

IMPEDIMENTS TO REPRODUCTIVE JUSTICE: THE CRIMINAL LEGAL SYSTEM AND AMERICAN CARCERAL STATE

In July 2019, at approximately four months pregnant, Lauren Kent sent a message to her jail’s private medical contractor that read: “PLEASE IM BEGGING YOU I NEED A DOCTOR.”¹ In the four weeks leading up to that message, Kent repeatedly informed guards, employees, and medical staff members of her increasingly severe abdominal pain and vaginal bleeding.² In response, nurses disparaged and belittled Kent and threatened to punish her by moving her to an increased security wing.³ Two days after sending her final message, Kent miscarried.⁴

Kent’s story reflects a larger reality of egregious reproductive injustice within the criminal legal system. The inadequate and inhumane prenatal care Kent received is just one example of numerous violations of reproductive justice: from forced sterilization of incarcerated individuals⁵ to almost immediate post-birth separation of infant and incarcerated parent,⁶ the American carceral state systematically fails to respect reproductive rights and human dignity.

Today, in a post-*Dobbs*⁷ world, legal advocates for reproductive justice⁸ focus considerable time, energy, and resources on protecting legal access to abortion.⁹ These efforts are meaningful and necessary to achieve reproductive justice in the United States. However, reproductive justice extends beyond abortion rights. Legal advocacy and scholarship must look at the overall state of reproductive rights and identify

¹ Kent v. Collin County, No. 21-CV-412, 2022 WL 949963, at *3 (E.D. Tex. Mar. 29, 2022) (quoting Plaintiffs’ Original Complaint ¶ 190, Kent, No. 21-CV-412).

² *Id.* at *2–3.

³ *Id.* at *4.

⁴ *See id.*

⁵ 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, 25–41 (2015).

⁶ *See* Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2223 (2018).

⁷ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

⁸ This Note uses “reproductive justice,” a movement and term Black advocates created to describe a “contemporary framework . . . for thinking about the experience of reproduction.” Loretta J. Ross & Rickie Solinger, *Reproductive Justice: An Introduction*, in REPRODUCTIVE JUSTICE: A NEW VISION FOR THE TWENTY-FIRST CENTURY 9, 9 (Rickie Solinger et al. eds., 2017). The term includes, but also looks beyond, abortion and contraception to create a holistic, intersectional understanding of reproduction. *See id.* at 9–12.

⁹ *See* DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 300–02 (Vintage Books 2d ed. 2017) (1997) (describing advocates’ “singular preoccupation with abortion rights,” *id.* at 302); Kimala Price, *What Is Reproductive Justice?: How Women of Color Activists Are Redefining the Pro-choice Paradigm*, MERIDIANS, Jan. 2011, at 42, 43.

larger systems of oppression that threaten bodily autonomy and perpetuate reproductive injustices.¹⁰ Looking broadly at the landscape of reproductive justice in the United States, this Note asserts that the American carceral state is one such system that must be attended to and understood as part of the effort to protect and attain reproductive justice.¹¹ This Note argues that until legal advocates reckon with the past and present intersections of reproductive rights and the criminal legal system, reproductive justice cannot be achieved.

The incompatibility of reproductive justice and incarceration is too often overlooked in reproductive rights advocacy.¹² This connection between incarceration and reproductive *in*justice in the United States extends from the original sin of slavery¹³ through to the complex legal landscape of today, marked by systemic violations of autonomy and access to essential healthcare. The injustices of the criminal legal system disproportionately impact marginalized communities and undermine the fundamental principles of bodily autonomy.¹⁴ Given that these injustices are innate to the modern criminal legal system, true reproductive justice cannot be achieved within it. And until there is a reckoning with how criminal law relates to and affects reproductive rights, legal advocates for abortion cannot fully realize reproductive justice.

In Part I, this Note briefly discusses the historical connection between the criminal legal system and reproductive coercion in the United States. Part II then considers how the current criminal legal system violates principles of reproductive justice. Finally, Part III looks forward and proposes a framework to challenge these entrenched systems of oppression. While this Note focuses on the carceral system and its

¹⁰ ROBERTS, *supra* note 9, at 301–02.

¹¹ This Note generally uses the terms “criminal legal system” and “carceral state.” The criminal legal system refers to the entire corpus of criminal law and policy in the United States, while the carceral state is an acknowledgement that the criminal legal system in the United States depends upon carceral law enforcement. See generally Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4 (2019). These carceral enforcement mechanisms include police, prisons, and the death penalty. See generally *id.*

¹² See, e.g., PLANNED PARENTHOOD, 2021–2022 ANNUAL REPORT (2022), https://cdn.plannedparenthood.org/uploads/filer_public/25/ed/25ed2675-fbbc-453b-8b35-f8ddaa025b57/281222-ppfa-annualreport-c3-digital.pdf [<https://perma.cc/R2MB-EX9H>] (omitting any mention of the criminal legal system); ALL. FOR JUST., ADVOCACY ESSENTIALS: REPRODUCTIVE RIGHTS, HEALTH, AND JUSTICE (2018), <https://afj.org/wp-content/uploads/2018/04/BA-Reproductive-Rights-Toolkit-3.pdf> [<https://perma.cc/89UU-W22N>] (same); CTR. FOR REPROD. RTS., THE FORWARD FIGHT: 2023 ANNUAL REPORT 7, 11, 15 (2023), https://reproductiverights.org/wp-content/uploads/2024/01/2023_Annual_Report_Digital.pdf [<https://perma.cc/6WVL-YDEE>] (mentioning criminalization in passing).

¹³ See Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2033–34 (2021).

¹⁴ See ROBERTS, *supra* note 9, at 4 (“How can we possibly talk about reproductive health policy without addressing race, as well as gender?”). For a discussion of how restrictions on reproductive rights are not just affronts to reproductive justice, but also racial injuries, see Khiara M. Bridges, *The Supreme Court, 2021 Term — Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 45–46 (2022) (“In this way, the fall of *Roe* inflicts a racial injury.” *Id.* at 46).

suppression of reproductive rights, this analysis operates against the backdrop of the broader reproductive justice movement and its current state.

I. REPRODUCTIVE INJUSTICE: A BRIEF HISTORY

The history of reproductive coercion in the United States reveals a fundamental connection between reproductive injustice and the criminal legal system.¹⁵ Just as the modern criminal legal system traces its roots to chattel slavery,¹⁶ so too does reproductive injustice.¹⁷ The co-evolution of these systems of oppression continued through the Jim Crow Era,¹⁸ persisted during the so-called “War on Drugs,”¹⁹ and continues into the modern post-*Dobbs* era.²⁰ While modern oppression of reproductive rights via the criminal legal system manifests acutely today, a brief look at the intertwined histories of reproductive injustice and slavery reveals that this reckoning is centuries in the making.

A. Chattel Slavery and the Antebellum South

Subjugation of reproductive rights via the criminal legal system can be traced to the nation’s inception.²¹ The survival of American chattel slavery depended upon pervasive violations of reproductive justice.²² Women who were enslaved faced egregious and systemic violations of their reproductive autonomy, enduring forced and manipulated marriages and sexual abuse from white enslavers, amongst other violations of bodily autonomy.²³ Throughout the antebellum South, white enslavers and supremacists understood that incarceration and reproductive

¹⁵ See Murray, *supra* note 13, at 2033–34.

¹⁶ Roberts, *supra* note 11, at 43–44 (outlining central tenets of abolitionism and explaining “the current carceral system is rooted in the logic of slavery,” *id.* at 44).

¹⁷ See Murray, *supra* note 13, at 2033–34; Halley Townsend, *Second Middle Passage: How Anti-abortion Laws Perpetuate Structures of Slavery and the Case for Reproductive Justice*, 25 J. CONST. L. 185, 190–200 (2023). While the carceral state and the antichoice movement share historic roots, this Note does not contend that forced pregnancy is the same affront to justice as chattel slavery. While each violates individuals’ bodily autonomy, to say they are the same is a misappropriation of the horrors of chattel slavery. Compare Debora Threedy, *Slavery Rhetoric and the Abortion Debate*, 2 MICH. J. GENDER & L. 3, 24 (1994) (discussing the incorrect appropriation of slavery rhetoric to further reproductive rights), with Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 486–93 (1990) (analogizing involuntary servitude to forced pregnancy).

¹⁸ See Murray, *supra* note 13, at 2037; Townsend, *supra* note 17, at 188, 205–06.

¹⁹ See Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, The War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC. CHANGE 381, 384–92 (2008).

²⁰ See Townsend, *supra* note 17, at 218–28.

