

# THE FIGHT FOR REPRODUCTIVE JUSTICE AFTER *DOBBS*: RACE AND REPRODUCTION AS CARCERAL TOOLS

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I. INTRODUCTION

Laws and policies in the United States have sought to control Black women’s bodies through slavery, involuntary sterilization, and the denial of reproductive services in prisons.<sup>1</sup> There are currently 231,000 women incarcerated in the United States, and while Black women comprise 13% of the U.S. population, they make up 29% of the prison population.<sup>2</sup> Despite the majority of incarcerated women being of reproductive age,<sup>3</sup> no universal policy exists to allow women to terminate their pregnancies while incarcerated.<sup>4</sup>

This paper analyzes how race and reproductive healthcare are used as carceral tools of racial oppression that emanate from slavery. I argue that both mass incarceration and the denial of reproductive health services for Black women must be abolished as a way of abolishing vestiges of slavery. Part II contextualizes the historical control of Black women’s bodies throughout slavery and Jim Crow and into mass incarceration. Part III examines the history of unequal access to reproductive healthcare for Black women before *Roe v. Wade*, and how the *Dobbs v. Jackson Women’s Health Organization* decision disproportionately discriminates against Black women. Part IV demonstrates that prisons control Black women’s reproductive autonomy as a tool of racial oppression, employing tactics from slavery. Part V analyzes the Court’s role in maintaining a gendered and racial hierarchy via the control of women’s reproductive autonomy and criticizes current Eighth Amendment jurisprudence for failing to consider institutional racism.

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<sup>1</sup> It is important to note that not only women suffer from the implications of reproductive health policies, but also all pregnant persons. Throughout this note, I use the terms "women/woman" to discuss these issues for the sake of consistency.

<sup>2</sup> Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html> [<https://perma.cc/K8CR-U8DV>].

<sup>3</sup> *INMATE AGE, FED. BUREAU OF PRISONS*, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_age.jsp](https://www.bop.gov/about/statistics/statistics_inmate_age.jsp) [<https://perma.cc/82VB-H425>].

<sup>4</sup> Thomas M. Blumenthal & Kelly M. Brunie, *The Absence of Penological Rationale in the Restrictions on the Rights of Incarcerated Women*, 32 U. ARK. LITTLE ROCK L. REV. 461, 469 (2010).

## II. EVER-SHIFTING BUT EVER-PRESENT: THE HISTORICAL CONTROL OF BLACK WOMEN AND THEIR BODIES

Women of color are disproportionately incarcerated and are the targets of public policies that punish women's reproductive choices.<sup>5</sup> Any discussion about Black women's reproductive rights would be incomplete without first examining how Black women's bodily autonomy has been controlled for centuries through racist policies promulgating slavery and involuntary sterilization.

### A. THE CONTROL AND STEREOTYPING OF BLACK WOMEN'S BODIES DURING SLAVERY

Many of the racist ideologies used to justify the mistreatment of Black women stem from slavery. When President Thomas Jefferson signed into law a statute prohibiting the importation of slaves in 1808,<sup>6</sup> Black women became the primary economic lifeline to ensure slavery continued throughout generations.<sup>7</sup> To ensure their slave force would increase, many slave owners raped their slaves and punished efforts to prevent or terminate slave pregnancies.<sup>8</sup> Further, Black women were forced to engage in demanding fieldwork and domestic tasks, and many were physically abused if they did not work fast enough, regardless of any physical limitations caused by pregnancy.<sup>9</sup> Separating enslaved mothers from their children for labor reinforced the stereotype of Black women as "unfit . . . mothers," viewed solely as "sources of both physical and reproductive labor."<sup>10</sup>

The exploitation and subjugation of Black women during slavery have also shaped the racial stereotype of Black women as "sexually deviant."<sup>11</sup> Enslaved Black women "were dehumanized and distinguished from prevailing values of white womanhood" through "the casting of Black women as dangerous, and . . . the construction of Black women as sexually deviant."<sup>12</sup> For instance, a 1662 Virginia statute declared that Black women's children inherited their mother's status as slaves and placed Black

<sup>5</sup> Rachel Roth & Sara L. Ainsworth, "If They Hand You a Paper, You Sign It": A Call to End the Sterilization of Women in Prison, 26 HASTINGS WOMEN'S L.J. 7, 13 (2015).

<sup>6</sup> Act to Prohibit the Importation of Slaves, ch. 22, 2 Stat. 426 (1807).

<sup>7</sup> Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2034 (2021).

<sup>8</sup> *Id.*; DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 29–30 (1999).

<sup>9</sup> ROBERTS, *supra* note 8, at 8–9.

<sup>10</sup> Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1254, 1263, 1266–68 (2012).

<sup>11</sup> *Id.* at 1259.

<sup>12</sup> *Id.*

women outside the coverage of statutes that prohibited rape.<sup>13</sup> These policies were justified by popular discourse declaring Black women as uncontrollable sexual aggressors.<sup>14</sup>

In sum, American legislatures justified the legal enslavement and abuse of Black women with racial stereotypes. These racial stereotypes of Black women as “unfit mothers” and “sexually deviant” have influenced modern policies shaping the mistreatment of female prisoners, modern prison policy, and limitations on reproductive justice for Black women.

#### B. CONTROLLING THE BLACK POPULATION THROUGH INVOLUNTARY STERILIZATION

Black women’s reproductive autonomy has also been controlled by laws enabling involuntary sterilization. Compelled by state statutes, involuntary and coercive sterilization was performed on more than 60,000 individuals in thirty-two states during the twentieth century under eugenics principles.<sup>15</sup> Eugenics applied theories of genetics and biology to human breeding, with Anglo-Saxons declared as “fit” to breed and Black Americans as “unfit.”<sup>16</sup> During the twentieth century, over thirty states passed laws granting state actors authority to involuntarily sterilize mentally or morally “defective” individuals under the guise of promoting health and safety.<sup>17</sup> In 1927, the Supreme Court held that states could sterilize “feeble minded” individuals to prevent the birth of feeble-minded children who might commit crimes or “starve for their imbecility.”<sup>18</sup> The Court’s language is steeped with a desire to uphold white supremacy and ableism, stating that “[i]t is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind.”<sup>19</sup> Permitting the sterilization of “unfit” individuals gave credence to eugenics ideology, thereby perpetuating the belief that those considered undesirable should be

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<sup>13</sup> See Enactment of Hereditary Slavery Law Virginia 1662-ACT XII; see also PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 33–34 (1984).

<sup>14</sup> Erlene Stetson, *Studying Slavery: Some Literary and Pedagogical Considerations on the Black Female Slave*, in ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE 61, 73–74 (Gloria T. Hull et al. eds., 1982) (discussing popular images of Black women as “female animals,” “especially passionate,” and “breeder[s]”).

<sup>15</sup> Alexandra Minna Stern, *Forced Sterilization Policies in the US Targeted Minorities and Those with Disabilities—and Lasted into the 21st Century*, THE CONVERSATION (Aug. 26, 2020, 8:20 AM), <https://theconversation.com/forced-sterilization-policies-in-the-us-targeted-minorities-and-those-with-disabilities-and-lived-into-the-21st-century-143144> [<https://perma.cc/8DZV-DZEM>].

<sup>16</sup> *Id.*

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

<sup>18</sup> *Buck v. Bell*, 274 U.S. 200, 205, 207 (1927) (upholding, under the Fourteenth Amendment, the constitutionality of a 1924 Act of Virginia that the superintendent of prisons or mental institutions can authorize the sterilization of individuals under his care in the name of the “welfare of society”).

<sup>19</sup> *Id.* at 207.

eliminated from the gene pool.<sup>20</sup> As a consequence of this decision, over a hundred thousand people, mostly Black, Latina, and Indigenous women, were involuntarily sterilized as a “population control measure.”<sup>21</sup> In 1978, the federal government enacted legislation outlawing sterilization of mentally incompetent and incarcerated individuals; however, this legislation only applied to women receiving government assistance for their medical care.<sup>22</sup> As such, 1400 involuntary sterilizations were performed between 1997 and 2010 in California prisons.<sup>23</sup>

The involuntary sterilization of Black women reflects the stereotype that Black women are unfit parents and thus should be reproductively constrained by American laws. Justice Thurgood Marshall once commented that involuntary sterilization is a “regime of state-mandated segregation and degradation . . . that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow.”<sup>24</sup> Clearly, racist eugenic ideology influenced American laws in the twentieth century, and these laws reaffirmed racist stereotypes from the slavery era that Black women are unfit mothers and that their reproductive autonomy must be controlled.

### C. THE CARCERAL STATE: DE FACTO SLAVERY EVOLVED

When slaves were emancipated, slavery did not end—it was transformed into a wraparound carceral system premised on maintaining a racial hierarchy favoring whites. The carceral system functioned to preserve caste and labor control during the transition between slavery and Jim Crow.<sup>25</sup> Following the end of Reconstruction in 1877, policymakers and government officials nationwide undermined the grant of equality to Black citizens, enacting the Black Codes to force formerly enslaved Black

<sup>20</sup> See Linda Villarosa, *The Long Shadow of Eugenics in America*, N.Y. TIMES (June 8, 2022), <https://www.nytimes.com/2022/06/08/magazine/eugenics-movement-america.html>.

