

Advocating for Abolition in Health Law: A Theory and Praxis to Liberate Black Incarcerated Women

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Abstract: The prison-industrial complex has historically operated as a mechanism for social control generally and as a tool to restrict women's reproductive capacities specifically. Reproductive justice is a domain within the practice of health law. However, health law as currently practiced is ill-equipped to understand how the carceral state functions as a structural determinant of health or how legacies of oppression have facilitated the abridgment of incarcerated women's reproductive capacities.

On May 2, 2022, a draft opinion authored by Justice Alito revealed the Supreme Court's intention to overturn *Roe v Wade*.¹ The leaked draft sparked national protests from the pro-choice movement. Protesters held signs saying "bans off my body," and "don't police my body." People on social media likened Justice Alito's draft opinion to the popular television show "The Handmaid's Tale," indicating a belief that this opinion could usher in a severe retrenchment of reproductive justice laws that would render women objects of the state. The idea that the state can force people to give birth and control what they do with their own bodies enraged and frightened

women and their allies throughout the nation. And yet, this is nothing new. Beyond the fact that reproductive justice rights have been whittled away in recent years, there already exists a subset of the population whose bodies and entire livelihoods are literally policed by law enforcement and the so-called criminal "justice" system—incarcerated women. Historically, the carceral state has served as a mechanism to control and regulate the reproductive capacities of marginalized people, particularly Black women.² As we collectively mourn the impending loss of our reproductive rights and buttress existing mutual aid networks to prepare for its eventuality, we must not forget those behind bars, who have been systematically robbed of such rights from the outset. Their designation as prisoners has robbed them of most reproductive health rights that many of us can still exercise, at least for the time being. If we are to remain ardent about protecting reproductive justice for all, then we must center the lived realities of our most marginalized people. Since the carceral state is a mechanism of control that disproportionately targets Black people,³ and the reality of being a woman compounds vulnerability, then we ought to understand how systems of oppression work to abridge their reproductive capacities. Black radical activists, such as those from the Combahee River Collective, have put forth the theory that "if Black women were free, it would mean that everyone else would have to be free since our freedom would necessitate the destruction of all the systems of oppression."⁴ This theory, combined with abolition, can provide an avenue to facilitate our collective reproductive freedoms.

Abolition is a vital tool that the law can use to end mass incarceration and the restriction of reproductive freedoms within prisons. Abolition is a theory

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and praxis that requires a two-pronged approach. First, it calls for the dismantling of the entire prison-industrial complex and the oppressive systems that uphold it, such as white supremacy, capitalism, and heteropatriarchy⁵. Second, abolition calls for building alternative systems of restorative justice centered on care rather than violence.⁶ As Ruth Wilson Gilmore explains, “abolition is about building life-affirming institutions.”⁷ The claim implicit within the abolitionist framework is that the carceral state is not malfunctioning. The disproportionate number of people of color behind bars⁸ is not by accident, but rather indic-

ates degeneracy, deviance, and societal burden.¹⁴ Thus, robbing Black women of their reproductive freedom is predicated on the belief that they are inherently unfit mothers.¹⁵ Since the violation of reproductive freedom is a consequence of imprisonment, health law could be used as an avenue to achieve justice. Unfortunately, health law as currently practiced reproduces carceral logics and is unable to substantially address how Black female inmates are oppressed by the state. For the purposes of this paper, health law will be defined as legal professionals who work at the intersections of public health and advocacy. Carceral logic refers to

The argument in favor of abolition is particularly powerful when discussing Black incarcerated pregnant women and mothers. Abolition discourse is often masculinized because women’s incarceration is viewed as an incidental effect of punitive systems designed to punish Black men. However, prisons are a central aspect in regulating and restricting Black women’s reproductive capacities in the United States. The inability of Black pregnant incarcerated women to birth and raise their children is not an oversight by the law, but rather an intended mechanism of social control. These policies are grounded in historically constructed stereotypes that Black reproduction perpetuates degeneracy, deviance, and societal burden.

ative of how the carceral state evolved from slavery.⁹ High recidivism rates are not by happenstance nor indicative of a formerly incarcerated person’s moral failing. Indeed, research shows that the exit and re-entry of incarcerated people are concentrated within the poorest, minority neighborhoods, indicating a targeted approach to imprisoning people.¹⁰ Abolition insists that the carceral state is working exactly as intended—to control and subjugate historically marginalized groups for the benefit of those in power.

