Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners

Priscilla A. Ocen*

The shackling of pregnant prisoners during labor and childbirth is endemic within women's penal institutions in the United States. This Article investigates the factors that account for the pervasiveness of this practice and suggests doctrinal innovations that may be leveraged to prevent its continuation. At a general level, this Article asserts that we cannot understand the persistence of the shackling of female prisoners without understanding how historical constructions of race and gender operate structurally to both motivate and mask its use. More specifically, this Article contends that while shackling affects female prisoners of all races today, the persistent practice attaches to Black women in particular through the historical devaluation, regulation, and punishment of their exercise of reproductive capacity in three contexts: slavery, convict leasing, and chain gangs in the South. The regulation and punishment of Black women within these oppressive systems reinforced and reproduced stereotypes of these women as deviant and dangerous. In turn, as Southern penal practices proliferated in the United States and Black women became a significant percentage of the female

* Associate Professor of Law, Loyola Law School, Los Angeles. Versions of this Article were presented to the 2011 Advanced Critical Race Studies Seminar at UCLA School of Law, the UCLA Critical Race Studies Works-in-Progress Series, the 2011 African American Girls and the Juvenile Justice System Symposium at U.C. Berkeley School of Law, and the 2011 Southern California Junior Faculty Workshop. I would like to thank Tauny Lovell Banks, Devon Carbado, Sharon Dolovich, Kolleen Duley, Cheryl Harris, Addie Rolnick, Ronald Williams II, Steve Yeazell, Noah Zatz, and Mike Zimmer for their thoughtful comments. I am also indebted to Kimberlé Crenshaw, Carole Goldberg, Jerry Kang, and Saul Sarabia for their willingness to serve as sounding boards for many of the ideas contained in this Article. I am also thankful for the expert research assistance provided by Alisha Burgin, Karla Crone, and Alexandra Oprea. I am particularly grateful to the UCLA School of Law generally, and the Critical Race Studies Program in particular, for their faith in, and support for, this project. Finally, I dedicate this Article to my late mother, Audrey R. Ocen, in whose memory I seek to explore and challenge barriers to racial equity.

prison population, these images began to animate harsh practices against all female prisoners.

Moreover, this Article asserts that current jurisprudence concerning the Eighth Amendment, the primary constitutional vehicle for challenging conditions of confinement, such as shackling, is insufficient to combat racialized practices at the structural level. Current doctrine focuses on the subjective intentions of prison officials at the individual level and omits any consideration of how race underlies institutional practices. Instead, this Article suggests an expanded reading of the Eighth Amendment and the "evolving standards of decency" language that undergirds the "cruel and unusual punishments" clause. Specifically, this Article argues that evolving standards of decency should be guided by other constitutional provisions, such as the Thirteenth Amendment. This expanded reading, which this Article refers to as the "antisubordination approach," draws upon Justice Harlan's oft-cited dissent in Plessy v. Ferguson *and his underappreciated reading of the Thirteenth Amendment therein. Under such a reading, conditions of confinement that result from or are related to repudiated mechanisms of racial domination should be deemed "cruel and unusual punishments." By challenging race and gender subordination at the structural level, this Article suggests that we can move from an aspiration to the actualization of humane justice.*

INTRODUCTION

> 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.[1]

Olivia Hamilton, a Black[2] woman, was held in a Georgia jail.[3] She was pregnant at the time of her conviction.[4] Despite her pregnancy, she often found it difficult to see a doctor because of the indifference of the guards and the overcrowding in the prison.[5] When the pains of labor harkened the arrival of

1. James Baldwin, *An Open Letter to My Sister Angela*, *in* IF THEY COME IN THE MORNING 13 (Angela Davis ed., 1971).

2. I capitalize Black because as Kimberlé Williams Crenshaw explains, it "reflect[s] my view that Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

3. INSIDE THIS PLACE, NOT OF IT: NARRATIVES FROM WOMEN'S PRISONS 29–31 (Robin Levi & Ayelet Waldman eds., 2011).

4. *Id.* at 28–29.

5. *Id.* at 30 ("I was [in jail in Georgia] about a month before I actually saw a doctor.").

her baby, the shackles placed around her wrists compounded her agony.[6] Despite being admitted to the hospital for a cesarean delivery, the birth of her child imminent, she remained under the close supervision of armed prison staff and was shackled throughout the procedure.[7]

Nearly one hundred years earlier, Elvira, also a Black woman, was sentenced to Eastham State Farm,[8] a prison camp in rural Texas populated by Black men and women, for a minor offense.[9] Although Elvira was pregnant at the time she was sentenced, her status as an expectant mother received no consideration.[10] While incarcerated, prisoners, including those who were pregnant, were forced to engage in arduous labor to maintain the prison's expansive physical plant and were also leased out to local industries to perform backbreaking labor.[11] When Elvira complained of pregnancy pains and the possible onset of labor, she was not provided any assistance and was instead given a heavy workload on the prison yard.[12] In the midst of this pain, Elvira gave birth, delivering the child herself, under a magnolia tree near the prison barracks.[13] Elvira remained under the tree, her baby beside her, until another prisoner heard her cries and rendered assistance. Because of the lack of medical assistance, the baby contracted pneumonia and died a few days after his birth.[14]

Olivia and Elvira have similar stories. Both are poor African American women. Both were subject to dehumanizing and degrading conditions of

---

6. *Id.* at 34 ("But she made me keep the shackles on me when I went in for the c-section."); *see also* AMNESTY INT'L USA, "NOT PART OF MY SENTENCE"—VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 11 (1999), *available at* http://www.amnesty.org/en/library/asset/AMR51/019/1999/en/7588269a-e33d-11dd-808b-bfd8d459a3de/amr510191999en.pdf (detailing the use of restraints on female prisoners during labor and childbirth in California as well as other prisons in the United States).

7. INSIDE THIS PLACE, NOT OF IT: NARRATIVES FROM WOMEN'S PRISONS, *supra* note 3, at 34.

8. ANNE M. BUTLER, GENDERED JUSTICE IN THE AMERICAN WEST, 165–66 (1997) (citing testimony regarding Elvira's experience from a Texas legislative committee investigating conditions at Eastham Camp).

9. In the post–Civil War South, African Americans were often arrested for offenses that were fabricated or on charges that would have been ignored if committed by whites. *See, e.g.*, DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 5–7 (2009); BUTLER, *supra* note 8, at 5 (noting that women served their sentences in men's institutions).

10. When sentencing Black women, pregnancy was not taken into consideration as a mitigating factor. *See infra* notes 159–68.

11. According to a Texas State Archives and Library exhibit on Texas prisons, "[i]n 1908, the African-American women were moved to a camp at Eastham Farm, about 20 miles north of Huntsville, where they were subject to whippings and sexual misconduct by the guards." *See* Tex. State Library and Archives Comm'n, *Fear, Force and Leather: The Texas Prison System's First Hundred Years, 1848-1948*, http://www.tsl.state.tx.us/exhibits/prisons/convictlease/women.html (last visited July 14, 2012) ("Several pregnant women were forced to work up until the time of delivery and to give birth in the fields.").

12. BUTLER, *supra* note 8, at 165–66.

13. *Id.*

14. *Id.*

confinement that devalued their pregnancies. Both were also subject to particularized forms of state violence inasmuch as the women's pregnancies were occasions for profound humiliation and abuse. Yet their experiences are separated by more than one hundred years. How is it, then, that there are so many continuities in their treatment?

In this Article, I explore this question, with a particular focus on the historical constructions of Black women, the denigration of their reproductive capacities, and their relationship to the practice of shackling pregnant prisoners during labor and childbirth. In the contemporary context, some feminist scholars have argued that shackling of pregnant prisoners stems from the unthinking exportation of "prison rules . . . to a hospital setting."[15] Others argue that the practice is based on a male-centric approach to corrections that has not been adapted to fit the needs of female prisoners. For example, criminologist Meda Chesney-Lind suggests that "[l]ittle or no thought was given to the possibility of a female prisoner until she appeared at the door of the institution. It was as though crime and punishment existed in a world in which gender equaled male."[16] To contest the unthinking or androcentric use of shackles on pregnant women in prisons across the country, advocates have turned to the Eighth Amendment's "cruel and unusual punishments" clause as a remedy. The clause's lenient standard seeks to determine whether a guard was indifferent to the medical needs of a prisoner. I contend, however, that these frames posited by feminist scholars are insufficiently attentive to the structural role of race and gender in women's prison practices and overestimate the ability of current Eighth Amendment jurisprudence to halt, at an institutional level, the use of shackles during labor and childbirth as a condition of confinement.

I argue in this Article that race and gender are at the heart of the practice of shackling female prisoners during labor and childbirth. The intersection of race and gender explains why female prisoners are at once masculinized, yet uniquely punished as women during pregnancy and childbirth. More specifically, the examination of the intersection of race and gender in the context of stereotypes about Black women demonstrates how the mechanisms of subordination, including criminalization and incarceration, have evolved since the era of chattel slavery to facilitate the marginalization of racialized[17] women. When framed in this manner, the shackling of pregnant prisoners

15. Dana L. Sichel, *Giving Birth in Shackles: A Constitutional and Human Rights Violation*, 16 AM. U. J. GENDER SOC. POL'Y & L. 223, 235 (2007).

16. INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 79 (Marc Mauer & Meda Chesney-Lind eds., 2002).

17. I use the term "racialized" to capture the "discursive process by which particular groups have been classified as non-white, specific meanings have been attached to those groups, and those meanings have been used to support the hierarchical distribution of power, land, and resources." Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 965 n.31 (2011) (citing MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994)).

appears as a manifestation of the punishment of "unfit" or "undesirable" women for exercising the choice to become mothers.[18] Within the prevailing punishment regime, undesirability is synonymous with race, as the impulse to punish such women is rooted in the stereotypical constructions of Black women.

The widespread use of shackles on pregnant prisoners is premised on constructions of Black feminine deviance that were outgrowths of earlier regimes of punishment, such as post–Civil War era convict leasing[19] and chain gangs.[20] It is well understood that contemporary crime and punishment policy and stereotypes about Black men are both informed by the criminalization of Black men during the post–Civil War era.[21] Scholars, such as Michelle Alexander, have argued that the criminalization of Black men in this era

18. *See, e.g.*, Lisa Ikemoto, *The In/Fertile, Too Fertile and Disfertile*, 47 HASTINGS L.J. 1007, 1045–53 (1997) (discussing deviant motherhood); Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1419, 1424 (1991) (noting that in the context of the prosecution of drug-addicted mothers, "[p]oor Black women have been selected for punishment as a result of an inseparable combination of their gender, race, and economic status. Their devaluation as mothers, which underlies the prosecutions, has its roots in the unique experience of slavery and has been perpetuated by complex social forces").

19. Convict leasing was a system of penal labor practiced predominately, though not exclusively, in the Southern United States. The system emerged following the Civil War and was almost exclusively applied to newly freed slaves, who were often convicted of minor crimes on the basis of little or no evidence. Those convicted of crimes were leased from the state to private individuals, businesses, and corporations in all manner of industries, including agriculture, mining, and railroad and levee construction. Payment for the labor of those leased was made to the state. *See, e.g.*, BLACKMON, *supra* note 9, at 4 (noting that convict leasing was a "system in which armies of free men, guilty of no crimes and entitled by law to freedom, were compelled to labor without compensation, were repeatedly bought and sold, and were forced to do the bidding of white masters through the regular application of extraordinary physical coercion"); DAVID OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 40–41 (1996).

20. Following the abolition of convict leasing in many Southern states, the chain gang was established as a new system of exploitative labor promulgated by prisons and local county jails. *See generally* Alex Lichtenstein, *Good Roads and Chain Gangs in the Progressive South: "The Negro Convict is a Slave,"* 59 J. S. HIST. 85 (1993) (discussing the development of chain gangs in Southern states after the abolition of convict leasing, and noting that chain gangs were originally viewed as a positive, progressive reform). Rather than leasing prisoners for the benefit of private industry, jail and prison administrators forced prisoners—who were almost all Black—to labor on plantations, roads, and other public works projects. *See, e.g.*, MILFRED C. FIERCE, SLAVERY REVISITED: BLACKS AND THE SOUTHERN CONVICT LEASE SYSTEM, 1865–1933, at 11–13, 194 (1994). Prisoners were worked in public and chained to one another as they engaged in coerced labor. *See* Jamison v. Wimbish, 130 F. 351, 355 (D.C. Ga. 1904) ("The sufferers wear the typical striped clothing of the penitentiary convict. Iron manacles are riveted upon their legs. These can be removed only by the use of the cold chisel. The irons on each leg are connected by chains."). The chains remained fastened around the ankles of prisoners even as they rested. *See* Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CALIF. L. REV. 441, 452 (1997) ("The convicts were usually harnessed together with chains at all times, even while eating or sleeping.").

21. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 26–35 (2009); Dorothy Roberts, *Race, Crime, and Reproduction*, 67 TUL. L. REV. 1945, 1954–61(1995).

formed the bedrock for the modern phenomenon of mass incarceration.[22] Less well understood, however, is the way in which Black women's subjugation during slavery and punishment regimes in the post–Civil War era shaped stereotypes of Black women, views of female prisoners, and modern prison policy. This Article seeks to fill this discursive gap. Drawing upon Black feminist and intersectionality theory,[23] I argue that post–Civil War era punishment regimes served to define the boundaries of womanhood and those boundaries were in turn used to identify which women should be labeled as "criminal." While Black men were seen as physically violent, Black women were seen as dangerous through a sexualized lens, one that often focused on reproduction. The way in which Black women and female prisoners became synonymous over time reveals the mutually constitutive relationship between Black women and prison.[24]

While the prison system has expanded as a mechanism for the governance of economically and racially marginalized populations,[25] incarcerated women's reproductive capacities have remained a site of subordination. What began as a mechanism to control and demean Black women has become the prevailing mechanism for the treatment of all female prisoners. Indeed, the formative years of the women's penal system in the United States occurred at a historical moment in which crime was deployed to maintain racialized and gendered boundaries.[26] Those boundaries now constitute the institutional parameters in which modern women's prisons operate.[27] This is particularly true given the ways in which Southern prison practices informed practices nationwide as the

22. *See generally* ALEXANDER, *supra* note 21 (arguing that mass incarceration, although race neutral, relies on assumptions of Black criminality and functions as a mechanism of racial subordination).

23. *See, e.g.*, Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Law,* 1989 U. CHI. LEGAL F. 139 (1989).

24. *See, e.g.*, Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751, 789 (2004) (noting that judicial perceptions of female prisoners are informed by stereotypical constructs of Black women).

25. *See, e.g.*, RUTH WILSON GILMORE, THE GOLDEN GULAG: PRISONS, SURPLUS, CRISIS AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007).

26. *See, e.g.*, Jenni Vainik, *The Reproductive Rights of Incarcerated Mothers*, 46 FAM. CT. REV. 670, 672–74 (2008) (noting that starting in the 1870s, "a woman's race dictated the type of penal institution where she would serve her sentence," and that "[t]he type of punishment used at each institution implicitly reinforced the racist and sexist stereotypes of the time"); ANGELA Y. DAVIS, *From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System*, *in* THE ANGELA Y. DAVIS READER 75–89 (Joy James ed., 1998) (tracking the racialization of specific crimes and of the penal system in post–Civil War America).

27. The claim advanced in this Article is not that shackling is applied to pregnant Black female prisoners in a racially disproportionate manner (though there is certainly evidence that it is). Rather, this Article seeks to interrogate the ideological and structural underpinnings of shackling practices that impact all female prisoners, but that rest on stereotypical racial and gender constructions of Black women. Using shackling as a metaphor in the service of a broader claim regarding the social meaning of particular forms of punishment, this Article will also explore the ways in which the social meanings of punishment practices contribute to their normalization within prison environments.

United States turned to a more retributivist philosophy of incarceration in the 1970s.[28] Consequently, the punitive orientation toward female prisoners, who were nearly all Black in the post–Civil War era,[29] has become the standard operating procedure in contemporary prisons.[30] Therefore, the presumed race and gender identity of female prisoners has played an essential role in normalizing the use of shackles on pregnant prisoners, not only in formal incarcerative spaces, such as prisons, but also in institutions, such as detention centers, that have come to resemble prisons in critical respects.[31]

A racial and gendered analysis of the use of shackles on pregnant prisoners reveals fundamental deficiencies within Eighth Amendment doctrine given its inability to engage in a race-conscious and historically contextualized analysis of conditions of confinement. As Sharon Dolovich and Alice Ristroph have noted, Eighth Amendment jurisprudence, and the "deliberate indifference" standard announced by the Supreme Court in a line of cases beginning with *Estelle v. Gamble*,[32] is insufficiently structural in its scope.[33] Rather, the doctrinal framework for "cruel and unusual punishments" is focused on the harmful intent of individual actors rather than institutions, and views conditions of confinement from the perspective of the perpetrator instead of the prisoner.

This Article adds to these critiques by arguing that Eighth Amendment jurisprudence is inadequate, not only because of its focus on individual actors, but also because of its inability to uproot the structural dynamics around race and gender that facilitate the continuation of harsh practices such as shackling during labor and childbirth.[34] Moreover, it elides any discussion of race and

28. *See, e.g.*, MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 2–3 (2010).

29. *See infra* notes 131–143 and accompanying text.

30. The structural argument advanced here is in many ways analogous to recent scholarship suggesting that workplaces can be "racialized over time" and that all workers within the racialized workplace are subject to degrading treatment, even if they are not members of the racialized group. In other words, this scholarship demonstrates that racialized occupational categories shape both the workplace environment and the public perceptions of all of the employees. *See, e.g.*, Leticia Saucedo, *Three Theories of Discrimination in the Brown Collar Workforce*, 1 U. CHI. LEGAL F. 345 (2009); Leticia Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workforce*, 67 OHIO ST. L.J. 964 (2006).

31. *See, e.g.*, *ACLU Challenges Prison-like Conditions at Hutto Detention Center*, ACLU (Mar. 6, 2007), http://www.aclu.org/immigrants-rights-racial-justice-prisoners-rights/aclu-challenges-prison-conditions-hutto-detention; Rafael Romo & Nick Valencia, *ACLU: Lawsuit Alleges 3 Immigrant Women Assaulted While in ICE Custody*, CNN (Oct. 21, 2011, 1:53 AM), http://www.cnn.com/2011/10/21/justice/us-detainees-assault-suit/index.html.

32. 429 U.S. 97 (1976).

33. *See, e.g.*, Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009); Alice Ristroph, *State Intentions and the Law of Punishment,* 98 J. CRIM. L. & CRIMINOLOGY 1353, 1357–60 (2008) (suggesting that an intent-based theory of state action is inappropriate in the Eighth Amendment context).

34. *See, e.g.*, Robin Levi et al., *Creating the "Bad Mother:" How the U.S. Approach to Pregnancy in Prison Violates the Right to Be a Mother*, 18 UCLA WOMEN'S L.J. 1 (2010) (discussing the shackling of pregnant women in prison and placing the practice in the context of eugenics and

gender in structuring the environment in which the practice takes place and ignores historical antecedents to contemporary shackling practices. In short, the current Eighth Amendment conditions of confinement jurisprudence is unable to contest the racial and gender stereotypes of female prisoners that render them vulnerable to shackling practices. Nor is the current doctrinal framework able to recognize the historical role of prisons in regulating the reproductive autonomy of women,[35] particularly Black women, and the role of such control in maintaining racial subordination and hierarchy.[36] Cases that have considered the constitutionality of shackling practices, such as *Nelson v. Correctional Medical Services*[37] and *Brawley v. Washington*,[38] bear out this point. In both cases, the doctrinal framework for "cruel and unusual punishments," which is narrowly focused on individual actors rather than institutions, functions to obscure race and ignores historical antecedents to contemporary shackling practices.

The invisibility of Black women within juridical discourse frustrates our ability to engage in a structural critique of prison practices, such as the shackling of pregnant women during childbirth, and to understand the social meanings attached to such practices. The absence of a race- and gender-conscious structural critique of shackling practices might explain why reports

welfare supervision. The authors argue for a remedy derived from a human rights framework rather than the Eighth Amendment. While the authors note the disproportionate number of women of color in prisons, they do not discuss the role that race plays in normalizing those practices); Elizabeth Alexander, *Unshackling Shawanna: The Battle over Chaining Women Prisoners During Labor and Delivery*, 32 U. ARK. LITTLE ROCK L. REV. 435 (2010) (provides a summary of the proceedings in *Nelson v. Correctional Medical Services* and briefly describes the harms associated with shackling, but it does not situate the practice within the overall devaluation of the reproductive capacities of female prisoners generally or of Black women in particular); Sichel, *supra* note 15 (arguing that shackling pregnant women during labor violates both the Eighth Amendment and international human rights standards but does not discuss race or racialized aspects of the practice); Heather L. McCrary, *Pregnant Behind Bars: Chapter 608 and California's Reformation of the Medical Care and Treatment of Pregnant Women*, 37 MCGEORGE L. REV. 314 (2006) (summarizing the trend of shackling pregnant prisoners and the changes to California law regarding the treatment of pregnant women in prison). One article argues that shackling violates human rights norms and notes that Black women have been particularly impacted. Dana Sussman, *Bound by Injustice: Challenging the Use of Shackles on Incarcerated Pregnant Women*, 15 CARDOZO J.L. & GENDER 477 (2009). The author also demonstrates that contemporary shackling "parallels" slavery in many respects. *Id.* at 482. While the article usefully notes the parallel between contemporary shackling and slavery, it does not interrogate the relationship between the history of racial subordination of Black women and the normalization of these practices. Rather than merely paralleling slavery, I argue that the practice of shackling exists *because* of slavery and the punitive practices that emerged in its wake.

35. *See* ESTELLE B. FREEDMAN, THEIR SISTERS' KEEPERS: WOMEN'S PRISON REFORM IN AMERICA, 1830–1930, at 96 (1984) (noting that early women's reformatories implemented "new feminine methods stress[ing] the other parts of inmates' female identities: their nonsexual, maternal, sentimental sides"); *id*. at 101 (documenting the imprisonment of women for the crime of having "sexual relations").

36. Vainik, *supra* note 26, at 672–74.

37. 583 F.3d 522 (8th Cir. 2009).

38. 712 F. Supp. 2d 1208 (W.D. Wash. 2010).

of shackling continue to emerge even in jurisdictions that have either limited or outright banned the use of shackles on pregnant prisoners. For example, in Illinois, the first state to ban the use of shackles on pregnant prisoners during labor and childbirth, female prisoners filed a class-action lawsuit alleging the continued use of shackles on pregnant prisoners in a manner prohibited by state law.[39]

A more robust reading of the Eighth Amendment can address the overlapping systems of subordination that operate within the contemporary carceral regime. In order to develop a doctrinal framework that can capture the historical construction and subjugation of Black womanhood, the Court must move beyond its narrow moorings to subjective intent in Eighth Amendment doctrine and instead embrace a broader approach that is centered on "evolving standards of decency" and a race- and gender-conscious definition of cruelty.