<sup>21</sup> See Rowena A. Daniels, *Rectifying a Wrong: American Eugenics—Beneficial to the State, but Detrimental to the People*, 4 TENN. J. RACE, GENDER & SOC. JUST. 157, 180 (2015); see also Villarosa, *supra* note 20.

<sup>22</sup> See 42 C.F.R. § 441.254 (rendering states unable to claim reimbursement from the federal government for sterilizations of mentally incompetent and institutionalized individuals); see also generally NAT'L WOMEN'S L. CTR., FORCED STERILIZATION OF DISABLED PEOPLE IN THE UNITED STATES, [https://nwlc.org/wp-content/uploads/2022/01/%C6%92.NWLC\\_SterilizationReport\\_2021.pdf](https://nwlc.org/wp-content/uploads/2022/01/%C6%92.NWLC_SterilizationReport_2021.pdf) (finding that as of 2021, thirty-one states and Washington, D.C., have laws allowing the forced sterilization of disabled people if the judge thinks it is the best choice for the disabled person because the judge believes the disabled person cannot make the decision on their own).

<sup>23</sup> Stern, *supra* note 15.

<sup>24</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 462 (1985).

<sup>25</sup> Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the "Race Question" in the US*, 13 NEW LEFT REV. 41, 53 (2002).

individuals back into an exploitative labor system that resembled slavery.<sup>26</sup> As a result of the Black Codes, most newly freed people could not vote, own arms, or testify in court.<sup>27</sup> For instance, any person of color who “intruded” on gatherings of white citizens could be charged with a misdemeanor and punished with thirty-nine lashes in Florida.<sup>28</sup>

While slavery and Jim Crow served a carceral objective, they also materialized from the construction of race.<sup>29</sup> Blackness itself was, and is, criminalized. Being Black in America “contemporaneously identifies one with a carcerality of Blackness.”<sup>30</sup> Punishment of Black Americans is inextricably linked with the ideology perpetuated during slavery that Blackness equates to a “dangerous [animal] . . . in need of taming.”<sup>31</sup> In sum, the carcerality of Blackness is a default rooted in the history of slavery and Jim Crow but perpetuated by the mass criminalization of Black men and women today.<sup>32</sup>

Further, the Black Codes and subsequent Jim Crow laws had a unique role in promulgating stereotypes of Black women, resulting in Black women experiencing oppression based on their second-class status as both women and Black Americans. The Black Codes and Jim Crow laws were mechanisms that rationalized the moral and economic control of Black women.<sup>33</sup> Southern states regularly punished Black women for their perceived deviation from the Victorian standards of white womanhood.<sup>34</sup> As Angela Y. Davis notes, “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

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<sup>26</sup> Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 267 (2021); see also, e.g., *The Black Code of St. Landry's Parish, 1865*, in 2 THE WAY WE LIVED: ESSAYS AND DOCUMENTS IN AMERICAN SOCIAL HISTORY 21, 21–22 (1988) (stating in Section 4 that “every negro is required to be in the regular service of some white person, or former owner, who shall be held responsible for the conduct of said negro” and in Section 3 that “no negro shall be permitted to rent or keep a house within said parish. Any negro violating this provision shall be immediately ejected and compelled to find an employer . . .”).

<sup>27</sup> Hinton & Cook, *supra* note 26, at 268.

<sup>28</sup> S. EXEC. DOC. NO. 39-6, at 174 (1867); see Hinton & Cook, *supra* note 26, at 268.

<sup>29</sup> Jason M. Williams, *Race as a Carceral Terrain: Black Lives Matter Meets Reentry*, 99 PRISON J. 387, 389 (2019).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See *id.*

<sup>33</sup> See, e.g., DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 20–21 (1997) (noting that Southern legislators rationalized the enactment of the Black Codes as a mechanism for regulating the supposed inherent moral degeneracy and criminality in the newly freed slaves).

<sup>34</sup> See Ocen, *supra* note 10, at 1262; MARY ELLEN CURTIN, BLACK PRISONERS AND THEIR WORLD, ALABAMA, 1865-1900, at 6 (Reginald Butler ed., 2000) (discussing how Black women in Mobile, Alabama were sentenced to ten days in jail at a workhouse for participating in a “war of words”) (internal quotation marks omitted).

women were practically anomalies.”<sup>35</sup> In this regard, the exploitation of Black women's labor acted to masculinize them in a society that viewed “womanhood” through a lens of domesticity.

While the Black Codes and Jim Crow laws are examples of state legislatures demonstrating explicit racism, the end of the Jim Crow era brought a new method of structural racism: mass incarceration. Currently, Black women comprise only 13% of women in the United States, yet they are 30% of the women's prison population and 44% of the women's jail population.<sup>36</sup> The number of incarcerated women in the U.S. increased by more than 525% between 1980 and 2021.<sup>37</sup> In recent decades, women's incarceration rates have increased at twice the pace of men's, with women disproportionately incarcerated in local jails.<sup>38</sup> A significant number of women are incarcerated because of their own traumas and substance abuse disorders.<sup>39</sup> In fact, an overwhelming majority of women are convicted of nonviolent crimes, most commonly drug or property-related offenses, which are tied to the conditions of disadvantage and oppression that characterize the living situations many incarcerated women experience outside of prison.<sup>40</sup> Further, an estimated 92% of all women in California prisons are victims of abuse.<sup>41</sup>

In sum, while there are no longer explicitly racist Black Codes or Jim Crow laws, American legislatures created and maintained racial hierarchies through modern-day mass incarceration. The carceral system disproportionately targets Black women and capitalizes on stereotypes of Black women as “unfeminine” and “aggressive” to perpetuate racist ideologies that stem from slavery. The next section of this paper will turn to the modern-day issues of abortion and the shackling of incarcerated

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<sup>35</sup> ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* 5 (1981).

<sup>36</sup> Talitha L. LeFlouria, *Criminal Justice Reform Won't Work Until It Focuses on Black Women*, WASH. POST (Feb. 12, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/02/12/criminal-justice-reform-wont-work-until-it-focuses-black-women> [<https://perma.cc/5DWW-6Z9F>]; *Women of Color in the United States*, Catalyst (Feb. 1, 2023), <https://www.catalyst.org/research/women-of-color-in-the-united-states> [<https://perma.cc/SPS3-2MDR>]; NIKI MONAZZAM & KRISTEN M. BUDD, *INCARCERATED WOMEN AND GIRLS 2* (2023), <https://www.sentencingproject.org/app/uploads/2023/05/Incarcerated-Women-and-Girls-1.pdf> [<https://perma.cc/52AF-KBK2>].

<sup>37</sup> MONAZZAM & BUDD, *supra* note 36, at 1.

<sup>38</sup> Kajstura, *supra* note 2.

<sup>39</sup> MONAZZAM & BUDD, *supra* note 36, at 5 (describing how incarcerated women reported high rates of childhood disadvantages, homelessness, disabilities, physical and mental health problems).

<sup>40</sup> Carolyn Sufrin, Alexa Kolbi-Molinas & Rachel Roth, *Reproductive Justice, Health Disparities and Incarcerated Women in the United States*, 47 PERSPS. ON SEXUAL & REPROD. HEALTH 213, 213 (2015) (stating that 70% of incarcerated women are convicted for nonviolent crimes, most commonly property or drug-related).

<sup>41</sup> *Facts about the Over-Incarceration of Women in the United States*, ACLU (Dec. 12, 2007), <https://www.aclu.org/facts-about-over-incarceration-women-united-states> [<https://perma.cc/GP46-W2NN>].

pregnant women and analyze how these phenomena are inseparable from slavery and involuntary sterilization.

### III. UNEQUAL ACCESS TO REPRODUCTIVE HEALTH SERVICES PERSISTED AFTER *ROE V. WADE*

#### A. A HISTORY OF DISPARITIES IN ACCESS TO REPRODUCTIVE HEALTH SERVICES

The health of Black Americans has been adversely affected by centuries of social and structural factors, such as lack of access to healthcare, a segregated healthcare workforce, and negative perceptions of the healthcare system.<sup>42</sup> The negative perceptions Black Americans hold of physicians stem from a long history of physicians experimenting on Black Americans during routine healthcare.<sup>43</sup> For instance, in the 1932 Tuskegee Experiment, the U.S. Public Health Service began a study to examine whether syphilis had a different “natural course” according to race.<sup>44</sup> Researchers did not tell the patients that they were being treated for syphilis; instead, they told the patients they were being treated for “bad blood.”<sup>45</sup> Research participants in the Tuskegee Experiment were underinformed and coerced. The 600 syphilis-infected participants selected for the study were poor, rural Black men who were only compensated through “free medical exams, [free] meals, and burial insurance.”<sup>46</sup> Despite the discovery of penicillin as a cure for syphilis in 1943, the participants in the experiment were not offered treatment.<sup>47</sup> The experiment continued and withheld treatment from these Black men for forty years.<sup>48</sup> By the end of the experiment, 128 participants died of syphilis or related complications, forty wives were infected, and nineteen children were born with syphilis.<sup>49</sup> The Tuskegee Experiment demonstrates how the health of Black Americans has

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<sup>42</sup> See generally Madeline Y. Sutton, Ngozi F. Anachebe, Regina Lee & Heather Skanes, *Racial and Ethnic Disparities in Reproductive Health Services and Outcomes*, 2020, 137 *OBSTETRICS & GYNECOLOGY* 225, 225 (2021).