The argument in favor of abolition is particularly powerful when discussing Black incarcerated pregnant women and mothers. Abolition discourse is often masculinized because women’s incarceration is viewed as an incidental effect of punitive systems designed to punish Black men.¹¹ However, prisons are a central aspect in regulating and restricting Black women’s reproductive capacities in the United States.¹² The inability of Black pregnant incarcerated women to birth and raise their children is not an oversight by the law, but rather an intended mechanism of social control.¹³ These policies are grounded in historically constructed stereotypes that Black reproduction perpetu-

the ways in which people’s behaviors and mentalities are informed by the ideologies of prisons,¹⁶ such as the tendency to police others’ actions for merely deviating from the norm or equating retribution with justice. In other words, “incarceration as a logic and method of dominance is not reducible to the particular institutional form of jails, prisons, detention centers, and other such brick-and-mortar incarcerating facilities.”¹⁷

Moreover, constrictions on how health law is practiced fail to consider the unique ways in which Black incarcerated women experience racial and gender oppression under the law. Erasing and punishing incarcerated pregnant women and mothers under the law renders prisons a structural determinant of health. If the prison-industrial complex is a modern remnant of slavery,¹⁸ and the subjugation of Black women is grounded in racial oppression, then merely reforming the carceral state will not be sufficient in uprooting it. This paper argues that the law often facilitates harm to Black women, making abolition critical to liberating Black women from punitive systems designed to subjugate them, especially with regard to reproductive justice. In other words, abolition is a tool that can be

leveraged by practitioners of health law to advance the reproductive and overall health of Black incarcerated women.

This paper will begin by first explaining how reproductive justice is compatible with abolition. Then, I will problematize the conception of “criminals” by illustrating how the carceral state punishes marginalized people for social problems born out of legacies of oppression. Next, I will delineate the specific ways prisons rob Black women of reproductive justice. Specifically, I will argue that systematic medical neglect, separation from their children, and shackling during labor and delivery, are all instruments of the law used to inhibit Black women’s reproductive capacities. I will then consider several reforms currently used to challenge punitive systems for pregnant women and mothers in prison. Ultimately, however, I will argue that while commendable, these reforms fall short because they do not dismantle the systems that incarcerate these women in the first place. Finally, I will offer an example of how abolitionist strategies can be used to re-imagine practicing health law.

Reproductive Justice and Abolition: Tools to Liberate Black Female Incarcerated Women

Reproductive justice is compatible with abolition and vital for the liberation of Black female inmates. In 1994, Black women coined the phrase “reproductive justice” in response to two major frustrations they faced at the time.¹⁹ First, Bill Clinton had proposed a Universal Healthcare plan that minimized the importance of reproductive and sexual health.²⁰ Second, Black women faced backlash and systematic silencing from the predominantly white-led pro-choice movement.²¹ Black women believed that a narrow focus on abortion rights obscured other tenets of reproduction, such as the right to have a child, raise that child with safety and dignity, and the right to bodily autonomy.²² Moreover, the individualistic lens of choice failed to account for the ways in which structural racism prohibited Black women from exercising that capacity in the first place.²³ In other words, “choice” is not a capacity allocated equally among all members of society. The problem of focusing solely on choice is particularly salient for incarcerated women. 70% of incarcerated women are primary caretakers of small children and 85% are of reproductive age.²⁴ Prisoners are deprived of authority over their healthcare decisions and revoked of their bodily autonomy rights as a condition of their confinement, often with serious detriments to their health and well-being.²⁵ A reproductive rights framework that fails to account for how systems of oppression hinder safe and dignified

pregnancy, parenting, and bodily autonomy cannot adequately protect incarcerated Black women. Thus, proponents of reproductive justice call for:

the complete physical, mental, spiritual, political, economic, and social well-being of women and girls, [which] will be achieved when women and girls have the economic, social, and political power and resources to make healthy decisions about our bodies, sexuality, and reproduction for ourselves, our families and our communities in all areas of our lives.²⁶

Rather than gain incremental rights within an abusive system, reproductive justice proposes a liberatory framework that renders such systems obsolete. In this sense, reproductive justice is congruent with abolition. Since reproductive justice is also inherently within the health law field, then health law too, must be concerned with abolition.