²¹ See Murray, *supra* note 13, at 2033; Townsend, *supra* note 17, at 190.

²² Townsend, *supra* note 17, at 194.

²³ See *id.* at 193–95; Pamela D. Bridgewater, *Ain’t I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN’S L.J. 89, 115–16 (2005).

coercion created a path to economic and political control.²⁴ Following the prohibition of the international slave trade in 1808, increases in slave labor in the American South relied fully upon the reproduction of the existing enslaved population,²⁵ further solidifying enslavers' dependence upon coerced and controlled reproduction.²⁶ As a result, enslaved individuals possessed few, if any, rights to control their reproductive decisions, from the decision of when to engage in sexual activity, to whether to become pregnant in the first instance.²⁷

Understanding slavery's dependence upon forced reproduction, states enacted, and courts upheld, laws that further entrenched the reproductive abuse of enslaved individuals.²⁸ In 1662, Virginia adopted the legal doctrine of *partus sequitur ventrem* under which the slave status of a child was the same as their mother's.²⁹ In most states, rape laws did not apply to assaults of an enslaved person; rape statutes either explicitly excluded Black women from the list of individuals protected by the law, or in the case of race-neutral statutes, courts would decline to enforce the law when Black women were sexually assaulted.³⁰ Under this legal regime, enslavers could sexually assault enslaved women without legal repercussions, and any resulting children were, by law, enslaved.³¹ Enslavers also brought suit to rescind contractual sales of enslaved individuals when they discovered that an enslaved woman's inability to bear children had been concealed prior to sale.³² In at least one instance, a court found a breach of contract when an enslaved woman was found to be "incapable of bearing children without endangering her life."³³ Such cases reveal the economic importance of control

²⁴ See Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 MINN. J.L. & INEQ. 187, 203 (1987) (explaining how reproduction and the birth of enslaved individuals was "a commercial," rather than "social," event).

²⁵ Murray, *supra* note 13, at 2034 (citing ROBERTS, *supra* note 9, at 24).

²⁶ Townsend, *supra* note 17, at 188, 193.

²⁷ See *id.* at 193–95; ROBERTS, *supra* note 9, at 24; see also A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only As an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1044–45 (1992).

²⁸ See, e.g., Roberts, *supra* note 11, at 51; Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 8–10 (2006); 2 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 170 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823) [hereinafter Virginia Act XII] (reproducing Act XII); *Fulton v. Shaw*, 25 Va. (4 Rand.) 597, 598–99 (1827) (describing the enslavement status of Black children as matrilineal and a master's "absolute . . . claim to all . . . children . . . born of her body," *id.* at 598).

²⁹ See Jennifer L. Morgan, *Partus Sequitur Ventrem: Law, Race, and Reproduction in Colonial Slavery*, SMALL AXE, March 1, 2018, at 1, 1; Virginia Act XII, *supra* note 28, at 170; Townsend, *supra* note 17, at 191.

³⁰ Pokorak, *supra* note 28, at 8.

³¹ See *id.* at 9–10, 10 n.38.

³² Townsend, *supra* note 17, at 196–97.

³³ *Id.* at 197 (quoting *Hooper v. Chism*, 13 Ark. 496, 497 (1853)).

over the Black body and reproduction in the antebellum South,³⁴ part of a long history of co-opting law to force reproduction under the system of chattel slavery.

Not only do the modern carceral state and reproductive injustice share a root in slavery, but criminal law was also leveraged against enslaved individuals to reinforce reproductive control. Enslaved individuals historically faced criminal penalties including incarceration and the death penalty for asserting their reproductive autonomy, including avoiding or stopping coercive and abusive sexual contact,³⁵ and attempting to raise their children with dignity.³⁶ During the same era, white women enjoyed significantly more reproductive autonomy than their Black counterparts did, including the ability to access an abortion prior to quickening — “the point at which fetal movement could be perceived.”³⁷ White women’s ability to exercise some level of reproductive autonomy while enslaved women were criminally punished for exercising those same rights demonstrates how the slavery and carceral systems often played a critical role in perpetuating reproductive injustice. And yet, slavery and incarceration are often excluded from discussions about, and movements seeking to further, reproductive justice.³⁸

B. *Post–Civil War America and Jim Crow*

After the Civil War, the carceral system and the social antichoice movement grew and evolved side by side. Following formal emancipation, white Americans viewed the transition of previously enslaved Black Americans into the job market and larger society as a threat

³⁴ See generally *id.*; ROBERTS, *supra* note 9.

³⁵ The history of Celia, an enslaved Missouri woman who was sentenced to death for killing her enslaver in an act of self-defense after enduring years of sexual assault, highlights the brutal realities of chattel slavery. MELTON A. MCLAURIN, CELIA, A SLAVE: A TRUE STORY OF VIOLENCE AND RETRIBUTION IN ANTEBELLUM MISSOURI 29–30, 102 (1991). The trial court judge refused to stay the order of execution to allow Celia to appeal to the Missouri Supreme Court. *Id.* at 103. Celia’s story demonstrates how the systems of American chattel slavery intertwined with grave reproductive injustices.

³⁶ See, e.g., Crystal M. Hayes et al., Commentary, *Reproductive Justice Disrupted: Mass Incarceration as a Driver of Reproductive Oppression*, 110 AM. J. PUB. HEALTH S21, S23 (2020) (“Mothers who are incarcerated are immediately prevented from raising their families with dignity and in safety because they are confined.”); Townsend, *supra* note 17, at 202 (recounting the story of Margaret Garner, who attempted to escape a Kentucky plantation with her children and, once discovered, resorted to infanticide in an attempt to prevent their return to enslavement); Murray, *supra* note 13, at 2034 (discussing punishment of enslaved individuals who sought to prevent or terminate pregnancy).

³⁷ Murray, *supra* note 13, at 2034; see also MCLAURIN, *supra* note 35, at 89–102 (acknowledging that a right to self-defense against an assailant existed generally, but not for Celia as a Black slave). Black and white women were regularly “distinguished . . . as confirmation of the inferiority of Blacks generally.” Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1259 (2012).

³⁸ See Bridgewater, *supra* note 23, at 91–92 (discussing the stark omission of slavery and particularly enslaved women from discussions of reparations, feminism, and reproductive justice).

to the political and economic power of white America.³⁹ In response, white supremacists turned toward reproductive control through societal and cultural means, promoting theories of eugenics which encouraged white reproduction to neutralize the threat of the newly freed Black population.⁴⁰

These attempts to control reproduction also often relied on criminalization.⁴¹ White physicians advocated for strict midwifery bans to assuage fears that Black and Indigenous midwives threatened the hegemony of the white medical profession.⁴² These bans left many people of color without access to essential gynecological care, making reproduction more dangerous for Black and Indigenous people.⁴³ These regulations, and the eugenicist theories on which they were based, sought to exert political and economic control; by promoting white reproduction and withholding essential care, the movement hoped to neutralize the threat that newly freed Black Americans posed to the status quo.⁴⁴

To increase white reproduction, physicians also advocated for regulations criminalizing abortion and contraceptives.⁴⁵ Following the Civil War, a decades-long anti-abortion movement began. By 1910, abortion was illegal across the United States.⁴⁶ Furthermore, federal “chastity laws” such as the Comstock Act of 1873⁴⁷ made it a crime to disseminate birth control, or information about birth control or pregnancy termination, either by mail or across state lines.⁴⁸ The universal regulation and criminalization of reproductive rights after chattel slavery evinces the continued coevolution of the carceral state and reproductive injustice in the United States.

In addition to universal restrictions on abortion, people in carceral settings — primarily Americans of color and recently emancipated individuals — suffered reproductive injustices within the carceral system. Incarceration, particularly the incarceration of women, grew

³⁹ See Avidit Acharya et al., *The Political Legacy of American Slavery*, 78 J. POL. 621, 622 (2016).

⁴⁰ Murray, *supra* note 13, at 2036–37 (charting the coinciding growth of the antichoice movement and interest in eugenics in the United States).

⁴¹ See, e.g., Ocen, *supra* note 6, at 2210 (describing the incarceration of women who “[b]y virtue of these expressions of independence, sexuality, and reproductive autonomy . . . were deemed to be deviant women and bad mothers”).

⁴² Michele Goodwin, *The Racist History of Abortion and Midwifery Bans*, ACLU (July 1, 2020), <https://www.aclu.org/news/racial-justice/the-racist-history-of-abortion-and-midwifery-bans> [https://perma.cc/K4WG-NXH4].

⁴³ *Id.*

⁴⁴ See *id.*

⁴⁵ See Murray, *supra* note 13, at 2035.