<sup>43</sup> Elizabeth A. Jacobs, Italia Rolle, Carol Estwing Ferrans, Eric E. Whitaker & Richard B. Warnecke, *Understanding African Americans' Views of the Trustworthiness of Physicians*, 21 *J. GEN. INTERNAL MED.* 642, 645–46 (2006).

<sup>44</sup> Charlotte Paul & Barbara Brookes, *The Rationalization of Unethical Research: Revisionist Accounts of the Tuskegee Syphilis Study and the New Zealand “Unfortunate Experiment,”* 105 *AM. J. PUB. HEALTH*, e12, e13 (2015); see also *The Untreated Syphilis Study at Tuskegee Timeline*, CDC [hereinafter *The Tuskegee Timeline*], <https://www.cdc.gov/tuskegee/timeline.htm> [<https://perma.cc/JY84-RHWG>].

<sup>45</sup> *The Tuskegee Timeline*, *supra* note 44.

<sup>46</sup> See *id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Tuskegee Syphilis Experiment*, EQUAL JUST. INITIATIVE (Oct. 31, 2020), <https://eji.org/news/history-racial-injustice-tuskegee-syphilis-experiment> [<https://perma.cc/7BUU-H2BX>].

been adversely affected by centuries of racist experimentation on Black Americans and structural racism.

The historical inequalities in healthcare access uniquely affect Black women because of their need for reproductive health services. The American College of Obstetrics and Gynecology (“ACOG”) has documented decades-long racial disparities in multiple areas of reproductive health, including contraceptive use, sexually transmitted infection care, reproductive cancer screenings, and maternal mortality.<sup>50</sup> This data demonstrates that Black women’s restricted access to reproductive health services extends past risks on the individual level and includes practitioner-level factors such as racial bias and stereotyping as well as social and structural factors such as less insurance coverage for Black women and fewer neighborhood legal services.<sup>51</sup> As a result, Black women have higher rates of premature births, HIV, deaths from endometrial cancer, have approximately four times more induced abortions, and are three times more likely to die of pregnancy-related causes than white women.<sup>52</sup>

Before the Supreme Court decided *Roe v. Wade* in 1973, the problem of unintended pregnancy and illegal abortions disproportionately impacted the lives of Black women.<sup>53</sup> Women with financial means, the majority of whom were white middle-to-upper-class women, still had some access to legal and safe abortions before *Roe*.<sup>54</sup> However, less affluent women, who were disproportionately women of color, had almost no abortion options besides dangerous, illegal procedures.<sup>55</sup> Illegal abortions also resulted in a distinct racial disparity in mortality caused by illegal abortions. In the 1960s, one in four child-birth-related deaths among white women in New York City was because of an abortion, compared with one in two childbirth-related deaths among Puerto Rican and non-white women.<sup>56</sup> Even when abortion was legal in some states in the early 1970s, the vast disparity in abortion access and abortion-related deaths continued.<sup>57</sup> Researchers estimated that 130,000 women obtained illegal or self-induced abortion procedures in 1972, and the then-Centers for Disease Control reported that

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<sup>50</sup> See generally Sutton et al., *supra* note 42.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 227.

<sup>53</sup> See generally Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?*, 6 GUTTMACHER POL’Y REV. 8 (2003).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* Starting in 1970, four states repealed their anti-abortion statutes. However, these legal and less dangerous abortions were only available to a small number of women, mostly wealthy white women, who were able to pay for the procedure and the expense of lodging and travel to these states. *Id.* at 10.

<sup>56</sup> *Id.* at 10.

<sup>57</sup> *Id.*

the mortality rate due to illegal abortions for non-white women was ten times higher than for white women from 1972 to 1974.<sup>58</sup>

In sum, structural healthcare inequalities adversely affect Black Americans, contributing to gaps in healthcare insurance, unequal access to services, and poorer health outcomes.<sup>59</sup> Centuries of structural racism and racist experiments have adversely affected the health of Black Americans, as seen by the Tuskegee Experiment. Black women have experienced unique structural barriers to accessing essential reproductive health services. Despite the legalization of abortion in 1973, Black women have continued to have disproportionate access to reproductive health services. In the following section, I will explore how this history of unequal access to reproductive health before *Roe* has continued into the modern day.

#### B. THE *DOBBS* DECISION DISPROPORTIONATELY DISCRIMINATES AGAINST WOMEN OF COLOR

In 1973, the Supreme Court decided one of the most important cases on abortion rights: *Roe v. Wade*. In *Roe*, the Supreme Court held that women have a constitutional right to an abortion without state interference until at least the end of the first trimester of pregnancy.<sup>60</sup> The Court considered a challenge by a pregnant single woman, a married couple, and an intervening physician to the constitutionality of a Texas abortion law.<sup>61</sup> In the Court's discussion of the balance between an individual's right to privacy for intimate decisions and other state interests, the Court reasoned that:

The detriment that the State would impose upon the pregnant woman by denying [the choice for an abortion] altogether is apparent . . . . Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child

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<sup>58</sup> Willard Cates, Jr. & Roger W. Roach, *Illegal Abortions in the United States: 1972-1974*, 8 FAM. PLAN. PERSPS. 86, 92 (1976); CDC, ABORTION SURVEILLANCE 1974, at 37 (1976), <https://stacks.cdc.gov/view/cdc/59313> [<https://perma.cc/UL79-BTPT>].

<sup>59</sup> Jamila Taylor, *Racism, Inequality, and Health Care for African Americans*, CENTURY FOUND. (Dec. 19, 2019), <https://tcf.org/content/report/racism-inequality-health-care-african-americans/?session=1> [<https://perma.cc/B5YC-S7LD>].

<sup>60</sup> *Roe v. Wade*, 410 U.S. 113, 163 (1973) (“[F]or the period of pregnancy prior to this ‘compelling’ point, [the end of the first trimester,] the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated.”).

<sup>61</sup> *Id.* at 116, 120–21.

into a family already unable, psychologically and otherwise, to care for it.<sup>62</sup>

As such, the Court found that the Texas abortion statute violated the personal right to privacy under the Due Process Clause of the Fourteenth Amendment.<sup>63</sup> Between 1973 and 2022, the Supreme Court upheld *Roe*, protecting a woman's right to an abortion.<sup>64</sup> For instance, in *Planned Parenthood v. Casey*, the Supreme Court reaffirmed that the Constitution protects the right to an abortion.<sup>65</sup>

However, in 2022, the Supreme Court decided to overturn fifty years of precedent and reverse *Roe* in *Dobbs v. Jackson Women's Health Organization*.<sup>66</sup> In *Dobbs*, the Court took an originalist view of the Constitution to reason that a Mississippi law restricting abortion before the end of the first trimester was constitutional because the Constitution does not reference abortion nor is abortion protected by a constitutional provision "deeply rooted in [the] Nation's history and tradition."<sup>67</sup> This decision reverses the constitutional protection for a woman to have an abortion within at least the first trimester of her pregnancy, leaving it up to state legislatures to either dismantle or protect a woman's right to her own body.<sup>68</sup>

As a result of the *Dobbs* decision, abortion is protected by state law in twenty-one states and the District of Columbia, but is prohibited or at risk of being severely limited in twenty-six states and three territories.<sup>69</sup> Specifically, abortion is banned entirely in fourteen states, and states enforce these bans through criminal penalties.<sup>70</sup> For instance, a pair of laws

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<sup>62</sup> *Id.* at 153.

<sup>63</sup> *Id.* at 153, 167.

<sup>64</sup> See generally, e.g., *Doe v. Boulton*, 410 U.S. 179 (1973); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983); *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>65</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 873, 875–76 (1992) (reaffirming the Court's decision in *Roe*, but declining to use *Roe*'s trimester framework, instead adopting an "undue burden" framework to regulate states' attempts to prohibit abortion before fetal viability).

<sup>66</sup> See generally *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

<sup>67</sup> *Id.* at 250 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (internal quotation marks omitted).

<sup>68</sup> *Id.* at 298–301.

<sup>69</sup> *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state> [https://perma.cc/QTY2-UT88] (as of February 2024, abortion is not protected in three states and Puerto Rico, meaning abortion may continue to be accessible in these states and territories, but would be unprotected by state and territory law. Ten states are hostile to abortion, meaning they have expressed a desire to prohibit abortion entirely and have no legal protections for abortion. Fourteen states ban abortion entirely and enforce those bans through criminal penalties).

