

2014

Restoring Rights for Reproductive Justice

Elizabeth J. Chen

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RESTORING RIGHTS FOR REPRODUCTIVE JUSTICE

ELIZABETH J. CHEN*

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INTRODUCTION

Ever since women gained the right to vote in the United States nearly 100 years ago, women have exercised that right. In fact, women's voting rates now outstrip those of men's,¹ and the number of women of color²

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1. See ELIZABETH J. CHEN, CTR. FOR AM. PROGRESS, A DUAL

voting has increased steadily over time.³ In the 2008 election, black women's turnout rate even outstripped that of white women's.⁴ The growth in voting rates has nearly doubled for both Latina and Asian women between 2000 and 2012.⁵ Much has been made of the "woman's vote" and its impact on the 2012 election. Commentators and pollsters suggested that President Obama's second term was secured through a gender gap larger than any other in recorded history.⁶ While those votes certainly reflected the politics of gender as they played out in the rhetoric of both campaigns, theirs is not the only story.

This Article considers the women who did *not* vote in the election because of felon disenfranchisement laws, and the impact on reproductive rights from leaving out their voices. The 2012 election season was rife with discussions about voter suppression, and separately, the "war on women."⁷ The story coming out of the election was about the gender gap, wider than ever before in particular because of reproductive rights concerns drawn out during the election.⁸ Moreover, with politicians making scientifically inaccurate statements, such as the contention that raped women have ways of "shutting that whole thing down" and preventing pregnancy,⁹ it is understandable that women voted in force to make their opinions known, and even to protect their rights. While former Massachusetts Governor Mitt Romney seemed to gain votes with women

DISENFRANCHISEMENT 17 (2012).

2. I use the term "woman of color" here to refer to Black, Latina, Asian American and Pacific Islander, Native American, Alaska Native, and Native Hawaiian women.

3. CHEN, *supra* note 1, at 2.

4. *Id.* at 4.

5. ELIZABETH CHEN, CTR. FOR AM. PROGRESS, A DUAL DISENFRANCHISEMENT: 2013 UPDATE 2 (2013).

6. Jonathan Easley, *Gallup: 2012 Election had the Largest Gender Gap in Recorded History*, THE HILL (Nov. 9, 2012, 3:17 PM), <http://thehill.com/blogs/blog-briefing-room/news/267101-gallup-2012-election-had-the-largest-gender-gap-in-history>.

7. *But see* CHEN, *supra* note 1, at 10 (projecting that almost 500,000 women of color would lose their right to vote in the November 2012 election and examining the intersection of the war on women and the war on voting).

8. Eleanor Smeal, *The Gender Gap Rules 2012 Election*, HUFFINGTON POST (Nov. 1, 2012, 4:49 PM), http://www.huffingtonpost.com/eleanor-smeal/the-gender-gap-rules-2012_b_2060065.html.

9. *See* Tara Culp-Ressler, *Rape Comments Cost Anti-Choice Candidates Their Seats*, THINKPROGRESS (Nov. 7, 2012), <http://thinkprogress.org/health/2012/11/07/1155211/rape-gaffes-lose-elections/>.

by making the tie between gender and the economy,¹⁰ President Obama understood that reproductive rights themselves are economic issues.¹¹ As a result, he won the “women’s vote.”¹²

That gender gap was driven by women of color. While attempts to suppress the votes of people of color were rampant, they were largely unsuccessful because of the protections of Section 5 of the Voting Rights Act in combination with advocates pointing out the extreme rarity of voter fraud and taking extensive measures to ensure that eligible voters were not disenfranchised.¹³ While President Obama lost the white woman’s vote, he overwhelmingly won the support of Black and Latina women.¹⁴ Women of color provided the margin for President Obama’s win of the so-called “women’s vote.”

Yet any conversation about the women who voted begs the question of which women were left out. While the women who voted managed to speak out on the issues that mattered most to them, what of the women precluded from voting? In this Article, I extend my previous consideration

10. *Full Transcript of the Second Presidential Debate*, N.Y. TIMES (Oct. 16, 2012), <http://www.nytimes.com/2012/10/16/us/politics/transcript-of-the-second-presidential-debate-in-hempstead-ny.html?pagewanted=all>.

What we can do to help young women and women of all ages is to have a strong economy, so strong that employers are looking to find good employees and bringing them into their workforce and adapting to a—a flexible work schedule that gives women the opportunities that—that they would otherwise not be able to—to afford.

11. *Id.* at 20-1.

In my health care bill, I said insurance companies need to provide contraceptive coverage to everybody who is insured, because this is not just a—a health issue; it’s an economic issue for women. It makes a difference. This is money out of that family’s pocket These are not just women’s issues. These are family issues. These are economic issues. And one of the things that makes us grow as an economy is when everybody participates and women are getting the same fair deal as men are.

