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INCARCERATION AS A THREAT  
TO REPRODUCTIVE JUSTICE  
IN MASSACHUSETTS AND THE UNITED STATES

*Rachel Roth\**

This Article is an edited and expanded version of Rachel Roth's presentation at the 2016 Western New England Law Review Symposium on Gender and Incarceration. It provides an overview of reproductive justice and describes (1) how prisons and jails undermine reproductive health, rights, and justice for the people they confine, and (2) how mass incarceration undermines the prospect for reproductive justice in the United States overall. It focuses on examples from women's prisons and includes issues and advocacy work from Massachusetts and across the country.

INTRODUCTION

Thank you to Samantha LeBoeuf and all the organizers for the opportunity to participate in this symposium and talk about the relationship between reproductive justice and incarceration. I'm honored to be in this company.

For those who are new to the term, "reproductive justice" is both a theoretical framework and a social movement developed by women of color in the United States as an alternative to the mainstream reproductive rights movement, which tends to emphasize privacy and choice.<sup>1</sup> This alternative framework is a needed corrective that is especially relevant in the context of prisons. Prisons, after all, are institutions of control that limit people's choices. What does "choice in childbirth" mean to someone who can't choose between a doctor and a midwife or even

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\* Rachel Roth, Ph.D., is an independent scholar and consultant in Arlington, MA, and author of the book *MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS* (2000). She would like to thank her colleagues in Massachusetts whose inspiring work informs this Article.

1. Jael Silliman et al., *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE* 1-23 (2004).

choose who will be in the room when she gives birth?

Reproductive justice can be understood in broad and specific terms. In its definition, the organization Forward Together argues that reproductive justice requires “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.”<sup>2</sup>

In policy terms, this expansive vision is often distilled to three things: the right to abortion, the right to have a child, and the right to be a parent. While framed in terms of rights, the vision of these rights is not abstract but one where rights are supported by social conditions—“power and resources”—to make them meaningful. In this way, reproductive justice shows its affinity with human rights, under which governments have an affirmative obligation to facilitate people’s exercise of their rights.<sup>3</sup> The emphasis on social conditions is critical given the deep race and class inequalities in the United States that contribute to and are reflected in the disproportionate incarceration of low-income people and people of color.

The United States incarcerates one of every three women held prisoner in the entire world.<sup>4</sup> Most are either mothers or in their reproductive years or both, making issues of reproductive justice incredibly important.<sup>5</sup>

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2. ASIAN CMTYS. FOR REPROD. JUSTICE, A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS, AND REPRODUCTIVE JUSTICE 1 (2005), <http://forwardtogether.org/assets/docs/ACRJ-A-New-Vision.pdf> [<https://perma.cc/AGQ5-U2NW>]. Forward Together was previously known as Asian Communities for Reproductive Justice. *About, FORWARD TOGETHER*, <http://forwardtogether.org> (last visited April 26, 2017).

3. On the obligation to respect, protect, and fulfill rights, see *International Human Rights Law*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> [<https://perma.cc/UK4U-KMAY>].

4. Barack Obama, Commentary, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 816 (2017); Aleks Kajstura & Russ Immarigeon, *States of Women’s Incarceration: The Global Context*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/global/women/> [<https://perma.cc/6GWR-9NEV>]. The United States has 5% of the world’s population, almost 25% of the world’s imprisoned population, and nearly 30% of the world’s imprisoned women. *Id.*

5. Carolyn Sufrin, Alexa Kolbi-Molinas & Rachel Roth, *Reproductive Justice, Health Care Disparities and Incarcerated Women in the United States*, 47 PERSPS. ON SEXUAL AND REPROD. HEALTH 213, 214 (2015).

### A. *Notes About Language*

My research is primarily on policies and practices in prisons designated for women. We know that in any given prison for women, there are likely people who identify with that label as well as transgender people who are sent to that prison without having any say over whether a women's prison is appropriate for them. The policies that I describe below affect transgender people confined in women's prisons. Most lawsuits and other documentation about pregnancy and reproductive health reflect the experiences of cisgender women, and I use the term "women" in this Article.<sup>6</sup>

I also tend to use "prison" as a generic term for institutions of involuntary confinement, but we should be mindful that the United States has a complex system with federal prisons, state prisons, local jails, prisons to incarcerate immigrants, and prisons to incarcerate young people, and each type of prison is administered by a different agency with its own rules.<sup>7</sup>

### B. *Criminal Justice and Incarceration in Massachusetts*

Massachusetts is a liberal state with a relatively low incarceration rate, but it also has some unusual and even retrograde policies. When other states were repealing three strikes laws, Massachusetts passed one.<sup>8</sup> Massachusetts is one of the few

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6. *Transgender* can be understood "as an umbrella term to describe people whose gender identity or expression is different from what society expects based on the gender assigned to them at birth." JOEY MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* xix (2011). In contrast, *cisgender* refers to people whose gender identity or expression aligns with the gender they were assigned at birth. For information on transgender people in prison and jail, see *Faculty Directory: Gabriel Arkles*, NE. U. SCH. OF L. <https://www.northeastern.edu/law/faculty/directory/arkles.html> [<https://perma.cc/3DZL-WE2C>]; JASON LYDON ET AL., *COMING OUT OF CONCRETE CLOSETS: A REPORT ON BLACK & PINK'S NATIONAL LGBTQ PRISONER SURVEY* (2015), <http://www.blackandpink.org/wp-content/uploads/Coming-Out-of-Concrete-Closets.-Black-and-Pink.-October-21-2015.pdf>.

7. Some agencies, notably the United States Bureau of Immigration and Customs Enforcement, contract out incarceration to private, for-profit companies. The number of individuals confined in private prisons is much smaller than the political attention directed to them would suggest; however, privatization is a much bigger phenomenon and is a major cause for concern, as many prisons and jails contract out essential services like medical care to profit-driven companies. Eric Markowitz, *Making Profits on the Captive Prison Market*, *NEW YORKER* (Sept. 4, 2016), <http://www.newyorker.com/business/currency/making-profits-on-the-captive-prison-market> [<https://perma.cc/Y3F9-K93S>] [hereinafter Markowitz, *Making Profits*].