<sup>70</sup> *Id.*

in Texas ban abortion at all stages of pregnancy with no exceptions for rape or incest and narrow exceptions to save the life of the mother.<sup>71</sup>

These post-*Dobbs* abortion restrictions have a disproportionate impact on Black women and incarcerated women in multiple intersecting ways. Abortion rates for Black women in the U.S. are approximately three times higher than those for white women.<sup>72</sup> According to the Guttmacher Institute, Black women's higher abortion rates are caused by the limited access to and ineffective utilization of contraceptives within communities of color.<sup>73</sup> Even when *Roe* guaranteed women the right to an abortion, abortion access was "very limited" for marginalized groups like Black women.<sup>74</sup> While the *Roe* decision in 1973 had a dramatic impact on women's health and well-being in the U.S., racial disparities continued to plague Black women's access to reproductive care.<sup>75</sup> For example, after *Roe* was decided, states enacted more than 1300 abortion restrictions.<sup>76</sup> Combining these abortion restrictions with failures of the healthcare and economic systems to provide Black Americans with high-quality, affordable healthcare has disproportionately limited Black women's access to abortions.<sup>77</sup> Black women often encounter financial and structural barriers to accessing medical care. For instance, two-thirds of reproductive-age women in the Medicaid coverage gap are people of color.<sup>78</sup> Black women have also

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<sup>71</sup> See S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (banning abortions after six weeks of gestation and authorizing a private civil right of action); H.B. 1280, 87th Leg., Reg. Sess. (Tex. 2021) (creating harsh criminal penalties, including the possibility of a first-degree felony conviction for providers and doctors who perform or aid abortions at all stages of pregnancy, without an exception for rape or incest, and with narrow exemptions for the life and health of pregnant people).

<sup>72</sup> Katherine Kortsmit, Michele G. Mandel, Jennifer A. Reeves, Elizabeth Clark, H. Pamela Pagano, Antoinette Nguyen, Emily E. Petersen & Maura K. Whiteman, *Abortion Surveillance—United States, 2019*, 70 MORBIDITY & MORTALITY WKLY. REP. 1 (2021) (finding that in 2019, the abortion rate for Black women was 23.8 abortions per 1000 women and for white women was 6.6 abortions per 1000 women).

<sup>73</sup> Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL'Y REV. 2, 2–3 (2008).

<sup>74</sup> Anne Branigin & Samantha Chery, *Women of Color Will Be Most Impacted by the End of Roe*, *Experts Say*, WASH. POST (June 24, 2022, 8:04 PM), <https://www.washingtonpost.com/nation/2022/06/24/women-of-color-end-of-roe/> [<https://perma.cc/5B43-V93F>].

<sup>75</sup> Gold, *supra* note 53, at 10 (showing that the deaths from abortion have declined from 200 in 1965 to less than ten since 1980).

<sup>76</sup> Liza Fuentes, *Inequity in US Abortion Rights and Access: The End of Roe Is Deepening Existing Divides*, GUTTMACHER INST. (Jan. 17, 2023), <https://www.guttmacher.org/2023/01/inequity-us-abortion-rights-and-access-end-roe-deepening-existing-divides> [<https://perma.cc/5E4N-QXZU>].

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

<sup>78</sup> Judith Solomon, *Closing the Coverage Gap Would Improve Black Maternal Health*, CTR. ON BUDGET & POL'Y PRIORITIES (July 26, 2021), <https://www.cbpp.org/research/health/closing-the-coverage-gap-would-improve-black-maternal-health> (finding that in the 12 states where Medicaid hasn't been expanded to include adults earning below 138 percent of the poverty line, 810,000 women of reproductive age, with incomes below the poverty line, were uninsured in 2019. Among them, 29 percent were Black, and 33 percent were Latina, leaving them with no access to affordable health coverage).

reported experiencing pressure during physician counseling to use contraceptive methods that do not align with their preferences.<sup>79</sup>

In sum, Black women have a history of unequal access to reproductive health services both before and during the *Roe* era. While the *Roe* decision did not completely eliminate racial disparities in abortion access, it played a crucial step in closing the racial gap in abortion access and prevented thousands of women from dying at the hands of illegal, unregulated, and unsafe abortion procedures.<sup>80</sup> However, the *Dobbs* decision further exacerbates these racial inequalities, disproportionately discriminates against Black women, and puts women's lives at risk from pre-*Roe* self-induced or illegal abortion methods.<sup>81</sup> The following section analyzes how the prison system exploits the connection between Black women's bodily autonomy and slavery to control the Black population.

#### IV. REPRODUCTIVE (IN)JUSTICE PROLIFERATED BY PRISONS

##### A. THE LACK OF ABORTION ACCESS IN PRISON BEFORE *DOBBS*

Incarcerated women are subjected to serious health risks in prison such as violence, sexual assault, communicable diseases, poor living conditions, and poor nutrition.<sup>82</sup> In addition to these horrendous conditions, inmates were blocked from accessing essential reproductive health services through multiple barriers even when the Supreme Court's decision in *Roe* protected a woman's right to an abortion in the first trimester of pregnancy.

First, many prisons and jails completely restrict abortion access for inmates.<sup>83</sup> ACOG conducted a study of twenty-two state prison systems, all Federal Bureau of Prison sites, and six county jails and found that only half of the state prisons in the study allowed abortion in both the first and second

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<sup>79</sup> Fuentes, *supra* note 76.

<sup>80</sup> See Gold, *supra* note 53, at 10.

<sup>81</sup> See Cohen, *supra* note 73, at 3 (noting that Black women have higher abortion rates due to systemic factors driven by a lack of access to and effective use of contraceptives for communities of color).

<sup>82</sup> Sufrin et al., *supra* note 40, at 213.

<sup>83</sup> See *Half of the Clinics that Provided Abortions to Incarcerated Individuals in 2020 Were in States Hostile to Abortion*, GUTTMACHER INST. (Nov. 9, 2023), <https://www.guttmacher.org/news-release/2023/half-clinics-provided-abortions-incarcerated-individuals-2020-were-states-hostile> [<https://perma.cc/CCQ4-ZBBR>] (finding that in 2020, 52% of clinics offering abortion services to individuals in the carceral system were situated in states that are now hostile to abortion after *Roe v. Wade* was overturned. This includes six states where abortion has subsequently been prohibited or is inaccessible after six weeks); see also Rachel Roth, *Do Prisoners Have Abortion Rights?*, 30 FEMINIST STUD. 353, 363–64 (2004) (noting that in 2004: (1) nine states had official prison policies that provide unrestricted access to abortion, at least during the first trimester; (2) six states and D.C. funded only “medically necessary” abortions; (3) nineteen states had abortion prison policies that provided funding only to save the life of the mother; (4) two states required prisoners to undergo counseling before obtaining an abortion; and (5) sixteen states had no official written policy).

trimesters, while 14% did not allow abortion at all.<sup>84</sup> Some states qualify abortion as “elective” and thus require inmates to obtain permission for the procedure from prison officials or a court order.<sup>85</sup> Fourteen states have no official written abortion policies, leaving abortion policy decisions to the discretion of the prison administrators.<sup>86</sup> Even when abortions are medically necessary, only seventeen states provide state funds for prisoners’ abortions.<sup>87</sup> Clearly, the current patchwork of abortion protections for inmates, who are disproportionately Black women, is inconsistent and does not provide equal protections for similarly situated women in different states or in the federal system.

Second, even if abortion services are offered, inmates are faced with financial barriers that restrict their access to abortion services. Of the nineteen state prisons that permitted abortion in the ACOG study, two-thirds required the incarcerated women to pay for the procedure.<sup>88</sup> Further, a study from the Guttmacher Institute reveals that prisons commonly require incarcerated women to pay for the costs related to their transportation to an abortion clinic and for correctional staff time while traveling to receive the procedure.<sup>89</sup> Despite the Federal Bureau of Prisons’ written policy that pregnant women in federal custody can obtain an abortion, the Hyde Amendment prohibits the Bureau of Prisons from paying for an inmate’s abortion if it is “elective.”<sup>90</sup> When the Hyde Amendment was enacted in 1976, it only restricted federal abortion funding for women on Medicaid.<sup>91</sup> However, in the 1980s, federal funding restrictions were put in place for women in federal prisons seeking abortions.<sup>92</sup> Without federal or state funds, an abortion procedure costs approximately \$500 in the first trimester and a minimum of \$2,000 in the second trimester.<sup>93</sup> However, when other

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<sup>84</sup> Carolyn Sufrin, Rachel K. Jones, Lauren Beal, William D. Mosher & Suzanne Bell, *Abortion Access for Incarcerated People: Incidence of Abortion and Policies at U.S. Prisons and Jails*, 138 *OBSTETRICS & GYNECOLOGY* 330, 330 (2021).

<sup>85</sup> Blumenthal & Brunie, *supra* note 4, at 462.

<sup>86</sup> *Id.* at 469–70.

<sup>87</sup> *Id.* at 470.

<sup>88</sup> Sufrin et al., *supra* note 84, at 330.

<sup>89</sup> Sufrin et al., *supra* note 40, at 219.