The Court often looks to legislative trends and jury deliberations in defining "evolving standards of decency." I suggest however, that to ascertain those evolving standards of decency, the Eighth Amendment's "cruel and unusual punishments" inquiry should be guided by the values underlying the Thirteenth Amendment and its prohibition against the "badges and incidents of slavery."[40] This approach, which I will call the "antisubordination approach," would interpret the Eighth Amendment to take into account the intent of the Framers of the Reconstruction Amendments not only to eliminate slavery as a formal matter, but also to eradicate the racial hierarchy upon which the system rested. In making this argument, I draw upon Justice Harlan's expansive reading of the aims of the Thirteenth Amendment in his oft-cited dissent in *Plessy v. Ferguson*.[41] While his antisubordination framing of the Constitution has had particular traction in the context of the Fourteenth Amendment,[42] his articulation of the Thirteenth Amendment has gone largely unexamined. A move toward an antisubordination reading of the Eighth Amendment not only allows for a robust structural critique of practices in prison, but also encourages

39. *See infra* notes 251–57.

40. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 555–58 (1896) (Harlan, J., dissenting); Bailey v. Alabama, 219 U.S. 219, 227, 241–44 (1911).

41. *Plessy*, 163 U.S. at 555–58 (Harlan, J., dissenting) (arguing that racial segregation constituted a badge or incident of slavery that is prohibited by the Thirteenth Amendment).

42. *See, e.g.*, Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 106 (2000); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2358 (1997); Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status – Enforcing State Action*, 49 STAN. L. REV. 1111, 1143–45 (1997); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 558 (1998) (noting that the equal protection inquiry should emphasize "classes over classifications, antisubordination over formal equality"); Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 824–25 (1995) (characterizing equality as a "substantive societal condition rather than as an individual right").

a normative orientation in defining "cruelty,"[43] which would prohibit punishments that are rooted in or facilitate racial dominance. This normative orientation, however, is not only protective of Black women; rather, it seeks to disrupt racialized practices that animate the punitive practices that impact all incarcerated women. In this way, the antisubordination approach is attentive to the ways in which penal practices rooted in racial dominance undergird the treatment of all people within carceral spaces.

In Part I, I describe the contemporary phenomenon of the shackling of pregnant prisoners during childbirth and situate the practice within the broader context of attempts to control the bodily integrity of incarcerated Black women. In Part II, I discuss the historical antecedents of the contemporary practice of shackling pregnant women. I describe the ways in which racism was expressed through the degradation and exploitation of Black women's reproductive capacities during slavery. I also highlight the centrality of Black women in the use of the convict lease system and the chain gang, both of which emerged during the post–Civil War era as a mechanism to maintain white racial dominance.[44] In Part III, I discuss the ways in which the racial blindness of Eighth Amendment jurisprudence has rendered the ideological foundations of shackling practices invisible. To make this point, I discuss *Nelson v. Correctional Medical Services*[45] and *Brawley v. Washington*,[46] two cases that have considered the constitutionality of the shackling of pregnant prisoners. I also argue that shackling practices endure, despite formal prohibitions, partly because of race blindness within doctrinal discourses. Lastly, in Part IV, I offer an antisubordination reading of the Eighth Amendment. Such an approach requires reading the Eighth Amendment's "cruel and unusual punishments" clause in light of the Thirteenth Amendment. Under the antisubordination approach, historical constructions and treatments of Black women within the context of slavery, convict leasing, and chain gangs are essential to a determination that the shackling of pregnant prisoners during childbirth is constitutionally and normatively infirm. My intent is to disrupt the normalization of practices that have functioned to shackle not only the physical bodies of women in prisons, but central expressions of their humanity as well.

43. Dolovich, *supra* note 33, at 907.

44. *See* Sarah Haley, ENGENDERING CAPTIVITY: BLACK WOMEN AND CONVICT LABOR IN GEORGIA, 1865–1938, at 3–4, 10 (May 2010) (unpublished Ph.D. dissertation, Yale University) (on file with author); *Cf.* ANGELA Y. DAVIS, *Surrogates and Outcast Mothers: Racism and Reproductive Politics in the Nineties*, *in* THE ANGELA Y. DAVIS READER 218 (Joy James ed., 1998) (arguing that women's prisons have historically functioned to police the boundaries of feminine deviance).

45. 533 F.3d 958, 961 (8th Cir. 2008), *vacated*, 583 F.3d 552 (8th Cir. 2009).

46. 712 F. Supp. 2d 1208, 1211 (W.D. Wash. 2010).

I.
INCARCERATION AND THE SHACKLING OF FEMALE PRISONERS DURING PREGNANCY

> "It is not fair to treat a person like this. I did a crime . . . but I'm not willing to be treated like a dog. I was treated like I wasn't human."[47]

Over the past thirty-five years, the prison system in the United States has grown at a dramatic rate, capturing an ever-increasing segment of the population in its midst.[48] This growth, however, has largely been driven by the disproportionate criminalization and incarceration of poor people of color, particularly from Black and Latino communities.[49] These outcomes are not mere happenstance of an occasionally biased system of justice; rather, theorists have suggested that prisons have become a mechanism for the regulation of racially and economically marginal populations.[50] Regulation of these populations has been accomplished through a broad set of punitive social policies, including the "War on Drugs" and the "tough on crime" rhetoric that undergirds contemporary drug laws, as well as the divestment from the social safety net.[51]

Prison expansion has resulted in significant increases in the number of women incarcerated. As of 2009, more than 114,979 women were incarcerated in women's prisons across the country.[52] This represents a sharp increase from the 5600 women who were incarcerated in 1970.[53] In addition to women held in prisons or jails, approximately 800,000 were on probation or parole in 2010.[54] Roughly 33 percent of women under these various forms of criminal supervision are Black,[55] despite the fact that Black women comprise roughly 7

47. Colleen Mastony, *Childbirth in Chains*, CHI. TRIB., July 18, 2010, http://articles.chicagotribune.com/2010-07-18/news/ct-met-shackled-mothers-20100718_1_shackles-handcuffs-labor (quoting Latiana Walton, a Black woman challenging the use of shackles during childbirth by Cook County Sherriff's Deputies in a class-action lawsuit).

48. *See, e.g.*, JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 13–31 (2007) (discussing the overall impact of crime on the United States from the 1960s to present).

49. Lawrence D. Bobo & Victor Thompson, *Racialized Mass Incarceration: Poverty, Prejudice, and Punishment*, *in* DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY 330–36 (Hazel R. Markus & Paula Moya eds., 2010).

50. *See, e.g.*, ALEXANDER, *supra* note 21; Ian Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1040–52 (2010).

51. *See* HEATHER C. WEST, PRISON INMATES AT MIDYEAR 2009, BUREAU OF JUSTICE STATISTICS 7 (2009).

52. *Id.*

53. *See* Julia Sudbury, *Women of Color, Globalization and the Politics of Incarceration*, *in* THE CRIMINAL JUSTICE SYSTEM AND WOMEN 13 (Barbara Rattel Price and Natalie Sokoloff eds., 2003).

54. WEST, *supra* note 51, at 7; LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2010, at 34, 44 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus10.pdf.

55. WEST, *supra* note 47, at 19.

percent of the overall population.[56] Indeed, Black women are eight times more likely to be incarcerated than their white counterparts.[57] Between 1980 and 2003, drug-related arrests of Black women increased by 888 percent, as compared to approximately 400 percent for white women.[58] All told, Black women represent the fastest growing segment of the prison population.[59]

As the number of incarcerated women has increased, so too has the rate of pregnancy and childbirth in jails and prisons.[60] Studies estimate that roughly 5 to 10 percent of all female prisoners are pregnant and that approximately 2000 children per year are born to incarcerated mothers.[61] Within prisons, shackling is often standard operating procedure for the transport of women in labor and is also used as a mechanism to control and demean them during childbirth.[62] Over the past decade, numerous reports have documented this practice, finding that restraints are used without regard to flight risk or dangerousness.[63] The contemporary practice of shackling in prisons results in the pervasive abuse of women's bodily integrity and reproductive capacity. Although this practice may seem anachronistic to those outside of the prison context, on the inside, it is routine.[64]

---

56. As of the most recent available census data from the year 2000, there were approximately 18 million Black women in the United States. This represented roughly 7 percent of the total U.S. population of 272 million. *See* RENEE E. SPRAGGINS, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, CENSUS BRIEF: WOMEN IN THE UNITED STATES: A PROFILE 1 (2000), *available at* http://www.census.gov/prod/2000pubs/cenbr001.pdf.

57. PAULA C. JOHNSON, INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON 6 (2003).

58. *See* LENORA LAPIDUS ET. AL., ACLU, BRENNAN CTR. FOR JUSTICE & BREAK THE CHAINS, CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 345 (2005).

59. *Id.*

60. *See* KATHERYN WATTERSON, WOMEN IN PRISON: INSIDE THE CONCRETE WOMB 211 (1996) (noting the number of pregnant female prisoners).

61. *Id.*; Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES, Mar. 2, 2006, at A16 (noting the number of children born to incarcerated mothers).

62. *See, e.g.*, AMNESTY INT'L, WOMEN IN CUSTODY 30–33, *available at* http://www.amnestyusa.org/pdf/custodyissues.pdf [hereinafter WOMEN IN CUSTODY]; Amnesty Int'l USA, *supra* note 6, at 10–12.

63. *See, e.g.*, WOMEN IN CUSTODY, *supra* note 62, at 30–33, Amnesty Int'l USA, *supra* note 6, at 10–12; *see also* KAREN SHAIN, LEGAL SERVS. FOR PRISONERS WITH CHILDREN, STOP SHACKLING: A REPORT ON THE WRITTEN POLICIES OF CALIFORNIA'S COUNTIES ON THE USE OF RESTRAINTS ON PREGNANT PRISONERS IN LABOR (2010), *available at* http://www.prisonerswithchildren.org/pubs/stop_shackling.pdf.

64. *See* Anna Enisa Carpenter, *Memorandum: State Shackling Policies* (Aug. 20, 2008), http://www.rebeccaproject.org/images/stories/policypapers/state_shackling_policies_memo.pdf (discussing half of the states' policies on shackling pregnant inmates); *Shackling of Pregnant Women in Custody*, THE REBECCA PROJECT FOR HUMAN RIGHTS, http://www.rebeccaproject.org/images/stories/factsheets/ShacklingFactSheet_7-12-10.pdf (noting that only ten states had laws prohibiting the use of shackles on pregnant prisoners during labor and childbirth).

Black women are not alone in experiencing these harmful impacts at the intersection of race, gender, and incarceration. Increasingly, undocumented Latinas have been targeted for arrests stemming from structural inequalities in the economy and in the immigration system. Tanya Doriss,

A. Control over the Exercise of Women's Reproductive Capacity in the Criminal Justice System

Constraints upon reproductive health and choices are a paradigmatic experience for incarcerated women. The constraints that have come to be the hallmark of women's incarceration are part of a larger trend of reproductive subordination that has impacted racially marginalized women within the carceral apparatus. Indeed, the reproductive capacities of Black women have historically served as a primary site for punishment within the criminal justice system. The intersection of race and gender in the lives of women of color, and Black women in particular, render them vulnerable to a host of ideological constructions—including sexual promiscuity and bad mothering—that portray them as lacking fundamental aspects of feminine gender identity.[65] Because of these ascribed failings, women who have been criminalized or incarcerated are subject to the prevention of or punishment for their choice to reproduce, often as a formal part of their sentences. In 1996, for example, women were given the "option" of taking birth control in lieu of a lengthy sentence in a California state prison.[66] Other women have been criminalized for the choice to become mothers while addicted to drugs.[67] Under recently proposed statutes in Georgia

---

Fact Sheet: Immigration Policy and Reproductive Justice, CTR. FOR AM. PROGRESS (July 10, 2007), http://www.americanprogress.org/issues/2007/07/womens_rights_factsheet.html ("Female immigrants, both documented and undocumented, often work in industries that are low-wage and do not offer health insurance."). Undocumented Latinas are increasingly arrested and prosecuted for immigration violations, particularly during workplace raids and drug offenses. *See* Nina Rabin, *Unseen Prisoners: Women in Immigration Detention Facilities in Arizona*, 23 GEO. IMMIGR. L.J. 695, 702–03 (2009). While detained during removal proceedings, undocumented Latinas have been shackled during childbirth and denied basic medical necessities. *See* HUMAN RIGHTS WATCH, DETAINED AND DISMISSED: WOMEN'S STRUGGLES TO OBTAIN HEALTH CARE IN UNITED STATES IMMIGRATION DETENTION (2009); Christina Costantini, *Arizona Sheriff Joe Arpaio Sued by Undocumented Woman Shackled During Labor*, HUFFINGTON POST (Dec. 21, 2011, 3:59 PM), http://www.huffingtonpost.com/2011/12/21/sheriff-joe-arpaio_n_1163490.html. Furthermore, like formerly incarcerated Black women, they are vulnerable to sexual and physical abuse while incarcerated. *See* HUM. RTS. WATCH, *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, (Aug. 25, 2010), http://www.hrw.org/en/reports/2010/08/25/detained-and-risk.

65. *See, e.g.*, LEITH MULLINGS, ON OUR OWN TERMS: RACE, CLASS, AND GENDER IN THE LIVES OF AFRICAN AMERICAN WOMEN 109–31 (1997).

66. ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 89 (2005); *see also* People v. Johnson, No. F015316, 1992 WL 685375 (Cal. Ct. App. Apr. 13, 1992) (unpublished) (requiring a criminal defendant to use a Norplant birth control implant as a condition of probation). *See generally* Janet F. Ginzberg, Note, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979 (1992) (discussing the ways in which the judicial system has mandated that women have to undergo birth control treatments as part of their probation requirements); 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, 407 (2004) (discussing the required use of birth control in lieu of jail or prison time).

67. *See, e.g.*, Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993) (vacating the trial court's determination that a drug-addicted mother criminally abused her child for using drugs during her pregnancy); *see generally* Roberts, *supra* note 21.

and Utah, some women could be subject to prosecution for having miscarriages.[68] In these states, the specter of criminal prosecution is raised to discipline women who have miscarriages that result from "reckless" behavior. In each instance, Black women have been disproportionately impacted by these policies.

Once incarcerated, women routinely endure the abuses and hardships of state-inflicted violence. Locked in cells behind the high walls of prison, women generally, and Black women in particular, have little recourse against the onslaught of brutality facing them when confined. Kim Buchanan has written persuasively about the pervasive violence Black women are subject to, as well as the dignitary and privacy harms that accompany a formal prison sentence.[69] These harms reinforce and reproduce the same constructions of Black women as aggressive, domineering, deviant, and sexually available.[70] In prison, punishments are meted out through a number of mechanisms, including sexual abuse and sterilization.[71]

The sexualized violence directed at female prisoners has been well documented.[72] Premised on notions of sexual deviance and violability of prisoners,[73] female prisoners have been subjected to a range of sexual abuses, including vaginal, anal, and oral rape; sexual assault; inappropriate touching during searches; and surveillance by male guards while in various states of undress.[74] Male guards often use their positions of authority or outright physical force to coerce female prisoners into sex.[75] In a 1996 report, Human

68. Brandon Loomis, *Measure on Illegal Abortions Heads to Governor*, SALT LAKE TRIB., Feb. 18, 2010, http://www.sltrib.com/news/ci_14429070; Jen Qudraishi, *Ga. Law Could Give Death Penalty for Miscarriages*, MOTHER JONES (Feb. 23, 2011, 5:32 AM), http://www.motherjones.com/blue-marble/2011/02/miscarriage-death-penalty-georgia.

69. *See, e.g.*, Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R-C.L L. REV. 45 (2007) (hereinafter Buchanan, *Impunity*); Buchanan, *supra* note 24.

70. Cassandra Shaylor, *It's Like Living in a Black Hole: Women of Color and Solitary Confinement in the Prison Industrial Complex*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 385, 395 (1998).

71. *See, e.g.*, Human Rights Program at Justice Now, *Prisons as a Tool of Reproductive Oppression,* 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 309 (2009); Cynthia Chandler, *Death and Dying in America: The Prison Industrial Complex's Impact on Women's Health,* 18 BERKELEY WOMEN'S L. J. 40 (2003).

72. *See, e.g.*, Amnesty Int'l USA, *supra* note 6; HUMAN RIGHTS WATCH, ALL TOO FAMILIAR (1996), *available at* http://www.hrw.org/legacy/reports/1996/Us1.htm#_1_2.

73. *See* Buchanan, *Impunity*, *supra* note 69, at 53 ("Racial stereotypes of black women as promiscuous, criminal, and prone to violence make it more difficult for law and society to recognize their victimization and more likely that they will be scrutinized as sexual deviants and potential criminals.").

74. *Id*. at 57; Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Re-thinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515 (2009); Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM (2003).

75. *See* Buchanan, *Impunity, supra* note 69, at 55–57 (discussing how prison guards often extend unofficial accommodations to favored inmates while using illegal forms of intimidation and force on others).

Rights Watch noted that women have very little recourse within prisons or in court to combat these abuses.[76] Consequently, prison guards who assault women are rendered immune from accountability for the brutality they inflict upon female prisoners.[77]

While sexual abuse is premised on ideological constructions of Black women as inherently violable and sexually available, another practice, sterilization, is premised on a historically related construct of incarcerated Black women: the "bad mother."[78] Sterilization can be seen as an attempt to eliminate the biological threat presented by incarcerated women as well as a representation of society's judgment that incarcerated Black women are unworthy heirs to the mantle of motherhood.

Women incarcerated in institutions are unable to adhere to white middle-class normative standards of "womanhood" and are therefore deemed unfit to be mothers as a result of the intersection of their race, gender, class, and incarcerated status. In *Poe v. Lynchburg Training School and Hospital*, for example, institutionalized women brought suit against the state of Virginia for coercing women to undergo sterilization.[79] More recently, Justice Now, an Oakland-based civil rights organization that advocates on behalf of female prisoners, has documented "a number of cases which suggest hysterectomies or oophorectomies have been used as the first response to problems such as uterine fibroids or ovarian cysts, when far less invasive remedies were available."[80] The organization has also documented cases where women were pressured to consent to sterilization based on a misdiagnosis or while sedated.[81]

The reproductive and sexual violence female prisoners experience, however, does not abate because an incarcerated woman is pregnant. Rather, particularized punishments of pregnant women have become standard practice in penal institutions across the country.[82] For example, pregnant prisoners are

76. *See* HUMAN RIGHTS WATCH, *supra* note 72, at 57.

77. *See* Buchanan, *Impunity*, *supra* note 69, at 64–82 (describing the ways in which contemporary rules of prison law block nearly all claims against institutions for custodial abuse).

78. *See, e.g.*, Ikemoto, *supra* note 18, at 1045–53 (discussing deviant motherhood and women of color).

79. 518 F. Supp. 789 (W.D. Va. 1981).

80. CYNTHIA CHANDLER, JUSTICE NOW, TESTIMONY OF JUSTICE NOW SUBMITTED TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN 4 (2011); *see also* Human Rights Program at Justice Now, *supra* note 71, at 321–25 (noting the disproportionate use of inappropriate hysterectomies on women of color in California women's prisons). *See generally* Poe v. Lynchburg Training Sch. & Hosp., 518 F. Supp. 789 (W.D. Va. 1981) (challenging involuntary sterilization procedures in a Virginia correctional institution).

81. *See* Human Rights Program at Justice Now, *supra* note 71, at 322 ("We also have learned of several cases of people being asked to consent to sterilization without full information or when under sedation.").

82. *See* Ellen Barry, *Pregnant, Addicted and Sentenced: Debunking the Myths of Medical Treatment in Prison,* 5 CRIM. JUST. 23 (1991).

often denied medical treatment during labor.[83] In one case, a mentally ill African American woman was arrested for trespass in the state of Washington.[84] After being ignored by guards when she told them she was in labor, she gave birth to her baby on the floor of her jail cell.[85] In another case, an African American woman held in a York, Nebraska, jail was forced to give birth alone, over the toilet in her cell, and was assisted only after the baby was born with the umbilical cord around its neck.[86] She was denied the ability to go to the hospital after she was accused of "faking" labor pains.[87] Even when pregnant prisoners are provided medical assistance during labor and childbirth, it is often at the expense of their dignity and basic humanity.

B. Shackling of Pregnant Women in Prison and the Attendant Psychological and Physical Harms

As noted above, a significant number of female prisoners are pregnant at some point during periods of incarceration. Prison, however, does not change the basic laws of nature. Like all women, pregnant prisoners experience significant pain and discomfort during labor and childbirth.[88] As labor commences, pregnant women have difficulty walking because of the weight of the baby, swollen feet, and the pain of contractions.[89] During active labor, women may experience "strong pressure in the lower back and rectum, nausea, fatigue, tightness in the throat and chest area, shakiness, chills, or sweats."[90]

Despite the pain women experience while giving birth, many pregnant prisoners are subjected to some form of shackling during labor or childbirth. Indeed, at least thirty-six states permit the practice.[91] A recent national study

83. *See, e.g.*, Staten v. Lackawanna Cnty., No. 4:07-CV-1329, 2008 WL 249988, at *2 (M.D. Pa. Jan. 29, 2008) (African American woman denied medical care by jail staff and forced to deliver the baby alone in her jail cell); Barry, *supra* note 82, at 23 (describing two pregnant, drug-dependent women who were forced to detoxify without adequate medical care or supervision, even during labor).

84. Chris Legeros, *Lawsuit over 'Horrific' Jail Cell Birth Moves Forward*, KIRO EYEWITNESS 7 NEWS (Apr. 28, 2011, 4:44 PM), http://www.kirotv.com/news/27710266/detail.html.

85. *Id.*; *see also* Pope v. McComas, No. 07-cv-1191-RSM-JPD, 2011 WL 1584213 (W.D. Wash. Mar. 10, 2011).

86. *Ex-Inmate Sues Prison over Giving Birth in Toilet*, OMAHA WORLD-HERALD, Oct. 16, 2011, at 2B.

87. Charles Schillinger, *Woman Who Gave Birth at Prison: No Justice Yet*, TIMES-TRIB., Aug. 15, 2010, http://thetimes-tribune.com/news/woman-who-gave-birth-at-prison-no-justice-yet-1.949114.

88. *See* HEIDI MURKOFF & SHARON MAZEL, WHAT TO EXPECT WHEN YOU'RE EXPECTING 367–91 (2008).

89. *Id.*

90. *Phases of Labor*, WHAT TO EXPECT: PREGNANCY & PARENTING EVERY STEP OF THE WAY, http://www.whattoexpect.com/pregnancy/labor-and-delivery/childbirth-stages/three-phases-of-labor.aspx (last visited July 14, 2012).

91. *See* WOMEN'S PRISON ASS'N: INSTITUTE ON WOMEN AND CRIMINAL JUSTICE, LAWS BANNING SHACKLING DURING CHILDBIRTH GAINING MOMENTUM NATIONWIDE, *available at* http://www.wpaonline.org/pdf/Shackling%20Brief_final.pdf. States prohibiting the use of shackles during labor or childbirth include California, New York, Illinois, New Mexico, Nevada, Vermont, Texas, Washington, Rhode Island, Colorado, Hawaii, Idaho, Pennsylvania, and West Virginia.

confirms the widespread use of shackles on pregnant prisoners.[92] The study found that approximately a third of prisons that responded use chains and handcuffs during prenatal visits or labor.[93] Several facilities reported that they cuff women's hands or ankles during labor.[94] One prison indicated that it leaves handcuffs on during delivery, while four stated that they shackle women at the ankle during delivery.[95] These studies demonstrate that the shackling of pregnant women is routine in women's prisons across the country.