Problematizing the Notion of “Criminal”: Challenging Punishment as a Response to Crime

If incarceration is a tool used by the state to restrict the reproductive capacities of Black women, then it is imperative to understand the forces that imprison them in the first place. The sociopolitical and economic circumstances under which many Black women live predispose them to the penal system. For instance, one third of women in state prisons are convicted for property crimes, such as fraud, larceny, and burglary.²⁷ Given that the vast majority of these women are poor, theorists argue that economic gain is a strong motivation. These were not malicious acts of thievery, but rather “crimes of survival.”²⁸ Structural racism creates unlivable circumstances for Black women and criminal law subsequently punishes them for attempting to alleviate its effects.

While most women are convicted of nonviolent crimes, such as those discussed above, a minority are serving sentences for violent offenses. However, an abolitionist framework still contends that incarceration should not be the solution to violence. An analysis of women’s convictions reveals that, of the women incarcerated for violent crimes, 42.3% were convicted for murdering a spouse or significant other.²⁹ These crimes were almost always done in self-defense against an abusive partner. This evidence strongly suggests that these women committed violent acts after years of abuse and victimization.³⁰ It is nonsensical to punish survivors of domestic abuse with additional trauma caused by the conditions of their

confinement. Moreover, incarcerating these women does not directly address or prevent further domestic abuse from happening to the individual or to the community. An abolitionist response to domestic violence survivors might include affordable therapy, accessible housing, or economic support so that they may begin to heal and rebuild their life. Incarceration merely punishes these women for trying to escape violence and does little to combat the patriarchal systems that support abusers. Indeed, research has revealed that Black women are more likely than their white counterparts to be arrested by the police when they report incidents of domestic violence.³¹ These analyses of how Black women are forced into the prison-industrial complex disrupt the common belief that all incarcerated people are inherently deviant or worthy of punishment.

Punishing Pregnancy: How Prisons Rob Black Women of Reproductive Justice

Once within the clutches of the penal system, Black women's reproductive capacities are systematically restricted. Approximately 5-10% of women begin their sentence in prison or jail pregnant, and about 2,000 babies are born to incarcerated women each year.³² For these incarcerated women, being pregnant heightens their vulnerability because it serves as another basis for punishment by the state.³³

One mechanism used to restrict Black women's reproductive capacities in prisons is medical neglect. Studies have shown that of the pregnant women in jail, less than half received obstetric care, and only about one third received other forms of prenatal care.³⁴ Prison personnel have also contributed to medical neglect by acting as a barrier between incarcerated women and the ability to receive medical care. For example, in *Doe v Gustavus*, an incarcerated woman was denied medical care during labor and delivery.³⁵ Throughout her labor, the plaintiff was accused of using her pregnancy to manipulate prison staff. She was called a "dumb bitch" by guards and told she "would have to clean up her own vomit if she got sick again."³⁶ The plaintiff gave birth to her child alone in a segregation unit without medical assistance.³⁷ Following delivery, the guards accused her of "pushing that baby out on purpose just to get out of segregation."³⁸ The systemic medical neglect of Black pregnant incarcerated women throughout the country is not necessarily an oversight by the government. The state has enough data to reasonably determine that female inmates are more likely to experience high-risk pregnancies due to their histories of poverty, substance abuse, and physical and sexual abuse.³⁹ Yet, the state has failed in substantially providing these women with

the medical resources they need to experience safe and dignified pregnancies.

The termination of parental rights is another instrument of abuse used to restrict an incarcerated woman's reproductive capacities. One study found that 15-20% of children in foster care have at least one parent in custody.⁴⁰ Another study found that of the children in foster care because of parental arrest, about 90% were due to maternal incarceration.⁴¹ However, women only make up 7% of the overall prison population.⁴² The federal policy often used to facilitate the termination of parental rights is the Adoption and Safe Families Act (AFSA) established in 1997.⁴³ This policy states that parental rights can be terminated if a child has been in foster care for 15 of the last 22 months.⁴⁴ Women are incarcerated for an average of 24 months, increasing the likelihood that they can lose their parental rights.⁴⁵ Moreover, since 1977, incarcerated women are less likely to be granted the visitation rights necessary to maintain maternal bonding that courts take into account when deliberating on termination proceedings.⁴⁶ Thus, incarceration prohibits women from complying with the court-mandated policies to initiate reunification with their children. Ultimately, AFSA perpetuates carceral logic by punishing women for consequences either beyond their immediate control or designed by the policy itself. Rather than offering these women substance use rehabilitation or socioeconomic resources to avoid incarceration in the first place, federal policy reproduces intergenerational trauma by legally separating a mother from her child.