<sup>90</sup> Hyde Amendment, Pub. L. No. 117-103, §§ 506–07, 136 Stat. 49, 496 (2022); see FED. BUREAU OF PRISONS, U.S. DEP’T OF JUST., *FEMALE OFFENDER MANUAL* 13 (2016); see also Lauren Kuhlik & Carolyn Sufrin, *The Politics of Pregnancy: Pregnancy, Systematic Disregard and Degradation, and Carceral Institutions*, 14 *HARV. L. & POL’Y REV.* 417, 431 (2020).

<sup>91</sup> Hyde Amendment, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976); Alyssa Engstrom, *The Hyde Amendment: Perpetuating Injustice and Discrimination After Thirty-Nine Years*, 25 *S. CAL. INTERDISC. L.J.* 451, 451 (2016).

<sup>92</sup> Engstrom, *supra* note 92, at 451 (stating that the Hyde Amendment now prevents the use of federal funding for inmates in federal prisons except in cases of rape, incest, or life endangerment).

<sup>93</sup> Allison McCann, *What It Costs to Get an Abortion Now*, *N.Y. TIMES* (Sept. 28, 2022), <https://www.nytimes.com/interactive/2022/09/28/us/abortion-costs-funds.html> [<https://perma.cc/FN4X-FCSA>].

expenses such as travel costs associated with an abortion procedure are considered, abortions would cost an inmate thousands of dollars.<sup>94</sup> The costs of abortion are further exacerbated by the fact that many prisons are located in rural areas.<sup>95</sup> A prison's rural location limits inmates' access to abortion because 89% of U.S. counties lack an abortion provider, requiring inmates to pay for transportation to abortion clinics that are hundreds of miles away.<sup>96</sup>

Third, inmates are faced with practical barriers to dissuade their choice to have an abortion. More than half of state jails that allow abortions impose a waiting period.<sup>97</sup> This waiting period results in most women requiring at least two trips to an abortion clinic, a significant burden for women who must pay for their transportation and correctional staff's time.<sup>98</sup> Moreover, numerous institutions, including the Federal Bureau of Prisons, give officers discretion to decline transporting a woman for an abortion if the officer "morally opposes" the abortion.<sup>99</sup> Giving federal guards the discretion to deny inmates transportation, extended waiting periods, and long travel distances creates an abortion process that is lengthy, costly, and not conducive to these time-sensitive abortion requests.<sup>100</sup>

Inmates' access to abortion services is further complicated by the increase in Catholic hospitals. Currently, one in six hospital beds, an increase of 22% since 2001, are in a facility that complies with Catholic directives that prohibit reproductive care services, even when a woman's life or health is at risk.<sup>101</sup> In some states, like Washington, more than 40% of all hospital beds are located in Catholic hospitals and entire regions have no other option for hospital care outside of these Catholic systems.<sup>102</sup> Catholic hospitals are also replacing physicians' practices, urgent care centers, and ambulatory care centers.<sup>103</sup> Patients seeking contraception or abortion care will be turned away if their physician is a part of this

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<sup>94</sup> See, e.g., *id.* (estimating that abortion expenses can range from \$1,321 to \$4,884 when considering travel and other costs related to the procedure).

<sup>95</sup> Sufrin et al., *supra* note 40, at 215.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

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

<sup>99</sup> See FED. BUREAU OF PRISONS, *supra* note 90, at 14; see Kuhlik & Sufrin, *supra* note 90, at 432.

<sup>100</sup> Kuhlik & Sufrin, *supra* note 90, at 431.

<sup>101</sup> JULIA KAYE, BRIGITTE AMIRI, LOUISE MELLING & JENNIFER DALVEN, HEALTH CARE DENIED 22 (2016), <https://www.aclu.org/wp-content/uploads/legal-documents/healthcaredenied.pdf> [<https://perma.cc/FUX2-VHW8>].

<sup>102</sup> *Id.* at 6.

<sup>103</sup> *Catholic Hospitals' Growth Has an Impact on Reproductive Health Care*, NBC NEWS (July 24, 2022, 11:30 AM), <https://www.nbcnews.com/news/us-news/catholic-hospitals-growth-impacts-reproductive-health-care-rcna39756> [<https://perma.cc/3YS6-3CWQ>].

system.<sup>104</sup> As a result, many Catholic hospitals are withholding emergency care from patients who are experiencing a miscarriage, risky pregnancy complications, or who need a time-sensitive abortion.<sup>105</sup> The rise in Catholic hospitals creates another barrier for inmates to receive crucial abortion services because even if a prison allows abortions, the closest hospital could be a Catholic hospital that refuses to perform the abortion even if an inmate's life is in danger. As a result, the inmate may have to pay more money for transportation to a farther hospital that does not follow Catholic directives or risk their lives in a Catholic hospital that can deny the inmate access to abortion in time-sensitive scenarios.

In sum, female inmates, who are disproportionately Black women, lacked sufficient access to reproductive health services and abortion procedures even when *Roe* protected women's access to abortion in the first trimester of pregnancy. Now that the Supreme Court overturned *Roe* with its *Dobbs* decision, female inmates' access to abortion will be further restricted.<sup>106</sup> Considering that Black women are disproportionately incarcerated for nonviolent crimes that are tied to conditions of disadvantage and oppression,<sup>107</sup> it is unlikely that these women can pay for their abortion and the associated costs while incarcerated. Evidently, female inmates are met with financial and structural barriers that are meant to control their bodily autonomy, which will only be exacerbated by the Supreme Court's decision in *Dobbs*.

#### B. A HORRIFIC ODE TO SLAVERY: SHACKLING INMATES DURING LABOR

In addition to lacking sufficient access to abortion procedures, prisons also subject female inmates to inhumane prenatal care, demonstrating how prison is inextricably linked to slavery and racial oppression. More than a dozen states do not have laws restricting the shackling of pregnant inmates.<sup>108</sup> Even though most women are imprisoned for nonviolent crimes, the shackling of pregnant inmates disproportionately impacts Black women, who are nearly twice as likely to be incarcerated as white women.<sup>109</sup>

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

<sup>105</sup> See generally KAYE ET AL., *supra* note 101.

<sup>106</sup> See CTR. FOR REPROD. RTS., *supra* note 69 (reporting that after *Dobbs*, abortion is protected by state law in twenty-one states and the District of Columbia but is prohibited or at risk of being severely limited in twenty-six states and three territories).

<sup>107</sup> Sufrin et al., *supra* note 40, at 213.

<sup>108</sup> Joe Hernandez, *More States Are Restricting the Shackling of Pregnant Inmates, but It Still Occurs*, NPR (Apr. 22, 2022, 8:48 AM), <https://www.npr.org/2022/04/22/1093836514/shackle-pregnant-inmates-tennessee> [<https://perma.cc/25PQ-823E>].

<sup>109</sup> *Shackling of Pregnant Women in Jails and Prisons Continues*, EQUAL JUST. INITIATIVE (Jan. 29, 2020), <https://eji.org/news/shackling-of-pregnant-women-in-jails-and-prisons-continues>

Further, the shackling of female inmates during labor is not an uncommon experience and creates unacceptable health risks for the mother.<sup>110</sup> Several hospital facilities report handcuffing women's hands or ankles to bedposts during labor and after delivery.<sup>111</sup> Even shackling inmates before delivery presents health hazards to the mother.<sup>112</sup> Inmates restrained by handcuffs are at a higher risk of falling and suffering from internal bleeding or stillbirths.<sup>113</sup> Shackling inmates during labor poses even more dangerous health risks for the mother and her child.<sup>114</sup> If medical staff detect birth complications, such as a deceleration in the fetal heart rate, and are worried about fetal distress, then they may need the pregnant inmate to change delivery positions.<sup>115</sup> In other instances, medical staff need to transfer pregnant inmates to the operating room quickly when an emergency C-section is required.<sup>116</sup> When medical staff must provide emergency, time-sensitive medical care, the time it takes for staff to negotiate with prison guards to unshackle the inmate can be the difference between life and death for both the mother and her child.<sup>117</sup>

Moreover, children born to female inmates are abruptly removed from their mothers.<sup>118</sup> The children are typically removed from their mothers within twenty-four hours of giving birth.<sup>119</sup> As such, mothers frequently cannot nurse or bond with their newborns.<sup>120</sup> After giving birth, an inmate can either place their newborn up for adoption, into foster care, or with relatives.<sup>121</sup> Many incarcerated mothers also have their parental rights terminated by the court due to their incarceration, losing legal rights over

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[<https://perma.cc/C3DF-G89H>]; see AMNESTY INT'L, UNITED STATES OF AMERICA: RIGHTS FOR ALL 72 (1999), <https://www.amnesty.org/en/documents/amr51/001/1999/en> [<http://perma.cc/A83M-7WCS>] (labeling the shackling of pregnant inmates as a human rights violation and finding that female inmates are in shackles "regardless of whether [they] ha[ve] a history of violence . . . [and] regardless of whether [they] ha[ve] ever absconded or attempted to escape").