12. See Tara McGuinness & Margie Omero, *How Women Changed the Outcome of the Election*, CTR. FOR AM. PROGRESS (Dec. 12, 2012), <http://www.americanprogress.org/issues/women/report/2012/12/12/47916/how-women-changed-the-outcome-of-the-election>.

13. See CHEN, *supra* note 5, at 1.

14. Exit polls do not parse Asian American or Native American votes by gender, but both populations voted Democrat heavily. See *id.* at 2; Carrie Budoff Brown, *Dems Woo Native American Vote*, POLITICO (May 29, 2008), <http://www.politico.com/news/stories/0508/10676.html> (“Native Americans traditionally and overwhelmingly vote Democratic.”); Callum Borchers & Alan Wirzbicki, *Asian-Americans Backed Obama Overwhelmingly*, BOSTON GLOBE (Nov. 9, 2012), <http://www.bostonglobe.com/news/politics/2012/11/09/asian-americans-voted-more-heavily-for-barack-obama-than/gdcKynV3Hq3OgSeOINEhHM/story.html>.

of the impact of newly enacted voter suppression laws on women of color¹⁵ to a much more pervasive and deep-rooted form of voter suppression, namely felon disenfranchisement.

Felon disenfranchisement is but one collateral consequence of imprisonment, and a mere symptom of a larger system of mass incarceration. The system itself has received increased attention recently upon the release of Michelle Alexander's book, *The New Jim Crow*.¹⁶ Alexander makes the argument that mass incarceration is just the next iteration of the system of legalized racial oppression in the United States, following directly from slavery and Jim Crow de jure segregation.¹⁷ She acknowledges, however, that *The New Jim Crow* does not address a number of populations affected by mass incarceration—among them women, Latinos, and immigrants—and calls for work building upon hers to further explore the issues raised in those particular contexts.¹⁸ This Article attempts to answer that call by specifically examining the impact of mass incarceration on women.

By linking the laws, regulations, and policies that produce reproductive oppression in prison with the breadth of felon disenfranchisement laws throughout the country, this Article provides the first attempt to tie together each of these social justice movements to show the urgency and importance of not forgetting those most marginalized by both society and law. In the same way that Kimberlé Crenshaw identifies the failure of the antiracist and feminist movements to address mass incarceration,¹⁹ this Article points to two specific issues within the antiracist and feminist movements to show the stake that both have in combating felon disenfranchisement in order to protect reproductive rights. In particular, I call attention to the problem of felon disenfranchisement and rights restoration within the antiracist civil rights movement, and reproductive abuses in prisons within the feminist reproductive rights movement. In effect, I want to call the two movements to work in coalition because their constituents are in fact the same people.

As of 2011, women made up 6.7% of the prison population.²⁰ While this

15. See CHEN, *supra* note 1, at 1.

16. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

17. *Id.* at 2.

18. *Id.* at 15-16.

19. Kimberlé Crenshaw, *From Private Violence to Mass Incarceration*, 59 *UCLA L. REV.* 1418, 1422-23 (2012).

20. E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2011*, at 7 (Dec. 2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>. See generally Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Incarceration*, in *INVISIBLE*

percentage may seem small, the growth of the number of women in prison has exponentially eclipsed the rate of the growth of men in prison.²¹ Women of color are disproportionately represented. In the female prison population, Black women make up twenty-five percent and Latinas eighteen percent.²² In the female American population as a whole, however, the Census Bureau shows that Black women make up 12.6% and Latinas 15.8%,²³ meaning that both populations are overrepresented in the prison system.

More cogent to this discussion is the fact that the prison population of women has exploded over the last three decades. This has not gone unnoticed within the feminist movement. From the academic perspective, the UCLA Law Review convened and published a symposium to discuss the notable lack of attention to women of color in the carceral state.²⁴ In the realm of practice, National Advocates for Pregnant Women has been calling to attention the increasing monitoring of women through criminalization and civil detainment because of pregnancy.²⁵ The explosion of women in prison has far outstripped the growth of the rate at which men are being incarcerated.²⁶ The point of this Article is not to diminish the magnitude of the problem of incarceration for men of color, or for men more generally, but to call attention to an oft-overlooked population.

This Article proceeds as follows. In Part I, I examine women of color as a unique population, deserving of attention in both the contexts of voter turnout and outcomes, as well as that of mass incarceration.²⁷ Part II explores the history of disenfranchisement in the context of felony convictions, its racial impact, and its particular impact on women of

PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Cheney-Lind eds., 2002) (providing an overview of women's incarceration).