⁴⁶ KAREN J. LEWIS & JON O. SHIMABUKURO, CONG. RSCH. SERV., 95-724A, ABORTION LAW DEVELOPMENT: A BRIEF OVERVIEW 1–2 (2001).

⁴⁷ An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use (Comstock Act), ch. 258, 17 Stat. 598 (1873).

⁴⁸ See Cynthia Soohoo, *Reproductive Justice and Transformative Constitutionalism*, 42 CARDOZO L. REV. 819, 840 (2021).

significantly after the Civil War under the pretense of thwarting immorality and punishing behavior perceived as unbecoming.⁴⁹ The increased incarceration of women acted as a useful tool for white supremacists to control and suppress reproduction through incapacitation.⁵⁰ During the Jim Crow Era, many states allowed — and in some cases legally required — the forced sterilization of incarcerated individuals.⁵¹ Incarcerated individuals also faced “horrific gynecological experiment[ation],” and “physical and sexual abuse.”⁵²

C. *The War on Drugs*

As the Jim Crow Era ended with the passage of the Civil and Voting Rights Acts in 1964⁵³ and 1965,⁵⁴ the modern pro-choice movement began to gain momentum.⁵⁵ The movement, again championed primarily by white medical professionals, focused on the right to abortion.⁵⁶ However, while advocates successfully pushed state-level abortion reform in the late 1960s and early 1970s,⁵⁷ President Richard Nixon simultaneously unveiled a set of punitive policies under the banner of the “War on Drugs.”⁵⁸ This so-called “war” utilized the carceral system to target primarily Black people and was rooted in historical trends of anti-drug sentiment and the falsification of drug use statistics.⁵⁹ Building on President Nixon’s punitive drug policies, President Ronald Reagan reinvigorated the War on Drugs after taking office in 1981.⁶⁰ Under the Reagan Administration, Congress “increased federal drug sentences, . . . introduced ‘mandatory minimum sentences for simple possession,’” and targeted communities of color.⁶¹ The racist weaponization of the criminal

⁴⁹ Ocen, *supra* note 6, at 2208–09.

⁵⁰ See *id.* at 2208.

⁵¹ See Soohoo, *supra* note 48, at 844.

⁵² Ocen, *supra* note 6, at 2211–12.

⁵³ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6).

⁵⁴ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702).

⁵⁵ See R. Sauer, *Attitudes to Abortion in America, 1800–1973*, 28 POPULATION STUD. 53, 63–64 (1974).

⁵⁶ See HADLEY DYNAK ET AL., U.C.S.F. CTR. FOR REPROD. HEALTH RSCH. & POL’Y, HONORING SAN FRANCISCO’S ABORTION PIONEERS 11 (2003) (describing the medical advocacy of physicians in igniting the pro-choice movement of the 1960s and ‘70s).

⁵⁷ *Historical Abortion Law Timeline: 1850 to Today*, PLANNED PARENTHOOD [hereinafter, *Abortion Law Timeline*], <https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america/historical-abortion-law-timeline-1850-today> [https://perma.cc/CX5E-3JUE].

⁵⁸ See Ehrlich, *supra* note 19, at 385.

⁵⁹ See *id.* at 384–85 (tracing President Nixon’s war on drugs to early twentieth-century fear-mongering tactics and racism).

⁶⁰ *Id.* at 385.

⁶¹ *Id.* at 385–86 (quoting JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS 27 (2001)) (specifying that federal laws imposed harsher penalties for the possession of crack cocaine, predominantly found in communities of color, compared to powder cocaine, predominantly found in white communities).

legal system, a hallmark of the War on Drugs, imposed new systemic restrictions on reproductive rights.⁶²

During the racialized War on Drugs, abortion advocates often overlooked the reproductive injustices faced by incarcerated individuals; instead, they focused on the push for national abortion rights, culminating in the *Roe*⁶³ decision.⁶⁴ As such, while advocates successfully shaped aspects of the legal landscape,⁶⁵ a parallel narrative unfolded — one that starkly contradicted the ideals of autonomy and bodily integrity championed by reproductive rights activists. As *Roe* solidified reproductive rights for some women, many people of color and low-income individuals faced increased criminalization and, as a result, additional reproductive injustices.⁶⁶ Pregnant people of color faced reproductive injustice as federal and state governments passed new laws punishing or penalizing individuals for “actions interpreted as harmful to their own pregnancies,” such as the use of drugs while pregnant.⁶⁷ Governments pushed to incarcerate pregnant people for drug use,⁶⁸ and American media spread unsupported stories of pregnant people’s cocaine use resulting in fetal harm.⁶⁹

Such legal and social trends highlight a continued interconnection between reproductive oppression and the carceral system. Reproductive rights advocates often overlook the historical and current reproductive injustices that chattel slavery, Jim Crow, and the War on Drugs perpetuated.⁷⁰ The exclusion of these injustices from the reproductive rights conversation, coupled with the pro-choice movement’s primary focus on abortion and contraception, has left a critical gap in scholarly discourse and in legal advocacy.

⁶² See *id.* at 387–92.

⁶³ *Roe v. Wade*, 410 U.S. 113 (1973).

⁶⁴ See, e.g., Arielle Bernhardt, *U.S. Groups Campaign to Legalize Abortion, 1969–1973*, GLOB. NONVIOLENT ACTION DATABASE (Apr. 17, 2010), <https://nvdatabase.swarthmore.edu/content/us-groups-campaign-legalize-abortion-1969-1973> [<https://perma.cc/L79W-XRGK>] (describing the various reproductive rights advocacy groups and their focus on abortion, with no focus on incarcerated individuals).

⁶⁵ See *id.* (charting the many successes of reproductive rights advocates).

⁶⁶ See Ehrlich, *supra* note 19, at 387–92; see also Lynn M. Paltrow, *The War on Drugs and the War on Abortion: Some Initial Thoughts on the Connections, Intersections and Effects*, 28 S.U. L. REV. 201 (2001), as reprinted in 10 REPROD. HEALTH MATTERS 162, 168 (2002).

⁶⁷ AMNESTY INT’L, CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA 5 (2017), <https://www.amnesty.org/en/wp-content/uploads/2021/05/AMR5162032017ENGLISH.pdf> [<https://perma.cc/PY58-NPDR>]; see also *id.* at 22–23.

⁶⁸ *Id.* at 19–20.

⁶⁹ *Id.* at 22.

⁷⁰ See *supra* note 12 and accompanying text (analyzing reproductive advocacy groups’ omission of incarceration).

II. THE MODERN CARCERAL SYSTEM AND REPRODUCTIVE INJUSTICE

The carceral system's connection with reproductive injustice is not merely a historical phenomenon.⁷¹ The modern carceral system has historical roots in racism: from chattel slavery, to Jim Crow, to the War on Drugs, up until today.⁷² To achieve reproductive justice in the United States, legal advocates must both understand the perpetuation of such injustices via the criminal legal system and reckon with the interconnectedness of these systems of oppression. Today, incarcerated individuals, and those who face the threat of incarceration, enjoy fewer rights, face poorer health outcomes, and have less access to resources that bolster reproductive autonomy.⁷³

The carceral state perpetuates state-sanctioned violations of reproductive rights.⁷⁴ This Part focuses first on injustices faced by incarcerated individuals and those within the criminal legal system. The Part then highlights the ways in which the growing threat of criminalization further inhibits reproductive justice. Today, the criminal legal system acts as a conduit for state-sanctioned violations of reproductive rights, a trend legal advocates for abortion must confront to realize reproductive justice.

A. *Within the Carceral State*

Within the carceral system, individuals are subject to a myriad of reproductive injustices, ranging from forced sterilization to the denial of adequate maternal and reproductive healthcare.⁷⁵ These injustices are often overlooked by legal advocates for reproductive rights.⁷⁶ To

⁷¹ See generally KATHERINE FLEMING, PREGNANCY JUST., WHEN FETUSES GAIN PERSONHOOD: UNDERSTANDING THE IMPACT ON IVE, CONTRACEPTION, MEDICAL TREATMENT, CRIMINAL LAW, CHILD SUPPORT, AND BEYOND (2022), <https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/fetal-personhood-with-appendix-UPDATED-1.pdf> [<https://perma.cc/3VHC-79CG>] (discussing historical and modern trends of criminalizing pregnant people, *id.* at 2).

⁷² See Roberts, *supra* note 11, at 4 (connecting the current criminal legal system to American chattel slavery); *supra* notes 51–62 and accompanying text.