8. Three strikes laws mandate long sentences, including life sentences, for a third

states with no compassionate release law for terminally ill people in prison,<sup>9</sup> one of the few to allow people to be punished for disciplinary infractions with up to ten years in solitary confinement,<sup>10</sup> and the only state to use prisons for people who have been civilly committed by the courts for a drug or alcohol problem.<sup>11</sup>

At the local level, the Hampden County jail videotaped women being strip-searched before placing them in solitary confinement, and even allowed male corrections officers to make the video recordings. Hampden County is the only jurisdiction in the state of Massachusetts and, as far as anyone can determine, in the entire country, to have adopted such a policy—despite the jail’s leadership priding itself on its “best practices” for dealing with women.<sup>12</sup> A federal judge held the policy to be unconstitutional in 2014.<sup>13</sup>

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criminal conviction; the circumstances that trigger a life sentence can be very broad, encompassing such crimes as shoplifting. Sadhbh Walshe, *Massachusetts Opts in to America’s Disastrous ‘Three Strikes’ Experiment*, THE GUARDIAN (Aug. 9, 2012), <https://www.theguardian.com/commentisfree/2012/aug/09/massachusetts-opts-americas-disastrous-three-strikes-experiment> [<https://perma.cc/X7GL-BR8Y>].

9. PRISONERS’ LEGAL SERVS. OF MASS., MEDICAL PLACEMENT OF TERMINAL AND INCAPACITATED INMATES (2015), <http://www.cjpc.org/2015/Medical-Placement-Fact-Sheet-S843-4.24.15.pdf> [<https://perma.cc/K5H7-YF9W>].

10. PRISONERS’ LEGAL SERVS. OF MASS., AN ACT TO REDUCE RECIDIVISM, CURB UNNECESSARY SPENDING, AND ENSURE APPROPRIATE USE OF SEGREGATION (2015), <http://www.cjpc.org/2015/H.1475-Factsheet.pdf> [<https://perma.cc/K86U-D3CY>].

11. Although the legislature passed and the governor signed a law to prevent the longstanding practice of sending women to state prison for detoxification (but no treatment) in January 2016, advocates remain concerned about the current administration’s interpretation of the law and are keeping alive the class-action lawsuit brought in 2014 (*Doe v. Patrick*, now *Doe v. Baker*). Press Release, ACLU of Mass., Following Civil Rights Lawsuit, State Lawmakers Act to Address Decades-Long Practice of Imprisoning Women Suffering from Addiction (Jan. 21, 2016), <https://aclum.org/uncategorized/following-civil-rights-lawsuit-state-lawmakers-act-address-decades-long-practice-imprisoning-women-suffering-addiction/> [<https://perma.cc/86NA-69DJ>]; Todd Feathers, *ACLU Sues Over Possible Jail Loophole*, LOWELL SUN (June 22, 2016), [http://www.lowellsun.com/todayshadlines/ci\\_30043982/aclu-sues-over-possible-jail-loophole](http://www.lowellsun.com/todayshadlines/ci_30043982/aclu-sues-over-possible-jail-loophole) [<https://perma.cc/X6TG-BXAV>].

12. The website of the Western Massachusetts Regional Women’s Correctional Center in Hampden County emphasizes its commitment to “trauma-informed, gender-responsive” best practices and its aspiration “to be a leader in the evolving model of women’s corrections.” WCC, HAMPDEN CTY. SHERIFF’S DEPT MASS., <http://hcsdma.org/wcc/> [<https://perma.cc/T6LN-478J>].

13. *Baggett v. Ashe*, 41 F. Supp. 3d 113 (D. Mass. 2014). Almost 200 women brought a class-action lawsuit against the county sheriff. *Id.* at 115. The judge held that allowing male officers to videotape naked women is unreasonable, demeaning, antithetical to human dignity, and unconstitutional. *Id.* at 122–26. Compounding the injury, the jail did not secure the videotapes; until 2010, they were kept in an unlocked

Structurally, the administration and funding of local jails is also unusual: sheriffs are elected in each county to run county jails, but all funding for jails comes from the annual budget passed by the state legislature. The legislature also approves bond funding that can be used for the construction of new jails. The governor's office reviews requests for funding and makes decisions.<sup>14</sup>

In other ways, Massachusetts is similar to the rest of the country. State officials operate prisons with little oversight and sheriffs operate jails with even less. Racism is systemic. At the front end of the process, for example, the American Civil Liberties Union ("ACLU") reports that African Americans are more than three times as likely as whites to be arrested for marijuana possession, despite using marijuana at the same rates.<sup>15</sup> Indeed, racial disparities have increased since the state decriminalized personal possession of less than one ounce of marijuana in 2008.<sup>16</sup> In another striking example, African American and Latino people make up only 15% of the Massachusetts population and yet they account for 72% of mandatory drug convictions.<sup>17</sup> The problem is so pronounced that the Chief Justice of the Supreme Judicial Court commissioned an investigation into sentencing disparities.<sup>18</sup>

Our system also disadvantages lower-income people. For

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cabinet, and some are missing. *See also* Victoria Law, *On the Way to Solitary, Women in Massachusetts Jail Get Strip Searched and Videotaped*, SOLITARY WATCH (May 15, 2014), <http://solitarywatch.com/2014/05/15/way-solitary-women-massachusetts-jail-get-strip-searched-videotaped/> [<https://perma.cc/FHP7-VTZL>].

14. Special thanks to Lois Ahrens, Director of the Real Cost of Prisons Project, for keeping a spotlight on jails as key institutions in the mass incarceration puzzle.

15. ACLU OF MASS., *THE WAR ON MARIJUANA IN BLACK AND WHITE: A MASSACHUSETTS UPDATE 2-3* (Oct. 2016), <https://aclum.org/wp-content/uploads/2016/10/TR-Report-10-2016-FINAL-with-cover.pdf> [<https://perma.cc/YU4J-B8Z6>].

16. *Id.* at 7.

17. MARY BROLIN ET AL., *MASS. HEALTH POLICY FORUM, IMPROVING ACCESS TO SUBSTANCE ABUSE TREATMENT AND REDUCING INCARCERATION AND RECIDIVISM 2* (2015), [http://masshealthpolicyforum.brandeis.edu/forums/Documents/Substance%20Abuse%202015%20Docs/IssueBrief\\_FULLL.final.pdf](http://masshealthpolicyforum.brandeis.edu/forums/Documents/Substance%20Abuse%202015%20Docs/IssueBrief_FULLL.final.pdf) [<https://perma.cc/S48W-Q6UD>].

