908 F.2d 1395 (1990)
\item\textsuperscript{224} Id. ("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.").
\item\textsuperscript{226} Troxel \textit{v. Granville}, 530 U.S. 57, 77 (2000)
\end{itemize}
courts have held that prisoners have no constitutional right to contact or conjugal visits. 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. As Justice Marshall noted in dissent, “As 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.”

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. 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.” While some courts have held that once visitation rights are extended a liberty interest is established, the weight of authority follows the lead of *Thompson* and its progeny, granting prison

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227 *Kentucky Dept. of Corrections v. Thompson*, 109 S.Ct. 1904 (1987). See also *Evans v. Johnson*, 808 F.2d 1427 (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.”). Courts have also held that incarcerated persons do not have a right toconjugal visits. See *Block v. Rutherford*, 468 US 576, 104 S.Ct. 3227 (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); *Hernandez v. Coughlin*, 18 F.3d 133 (2d Cir. 1994) (no constitutional right to conjugal visits)


231 Id. at 133.

232 Thus, in *Patchette v. Nix*, 952 F.2d 158 (8th Cir. 1991) the court held that Iowa visiting rules created a liberty interest in week-end visiting which prison officials could not modify without providing due process, the court issued an injunction preventing the shortening of weekend visits. In *Lang v. Norris*, 929 F.2d 1111 (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 rules violation had occurred. “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.”

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officials wide latitude to determine whether and to what extent visitation will be offered to imprisoned people.\textsuperscript{233}

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.”\textsuperscript{234} 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.”\textsuperscript{235} 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

a. The Underenforced Right Reproductive and Pregnancy Care

The Eighth Amendment prohibits the infliction of cruel and unusual punishment. This prohibition extends to the treatment individuals receive while they are incarcerated.\textsuperscript{236} As the Court noted in \textit{Estelle v. Gamble}, the Eighth Amendment requires the government “to provide medical care for those whom it is punishing by incarceration.”\textsuperscript{237} Under this standard, prison officials may not be deliberately indifferent to the serious medical needs of prisoners.\textsuperscript{238}

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 often flout these regulations, frustrating women’s ability to have healthy pregnancies.

\textsuperscript{233} 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).

\textsuperscript{234} Chesa Boudin et. al., \textit{Prison Visitation Policies: A Fifty-State Survey}, 32 Yale L. & Pol’y Rev. 149 (2013); \textit{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).

\textsuperscript{235} Kacy Elizabeth Wiggum, \textit{Defining Family in American Prisons}, 30 WOMEN’S RTS. L. REP. 357 (2009)

\textsuperscript{236} \textit{Estelle v. Gamble}, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251 (1976)

\textsuperscript{237} Id.
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.239 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. 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 care, including the failure to provide reproductive and pregnancy care. Women described the harrowing experience of giving birth while shackled.240 Later investigations into reproductive care in women’s prisons in California found that women were subject to sterilizations that were coerced or performed without adequate informed consent.241

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 *Martinez-Mendiola v. Arpaio*, an Arizona District Court rejected a claim by an undocumented woman who alleged that she was shackled during labor and postpartum recovery by Maricopa County jail officials.242 In rejecting *Martinez-Mendiola’s* claim, the court held that the right to be free of shackles during labor, delivery and postpartum recovery was not a clearly established right.243 In such cases, prison officials are not held accountable, sending 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**

[In this section, I intend to introduce reproductive justice as a frame and highlight how it can be used to liberate motherhood for incarcerated women. In particular, I will argue that reproductive justice is framework that can provide support for pregnant and parenting women on the front end by directing services and resources to vulnerable women and their families. This approach would focus on programs that divert women

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away from the criminal justice system and toward programs that address the root causes of what leads to contact with the criminal justice system. Under this approach, if women must be held in prison, the state must provide resources for women to maintain contact and custody of their children. This approach would also require adequate medical care and dignity in childbirth for incarcerated women. In sum, this approach gives women, rather than prisons, control their reproductive destinies and the destinies of their families.]