Instead of approaching the pregnancy and childbirth of incarcerated women with dignity and respect, the childbirth process is often an occasion for particularized punishment, degradation, and humiliation. Prison officials frequently justify the use of shackles on pregnant prisoners by citing concerns for the safety of correctional officers and the public.[96] Advocacy groups, however, have demonstrated that shackles are used on all women, regardless of security threat, even when alternative security mechanisms are available. For example, Amnesty International has found that women are shackled "regardless of whether they have a history of violence (which only a minority have) and regardless of whether they have ever absconded or attempted to escape (which few women have)."[97] In one instance described in the report, a hospital ward where incarcerated women gave birth was locked and guarded by four armed men. Despite the presence of these guards, "every inmate [was] chained by a

92. Andrea Hsu, *Difficult Births: Laboring and Delivering in Shackles*, NAT'L PUB. RADIO (July 16, 2010), http://www.npr.org/templates/story/story.php?storyId=128563037.

93. *Id.*

94. *Id.*

95. *Id.*; *see also Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women*, AMNESTY INT'L, http://www.amnestyusa.org/violence-against-women/abuse-of-women-in-custody/key-findings-use-of-restraints-on-pregnant-women-in-custody/page.do?id=1108300 (last visited Aug. 7, 2012) **(**finding that thirty-eight state departments of corrections may use restraints on pregnant women in the third trimester, while another twenty-three state departments of corrections allow the use of restraints during labor).

96. *See* Hsu, *supra* note 92. Some have suggested that the policy simply treats women like incarcerated men, who are similarly shackled during transport to noncustodial settings such as hospitals. *Id*. The equality rationale for the use of shackles is in some respects accurate, but not entirely. In jurisdictions that permit shackling, prison officials promulgate regulations requiring the use of shackles when prisoners are moved from the prison setting to a noncustodial facility such as a hospital. Restraints are often used on male prisoners during treatment, including chemotherapy, consultation with doctors, and even when individuals are nonambulatory following a treatment. Generally, however, individuals are not shackled during surgical procedures, which might be the most analogous to childbirth. *See, e.g.*, CAL. CODE REGS. tit. 15, § 3268.2(b)(1) (2011) (noting that restraints must be used when transporting a prisoner between locations); LA. STATE UNIV. HEALTH SCIS. CTR., HOSPITAL POLICY MANUAL 2 (2009), *available at* http://www.sh.lsuhsc.edu/policies/policy_manuals_via_ms_word/hospital_policy/h_2.20.0.pdf (requiring prisoners to be shackled during hospital stay, unless inconsistent with medical care); GA. CODE ANN. § 42-5-58 (2006) ("Handcuffs, leg chains, waist chains, and waist belts may also be used in securing violent or potentially dangerous inmates within an institution and in public and private areas such as hospitals and clinics; but in no event may handcuffs, leg chains, waist chains, and waist belts be used as punishment . . . .").

97. Amnesty Int'l USA, *supra* note 6, at 10.

leg to her bed."[98] Women are often handcuffed to bedrails even as they nurse or hold their children after they are born.[99] Moreover, children are generally removed from women within twenty-four hours of giving birth.[100]

The degradation represented by the use of shackles during pregnancy and childbirth inflicts significant psychological harm on female prisoners. One pregnant woman incarcerated at a women's institution in Michigan, Kebby Warner, described the shackling experience this way:

> Every time I went for a "medical" run, I had to get a humiliating strip-search when I left and returned to prison. Prisoners are placed in belly chains and our hands are cuffed for the duration of the visit unless the doctor asks that they be removed. At about the sixth month of pregnancy, the strip-searches become difficult. By this time, my emotional state was up and down, and most of the time I left the "strip room" in tears from shame and humiliation.[101]

In addition to the psychological harms associated with shackling, the practice also has profound physical consequences, including restricting the ability of women to move into appropriate positions during childbirth. Indeed, shackling increases the probability of falls because

> [t]he pregnant uterus shifts a woman's center of gravity. Anything that throws her further off balance or makes walking more difficult can increase her risk of falling. A fall in pregnancy is no small matter, as it can potentially harm the baby as well as the mother, and in serious cases, can cause stillbirth.[102]

Moreover, shackling can cause trauma to the mother and child, and can result in significant delays in treatment in the event of a medical emergency. As one doctor reported, women and their children could face significant health risks should a complication arise during childbirth: "If there were a need for a [cesarean] section, the mother [would] need[] to be moved to an operating room immediately and a delay of even five minutes could result in permanent brain damage for the baby."[103] Despite the psychological and physical harms that result from the use of shackles on pregnant women, many prisons across the country adhere to the practice.

---

98. *Id.*

99. *See, e.g.*, Maria Kayanan, *Ending Florida's "Dirty Little Secret,"* FLORIDA BLOG OF RIGHTS (Mar. 15, 2012), http://aclufl.wordpress.com/page/3/.

100. Malika Saada Saar, *Mothering as a Reproductive Right,* RH REALITY CHECK (Dec. 11, 2007, 10:18 AM), http://www.rhrealitycheck.org/blog/2007/12/11/mothering-as-a-reproductive-right.

101. Kebby Warner, *Pregnancy, Motherhood and Loss in Prison*, *in* INTERRUPTED LIVES: THE EXPERIENCES OF INCARCERATED WOMEN IN THE UNITED STATES 90 (Paula Johnson et al. eds., 2010).

102. Carolyn Sufrin, *End Practice of Shackling Pregnant Inmates*, S.F. CHRON. (Aug. 26, 2010), http://articles.sfgate.com/2010-08-26/opinion/22235348_1_pregnant-inmates-pregnant-women-labor.

103. Sichel, *supra* note 15, at 226 (quoting Amnesty Int'l, *supra* note 95).

The use of restraints on pregnant prisoners rests on an assumption that incarcerated women are dangerous as individuals and as mothers. This presumption rests on stereotypes of female prisoners informed by prior regimes of racialized punishments that viewed Black women as lacking in maternal instincts, driven by sexual desires, and physically threatening.[104] The comments of one female prison guard reflect these stereotypes: "I'm a mother of two and I know what that impulse, that instinct, that mothering instinct feels like. It just takes over, you would never put your kids in harm's way. . . . Women in here lack that. Something in their nature is not right, you know?"[105] This comment emphasizes the contempt with which incarcerated mothers are viewed. Female prisoners are cast as "bad mothers" by virtue of their incarceration. Thus, the use of shackles during labor and childbirth can be understood as one way of punishing women for choosing to become mothers while incarcerated.

II.
SLAVERY, RECONSTRUCTION-ERA PUNISHMENT, AND CONSTRUCTIONS OF BLACK WOMANHOOD

> "I expect within two or three weeks to become a Mother and as it is a matter of life and death for me and my child . . . I . . . ask you . . . as an act of common humanity to grant my pardon."[106]

The devaluation, degradation, and dehumanization of female prisoners represented by the use of shackles during labor and childbirth does not occur in a vacuum. Rather, the women's prison system, and the punitive practices that occur within it, are inextricably linked to the subjugation of Black women. The historical subordination of Black women in the context of slavery and post–Civil War punishment systems has shaped their racial and gender identities and those identities in turn have shaped punitive responses to social problems associated with Black women in the era of mass incarceration.

Over time, these racial and gender dynamics that attached to Black women became embedded within and now undergird the contemporary operation of women's prisons. In this Part, I focus on Black women and describe the ways in which slavery created racial and gendered subjects through the exploitation of Black women's physical labor and reproductive capacities.[107] Moreover, I examine the mechanisms by which the shackles of slavery and particular ideological constructions of Black women endured well

104. *See infra* Part II.

105. JODY RAPHEAL, FREEING TAMMY: WOMEN, DRUGS, AND INCARCERATION 42 (2007).

106. BUTLER, *supra* note 8, at 148 (quoting the 1891 pardon petition of Mrs. R. M. Lester, a Black woman convicted of adultery, to officials of the Texas state prison system).

107. *See* PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 34–39 (1996) (noting that social constructions of Black women as lascivious, combined with their legal status as property, rendered Black women vulnerable to sexual violence and reproductive subordination).

beyond its formal collapse in the Reconstruction-era punishment regimes of convict leasing and chain gangs. [108] During this era, the use of punishment reinforced and reinscribed notions of Black feminine deviance that further entrenched their subordinate status.

Indeed, the ideological constructs of Black women are rooted in and are essential to racial domination, specifically the "peculiar institution" of slavery.[109] Slavery, convict leasing, and chain gangs operated in conflict with the broad ideals of freedom and liberty espoused by the American polity. To reconcile this contradiction, Black identity was constructed separately from white identity as sub- or nonhuman and thus justified a separate set of governing principles within the larger society.[110] This differentiation and othering was, therefore, critical to the enterprise of maintaining racial dominance and white supremacy.[111] The process of othering, however, was both racialized and gendered.

To the extent that Black women were dehumanized and distinguished from prevailing values of white womanhood, these constructs of Black women specifically were imputed as confirmation of the inferiority of Blacks generally.[112] These notions of inferiority were reinforced following the abolition of slavery as Southern legislators passes as series of statutes, known as the Black Codes, designed to criminalized behavior disproportionately committed by former slaves.[113] As Black women were incarcerated under these Black Codes, punishment signaled their degraded status, while the insulation from punishment signaled the valorization of white women.[114] Black women's devaluation through punishment positioned them at the outer limit of "womanhood," reflecting the lack of value afforded to Black people.

In mapping the ideological constructions of Black women in the context of slavery, convict leasing, and chain gangs, I note four characteristics that emerged during this period: (1) the masculinization of Black women, (2) the devaluation of Black women as mothers, (3) the casting of Black women as dangerous, and (4) the construction of Black women as sexually deviant. While the actual practice of shackling during labor and childbirth was not widespread during the pre- and post–Civil War eras, these four characteristics that came to

108. *See, e.g.*, OSHINSKY, *supra* note 19, at 20–21, 168–77 (describing the enactment of the Black Codes as a mechanism to reconstitute the racial order previously maintained by slavery and noting that Black women were subject to criminalization under this regime); JOHNSON, *supra* note 53, at 32–34 (noting that Black women disproportionately filled women's prisons in the post–Civil War South, largely justified by "[n]egative racial stereotypes" of Black women as "captives of lesser morals and uncontrolled lust"). *See generally* ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR (1996) (noting the expansion of chain gangs in the post–Civil War South).

109. MULLINGS, *supra* note 65, at 110–11.

110. *Id.*

111. Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1715–20 (1996).

112. MULLINGS, *supra* note 65, at 99–114.

113. *See, e.g.*, BLACKMON, *supra* note 9, at 53.

114. Haley, *supra* note 44.

be during this period created the necessary conditions for the use of shackles during labor and childbirth in the contemporary era of mass incarceration. Specifically, I contend that the constructs that initially attached to Black women through an ideological edifice that justified enslavement and the racial domination through the use of the criminal law became normalized within the punishment system over time. This is so because Black women were the primary subjects of punishment during the formative years of the women's prison. Thus, in many respects, the modern women's prison was built around specific perceptions of Black women. All female prisoners that are incarcerated in jails and prisons are, therefore, impacted by this racialized legacy.

A. Racial and Gender Constructs of Black Women During Slavery and Post–Civil War Punishment Regimes

1. Masculinization

Slavery and the post–Civil War punishment systems were fundamental in shaping the racial and gender constructs that have come to shape perceptions of Black women. Within these regimes, Black women were perceived as lacking in essential feminine qualities.[115] Rather than being seen as "women," Black women were cast to the opposite side of the gender binary. Such perceptions are both racialized and gendered, and served to facilitate particular forms of subordination of Black women and Black people generally.[116] Indeed, the masculinization of Black women within these systems of punishment, through the stripping away of a feminine identity, allowed for the exploitation of Black women without the "protection" of womanhood and justified pervasive physical and sexual abuse.

In the context of slavery, Black women's masculinization was a constitutive element of their enslavement and of their forced labor under a regime that denied their personhood, instead viewing them as property. The

115. *See, e.g.*, Bernice D. Jones, *Southern Free Women of Color in the Antebellum North: Race, Class and a "New Women's Legal History,"* 41 AKRON L. REV. 763, 772-73 (2008); Bonnie Thornton Dill, *The Dialectics of Black Womanhood*, 4 SIGNS 543 (1979) (noting the duality of Black women's identities and the separation from prevailing standards of femininity, largely defined by white normative standards).

116. In suggesting that Black women have been masculinized, I do not mean to say, however, that masculinity or femininity are natural categories. Rather, like race, gender binaries of male and female are not biological, but rather socially constructed. *See* JUDITH BUTLER, GENDER TROUBLE 25 (1990) ("There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results."). Moreover, as legal scholar Russell Robinson notes, "law does not simply respond to preexisting, natural categories—man, woman, gay, straight. Rather, the law produces these categories and then creates the illusion that they are innate and inevitable." Russell K. Robinson, *Masculinity as Prison: Sexuality, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1331 (2011). Gender is constructed through associations with the physical and the ideological, gender expressions, and gender roles. *See* Ally Windsor Howell, *A Comparison of the Treatment of Transgender Persons in the Criminal Justice Systems of Ontario, Canada, New York, and California*, 28 BUFF. PUB. INT. L.J. 133, 207 (2010) (providing a glossary of gender terms).

exploitation of Black women created a perverse equality of subordination with Black men given the stringent labor demands placed upon them as slaves.[117] Black women were forced to engage in all manner of hard labor, including backbreaking fieldwork and lease work in places like coal mines and lumberyards.[118] The arduous work Black women were forced to perform functioned to negate their femininity, placing them outside of dominant conceptions of Victorian womanhood.[119]

During slavery arose the duality and contradiction represented by Black women's bodies: they were seen as departing from prevailing ideals of "womanhood," yet their uniquely feminine reproductive capacities were exploited as a means of expanding the system of slavery.[120] As Black feminist scholar Leith Mullings notes, the "true woman" was seen as the paradigmatic wife and mother. Her innate qualities included passivity, dependency, and submissiveness. She was viewed as delicate and frail. She was essentially good.[121] As Angela Y. Davis notes, "[j]udg[ing] by the evolving nineteenth-century ideology of femininity, which emphasized women's roles as nurturing mothers and gentle companions and housekeepers for their husbands, Black women were practically anomalies."[122] In this regard, the exploitation of Black women's labor acted to masculinize them in a society that viewed "womanhood" through a lens of domesticity.[123]

Black women's work in the fields and in the homes of white slaveholders positioned them as the antithesis of "woman," which was defined by the private domain of the home and family.[124] Ideological constructs of Black women excluded them from the protection of patriarchal constructs of femininity and justified their enslavement and the constant abuse to which they were subjected.[125] The masculinization of Black women served to reconcile contradictory ideologies about women's capabilities and the labor demands placed on Black women.[126]

Following the abolition of slavery, Black women continued to be subject to an array of subordinating treatments and punishments as a result of

---

117. *See* BELL HOOKS, AIN'T I A WOMAN : BLACK WOMEN AND FEMINISM 22–23 (1981).

118. For a fuller discussion of this period see DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 22-55 (1999) and ANGELA Y. DAVIS, WOMEN, RACE & CLASS 3–29 (1981).

119. *See* DAVIS, *supra* note 118, at 5–11.

120. GIDDINGS, *supra* note 107, at 33–56.

121. MULLINGS, *supra* note 65, at 111.

122. DAVIS, *supra* note 118, at 5.

123. MULLINGS, *supra* note 65, at 111–13.

124. *Id.*; *see also* K. SUE JEWELL, FROM MAMMY TO MISS AMERICA AND BEYOND: CULTURAL IMAGES AND THE SHAPING OF U.S. SOCIAL POLICY 55–56 (1993).

125. *Id.* at 112 ("In a model of femininity based on dependence as a defining characteristic, enslaved women became 'defeminized'—excluded from the protections offered by womanhood, motherhood, and femininity.")

126. *Id.*

masculinization. Through the Black Codes, Southern states criminalized a range of conduct thought to be committed by former slaves.[127] These crimes included vagrancy, absence from work, the possession of firearms, insulting gestures or acts, job or familial neglect, reckless spending, and disorderly conduct.[128] Blacks were also prosecuted for the failure to perform under employment contracts.[129]

Individuals arrested under the newly expansive criminal law were punished through the use of convict leasing and chain gangs and put to work in areas that were previously maintained by slave labor.[130] Under this regime, Blacks became the majority in Southern prison camps, with their populations rising to as high as 90 percent.[131] As sociologist Loic Wacquant notes, "the carceral system . . . functioned as an *ancillary* institution for caste preservation and labour control in America during [the] . . . transition between regimes of racial domination, that [of] slavery and Jim Crow in the South."[132] Crime and the penitentiary, therefore, emerged as a new device for racial control.[133]

Unlike white women, who were protected by their race and gender identities, Black women were subject to arrest, criminalization, and incarceration. This regime often criminalized Black women for their failure to perform femininity in a manner consistent with white Victorian standards of womanhood.[134] The states disciplined Black women's perceived gender identities through convictions for behavior associated with masculinity, including public quarreling, using profane language, and public drunkenness.[135] In one example, Black women in Mobile, Alabama, were sentenced to ten days at a workhouse for engaging in a "war of words."[136] White women, however, were not arrested for such minor offenses. Between 1908 and 1938, only four white women were ever sentenced to the chain gang in Georgia, compared with almost two thousand Black women.[137]

---

127. *See, e.g.*, BLACKMON, *supra* note 9, at 53.

128. *Id.* at 85–86.

129. *See id.* at 64–69; Bailey v. Alabama, 219 U.S. 219, 227 (1911) (striking down Alabama's statute that provided for criminal penalties, including the chain gang, for failure to perform under a contract in which an advance was paid).

130. *See, e.g.*, Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1871) (upholding the use of convict leasing); *see also* Wendy Imatani Peloso, *Les Miserables: Chain Gangs and the Cruel and Unusual Punishments Clause,* 70 S. CAL. L. REV. 1459, 1463–65 (1997); FIERCE, *supra* note 20, at 9.

131. NICOLE HAHN RAFTER, WOMEN IN STATE PRISONS 1800–1935, at 133 (1985); LICHTENSTEIN, *supra* note 108, at 195.

132. Loic Wacquant, *From Slavery to Mass Incarceration: Rethinking the 'Race Question' in the U.S.*, 13 NEW LEFT REV. 41, 53 (2002).

133. *Id.*

134. *See, e.g.*, Haley, *supra* note 44, at 191.

135. *Id.* at 45.

136. MARY ELLEN CURTIN, BLACK PRISONERS AND THEIR WORLD, ALABAMA 1865-1900, at 6 (2000).

137. Haley, *supra* note 44, at 215.

In this way, we can understand the punishment of Black women as performing as much a disciplinary function as an economic one. The criminal law was organized around stereotypical depictions of Black women,[138] much in the same way that the Black Codes fused notions of race and criminality with respect to Black men.[139] Indeed, gendered and racial constructions of crime and criminality can be seen in the disproportionate policing of Black women and insulation from punishment for white women in the Reconstruction era.[140]

Once convicted, the arduous agricultural work required under the convict lease system and the coerced backbreaking labor on railroads on chain gangs reinforced Black women's masculinization.[141] Black women were even forced to wear men's clothing when engaging in this demanding work.[142] In this regard, Black women were, as one prison administrator noted, "worked without any discrimination with the male convicts."[143] While Black women were masculinized as a result of the exploitation of their labor and their subsequent incarceration in post–Civil war punishment regimes, they were subject to racialized gender violence that could only be meted out as a result of their status as women.[144]

2. Sexual Deviance

In the context of slavery, Black women were fundamentally valued as sources of both physical and reproductive labor.[145] Stated differently, Black women's bodies were not only utilized to generate profits as a result of labor, but were also used as a means of increasing the slave population.[146]

138. *See* OSHINSKY, *supra* note 19, at 169–70 (noting stereotypes of Black women as violent and dangerous served to justify their disproportionate incarceration); DARLENE CLARK HINE, *Lifting the Veil, Shattering the Silence: Black Women's History in Slavery and Freedom*, *in* HINE SIGHT: BLACK WOMEN AND THE RE-CONSTRUCTION OF AMERICAN HISTORY 14 (1997) (noting that constructs of Black women as sexually promiscuous drove disproportionate arrest rates of Black women for prostitution).

139. *See, e.g.*, OSHINSKY, *supra* note 19, at 20–21, 32 (noting that Southern legislators rationalized the enactment of the Black Codes as a mechanism for regulating the inherent moral degeneracy and criminality in the newly freed slaves); Roberts, *supra* note 21, at 1955–56.

140. JOHNSON, *supra* note 57, at 32 ("White women were systematically channeled out of prisons, while African American women were systematically channeled into them."); Haley, *supra* note 44, at 41–45; RAFTER, *supra* note 131, at 143 ("Judges sometimes refused outright to send white women to penal institutions. But to white officials, incarceration of a [B]lack woman was a matter of small consequence.").

141. Haley, *supra* note 44, at 170–85.

142. *Id.* at 175.

143. *Id.* at 97.

144. Crenshaw, *supra* note 23, at 158–59 (1989) (noting that reproductive capacities as the site of subordination for Black women is not coincidental, as in the case of the rape of Black women during slavery, "[t]heir femaleness made them sexually vulnerable to racist domination, while their Blackness effectively denied them any protection").

145. *See, e.g.*, Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence,* 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11 (2001).

146. Harris, *supra* note 111, at 1716.

Consequently, the degradation and control of Black women's reproductive capacities was central to the operation of the system of slavery.[147] To exploit Black women's reproductive capacities, their bodies were treated as sexually violable commodities.[148] Indeed, neither the laws nor the customs that valorized the chastity of white womanhood protected Black women.[149] Instead of being constructed as the victims of sexual violence, the endemic violence that Black women experienced was justified by their construction as sexually aggressive, promiscuous, and deviant.[150]

For example, in 1662 Virginia passed a statute that upended centuries of English law, which provided for patrilineal heritage, and instead provided that children born to Black women inherited the status of the mother.[151] At the same time, the law placed Black women outside of the coverage of statutes that prohibited rape.[152] These statutes thus allowed for the rape of Black women with impunity and for any resulting pregnancy to benefit the perpetrator of the rape, namely white slave masters, as any child born to an enslaved Black woman would become a slave as well.

These policies doubly victimized Black women, first through sexual violence and second through the enslavement of their children. Notwithstanding this victimization, public discourse did not present Black women in a sympathetic light. Rather, these and other policies were justified by and reinforced prevailing ideas about Black women's uncontrolled sexual aggression and lasciviousness.[153] Taken together, the Virginia statute and the

147. Dorothy Roberts*, Racism and Patriarchy in the Meaning of Motherhood,* 1 AM. U. J. GENDER & L. 1, 7 (1993).

148. *See* Harris, *supra* note 111, at 1719 (discussing legislation that provided that children of Black women took on the status of the mother, regardless of the status of the father, thus generating a financial incentive for the sexual violation of Black women); DAVIS, *supra* note 118, at 7; GIDDINGS, *supra* note 107, at 37; Erlene Stetson, *Studying Slavery: Some Literary and Pedagogical Considerations on the Black Female Slave, in* BUT SOME OF US ARE BRAVE 74 (Gloria Hull et al. eds., 1982) (quoting an advertisement for the sale of a female slave: "She is very prolific in her generating qualities, and affords a rare opportunity to any person who wishes to raise a family of healthy servants for their own use").