⁷³ See generally Hayes et al., *supra* note 36. Magnifying the reproductive injustice of the American criminal legal system today is the sheer scale of that system. The United States is home to over 20% of the world's incarcerated population despite making up less than 5% of the global population. *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> [<https://perma.cc/7ATC-TBD6>]. Millions of people are held in the American carceral system, and millions more are at various stages of the criminal legal system or face some persistent risk of incarceration. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html> [<https://perma.cc/442T-AMYH>] (finding that nearly two million people are currently incarcerated). These individuals are disproportionately people of color. *Id.*

⁷⁴ Hayes et al., *supra* note 36, at S21.

⁷⁵ See generally *id.*

⁷⁶ See *supra* note 12 and accompanying text (discussing reproductive advocacy groups' omission of incarceration).

achieve reproductive justice, it is imperative that these systemic violations be brought into the reproductive rights discourse.

1. *The Fundamental Decision to Have Children.* — Incarceration *itself* interferes with reproductive justice because it “interferes with people’s abilities to decide if and when to have children.”⁷⁷ The reproductive injustice of incarceration has been acknowledged and nevertheless upheld by courts.⁷⁸ In 2002, the Ninth Circuit held that while certain constitutional rights, such as the right to marry,⁷⁹ follow an individual even when they are incarcerated, the rights to “bearing and rearing of children[] are superseded by the fact of confinement.”⁸⁰

Discrete reforms cannot adequately rectify the affront to reproductive justice the carceral system poses. Because female “fertility . . . declines with age,” and because “most incarcerated [people] are confined during their childbearing years,” incarceration can, and often does, “preclude[] reproduction.”⁸¹ This core violation of reproductive rights existed in carceral settings long before the Court reversed *Roe*, and long before *Roe* itself.

2. *Forced and Coerced Sterilization.* — As the Court stated in *Skinner v. Oklahoma*,⁸² an individual who is sterilized against their will suffers “irreparable injury . . . [and] is forever deprived of a basic liberty.”⁸³ Despite this assertion, the Court did not wholly reject states’ power to authorize sterilization in furtherance of state policy.⁸⁴ Indeed, thirty-one states and Washington, D.C. legally allow forced, permanent sterilization.⁸⁵ Forced sterilizations occurred as recently as 2011 in state prisons⁸⁶ and 2020 in immigration detention centers, often by physicians who failed to disclose what procedures they performed and without

⁷⁷ See Hayes et al., *supra* note 36, at S22.

⁷⁸ See, e.g., Gerber v. Hickman, 291 F.3d 617, 621–23 (9th Cir. 2002).

⁷⁹ See *id.* at 625 (citing Turner v. Safley, 482 U.S. 78, 96 (1987) (holding that there is “a constitutionally protected marital relationship in the prison context”).

⁸⁰ *Id.* at 621 (quoting Goodwin v. Turner, 702 F. Supp. 1452, 1454 (W.D. Mo. 1988)). This ruling relied on precedent from many other circuits. See, e.g., *id.* at 627 (citing, inter alia, Hernandez v. Coughlin, 18 F.3d 133, 137 (2d Cir. 1994); Davis v. Carlson, 837 F.2d 1318, 1319 (5th Cir. 1988) (per curiam); Bellamy v. Bradley, 729 F.2d 416, 420 (6th Cir. 1984)).

⁸¹ Hayes et al., *supra* note 36, at S22.

⁸² 316 U.S. 535 (1942).

⁸³ *Id.* at 541.

⁸⁴ See *id.* at 538–41 (distinguishing Buck v. Bell, 274 U.S. 200 (1927), and purporting “not to reexamine the scope of the police power of the States,” *id.* at 541). Forced sterilization is banned in only two states, and the majority of states will allow for the forced sterilization with the approval of a judge. See NAT’L WOMEN’S L. CTR., FORCED STERILIZATION OF DISABLED PEOPLE IN THE UNITED STATES 15 (2021) [hereinafter FORCED STERILIZATION REPORT], https://nwlc.org/wp-content/uploads/2022/01/%C6%92.NWLC_SterilizationReport_2021.pdf [<https://perma.cc/ZSP4-62D3>].

⁸⁵ FORCED STERILIZATION REPORT, *supra* note 84, at 15.

⁸⁶ See ELAINE M. HOWLE, CAL. STATE AUDITOR, STERILIZATION OF FEMALE INMATES 1 (2014), <https://www.auditor.ca.gov/pdfs/reports/2013-120.pdf> [<https://perma.cc/JE58-KYFD>].

adequate informed consent.⁸⁷ Communities of color, specifically those individuals of color who are incarcerated or are facing incarceration, disproportionately suffer under such sterilization laws.⁸⁸

A series of egregious, recent forced sterilizations are rooted in modern reliance on a 1909 California law, which permitted forced sterilization of certain incarcerated individuals perceived to suffer from mental illnesses that could be genetically transmitted.⁸⁹ While the law was repealed in 1979 — after a reported 20,000 sterilizations⁹⁰ — the practice continued. An estimated 150 incarcerated individuals in California were sterilized after 2006, with some forced sterilizations performed as recently as 2011.⁹¹ At twenty-four, Kelli Dillon, who was incarcerated at Central California Women’s Facility, was told that she was undergoing an operation to biopsy potentially cancerous cysts.⁹² The doctor instead removed “her ovaries and part of her fallopian tubes,” but told Dillon he only “took out some cysts” and that she could still have children.⁹³ Dillon realized she was sterilized a year later, when a lawyer requested her medical records.⁹⁴ After Dillon brought suit against the California Department of Corrections and Rehabilitation for her forcible sterilization, the Center for Investigative Reporting launched an investigation.⁹⁵ The investigation found that the most individuals sterilized in accordance with the 1909 law were women of color, whom the staff “deemed likely to be incarcerated again.”⁹⁶ One doctor justified his actions by describing his desire to save the state and taxpayers money by reducing the need for welfare via forced sterilization.⁹⁷ Similar injustices occurred to incarcerated individuals in North Carolina and Virginia, and

⁸⁷ See Sabrina Davis, *Unrepeatable Harms: Forced Sterilization at ICE Detention Centers*, 25 HUM. RTS. BRIEF 153, 153–57 (2022).

⁸⁸ See FORCED STERILIZATION REPORT, *supra* note 84, at 8.

⁸⁹ Alexandra Minna Stern et al., Commentary, *California’s Sterilization Survivors: An Estimate and Call for Redress*, 107 AM. J. PUB. HEALTH 50, 50 (2017).

⁹⁰ *Id.*

⁹¹ Bill Chappell, *California’s Prison Sterilizations Reportedly Echo Eugenics Era*, NPR (July 9, 2013, 3:06 PM), <https://www.npr.org/sections/thetwo-way/2013/07/09/200444613/californias-prison-sterilizations-reportedly-echoes-eugenics-era> [<https://perma.cc/J8A6-LYPY>]; HOWLE, *supra* note 86, at 1; see also Stern et al., *supra* note 89, at 50 (estimating that “[a]s of 2016, . . . as many as 831” victims of forced sterilizations performed under the California law were alive).

⁹² Ko Bragg, “*Belly of the Beast*” Spotlights Forced Sterilizations in California Prisons, THE 19TH (Oct. 15, 2020, 2:37 PM), <https://19thnews.org/2020/10/belly-of-the-beast-forced-sterilizations-california-prisons> [<https://perma.cc/42C4-KA7Y>].

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Shilpa Jindia, *Belly of the Beast: California’s Dark History of Forced Sterilizations*, THE GUARDIAN (June 30, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/jun/30/california-prisons-forced-sterilizations-belly-beast> [<https://perma.cc/W5TY-9VQL>].