Shackling is another practice used in prisons that punishes the reproductive capacities of women. Since most prisons do not provide on-site obstetric care, most women must be transported to a nearby clinic.⁴⁷ Although practices vary by state, most women are shackled by the wrist, ankles, and waist during transport, labor, and delivery.⁴⁸ Shackling pregnant women can cause physical harm to both the mother and the child. Pregnancy shifts a woman's center of gravity, making her more prone to falling, and since shackling restricts movement, it increases her risk of injury.⁴⁹ Shackling also prevents women from changing positions that may make labor and delivery easier.⁵⁰ Though the physical and medical threat shackling poses to women and their fetuses is clear, prison personnel insist on this practice's continuation on several grounds. An argument defending the shackling policy is the security threat that abolishing it would pose. Proponents claim that shackling inmates is necessary to protect medical providers and prison personnel from harm.⁵¹ This claim neglects the fact that most women are incarcerated for nonviolent crimes, as mentioned above.⁵² However, even if these women

were inherently and irrationally violent, surely being in active labor precludes them from being a physical threat to those around them.

The shackling endemic within this nation's prisons has historical and ideological underpinnings. While shackling affects prisoners of all races, its use is predicated on the devaluation, subjugation, and regulation of Black women throughout history.⁵³ It is difficult to divorce the shackling of Black women today from the chains used to enslave them or those used to tie them to a life of convict leasing and chain gangs.⁵⁴ In "*An Open Letter to My Sister, Miss Angela Davis*," James Baldwin writes:

One might have hoped that, by this hour, the very sight of chains on black flesh, or the very sight of chains, would be so intolerable a sight for the American people, and so unbearable a memory, that they would themselves spontaneously rise up and strike off the manacles. But, no, they appear to glory in their chains; now, more than ever, they appear to measure their safety in chains and corpses.⁵⁵

The shackling of prisoners must be understood from the backdrop of our nation's history with slavery. Ideological constructs of Black women as "deviant," or "dangerous" were designed to justify their enslavement and later, their punishment within the prison-industrial complex.⁵⁶ When seen through this lens, it is clear that shackles are not only medically hazardous for pregnant women, but they are also inherently racist.

Limitations of the Law in Protecting Reproductive Capacities of Incarcerated Black Women

Constitutional deference has often been used to curtail an inmate's reproductive liberties. Constitutional deference is a judicial review in which the courts yield to an agency's interpretation of a statute or regulation. The Supreme Court has taken the position that "courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform."⁵⁷ Paradoxically, they have also claimed that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."⁵⁸ Thus, due to a court's lack of institutional competence regarding prisons, they may privilege the rationales of prison officials at the expense of an incarcerated person's testimonies. In *Turner v Safely*, for example, the Supreme Court ruled that, in decisions regarding a penal environment, "a lesser standard of scrutiny" for

"determining the constitutionality of the prison rules" would be applied.⁵⁹ The decision was made on the grounds that the Court lacked expertise in the penal environment. This lenient standard of review determined that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."⁶⁰ To determine what is considered a penological interest, the court established a test that essentially amounts to a rational review, the lowest level of scrutiny. Strict scrutiny, on the other hand, privileges an individual's rights against policies that may abridge them. Due to the doctrine of deference, an incarcerated women's testimony regarding the violation of her reproductive liberties by the penal environment often goes unheard.

The 8th Amendment to the Constitution is the most salient legal tool a victim of prison abuse can use to demand restitution. Unfortunately, precedent and judicial interpretation of the 8th amendment structurally prohibit the transformational change necessary to abolish the abuse. The 8th Amendment states that "no cruel or unusual punishment [shall be] inflicted" upon any person.⁶¹ It also "imposes duties on [prison officials] who must provide humane conditions of confinement; prison officials must ensure inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of inmates."⁶² While this seems sufficient to protect incarcerated people from state abuse, cases that have tried to use the 8th Amendment defense created precedence for narrower readings, diluting its protective effects. For example, in *Estelle v Gamble*, the court heard allegations of deprivation of medical care. The court decided that an incarcerated person must show "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."⁶³ Unfortunately, the court never defined what it meant by "deliberate indifference,"⁶⁴ paving the way for the Amendment's future dilution. In *Wilson v Seiter*, the court held that to constitute punishment, there must be proof of a "deliberate act intended to chastise or deter."⁶⁵ Thus, pain can be inflicted on incarcerated people so long as it does not fall under this definition of punishment.