149. Crenshaw, *supra* note 23, at 158–59.

150. *See* PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 81 (2000) (noting that the image of the Black woman as a "jezebel originated under slavery when Black women were portrayed as . . . 'sexually aggressive wet nurses.' Jezebel's function was to relegate all Black women to the category of sexually aggressive women, thus providing a powerful rationale for the widespread sexual assaults by White men typically reported by Black slave women").

151. *See* GIDDINGS, *supra* note 107, at 37.

152. *See* HANNAH ROSEN, TERROR IN THE HEART OF FREEDOM: CITIZENSHIP, SEXUAL VIOLENCE, AND THE MEANING OF RACE IN THE POSTEMANCIPATION SOUTH 10 (2009) ("Antebellum southern state law depicted enslaved women as both incapable of consent—because, as slaves, they had no will or honor of their own—and simultaneously as always consenting to sex; in other words, the law represented enslaved women as lacking the will and honor to refuse consent.").

153. *Id.*; *see also* Stetson, *supra* note 148, at 73–74 (noting popular images of Black women as "female animals," "especially passionate" and thus well positioned to be "breeder[s]").

uncognizability of the rape of Black women established a regime in which Black women's vulnerability to sexual assault was sanctioned, if not encouraged, by law.

After the formal abolition of slavery, the criminalization of Black women reinforced stereotypes of Black women's sexual deviance and moral depravity. In the years following the Civil War, Southern states singled out Black women for prostitution or illegal solicitation offenses. Over a twelve-month period in 1881, in the state of Tennessee, for example, only 136 white women were arrested for solicitation compared to 731 Black women.[154] In Atlanta, women represented 1715 of the 7236 Blacks arrested in 1890, with many of these arrests likely for prostitution offenses.[155] As Darlene Clark Hine has observed, "[c]learly, the actions of law enforcement officials reflected a shared belief in the stereotype that depicted all black women as natural prostitutes."[156] For crimes of prostitution, Black women were sent away to hard labor.

Within these labor camps, guards and other white administrators often targeted and sexually abused Black women.[157] Indeed, Black female prisoners, cast as sexually deviant and therefore subject to sexual violation, experienced profound abuse and intense surveillance by male guards.[158] Unlike Black men or white women, they were uniquely subject to sexual violence and abuse at the hands of guards as rape was endemic.[159] Such assaults largely went unprosecuted and at times resulted in the pregnancy of Black female prisoners.[160] White women, however, were rarely, if ever, charged with prostitution offenses or sent to such institutions.[161] In the rare instances in which white women were punished, they often received special treatment, better conditions, and earlier releases.[162]

---

154. HINE, *supra* note 138, at 14.

155. *Id.*

156. *Id.*

157. *See* BLACKMON, *supra* note 9, at 146 ("[B]lack women faced the double jeopardy of being required to submit both to the cotton fields and kitchens, as well as the beds of the white men obtaining them.").

158. *See, e.g.*, Haley, *supra* note 44, at 146–63; OSHINSKY, *supra* note 19, at 172.

159. *See* Haley, *supra* note 44, at 146–63 (exploring the history of rape in Georgia prisons during the Jim Crow era).

160. *See, e.g.*, BUTLER, *supra* note 8, at 137–38, 140; CURTIN, *supra* note 136, at 124.

161. JOHNSON, *supra* note 57, at 32.

162. *Id.* at 83. This is not to say, however, that white women were not punished at all. Under the patriarchal norms that prevailed during this period, women were deemed the property of their husbands and therefore subject to their authority within the context of the home. *See, e.g.*, Angela Y. Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 NEW ENG. J. CRIM. & CIV. CONFINEMENT 339 (1998). White women experienced significant discipline and punishment through the imposition of violence at the hands of their husbands in these "private" spaces. *Id.* Thus, the prison served as a racialized boundary between the public and private punishment of women.

Moreover, while notions of patriarchy and womanhood largely insulated white women from criminalization and incarceration, there were occasions (such as open cohabitation with black men) under which they were subject to punishment within the harsh regimes of convict leasing or chain

The dichotomy between the denigration of Black women on the one hand and the valorization of white women on the other formed the basis for state-sponsored or state-sanctioned violence, including lynching, rape, and segregation. This dichotomy fueled the creation of racialized boundaries to prevent interactions between Black men and white women. At the same time, Black women were largely unprotected from sexual or physical violence at the hands of white men. In this regard, notions of white femininity and sexual chastity played an important role in maintaining white racial power at a time when Reconstruction threatened white racial dominance.

3. Maternal Devaluation

The construction of Black women as sexually deviant operated in tandem with their devaluation as mothers.[163] This devaluation was most clearly expressed through the lack of care provided to enslaved women during pregnancy. Pregnant Black women were routinely forced to engage in demanding domestic tasks and fieldwork, often up until the delivery of their children.[164] Women could be beaten if they did not work fast enough, regardless of the physical limitations they might have experienced as a result of their pregnancies.[165]

While Black women's identities as mothers were not valued, their children were highly valued as property. Indeed, in a perverse physical representation of this contradiction, pregnant women were whipped in such a manner so as to protect the fetus while at the same time disciplining women as workers.[166] As one overseer observed, a "woman who gives offense in the field, and is large in a family way, is compelled to lie down over a hole made to receive her corpulency, and is flogged with the whip or beat with a paddle, which has holes in it; at every stroke comes a blister."[167]

---

gangs. *See* CURTIN, *supra* note 136, at 115. In the event that white women were incarcerated, it was often for a separate class of crimes, which was viewed as degrading to their race and femininity and thus threatening to the prevailing racial order. *Id.* In *Black Prisoners and Their World*, Mary Ellen Curtin notes that white women held in Alabama prisons were often sent there for traversing sexual mores of the time with respect to interracial relationships: "In 1882 four out of the five white female state prisoners had been found guilty of adultery, a crime which implied interracial sex." *Id.* at 114. Such conduct on the part of white women stripped them of "their racial privilege." *Id.* at 115. White women in Alabama with this class of conviction were housed with Black women until the interracial housing arrangement raised concerns about whether white women could ever be "cured of [their] disease" if they were subject to the corrupting influence of Black women. *Id.* at 114. Thus, even in moments when white women were punished, the prison actively functioned to define and maintain racial and gender boundaries.

163. *Id.* at 85.

164. DAVIS, *supra* note 118, at 8–9.

165. *Id.* at 9.

166. *Id.*

167. *Id.*

The devaluation of Black women as mothers was further inscribed given that women were often immediately separated from their children due to the demands of slave labor.[168] Black women were sent back to the fields shortly after childbirth, where they were worked from sunup to sundown. In this context, women had no choice but to leave their children in the care of other women who were no longer able to work or to take their newborns into the field with them.[169] In either case, the ability to bond with their children was limited by the work demands placed upon them. Moreover, Black women had no legal claim to their children and therefore could not prevent them from being sold away for any reason or no reason at all.[170]

Additionally, attempts to resist sexual exploitation and domination contributed to the characterization of Black women as bad mothers. According to historian Darlene Clark Hine, Black women who were raped by their masters often turned to abortions as a means of resisting the institution of slavery and sexual exploitation.[171] These Black women often refused to bear children who were conceived in acts of violence or to raise their children in a state of bondage.[172] The white slaveholding class, however, interpreted this resistance as evidence of Black women's degenerate status as mothers. According to Hine, one Southern physician suggested that all doctors in Hancock County, Georgia, were "aware of the frequent complaints of planters about the unnatural tendency in the African female population to destroy her offspring."[173] These prevailing notions of Black women as failing to possess maternal instincts not only reinforced their stereotypes as bad mothers, but also separated them from fundamental aspects of the social constructions of "womanhood."[174]

The social construct of Black women as bad mothers evolved to become a constitutive element in Black women's incarceration in post–Civil War punishment systems. Indeed, pregnancy provided little protection from the harsh punitive environment to which Black women were often subjected. Rather, Black women were often treated harshly, sent to chain gangs, and ordered to perform hard labor despite being pregnant.[175] Unlike the slavery context, convict leasing operators had no vested interest in the children of

168. *Id.* at 8.

169. *See* ROBERTS, *supra* note 118, at 36–37.

170. *Id*. at 34–35; *see also* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 5 (1982) (identifying "natal alienation"—the separation from past, present, and future generations—as a central aspect of slavery).

171. DARLENE CLARK HINE, *Female Slave Resistance: The Economics of Sex*, *in* HINE SIGHT: BLACK WOMEN AND THE RE-CONSTRUCTION OF AMERICAN HISTORY 30–31 (1997).

172. *Id.*

173. *Id.* at 31.

174. *See, e.g.*, April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood,* 10 TEX. J. WOMEN & L. 83, 93 (2001) (noting that there are "both structure[s] and ideolog[ies] that require motherhood as a prerequisite for all socially acceptable female adult roles").

175. *See, e.g.*, BUTLER, *supra* note 8, at 164–68; Haley, *supra* note 44, at 100–03.

Black women given that they would not inherit their mother's status as a formal matter.[176] Instead, women's pregnancies were often seen as reflections of the bad moral character of Black women; therefore, states extended no mitigation of penalty during sentencing.[177] Moreover, once imprisoned, pregnancy was seen as a hindrance to the state's ability to extract labor from Black women and was therefore punished.[178] The punitive posture toward Black women's pregnancies at sentencing and during incarceration served to devalue Black women as mothers and center their reproductive capacities as a cause for racial subordination.

Several stories bear this point out. In 1881, Richmond County, Georgia, sent at least five pregnant Black women to the chain gang.[179] In testimony before an 1881 investigatory committee on prison conditions in Georgia, one Black woman at the camp testified that her baby was born prematurely as a result of overwork.[180] Another Black woman was raped by a prison official, subsequently became pregnant, and was punished as a result of the pregnancy. After she delivered the baby, "guards separated [her] from the newborn and placed the mother in the dungeon, but not before subjecting her to [a] public head shaving."[181] As Anne Butler notes in *Gendered Justice in the American West*, "[f]orced work situations and inappropriate birthing conditions, both highlighted by the absence of gender dignity, gave male overseers yet another form of violence to make a woman's prison time distinctive."[182]

Like their pregnancies, Black women's roles as mothers and caretakers were devalued. Prisons denied female prisoners the ability to parent or even keep in contact with their children given the remote locations of the prisons.[183] States routinely rejected petitions by Black women who sought clemency as a result of their duties and obligations as mothers.[184] Instead, the number of children a Black woman had provided a basis for assuming moral deviance and thus the need for harsher penalties.[185]

4. Dangerousness

As a consequence of Black women's perceived failure to conform to dominant constructs of femininity, sexual chastity, and motherhood, they were often cast as dangerous to the prevailing racialized and patriarchal social

176. *See, e.g.*, OSHINSKY, *supra* note 19, at 46–47 (describing the high mortality rates in convict leasing camps).

177. *See, e.g.*, Haley, *supra* note 44, at 100–02.

178. *Id.*

179. *Id.* at 102.

180. *Id.*

181. BUTLER, *supra* note 8, at 136.

182. *Id.* at 168.

183. Haley, *supra* note 44, at 81.

184. *Id.*

185. *Id.* at 163.

norms. They were described in popular discourse as hyperaggressive, embodying characteristics of "dishonesty, tardiness, drunkenness, immorality, and irresponsibility."[186] Accounts that highlighted the dangerousness of Black women served to further justify the subordination of Black women specifically and Black people more generally.

For example, in one instance, a leader of the Missouri Press Association wrote a letter to an international antislavery group in England, "declaring that 'the Negroes of this country are wholly devoid of morality' and that 'the women were prostitutes and all were natural thieves and liars.'"[187] In another case, one Mississippi Delta resident remarked to a local newspaper that Black women

> exhibit a ferocity as bloody and as savage as that exhibited by the men. They stab with deadly effect and shoot with unerring precision. They plunge ice picks into the hearts of men and women, cut throats with razors, batter heads with axes, and shoot their victims full of holes with pistols.[188]

These anecdotes demonstrate the ways in which ideological stereotypes of Black women pervaded public discourse, not only reinforcing their marginality within broader society, but also equating their gendered racial identity with criminality and dangerousness.

B. The Second Reconstruction, Black Women, and the "New" Carceral Regime

In the late 1920s, the use of prisons as a means of racial control reached its nadir. Prisons were largely displaced as a mechanism of social control by laws mandating or allowing segregation. Nevertheless, negative social constructs of Black women persisted and justified discriminatory treatment of African Americans under the guise of Jim Crow.[189] Under this new regime, jurisdictions across the United States excluded African Americans from participation in social, political, and economic life. Anti-Black violence was widespread. During this era, Black women were kept in subservient positions in a variety of contexts and were often subject to rape and other forms of sexual

186. BEVERLY GUY-SEHFTALL, DAUGHTERS OF SORROW: ATTITUDES TOWARD BLACK WOMEN, 1880–1920, at 136 (1990).

187. HINE, *supra* note 138, at 13.

188. OSHINSKY, *supra* note 19, at 169.

189. *See, e.g.*, CRYSTAL N. FEIMSTER, SOUTHERN HORRORS: WOMEN AND THE POLITICS OF RAPE AND LYNCHING 103 (2009) (referring to "the rape/lynch narrative [that] depended on a variety of racialized gender constructions: the chaste and dependent white woman; the sexually violent black man; the immoral and unredeemable black woman; and the honorable and civilized white man"); Carrie E. Johnson, Book Note, *Policy and Prejudice*, 10 BERKELEY WOMEN'S L.J. 134, 140–42 (1995) (reviewing JILL QUADANGO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994)) (listing the various ways in which Black Americans were discriminated against during the middle of the twentieth century).

violence.[190] Governments refused to intervene in private customs and practices that prevented African Americans from accessing public accommodations, housing, and employment.[191] Together, these public and private arrangements constituted the system of Jim Crow and operated as a comprehensive system of racial control.

As Jim Crow and segregation became more entrenched, the use of the criminal law to regulate racialized populations was drastically curtailed.[192] Indeed, between 1929 and 1967, the rate of incarceration in the United States did not exceed 100 prisoners per 100,000 people in the general population,[193] and the incarceration of women was virtually nonexistent. Since the late 1960s, however, incarceration rates have spiked and the expansive use of incarceration has come to resemble prior regimes of racial control.[194]

Several theorists have suggested that the dramatic increase in use of the criminal law and incarceration came in response to the gains of the Civil Rights Movement.[195] In the mid-1950s through the late 1960s, the Civil Rights campaign to dismantle Jim Crow and formal segregation reached its high watermark. In what has been called the "Second Reconstruction,"[196] activists and lawyers deployed organizing and legal strategies that succeeded in dismantling formal discrimination and the doctrine of "separate but equal" in critical respects. In response to the opening of American society and the anxiety it generated among whites, politicians proposed "law and order" as a means of ensuring the stability of the social, political, and economic order. The language of "law and order" was racialized, drawing on ideological constructs of Black men and women as deviant and dangerous.[197] Under the auspices of the "law and order" political framework, states criminalized more conduct and stiffened penalties—with racially disparate results.

Southern states, in many ways, led or heavily influenced the "law and order" rhetoric and the "tough on crime" policies and prison practices that followed.[198] Racialized constructs of criminality that were solidified during earlier regimes of punishment informed the public's perspective on social problems such as poverty, joblessness, and addiction. As the punitive demands of the public extended into prison practices, harsh conditions of confinement

190. *See generally* FEIMSTER, *supra* note 189 (arguing that the sexual victimization of Black women was an essential part of white subordination of Blacks).

191. *See, e.g.*, MARY FRANCES BERRY, BLACK RESISTANCE, WHITE LAW 97–107 (1994).

192. ALEXANDER, *supra* note 21, at 86.

193. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1997 (1998).

194. *See, e.g.*,Wacquant, *supra* note 132, at 41–50; ALEXANDER, *supra* note 21, at 176–95.

195. *See, e.g.*, Vesla M. Weaver, *Frontlash: Race and the Development of Putative Crime Policy*, 21 STUD. AM. POL. DEV. 230 (2007); KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997).

196. *See, e.g.*, C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 8–10 (1974).

197. *See generally* Weaver, *supra* note 195, at 230; BECKETT, *supra* note 195.

198. LYNCH, *supra* note 28, at 9.

within prisons in "Sunbelt states" influenced legislators and prison administrators.[199] Moreover, restrictions upon individuals marked by a criminal conviction proliferated, in many ways resembling felon disenfranchisement laws enacted in Southern states after Reconstruction.[200] Taken together, these threads of Southern influence on national punishment policies served as anchors of the modern regime of mass incarceration. Given the role of Black women in shaping Southern punitive practices, ideological constructions of Black women and particular practices inflicted upon them in the South can also be seen as informing the operation of women's prisons across the country.

Following the "Second Reconstruction," the number of individuals incarcerated in state and federal institutions increased significantly.[201] Crack cocaine and other drug offenses drove much of the increase in the prison population. Constructs of Black men and women, which were refined in early regimes of punishment, influenced the public's perception of drug users and sellers.[202] Earlier ideological constructions of Black women as criminal, morally bankrupt, and sexually deviant translated into public stereotypes of "crackheads" and "crack mothers."[203] These constructs animated the heavy police surveillance of poor communities as well as the disproportionate arrests of Black men and women suspected of drug possession and related offenses.[204] Draconian sentencing disparities for crack cocaine assured that individuals convicted of crimes involving crack (who were largely Black) were treated more harshly than individuals convicted of cocaine offenses (who were largely white) through the imposition of lengthier sentences.[205]

Driven by the War on Drugs, approximately 1.5 million people were in prison by the mid-2000s, nearly half of whom were Black.[206] In Southern states, including those which employed convict leasing and chain gangs only a few decades earlier, "[n]early half of all the nation's state-level prisoners were

199. *Id.* at 208.

200. *Id.* at 211–13.

201. *See, e.g.*, MARC MAUER, RACE TO INCARCERATE 23–34 (2006); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 34–51 (2005).

202. Bobo & Thompson, *supra* note 49, at 336–41.

203. *See, e.g.*, Sherri Sharma, *Beyond "Driving While Black" and "Flying While Brown": Using Intersectionality to Uncover the Gendered Aspects of Racial Profiling*, 12 COLUM. J. GENDER & L. 275, 287–93 (2003); Dorothy E. Roberts, *Unshackling Black Motherhood,* 95 MICH. L. REV. 938, 949–52 (1997); Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means*, *in* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 323, 332–33 (Toni Morrison ed., 1992).

204. *See, e.g.*, Natalie Sokoloff, *The Effects of the Prison Industrial Complex on African American Women*, *in* RACIALIZING JUSTICE, DISENFRANCHISING LIVES: THE RACISM, CRIMINAL JUSTICE, AND THE LAW READER 74 (Manning Marable ed., 2007).

205. *See generally* MARC MAUER ET AL., GENDER AND JUSTICE: WOMEN, DRUGS, AND SENTENCING POLICY (1999), *available at* http://www.sentencingproject.org/doc/File/Drug%20Policy/dp_genderandjustice.pdf.

206. Bobo & Thompson, *supra* note 49, at 325–28.

held in institutions of 11 high-growth Sunbelt states in 2000 . . . ."[207] This figure includes nearly half of all incarcerated women.[208] During this period, the number of prisons constructed in the United States reached a historic high.[209]

Black women led the trend toward increasing incarceration rates for women, totaling approximately 32 percent of all female prisoners.[210] The disproportionate representation of Black women in prison relates to the negative normative constructs of them as masculine and sexually deviant. Indeed, anthropologist Diane Lewis suggests that punishment is used as much to discipline women for violating gender roles as for violating the criminal law.[211] Because Black women have historically been perceived as masculine, Lewis suggests that Black women are disproportionately represented in prisons and jails because society views them as gender deviant and thus in greater need of discipline.[212]

This observation is supported by the positive relationship between Black women's representation in contemporary prisons and the harsh turn in prison practices. Indeed, the state's willingness to rehabilitate prisoners decreased at roughly the same time as the number of incarcerated Black women increased.[213] Instead, the conditions within women's prisons declined drastically, perhaps related to historical constructs of Black women as both more dangerous and more masculine.[214] Black women, as the stereotypical female prisoner in the public mind, did not engender public attention or sympathy.[215]

---

207. LYNCH, *supra* note 28, at 9.

208. *Id.*

209. *See, e.g.*, THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf (noting that the United States has the highest incarceration rate in the world).

210. WEST, *supra* note 51, at 7, 20.

211. MULLINGS, *supra* note 65, at 118. Shaylor, *supra* note 70, at 394 ("A central function of prisons in general is to punish women who fail to subscribe to a model of femininity that historically has been (re)produced in discourse as white, pure, passive, heterosexual, and located in motherhood.").

212. MULLINGS, *supra* note 65, at 118 (noting that Black women's disproportionate incarceration "may simply reflect society's view that they are in greater need of demasculinization").

213. LYNCH, *supra* note 28, at 13 (noting the relationship between the change in the size and racial composition of jails and prisons and shifts in the purpose of incarceration).

214. *See* Phillip A. Goff et al., *"Ain't I a Woman": Towards an Intersectional Approach to Person Perception and Group-Based Harms*, 59 SEX ROLES 392–403 (2008) (arguing there is a strong association between "Blackness" and masculinity); Buchannan, *Impunity*, *supra* note 69, at 53 (noting stereotypes of Black women as criminal and violent); RAFTER, *supra* note 131, at 143 (noting the link between stereotypes of Black women as masculine and Black women's incarceration rates); KALI N. GROSS, COLORED AMAZONS: CRIME, VIOLENCE, AND BLACK WOMEN IN THE CITY OF BROTHERLY LOVE, 1880–1910, at 101–26 (2006); *see generally* Nell Irvin Painter, *Hill, Thomas, and the Use of Racial Stereotype*, *in* RACE-ING JUSTICE, EN-GENDERING POWER 200, 209–13 (Toni Morrison ed., 1992) (noting stereotypes of Black women as aggressive and sexually promiscuous).

215. JOHNSON, *supra* note 57, at 31 ("[I]ncreasing numbers of African American women garnered less compassion than the previous, largely White inmate populations.").

Thus, states driven by the public's need for a punitive response to racialized social problems, engaged in a "race to the bottom" of sorts. In what Craig Haney calls the "devolving standards of decency," prisons reduced educational and therapeutic programming and increased punitive measures such as solitary confinement.[216] Some states instituted supermaximum prisons and others reinstituted the chain gang.[217] In this race to the bottom, the same Southern states that perfected punitive regimes such as chain gangs were on the vanguard of the retributivist trend. States in the "Sunbelt" touted their harsh and low-cost conditions of confinement.[218] As Mona Lynch notes, "[w]ithin these 'no frills' prisons, policies and procedures are implemented that aim to punish more deeply than the sentence of imprisonment itself."[219]

As the system of punishment developed and extended its reach in the era of mass incarceration, ideas that were once attached only to Black women's bodies, such as dangerousness, deviance, and control of bodily integrity, have come to shape overall institutional functioning in contemporary women's prisons.[220] Indeed, many of the racial and gender constructs associated with Black women are employed to justify the shackling of pregnant prisoners during labor and childbirth. Explicitly, shackling is rationalized by highlighting the dangerousness of female prisoners or the risk that they will use their pregnancy as an excuse to escape. Implicit within the justifications for shackling is an assumption that incarcerated women are bad mothers, such that they would feign labor pains or put their children at risk in order to escape from custody. In many respects, these explicit and implicit justifications for the shackling of all women mirror the constructs used to subordinate Black women in earlier regimes of racial domination.