⁹⁶ *Id.*

⁹⁷ *Id.*

all three states maintain outreach and compensation programs to notify and compensate victims and families.⁹⁸

Similarly, forced sterilization within immigration incarceration facilities continues.⁹⁹ People who have immigrated to the United States frequently find themselves in carceral immigration centers, which mirror the conditions of federal and state prisons across the United States.¹⁰⁰ In 2020, a whistleblower report filed by a nurse at a carceral immigration facility in Ocilla, Georgia alleged that the facility had performed invasive, nonconsensual hysterectomies on immigrant women detained by ICE.¹⁰¹ Following the report, testimony from other women corroborated the story and revealed a broader pattern of reproductive injustice within ICE facilities.¹⁰² Although they endured violations of reproductive justice, those detained and sterilized by ICE face significant barriers to asserting their legal rights and seeking remedies.¹⁰³ In addition to legal barriers, many individuals in such circumstances face language barriers and coercion, including deportation as a punishment for reporting.¹⁰⁴

Ultimately, despite credible, modern reports of forced sterilization in carceral settings, such injustices are often considered relics of the past and are rarely centered within the landscape of reproductive rights.¹⁰⁵ Legal scholarship and modern reporting often detail the “history” of sterilization in carceral systems.¹⁰⁶ In addition, legal advocacy surrounding sterilization is often “viewed as distinct from . . . traditional

⁹⁸ *Id.* Similar stories of coerced sterilization occur throughout the criminal legal system. A Tennessee judge was reprimanded in 2017 for offering to reduce the jail sentence of a convicted woman if she agreed to sterilization, an offer the judge made to multiple individuals so they could “make something of themselves.” Derek Hawkins, *Judge to Inmates: Get Sterilized and I’ll Shave Off Jail Time*, WASH. POST (July 21, 2017, 8:19 PM), <https://www.washingtonpost.com/news/morning-mix/wp/2017/07/21/judge-to-inmates-get-sterilized-and-ill-shave-off-jail-time> [https://perma.cc/5JFX-DJV3].

⁹⁹ See Davis, *supra* note 87, at 153.

¹⁰⁰ See JESSE FRANZBLAU, NAT’L IMMIGRANT JUST. CTR., A LEGACY OF INJUSTICE: THE U.S. CRIMINALIZATION OF MIGRATION 3–4 (2020), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-07/NIJC-Legacy-of-Injustice-report_2020-07-22_FINAL.pdf [https://perma.cc/7M47-WM9G].

¹⁰¹ Davis, *supra* note 87, at 153–54.

¹⁰² See Helen Jennings, “*He’s the Uterus Collector*” *The Reproductive Rights of Women in ICE Detention: An Opportunity to Protect the Constitutional Rights of Federal Detainees in Privately Run Facilities*, 23 GEO. J. GENDER & L. 53, 55–56 (2021).

¹⁰³ *Id.* at 61–69 (discussing three barriers to a successful claim).

¹⁰⁴ *Id.* at 56, 69.

¹⁰⁵ Many scholars and outlets discuss forced sterilization in historical terms. See, e.g., Matthew Wills, *When Forced Sterilization Was Legal in the U.S.*, JSTOR DAILY (Aug. 3, 2017), <https://daily.jstor.org/when-forced-sterilization-was-legal-in-the-u-s> [https://perma.cc/NS3Z-2ELY].

But see Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 WM. & MARY L. REV. 1599, 1606–07 (2022) (documenting the relationship between historical forced sterilization and Justice Thomas’s legal reasoning surrounding abortion).

¹⁰⁶ See, e.g., MARK A. LARGENT, BREEDING CONTEMPT: THE HISTORY OF COERCED STERILIZATION IN THE UNITED STATES 145 (2008) (briefly discussing the history of legal sterilization of incarcerated or convicted individuals).

reproductive rights concerns.¹⁰⁷ Courts too often tend to consider sterilization, particularly carceral sterilization, as distinct from other reproductive rights.¹⁰⁸ This disjunction between sterilization and other reproductive injustices, coupled with the lack of attention given to incarcerated individuals' unique vulnerability, creates a gap in modern reproductive rights advocacy and scholarship and presents an opportunity for the movement to address an ongoing wrong.

3. *Access to Contraception and Abortion.* — Even before *Dobbs*, the right to affirmatively access contraception and abortion healthcare featured heavily in the Supreme Court's jurisprudence concerning reproductive rights.¹⁰⁹ Despite jurisprudence affirming the constitutional right to abortion for incarcerated women,¹¹⁰ incarcerated individuals are often denied access to contraceptives and abortion through legal restrictions and institutional barriers.¹¹¹ Discussions of these injustices appear infrequently in scholarly literature and legal advocacy¹¹² and should be reckoned with as a part of the reproductive justice movement.

Institutional barriers permeate the carceral system, even in states where abortion and contraception are not restricted by law.¹¹³ Although a majority of incarcerated women express a desire to begin contraception before release, most prisons and jails fail to offer contraceptive access.¹¹⁴ Many are not equipped to enable continued use of pre-incarceration contraceptive methods.¹¹⁵ Especially for those individuals “in short stay jails with unpredictable release dates,” there is a heightened “risk of unplanned pregnancy upon [release and] reentry.”¹¹⁶ While

¹⁰⁷ Murray, *supra* note 105, at 1635.

¹⁰⁸ See *id.* at 1606 (describing the usually separate topics of abortion, sterilization, and reproductive rights).

¹⁰⁹ See Sonia M. Suter, *The “Repugnance” Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1517 (2008) (“Although the Supreme Court has developed a substantial body of law that defines reproductive rights, this jurisprudence has focused principally on decisions regarding contraception and abortion.”).

¹¹⁰ See, e.g., Rachel Roth, *Do Prisoners Have Abortion Rights?*, 30 FEMINIST STUD. 353, 359 (2004) (highlighting an Ohio district court case that found certain barriers to incarcerated women accessing abortion unconstitutional).

¹¹¹ *Id.*; see also Hayes et al., *supra* note 36, at S22.

¹¹² See sources cited *supra* note 12 (explaining reproductive advocacy groups' omission of incarceration).

¹¹³ See Diana Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict with Constitutional Standards?*, 41 PERSPS. ON SEXUAL & REPROD. HEALTH 59, 59 (2009).

¹¹⁴ Carolyn Sufrin et al., *Reproductive Justice, Health Disparities and Incarcerated Women in the United States*, 47 PERSPS. ON SEXUAL & REPROD. HEALTH 213, 216 (2015) (“60% [of incarcerated women] want to start birth control before their release in order to avoid barriers to access in [their] communit[ies]. However, . . . very few facilities provide on-site access to contraceptives in preparation for release.” (footnote omitted)).

¹¹⁵ See Comm. on Health Care for Underserved Women, *ACOG Committee Opinion Number 830: Reproductive Health Care for Incarcerated Pregnant, Postpartum, and Nonpregnant Individuals*, 138 OBSTETRICS & GYNECOLOGY e24, e26 (2021) [hereinafter ACOG Committee Opinion].

¹¹⁶ Hayes et al., *supra* note 36, at S23.

media attention paid to threats to contraception has increased,¹¹⁷ advocates and scholars often fail to acknowledge that even before *Dobbs*, incarcerated women were regularly denied access to contraceptive care.¹¹⁸

Barriers to accessing abortion during incarceration are similarly overlooked. Since before *Dobbs*, the accessibility of abortion for an individual in a federal or state prison was contingent on the facility's geographic location, potentially resulting in the denial of abortion services.¹¹⁹ This patchwork abortion care regime underscores the arbitrariness and lack of uniformity in reproductive healthcare provision innate to the federal prison system. Moreover, multiple states require incarcerated individuals to bear financial responsibility for the procedure and related security measures.¹²⁰ Some states simply label the procedure as “elective” and require prisoners to “pay[] for transportation[,] . . . security[,] . . . [and] the abortion itself.”¹²¹ Such incarceration-specific hurdles contribute to a broader context of reproductive injustice in the United States, where restrictive laws already curtail abortion access.

4. *Conditions of Pregnancy.* — In 2016, national statistics on pregnancy and incarceration were collected by the Pregnancy in Prisons Statistics Project.¹²² In 2016 alone, nearly 1,400 pregnant people were admitted to prisons, leading to “753 live births” while incarcerated.¹²³ Today, pregnant incarcerated individuals face numerous challenges, including inadequate and untimely care, shackling in violation of obstetric best practices, and inhumane separation of infants from parents.¹²⁴ All this, despite the Court's holding that healthcare while incarcerated, including healthcare during pregnancy, is a constitutional right.¹²⁵

¹¹⁷ See, e.g., Lisa Marshall, *Post-Roe, Contraception Could Be Next*, CU BOULDER TODAY (Oct. 9, 2023), <https://www.colorado.edu/today/2023/10/09/post-ro-contraception-could-be-next> [<https://perma.cc/FSX5-LBJZ>]; Sarah McCammon, *What Would Overturning Roe Mean for Birth Control?*, NPR (May 11, 2022, 9:31 AM), <https://www.npr.org/2022/05/11/1097666334/roe-birth-control> [<https://perma.cc/67GW-MYSY>].

¹¹⁸ See, e.g., Leah R. Fowler & Michael R. Ulrich, *Femtechnodystopia*, 75 STAN. L. REV. 1233, 1242 (2023) (discussing access to contraceptives in the United States, but neglecting to mention access to contraceptives for incarcerated individuals).