18. Milton J. Valencia, *SJC Chief Wants to Know If Minorities Get 'Equal Justice'*, BOSTON GLOBE (Oct. 21, 2016), <https://www.bostonglobe.com/metro/2016/10/20/sjc-chief-probe-sentencing-disparities-for-minorities/44Dxw4qDmqOcKYSGGOpw5I/story.html> [<https://perma.cc/7U4D-953S>]; *see also* BENJAMIN FORMAN, LAURA VAN DER LUGT & BEN GOLDBERG, *BOSTON INDICATORS PROJECT, THE GEOGRAPHY OF INCARCERATION: THE COST AND CONSEQUENCES OF HIGH INCARCERATION RATES IN VULNERABLE CITY NEIGHBORHOODS* (2016), [https://www.tbf.org/~media/TBF0rg/Files/Reports/Indicators\\_Incarceration\\_Final-web.pdf](https://www.tbf.org/~media/TBF0rg/Files/Reports/Indicators_Incarceration_Final-web.pdf) [<https://perma.cc/B2ZF-CBWT>].

example, many women in jail are waiting to go on trial, and many are too poor to pay even \$50 bail.<sup>19</sup> Social workers and defense attorneys created the Massachusetts Bail Fund to free people from jail. They focus on people whose bail is set at \$500 or less, but they still cannot raise enough money to help everybody who needs it. This is very serious because being held in jail before trial is associated with worse outcomes: people are more likely to be convicted and to get a harsher sentence that includes prison time once convicted; even if someone doesn't get convicted, they may have lost their job, their apartment, and even their children to foster care because they were locked up in jail.<sup>20</sup> Activists and some politicians and government officials are working to reduce the use of pretrial detention in Massachusetts and around the country.<sup>21</sup>

### C. *Prisons as Health Hazards*

Because this Article emphasizes health care and because health is central to the definition of reproductive justice, it is important to understand at the outset that prisons are health hazards. At the most basic level, prisons strip people of dignity and the means to take care of themselves. Consider these findings from a study about access to reproductive health care in New York state prisons for women: half the participants said they do not get

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19. ERIKA KATES, WELLESLEY CTRS. FOR WOMEN, GENDER AND JUSTICE PROJECT ON FEMALE OFFENDERS 1 (2012), <https://www.wcwoonline.org/pdf/Gender%20%20Justice%20%202009-2012%20overview.pdf> [<https://perma.cc/S8YL-2HYF>].

20. See generally PRETRIAL JUSTICE INST., <http://www.pretrial.org/> [<https://perma.cc/2B2Y-UKDC>].

21. The problems that poor people faced in colonial America, such as being jailed because they could not afford to pay for bail or court fines or fees, are strikingly resonant today. See generally Jen Manion, *Prisons Prior to Mass Incarceration: The Ideological Foundations of Women's Dependency*, 39 W. NEW ENG. L. REV. 371 (2017); Milton J. Valencia, *Scores of Indebted Become 'Fine-Time' Inmates*, BOSTON GLOBE (Nov. 7, 2016), <https://www.bostonglobe.com/metro/2016/11/06/study-finds-scores-inmates-who-serve-fine-time/B0eipuyXLzeDYLRwicfhUJ/story.html> [<https://perma.cc/K96X-XL62>] (regarding the problem of Massachusetts residents being jailed for inability to pay court fees or fines); Julie Manganis, *Punished for Being Poor? Lawyers Ask SJC to Take Up Bail Issue*, SALEM NEWS (Aug. 5, 2016), [http://www.salemnews.com/news/local\\_news/punished-for-being-poor/article\\_a1c9e610-a056-516e-9ae3-79a9b571584c.html](http://www.salemnews.com/news/local_news/punished-for-being-poor/article_a1c9e610-a056-516e-9ae3-79a9b571584c.html) [<https://perma.cc/A2KA-2WU4>] (regarding a lawsuit brought in Massachusetts by the Committee for Public Counsel Services—statewide public defenders—and Equal Justice Under Law—a national organization bringing impact litigation across the country); MASS. BAIL FUND, <http://www.massbailfund.org/> [<https://perma.cc/Q27R-6YCW>].

enough sanitary pads for their period and two-thirds said they do not get enough toilet paper.<sup>22</sup>

Some people argue that incarceration is a “window of opportunity” to provide medical care—and of course prisons should provide medical care; indeed they are constitutionally obligated to do so.<sup>23</sup> But prisons are like obstacle courses strewn with barriers to that care, and prisons expose people to dangers including violence, sexual assault, injury, infectious disease, poor nutrition, bad living conditions, and medical neglect, all of which should give us pause about the “window of opportunity” argument.<sup>24</sup>

### I. THE RIGHT TO ABORTION

When he was sued over his restrictive abortion policy, Sheriff Joe Arpaio said: “You lose a lot of rights when you’re in jail, whether it’s trying to get an abortion or watching R-rated movies or sex movies or smoking or coffee.”<sup>25</sup> Sheriff Arpaio liked to stir up controversy, but his views and his policies are not unusual.<sup>26</sup>

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22. TAMAR KRAFT-STOLAR, CORR. ASS’N OF N.Y., *REPRODUCTIVE INJUSTICE: THE STATE OF REPRODUCTIVE HEALTH CARE FOR WOMEN IN NEW YORK STATE PRISONS* 8 (2015). The specific findings are: 54% (514 of 957) of respondents did not get enough sanitary pads, and 68% (694 of 1,025) of respondents did not get enough toilet paper. *Id.* at 66–68. In 2008–09, the Correctional Association sent 2,480 surveys, enough for every woman in state prison, and got 1,068 surveys back, for a return rate of 43%. *Id.* at 14. This high level of participation in survey research where women in prison fill out a written paper survey on their own is, to my knowledge, unprecedented. The Correctional Association can only do this type of research because it has legislative authority to monitor prisons, a distinction it shares with organizations in only two other states (Illinois and Pennsylvania).

23. *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976) (establishing that prisons have an Eighth Amendment obligation to meet incarcerated people’s serious medical needs).

24. See generally Ross MacDonald, Amanda Parsons & Homer D. Venters, *The Triple Aims of Correctional Health: Patient Safety, Population Health, and Human Rights*, 24 J. HEALTH CARE FOR POOR & UNDERSERVED 1226 (2013); Rachel Roth, *Obstructing Justice: Prisons as Barriers to Medical Care for Pregnant Women*, 18 UCLA WOMEN’S L.J. 79 (2010).

25. Howard Fischer, *Ruling Clears Way for Women Inmates Seeking Abortions*, ARIZ. DAILY SUN (Aug. 24, 2005), [http://azdailysun.com/ruling-clears-way-for-women-inmates-seeking-abortions/article\\_0801abc6-3164-5cbc-9290-f605bacc3cb.html](http://azdailysun.com/ruling-clears-way-for-women-inmates-seeking-abortions/article_0801abc6-3164-5cbc-9290-f605bacc3cb.html) [https://perma.cc/FC7Y-Q6YG].