Much like the social welfare context, where the punitive posture taken toward Black women as the imagined primary beneficiary impacts all who are subsidy reliant,[221] prison is a gendered and racialized institution informed by

---

216. Craig Haney, *Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency,* 9 HASTINGS WOMEN'S L.J. 27, 55–59 (1998) (noting the repudiation of the rehabilitative goal of the criminal justice system); *see also* JOAN PETERSILIA, WHEN PRISONERS COME HOME 5–8 (2003) (noting the defunding of educational, therapeutic, and vocational programs in prisons).

217. *See* Jesenia M. Pizarro et al., *Supermax Prisons: Myths, Realities, and the Politics of Punishment in American Society*, 17 CRIM. JUST. POL'Y REV. 6, 13 (2006) (noting "the advent of the supermax institution in the 1980s"); Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem?*, 1 PUNISHMENT & SOC'Y 163, 175 (1999) (listing states with supermaximum prison beds in 1997 and 1998); LYNCH, *supra* note 28, at 135–38 (describing early construction of supermaximum units in Arizona in the late 1980s).

218. LYNCH, *supra* note 28, at 7.

219. *Id.* at 3.

220. Katherine Beckett & Naomi Murakawa, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC'Y REV. 695, 696 (2010) (collection of studies regarding society's hostility toward people of color and its willingness to punish harshly if people of color are presumed to be the subject of punishment).

221. *See* ANGE MARIE HANCOCK, THE POLITICS OF DISGUST AND THE PUBLIC IDENTITY OF THE "WELFARE QUEEN" 1–22 (2004).

societal constructs of and hostilities toward Black women. Non-Black women are effectively "Blackened" by virtue of their incarceration. Therefore, they are also harmed by the racialized practices, such as shackling during labor and childbirth, that occur within women's prisons and jails. In this regard, as Patricia Hill Collins asserts, "controlling images of Black womanhood also functioned to mask social relations that affected all women."[222] Thus, when practices such as the shackling of pregnant prisoners during childbirth are framed in these terms, Black women's identities are silently but heavily influencing women's prisons more broadly.

III.
THE INVISIBILITY OF RACE AND GENDER WITHIN EIGHTH AMENDMENT DOCTRINAL DISCOURSES

The Eighth Amendment provides that no "cruel and unusual punishments [shall be] inflicted" upon any person.[223] However, current Eighth Amendment doctrine is insufficient to address the racial and gender dynamics that lead to the use of shackles on pregnant prisoners. In particular, the Eighth Amendment doctrine's emphasis on the individual intent of prison officials obscures fundamental racial and gender dynamics that influence practices such as shackling. Indeed, as legal scholar Sharon Dolovich has noted, the standard for measuring whether conditions of confinement are constitutionally adequate "is premised on a narrow, individualistic conception of punishment that is wholly unsuited for the Eighth Amendment context."[224] Because the standard is individualized and therefore fails to consider the historical implications of race and gender in creating shackling practices, it is unable to consider the broader institutional context out of which individual acts of brutality emerge. Consequently, the deeply embedded ideological moorings and social meanings of practices that are outgrowths of slavery, such as shackling, will not be fundamentally uprooted, contested, or eliminated.

Indeed, the Eighth Amendment's profound inability to uproot racism in the administration of justice has deep implications and extends beyond the question of conditions of confinement. In *McCleskey v. Kemp*, the Court considered a challenge to a Georgia state statute on the grounds that it was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments.[225] Specifically, McCleskey alleged that the death penalty was being discriminatorily and arbitrarily applied as evidenced by gross racial disparities in its application.[226]

222. COLLINS, *supra* note 150, at 72.
223. U.S. CONST. amend. VIII.
224. Dolovich, *supra* note 33, at 897.
225. 481 U.S. 279, 283–84 (1987).
226. *Id.* at 286.

McClesky presented the Baldus study, the most comprehensive study of its kind suggesting that racial disparities existed at all levels of administration of the death penalty. Indeed, the study demonstrated that prosecutors were more than three times more likely to seek the death penalty when a Black defendant was accused of killing a white victim than when a white defendant killed a Black victim.[227] The study further demonstrated that defendants who were convicted of killing whites were 4.3 times more likely to be sentenced to death than when convicted of killing Blacks and that Black defendants were more likely to receive the death penalty regardless of their victim's racial identity.[228] Taken together, the Court noted that "the Baldus study indicates that black defendants . . . who kill white victims have the greatest likelihood of receiving the death penalty." [229]

The Court, however, rejected McCleskey's arguments and found the operation of Georgia's statute constitutionally permissible. Relying on *Furman v. Georgia*, the Court noted that any penalty irrationally applied is presumptively invalid under the Eighth Amendment.[230] It stated, however, that the guided use of jury discretion was sufficient to defeat claims of arbitrariness and thus upheld Georgia's statute.[231] In reaching this conclusion, the Court decontexualized McCleskey's claim by failing to engage the ways in which the criminal justice system generally and the death penalty in particular had historically been used to maintain racial power. Instead, the Court suggested that some degree of racial bias is inherent in the system of discretion and that to delegitimize the exercise of such discretion would challenge the entire criminal justice system.[232] In the absence of direct evidence of racial discrimination in a particular case, the Court held that a showing of "likelihood" or "risk" that racial discrimination factored into a decision to impose the death penalty was insufficient to make out an Eighth Amendment claim.[233]

The narrow, intent-based inquiry of the Eighth Amendment preserves what scholars have called the "penology of racial innocence."[234] The penology of racial innocence refers to legal and academic approaches to the examination of crime and punishment, such as that of *McCleskey*, that presume "criminal justice is innocent of racial power until proven otherwise."[235] As I discuss

227. *Id*. at 287.
228. *Id.*
229. *Id.*
230. *Id*. at 299–301.
231. *Id.* at 301–08.
232. *Id.* at 296–97.
233. *Id.* at 309 ("McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do.").
234. Beckett & Murakawa, *supra* note 220 (coining the term "penology of racial innocence" and defining it as "the study of punishment that obscures the operation of racial power in penal practices and institutions").
235. *Id.*

below, the intent-based posture of contemporary Eighth Amendment jurisprudence ignores the racialized and gendered structures of penal institutions and instead focuses on discrete instances of brutality that occur within such institutions, while ignoring the institutional culture that gives rise to the brutality. In the context of shackling, the history of racialized punishment and constructs of Black women as dangerous, maternally deviant, and masculine informs the harsh posture taken toward pregnant women prisoners. Eighth Amendment jurisprudence, therefore, does little to unearth the functioning of racial imagery and power as expressed by and through prison practices such as shackling. Consequently, Eighth Amendment jurisprudence lends itself more to temporary individual relief while the racialized ideologies that animate practices within women's prison continue undisturbed.

A. The Current Constitutional Standard for Evaluating Conditions of Confinement Claims Under the Eighth Amendment

Incarceration, by definition, removes individuals from the autonomy of their private lives and places them at the mercy of the state for the purposes of punishment.[236] Incarcerated individuals, therefore, are completely reliant on the state to meet their basic needs. In the absence of the fulfillment of those needs, illness, pain, or even death can result. Consequently, the Supreme Court has held that the Eighth Amendment "imposes duties on [prison officials] who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care and must take 'reasonable measures to guarantee the safety of inmates.'"[237]

In *Estelle v. Gamble*, the Court noted that the constitutional duties imposed by the Eighth Amendment embody "'broad and idealistic concepts of dignity, civilized standards, humanity, and decency' against which we must evaluate penal measures."[238] The Court went on to emphasize that "the evolving standards of decency that mark the progress of a maturing society" inform the Eighth Amendment.[239] In applying this standard, the *Estelle* line of cases has held that the Eighth Amendment's reach extends to conditions of confinement, rather than simply to judicial and legislative sentencing determinations.[240]

While articulating a robust and progressive vision of the Eighth Amendment, the *Estelle* Court nevertheless described a test for Eighth

236. *See* Estelle v. Gamble, 429 U.S. 97, 103 (1976) ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical 'torture or a lingering death,' the evils of most immediate concern to the drafters of the Amendment.") (citations omitted).

237. Farmer v. Brennan, 511 U.S. 825, 832 (1994).

238. *Estelle*, 429 U.S. at 102.

239. *Id*.

240. *Id.* at 104–05; *see also* Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (holding that the conditions of confinement could constitute cruel and unusual punishment).

Amendment conditions of confinement challenges that was largely ambiguous and therefore subject to narrow readings.[241] In considering an allegation of the deprivation of medical care, the *Estelle* Court held that a party must show "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs" in order to state a cognizable claim under the Eighth Amendment.[242] The Court, however, did not describe what "deliberate indifference" meant or how it was to be applied in the conditions of confinement context; thus, the language's meaning faced vigorous contestation in subsequent opinions.

In *Wilson v. Seiter*, the Court opted for a narrow reading of the cruel and unusual punishments clause and limited the scope of the "deliberate indifference" test articulated in *Estelle*.[243] In *Wilson*, the Court held that a prisoner's pain and suffering, without more, does not fall within the protection of the Eighth Amendment.[244] Instead, the Court held that for conditions to constitute "punishment" and thus violate the Eighth Amendment, there must be an "inquiry into a prison official's state of mind."[245] This inquiry is necessary because the Court read the word "punishment" to mean "a deliberate act intended to chastise or deter."[246] Thus, the Court held that "[i]f the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify."[247] As a consequence of *Wilson*, subsequent case law read "deliberate indifference" to include a scienter requirement, although *Wilson* left the precise contours of such indifference undefined.

In *Farmer v. Brennan*, the Court further explained the state of mind showing necessary to establish "deliberate indifference" under the intent regime announced in *Wilson*.[248] To state a cognizable claim of injury under the Eighth Amendment, the Court established a two-pronged test for deliberate indifference that contained both objective and subjective elements. First, "the deprivation must be, objectively, sufficiently serious."[249] In other words, "[a] party must show that [s]he is incarcerated under conditions posing a serious risk of harm."[250]

241. *Estelle*, 429 U.S. at 106.
242. *Id.*
243. *See* Wilson v. Seiter, 501 U.S. 294, 297–301 (1991).
244. *Id.* at 296–97, 300.
245. *Id.* at 299; *see also* Helling v. McKinney, 509 U.S. 25 (1993) (finding that the Eighth Amendment applies to conditions of confinement that pose a substantial risk of future harm to inmate health or safety).
246. *Wilson*, 501 U.S. at 300.
247. *Id.*
248. Farmer v. Brennan, 511 U.S. 825, 835–45 (1994).
249. *Id.* at 834.
250. *Id.*

Second, the Court read a subjective intent requirement into the "deliberate indifference" standard similar to a modified recklessness standard.[251] To establish the subjective prong of the deliberate indifference standard, the Court held that a prison "official must both be aware of the facts from which the inference can be drawn that a substantial risk of harm exists, and he must also draw the inference."[252] In sketching the contours of the subjective prong of the Eighth Amendment, the Court noted 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."[253]

The intent-based inquiry that animates the Court's Eighth Amendment jurisprudence in the context of conditions of confinement is problematic for several reasons. First, the text of the Eighth Amendment does not call for a demonstration of intentionality. Second, the intent-based standard in conditions of confinement cases incentivizes guards and prison officials to ignore threats of harm to prisoners. Third, the *Estelle-Farmer* test adopts a perpetrator perspective that is overly deferential to prison administrators. Fourth, the test largely insulates high-ranking policy makers from liability given its focus on individual intent. Fifth, the individualistic, intent-based standard elides any consideration of the historical, gendered, or racialized context out of which prison practices arise. I will discuss each of these issues in turn.

While the Court has determined that conditions of confinement are outside of the scope of "punishment," unless officials intend harm or are deliberately indifferent, the language of the Eighth Amendment does not solely prohibit cruel and unusual punishment that is intentionally inflicted. In interpreting the Eighth Amendment, conditions of confinement can just as plausibly be understood as part of the sentence of incarceration that statutes govern and a judge applies. Prisons, and the conditions or practices that take place therein, are essential elements of incarceration as a means of punishment. Justice White made this point in a concurring opinion in *Wilson*: "[in] our prior decisions that have involved challenges to conditions of confinement, . . . we have made it clear that the conditions are themselves *part of the punishment*, even though not specifically 'meted out' by a statute or judge."[254] Indeed, during sentences of incarceration, prisoners are separated from the outside world, placed in cells, restrained by various mechanisms, and supervised at all times by correctional staff. Their access to food, medical care, and safety depends on policy choices and practices within prisons. These are not merely incidental or "collateral

251. *Id.* at 835.

252. *Id.* at 837.

253. *Id.* at 838. *See also* Wilson v. Seiter, 501 U.S. 294, 299–302 (1991) (rejecting a reading of the Eighth Amendment which would have allowed liability based on objectively inhumane prison conditions).

254. *Wilson*, 501 U.S. at 306 (White, J., concurring).

consequences" to the punishment meted out by the statute or a judge, but rather central aspects of such punishment. Nevertheless, the conditions that constitute a sentence of imprisonment are currently placed outside of the Court's narrow, intent-based definition of punishment. Consequently, "'serious deprivations of basic human needs,' [often] go unredressed due to an unnecessary and meaningless search for 'deliberate indifference.'"[255]

Moreover, the *Estelle-Farmer* test provides an incentive for guards and other prison employees to ignore information that might lead them to "know" about potential threats to the safety of incarcerated persons. Given that the Court has insulated prison officials from liability when they fail to perceive a risk of harm, there is no reason for guards to be proactive in anticipating risks to the health and safety of prisoners, nor to be attentive to the particular needs of subpopulations of prisoners. Instead, this standard provides a disincentive for prison administrators to ensure adequate record keeping regarding issues that degrade conditions of confinement, such as reports of assault or the use of restraints on prisoners who are pregnant. Because of the disincentives toward knowledge of dangerous conditions within prisons, the constitutional standard in conditions of confinement cases is often more protective of prison staff than prisoners.

In addition, the Court's intent-based view of punishment does not consider the perspective of those who are the protected class (i.e., incarcerated individuals), but rather that of the perpetrators of violence or neglect within prisons.[256] From the perspective of the imprisoned, inhumane treatment or conditions of confinement are no less punitive because a guard or official did not intend it to be as such. As Justice Blackmun noted in his concurring opinion in *Farmer*, a prisoner may experience punishment when she suffers "'severe, rough, or disastrous treatment,' regardless of whether a state actor intended the cruel treatment to chastise or deter."[257] This broader view of punishment, however, does not animate the Court's interpretation of the applicability of the Eighth Amendment in conditions of confinement cases.

The *Estelle-Farmer* standard also makes it difficult to establish liability against policy makers given the subjective knowledge prong of the *Farmer* inquiry. The subjective knowledge prong focuses on the individual intent of prison officials rather than on the structural dynamics that lead to the deprivation of life's necessities. Such a standard for punishment evinces little

255. *Id.* at 311.

256. The perpetrator perspective, which is useful in this context, has been described in the context of antidiscrimination law as "racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class." Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–57 (1978).

257. *Farmer*, 511 U.S. at 854–55; *see also id.* at 856–57 ("A punishment is simply no less cruel or unusual because its harm is unintended.").

regard for the administrative context in which guards make decisions or the institutional culture of prisons that allows degrading conditions to flourish. As Justice White has noted, "[i]nhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time."[258] Yet, the cumulative actions are disaggregated and the doctrinal inquiry focused on the intent of individuals who have the least ability to transform conditions. Consequently, the layers of bureaucracy that exist at various stages of policy implementation often insulate high-ranking policy makers from liability.

Lastly, the prevailing "deliberate indifference" standard ignores the structural dynamics that enable harsh punitive environments to flourish and overlooks the way in which challenged practices function as mechanisms of racial dominance. As noted in Part II, individual conduct occurs within institutional cultures, where prevailing norms and attitudes shape behaviors and perceptions. Yet the Eighth Amendment's individualized focus negates any consideration of the racialized institutional culture out of which particular practices emerge.

Additionally, even if a court deems a particular instance of a practice unconstitutional, the resolution is often incident specific and generally does little to disrupt the ideological constructs that animated the use or existence of a practice in the first place. The result is a consequence of the fundamental mismatch between the structural dynamics that give rise to the abuse of women in prisons and the doctrinal tools for recognizing and remedying this harm. On the one hand, as Katherine Beckett notes, "racial power [is] systemic, institutional, and long-standing; it is premised on ideologies and institutions that preserve white advantage, and it perpetuates ongoing patterns of undeserved enrichment and unjust impoverishment."[259] On the other hand, doctrinal tools are unable to address racial subordination in prisons unless there is intent to discriminate, perhaps as supported by evidence of racial disproportionality.[260] Yet when racial power is embedded within the prison as an institution, is organized around racialized constructs of female prisoners, and results in pervasive dehumanization and disregard for prisoners, this form of racial subordination is not cognizable. Instead, the Constitution permits only the examination of discrete physical harms that individual officers inflict. This approach, however, will fail in the long run because it addresses the symptoms, not the causes of abuse. Prison as a racially disciplinary apparatus, therefore, continues to function unabated.

---

258. *Wilson*, 501 U.S. at 310 (White, J., concurring).

259. Beckett & Murakawa, *supra* note 220, at 701.

260. *See, e.g.*, Johnson v. California, 543 U.S. 499 (2005) (applying strict scrutiny to the race-based cell assignment policies in California state prisons under the Equal Protection Clause); McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting a challenge to the racially discriminatory application of the death penalty, despite significant evidence of racial disproportionality).

B. Doctrinal Elision of Race and Gender in Eighth Amendment Challenges to the Shackling of Pregnant Prisoners

The Court's doctrinal framework for evaluating conditions of confinement under the Eighth Amendment elides the ways in which race and gender are deeply implicated in challenged practices. *Nelson v. Correctional Medical Services*, the first federal court of appeals case to consider the use of shackles on pregnant prisoners, is a primary example of this phenomenon. In *Nelson*, a Black woman brought an Eighth Amendment challenge against a private medical service provider as well as other institutional defendants.[261] The plaintiff, Shawanna Nelson, was convicted of passing bad checks and credit card fraud.[262] She was six months pregnant when she was brought to the Arkansas prison. When Nelson went into labor, she was transported to a hospital facility outside of the prison.[263] Nelson's pain was so severe that she could hardly walk. Nevertheless, in addition to being assigned an armed escort, she was placed in handcuffs and her ankles were secured by leg restraints during transport to the hospital.[264] Once admitted to the hospital, Nelson's ankles were shackled to her hospital bed.[265] According to Nelson, "the shackles prevented her from moving her legs, stretching, or changing positions."[266] She delivered her baby without any anesthetics and sustained significant injury.[267]

In considering Nelson's Eighth Amendment claim, a three-judge panel of the Eighth Circuit found that the conduct of prison officials did not offend constitutional standards.[268] The panel opinion began by noting that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' [which is] proscribed by the Eighth Amendment."[269] Nevertheless, the panel concluded that the prison officials were not deliberately indifferent to Nelson's needs because they took her to the hospital when she complained of pains and removed her shackles before delivery.[270]

Moreover, the panel deemed the actions of the prison officials to be without any intent to punish Nelson and justifiable given the penological interests at stake. In particular the panel noted

> [the shackling policy] serves the legitimate penological goal of preventing inmates . . . from escaping . . . less secure confines, and is

261. Nelson v. Corr. Med. Servs. (*Nelson II*), 583 F.3d 522 (8th Cir. 2009).
262. *Id.* at 524–25; Nelson v. Corr. Med. Servs. (*Nelson I*), 533 F.3d 958, 961 (8th Cir. 2008), *vacated*, 583 F.3d 552 (8th Cir. 2009).
263. *Nelson II*, 583 F.3d at 524–25.
264. *Id.*
265. *Id.*
266. *Id.* at 526.
267. *Id.*
268. *Nelson I*, 533 F.3d 958, 962–63 (8th Cir. 2008).
269. *Id.* at 962 (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)).
270. *Id.* at 962–63.

> not excessive given that goal. A single armed guard often cannot prevent a determined, unrestrained, and sometimes aggressive inmate from escaping without resort to force. *It is eminently reasonable to prevent escape attempts at the outset by restraining hospitalized inmates to their beds . . . .*[271]

Here, the panel frames women who are routinely subject to the shackling policy as "aggressive" and "dangerous," thus reinscribing racial and gendered constructions of women who are imprisoned. The women, like their historical counterparts in the convict leasing and chain gang systems, are stereotyped as masculine, cunning, and dangerous, rather than as women who are deeply vulnerable due to labor and childbirth.

While it may be argued that the panel was simply trying to anticipate incarcerated individuals in the noncustodial setting who might be less vulnerable (and not just pregnant prisoners during labor or childbirth), the opinion's language was not quite so nuanced. It did not suggest an individualized determination of a prisoner's dangerousness based on, for example, her offense, security classification, history of violence, or previous attempts at absconding. Instead of rooting out stereotypical constructions of female prisoners that often render them vulnerable to various forms of state violence, the panel's decision legitimized these images as the basis for continued brutality. The panel's determination and its corresponding rationale, however, would not stand long since the Eighth Circuit granted Nelson's petition for en banc review.

In a closely divided 6-5 opinion, the full Eighth Circuit ruled that the use of shackles during childbirth violated Nelson's Eighth Amendment rights.[272] Specifically, the court found that Nelson's pregnancy was a serious medical need and that the guard ignored the obvious risks to her serious medical need through the application of shackles during and after labor.[273] The court, however, reached this conclusion only with respect to the *individual officer* that placed the restraints on Nelson. The court found that the director of the prison was not liable and therefore dismissed Nelson's claims against him.[274] Nor did the court engage in any attempt to disrupt the stereotyping of female prisoners that animated the original panel opinion or the dissenting opinion of five members of the en banc court.