¹¹⁹ Martha Paynter et al., *Abortion and Contraception for Incarcerated People: A Scoping Review*, 18 PLOS ONE, Mar. 30, 2023, at 1, 2.

¹²⁰ Roth, *supra* note 110, at 366–67.

¹²¹ *Id.*

¹²² *Pregnancy in Prison Statistics (PIPS) Project*, ADVOC. & RSCH. ON REPROD. WELLNESS OF INCARCERATED PEOPLE, <https://arrwip.org/projects/pregnancy-in-prison-statistics-pips-project> [<https://perma.cc/UW5E-TJYA>].

¹²³ Carolyn Sufrin et al., *Pregnancy Outcomes in US Prisons, 2016–2017*, 109 AM. J. PUB. HEALTH 799, 799 (2019). A similar number of births was reported in 2019, reflecting a steady number of pregnant individuals in the American carceral system year to year. Hayes et al., *supra* note 36, at S22.

¹²⁴ Hayes et al., *supra* note 36, at S22–23.

¹²⁵ See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (holding that incarcerated individuals are entitled to medical care because they depend on prison authorities to meet their medical needs).

Despite the Court's affirmation of the constitutional right to healthcare for those in custody, "many jails and prisons provide substandard, minimal, or even dangerous prenatal care."¹²⁶ There is no governing body that ensures correctional facilities adhere to a prescribed set of essential healthcare services, including adequate pregnancy care.¹²⁷ While guidelines exist, the absence of standardized regulations, oversight, and avenues for legal recourse in carceral healthcare contributes significantly to the variability in prenatal care provided to incarcerated individuals.¹²⁸ Recall Lauren Kent, the woman whose miscarriage symptoms were ignored for weeks.¹²⁹ She is one of many incarcerated individuals who are unable to receive basic maternal healthcare. Similar stories report pregnant individuals deprived of caloric and nutritional needs, laboring alone in cells after begging for help, and being refused post-labor medical care.¹³⁰

Aside from neglectful and inadequate care, pregnant individuals in custody are often subjected to practices that violate both their dignity and "the core principles of reproductive justice,"¹³¹ including unnecessary shackling and solitary confinement.¹³² The practice of shackling incarcerated pregnant individuals during labor, birth, and postpartum presents substantial dangers to maternal and fetal well-being.¹³³ Despite federal- and state-level prohibitions, as well as international restrictions on the shackling of pregnant individuals, data indicate that prisons vary in compliance and consistency.¹³⁴ Shackling while pregnant elevates the risk of falls, compromising safety for both the pregnant

¹²⁶ Hayes et al., *supra* note 36, at S22.

¹²⁷ See ACOG Committee Opinion, *supra* note 115, at e25; Brendan Saloner et al., *A Human Rights Framework for Advancing the Standard of Medical Care for Incarcerated People in the United States in the Time of COVID-19*, 24 HEALTH & HUM. RTS. J. 59, 63–66 (2022) (discussing the lack of national standards for correctional health care).

¹²⁸ See ACOG Committee Opinion, *supra* note 115, at e25.

¹²⁹ See *supra* p. 2320.

¹³⁰ See, e.g., Roxanne Daniel, *Prisons Neglect Pregnant Women in Their Healthcare Policies*, PRISON POL'Y INITIATIVE (Dec. 5, 2019), <https://www.prisonpolicy.org/blog/2019/12/05/pregnancy/> [<https://perma.cc/SP93-QDEB>]; Mariel Padilla, *Woman Gave Birth in Denver Jail Cell Alone, Lawsuit Says*, N.Y. TIMES (Sept. 1, 2019), <https://www.nytimes.com/2019/09/01/us/diana-sanchez-birth-denver-jail.html> [<https://perma.cc/GNZ3-GF9E>].

¹³¹ Hayes et al., *supra* note 36, at S21.

¹³² Camille Kramer et al., *Shackling and Pregnancy Care Policies in US Prisons and Jails*, 27 MATERNAL & CHILD HEALTH J. 186, 187 (2023) (detailing the practice of shackling in American prisons, which typically involves the use of restraints such as "handcuffs, leg shackles, [or] belly chains"); ACLU, *STILL WORSE THAN SECOND-CLASS: SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES* 7, 9 (2019), <https://www.aclu.org/publications/worse-second-class-solitary-confinement-women-united-states> [<https://perma.cc/TTZ2-7467>] (explaining the use of solitary confinement in U.S. prisons despite the practice being internationally condemned, disfavored by the Department of Justice, and medically dangerous).

¹³³ See Kramer et al., *supra* note 132, at 187, 191.

¹³⁴ *Id.* at 186–91 ("Data indicate that pregnancy policies and services in prisons and jails vary and compliance inconsistencies with anti-shackling legislation exist." *Id.* at 186.); see also Samantha Laufer, Note, *Reproductive Healthcare for Incarcerated Women: From "Rights" to "Dignity,"* 56 AM. CRIM. L. REV. 1785, 1796 (2019).

individual and the fetus.¹³⁵ The practice of restraining through shackling can also impede blood circulation for pregnant individuals, heightening the potential for complications, including fatal blood clots.¹³⁶ Moreover, the psychological impact of being physically restrained during pregnancy contributes to increased stress and anxiety, negatively affecting the well-being of both the parent and the developing fetus.¹³⁷ A lack of oversight and accountability among custody officers, insufficient awareness of the laws within hospitals, and punitive attitudes toward pregnant incarcerated individuals allow these violative acts to persist, inhibiting reproductive justice and violating the bodily autonomy of pregnant individuals in carceral settings.¹³⁸

Finally, the systematic separation of incarcerated mothers from their newborns is a pervasive practice throughout the carceral system that violates reproductive dignity.¹³⁹ The practice raises myriad medical concerns for parent and child, disrupting critical early bonding opportunities between parents and newborns, including denying both parties the benefits of breastfeeding.¹⁴⁰ The perpetuation of this separation within carceral settings undermines the fundamental right to parent in a dignified manner.¹⁴¹ The routine deprivation of essential parent-child bonding not only exacerbates the challenges of reentry for the parent but also hampers the infant's potential for healthy emotional attachment,¹⁴² perpetuating a cycle of intergenerational reproductive injustice.¹⁴³

Incarcerated pregnant individuals are often ignored in discussions of reproductive rights and advocacy.¹⁴⁴ The lack of engagement with carceral reproductive injustice is exacerbated by the decentralized nature of the carceral system and the according lack of reliable national data.¹⁴⁵ Addressing reproductive injustices within the carceral system requires integrating them into the larger discourse on reproductive rights,

¹³⁵ Alison L. Smock, *Childbirth in Chains: A Report on the Cruel but Not So Unusual Practice of Shackling Incarcerated Pregnant Females in the United States*, 3 TENN. J. RACE, GENDER & SOC. JUST. 111, 121 (2014); see Kramer et al., *supra* note 132, at 191.

¹³⁶ Susan Hatters Friedman et al., *The Realities of Pregnancy and Mothering While Incarcerated*, 48 J. AM. ACAD. PSYCHIATRY & L. 365, 367 (2020).

¹³⁷ Smock, *supra* note 135, at 120; see Friedman et al., *supra* note 136, at 367.

¹³⁸ See Laufer, *supra* note 134, at 1798.

¹³⁹ See Friedman et al., *supra* note 136, at 368.

¹⁴⁰ Hayes et al., *supra* note 36, at S23.

¹⁴¹ *Id.*

¹⁴² Smock, *supra* note 135, at 122.

¹⁴³ See Hayes et al., *supra* note 36, at S23.

¹⁴⁴ *Id.* at S22 (“Women behind bars have been largely eclipsed in broader discussions on health care for incarcerated people, criminal legal system reform, and critiques of the negative impact of incarceration on health status and outcomes.”).

¹⁴⁵ See *id.*; see also Nicole Lewis & Carla Canning, *Reproductive Healthcare Behind Bars Was Dismal Even Before Roe Ended*, MARSHALL PROJECT (June 30, 2023, 6:00 AM), <https://www.themarshallproject.org/2023/06/30/post-ro-abortion-prison-jail-reproductive-justice> [https://perma.cc/UTE2-JYDL].

demanding accountability and recordkeeping, and fighting to ensure that the legal guarantee of healthcare while incarcerated is meaningfully upheld.