<sup>110</sup> Lorie S. Goshin, D. R. Gina Sissoko, Grace Neumann, Carolyn Sufrin & Lorraine Byrnes, *Perinatal Nurses' Experiences with and Knowledge of the Care of Incarcerated Women During Pregnancy and the Postpartum Period*, 48 JOGNN 27, 32 (2019) (finding that, among hospital nurses who said they cared for incarcerated women during pregnancy or the postpartum period, 82.9% reported that their incarcerated patients were shackled "sometimes to all of the time") (emphasis added).

<sup>111</sup> Ocen, *supra* note 10, at 1256.

<sup>112</sup> Hernandez, *supra* note 108.

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

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Ocen, *supra* note 10, at 1257.

<sup>119</sup> *Id.*

<sup>120</sup> Deborah Ahrens, *Incarcerated Childbirth and Broader "Birth Control": Autonomy, Regulation, and the State*, 80 MO. L. REV. 1, 30 (2015).

<sup>121</sup> Jennifer Warner, *Infants in Orange: An International Model-Based Approach to Prison Nurseries*, 26 HASTINGS WOMEN'S L.J. 65, 67–68 (2015).

their child.<sup>122</sup> As a result, mothers lose their visitation rights and the ability to decide how to raise their child, potentially resulting in the child's adoption without their mother's consent.<sup>123</sup>

While shackling during pregnancy affects inmates of all races today, the practice of shackling women has persistently attached to Black women since slavery. These shackling policies disproportionately affect Black women, because they are almost twice as likely to be incarcerated as white women.<sup>124</sup> Shackling pregnant inmates during labor is a degrading, dehumanizing experience that devalues a woman's bodily autonomy.<sup>125</sup> Black female inmates are shackled during labor, even if their convictions are for nonviolent crimes and they do not pose a flight risk.<sup>126</sup> This is because they are stereotyped as masculine, cunning, and dangerous, rather than being perceived as women who are deeply vulnerable due to labor and delivery.<sup>127</sup> This subjugation of Black women through prison policies allowing shackling during labor punishes Black women for exercising their choice to become mothers.<sup>128</sup> Forcing Black women to give birth under these horrendous and life-threatening conditions and then ripping their children away from them within twenty-four hours perpetuates the slavery-era stereotype that Black women are "unfit" mothers.<sup>129</sup> Further, the removal of children from their incarcerated mothers by stripping parental rights is a vestige of slavery.<sup>130</sup> Black women in prison and slaves were both subject to dehumanizing and degrading conditions of confinement that devalued their reproductive autonomy.<sup>131</sup>

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<sup>122</sup> *Id.* at 69–70.

<sup>123</sup> *Id.*; see generally EDUC. FOR JUST., TERMINATION OF PARENTAL RIGHTS (TPR) (2024), [https://www.lawhelpmn.org/sites/default/files/2024-02/f-10\\_termination\\_of\\_parental\\_rights.pdf](https://www.lawhelpmn.org/sites/default/files/2024-02/f-10_termination_of_parental_rights.pdf) [<https://perma.cc/WC5B-T797>].

<sup>124</sup> *Shackling of Pregnant Women in Jails and Prisons Continues*, *supra* note 109.

<sup>125</sup> *Ocen*, *supra* note 10, at 1258.

<sup>126</sup> *Shackling of Pregnant Women in Jails and Prisons Continues*, *supra* note 109.

<sup>127</sup> *Ocen*, *supra* note 10, at 1256.

<sup>128</sup> *Id.* at 1244.

<sup>129</sup> *Id.*

<sup>130</sup> See *Black Families Severed by Slavery*, EQUAL JUST. INITIATIVE (Jan. 29, 2018), <https://eji.org/news/history-racial-injustice-black-families-severed-by-slavery> [<http://perma.cc/9RCD-CLLB>] (stating that approximately half of all enslaved people were sold to different slave owners and separated from their families and about a quarter of slaves sold were children).

<sup>131</sup> *Ocen*, *supra* note 10, at 1258.

V. INCARCERATED WOMEN AND ABORTION: HOW THE  
EIGHTH AMENDMENT FAILS TO CONSIDER  
INSTITUTIONALIZED RACISM

The majority of federal cases that protect an inmate's right to abortion are decided using the concept of the Fourteenth Amendment's liberty interest of privacy in one's fundamental personal decisions.<sup>132</sup> However, this right to an abortion under the Fourteenth Amendment is on shaky grounds after the *Dobbs* decision.<sup>133</sup> This section will analyze avenues inmates can pursue when they are denied reproductive care and suggest that, in lieu of using the Fourteenth Amendment, prisoners should focus on pursuing § 1983 and *Bivens* claims under the Eighth Amendment. Finally, this paper will suggest that the court adopt an expanded reading of "cruel and unusual punishment" to combat structural racism in the female prison system.

A. PATHWAY TO JUSTICE: ABORTION RIGHTS IN PRISON UNDER THE  
EIGHTH AMENDMENT

The Eighth Amendment is the primary constitutional vehicle for challenging conditions of confinement.<sup>134</sup> The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."<sup>135</sup> While the original aim of the Eighth Amendment was to proscribe inhuman techniques of punishment, the Court has extended it to encompass "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."<sup>136</sup>

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<sup>132</sup> See, e.g., *Victoria W. v. Larpenter*, 369 F.3d 475, 482 (5th Cir. 2004) (holding that the denial of an inmate's elective abortion violated the inmate's Fourteenth Amendment rights but did not constitute cruel and unusual punishment because elective abortion is not as similar or intense as medical conditions that have been found to be serious medical needs under the Eighth Amendment); *Roe v. Crawford*, 514 F.3d 789, 801 (8th Cir. 2008) (holding that a prison institution's refusal to provide inmates access to elective abortions did not rise to the level of deliberate indifference, but violated the inmate's Fourteenth Amendment rights).

<sup>133</sup> *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 301 (2022) (overturning *Roe*, which protected women's right to an abortion under the Fourteenth Amendment); Mabel Felix, Laurie Sobel & Alina Salganicoff, *Legal Challenges to State Abortion Bans Since the Dobbs Decision*, KAISER FAM. FOUND. (Jan. 20, 2023), <https://www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-state-abortion-bans-since-the-dobbs-decision> [<https://perma.cc/7DZW-FAEC>]; see also *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 222 (2023) (striking down Food & Drug Administration actions that increased access to the abortion medication mifepristone, but rejecting anti-abortion organizations' challenge to the drug's initial approval in 2000).

<sup>134</sup> Ocen, *supra* note 10, at 1276.

<sup>135</sup> U.S. CONST. amend. VIII.

<sup>136</sup> *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)) (internal punctuation omitted).

Thus, inmates can allege that a state-run jail, prison practice, or policy is unconstitutional under the Eighth Amendment using a § 1983 civil action for deprivation of their rights.<sup>137</sup> 42 U.S.C. § 1983 broadly authorizes a civil cause of action against state officials for the “deprivation of any rights” secured by the Constitution.<sup>138</sup> Any litigant, including a prisoner, can use § 1983 to compel a change of state laws “when necessary to vindicate federal constitutional rights.”<sup>139</sup> As such, a prisoner can use § 1983 to seek relief that would prohibit a state from enforcing a state statute as currently written.<sup>140</sup> A typical § 1983 suit by prisoners is one challenging prison conditions, like inadequate medical care or overcrowding.<sup>141</sup>

Further, inmates can allege that a federal prison officer’s actions violate the Eighth Amendment using a *Bivens* action.<sup>142</sup> In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court held that injured plaintiffs could bring suit for damages against individual federal officers for conduct disregarding constitutional constraints.<sup>143</sup> Then, in *Carlson v. Green*, the Supreme Court held that federal prisoners could recover damages from federal officers using a *Bivens* action when an officer fails to provide an inmate with adequate medical treatment.<sup>144</sup>

The current standard of what constitutes cruel and unusual punishment in the context of inmates’ medical care is whether the prison doctors or staff demonstrate “deliberate indifference.”<sup>145</sup> In *Estelle v. Gamble*, an inmate filed a § 1983 complaint alleging that prison doctors subjected him to cruel and unusual punishment by failing to diagnose and adequately treat his back injury.<sup>146</sup> While the inmate’s claim was unsuccessful, the Court held that “deliberate indifference” by prison staff and doctors to the “serious medical

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<sup>137</sup> 42 U.S.C. § 1983 (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”).

<sup>138</sup> *Nance v. Ward*, 142 S. Ct. 2214, 2216, 2223 (2022) (holding that a § 1983 suit is the appropriate procedural vehicle for a prisoner’s method-of-execution challenge, even if the requested relief would necessitate a change in state law).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 2224.

<sup>141</sup> *Id.*

<sup>142</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (holding that federal officials may be sued in their individual capacity for violations of personal constitutional rights); see also *Ziglar v. Abbasi*, 582 U.S. 120, 138–40 (2017) (stating that the test for determining if a case presents a new *Bivens* context is if the case is different in a meaningful way from previous *Bivens* cases).

<sup>143</sup> *Bivens*, 403 U.S. at 396.

<sup>144</sup> *Carlson v. Green*, 446 U.S. 14, 24 (1980).