Following the decision reversing the panel's determination with respect to the individual officer, the court sent the case back for a jury trial, which resulted in a verdict awarding Nelson compensatory damages in the amount of

271. *Id.* at 963 (quoting Haslar v. Megerman, 104 F.3d 178, 180 (8th Cir. 1997)).
272. *See Nelson II*, 583 F.3d 522, 533 (8th Cir. 2009).
273. *Id.* at 529–30.
274. *Id.* at 534–36.

one dollar.[275] While we cannot know what motivated the jury's valuation of damages in this case, it is certainly plausible that the ideological constructions of female prisoners generally and Black women in particular as bad mothers who are deviant, dangerous, and sexually promiscuous, impacted how the jury viewed the physical and dignitary harms Nelson suffered as a result of being placed in shackles during childbirth.[276]

In a case following *Nelson*, a district court in Washington State considered an Eighth Amendment challenge to the shackling of a pregnant prisoner. In *Brawley v. Washington*, a prisoner housed at the Washington State Corrections Center for Women brought suit against officials for violation of her Eighth Amendment rights after she was shackled during prenatal care and childbirth.[277] When she went into labor and was to be transported to the hospital, she was first strip searched and placed in full restraints, including waist restraints.[278] After being admitted to the hospital, officers "chained her to the bed in the birthing room."[279] The chains prevented Brawley from engaging in a full range of motion.[280] Complications during the childbirth required Brawley to undergo a cesarean delivery.[281] While the shackles were removed during the procedure, they were replaced "right after the surgery, before she could even feel her legs."[282] Shackles prevented her from assisting her newborn child when he appeared to be in distress and from walking around as part of her recovery from surgery as recommended by the hospital nursing staff.[283] In reviewing Brawley's claims, the district court concluded that there was

275. *See* Andrea Hsu, *Transcript: Difficult Births: Laboring and Delivering in Shackles*, NAT'L PUB. RADIO, (July 16, 2010), http://www.npr.org/templates/transcript/transcript.php?storyId=128563037 ("[A] jury in Arkansas found that a guard had violated the constitutional rights of a woman by shackling her in labor. The jurors awarded her one dollar.").

276. *See* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 156 (2010) (noting that "not unlike sentences meted out in criminal cases, tort measurements of lost earnings potential, pain and suffering, and other types of damages can be affected by negative attitudes toward social groups and are not immune to conscious and unconscious gender and race bias"); Buchanan, *Impunity*, *supra* note 69, at 70 (highlighting *Morris v. Eversley*, a case wherein a "jury convicted a guard of sexually assaulting a female prisoner based on DNA evidence. A civil jury awarded the prisoner only $500 in compensatory damages and $7,500 in punitive damages"); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1622 (2003) (noting that juries are more likely to "lowball prisoners' nonwage damages as an expression of disregard for them"). *Cf.* McMillan v. City of New York, 253 F.R.D. 247 (E.D.N.Y. 2008) (rejecting the use of race in tort damage determinations, which causes depressed recovery for plaintiffs of color, as a violation of equal protection and due process).

277. *See* 712 F. Supp. 2d 1208, 1211 (W.D. Wash. 2010).

278. *Id.* at 1211–12. *But see id*. at 1212 (noting that the defendant denied applying waist restraints on plaintiff during transport to the hospital).

279. *See id*. at 1213.

280. *Id.* at 1213–14.

281. *Id.* at 1214.

282. *See id.*

283. *See id.*

sufficient evidence of deliberate indifference such that the officer was not entitled to qualified immunity.[284]

Many feminist advocacy groups have lauded decisions like *Nelson* as significant victories for incarcerated women and the cause of reproductive rights in prison.[285] These decisions, however, are just as important for what they do not say as for the favorable decisions rendered. In particular, the decisions reveal a number of elisions that obscure the broader racial and gender dynamics that undergird the practice of shackling incarcerated pregnant women and therefore undermine attempts at broader structural reform.

The first elision represented in these opinions is the focus on individual actors rather than institutions. In *Nelson*, for example, the court rejected liability for prison administrators. Despite the fact that there was a policy governing the use of restraints on prisoners in noncustodial settings, discretion was left to guards with no requirement that they be directed by medical professionals in the use of restraints, and no training on how to treat pregnant prisoners during labor and childbirth.[286] The court rejected liability for these actors because the administrators did not specifically "know" that shackles were being applied to the plaintiffs in each case.

Second, the rationale of each case rendered invisible the structural role of racial subordination as well as racial and gender constructs in informing contemporary penal practices such as shackling during childbirth. As noted above, the justifications for shackling during labor and childbirth are bound up with constructs of Black women, and therefore all female prisoners, as masculine and dangerous. Rather than thoroughly interrogating the justificatory rationales or the ideological constructs that undergird such rationales, the *Nelson* and *Brawley* courts required the prisoner to disprove that she fit within the ideological construct in order to obtain relief. To the extent that the racialized constructs of female prisoners are unexamined, racial power can continue to operate in women's prisons. Meanwhile, the women's prison persists in the degrading treatment of all who are incarcerated.

Third, the current doctrinal framework embodied by *Nelson* and *Brawley* does not capture the dignitary harms caused by the use of shackles on pregnant prisoners.[287] Assuming there was no physical injury resulting from the use of

284. *See id*.

285. *See, e.g.*, Elizabeth Alexander, *Ending the Inhumane Practice of Shackling Prisoners During Childbirth*, ACLU (Oct. 30, 2009, 2:10 PM), http://www.aclu.org/blog/prisoners-rights-reproductive-freedom/ending-inhumane-practice-shackling-prisoners-during; *NOW Calls for End to Shackling of Pregnant Incarcerated Women*, NAT'L ORG. FOR WOMEN, http://www.now.org/nnt/spring-2010/shackling.html (last visited July 14, 2012).

286. *See Nelson II*, 583 F.3d 522, 535–36 (8th Cir. 2009).

287. *See* Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 171 (2006) ("Legal scholars and philosophers may be partly to blame for this gulf between the legal conceptions of punishment and the reality of penal practices. In striving to legitimate state punishment and distinguish it from violence, they have carefully defined away the reality of penal practices.").

shackles, it would likely be difficult for a plaintiff to raise an Eighth Amendment "deliberate indifference" claim.[288] In the context of shackling during labor and childbirth, however, the harms are much broader than the physical. Shackling harms women's sense of bodily integrity, dignity, and self-worth; it is psychologically scarring.[289] Moreover, given the historical devaluation of Black women and their reproductive capacities within punitive institutions, shackling sends broader social messages of inferiority and deviance. Despite the deep implication of these harms to female prisoners, they are largely irrelevant to the question of deliberate indifference. Consequently, to the extent that these decisions addressed individual injury, they failed to recognize and address the larger structural issues that animate the practice of shackling pregnant prisoners or the broader set of harms that correspond to the use of shackles during labor and childbirth.

C. Persistence of Shackling Practices

The consequences of the collective elisions in contemporary conditions of confinement jurisprudence, as represented by *Nelson* and *Brawley*, are significant. Given the obscured role of race and gender in Eighth Amendment jurisprudence, it is unsurprising that practices such as the shackling of female prisoners persist, often despite guidelines to the contrary. Indeed, while the *Nelson* lawsuit was pending, the Arkansas Department of Corrections, a defendant in the case, continued to justify its shackling policy to the public by appealing to the idea that incarcerated women can be dangerous.[290] One department spokesperson remarked, "Though these are pregnant women, they are still convicted felons, and sometimes violent in nature."[291] This framing of pregnant women invites us to explore the racial identity we imagine when terms such as "felons" and "violence" are mentioned in the context of prisons. I contend that stereotypical depictions of Black women continue to proliferate and provide the ideological content in depictions of and statements regarding female prisoners. In this way, the history of Black women's enslavement, economic exploitation of their reproductive capacities, and harsh punishment of them in the post–Civil War South looms large.

The ideological constructions of the deviant, hostile, and violent female prisoner undermine efforts to prohibit shackling in states that currently authorize the practice. Arkansas, for example, rejected antishackling legislation

288. *See* Hudson v. McMillan, 503 U.S. 1, 9–10 (1992) (holding that a prisoner must suffer at least de minimis injury to state a claim for cruel and unusual punishment as a result of mistreatment in prison).

289. INSIDE THIS PLACE, NOT OF IT: NARRATIVES FROM WOMEN'S PRISONS, *supra* note 3, at 37 (relating Olivia Hamilton's prison experience that "[b]eing shackled, being forced to have that c-section . . . was the worst feeling, mentally and emotionally").

290. *U.S. Jails 'Shackle Pregnant Women'*, BBC NEWS (Mar. 2, 2006, 1:41 PM), http://news.bbc.co.uk/2/hi/americas/4766218.stm.

291. Liptak, *supra* note 61.

notwithstanding the *Nelson* decision.[292] Soon thereafter, a Virginia bill that proposed limitations on the use of shackles on incarcerated pregnant women was defeated in committee. During a committee hearing on the bill, one legislator remarked that pregnant prisoners are threats and should be shackled as a matter of course.[293] The member contended that incarcerated women in labor should be unshackled only in exceptional circumstances.[294]

Even in states that allow the practice only in circumstances involving danger to others or flight risks, stereotypical constructions of female prisoners as "dangerous" have operated to become exceptions that render the rule ineffective. In California, state law formally provides that "at no time shall a woman who is in labor be shackled by the wrists, ankles, or both including during transport to a hospital, during delivery, and while in recovery after giving birth . . . ." [295] There are exceptions, however, that permit shackling in cases where they are "deemed necessary for the safety and security of the inmate, the staff and the public."[296] Because of the exceptions built into the statute, the legislature's intent has gone unenforced in critical respects. Advocates continue to note noncompliance by county jails regarding the use of shackles during labor.[297] Prisons narrowly construe or ignore the law, while county jails argue they are exempt from coverage.[298] The continued use of the practice prompted advocates to return to the legislature for an additional bill that would ban the practice outright. Former California Governor Arnold Schwarzenegger, however, vetoed the bill.[299]

Similar dynamics operate in other states. In New York, for example, the state legislature has prohibited the use of restraints on women in labor unless they have a history of violence or have attempted to escape.[300] Nevertheless, Amnesty International found that guards routinely ignore the law. Women with neither a history of violence nor a record of escape attempts are still shackled.[301] This is particularly true in Illinois, the first state to pass a statute

---

292. *Id.*

293. Heather Rice, *Giving Birth in Chains*, ROANOKE TIMES, Feb. 14, 2011, http://www.roanoke.com/editorials/commentary/wb/276951.

294. *Id.*

295. CAL. PENAL CODE §§ 5007.7, 6030(f) (West 2011).

296. *Id.*

297. *See, e.g.*, SHAIN, *supra* note 63.

298. *Id.*

299. *See* Karen Shain, *Governor Vetoes Bill to Ban Shackling of Pregnant Inmates*, S.F. CHRON. (Sept. 28, 2010), http://www.sfgate.com/cgi-bin/blogs/opinionshop/detail?entry_id=73370.

300. Amnesty Int'l USA, *supra* note 6, at 11.

301. *Id.* ("While inducing labor she was put into handcuffs. They took the handcuffs when the baby was about to be born. After the baby was born she was shackled in the recovery room. She was shackled while she held the baby. Had to walk with shackles when she went to the baby. She asked the officer to hold the baby when she went to pick something up. The officer said it was against the rules. She had to manoeuvre with the shackles and the baby to pick up the item. In the room she had a civilian roommate and the roommate had visitors and she had to cover the shackles . . . . She said she was traumatized and humiliated by the shackles. She was shackled when she saw her baby in the

banning the practice, where there have been more than twenty lawsuits filed against the Cook County Sherriff's Department alleging that women were shackled during labor and childbirth despite a state statute prohibiting the practice.[302] Officials contend that the practice continues because they are authorized to shackle women up until labor and they are often unaware when labor has commenced.[303] Given the ways in which stereotypes of female prisoners have informed prison practices, it is likely that prison officials have internalized such imagery at a conscious or subconscious level and thus approach pregnant prisoners as threats rather than as human beings.[304] Because such stereotypes of Black women have been largely uncontested in case law or scholarly engagements, this practice will likely endure despite formal prohibitions or limitations on the use of shackles on pregnant prisoners during labor and delivery.

IV.

UNSHACKLING THE PREGNANT BODY: THE LIBERATORY POTENTIAL OF READING THE EIGHTH AMENDMENT IN LIGHT OF THE THIRTEENTH

> "In every human Breast, God has implanted a Principle, which we call love of Freedom; it is impatient of Oppression, and pants for Deliverance."[305]

As previously mentioned, the current doctrinal framework governing conditions of confinement claims brought under the Eighth Amendment is insufficient to address the structural, racial, and gender dynamics that animate the practice of shackling pregnant prisoners. Instead, the existing framework is more amenable to combating individual, rather than institutional, behaviors.[306]

---

hospital nursery (a long distance from the room). Passing visitors were staring and making remarks. She was shackled when she took a shower; only one time when she was not.").

302. *See, e.g.*, Zaborowski v. Sheriff of Cook Cnty., No. 08 C 6946, 2010 WL 5463065 (N.D. Ill. Dec. 29, 2010) (denying motion to dismiss complaint challenging the constitutionality of the practice of shackling women during labor and delivery in Cook County women's jails); Colleen Mastony, *Childbirth in Chains*, CHI. TRIB., July 18, 2010, http://articles.chicagotribune.com/2010-07-18/news/ct-met-shackled-mothers-20100718_1_shackles-handcuffs-labor/4.

303. *See* Mastony, *supra* note 302.

304. *See, e.g.*, Jennifer L. Eberhart et al., *Seeing Black: Race, Crime and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876–93 (2004); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498–1528 (2005).

305. Phyllis Wheatley, *Letter to Rev. Samson Occum*, CONN. GAZETTE, Feb. 11, 1774.

306. I am not alone in critiquing the intent-based, individualized focus of contemporary Eighth Amendment jurisprudence. Eighth Amendment scholars such as Thomas Landry and Alice Ristroph have critiqued Eighth Amendment conditions of confinement as insufficiently institutional in scope. *See, e.g.*, Ristroph, *supra* note 33, at 1353 (arguing that an intent-based theory of punishment is inappropriate in the Eighth Amendment context and calling for a more objective approach to punishment, including specified factors to assist courts in defining what constitutes cruelty for purposes of the Eighth Amendment); Ristroph, *supra* note 287, at 167–68 ("[P]arsing of the concept of punishment is arbitrary and incoherent. Contemporary punishment is a complex set of practices carried out by a number of official actors and institutions. The use of official intent to circumscribe the category of 'punishment' . . . denies both the complexity of punishment and its status as a set of

In the absence of a doctrinal space that regulates institutional subordination and challenges the ideological foundations upon which such institutional subordination rests, degrading practices such as the shackling of pregnant prisoners during labor and childbirth will persist.

In this Part, I provide an institutional intervention through the application of an antisubordination approach to the Eighth Amendment and definitions of "cruel and unusual punishments." This approach rejects subjective factors and instead utilizes objective factors, such as other constitutional provisions, to define "cruel and unusual punishments" and to give meaning to notions of evolving standards of decency that animate the Eighth Amendment. Relying on the Thirteenth Amendment, I outline a reading of the Eighth Amendment that is race and gender conscious and argue that this alternative would provide the intersectional, historical, and structural framework necessary to root out not only individual expressions of degrading treatment, but also institutional expressions of racial domination. In this antisubordination approach to the Eighth Amendment, historical constructions of Black women during slavery and in the post–Civil War era are central to understanding whether institutional practices, such as the shackling of pregnant prisoners during labor and childbirth, constitute cruel and unusual punishment.

In this regard, the Thirteenth Amendment provides the normative force in defining what it means for conditions of confinement to be "cruel."[307] As I discuss below, cases interpreting the scope of the Amendment suggest that it is concerned with contesting racial subordination by opposing public and private

practices."); James J. Park, *Redefining Eighth Amendment Punishments: A New Standard for Determining the Liability of Prison Officials for Failing to Protect Inmates from Serious Harm*, 20 QUINNIPIAC L. REV. 407, 409 (2001) (critiquing the "knowledge requirement" in Eighth Amendment jurisprudence and arguing that "prison official[s] should be liable for objectively serious harms suffered by a prisoner caused by the prison official's failure to take reasonable precautions to protect the prisoner from risks of serious harm that are discoverable with reasonable care"); Thomas K. Landry, *"Punishment" and the Eighth Amendment*, 57 OHIO ST. L.J. 1607, 1610–11 (1996) (proposing a "governmentalist" definition of punishment, which includes "those conditions or events in prison that are attributable to the punitive intent of the government in its role as monopolist over the machinery of punishment. In doctrinal terms, this definition entails three elements: (1) a penalty, (2) inflicted for criminal conduct, (3) pursuant to regular processes of governmental administration and thus attributable to the government in its role as monopolist over punishment"); Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373, 395–99 (1995) (critiquing the "deliberate indifference standard" in the context of conditions of confinement and suggesting that the Court has "yielded too much to federalism and deference toward prison officials by placing too formidable a barrier in the path of prison reform"); Russell W. Gray, Wilson v. Seiter*: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339, 1386–87 (1992) (critiquing the Court's ruling in *Wilson v. Seiter* and arguing for a modified intent standard in Eighth Amendment jurisprudence). *But see* Richard D. Nobleman, Wilson v. Seiter*: Prison Conditions and the Eighth Amendment Standard*, 24 PAC. L.J. 275, 309 (1992) (arguing that "common sense rebels against the notion that prison conditions are intended to be punishment" and suggesting that an objective standard in conditions of confinement would create "uncertainty in prison litigation").

307. Dolovich, *supra* note 33, at 907.

actions that rely on negative racial and gender constructs that emerged out of a history of racial subjugation and that may reasonably be conceived of as badges or incidents of slavery. Moreover, these cases describe the Thirteenth Amendment as seeking to combat practices that express racially invidious social messages or symbolic meanings regarding subordinated groups. Importantly, these cases support the application of the Thirteenth Amendment to limit the scope of punishment within the criminal justice system. Under the approach I outline below, these principles stand as objective factors by which to define cruelty and measure our evolving standards of decency that give content and meaning to the Eighth Amendment and prohibit conditions of confinement that maintain or reinforce racial subordination. Applying this standard, I conclude that given the historical continuities and social meanings associated with the practice, the shackling of pregnant prisoners during childbirth runs afoul of the Eighth Amendment.

Some might suggest that the likelihood of a court adopting this approach is extremely low or that the Supreme Court's conditions of confinement jurisprudence is too deferential for a more structural and race-conscious standard to take root. The Court's recent decisions, however, may suggest otherwise. In *Brown v. Plata*,[308] for example, the Court rejected a deferential approach in the face of pervasive constitutional violations regarding medical care in California state prisons.[309] The Court upheld an order by a three-judge panel requiring the reduction of the state prison population by approximately 40,000 people, the largest population reduction ever ordered.[310] Perhaps the pervasive and abysmal conditions within American prisons have reached a juridical tipping point regarding the willingness of courts to allow administrators extraordinary latitude in the name of "security."[311]

This does not necessarily mean that the Court's willingness to engage in institutional prison reform will extend to a race-conscious examination of such prison practices. Indeed, over the course of the past thirty years, the Court has embarked on a project of constitutionalizing colorblindness and dismantling race-conscious doctrines and remedies.[312] While it does not appear that the current membership of the Court is inclined to dramatically shift course, later courts or lower courts could be receptive to the antisubordination approach to

308. 131 S. Ct. 1910 (2011).

309. Under the Prisoner Litigation Reform Act, prior to the issuance of a population reduction order, a three-judge panel must determine that "crowding is the primary cause of the violation of a Federal right." 18 U.S.C. § 3626(a)(3)(E)(i) (2006).

310. *Brown*, 131 S. Ct. at 1923.

311. *Id.* at 1928–29 ("Courts nevertheless must not shrink from their obligation to 'enforce the constitutional rights of all 'persons,' including prisoners.' Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.") (citation omitted).

312. *See, e.g.*, Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Grutter v. Bollinger, 539 U.S. 306 (2003).

the Eighth Amendment proposed here. Indeed, judges might be inclined to adopt a test for "cruel and unusual punishments" that is informed by the Thirteenth Amendment precisely because the Thirteenth Amendment can serve as a vehicle for racial equity in ways that have been foreclosed by the Supreme Court's Fourteenth Amendment jurisprudence. In some ways, the antisubordination approach I outline below is "an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error[s]" made by courts regarding critical issues of race, crime, and punishment.[313]

Moreover, while the antisubordination approach to understanding punishment practices is decidedly oriented to doctrinal reform, it is equally relevant to legislative and advocacy discourses. Specifically, this approach is relevant at the legislative and executive branches inasmuch as they have the right and obligation to enforce constitutional provisions.[314] In many respects, legislatures have more flexibility in their ability to enact policies that are attentive to the racial and gender stereotypes that may motivate punitive public policies or prison regulations and to establish more robust oversight over the operation of prisons.[315] The members of the legislative and executive branches can institute antishackling policies or promulgate regulations that are broad and unequivocal in their protection of female prisoners during labor and childbirth and that limit official discretion given the racial and gender constructs that underlie harsh shackling practices.

By embracing a framework for contesting shackling practices that reveals the ways in which race and gender are implicated in ostensibly race-neutral prison practices, advocacy groups can leverage the moral authority of antisubordination with respect to mass incarceration. Advocates can utilize this approach to challenge basic assumptions about incarcerated women and the impact of incarceration on racialized communities. Importantly, this approach keeps the question of contemporary manifestations of slavery and racial inequality present in the prevailing postracial discourse. Moreover, the utilization of this approach, which interrogates race and gender constructs, can link feminist advocacy communities centered on reproductive rights with antiracist communities focused on resistance to racialized mass incarceration. The coalitional possibilities under an antisubordination reading of the Eighth Amendment will allow advocates to expand their base and to increase their ability to demand reform within legislative bodies. Such a coalitional approach will allow the antishackling movement to be more powerful not only in the

313. *See* Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 144 (1990) (quoting CHARLES HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1936)).

314. *See* U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5.

315. *See, e.g.*, Anna Stolley Persky, *North Carolina's Death Row Inmates Let Statistics Back Up Bias Claims*, ABA J. (May 1, 2011, 3:00 AM), http://www.abajournal.com/magazine/article/north_carolinas_death_row_inmates_let_statistics_back_up_bias_claims/ (describing North Carolina's Racial Justice Act).

court of law but also in the court of public opinion. As Angela Davis once noted, "[i]f we are already persuaded that racism should not be allowed to define the planet's future and if we can successfully argue that prisons are racist institutions," then perhaps we would be more willing to heavily inquire regarding the operation of race at the structural level and to ultimately reduce our reliance on incarceration as a solution to social ills.[316]

A. An Antisubordination Reading of the Eighth Amendment

Under the antisubordination approach, the Eighth Amendment's "cruel and unusual punishments" clause should be read objectively, broadly, and in light of the historical aims of the Thirteenth Amendment. By antisubordination, I mean a constitutional orientation that "views social patterns and institutions that perpetuate the inferior status of Blacks as the primary threats to equality."[317] Through this lens, the antisubordination approach's doctrinal framework is particularly attentive to the ways in which conditions of confinement are premised upon or facilitate the continuation of racial domination within the context of prisons. Moreover, the antisubordination approach seeks to disrupt state actions or omissions that preserve material and symbolic racial subordination through particular forms of punishment.[318]

1. Conditions of Confinement as Punishment

Rejecting the Eighth Amendment's preoccupation with intent, the antisubordination approach focuses on institutional patterns and practices that facilitate racial subordination. Under this approach, all conditions of confinement would be deemed "punishment" for the purpose of the doctrinal inquiry, regardless of the state of mind of the institutional actor.

By contrast, the contemporary Eighth Amendment "deliberate indifference" standard conceives of punishment in narrow terms, focuses on the intent of individual governmental actors, and provides broad deference to prison officials. The deliberate indifference standard raises a defendant-friendly presumption that a particular practice or course of action does not constitute "punishment" and places the burden on the prisoner to show otherwise. This burden also makes it difficult to hold institutional actors accountable for policies or practices that occur within penal institutions. As noted in the preceding Part, however, the text of the Eighth Amendment need not be read in such a limited fashion.