B. *A Growing Threat of Criminalization*

In addition to the pervasive reproductive injustices that characterize the carceral system, another threat looms: the co-opting of the criminal legal system to enforce regulations that curtail reproductive rights. Criminal prosecution, and the threat thereof, are longstanding, state-sanctioned methods for curbing reproductive rights and suppressing bodily autonomy.¹⁴⁶ The antichoice movement's increasing reliance on the criminal legal system to further its goals has been fast-tracked by *Dobbs*, which opened the door to the possibility of a prosecutorial presumption of fetal personhood, or at least some fetal rights.¹⁴⁷

From the criminalization of pregnancy outcomes to the targeting of healthcare providers who perform abortions, the criminal legal system is being weaponized to police and punish reproductive choices.¹⁴⁸ This legal trend presents an obstacle to achieving reproductive justice, as the threat of criminal punishment is increasingly utilized to suppress individuals' reproductive autonomy. Growing criminalization exacerbates existing inequalities within the carceral system and perpetuates a cycle of reproductive oppression, disproportionately impacting marginalized communities.¹⁴⁹ Accompanying and furthering the trend toward criminalization is the rise of fetal protection laws and fetal personhood theories, which often act as the legal underpinning for draconian restrictions on abortion and pregnancy.¹⁵⁰ Scholars and advocates have not yet fully addressed the increasing criminalization of reproductive rights.¹⁵¹ In failing to address this reality, scholars and advocates overlook both an

¹⁴⁶ See *supra* Part I, pp. 2322–27. Historically, access to contraceptives and abortion has been criminalized at both the federal and the state levels, though laws and regulations fluctuate over time.

¹⁴⁷ See HUM. RTS. WATCH, HUMAN RIGHTS CRISIS: ABORTION IN THE UNITED STATES AFTER *DOBBS* 12 (2023), https://www.hrw.org/sites/default/files/media_2023/04/Human%20Rights%20Crisis%20-%20Abortion%20in%20the%20United%20States%20After%20Dobbs.pdf [<https://perma.cc/RJ7E-M8UX>] (describing the “significant risk that . . . fetal personhood language” poses amidst an increase in “zeal for prosecuting pregnant individuals”).

¹⁴⁸ See Caren Myers Morrison, Essay, *State Abortion Bans: Pregnancy as a New Form of Coverture*, 108 VA. L. REV. ONLINE 381, 385–88 (2022) (tracking the increasing use of “draconian penalties,” *id.* at 386, and criminalization in legislation restricting reproductive rights). See generally Michele Goodwin, *How the Criminalization of Pregnancy Robs Women of Reproductive Autonomy*, HASTINGS CTR. REP., Nov.–Dec. 2017, at S19.

¹⁴⁹ See Bridges, *supra* note 14, at 44–46.

¹⁵⁰ See Amanda Gvozden, Comment, *Fetal Protection Laws and the “Personhood” Problem: Toward a Relational Theory of Fetal Life and Reproductive Responsibility*, 112 J. CRIM. L. & CRIMINOLOGY 407, 409–11 (2022); Morrison, *supra* note 148, at 386.

¹⁵¹ Increased criminalization of reproductive rights is often discussed in the context of criminal penalties against healthcare providers who facilitate and perform abortions. See, e.g., David W. Chen, *A New Goal for Abortion Bills: Punish or Protect Doctors*, N.Y. TIMES (Feb. 16, 2023), <https://www.nytimes.com/2023/02/16/us/abortion-bills-doctors.html> [<https://perma.cc/98KF-CQWS>].

emergent threat to reproductive autonomy and its connection to the historical tradition of hampering reproductive rights via the criminal legal system.

1. Fetal Personhood. — The fetal personhood theory is a legal framework that defines fetuses as independent people, which thereby attaches full rights and legal remedies to the fetus.¹⁵² Laws predicated on this theory often put the rights of the pregnant person in tension with those of their fetus, creating a foundation for restricting reproductive rights and enabling criminal punishment of pregnant people.¹⁵³

Despite the rejection of fetal personhood at common law,¹⁵⁴ the theory gained traction in recent years, even capturing the attention of Supreme Court Justices.¹⁵⁵ The concept of fetal personhood is now apparent in many legal regimes through broad definitions of personhood in statutes, the explicit inclusion of fetuses in definitions of personhood, and the inclusion of personhood language in abortion regulations.¹⁵⁶ Recently, the Alabama Supreme Court extended fetal personhood to embryos fertilized through in vitro fertilization (IVF), thereby leaving open the possibility of attaching criminal penalties to the disposal of unused fertilized eggs during the IVF process.¹⁵⁷

Because fetal personhood laws extend protective rights to fetuses and define fetuses as “separate legal entit[ies]” distinct from the pregnant individuals carrying them, pregnant individuals and healthcare professionals can face criminal prosecution for fetal harm.¹⁵⁸ Even statutes that may not intend to assign personhood may allow for the prosecution of pregnant individuals, highlighting the dangers inherent in the rise of fetal personhood within the legal system.¹⁵⁹ Legal advocates for reproductive justice must reckon with the increasing potential for the fetal personhood movement to be used as a vehicle to criminalize reproductive rights.

2. Pregnancy Criminalization. — Pregnancy criminalization occurs when an individual is “arrested for reasons related to their pregnancy, or where the terms of their bail, sentencing, or probation are heightened because they became pregnant after being charged with an unrelated

¹⁵² See Gvozden, *supra* note 150, at 409–10; Michele Goodwin, *If Embryos and Fetuses Have Rights*, 11 LAW & ETHICS HUM. RTS. 189, 193–94 (2017).

¹⁵³ Gvozden, *supra* note 150, at 428–29; *see also* Goodwin, *supra* note 152, at 191.

¹⁵⁴ See Gvozden, *supra* note 150, at 414 (“At early common law, the fetus was not considered alive for somewhere between several days to several months after conception.”).

¹⁵⁵ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243–44 (2022) (repeatedly using the term “unborn human being” in reference to a fetus).

¹⁵⁶ See generally FLEMING, *supra* note 71 (explaining how “broad personhood language” can allow prosecutors to read fetal personhood into state laws, *id.* at 3).

¹⁵⁷ *LePage v. Ctr. for Reprod. Med., P.C.*, Nos. SC-2022-0515 & SC-2022-0579, 2024 WL 656591, at *4, *7–8 (Ala. Feb. 16, 2024).

¹⁵⁸ Gvozden, *supra* note 150, at 428; FLEMING, *supra* note 71, at 13–15.

¹⁵⁹ FLEMING, *supra* note 71, at 13–14.

crime.”¹⁶⁰ Criminalization of pregnancy often combines punitive drug policies with expansive views of personhood to criminally punish pregnant people for behaviors that, absent their pregnancies, would not be criminalized.¹⁶¹ As pregnancy-related arrests soar, predominantly affecting marginalized and financially vulnerable populations,¹⁶² advocates face the urgent task of safeguarding reproductive rights from novel and insidious assaults.

Antichoice advocates, empowered by the *Dobbs* decision, exploit the legal concept of fetal personhood to criminalize a spectrum of actions related to pregnancy, primarily focusing on substance use.¹⁶³ The surge in pregnancy-related arrests post-*Dobbs* is not a random occurrence but rather a calculated move to advance an antichoice agenda through legal channels. By framing actions during pregnancy, particularly substance use, as criminal offenses, antichoice advocates intertwine the carceral system and reproductive injustice, leveraging a punitive response to punish and deter basic vindication of reproductive rights.¹⁶⁴ These practices capitalize on the vulnerability of pregnant people and their need for familial, communal, and medical support, and often lead pregnant individuals to accept coercive plea deals and pretrial conditions in hopes of avoiding incarceration.¹⁶⁵ Legal advocates for reproductive rights must grapple with the weaponization of the criminal legal system to curb reproductive rights.

3. *Increasing Threat of Abortion Criminalization.* — Reproductive rights are increasingly restricted through the criminalization of abortion, abortion-related travel, and aiding and abetting abortion. Antichoice advocates are utilizing felony charges, civil penalties, and even imprisonment to curtail reproductive justice.¹⁶⁶ These laws create uncertainty for healthcare providers regarding the legal boundaries of abortion services and bar access for patients.¹⁶⁷ The criminal penalties for illegal

¹⁶⁰ PURVAJA S. KAVATTUR ET AL., PREGNANCY JUST., THE RISE OF PREGNANCY CRIMINALIZATION: A PREGNANCY JUSTICE REPORT 3 (2023), <https://www.pregnancyjusticeus.org/wp-content/uploads/2023/09/9-2023-Criminalization-report.pdf> [<https://perma.cc/NH3E-MAKB>].

¹⁶¹ *Id.*; see Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL. POL’Y & L. 299, 322–24 (2013); FLEMING, *supra* note 71, at 1–3.