21. NATASHA A. FROST ET AL., INST. ON WOMEN & CRIM. JUSTICE, *HARD HIT: THE GROWTH IN THE IMPRISONMENT OF WOMEN, 1977-2004*, at 9 (2006), *available at* <http://www.wpaonline.org/institute/hardhit/HardHitReport4.pdf>.

22. CARSON & SABOL, *supra* note 20, at 7 tbl.7. The Bureau of Justice Statistics does not break down Asian and Pacific Islander or Native American prisoners by gender.

23. U.S. CENSUS BUREAU, *ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SEX, RACE, AND HISPANIC ORIGIN FOR THE UNITED STATES, STATES, AND COUNTIES: APR. 1, 2010 TO JULY 1, 2012* (2012), *available at* <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml>.

24. Crenshaw, *supra* note 19, at 1428.

25. Press Release, National Advocates for Pregnant Women (Sept. 12, 2012) (on file with the author).

26. FROST ET AL., *supra* note 21.

27. *See infra* Part I.

color.²⁸ Part III then contextualizes and explores the oppressions women face in prison and after they have fully served their sentences, paying particular attention to the egregious reproductive injustices perpetrated.²⁹ Part IV then offers suggestions to both the prison abolition and women's health communities on how to leverage the successes of the 2012 election to ensure that all women are able to vote and make their voices heard.³⁰

I. WOMEN OF COLOR

This Article makes a deliberate choice in focusing on women of color for a number of reasons. Not only are women of color a growing demographic and voting at increasing rates, but they are also a rapidly growing segment of the incarcerated population.³¹ Each of those aspects will be explored in greater depth below.

Equally important, however, women of color have unique life experiences, as explained by a number of scholars. Kimberlé Crenshaw explains that women of color, in her case Black women, experience oppression because of their identity categories, not merely in an additive manner, but also at the intersection of those identities.³² Black women then, do not merely experience oppression similar to white women and Black men, but also because of their own particular experiences as Black women, which they share with neither white women nor Black men.

Moreover, Angela Harris explains the danger in theorizing women's oppression through the law from a universal subject who is white, arguing instead for recognizing multiple identities.³³ In practice, women of color experience the wage gap more sharply, have had their reproduction controlled in different ways, and are affected differently by efforts to reform immigration.³⁴ By recognizing their unique life experiences, and examining their particular political power and experiences of oppression through the system of felony disenfranchisement, we can ensure that both their marginalized voices and all marginalized voices are better heard.

28. *See infra* Part II.

29. *See infra* Part III.

30. *See infra* Part IV.

31. *See* CARSON & SABEL, *supra* note 20, at 7.

32. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

33. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (explaining that gender essentialism results in "some voices . . . silenced in order to privilege others.").

34. NAT'L WOMEN'S LAW CTR., FACT SHEET: CLOSING THE WAGE GAP IS ESPECIALLY IMPORTANT FOR WOMEN OF COLOR IN DIFFICULT TIMES (2012), available at <http://www.nwlc.org/sites/default/files/pdfs/womenofcolorfactsheet.pdf>.

A. Electoral Force

1. High Turnout

Between 2000 and 2012, voter turnout among women of color increased dramatically. Their voter turnout rates have come at historic highs, increasing rapidly over the last four presidential elections. In that 12-year span, Asian-American and Pacific Islander (API) women nearly doubled their voting participation from 24.5% in 2000 to 48.5% in 2012.³⁵ In 2012, Black women topped white women's participation reaching a historic high of over seventy percent turnout.³⁶ This greater level of participation is, with good reason, based on the unique intersectional ways in which they experience the world around them.

It is also worth noting that the nation's demographics are shifting rapidly. As soon as 2043, non-Hispanic whites will no longer comprise a majority of the nation's population.³⁷ Women of color currently make up eighteen percent of the nation's population, but by 2050, they will comprise twenty-seven percent of the population.³⁸ Based on both numbers and turnout rates, women of color are poised to make a significant impact on both the national and local political landscape.

2. Driving the Gender Gap

An electoral narrative that remains unexplored is the precise means by which the gender gap was achieved. The gender gap is calculated a number of ways, one of which is a calculation derived from adding the margin by which a candidate won men's votes, to the margin by which the other candidate won women's votes.³⁹ By all accounts, the gender gap that contributed to President Obama's victory during the 2012 presidential election was the widest in recorded history, at twenty points.⁴⁰

In examining the exit polls from the 2012 election, it is clear that women of color provided the crucial votes that comprised the gender gap. While forty-two percent of white women voted for President Obama, ninety-six percent of Black women, and seventy-six percent of Latinas voted for him,

35. See CHEN, *supra* note 5, at 3.

36. *Id.* at 2.