In cases that followed *Estelle*, the Court applied a more expansive, objective test to determine whether conditions of confinement constituted cruel

316. *See* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 25 (2003).
317. *See* Roberts, *supra* note 18, at 1454.
318. *Id.*

and unusual punishment. For example, in *Rhodes v. Chapman*,[319] the Court considered a challenge to overcrowding at a state correctional facility. The plaintiff alleged that the practice of double celling and overcrowding at an Ohio prison violated the Eighth Amendment. In analyzing the challenge, the Court made it clear that the conditions were punishment for the purposes of Eighth Amendment scrutiny.[320] The Court noted that conditions of confinement were cognizable as punishment under the Eighth Amendment because they can result in the "unquestioned and serious deprivation of basic human needs."[321] The Court observed that conditions of confinement, such as the denial of medical treatment, can rise to the level of cruel and unusual punishment based on the level of seriousness.[322]

Similarly, in the context of an antisubordination reading of the Eighth Amendment, an objective, rather than subjective, measure of conditions of confinement would govern determinations of punishment. Under such an objective test for punishment, conditions of confinement, such as the shackling of pregnant prisoners, would constitute punishment imposed by the state. The notion that conditions of confinement are indeed punishment rests on the fact that prisoners would not be in a position to be injured or harmed but for the confinement imposed by the state. As Sharon Dolovich has noted in arguing for a broad and objective reading of the punishments clause, "when convicted offenders are sentenced to time in prison, living in prison for that time under existing conditions is the punishment."[323]

This objective test is more protective of prisoners, institutionally rather than individually oriented, and grounded in the lived experiences of the subject of incarceration. Indeed, by shifting the focus from individual actors to institutional conditions, some of the most problematic aspects of the current doctrine would be eliminated. For example, this objective measure of "punishment" allows for macrolevel reform of institutions, rather than the rebuke of individual actors that operate within particular structural contexts.[324] Recall that under current doctrine, high-ranking officials can plead actual ignorance to avoid liability. Under the antisubordination reading, however,

---

319. 452 U.S. 337 (1981).

320. *Id.* at 347 (noting that Eighth Amendment "principles apply when the conditions of confinement compose the punishment at issue"); *see also* Hutto v. Finny, 437 U.S. 678, 685 (1978) ("Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.").

321. *Rhodes*, 452 U.S. at 347.

322. *Id.*

323. Dolovich, *supra* note 33, at 907; *see also* Ristroph, *supra* note 306, at 169 ("When a person is sentenced to prison as criminal punishment, the standard and foreseeable conditions of incarceration are part of that punishment.").

324. Wilson v. Seiter, 501 U.S. 294, 310 (1991) (White, J., concurring) ("Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison," and "intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.").

high-ranking officials could not escape liability merely by pleading ignorance of conditions for which they are responsible for maintaining as a result of their failure to act.[325] An objective approach allows for increased opportunity to hold high-ranking institutional actors accountable for policies and practices that occur within prisons, and also allows for increased institutional reform. By shifting to this objective test, the core of the Eighth Amendment inquiry will consist of determining which punishments are impermissibly "cruel."[326]

2. Objective Measures of Contemporary Values, the Thirteenth Amendment, and the Shackling of Pregnant Prisoners

In answering this question regarding what constitutes cruelty, the antisubordination approach to the Eighth Amendment draws upon the evolving standards of decency, which undergird Eighth Amendment jurisprudence. In *Trop v. Dulles*,[327] the Court considered whether the denationalization of a wartime deserter was "cruel and unusual punishment." In articulating the parameters of the "cruel and unusual punishments" clause, the Court noted that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[328] In *Rhodes*, the Court noted that no "static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'"[329]

While the Court has articulated that broad and progressive ideals of decency and dignity underlie the Eighth Amendment, it has not provided a concrete definition of those terms. Rather, the Court has noted that these terms and the Eighth Amendment are "not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."[330] Moreover, in defining decency and dignity that guide evaluations of cruelty, the Court has said that "'the Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability' of a given punishment."[331] But such "'judgment[s] should be informed by objective factors to the maximum possible extent.'"[332] When considering whether the

325. This is not to say, however, that the question of intent would be entirely absent in considering the liability of high-ranking officers and officials. In the context of § 1983 actions, the primary statutory vehicle for the vindication of constitutional rights, the Supreme Court has required a heightened awareness standard for supervisory liability. *See, e.g.*, Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948–50 (2009); Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 691 (1978). The question of supervisory liability pursuant to § 1983, however, is a separate inquiry from the means by which a litigant can secure institutional relief based on constitutional standards.

326. *See* Dolovich, *supra* note 33, at 907.

327. Trop v. Dulles, 356 U.S. 86 (1958).

328. *Id.* at 100.

329. Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (quoting *Trop*, 356 U.S. at 101).

330. Weems v. United States, 217 U.S. 349, 378 (1910).

331. *Rhodes*, 452 U.S. at 346.

332. *Id.*

death penalty violated contemporary values, "the Court looked for 'objective indicia' derived from history, the action of state legislatures, and the sentencing by juries."[333] In measuring evolving standards of decency, the antisubordination approach similarly looks to "objective indicia" of contemporary values to evaluate the cruelty of a particular practice.[334]

I suggest expanding these objective indicia to include other constitutional provisions, particularly the Thirteenth Amendment, to help inform the meaning of evolving standards of decency and "cruel and unusual punishments."[335] The symbolic value of the Thirteenth Amendment is relevant given overlapping principles of both the Eighth and Thirteenth Amendments. Indeed, both are grounded in broad notions of personhood and human dignity.[336] As the Court noted recently in *Brown v. Plata*, under the Eighth Amendment, "[p]risoners retain the essence of human dignity inherent in all persons."[337]

Moreover, members of the Court have hinted at the fundamentally anticaste, antisubordination orientation of this proposed reading of the Eighth Amendment. This is particularly the case in the Court's death penalty jurisprudence. For example, in *Furman v. Georgia*, the Court considered a challenge to the administration of the death penalty in light of racially disparate results and concluded that the punishment was arbitrarily and irrationally applied in violation of the Eighth Amendment.[338] This conclusion was infused by antidiscrimination principles articulated by a number of Justices in separate opinions. For example, Justice Douglas contended, "there is no permissible 'caste' aspect of law enforcement."[339] He went on to suggest that "equal protection of the laws . . . is implicit in the ban on 'cruel and unusual' punishments."[340]

---

333. *Id.* at 347.

334. *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976).

335. *See, e.g.*, Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 125–26, 155–60 (1992) (arguing that First Amendment challenges to ordinances or statutes prohibiting hate speech should be analyzed in light of the Thirteenth Amendment). The Court's recognition that the Eighth Amendment is an evolving provision makes it even more suitable for illumination based on the development of subsequent constitutional developments.

336. *See supra* notes 279–84. That dignity is at the heart of the Eighth Amendment's cruel and unusual punishment clause is significant given the role that degradation, in many ways the opposite of dignity, plays in facilitating harsh conditions of confinement. James Whitman argues that to understand American punishment, we must understand the relationship between "social hierarchy and the dynamic of degradation in punishment." JAMES WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 7 (2003) (emphasis omitted). In particular, he argues that "[t]he susceptibility to degradation lies at the core of what makes American punishment harsh. And our susceptibility to degradation has to do precisely with our lack of an 'aristocratic element.'" *Id.*

337. Brown v. Plata, 131 S. Ct. 1910, 1928 (2011).

338. 408 U.S. 238 (1972) (per curiam).

339. *Id*. at 255 (Douglas, J., concurring).

340. *Id.* at 257.

In the years that followed *Furman*, and despite the reinstitution of the death penalty in *Gregg v. Georgia*, several Justices continued to expound on the antisubordination values of the Eighth Amendment. In *McCleskey v. Kemp*, the Court reviewed a challenge to a Georgia state statute that alleged it was being administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments. In emphasizing that the death penalty was unconstitutional given the racial disparities revealed during the course of the litigation, Justice Brennan noted in his dissenting opinion that "there was a significant chance that race would play a prominent role in determining if [the petitioner] lived or died."[341]

In evaluating McCleskey's claims of arbitrariness in the application of the death penalty in Georgia, Justice Brennan considered "Georgia's legacy of a race-conscious criminal justice system."[342] Justice Brennan noted Georgia's history of a "dual system" of punishment that emerged out of slavery: slave codes and laws subjecting Black men to the death penalty for raping white women while white men who raped Black women went largely unpunished.[343] The dual system was furthered by prevailing ideologies of white dominance and the inferior status of Blacks.[344] Based on the evidence of disparity, Justice Brennan contended that the dual system was "still effectively in place."[345] He noted that the racial disparities revealed by the case demonstrate "the subtle and persistent influence of the past."[346] He concluded, however, by noting that "we remain imprisoned by the past as long as we deny its influence in the present."[347]

The antisubordination reading of the Eighth Amendment takes Justice Douglas's interpretation of cruel and unusual punishments, Justice Brennan's admonishment that we must be attentive to the ways in which the past shapes the present, and utilizes the Reconstruction Amendments, namely the Thirteenth, to give the Eighth Amendment content and meaning. Thus, the examination of evolving standards of decency, and by extension the meaning of cruelty, would be informed by values represented by the Thirteenth Amendment and the Framers' intent to eliminate slavery and its badges and incidents.

a. The Thirteenth Amendment as a Symbol of Contemporary Values

In defining the parameters of the evolving standards of decency that undergird the Eighth Amendment's cruel and unusual punishments clause, the

341. McCleskey v. Kemp, 481 U.S. 279, 321 (1987) (Brennan, J., dissenting).
342. *Id.* at 328.
343. *Id.* at 329–30.
344. *See id.* at 330.
345. *Id.* at 329.
346. *Id.* at 344.
347. *Id.*

antisubordination approach looks to the historical record generally and the history of the Reconstruction Amendments in particular. The Thirteenth Amendment and the circumstances surrounding its passage provide critical insight. While the Thirteenth Amendment may be used as an independent vehicle for challenging conditions of confinement,[348] I argue that it can also be used to measure societal values with respect to prison practices that are anathema to contemporary standards of decency.

As part of a trio of post–Civil War Reconstruction Amendments, the Thirteenth Amendment was designed to abolish slavery and elevate the status of former slaves by combating the badges or incidents of slavery.[349] In other words, the Framers intended not only to abolish slavery as a formal matter, but also to extinguish all of the permutations of racial domination that were derived from slavery.[350] In keeping with this sentiment, Senator Henry Wilson, a proponent of the Thirteenth Amendment, argued:

> If this Amendment shall be [enacted], it will obliterate the last lingering vestiges of the slave system . . . all it was and is, everything connected with or pertaining to it. . . . Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child will be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom.[351]

During congressional debates, another supporter of the Thirteenth Amendment, Senator James Harlan, included interference with parental and marital relationships as the types of badges or incidents of slavery that the Thirteenth

348. *See, e.g.*, Kamal Ghali, *No Slavery Except as Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 638–41 (2008) (arguing for a modified intent-based reading of the punishment clause and the application of the Thirteenth Amendment to the prison context to prohibit sexual slavery); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 17 (2009) (arguing that the "use of race as a proxy for criminality is . . . a badge and incident of slavery in violation of the Thirteenth Amendment"). Given that I am not arguing for an independent cause of action arising out of the Thirteenth Amendment, there is no need for intratextual analysis of the word "punishment" in the Eighth and Thirteenth Amendments. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (positing an approach to constitutional interpretation whereby "the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase").

349. Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 PA. J. CONST. L. 1337, 1337–38 (2009).

350. *See* Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1811 (2006) ("If 'freedom' was to mean nothing more than liberation from shackles, Representative and future president James A. Garfield pointed out in 1865, then it would be 'a bitter mockery' and 'a cruel delusion.'"); Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, COLUM. L. REV. (forthcoming 2012) (manuscript at 105), *available at* http://ssrn.com/abstract=2115222 (arguing that the word "slavery" as used at the time of the drafting of the Thirteenth Amendment had a much broader meaning than "chattel slavery" and included "illegitimate domination, political subordination and the absence of republican government").

351. CONG. GLOBE, 38TH CONG., 1ST SESS. 1319, 1321, 1324 (1864).

Amendment should be deployed against.[352] Harlan's comments reflect the concerns of the Reconstruction Congress with the family and reproductive liberty of former slaves.[353] These legislative debates provide some central insights regarding bodily autonomy and integrity that can shed light on the meaning and symbolic value of the Thirteenth Amendment today.[354] Indeed, they demonstrate that Congress understood that reproductive subordination and exploitation were constitutive elements of slavery and that racialized policies that touch on reproductive capacity could constitute badges or incidents of slavery. [355]

These legislative debates and the concern with the badges and incidents of slavery are in line with the Supreme Court's interpretations of the Thirteenth Amendment. In the *Slaughter-House Cases*, for example, the Supreme Court noted that the Thirteenth Amendment was a "grand yet simple declaration of the personal freedom of all the human race within the jurisdiction."[356] In the *Civil Rights Cases*, the Court reaffirmed this observation, noting that the Thirteenth Amendment allowed Congress the authority to engage in actions "necessary and proper . . . for the obliteration and prevention of slavery with all its badges and incidents."[357]

Despite acknowledgement of the broad goals of the Thirteenth Amendment, the Court's early application of the provisions of the Amendment were very narrow in the *Slaughter-House Cases*,[358] the *Civil Rights Cases*,[359] and *Plessy v. Ferguson*.[360] These interpretations, along with the Thirteenth Amendment's Exception Clause permitting involuntary servitude as a condition of punishment,[361] combined to enable recalcitrant Southern legislatures to circumvent the aims of Reconstruction through the imposition of Black Codes;

352. Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 177–78 (1951) (citing CONG. GLOBE, 38TH CONG., 1ST SESS. 1439, 1440 (1864)); *id.* at 202 (stating that "[the meaning of the Thirteenth Amendment] is to be gathered from the comprehensive goals of the abolitionist crusade").

353. Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1349 (1993); *see also* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 83–109 (1997) (noting that the Reconstruction Amendments are grounded in "antislavery traditions of human dignity and family liberty").

354. See Risa L. Goluboff, *The Thirteenth Amendment in Historical Perspective*, 11 U. PA. J. CONST. L. 1451 (2008).

355. Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER, RACE & JUST. 401 (2000).

356. 83 U.S. 36, 69 (1873).

357. 109 U.S. 3, 28 (1883).

358. 83 U.S. 36, 71 (1873) (rejecting the argument that a state-created monopoly circumscribed the right to choose a vocation in violation of the Thirteenth Amendment).

359. *Civil Rights Cases*, 109 U.S. at 20–23 (holding that the Thirteenth Amendment did not authorize Congress to regulate private discrimination, which it did not regard as a badge or incident of slavery).

360. *See* 163 U.S. 537 (1896).

361. U.S. CONST. amend. XIII, § 1.

the authorization of private discrimination; and the institution of formal racial barriers in social, economic, and political life.[362] For example, in *Plessy v. Ferguson*, where the Supreme Court considered a challenge under the Thirteenth and Fourteenth Amendments to a statute mandating segregated rail cars in Louisiana, the Court rejected Plessy's claims, finding that segregation did not implicate rights protected by the Thirteenth and Fourteenth Amendments. Relying on the *Slaughter-House Cases* and the *Civil Rights Cases*, the Court held that segregation was "merely a legal distinction" which did not constitute involuntary servitude, nor did it impose a badge or incident of slavery prohibited by the Thirteenth Amendment.[363]

The Supreme Court's cramped reading of the scope of the Thirteenth Amendment was not, however, without vigorous opposition. Indeed, Justice Harlan dissented from the majority opinions in the *Civil Rights Cases* and *Plessy v. Ferguson*. In his *Civil Rights Cases* dissent, Justice Harlan argued that the majority's construction of the Thirteenth Amendment was "narrow and artificial."[364] He further asserted that the construction went against the "substance and spirit" of the Amendment.[365] In his famous dissent in *Plessy*, Justice Harlan vociferously contested the majority's anemic reading of the Thirteenth Amendment. Contrary to the majority, Justice Harlan argued that the Thirteenth Amendment prohibited segregation, which he saw as constituting a system of domination that was rooted in slavery.[366] In particular, he asserted that "[i]t not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country."[367] In this way, not only did Justice Harlan suggest that the Thirteenth Amendment had significant force in prohibiting the racial subordination that was the legacy of slavery, he also asserted that the Court had a role in enforcing its provisions.

In the wake of these debates regarding its scope, the Thirteenth Amendment maintained some vibrancy. In *Bailey v. Alabama*,[368] for example, the Court invalidated a statute that required an individual to be punished for failing to perform under a labor contract in which some funds were paid in

362. *See, e.g.*, United States v. Reynolds, 235 U.S. 133, 150 (1914) (holding that an Alabama peonage statute operated in violation of the Thirteenth Amendment and federal law promulgated under the authority granted by the Thirteenth Amendment). *See generally* BLACKMON, *supra* note 9 (describing the expansive reach of the criminal law and the use of crime as a means to control newly freed slaves under the Black Codes).

363. *Id.* at 542–43.

364. *Civil Rights Cases*, 109 U.S. at 26 (Harlan, J., dissenting).

365. *Id.*

366. Plessy v. Ferguson, 163 U.S. 537, 555–58 (1896) (Harlan, J., dissenting).

367. *Id.*

368. 219 U.S. 219 (1911).

advance.[369] In considering Congress's authority under Section 2 of the Thirteenth Amendment, the Court noted some limits on legislative authority to use crime as a means of reinstituting a system of slavery. The Court noted that, "[t]he plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage . . . ."[370]

In reaching this conclusion, the Court was not concerned with the racially disparate impact of the criminal statute or the discriminatory intent of the legislature in passing the measure. Instead, the *Bailey* Court noted that in reversing the conviction they did so "[w]ithout imputing any actual motive to oppress."[371] The Court was also not concerned with the racial identity of the target of the punishment; rather, it was concerned with the statute's relationship to slavery and racial oppression.[372] *Bailey*, therefore, stands for the proposition that the Thirteenth Amendment contests entrenched patterns, practices, and policies that are rooted in slavery and that facilitate subordination, regardless of whether the complainant is a descendant of slaves and regardless of the intent of policy makers. Through this holding, the Court revived the Thirteenth Amendment from its moribund status and deployed it to undermine one of the most pernicious mechanisms of racial subordination in operation in the South during that era.

More recently, the Court has read congressional authority to enforce the provisions of the Thirteenth Amendment more broadly in order to combat racial domination. In *Jones v. Alfred H. Mayer Co*., the Court upheld the use of a statute to prohibit private housing discrimination pursuant to Congress's Thirteenth Amendment authority.[373] The Court's decision in *Jones* reaffirmed that the scope of the Amendment extended beyond a mere prohibition of slavery. Rather, the Court held that the Thirteenth Amendment "authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free."[374] These "vestiges" and "incidents" need not have existed during slavery,

369. *Id.* at 227; *see also* Cylatt v. United States, 107 U.S. 207, 207 (1905) (upholding the Anti-Peonage Act, which prohibited the punishment of individuals for failure to perform a labor contract); Rebecca E. Zietlow, *Free at Last! Antisubordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 292–93 (2010); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 490 (1990) (arguing that *Bailey v. Alabama* represents "[t]he seminal case construing the self-executing force of the thirteenth amendment").

370. *Bailey*, 219 U.S. at 241.

371. *Id.* at 244.

372. *Id*. at 231 ("We at once dismiss from consideration the fact that the plaintiff in error is a black man.").

373. 392 U.S. 409, 409 (1968).

374. *Id.* at 440; *see also* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973) (private swimming club's racially discriminatory admissions policies violated 42 U.S.C. § 1981, a statute enacted pursuant to Congress's Section 2 authority under the Thirteenth Amendment); Runyon v. McCrary, 427 U.S. 160, 160–62 (1970) (finding the Thirteenth Amendment authorized Congress to enact legislation to prohibit discrimination in private educational institutions); Johnson v. Ry. Express, 421 U.S. 454 (1975) (concluding that a lawsuit filed pursuant to section 1981, a statute enacted under

they could be extensions of society explicitly organized around racial exclusion, exploitation, and hierarchy. Moreover, *Jones* reflects a concern with not only the material consequences of the badges or incidents of slavery, but with invidious symbolic messages as well.[375]

Taken together, I argue that the history of the passage of the Thirteenth Amendment, Justice Harlan's articulation of the Thirteenth Amendment as a vehicle to combat the badges and incidents of slavery in his dissent in *Plessy*, the *Bailey* Court's focus on the structural facilitation of subordination rather than racially invidious intent, and the recent use of the Thirteenth Amendment to repudiate the racially invidious social meanings inherent in the context of housing discrimination in *Jones* demonstrate that the Thirteenth Amendment stands for more than just the elimination of slavery. It stands as a symbol of our society's commitment to substantive racial equity and the human dignity of all persons, and is oriented against the placement of burdens or benefits that facilitate the establishment or maintenance of a racial caste.[376]

Applying these insights in the context of the Eighth Amendment can assist in the creation of a test for cruelty that is steeped in antisubordination values. First, to the extent that a practice constitutes a badge or incident of slavery, or relies on normative racial and gender constructs that are outgrowths of slavery, that practice should be deemed cruel and unusual punishment for purposes of the Eighth Amendment. To interpret the meaning of "badges and incidents of slavery," we can draw from the definition offered by Judge Wisdom in his dissenting opinion in *Williams v. City of New Orleans*. Judge Wisdom suggested that when a practice can be "linked with a discriminatory practice against blacks as a race under the slavery system, the present effect may be eradicated under the auspices of the Thirteenth Amendment."[377] Stated

---

congressional authority granted by the Thirteenth Amendment, is allowable against a private employer).

375. While the *Jones* Court did not address whether the judiciary had any role in enforcing the Thirteenth Amendment, judges at the appellate level have raised the possibility. In *Williams v. City of New Orleans*, for example, Judge Wisdom, writing for himself and five other judges in dissent, noted that "[w]hen a present discriminatory effect upon blacks as a class can be linked with a discriminatory practice against blacks as a race under the slavery system, the present effect may be eradicated under the auspices of the Thirteenth amendment." Williams v. City of New Orleans, 729 F.2d 1554, 1577 (5th Cir. 1984) (Wisdom, J., dissenting). Consequently, Judge Wisdom argued that an affirmative action program was constitutional under the Thirteenth Amendment. *See id.* at 1578. In *City of Memphis v. Greene*, 451 U.S. 100, 128 (1981), the Court undertook an analysis to determine whether a wall between a black and white neighborhood constituted a badge or incident of slavery. *See also* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 2–4 (1995).

376. *See* Koppelman, *supra* note 369, at 496.

377. *Williams*, 729 F.2d at 1577 (Wisdom, J., dissenting); *see also* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1396–97 (2008) ("The badges and incidents of slavery are intermediate in both a conceptual and an instrumental sense. Conceptually, they constitute the components of slavery; instrumentally, eliminating them one-by-one serves the ultimate goal of eradicating slavery itself.").

differently, when considering an Eighth Amendment challenge under the antisubordination approach, a court should endeavor to ascertain whether the contested practice is related to slavery and the post–Civil War systems of subordination. Courts should also consider whether a practice relies on the normative constructs derived from slavery, whether it reproduces particular historical mechanisms of subordination, and whether the practice reinforces racialized notions of inferiority rooted in slavery.