Subsequent case law following *Wilson* read deliberate indifference to include intent. In *Famer v Brennan*, the court created a two-step test to establish whether a violation of the 8th Amendment occurred.⁶⁶ First, the inflicted party must show that "she is incarcerated under conditions posing a serious risk of harm."⁶⁷ Second, the court described deliberate indifference to mean that a prison official must be aware that sub-

stantial harm exists and that he must be able to infer how the harm could have come about.⁶⁸ Nevertheless, the court when on to claim that “the failure to alleviate a significant risk that an official should have perceived but did not, while no cause for commendation, cannot be condemned as the infliction of punishment under the Court’s cases.”⁶⁹

Finally, *Nelson v Correctional Medical Services* was the first federal court of appeals case to consider the use of shackles on pregnant inmates.⁷⁰ Nelson, a Black woman convicted of credit card fraud, brought 8th amendment challenges to the private medical provider and the institution that incarcerated her.⁷¹ She was six months pregnant when she entered prison and thus had to give birth during her sentence. As such, Nelson was shackled during transport and labor. She recounted that the shackles made it difficult for her to move, stretch, or change positions while in labor.⁷² As a result, she sustained a serious injury because of the shackles. A 3-judge panel ruled that the offending officer did not violate Nelson’s 8th Amendment rights.⁷³ The panel grounded their claims on the fact that the officer was not deliberately indifferent given the fact that he removed the chains after she complained and before delivery.⁷⁴ Moreover, they concluded that the use of shackles did not constitute punishment but rather was standard penological protocol. Their argument was backed by the claim that shackles are necessary to prevent an inmate’s escape. One judge noted that a “guard often cannot prevent a determined, unrestrained, and sometimes aggressive inmate from escaping without resort to force.”⁷⁵ The full Eighth Circuit did grant that the use of shackles violated Nelson’s 8th Amendment rights. Unfortunately, the court deemed only the individual officer who placed the shackles on Nelson to be at fault, not the prison director himself nor the institution as a whole.⁷⁶ The court sent the case back for a jury trial which resulted in a verdict awarding Nelson one dollar.⁷⁷

All these cases have established a reading of the 8th Amendment that renders it ineffective in protecting female inmates from state-sanctioned abuse. First, it is important to establish that the 8th Amendment in itself does not require an intent-based interpretation.⁷⁸ When requiring proof of intent in an 8th Amendment violation claim, the court has necessarily excluded the conditions of an inmate’s confinement from the definition of punishment.⁷⁹ In other words, conditions of confinement, such as access to food, medicine, or safety, if not adequately provided, do not necessarily constitute punishment unless the prison official intended to harm. However, prisoners are isolated from the rest of the world, confined

to cells, and are completely at the mercy of the state. The conditions of an inmate’s confinements must be understood as punishment because they are under the state’s purview.⁸⁰ In fact, a judge in the Wilson case claimed “we have made it clear that conditions are themselves part of the punishment... even if not ‘meted out’ by a statute or judge.”⁸¹ Thus, the narrow intent-based reading of deliberate indifference has allowed for the violation of basic human needs to go unpunished. Second, requiring proof of intent incentivizes officers to ignore threats of harm to prisoners.⁸² There is no reason for guards to be proactive in anticipating needs or to respond to the conditions of prisoners. By keeping detailed records of abuse, such as sexual violence against inmates, or the unnecessary use of shackles on pregnant women, prison officials may inadvertently provide proof of intent. Remaining willfully ignorant of the conditions within prisons allows officials to continue to mete out abuse with impunity and gives them more Constitutional protection than their inmates.⁸³ Surely, from the inmate’s perspective, it is irrelevant whether the horrific conditions they are subjected to were intended by their guard. Third, the *Estelle-Farmer* cases structurally prohibit the transformational change from happening because they hinge accountability on individual intent rather than the institution itself.⁸⁴ It must be noted that individual actions often occur within institutions designed with dominant cultural norms in mind. Thus, individuals within such institutions are likely to reproduce and reinforce dominant cultural norms, such as the ideological constructs that oppress Black women. Moreover, focusing on individual actions neglects to take into account that a series of actions or inaction often cause the effects of harm via systemic injustice.⁸⁵ Tethering accountability to an individual does little to disrupt the institution that engendered one’s actions in the first place. Finally, these cases obscure the racial and gender analysis necessary to understand the pervasive use of shackles among Black women.⁸⁶