26. After six terms as sheriff, Joe Arpaio of Maricopa County (Phoenix), Arizona was finally defeated in the November 2016 election, thanks to concerted grassroots opposition. See Megan Janetsky, *Advocacy Groups Celebrate Sheriff Joe Arpaio’s Defeat in Phoenix*, ARIZ. REPUBLIC (Nov. 9, 2016), <http://www.azcentral.com/story/news/local/phoenix/2016/11/09/advocacy-groups-celebrate->

Despite a consensus in the courts that the right to abortion survives incarceration, in practice it can be very difficult to get an abortion.<sup>27</sup> Some prisons and jails have stonewalled or flat out refused to take women for an abortion, forcing them to go to court and wait on edge for weeks or months. Abortion care is not provided in prison, and that means anyone who is incarcerated has to persuade someone in a position of authority to take her out for that medical care.

Women are subject to whatever restrictions are in place in the state, such as mandatory delays (a.k.a. waiting periods) or in-person “counseling” prior to the appointment, plus whatever internal hoops the prison sets up for them to jump through. Abortion providers tend to be in cities and many prisons are in rural areas. Most prisons and jails make women pay for abortion care. Imagine having to come up with enough money for two trips to a far-away clinic, including the cost of the officers’ time to drive you there, gas, *and* the cost of the abortion—while earning pennies a day or nothing at all.

In Massachusetts, women who are incarcerated do not have to pay for all the ancillary charges, but do have to pay for abortion care, even though it would be covered if they were in the community and enrolled in Medicaid.

Just as women are forced to fight for their right to end a pregnancy, sometimes women are pressured to have abortions that they do not want to have, especially if they are pregnant as a result of sexual misconduct on the part of a staff person.<sup>28</sup>

The ACLU and National Network of Abortion Funds can help women who are incarcerated with legal advocacy and financial aid.

## II. SAFE PREGNANCY, FERTILITY, AND THE RIGHT TO HAVE A CHILD

Getting prenatal care, including methadone if needed, is

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sheriff-joe-arpaios-defeat-phoenix/93554316/ [https://perma.cc/Q9X3-638U].

27. See generally Diana Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict With Constitutional Standards?*, 41 PERSP. ON SEXUAL & REPROD. HEALTH 59 (2009); Rachel Roth, *Do Prisoners Have Abortion Rights?*, 30 FEMINIST STUD. 353 (2004).

28. For example, a corrections officer in Arkansas raped a woman and then “forced her to drink quinine and turpentine in an” effort to end her pregnancy. NAT’L PRISON RAPE ELIMINATION COMM’N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 46 (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf> [https://perma.cc/N2AE-B4AL].

essential and cannot be taken for granted in prison. In the interest of time, I will focus on safe labor and delivery in a hospital. This issue is rarely addressed in prison policy. Most prisons and jails have policies on prenatal care, the use of restraints, transportation, and security in the hospital, but *not* on when to take a woman to the hospital.

Similarly, most prisons and jails have an obstetrician on the premises only a few hours a week (or not at all, if they take women to a clinic or hospital for prenatal care), but women go into labor 24/7, meaning no one with clinical expertise is available to see them.

Given the tendency to discredit what people in prison say and perhaps especially what women in prison say, it is perhaps no surprise how many women give birth locked in a cell because no one believed—or cared—that they were in labor. A nineteen-year-old in an Iowa jail pounded on the door and asked for the nurse, only to give birth alone in her cell. Afterward she asked, “[H]ow does somebody have a baby in jail without anybody noticing?”<sup>29</sup> A young woman in Pennsylvania gave birth in a jail cell (ironically called an observation cell) right by the nurse’s station, but nobody paid any attention to her. Jail officials then accused her of having the baby on purpose so she could sue them.<sup>30</sup> A woman in Texas went into premature labor, could not persuade the overnight nurse to send her to a hospital, and gave birth all alone. Her baby girl’s umbilical cord was wrapped around her neck and she died before the paramedics got there.<sup>31</sup> News of these incidents always makes me wonder why anybody who works in a prison or jail wants to risk the kind of bad publicity that comes with having a dead baby on their hands.<sup>32</sup>

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29. Ann, *Woman gives Birth in Jail Cell, Alone*, FEMINISTING, [http://feministing.com/2009/05/15/woman\\_gives\\_birth\\_in\\_jail\\_cell/](http://feministing.com/2009/05/15/woman_gives_birth_in_jail_cell/) [<https://perma.cc/6LJ9-8WNW>].

30. RACHEL ROTH, CTR. FOR WOMEN POLICY STUDIES, “SHE DOESN’T DESERVE TO BE TREATED LIKE THIS”: PRISONS AS SITES OF REPRODUCTIVE INJUSTICE 9–10 (2012) [https://www.prisonpolicy.org/scans/CWPS\\_Roth\\_Reproductive\\_Injustice\\_7\\_13\\_2012.pdf](https://www.prisonpolicy.org/scans/CWPS_Roth_Reproductive_Injustice_7_13_2012.pdf) [<https://perma.cc/PB2D-NBUA>].

31. Diana Claitor & Burke Butler, *Pregnant Women in Texas County Jails Deserve Better Than This*, DALL. NEWS (June 2014), <http://www.dallasnews.com/opinion/commentary/2014/06/26/pregnant-women-in-texas-county-jails-deserve-better-than-this> [<https://perma.cc/2EM8-WC3C>].

32. In the two weeks after the Symposium, I learned of three similar cases: a woman in a New Mexico jail told the staff that she needed to see a doctor because of cramping and bleeding, but instead gave birth the next day in the jail infirmary to a

In Massachusetts, I'm aware of a number of close calls: one woman told me that it took just three pushes to have her baby once she got to the hospital; others have given birth almost immediately in emergency rooms because it took so long to persuade someone to take them to the hospital.<sup>33</sup>

These examples are gathered from interviews, lawsuits, news reports, and other sources—there is no reliable national data on pregnancy outcomes among women who are incarcerated, let alone on where women give birth.<sup>34</sup>

The common practice of using restraints also undermines women's chances for a safe pregnancy. Restraints like leg irons are especially risky during pregnancy and postpartum recovery because they can lead to tripping and falling and also to dangerous blood clots.<sup>35</sup>

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baby whose umbilical cord was wrapped around his neck and died; a judge in Florida recommended that an 18-year-old with a high-risk pregnancy be transferred to the hospital, but the jail didn't transfer her and within five days of going to jail, her fetus died inside her; and a woman who had given birth inside a Tennessee prison cell after nurses told her she was "faking" labor and whose baby subsequently spent five days in intensive care filed suit against the private company that has a contract to provide medical care in the prison. These cases represent just what was reported by the mainstream press in a two-week period. See Marissa Lucero, *MDC Launches Investigation After Pregnant Inmate Gives Birth, Baby Dies*, KRQE NEWS 13 (Oct. 20, 2016, 6:06 AM), <http://krqe.com/2016/10/19/mdc-launches-investigation-after-pregnant-inmate-gives-birth-baby-dies/> [<https://perma.cc/N9MF-ESMY>]; Willard Shepard, *Mom-to-Be Says Baby Died After Miami-Dade Corrections Mix-Up*, NBC MIAMI (Oct. 20, 2016, 7:52 PM), <http://www.nbcmiami.com/news/local/Woman-Says-Baby-Died-While-She-Was-in-Miami-Dade-Corrections-Custody-397842221.html> [<https://perma.cc/T34X-6C9L>]; Anita Wadhvani, *After Jail Cell Birth, Nashville Inmate Files Suit*, THE TENNESSEAN (Oct. 28, 2016, 9:20 PM), <http://www.tennessean.com/story/news/crime/2016/10/28/after-jail-cell-birth-nashville-inmate-files-suit/92841798/> [<https://perma.cc/X4JG-U5L2>].