<sup>145</sup> *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

<sup>146</sup> *Id.* at 101.

needs” of inmates violated the Eighth Amendment.<sup>147</sup> Deliberate indifference in medical care cases violates the Eighth Amendment when there is either interference with medical care or infliction of “unnecessary suffering.”<sup>148</sup> Thus, prisons must provide medical care to prisoners because the denial of medical treatment may result in “torture or a lingering death” or “result in pain and suffering which no one suggests would serve any penological purpose.”<sup>149</sup> However, deliberate indifference requires an inmate to prove that a prison official acted knowingly to prevent, deny, or delay treatment: mere negligence is not enough on its own.<sup>150</sup>

The Supreme Court later defined a two-pronged test for deliberate indifference under the Eighth Amendment.<sup>151</sup> First, the suffered deprivation must be “objectively, sufficiently serious,” meaning a party “must show that [s]he is incarcerated under conditions posing a substantial risk of serious harm.”<sup>152</sup> Second, the prison official must be “aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”<sup>153</sup> In sum, a prison official is deliberately indifferent to an inmate’s medical needs, in violation of the Eighth Amendment, if they “know[] of and disregard[]” a serious medical need or a substantial risk to an inmate’s health or safety.<sup>154</sup> Thus, the Eighth Amendment imposes a duty on prison officials to provide humane conditions of confinement.<sup>155</sup> As such, prison officials must ensure that inmates receive adequate food, shelter, clothing, and medical care, and must “take reasonable measures to guarantee the safety of the inmates.”<sup>156</sup>

The federal courts are split on whether female inmates have a right to elective abortions under the Eighth Amendment.<sup>157</sup> Only one federal court has distinctly recognized an inmate’s right to an abortion as a right to healthcare.<sup>158</sup> In *Monmouth County Correctional Institutional Inmates v. Lanzaro*, the Third Circuit held that denying a pregnant inmate access to an elective abortion constituted deliberate indifference and violated the Eighth

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<sup>147</sup> *Id.* at 104.

<sup>148</sup> *Id.* at 103.

<sup>149</sup> *Id.* at 103–04 (explaining the common law view that “it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself”) (quoting *Spicer v. Williamson*, 132 S.E. 291 293 (N.C. 1926)) (internal quotation marks omitted).

<sup>150</sup> *Id.* at 104.

<sup>151</sup> *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

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

<sup>153</sup> *Id.* at 837.

<sup>154</sup> *Id.*

<sup>155</sup> *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984).

<sup>156</sup> *Id.*

<sup>157</sup> See Avalon Johnson, *Access to Elective Abortions for Female Prisoners Under the Eighth and Fourteenth Amendments*, 37 AM. J. L. & MED. 652, 653 (2011).

<sup>158</sup> See generally *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987).

Amendment.<sup>159</sup> The Third Circuit reasoned that a woman's constitutional right to choose an abortion survived incarceration because denying an inmate an abortion bore "no logical connection to any legitimate penological interests" and deprived the inmate of "alternative means of exercising their right."<sup>160</sup> The Third Circuit also explicitly held that the state must cover the costs associated with an inmate's abortion if they cannot afford the procedure because the state prison has an affirmative duty to ensure that medical care is provided for inmates.<sup>161</sup>

B. COLOR BLINDNESS: HOW THE EIGHTH AMENDMENT CURRENTLY FAILS TO CONSIDER HISTORICAL IMPLICATIONS OF RACE

After *Monmouth*, the Supreme Court created a general standard for measuring inmates' claims of deprivation of their constitutional rights. In *Turner v. Safley*, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."<sup>162</sup> Thus, a regulation is valid if there is a rational basis for a legitimate penological interest.<sup>163</sup> This rational basis test has limited the circumstances in which courts will recognize inmates' constitutional violation claims.<sup>164</sup>

The Supreme Court further limited the scope of inmates' Eighth Amendment claims by implicitly accepting the definition of "punishment" to mean "a deliberate act intended to chastise or deter."<sup>165</sup> In *Wilson v. Seiter*, the Court held that a prisoner's pain and suffering on its own does not fall within the protection of the Eighth Amendment.<sup>166</sup> Instead, the Court held that for conditions to constitute "punishment" and thus violate the Eighth Amendment, there must be an inquiry into a prison official's state of mind.<sup>167</sup>

A legal avenue female inmates seeking abortions in state correctional facilities could pursue is to file a § 1983 claim against a municipality for its anti-abortion policies and procedures.<sup>168</sup> Municipal liability can be based on

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<sup>159</sup> *Id.* at 351.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Turner v. Safley*, 482 U.S. 78, 89 (1987).

<sup>163</sup> *Id.*

<sup>164</sup> *Blumenthal & Brunie*, *supra* note 4, at 465.

<sup>165</sup> *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986).

<sup>166</sup> *Wilson v. Seiter*, 501 U.S. 294, 305 (1991).

<sup>167</sup> *Id.* at 302.

<sup>168</sup> *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978) (holding that a city is only liable under § 1983 when a municipal policy, practice, or decision causes a constitutional deprivation of a plaintiff's

either an express municipal policy, a “widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of the law,” or the decision of a person with “final policymaking authority.”<sup>169</sup> Further, a municipality can be held liable under § 1983 if the municipal policy or practice constitutes a deliberately indifferent failure to adopt policies necessary to prevent constitutional violations.<sup>170</sup> In *City of Canton v. Harris*, the Supreme Court held a municipality liable for failure to train its employees because the municipality’s failure demonstrated “a deliberate indifference to the constitutional rights of its inhabitants.”<sup>171</sup> The Court in *Canton* reasoned that:

[I]n light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.<sup>172</sup>

Using the Court’s standard in *Canton*, female inmates in state prisons could argue that the prison is liable under § 1983 for its anti-abortion policies.<sup>173</sup> Inmates can argue that anti-abortion policies deprived them of the Eighth Amendment right to be free from cruel and unusual punishment because these policies amount to a “deliberate indifference” of prisoners’ serious medical needs.<sup>174</sup> Enforcing anti-abortion policies in state-run prisons could amount to “deliberate indifference” to the inmates’ Eighth

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rights, that a § 1983 claim will not be satisfied by alleging only that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible, and that municipalities cannot be held liable under the doctrine of *respondeat superior*).

<sup>169</sup> *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 127 (1988) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–68 (1970)) (internal quotation marks omitted); see also *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992) (holding that to establish a municipal “policy,” a plaintiff must prove that the municipal action was (1) taken with the requisite degree of culpability and (2) causally linked to the deprivation of a federal right).

<sup>170</sup> See, e.g., *Oviatt v. Pearce*, 954 F.2d 1470, 1477 (9th Cir. 1992) (“[T]he decision not to take any action to alleviate the problem of detecting missed arraignments constitutes a policy for purposes of [§] 1983 municipal liability.”).

<sup>171</sup> *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (internal quotation marks omitted).

<sup>172</sup> *Id.* at 390.

<sup>173</sup> See *id.* at 389–91 (establishing that a local government entity is liable under § 1983 if a plaintiff can establish that (1) they possessed a constitutional right of which they were deprived, (2) the municipality had a policy, (3) this policy “amounts to deliberate indifference” to the plaintiff’s constitutional right; and (4) the policy is the “moving force behind the constitutional violation”) (internal formatting omitted).

<sup>174</sup> See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that “deliberate indifference” by prison staff and doctors to the “serious medical needs” of inmates violated the Eighth Amendment).

Amendment rights because forcing an inmate to carry her pregnancy to term poses serious physical and mental health risks for the mother.<sup>175</sup> Thus, the need for time-sensitive and low-cost prison abortion policies is “so obvious, and the inadequacy so likely to result in the violation of” the Eighth Amendment<sup>176</sup> that the prison policymakers can reasonably be said to have been deliberately indifferent to an inmate’s need for an abortion, especially if the mother’s life is in danger due to pregnancy complications.

However, using the Court’s standard in *Canton* to attach municipal liability under § 1983 to a state-run prison runs into multiple legal problems that may deter from the claim’s success. First, the *Canton* approach rests on the assumption that a state prison or jail policy is created by local government or is itself considered a municipality. The plaintiffs’ claims in *Canton* were cognizable under § 1983 municipal liability for the city’s failure to provide training to municipal employees, resulting in the deprivation of the plaintiffs’ constitutional rights.<sup>177</sup> Thus, to use municipal liability under *Canton*, a government entity, such as a city, would need to be the institution creating the anti-abortion policies, or lawyers would need to establish that a state-run correctional facility is a government entity and thus a municipality.<sup>178</sup>

Further, using the Court’s standard in *Canton* is unlikely to be successful after the Supreme Court clarified the subjective approach to Eighth Amendment violations in *Farmer v. Brennan*.<sup>179</sup> In *Farmer v. Brennan*, the Supreme Court stated that:

[T]he term [deliberate indifference] was used in the *Canton* case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents . . . . [C]onsiderable conceptual difficulty would attend any search for the subjective state of mind of a

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<sup>175</sup> See Pamela Herd, Jenny Higgins, Kamil Sicinski & Irina Merkurieva, *The Implications of Unintended Pregnancies for Mental Health in Later Life*, 106 AM. J. PUB. HEALTH 421, 425–27 (2016) (finding that unwanted pregnancies are strongly associated with poorer mental health outcomes); see also DONNA L. HOYERT, MATERNAL MORTALITY RATES IN THE UNITED STATES, 2021 3 (2023), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2021/maternal-mortality-rates-2021.pdf> [<https://perma.cc/7VW2-VVB9>] (finding that (1) 1205 women died of maternal causes in the United States in 2021 compared with 861 in 2020 and 754 in 2019 and (2) the maternal mortality rate for 2021 was 32.9 deaths per 100,000 live births, compared with a rate of 23.8 in 2020 and 20.1 in 2019).