Substantive barriers to civil rights law has made transformative change nearly impossible. What health advocates call “health disparity” legal scholars refer to it as a form of discrimination.⁸⁷ Unfortunately, regressions in civil rights law have resulted in a gap between what public health scholars advocate for and what the courts have offered. For instance, public health literature has deemed poverty to be a powerful driver of ill health⁸⁸ and abolitionists have linked poverty to incarceration. However, the Supreme Court has not recognized poverty as a status that can receive universal anti-discrimination protection under the U.S Constitution.⁸⁹ Furthermore, the Supreme Court

has defined discrimination to mean explicit interpersonal discrimination.⁹⁰ Like the intent-based reading of the 8th Amendment, this narrow understanding of discrimination requires proof of conscious intent to harm. Institutional and structural discrimination by their nature makes it difficult to pinpoint intentional action. Thus, this restrictive understanding of discrimination obscures institutional and structural harms that enable and reproduce the carceral system.

Possible Reforms

Several well-intentioned reforms have been implemented to mitigate the draconian nature of prisons. Unfortunately, reforms by their nature fail to disrupt the structures that imprison people to begin with. Consequently, the reproductive health of inmates remains in jeopardy. For example, mother-infant programs and prison nurseries have been introduced around the country in response to the growing number of incarcerated mothers.⁹¹ These programs are meant to encourage bonding between mother and child and act as an alternative to the often punitive separation policies. Currently, only 9 states have these programs in place and all are controlled by the correctional department.⁹² While the intentions behind these programs seem well-meaning, they still reproduce carceral logic that ultimately punishes the mother and child. For example, to be eligible for the program, a child must be born within state custody.⁹³ This excludes all incarcerated mothers who have children born outside the prison's walls. Second, the mother cannot have a violent crime conviction or a history of child abuse or neglect to be considered for admittance.⁹⁴ Such a policy may seem reasonable, but it obscures the fact that a substantial proportion of women who commit violent crimes are acting in self-defense after years of victimization.⁹⁵ Moreover, this restriction in the program punishes the individual mother for histories of child abuse or neglect while failing to consider the structural dynamics at play. Indeed, the Child Welfare system acts in conjunction with the carceral state.⁹⁶ Studies have revealed that it “takes less risk of maltreatment for a Black child to be removed from the home compared to a white child.”⁹⁷ The third problem with these mother-infant programs is the fact that the correctional department requires the mother to sign a waiver releasing the prison from any liability should the child become ill or injured.⁹⁸ Forcing women to sign these waivers is particularly troubling because the ability to protect and parent their children is itself not guaranteed under these programs.⁹⁹ Since incarcerated women by circumstance have no autonomy and limited resources, they have no recourse but to rely on

prison staff. Unfortunately, the ability to properly care for their children is often undermined by prison staff. In San Diego, an officer denied a 5-year-old girl from accessing medical care who was later diagnosed with brain cancer despite complaints by the mother that her child was suffering headaches and nausea.¹⁰⁰ This case was not an anomaly. Mother-infant programs in prison have frequently been subject to criticism for their documented histories of denied medical care and social welfare resources.¹⁰¹ This is despite the fact that their goal is to provide “a safe and wholesome environment” for mother and child and to provide “the best possible care.”¹⁰² Having children spend valuable bonding time with their mothers within prisons is clearly unideal. The potential long-term psychological impacts that this may have on both the mother and the child cannot be understated.¹⁰³ Mother-infant programs and prison nurseries do not function as alternatives to punitive systems but reproduce and normalize them.

Some states have introduced efforts to enhance the level of medical care provided to pregnant and postpartum incarcerated women. Assembly Bill 478, A.B. 478, was signed into law in October 2005 and went into effect in January 2006 in California.¹⁰⁴ The goals of this law are ambitious. First, the law bans the use of shackling among pregnant women under any circumstance.¹⁰⁵ Second, it requires that women have access to “complete prenatal health care” and a “balanced nutritious diet approved by a doctor.”¹⁰⁶ Third, it requires that information on pregnancy, birthing, and infant care be readily available.¹⁰⁷ Reports on prison conditions after the law went into effect reveal that these rights and privileges largely exist on paper. In interviews conducted by Justice Now!, an Oakland-based abolitionist group, inmates reported that the food provided to them was low in nutritional value and often spoiled.¹⁰⁸ Additionally, the ban on shackling pregnant and postpartum women acts merely as an idealistic goal rather than a law that must be adhered to. Reports issued by the ACLU revealed that bans on shackling are not strictly enforced.¹⁰⁹ Perhaps the inability of prison officials to realize the full extent of this law relies on something legislation cannot fix: the inability to see Black women as human and worthy of safe and dignified pregnancies.¹¹⁰