33. For example, Kenzie gave birth just eleven minutes *after leaving* the Hampden County jail; she had given birth before and knew that she was in labor. She barely got to the hospital and almost gave birth in the back seat of a sheriff's car, with her hands shackled together. Avital Norman Nathman, *Why Are So Many Pregnant Prisoners Still Being Shackled?*, COSMOPOLITAN (May 21, 2014), <http://www.cosmopolitan.com/politics/news/a6890/anti-shackling-laws-pregnant-prisoners/> [<https://perma.cc/HS2L-BPFK>]. Across the state in Bristol County, Korianne gave birth nine minutes after getting to the hospital, not even making it to the Labor and Delivery ward. She had spent hours trying to persuade nurses and corrections officers that she needed to go to the hospital before someone listened (from about 5:00 p.m. until about 2:00 a.m.). Victoria Law, *Pregnant Women Are Being Shackled in Massachusetts—Even though It's Been Illegal for Years*, REWIRE (June 15, 2016, 12:19 PM), <https://rewire.news/article/2016/06/15/pregnant-women-shackled-massachusetts-even-though-illegal-years/> [<https://perma.cc/G9WA-W8N4>].

34. Sufirin, Kolbi-Molinas & Roth, *supra* note 5, at 215.

35. COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OF

Finally, incarceration undermines the right to have a child by jeopardizing the ability to get pregnant in the future. This can happen in different ways, including medical neglect and sterilization. If prisons don't provide routine preventive care like Pap smears, problems that could be identified and addressed early instead develop to the point where extreme intervention is needed, such as a hysterectomy.<sup>36</sup> Compounding this neglect is the difficulty of achieving any kind of redress after the fact. What counts as medical malpractice for people in the community is not sufficient to bring a lawsuit for someone in prison; the barriers to court are many and the standards of wrongdoing are higher and harder to prove.<sup>37</sup>

In California, more than 100 women from state prison were sterilized, usually right after giving birth—and in violation of state policy.<sup>38</sup> Women told Justice Now and the Center for Investigative Reporting that they felt pressured by doctors in the prison *and* in the hospital to submit to the operation.<sup>39</sup> No comparable

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OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE OPINION NO. 511: HEALTH CARE FOR PREGNANT AND POSTPARTUM INCARCERATED WOMEN AND ADOLESCENT FEMALES 2–3 (2011), <https://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co511.pdf?dmc=1&ts=20140810T1315226147> [https://perma.cc/7Y6E-NPE3], reaffirmed in 2016. See *infra* Part V.

36. See generally Catherine G. Magee et al., *Preventive Care for Women in Prison: A Qualitative Community Health Assessment of the Papanicolaou Test and Follow-Up Treatment at a California State Women's Prison*, 95 AM. J. PUBL. HEALTH 1712 (2005). See also Robin Levi et al., *Prisons as a Tool of Reproductive Oppression*, 5 STAN. J.C.R. & C.L. 309, 326–29 (2009).

37. See *Farmer v. Brennan* 511 U.S. 825, 835–836 (1994) (discussing deliberate indifference in prisons); *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976); see also HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 41–43 (2009), <http://www.hrw.org/sites/default/files/reports/us0609web.pdf> (discussing barriers to court); Meredith Booker, *20 Years is Enough: Time to Repeal the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (May 5, 2016), [https://www.prisonpolicy.org/blog/2016/05/05/20years\\_plra/](https://www.prisonpolicy.org/blog/2016/05/05/20years_plra/) [https://perma.cc/BCK7-X94C].

38. This happened despite state regulations that define tubal ligation as an “excluded service” that may be provided only with prior approval from two different committees; doctors only sought approval in one case. 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, 32–36 (2015).

39. For example, Christina Cordero explained how the obstetrician at Valley State Prison for Women treated her: “As soon as he found out that I had five kids, he suggested that I look into getting it done. The closer I got to my due date, the more he talked about it. He made me feel like a bad mother if I didn't do it.” *Id.* at 8. She had the surgery and said, “I wish I never had it done.” *Id.* at 32. See also series on sterilization of women in California prisons by Corey G. Johnson. *Corey G. Johnson*,

information is readily available from other states (the knowledge we have about California is a testament to years of research and organizing by Justice Now), but I found policies permitting women to be sterilized in at least nine other state prison systems.<sup>40</sup> A critical question for reproductive justice is, can someone give meaningful consent to the permanent destruction of fertility in an inherently coercive institution like a prison?<sup>41</sup>

On another note, a few men who have tried to assert an affirmative right to procreate have not succeeded. Ruling *en banc*, the Ninth Circuit, for example, narrowly held that the right to procreate is “fundamentally inconsistent” with incarceration.<sup>42</sup>

### III. FAMILY RELATIONSHIPS AND THE RIGHT TO BE A PARENT

Carol Strickman of Legal Services for Prisoners with Children describes many complexities affecting family relationships for people in prison.<sup>43</sup> I highlight a few points here because this is a

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CTR. FOR INVESTIGATIVE REPORTING, <http://cironline.org/person/corey-g-johnson> [<https://perma.cc/995G-RUXM>] (follow links below the information on Johnson to read his writings on sterilization of women in California prisons).

40. Roth & Ainsworth, *supra* note 38, at 36–41. Notably, I have not seen any policies permitting vasectomies for men. *Id.* at 47 n. 208.

41. As Misty Rojo, who spent ten years in California prisons and now works for Justice Now, put it in testimony to the state legislature: “There is no autonomy [in prison]. Your body is in effect ‘property of state.’ You can receive disciplinary action for getting a haircut too short . . . so the idea that you could make such a long-term permanent decision in that type of environment is ludicrous.” *Id.* at 7.