The use of the Thirteenth Amendment as a measure of our commitment to evolving standards of decency not only renders the history of slavery and the ideological constructs that emerged out of that history cognizable, it also captures the dignitary harms that arise from practices such as shackling. It recognizes that the choice to become a mother is "central to personal dignity and autonomy."[378] With respect to shackling, an antisubordination understanding renders cognizable the injury to the dignitary interest of reproductive autonomy while capturing the relationship between this injury and slavery. To the extent that the contemporary use of shackles on pregnant prisoners relies on negative constructs of Black women as masculine, sexually deviant, or as lacking in maternal instincts, the use of shackles during pregnancy does violence to the dignitary interests of female prisoners.

The loss or deprivation of this dignity represents a legitimate interest that can be remedied by an antisubordination orientation of the Eighth Amendment. Such a robust reading of the scope of the Eighth and Thirteenth Amendments would enable Eighth Amendment remedies even in cases where no physical injury is present. Indeed, as Judge Reinhardt noted in his dissenting opinion in *Campbell v. Wood*, a case challenging the administration of the death penalty via hanging, "[a]lthough indignity may stem from the needless infliction of pain, it can also arise from the relatively painless infliction of degradation, savagery, and brutality. Cruelty does not necessarily involve pain."[379]

Moreover, the antisubordination approach to the Eighth Amendment is not only concerned with material consequences of the badges or incidents of slavery, but also with the invidious social meaning that can be drawn from challenged penal practices that reinforce or reinscribe racial subordination.[380] As Charles Lawrence has noted, governments may "convey[] a symbolic message to which the culture attaches racial significance."[381] Indeed, particular conditions of confinement can cause physical as well as dignitary harms to

378. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

379. Campbell v. Wood, 18 F.3d 662, 702 (9th Cir. 1994) (Reinhardt, J., dissenting).

380. *Id.* at 701–02.

381. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 356 (1987); *see also* Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 21–22 (1996) (articulating a vision of antidiscrimination that "focuses less on whether the state actor holds or credits prejudiced beliefs and more on whether the state action reinforces a system of racial subjugation or caste").

individuals, but the scope of the injury is much broader than the harm experienced by the individual subject to the practice. They can send social messages of inferiority about racialized groups of people. Such messages may constitute a badge or incident of slavery[382] and thus be deemed cruel when read through the lens of the Eighth Amendment.

b. Standing to Bring Antisubordination Claim

Individuals of any racial background should be able to bring claims under the antisubordination reading of the Eighth Amendment. However, in weighing claims brought under that reading, the racial identity of the claimant is relevant when assessing whether a particular practice has some resonance with slavery or constitutes a badge or incident of slavery. Indeed, the primary evil the Thirteenth Amendment sought to address was African slavery.[383] Consequently, its normative orientation is attentive to the ways in which racial subordination functioned in the context of slavery and its contemporary salience in shaping punitive policies. In the context of the women's prison, the ways in which slavery and successive racial regimes shape modern practices is necessarily bound up in ideologies, constructs, and histories related to Black women. As I noted in Part II, the ideological constructs of Black women as lacking in maternal qualities, sexually deviant, masculine, and dangerous have shaped and become embedded within the modern women's prisons.[384] Indeed, Black women are the paradigmatic prisoners and the paradigmatic victims of harsh punitive practices, such as shackling, precisely because the carceral system around which punishment is organized is premised on historical constructs and representations of Black women. These constructs and the practices derived from them function to subordinate Black women both inside and outside of prison.

For example, while there is no data on the racial distribution of shackling practices, civil rights and prisoners' rights organizations have found that Black women were more likely to be subject to sterilization practices and more likely to be sanctioned through practices such as solitary confinement.[385] To the extent that Black women are the primary class of litigants under the antisubordination approach, they can challenge policies and practices at the institutional level and therefore produce broad structural reform that will improve conditions for all women. This is so not only because a challenged policy such as shackling could be deemed normatively and constitutionally infirm, but also because of the work the doctrinal standard can do to

382. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968).
383. *Id*. at 438–39.
384. *See supra* Part II.
385. *See, e.g.*, Shaylor, *supra* note 70, at 394–96; Chandler, *supra* note 80, at 5–6.

deconstruct and contest negative stereotypes of Black women that give rise to harsh practices that in turn affect all women.

Yet, because non-Black women are also incarcerated in spaces that are shaped by these racialized norms derived from slavery and the post–Civil War period, they too are subject to injuries arising from the harsh punitive practices that flourish within prisons.[386] As Camille Rich notes in the context of employment discrimination, nonminorities may be vulnerable to discriminatory treatment in the workplace as a result of minority targeted, yet facially neutral, policies that have discriminatory purposes or effects.[387] In the context of employment discrimination, Rich highlights what she calls the "economic injury cases" where "a marginal white alleges that pay, benefits, or other privileges associated with her position are being allocated according to facially colorblind procedures intended to disadvantage minorities."[388] To substantiate the existence of such facially neutral, yet discriminatory policies, Rich notes that "[e]conomists have shown that employers tend to decrease wages for certain jobs when they appear to be dominated by minorities, and whites who are employed in these positions experience the same drop in wage levels."[389] In this way, certain areas of employment have been racialized, and consequently, all individuals who access such work are adversely impacted.

Similarly, in the context of women's penal institutions, the category that incarcerated non-Black women occupy, that of the prisoner, is highly racialized. The women's prison was built around assumptions regarding and constructs of Black women who have been criminalized at disproportionate rates both historically and contemporarily. Consequently, such racialized imagery and ideology structures the treatment of incarcerated Black and non-Black women alike. All incarcerated women are thus subject to racialized forms of discrimination. Non-Black women, like Black women, are denied routine medical care and are subject to pervasive sexual abuse. Further, like Black women, non-Black women have been the victims of shackling practices in jurisdictions across the country. To the extent that non-Black women make claims under the antisubordination theory of the Eighth Amendment, they too must demonstrate the relationship between slavery, the racial subordination of Black women, and a particular practice. In sum, they must demonstrate that a practice constitutes a badge or incident of slavery. The availability of this antisubordination vehicle to non-Black women could open up possibilities for broader antiracist coalitional work both within and outside of the prison context to the extent that we can begin to see a common source of racial subordination that impacts a broader class of women.

386. Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497 (2010).
387. *Id.* at 1539–41.
388. *Id*. at 1539.
389. *Id.* at 1541–42.

While there are significant normative and political benefits to broadening the class of female prisoners who have standing to pursue an antisubordination claim under the Eighth Amendment, there may be substantial disadvantages as well. The racial harms and social meanings of shackling during labor and pregnancy may not be as salient for white women as for Black women. As noted above regarding sterilizations and solitary confinement, in many respects, white women have been comparatively advantaged within prisons. Indeed, historically and contemporarily they have been disproportionately diverted away from confinement or punishment entirely. Moreover, given their relative racial privilege, the negative constructs do not attach as strongly to white female prisoners. To the extent that white women do raise objections to the operation of the negative constructs of Black women and their relationship to slavery, there is a risk that these arguments would reinforce rather than contest those racialized and gendered constructs because a court could perceive that the white women are complaining about being treated like Black women rather than about the existence of the negative construct that shapes penal practices.

To allay concerns about the reinforcement of racialized and gendered ideologies about Black women in the context of claims made by non-Black women, racial identity may be one factor a court may consider in determining whether a challenged practice relies on racialized and gendered constructs that emerged out of slavery and the postslavery era and whether a practice constitutes a badge or incident of slavery such that it should be deemed cruel under the Eighth Amendment. Given the historical constructs and their relationship to contemporary practices, it may be the case that Black women have the strongest claim regarding a contested practice and its relationship to slavery. At base, however, the central purpose of the antisubordination approach is not the examination of an individual's racial identity, but rather the examination of the racial and gendered history and contemporary salience of a challenged practice. It is structurally oriented such that it is concerned with rooting out racial and gender constructs that are embedded in ostensibly race-neutral penal institutions and seeks to contest the ways in which race and gender structure and shape punishment practices that impact all women.

c. Exception Clause No Bar to Symbolic Value of Thirteenth Amendment in the Context of Prison

As mentioned previously, the Thirteenth Amendment contains an exception clause that reads "[n]either slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States."[390] However, because the Clause provides

390. U.S. CONST. amend. XIII, § 1 (emphasis added).

an exception only to involuntary servitude, and not slavery,[391] it does not preclude an antisubordination reading that reaches the badges and incidents of slavery.[392] The exception is limited to involuntary servitude for a number of reasons, including the intent of the Framers, the text of the Amendment, and subsequent constitutional developments that render any exception regarding slavery obsolete. Thus, the Thirteenth Amendment remains steadfast as a symbol of our nation's commitment to abolish not only slavery, but its permutations, even those that exist behind the walls of prisons.

Little is known about the circumstances leading to the drafting of Section 1 and the Exception Clause of the Thirteenth Amendment.[393] Legal scholars and historians, however, have suggested that the Amendment was patterned after the Northwest Ordinance of 1789,[394] which was enacted to prohibit slavery in certain territories admitted to the United States, including those of the Louisiana Purchase.[395] Importantly, the text of the Ordinance allowed the practice of involuntary labor as a punishment for failure to pay a debt to continue.[396] In drafting the Exception Clause, the Reconstruction Congress may have been attempting to make a similar distinction. If this is the case, the Exception Clause can be interpreted as allowing for involuntary servitude in the context of prisons, not the operation of slavery or its badges and incidents.

This distinction is critical since "slavery" and "involuntary servitude" had distinct meanings at the adoption of the Northwest Ordinance and the Thirteenth Amendment. The slave and the indentured servant were differentiated in critical respects, the most central being that the latter's existence as a rights-bearing subject. As legal scholar Andrea Armstrong notes, "[t]he 'social death' of the enslaved, the community exclusion and exile, is imposed through symbols and rituals differentiating the enslaved from the involuntary servant."[397] The social death of the enslaved was expressed through a myriad of legal policies and practices that separated slaves from the status of a person.[398] In *Dred Scott v. Sandford*, for example, the Supreme Court held that Blacks held a status no higher than property and that they had "no rights

391. *See, e.g.*, Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, SEATTLE U. L. REV. (forthcoming 2012) (on file with author).

392. Importantly, there are limitations on the types of conditions under which involuntary labor may be extracted from prisoners. *See, e.g.*, *id.*

393. *Id.* (manuscript at 7); *see also* tenBroek, *supra* note 352 (noting sparse legislative history of the drafting process for the Thirteenth Amendment).

394. 1 HENRY STEELE COMMAGER & MILTON CANTOR, DOCUMENTS OF AMERICAN HISTORY 128, 132 (10th ed. 1988) (noting that the Northwest Ordinance provided: "There shall be neither slavery nor involuntary servitude in the said territory otherwise than in the punishment of crimes, whereof the party shall have been duly convicted"); Balkin & Levinson, *supra* note 350, at 121–28.

395. Balkin & Levinson, *supra* note 350, at 128–32.

396. Armstrong, *supra* note 392, at 15.

397. *Id.*

398. Harris, *supra* note 111, at 1716–21.

which a white man was bound to respect."[399] Blackness, which became synonymous with slave status, was a racial category for which membership meant absolute vulnerability to unmitigated violence and unspeakable brutality. The "peculiar institution" of slavery imposed intergenerational status as a slave.[400] Slaves possessed no legal agency in that they could not marry and had no rights to their children.[401] By contrast, "[i]nvoluntary servitude is not racially defined, i.e., membership in a particular race or ethnic group does not automatically confer servitude."[402] Involuntary servitude was not intergenerational, nor did it strip those held in such servitude of their status as rights-bearing subjects. Consequently, those held in prisons as indentured servants did not experience the total "civil or social death" that deprived individuals of all rights as was the case with those designated as slaves.

Moreover, the text of the Thirteenth Amendment suggests a distinction between the term "slavery" and "involuntary servitude" as used in Section 1 of the Amendment. Indeed, Andrea Armstrong argues that the terms have been conflated in analysis of the Exception Clause. In particular, she notes that "[t]extually, the convict exception to the Thirteenth Amendment only applies to conditions of involuntary servitude and not to slavery."[403] To support this claim, Armstrong points to that the "rule of the last antecedent."[404] The rule of the last antecedent, a canon of judicial construction, "requires that a clause 'should ordinarily be read as modifying only the noun or phrase that it immediately follows.'"[405] Under this rule, when a disjunctive conjunction immediately precedes a modifying clause, "the modifying clause only applies to the last term and not the term preceding the disjunctive conjunction."[406] The word "nor" as used in the Exception Clause, which separates "slavery" from "involuntary servitude" is a "considered a disjunctive conjunction and accordingly, the convict labor exception should only apply to conditions of servitude and not to conditions of slavery."[407] Consequently, the exception modifies only involuntary servitude rather than slavery.[408] This reading is consistent with the resolution of various decisions expounding on the scope of

399. Dred Scott v. Sandford, 60 U.S. 393, 407 (1856).

400. Harris, *supra* note 111, at 1719–20.

401. W.E.B DU BOIS, BLACK RECONSTRUCTION IN AMERICA 10 (1964) (noting that slaves were not considered "[wo]men; . . . they could not legally marry nor constitute families; they could not control their children; they could not appeal from their master; they could be punished at will").

402. Armstrong, *supra* note 392, at 22.

403. *Id.* at 5.

404. *Id.*

405. *Id*. (quoting Barnhart v. Thomas, 540 U.S. 20, 27 (2003)).

406. *Id.* at 6.

407. *Id.*

408. *Id.*

the Exception Clause. In those cases, courts have only permitted involuntary labor in prisons, while failing to engage the question of slavery.[409]

Any argument that the exception applies to slavery, moreover, is obsolete. As noted above, slavery created a racialized regime that imposed a status of property rather than personhood on people of African descent who were designated as slaves. Contemporarily, such a status has become inconsistent with the Constitution for a number of reasons. First, at a minimum, the Fourteenth Amendment's Equal Protection Clause outlaws state action that mandates the type of racial hierarchy that was essential to the system of slavery.[410] Second, the Fourteenth Amendment, through its Due Process Clause, entitles citizens, even those in prison, a broad array of constitutional protections, including the right to be free of cruel and unusual punishments. Initially, the Eighth Amendment did not regulate state punishments.[411] In 1962, however, the Supreme Court made clear that the Eighth Amendment is binding upon the states via the Fourteenth Amendment in *Robinson v. California*.[412] The Court has read the Eighth Amendment's cruel and unusual punishments clause as prohibiting the application of punishments that result in social death.[413] In *Trop v. Dulles*, the Court held that the challenged sentence, denationalization, constituted "the total destruction of the individual's status in organized society."[414] The Court's ruling in *Trop* is incompatible with a state of total bondage that was the hallmark of chattel slavery. In other words, for one to be held in a state of bondage as required by slavery, it would necessitate the same sort of "destruction of an individual's status in organized society" that was invalidated in *Trop*. This, combined with the Fourteenth Amendment's repudiation of overt racial exclusion and its reversal of the historic denial of the rights of citizenship to Blacks, suggest that slavery, were it authorized within prisons by the Thirteenth Amendment, could not constitutionally operate in light of other constitutional provisions.

Given the history of the Thirteenth Amendment and its text and subsequent constitutional developments that bear on it scope, it is clear that its provisions reach beyond the walls of prisons. Indeed, the Court has applied the Thirteenth Amendment in the context of the criminal law on at least one

409. *See, e.g.*, United States v. Reynolds, 235 U.S. 133 (1914) (invalidating peonage policies where convicted inmate concluded labor contract with private party in exchange for payment of court-assessed fines and fees).

410. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (ruling segregation of public schools on the basis of race unconstitutional and overruling the doctrine of "separate but equal"); Loving v. Virginia, 388 U.S. 1 (1967) (ruling Virginia's antimiscegenation statute unconstitutional); Johnson v. California, 543 U.S. 499 (2005) (ruling the use of race in cell assignment in a California state prison is subject to strict scrutiny).

411. *See* O'Neil v. Vermont, 144 U.S. 323 (1892) (reaffirming that the Eighth Amendment was not applicable to the states).

412. *See* Robinson v. California, 370 U.S. 660 (1962); Powell v. Texas, 392 U.S. 514 (1968).

413. Armstrong, *supra* note 392, at 27.

414. Trop v. Dulles, 356 U.S. 86 (1958).

occasion. In *Bailey v. Alabama*, the Supreme Court upheld the statute and its application in the context of the criminal law.[415] Indeed, while acknowledging that the Thirteenth Amendment prohibits involuntary servitude except as punishment for a crime, the Court asserted:

> [T]he exception, allowing full latitude for the enforcement of penal laws, does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to one or to render the service which would constitute the other.[416]

Under this reading, there are limitations to the way in which the criminal law may be used. While states may extract forced labor from individuals who are duly convicted of a crime, there are limits on how such labor may be extracted. They may not, for example, use the criminal law to maintain racial dominance or to facilitate broad scale racial and economic exploitation akin to slavery through the criminalization of breach of contract.[417]

In this Section, I have argued that the Thirteenth Amendment's Exception Clause does not permit slavery within jails or prisons. Rather, the Amendment's prohibition remains in effect despite a criminal conviction. The Amendment's prohibition, however, extends beyond slavery to reach its "badges and incidents."[418] In the Section that follows, I will discuss how the use of shackles on pregnant prisoners during labor and childbirth constitutes a badge or incident of slavery that is inconsistent with the values of the Thirteenth Amendment and therefore with evolving standards of decency. This is so given the historical devaluation and control of Black women during slavery and post–Civil War punishment regimes, which have now been largely repudiated. Because of this association, I argue that the practice of shackling should be prohibited outright as it is informed by this troubled historical linkage.

B. Social Meaning of the Shackling of Pregnant Prisoners and Conflict with the Antisubordination Values of the Thirteenth Amendment

The social meaning of a challenged practice and its historical linkage to repudiated regimes, such as slavery and the post–Civil War era, are critical to assessing whether a practice is inconsistent with evolving standards of decency and whether it should therefore be deemed "cruel" under the Eighth Amendment. To the extent that a punishment practice is traceable to the era of chattel slavery and racial domination, it may be deemed a badge or incident of

415. *See* 219 U.S. 219 (1911).

416. *Id.* at 244.

417. *See* Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 395–96 (2009); Watson v. Graves, 909 F.2d 1549, 1553 (5th Cir. 1990).

418. *See supra* notes 342–61.

slavery and therefore condemned as "cruel" under the auspices of the Eighth Amendment.

As I described in Part II, the devaluation of Black women, the repeated violations of their bodily integrity, the restrictions on their sexual autonomy, and the demonization of Black womanhood are outgrowths of the era of chattel slavery. Black women were often punished for their failure to produce offspring and were given little respite from the backbreaking demands of field labor during pregnancy. Even during pregnancy, women were brutally punished by whipping and shackling. The exploitation of Black women as laborers and as a source of populating additional labor was justified based on the social construction of Black women as deviating from traditional standards of womanhood. Indeed, as Andrew Koppleman notes, "loss of control over one's reproductive capacities were partially *constitutive* of slavery for most [B]lack women of childbearing age."[419]

Following the prohibition of slavery, Black women did not fare much better. Drawing upon preexisting racial constructions of Black women that arose during slavery, the carceral apparatus that emerged during the post–Civil War era positioned Black women as masculine, deviant, dangerous, and therefore punishable in a way that white women were not. In the context of convict leasing and chain gangs, these images were drawn upon and Black women were punished as a means of exploiting their labor. On the chain gangs, their legs were placed in manacles and they were forced to engage in arduous labor on railroads, streets, and in coal mines. As in slavery, pregnancy did not insulate Black women from performing these tasks; instead, they were worked, feet in chains and under the threat of the lash, often up until the onset of labor. Critical for the purposes of this doctrinal engagement, Black women were often punished for their pregnancies through more demanding work assignments, the denial of medical assistance, and the separation from their children after childbirth.[420]

For many, the placement of shackles on the arms, legs, and bellies of pregnant prisoners during labor and childbirth, when these women are most vulnerable, invokes images of the profound degradation and denial of physical autonomy of slavery and the postslavery era. The antisubordination approach to the Eighth Amendment renders these gendered and racial connections visible and cognizable in the determination of constitutional injury.

Given the historical association with the degradation and devaluation of Black women during slavery, the punitive regimes that followed it and the punishment of the reproductive expressions of women in contemporary prison, the use of shackles on pregnant prisoners during labor and childbirth should be seen as a badge or incident of slavery. This badge is affixed to all women who

419. Koppelman, *supra* note 369, at 508.

420. *See supra* Part II.A.2.

occupy the category of female prisoner and who inhabit the racialized space of the women's prison, regardless of their own racial identity. Based on this connection to slavery and its broad impact, the practice should be viewed as inconsistent with our evolving standards of decency and therefore deemed cruel and unusual punishment with respect to all female prisoners.

In sum, this relationship between historical constructions of Black women and contemporary shackling of pregnant prisoners during labor and childbirth must, therefore, inform our conceptions of cruelty within the context of Eighth Amendment jurisprudence. By reading this punishment as "cruel" for purposes of the Eighth Amendment, and taking into account this historical relationship and the values represented by the Thirteenth Amendment, the Court can deploy the moral force of the Constitution to root out dehumanizing practices such as the shackling of pregnant prisoners not only at the individual level, but at the institutional level as well.

CONCLUSION

"The past is not dead. It's not even past."[421]

The past is represented, quite viscerally and violently, in prisons across the country when pregnant prisoners are chained at the hands, waist, and feet during transport to the hospital at the onset of labor. It operates when guards shackle pregnant prisoners to bedrails during the delivery of their children and during recovery. But all too often, in judicial, scholarly, and public discourses regarding the practice, the past is rendered mute and invisible.

The past is made visible, however, when Black women are centered and when the practice of shackling pregnant prisoners is situated in a historical context of racial subjugation. When placed in this context, we can see the continuities between the degradation and devaluation of Black women during slavery, convict leasing, and chain gangs and the modern dehumanization of female prisoners through the use of shackles during childbirth. The constructions of Black women as masculine, deviant, and dangerous constitute the metaphorical scaffolding of women's prisons, framing experiences within institutions and justifying the application of harsh conditions upon all imprisoned women.

Despite the impact of this history, it has been conspicuously absent in our Eighth Amendment jurisprudence. As a consequence, we compromise our ability to challenge the shackling of pregnant women during childbirth and to contest the racial and gender constructions that animate the practice. A race- and gender-conscious approach to punishment, therefore, is necessary. In this Article, I have offered a reading of the Eighth Amendment that recognizes the historical subordination of Black women, the denigration of their reproductive capacities, and the devaluation of their identities as mothers. Under this

421. WILLIAM FAULKNER, REQUIEM FOR A NUN (1951).

approach to the Eighth Amendment, we can leverage the moral authority and antisubordination command represented by the Thirteenth Amendment to make our constitutional commitment to evolving standards of decency real and functional within our nation's prisons.