<sup>176</sup> *Canton*, 489 U.S. at 390.

<sup>177</sup> *Id.* at 391.

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

<sup>179</sup> *Farmer v. Brennan*, 511 U.S. 825, 839 (1994).

governmental entity, as distinct from that of a governmental official.<sup>180</sup>

The *Farmer* court reasoned that *Canton* does not necessitate that a prison official who was unaware of the substantial risk of harm to an inmate could be liable under the Eighth Amendment if the risk was obvious and a reasonable prison official would have noticed.<sup>181</sup> However, the Court states that an Eighth Amendment claim can succeed if the claimant demonstrates that the official acted or failed to act despite their knowledge of a substantial risk of serious harm.<sup>182</sup> Thus, female inmates likely have a viable § 1983 claim against state prison officials for policies that inhibit abortions if the prison official knew the risk of inhibiting abortion for pregnant women.

As Professor Ocen argues, the Court's focus on the subjective intent of individual prison officials omits any consideration of how race underlies institutional practices.<sup>183</sup> The Court, in *Wilson*, focused too much on the harmful intent of individual actors instead of the effects of institutional racism on prison officials' punishment choices.<sup>184</sup> For instance, prison policies that create disproportionate barriers for incarcerated women to access abortions like requiring them to pay for their transportation and procedure, or prison officials negligently causing a prisoner to miss an abortion appointment do not qualify as "a deliberate act intended to chastise or deter" under *Wilson*.<sup>185</sup> As a result, incarcerated women suffer from these policies and the negligent decisions of prison officials.

Instead of focusing on the subjective intent of individual prison officials, the Court should adopt a revised deliberate indifference standard to evaluate the denial of reproductive care for inmates. In *Women Prisoners of the D.C. Department of Corrections v. District of Columbia*, the federal district court in the District of Columbia held that shackling a woman during labor was inhumane and violated the Eighth Amendment.<sup>186</sup> The Court held the prison official liable, reasoning that shackling a woman during labor constituted deliberate indifference because "the risk of injury to women

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<sup>180</sup> *Id.* at 841 (internal citations and quotation marks omitted).

<sup>181</sup> *Id.* at 842.

<sup>182</sup> *Id.* ("Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate . . .").

<sup>183</sup> Ocen, *supra* note 10, at 1248.

<sup>184</sup> *Id.* at 1277.

<sup>185</sup> *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (internal citations omitted).

<sup>186</sup> *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 877 F. Supp. 634, 668 (D.D.C. 1994), *modified in part on other grounds*, 899 F. Supp. 659 (D.D.C. 1995).

prisoners is obvious.”<sup>187</sup> Using this standard, inmates could argue that restricting their access to reproductive health services, including abortion, amounts to deliberate indifference because the risk of injury for a female inmate denied reproductive health services is “obvious.” Shackling women during labor poses serious health risks such as increasing the risk of falling and suffering from internal bleeding or stillbirths.<sup>188</sup> When medical staff must provide emergency, time-sensitive medical care, the time it takes for staff to negotiate with prison guards to unshackle the inmate can be the difference between life and death for both the mother and her child.<sup>189</sup> Similarly, denying female inmates reproductive health services, including abortion, poses serious physical and mental health risks.<sup>190</sup> For instance, women who are denied an abortion and give birth report more life-threatening complications like eclampsia and postpartum hemorrhage compared with those who received wanted abortions.<sup>191</sup> The risk of injury to women denied an abortion is extremely high, similar to the risk of shackling a pregnant inmate. Thus, the Court should apply the revised deliberate indifference standard found in *Women Prisoners* to evaluate the denial of abortions to inmates because the risk to a female inmate’s health from restricted reproductive care is “obvious.” Denying incarcerated women access to abortions could be seen as cruel and unusual punishment, particularly if the pregnancy is unwanted or poses a risk to the woman’s health.

Accordingly, courts should move beyond the subjective intent standard articulated in *Wilson* and embrace a deliberate indifference approach that recognizes how “the risk of injury to women prisoners is obvious” when inmates are shackled during labor or denied reproductive

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<sup>187</sup> *Women Prisoners*, 877 F. Supp. at 669 (reasoning that the shackling of pregnant women prisoners in the third trimester and after delivery poses a risk “so serious that it violates contemporary standards of decency”); see also *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 528 (8th Cir. 2009) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)) (stating that a prison official is deliberately indifferent if they “‘know[] of and disregard[]’ a serious medical need or substantial risk to an inmate’s health or safety”).

<sup>188</sup> *Hernandez*, *supra* note 108.

<sup>189</sup> *Id.*

<sup>190</sup> See *Sufrin et al.*, *supra* note 40, at 213–14 (stating that due to experiences of trauma, abuse, and substance abuse, incarcerated women typically have higher incidences of serious medical conditions, including H.I.V., hepatitis, diabetes, and cervical cancer); see also *The Turnaway Study*, ANSIRH, <https://www.ansirh.org/research/ongoing/turnaway-study> [<https://perma.cc/258V-36PS>] (last visited Jan. 26, 2024) (finding that women denied abortions are more likely to experience poor physical health for years after the pregnancy, including chronic pain and gestational hypertension); see also *Women Prisoners*, 877 F. Supp. at 669 (stating that while “the injuries which flow from the Defendants’ actions in this area are primarily psychological, there is nothing to suggest that the Eighth Amendment is limited to physical injury”).

<sup>191</sup> Caitlin Gerds, Loren Dobkin, Diana Greene Foster & Eleanor Bimla Schwarz, *Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth After an Unwanted Pregnancy*, 26 *WOMEN’S HEALTH ISSUES* 55, 58 (2016).

healthcare such as abortion access.<sup>192</sup> Acknowledging the fundamental importance of reproductive autonomy through deliberate indifference embraces a broader approach centered on a race-and-gender-conscious definition of cruel punishment.

## VI. CONCLUSION

In conclusion, race and reproductive healthcare are used as carceral tools of racial control and domination that emanate from slavery. American laws and policies have historically sought to control Black women's reproductive autonomy through slavery and involuntary sterilization. This pattern of racial and reproductive domination continues today: prisons disproportionately incarcerate Black women and then control their reproductive autonomy. Incarcerated Black women are subject to inhumane restrictions on their bodily autonomy: sterilization, shackling during pregnancy, and denial of access to an abortion even if medically necessary. These practices are inextricably linked to the explicitly racist laws during slavery and Reconstruction. The justifications for controlling Black women's reproductive autonomy are inseparable from the constructs of Black women during slavery, viewing Black women as masculine, dangerous, and incapable of good parenting. Thus, mass incarceration and the denial of reproductive health services for Black women must be abolished as a way of abolishing vestiges of slavery.

An avenue courts can pursue to abolish these vestiges of slavery is to use a revised deliberate indifference standard when prison officials deny inmates reproductive health services or shackle inmates during labor. After the *Dobbs* decision, women no longer have a federally protected right to an abortion under the Fourteenth Amendment.<sup>193</sup> As such, advocates should turn to the Eighth Amendment as the next frontier of reproductive justice for inmates. While current Eighth Amendment doctrine focuses on the subjective intentions of prison officials and omits any consideration of how race underlies institutional practices, there is hope that more courts will adopt a deliberate indifference standard like the one articulated by the federal district court in the District of Columbia.<sup>194</sup> Using this standard, inmates could argue that restricting their access to reproductive health services, like elective abortions, is deliberate indifference because the risk of injury from denying inmates reproductive healthcare is obvious. Another avenue courts could pursue is to follow the Third Circuit's reasoning that female inmates have a right to elective abortions under the Eighth

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<sup>192</sup> *Women Prisoners*, 877 F. Supp. at 669.

<sup>193</sup> *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 300–01 (2022).

<sup>194</sup> See *Wilson v. Seiter*, 501 U.S. 294, 302 (1991); *Women Prisoners*, 877 F. Supp. at 668; Ocen, *supra* note 10, at 1241.

Amendment because denying an inmate an abortion bears “no logical connection to any legitimate penological interests.”<sup>195</sup> Lastly, Congress can help end these ghosts of slavery’s past by passing a bill creating a national standard to protect pregnant inmates’ access to reproductive health services, including abortion, and calling for an end to the shackling of pregnant inmates during labor.

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<sup>195</sup> *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 351 (3d Cir. 1987).