¹⁶² KAVATTUR ET AL., *supra* note 160, at 3–4; FLEMING, *supra* note 71, at 14; Emma Coleman, *Many States Prosecute Pregnant Women for Drug Use. New Research Says That’s a Bad Idea.*, CTR. FOR CHILD HEALTH POL’Y, VAND. UNIV. MED. CTR. (Dec. 5, 2019), <https://www.vumc.org/childhealthpolicy/news-events/many-states-prosecute-pregnant-women-drug-use-new-research-says-thats-bad-idea> [<https://perma.cc/E6RK-VVQP>].

¹⁶³ See KAVATTUR ET AL., *supra* note 160, at 3–4.

¹⁶⁴ See generally *id.*

¹⁶⁵ See *id.* at 44–47.

¹⁶⁶ See Amanda Zablocki & Mikela T. Sutrina, *The Impact of State Laws Criminalizing Abortion*, LEXISNEXIS: PRAC. GUIDANCE J. (Sept. 28, 2022), <https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/the-impact-of-state-laws-criminalizing-abortion> [<https://perma.cc/4BW2-MYFR>].

¹⁶⁷ HUM. RTS. WATCH, *supra* note 147, at 7.

abortion vary widely among states, including fines of up to one hundred thousand dollars and lifetime prison sentences.¹⁶⁸ Notably, Texas and Oklahoma extended these penalties to those “aiding and abetting” abortion[s],” potentially implicating employers, healthcare insurers, and individuals providing logistical support.¹⁶⁹ These laws may also disrupt women’s healthcare by impeding hospital staffing, hindering access to essential medications, and discouraging physicians from providing necessary treatments.¹⁷⁰ Wide variation and inconsistency across state laws intensify the challenges for women, providers, and organizations.¹⁷¹

Criminalization is likely to compound other reproductive injustices and create a cascading effect on health outcomes. Criminal prohibitions of abortion set legal foundations for the future criminalization of preventive measures like birth control, adding complexity to the legal connection between reproductive injustice and the criminal legal system.¹⁷² Similarly, with the erosion of “a common baseline” of reproductive rights protection post-*Dobbs*, a “[c]hilling [e]ffect on [w]omen’s [h]ealthcare” is likely.¹⁷³ At present, reproductive rights scholarship and advocacy often fail to address how criminal law is increasingly leveraged to thwart reproductive justice, and a reckoning with the duality and interconnect-edness of these systems of oppression is needed to address these alarming trends.

III. A RECKONING

Reproductive rights advocacy is too often myopically focused on the experience of “middle [and upper] class, heterosexual, white women” untouched by the carceral system, and their “access to abortion and contraception.”¹⁷⁴ This focus pushes the experiences of women of color, particularly low-income and incarcerated women of color, to the periphery. In addition, centering contraception and abortion unnecessarily restricts a holistic understanding and addressing of vast reproductive injustices in the United States.¹⁷⁵

The future of reproductive justice in the United States faces challenges as antichoice advocates continue to capitalize on the criminal legal system as a tool for restricting and preventing the full exercise of

¹⁶⁸ *Id.* at 16. The interstate applicability of these laws raises constitutional concerns, yet their impact on reproductive healthcare remains profound. *Id.* at 18.

¹⁶⁹ *Id.* at 16; *see also id.* at 17.

¹⁷⁰ Zablocki & Sutrina, *supra* note 166; *see also* Selena Simmons-Duffin, *Doctors Who Want To Defy Abortion Laws Say It's Too Risky*, NPR (Nov. 23, 2022, 5:01 AM), <https://www.npr.org/sections/health-shots/2022/11/23/1137756183/doctors-who-want-to-defy-abortion-laws-say-its-too-risky> [<https://perma.cc/WFX4-VKUN>].

¹⁷¹ *See* Zablocki & Sutrina, *supra* note 166; HUM. RTS. WATCH, *supra* note 147, at 9, 19.

¹⁷² *See* Zablocki & Sutrina, *supra* note 166.

¹⁷³ *Id.*

¹⁷⁴ Ocen, *supra* note 6, at 2238.

¹⁷⁵ *Id.* at 2238–39.

reproductive rights. Reproductive justice cannot be achieved unless the injustices of the criminal legal system are also addressed. Maintaining a narrow focus on the experiences of white women, abortion, and contraception will limit legal advocates' ability to meaningfully address the interconnectedness of the criminal legal system and reproductive injustice.¹⁷⁶ A broader understanding of reproductive justice must look at those systems that perpetuate reproductive injustices, including the criminal legal system and the American carceral state, and how those systems interact with a history of racism and classism.

From the moment of detainment, where individuals are stripped of reproductive autonomy, to the conditions of confinement, where reproductive healthcare is frequently inadequate or denied altogether, the carceral system perpetuates egregious violations of reproductive justice.¹⁷⁷ The overpolicing and mass incarceration of Black and brown communities exacerbate these injustices, perpetuating a cycle of reproductive oppression. In addition, a growing trend toward criminalization of pregnancy and abortion risks further entrenching reproductive injustices within the carceral state.¹⁷⁸

An investigation of the past and present failures of the American carceral system suggests that any comprehensive approach to reproductive justice must address the injustices of the carceral system head-on, and through an abolitionist approach.¹⁷⁹ The reproductive injustices within the American carceral state are vast and cannot be overcome through a reformation of the system. Abolitionist scholars observe that traditional reform measures often perpetuate rather than eradicate inequalities, maintaining oppressive systems under the guise of progress.¹⁸⁰ Abolition, however, calls for the complete dismantling of these systems, recognizing that incremental changes only serve to perpetuate injustice.¹⁸¹ By envisioning and actively working toward a society free from systems of control and violence, abolition provides a framework for genuine liberation from reproductive injustices in the modern American carceral system.

For decades, advocates of color have supported a holistic approach to reproductive justice that reimagines community well-being and envisions a system that does not depend on the caging of humans.¹⁸² These advocates center the voices and experiences of those most impacted by

¹⁷⁶ See *id.* at 2238–40.

¹⁷⁷ See *supra* section II.A, pp. 2328–36.

¹⁷⁸ See *supra* section II.B, pp. 2336–39.

¹⁷⁹ For an overview of the contemporary prison abolition movement, see generally Roberts, *supra* note 11.

¹⁸⁰ See *id.* at 4–5 (describing how abolitionists do not support reform as a viable solution).

¹⁸¹ See *id.* at 114.

¹⁸² See Ocen, *supra* note 6, at 2238–41; Roberts, *supra* note 11, at 47 (“Some abolitionists are implementing local social-change projects, based on principles of mutual aid rather than competition and profit, to foreshadow and move toward a society that has no need to cage people.”).

systems of oppression like incarceration and reproductive injustice, and they proceed with an intersectional lens that looks beyond abortion.¹⁸³ This approach requires that legal advocates for reproductive justice do not view their work as separate from prison abolition; prisons and the criminal legal system are key perpetrators of reproductive injustice. Addressing the ills of the criminal legal system is not just a project of solidarity, but an essential part of attaining reproductive justice.

CONCLUSION

The use of incarceration and the criminal legal system to control reproductive rights was a documented practice long before *Dobbs*.¹⁸⁴ But since the overturning of *Roe* and the rise of laws predicated on the theory of fetal personhood, criminalization in the reproductive rights space is increasing.¹⁸⁵ Incarceration removes bodily autonomy from individuals, and antichoice supporters and lawmakers have found this avenue increasingly attractive in controlling those who seek to exercise their bodily autonomy through contraception and abortion. The intersection of abolitionism and abortion rights is rooted in a shared commitment to challenging systemic oppression and upholding individual autonomy, particularly in matters concerning bodily integrity and reproductive choices.

Opposition to the criminalization of reproductive choices is a common thread that binds abolitionist and abortion rights perspectives. Advocates within these movements argue that restrictive abortion laws are emblematic of oppressive structures that extend beyond reproductive rights.¹⁸⁶ Abolitionist theory necessarily opposes the criminalization of abortion through the broader lens of dismantling systems that exert control over individuals' bodies and restrict autonomy via coercion. Reproductive justice advocates ought to follow suit, embracing the abolitionist charge to challenge the American carceral state from the ground up.

¹⁸³ Roberts, *supra* note 11, at 47.

¹⁸⁴ See Lynn M. Paltrow, *Roe v. Wade and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration*, 103 AM. J. PUB. HEALTH 17, 17–19 (2013).

¹⁸⁵ See *supra* section II.B, pp. 2336–39.

¹⁸⁶ See *supra* Part III, pp. 2339–41.