Getting to the Root Cause of the Problem: An Abolitionist Approach

Since incarceration is a mechanism of social control¹¹¹ that promotes the abridgment of Black women's reproductive capacities, reforms will not be sufficient to uproot the harms they endure. Constitutional doc-

trine and policy proposals have either fallen short of protecting Black women from state-sanctioned abuse or have facilitated it outright. Indeed, those that call for prison reform rather than abolition maintain the state's surveillance over these women's bodies. Moreover, reforms, by their nature, fail to address the root cause of incarceration, namely subordination. Legacies of oppression have resulted in structural inequities that render Black women vulnerable. Social problems such as poverty, homelessness, mental illnesses, and substance abuse are criminalized rather than remedied. Thus, calls for reform obscure how Black women are "placed on the path to imprisonment" in the first place.¹¹² Those who advocate for the liberties of marginalized peoples, and incarcerated Black women specifically, must look beyond what the limits of the

to premature death,¹¹⁶ is widely accepted in public health literature as a social determinant of health.¹¹⁷ However, the carceral state is not. Yet, prisoners, by definition, cannot "fully participate in society" or have equal access to "opportunity," let alone the chance to be free from "hazards that jeopardize health" since these are all factors that are controlled by the state as a condition of their punishment. Indeed, public health literature has revealed that lacking the power to control one's circumstances contributes to poor physical and mental health.¹¹⁸ Additionally, when a group is exposed to constant violations of human dignity, higher rates of morbidity, mortality, and disability can follow.¹¹⁹ This phenomenon is particularly salient when the forces that contribute to violations of human dignity are codified under the law. If it is true that

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subordination is central to health disparities, then the carceral state should be understood as a structural determinant of health. While there are research and policy efforts that currently do so, there must also be a larger movement within the health law profession that actively centers abolition within their work.

Another strategy is to divest from the bloated prison-industrial complex and invest in communities. Rather than spend \$80 billion annually on the prison-industrial complex,¹²⁰ lawmakers can

law can offer and use their expertise in solidarity with ongoing social justice movements, such as abolition.

There are several abolitionist strategies for health law that can be deployed to protect the well-being of vulnerable Black women and decrease the likelihood of their incarceration. First, health lawyers, legislators, judges, and policymakers should align themselves with the health justice movement. According to Emily Benfer, "health justice requires that all persons have the same chance to be free from hazards that jeopardize health, fully participate in society, and access opportunity."¹¹³ Health justice also requires acknowledging and understanding that subordination is the root cause of health disparities.¹¹⁴ Finally, health justice is a framework that calls on health lawyers, public health advocates, and social justice organizers to be in conversation, collaboration, and support of one another.¹¹⁵ By following the tenets of health justice, lawyers can begin to advocate for and create laws that serve subordinated groups rather than those already in power.

Moreover, health lawyers must understand how the carceral state drives ill health. For example, racism, "state-sanctioned or extra-legal production, and exploitation of group-differentiated vulnerability

instead choose to fund social welfare programs that have proven effective in advancing public health. States that have prioritized public health interventions, such as Medicaid, secondary education, and unemployment insurance, have reported a lower average prison incarceration rate and better health outcomes overall.¹²¹ Meanwhile, states that advance conservative policies that aim to cut social welfare programs have a lower life expectancy in aggregate than states that provide sufficient funding.¹²² Divestment-investment is powerful because it challenges the state's current response of imprisoning people for struggling to survive their social conditions. This strategy also addresses that the root of health disparities is subordination, or differential access to power and privilege, because it funnels social resources to communities that have historically been deprived. Those that would stand to benefit from Medicaid, affordable education, and unemployment insurance are likely to be the same communities that are targeted by the carceral state. The prison-industrial complex has become the answer to too many social problems, signaling the need for alternative systems of care.¹²³ Abolition's emphasis on the prevention of incarceration is also compatible with public health

strategies that aim to prevent illness on systemic levels. Abolition would do far more than eradicating police and prisons; it would breathe life into communities that have been suffocating from lack of resources for too long.

Health lawyers and policymakers should also legally disentangle social welfare programs from the clutches of the carceral state. Social welfare resources such as healthcare and public housing function as behavior modification programs that resort to punitive measures to ensure compliance. People who receive Medicaid or Temporary Assistance for Needy Families are subject to heightened government surveillance as a result of using these resources.¹²⁴ Thus, even seemingly benevolent programs that exist to provide aid to desperate people work in conjunction with the prison-industrial complex. Social welfare programs should not function through carceral logics in which merely being poor or a member of a marginalized group legitimizes being subjected to punishment.