42. See generally *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002). Given prisons’ and courts’ rejection of men’s right to procreate, it seems extremely unlikely that these institutions would uphold women’s right to procreate, that is, their right to become pregnant. In fact, some opinions cite concern that if prison systems allow men to procreate, they will have to allow women to do so as well, and this would be costly and burdensome. Rachel Roth, “No New Babies?” *Gender Inequality and Reproductive Control in the Criminal Justice and Prison Systems*, 12 AM. U. J. GENDER, SOC. POL’Y & L. 391, 397–404 (2004). Perhaps if a woman had been diagnosed as infertile prior to being incarcerated, she could assert a right under the Americans with Disabilities Act (although I am just speculating here). In a notable twist, the United States Bureau of Prisons facilitated the pregnancy-by-insemination of an incarcerated Cuban man’s wife in 2014 as part of diplomatic efforts to improve conditions for a U.S. citizen incarcerated in Cuba and eventually renew the relationship between the two countries. Daniel Trotta, *U.S. Helped Imprisoned Cuban Spy Artificially Inseminate Wife*, REUTERS (Dec. 22, 2014, 8:01 PM), <http://www.reuters.com/article/us-cuba-usa-insemination-idUSKBN0K100W20141223> [<https://perma.cc/ESD2-PQVK>]. This action stands in stark contrast to the Bureau’s denial of the same consideration to a male U.S. citizen in its custody. *Goodwin v. Turner*, 908 F.2d 1395, 1397 (8th Cir. 1990); Roth, *supra* note 27, at 397–404.

43. Carol Strickman, *Gender and Incarceration—Family Relationships and the Right to be a Parent*, 39 W. NEW ENG. L. REV. 401 (2017).

critical pillar of the reproductive justice framework. A majority of people in prison are parents.<sup>44</sup> According to the United States Bureau of Justice Statistics (the only source of nationally representative data), more than half of women in state prison never have a visit with their children.<sup>45</sup> Research from Black and Pink with lesbian, gay, bisexual, and transgender people is even more dire: 44% of respondents reported having children, but only 29% had any kind of contact with them, such as phone calls or visits.<sup>46</sup>

Staying in touch is expensive. The Ella Baker Center for Human Rights, et al., found that one-third of people they surveyed went into debt to pay for visits and phone calls to loved ones in prison.<sup>47</sup> A national movement for “telephone justice” has been working through the courts and the Federal Communications Commission to lower the exorbitant cost of phone calls—costs that are inflated by kickbacks and monopoly contracts given to private companies.<sup>48</sup> The Massachusetts Department of Correction is considering some troubling new regulations to limit visits and access to mail, including a measure to prohibit children from sitting on their parents’ laps in the visiting room.<sup>49</sup>

The Bureau of Justice Statistics identified an important gender difference in its surveys of parents: when mothers go to prison, their children are more likely to wind up in foster care than when fathers go to prison because women are more likely to be single

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44. LAUREN E. GLAZE & LAURA M. MARUSCHACK, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2008), <http://www.bjs.gov/content/pub/pdf/pptmc.pdf> [<https://perma.cc/X9QV-YUHF>], revised in 2010.

45. *Id.* at 18.

46. LYDON, *supra* note 6, at 19. The report by Black and Pink represents the largest survey ever of lesbian, gay, bisexual, transgender, and queer/questioning people in prison. *Id.* at 3.

47. ELLA BAKER CENTER FOR HUMAN RIGHTS, ET AL., WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 30 (2015), <http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf> [<https://perma.cc/KTR3-YE5F>].

48. Erik Markowitz, *How Prison Phone Calls Became A Tax on the Poor*, INT’L BUS. TIMES (Mar. 30, 2016, 4:00 AM), <http://www.ibtimes.com/how-prison-phone-calls-became-tax-poor-2342043> [<https://perma.cc/V752-ENS5>]; see *Regulating the Prison Phone Industry*, PRISON POLY INITIATIVE, <http://www.prisonpolicy.org/phones/> [<https://perma.cc/K54W-7ATV>].

49. Milton J. Valencia, *Proposed Changes to Privileges, Regulations Have Prisoners on Edge*, BOS. GLOBE (Oct. 12, 2016), <https://www.bostonglobe.com/metro/2016/10/12/proposed-regulations-has-prisoners-edge/TelqUR7RQfY98fNjmCv1SM/story.html> [<https://perma.cc/ZU29-W3LQ>]. See generally Strickman, *supra* note 43 (discussing rules about visits by family members).

parents.<sup>50</sup> This puts mothers at greater risk of permanently losing their children because of laws that mandate the termination of parental rights once a child has been in foster care for fifteen months in a twenty-two-month period.<sup>51</sup> A few states have made changes to their laws to allow parents more opportunity to demonstrate to the courts that they have an ongoing relationship with their children that should be preserved.<sup>52</sup> New York and Washington have some of the best provisions for other states to follow.

Another strategy to keep families together is alternatives to incarceration for primary caregivers, so that the arbitrary time limits of foster care never come into play. California, Oregon, and Washington all have some type of state law in this area.<sup>53</sup> These important developments would be even more beneficial if they took effect at arraignment instead of later, at sentencing, or even after someone is already incarcerated following their conviction, to prevent the trauma and consequences of separation in the first place. In Massachusetts, Families for Justice as Healing worked to get a bill on community-based sentences for primary caregivers introduced for the first time in 2015, but it didn't get out of committee.<sup>54</sup>

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50. GLAZE & MARUSCHACK, *supra* note 44, at 16.

51. The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997), set rigid time limits with no exception for parents in prison whose children are in foster care solely because of their parents' incarceration. *See also* Dorothy Roberts, *Prison, Foster Care, and the Systematic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012).

52. California, Colorado, Nebraska, New Mexico, New York, and Washington have modified their laws to allow incarcerated parents more opportunity to maintain their family ties. The New York and Washington laws afford families the most flexibility to protect parent-child relationships. *See* Victoria Law, *New Law Gives Parents Behind Bars in Washington State a Way to Hold Onto Their Children*, TRUTHOUT (May 11, 2013), <http://www.truth-out.org/news/item/16312-new-law-gives-parents-behind-bars-in-washington-state-a-way-to-hold-onto-their-children> [https://perma.cc/9BEH-5VYK] (discussing Washington's law); Tamar & Sam Streed, *A Fair Chance for Families Separated by Prison*, NORTH STAR FUND (June 30, 2010), <http://northstarfund.org/blog/2010/06/a-fair-chance-for-families-separated-by-prison> [https://perma.cc/GFT5-CXCG] (discussing New York's law).

53. *See* S.B. 219, 2015 S., Reg. Sess. (Cal. 2015) (referred to as California Alternative Custody Program); H.B. 3503, 78th Leg. Assemb., Reg. Sess. (Or. 2015) (referred to as Oregon Family Sentencing Alternative Pilot Program); S.B. 6639, 61st Leg., Reg. Sess. (Wash. 2010); WASH. DEP'T OF CORRECTIONS, *Parenting Sentencing Alternative* (Feb. 29, 2012) <http://www.doc.wa.gov/corrections/justice/sentencing/docs/fosa-legislative-work-group-presentation.pdf> [https://perma.cc/9P3P-A6E5].

54. H. 1382, 189th Gen. Ct., Reg. Sess. (Mass. 2015); reintroduced as S. 770, 190th Gen. Ct., Reg. Sess. (Mass. 2017).

The JusticeHome program run by the Women’s Prison Association in New York City allows women charged with felonies that carry at least six months in prison to serve out a community-based sentence instead. The Association, a non-profit organization, provides services and supervision, in lieu of the probation or parole department. While not specifically aimed at primary caregivers, the initiative benefits mothers and children, has had good results so far, and has saved tens of thousands of dollars per person.<sup>55</sup>

#### IV. SOCIAL COSTS

As even this brief overview demonstrates, prisons undermine reproductive rights and health in numerous ways. At the same time, mass incarceration also undermines the prospect for reproductive justice in the United States overall. Even if every woman and girl somehow got out of prison tomorrow, there would still be about two million people in prison, and this would still be a problem for reproductive justice. The United States spends about \$80 billion each year on incarceration,<sup>56</sup> instead of on priorities like health care, housing, and education—investments that help people to flourish and keep people out of prison in the first place. The current system puts punishment and dehumanization at the center of our public policy and creates permanent second-class citizenship for millions of people. Individuals with felony convictions, especially felony drug convictions, are often barred from public housing, jobs, food stamps, student loans, and drivers’ licenses, *and also* lose their voting rights—the most basic right of citizenship.<sup>57</sup>

55. Sadhbh Walshe, *The Program That’s Keeping Women Out of Prison – and Saving Money*, THE GUARDIAN (Sept. 17, 2015, 8:00 AM), <https://www.theguardian.com/us-news/2015/sep/17/justice-home-program-keeping-women-out-of-prison-saving-money> [<https://perma.cc/33H3-FFC4>]. In New York, one year of prison costs \$60,000, higher even than the cost in Massachusetts; in contrast, services provided by the Women’s Prison Association cost \$15,000.

56. Markowitz, *Making Profits*, *supra* note 7.

57. See *generally* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind, eds., 2002). In 2016, Massachusetts enacted a law to end the automatic suspension of drivers’ licenses for people convicted of some, but not all, drug crimes. Amy Gorel, *New Law Ends Automatic Driver’s License Suspensions for Drug Crimes*, WBUR NEWS (Mar. 30, 2016, 2:20 PM), <http://www.wbur.org/news/2016/03/30/baker-bill-automatic-license-suspensions> [<https://perma.cc/W6RA-6MY6>]; see also Leah Sakala, *Suspending Common Sense in Massachusetts: Driver’s License Suspensions for Drug Offenses Unrelated to Driving*, PRISON POL’Y INITIATIVE (May 14, 2014), <https://www.prisonpolicy.org/driving/report.html> [<https://perma.cc/E4Q4-3ZU7>].

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Considering the toll that incarceration takes on individuals and families as well as the harsh aftermath of conviction and incarceration, all undergirded by entrenched race and class stratification, our current system is incompatible with any notion of social justice.

#### V. ANTI-SHACKLING ADVOCACY AND THE NEED FOR ACCOUNTABILITY

I'd like to close by returning to the issue of shackling pregnant women and what it can tell us about the prospect for change. When people talk about shackling, they are referring to the practice of physically restraining someone by using handcuffs, heavy chains around the waist or belly, and ankle cuffs connected by a chain. Sometimes the handcuffs are attached to the waist chain and are used with "black boxes" over the hands to further limit the ability to move. Default practice is to restrain people who are being taken outside of prison (to court or the hospital, for example), typically without regard to an individual's likelihood of trying to escape or strike out at others.

Twenty-two states and the District of Columbia have passed some type of law to limit the use of restraints during pregnancy, birth, and postpartum recovery.<sup>58</sup> Some laws focus narrowly on labor and birth, while others limit the use of restraints throughout pregnancy and postpartum recovery. The shackling of pregnant women seems to be one of the only conditions of confinement that legislatures are willing to address; typically legislatures delegate decisions about conditions to sheriffs or Departments of Correction. Most laws have been enacted since 2009, and a tremendous amount of energy has gone into getting them passed.

However, in every state where anyone has done follow-up research, they have found that the laws are being violated. A class-action lawsuit in Illinois that settled for \$4.1 million provides

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58. INT'L HUMAN RIGHTS CLINIC, UNIV. OF CHI. LAW SCH., CAT SHADOW REPORT: THE SHACKLING OF INCARCERATED PREGNANT WOMEN (2014), <http://www.ushrnetwork.org/sites/ushrnetwork.org/files/08-indiv-aclu.pdf> [<https://perma.cc/HAR5-Z5P3>] [hereinafter CAT SHADOW REPORT] (listing twenty-one state bill or statute citations); Limitations on the Use of Restraints Amendment Act of 2014 Act 20-596, 62.6 D.C. Reg. 1495-99 (Feb. 6, 2015); S.P. 353, 127th Me. Leg., First Reg. Sess. (Me. 2015). Several federal agencies have adopted internal policies but there is no federal statute on the use of restraints on pregnant women. See CAT SHADOW REPORT, *supra* note 58, at paras. 7, 13.

further evidence of violations.<sup>59</sup> This situation is not too surprising because the statutes almost never have any oversight or enforcement mechanism, let alone a penalty for violating the law.<sup>60</sup>

Massachusetts fits into this pattern. The legislature passed a very comprehensive law in 2014 that absolutely bans the use of any restraints during labor and birth, and bans leg irons and waist chains throughout pregnancy and postpartum recovery.<sup>61</sup> The law is unusual because it embeds these limits on shackling in a broader framework that also mandates minimum standards of medical care, nutrition, clothing, and other conditions of confinement for pregnant women in prison and jail, including transportation in a car or van with seat belts. The mandate on seat belts is the direct result of incarcerated women giving input on a draft of the bill. California is the only state with any legislation comparable in scope.<sup>62</sup>

But prisons and jails are not consistently delivering on the promise of the law. The Prison Birth Project and Prisoners' Legal Services have documented violations in policy and practice across Massachusetts.<sup>63</sup> Women are still being shackled in labor, in the

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59. The states with follow-up research include California, New York, Pennsylvania, and Texas. CAT SHADOW REPORT, *supra* note 58, at para. 16. See also KRAFT-STOLAR, *supra* note 22, at 135–43.