Finally, establishing a positive right to health within the U.S Constitution can provide the legal landscape necessary to build alternatives to incarceration. The current 18th century Constitution mainly delineates negative rights—i.e the right not to be subject to government intrusion—rather than positive rights—i.e rights the government is obligated to provide for its citizens. As a result, many rights that are relevant to health, such as the right to clean water, adequate housing, or nutritious food, are absent from federal law. Establishing a positive right to health can provide universal access to social and economic benefits, thereby promoting collective well-being. Moreover, creating a positive right to health directly targets subordination. By providing a right to health, legal action can be facilitated to account for the unequal realization of that right.¹²⁵ Thus, a positive right to resources that promote one's health can generate the redistribution of power and wealth necessary to combat subordination. This tactic will benefit historically marginalized groups the most, such as those targeted by the carceral state. As discussed earlier, providing access to resources will undercut the pathways to carcerality and thus serves the abolitionist agenda.

Building alternatives to punitive systems will require radical imagination such that we collectively achieve a new world. It is undoubtedly a daunting and difficult task. Yet, given how draconian the prison system is and the ineptitude of reforms, abolition must be given its due consideration. Academics, lawyers, policymakers, and other professionals must join grassroots activists in their endeavors to build a better world.

Objections to Abolition

Those who object to abolition cite the deterrence theory. They argue that punishment and incarceration disincentivize crime because the consequences of the action become too costly.¹²⁶ However, what crimes are these women committing? Most women are convicted of crimes of survival, such as burglary or fraud.¹²⁷ If the state insists on people gaining wealth by legal means, then they should release the economic restraints that prevent Black people from doing so, such as unequal pay,¹²⁸ denial of bank loans,¹²⁹ or redlining policies.¹³⁰ The women incarcerated for violent crimes often acted in self-defense after years of victimization. The state's answer to domestic violence requires women to spend years behind bars, where they are subject to sexual and physical abuse by prison guards.¹³¹ The solution to social problems, such as economic inequality or domestic violence should not perpetuate more harm. Instead, the law should be used in creative ways to restructure systems of violence into those of care and rehabilitation.

Proponents of incarceration also cite the incapacitation theory. This theory claims that prisons and police are necessary to ensure public safety. However, there is an a priori association of criminality with Blackness.¹³² Thus, believing that one's safety is guaranteed by the increasing number of Black people behind bars is inherently racist. Second, the price of safety, in the minds of those who uphold the incapacitation theory, is predicated on the oppression of Black people. Those who uphold this theory must unlearn the tendency to equate safety with the number of people in chains. Moreover, studies have shown that there is a "marginal-to-zero" association between the number of people incarcerated and crime rates.¹³³ Given that many crimes are motivated by survival, it is more effective to fund institutions that provide people with basic necessities, such as drug rehabilitation centers in low-income areas, universal healthcare, and economic mobility for those historically denied access to wealth. The prison-industrial complex requires 80 billion dollars annually to sustain it.¹³⁴ Meanwhile, the state continues to under-invest in institutions that are less expensive and more effective at reducing crime,¹³⁵ such as those mentioned above.

Abolition holds within it the potential to transform the society we currently live in. Rather than barricading historically oppressed people from the rest of the community and calling it "justice," or "safety," we can reimagine what it means to collectively care for one another.

Conclusion

How far has this nation come in freeing Black women from state abuse? Evidently, not far enough. Regulating Black women's reproductive capacities has been a central tenet of social control throughout this nation's history.¹³⁶ To protect Black women's right to carry, birth, and raise their children free from state-sanctioned abuse, we must abolish the systems that prevent them from doing so. Abolition contends that it is by no accident that the laws that fail to protect Black women are also the ones that punish them. Thus, we must reimagine how the law can be used to rebuild alternate systems of care in place of those that perpetuate violence. While the abolitionist agenda advanced in this paper would indeed liberate Black incarcerated women and promote their health and wellbeing, it should be noted that its effects are far-reaching. Indeed, studies have shown that bettering the lives of marginalized peoples uplifts us all.¹³⁷ Abolition is more than a tool to dismantle prisons. Abolition is a medicine that can heal us all.

If the abolitionist agenda put forth seems daunting, it is because it is. However, Black women deserve our efforts. They deserve our solidarity.

Note

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