60. CAT SHADOW REPORT, *supra* note 58 at Section IV, paras. 10, 14 & Section VII, paras. 25. Rhode Island's statute is unique in establishing a private right of action. 42 R.I. GEN. LAWS § 56.3–4 (2011) (“In addition to any other rights and remedies afforded by law, any person who has been restrained in violation of this chapter may file a civil action for damages and any appropriate and equitable relief in Superior Court. The court may also award a prevailing plaintiff reasonable attorneys’ fees and costs.”). Some statutes have reporting requirements, but the requirements are often vague and the reports are often internal. Moreover, investigative reporting in Pennsylvania shows how compliance with the letter, but not the spirit, of the law fails to yield meaningful information. Audrey Quinn, *Pregnant Pa. Inmates Continue to Be Shackled, Despite State Law*, NEWSWORKS (Aug. 28, 2014), <http://www.newsworks.org/index.php/local/the-pulse/71964-pregnant-pa-inmates-continue-to-be-shackled-during-labor-despite-state-law-> [https://perma.cc/RL68-9N8V].

61. MASS. GEN. LAWS ch. 127, § 118 (2016) (effective May 15, 2014).

62. A 2005 statute championed by Legal Services for Prisoners with Children mandated minimum standards including medical care, nutrition, and a unique provision on dental care, as well as limits on shackling during labor; a 2012 statute (twice vetoed, finally signed) expanded protections against shackling throughout pregnancy. Assemb. B. 478, 2005–06 Leg., Reg. Sess. (Cal. 2005); see also Karen Shain, *No More Shackles: AB 2530 is SIGNED!*, LEGAL SERVS. FOR PRISONERS WITH CHILD. (Sept. 28, 2012), <http://www.prisonerswithchildren.org/2012/09/blog-post-1/> [https://perma.cc/VTL8-CVSW].

63. See generally RACHEL ROTH, LAUREN PETIT & MARIANNE BULLOCK, PRISON BIRTH PROJECT & PRISONERS’ LEGAL SERVS. OF MASS., *BREAKING*

hospital after giving birth, on the way back to prison after having their baby, and throughout postpartum recovery. As one woman said, “It was really my worst nightmare, being told there was a law to prohibit this, but now here I was, experiencing it.”<sup>64</sup>

In some cases, this shackling may be happening because the prison or jail didn’t update its policy to reflect the law. In others, corrections officers are shackling women even though there is a policy on the books—perhaps because no one ever told them about it. For example, during a candidates’ forum for sheriff of Middlesex County, the incumbent sheriff insisted his office was in full compliance with the law (contrary to our findings), but his opponent, a transportation officer who worked for him, didn’t even know about the law.<sup>65</sup> In Bristol County, a woman was shackled to the bed by the night shift, then unlocked by the day shift, then shackled again by the night shift during her time in the hospital.<sup>66</sup>

In addition to these problems, pregnant women are still driven in vans without seat belts or forced to miss court dates because the staff do not plan to have the right type of vehicle ready. Women do not get enough food or enough nutritious food (depending on where they are). One said, “It’s like that show ‘Punk’d’ on TV, they put up signs in the kitchen about how many fresh fruits and vegetables we should eat every day . . . then serve us food that doesn’t have any of that!”<sup>67</sup> Women do not get clothes that fit their bodies as they change throughout pregnancy. Pants that are too long aren’t just uncomfortable: they are a trip hazard and dangerous to a pregnant woman and her fetus.

Working so intensively on this campaign for the past three years has raised a lot of questions for me, especially at this moment of unprecedented attention to police, prisons, and the criminal justice system: What does our collective experience trying to limit shackling mean for the tension between working to improve conditions for people who are incarcerated and working to stop the flow of people into prison? Is it worth trying to get new laws passed if they are not enforced? Strategically, should we be

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PROMISES: VIOLATIONS OF THE MASSACHUSETTS PREGNANCY STANDARDS & ANTI-SHACKLING LAW (2016).

64. *Id.* at 6.

65. Greg Reibman, *VIDEO: Middlesex County Sheriff Debate*, VILLAGE 14 (Sept. 1, 2016), <http://village14.com/2016/09/01/video-middlesex-county-sheriff-debate/#axzz4JVS5IS1j> [<https://perma.cc/292B-RBGQ>].

66. Law, *supra* note 33.

67. ROTH, PETIT & BULLOCK, *supra* note 63, at 13.

focusing on specific issues like safe pregnancy or solitary confinement, or should we be pressing for some sort of citizen oversight of entire prison and jail systems?<sup>68</sup> Whatever facet of gender and incarceration we're motivated by, how do we hold the State accountable?

For the foreseeable future, we will need a three-pronged strategy: work on specific issues relating to prison conditions to alleviate the suffering of people in prison, work to hold governments accountable for the way they treat the people they subject to incarceration, and work to reduce incarceration in the first place. It is not necessary for every individual or organization to do all three. We can have a division of labor and work in partnership with others to cover all the bases.

## VI. POSTSCRIPT

The 2016 presidential election was held a few short weeks after the Symposium, while participants were working on their contributions to this issue, and it feels imperative to address it in some way.

Gains at the federal level—such as the Department of Justice's decision under President Obama to phase out the use of private prisons—are clearly in jeopardy.<sup>69</sup> Indeed, stock values for private prison companies rose immediately following the election.<sup>70</sup> If the Republican majority succeeds in further restricting access to abortion, and more women take matters into their own hands as a result, there may be a spike in prosecutions of women for giving themselves abortions, something that has already happened in several states.<sup>71</sup>

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68. Similarly, does limiting the use of shackling or solitary confinement for pregnant women or other specific groups open the way for broader protections, or does it blunt momentum for systemic change?

69. Markowitz, *Making Profits*, *supra* note 7.

70. Tracy Alloway & Lily Katz, *Private Prison Stocks Are Surging After Trump's Win*, BLOOMBERG (Nov. 9, 2016, 10:39 AM), <https://www.bloomberg.com/news/articles/2016-11-09/private-prison-stocks-are-surging-after-trump-s-win> [<https://perma.cc/S5V3-CCCU>].

71. See Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 GUTTMACHER POL'Y REV. 3 <https://www.guttmacher.org/gpr/2015/09/prosecuting-women-self-inducing-abortion-counterproductive-and-lacking-compassion> [<https://perma.cc/2FPA-YCDA>]; Lynn M. Paltrow, *How Indiana Is Making It Possible to Jail Women for Having Abortions*, POL. RES. ASSOCS. (Mar 29, 2015), <http://www.politicalresearch.org/2015/03/29/how-indiana-is-making-it-possible-to-jail-women-for-having-abortions/>

The change in the balance of power makes this conversation about incarceration more important than ever.