37. Patrick Oakford, *The Rising Influence of the Latino Electorate*, NAT'L J., 1 Mar. 5, 2013, available at <http://www.nationaljournal.com/thenextamerica/politics/opinion-the-rising-influence-of-the-latino-electorate-20130305>.

38. CHEN, *supra* note 5, at 4.

39. Jeffrey M. Jones, *Gender Gap in 2012 Vote Is Largest in Gallup's History*, GALLUP, (Nov. 9, 2012), <http://www.gallup.com/poll/158588/gender-gap-2012-vote-largest-gallup-history.aspx>.

40. *Id.*

leading to a cumulative fifty-five percent of women voting for him.⁴¹ On the other hand, fifty-two percent of men voted for Governor Romney.⁴² The difference between women's and men's votes was stark, and only more so when examining the votes of women of color against the votes of white men.

B. Growing Segment of Incarcerated Population

Women's incarceration in the United States has grown dramatically over the last three decades. With an 800% increase in that time period,⁴³ the growth of the female prison population has far outstripped the growth of the male prison population.⁴⁴ This unprecedented growth in the incarceration rates of women comes as the male prison population is contracting.

Within that context, women of color are disproportionately represented. Black women are three times more likely to be incarcerated than white women.⁴⁵ Latina women are sixty-nine percent more likely to be imprisoned.⁴⁶ These disproportionate rates are largely due to drug policies that require incarceration for nonviolent offenses.⁴⁷ This rapid growth only stands to increase, especially with shifting demographics, making it more important than ever to recognize the collateral effects of felony convictions on these individuals.

II. FELONY DISENFRANCHISEMENT

The right to vote is constitutionally protected for most citizens. For those who have committed certain kinds of crimes, that right can be

41. *Presidential Exit Poll*, CNN (Dec. 10, 2012), <http://www.cnn.com/election/2012/results/race/president>.

42. *Id.*

43. See George Hill & Paige Harrison, *Female Prisoners Under State or Federal Jurisdiction*, U.S. Dep't of Justice, Bureau of Justice Statistics, <http://bsj.ojp.usdoj.gov/content/dtdata.cfm#corrections> (noting that the U.S. total of female prisoners has grown from 12,729 in 1977 to 104,848 in 2004); CARSON & SABOL, *supra* note 20, at 25 (finding that the U.S. female prison population was 85,044 in 2000 and 103,674 in 2011).

44. See INSTITUTE ON WOMEN & CRIMINAL JUSTICE, QUICK FACTS: WOMEN & CRIMINAL JUSTICE—2009 (2009), http://www.wpaonline.org/pdf/Quick%20Facts%20Women%20and%20CJ_Sept09.pdf (explaining that the male incarceration rate grew by 400% between 1977 and 2007).

45. CARSON & SABOL, *supra* note 20, at 9.

46. *Id.*

47. DRUG POLICY ALLIANCE, FACT SHEET: WOMEN, PRISON, AND THE DRUG WAR 1 (2013), available at http://www.drugpolicy.org/sites/default/files/DPA_Fact%20Sheet_Women,%20Prison%20and%20the%20Drug%20War.pdf.

abridged or eliminated altogether. The history of disenfranchisement spans the breadth of this country's history, and has had racially disparate impacts. While other countries restrict the right of incarcerated individuals to vote, the United States is unique in continuing to restrict that right even after individuals are no longer incarcerated.⁴⁸

A. Generally

The landscape of disenfranchisement has shifted substantially over the course of history in the United States. During colonial rule, the right was excised only if one had committed an election-related crime.⁴⁹ Over time, as political power began to extend to increasingly larger groups of individuals, so too did the range of crimes for which disenfranchisement was attached as a penalty. While states first began including disenfranchisement as a penalty for felony convictions generally after the American Revolution, the practice ramped up once the property test for voter qualification was eliminated, presumably in an attempt to limit the expansion of the electorate.⁵⁰ With the passage of the Fifteenth Amendment,⁵¹ the restrictions merely became less overtly racial in nature but increasingly racial in their impact. They continue in this fashion to this day.

B. Racial Impact

After the passage of the Fifteenth Amendment, there were expanded efforts to dilute the voting power of people of color. The Fifteenth Amendment was passed during Reconstruction as a direct response to attempts to limit the full citizenship and civic participation of formerly enslaved black men.⁵² It explicitly states that the right to vote “shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”⁵³ With an explicit prohibition on disenfranchisement on the basis of race, states seeking to abridge voting rights of people of color were forced to do so in more subtle ways, from literacy tests, to poll taxes, to selection of particular crimes for

48. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 778 (2002).

49. JEAN CHUNG, SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 2 (2013), http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf.

50. *Id.* at 2-3.

51. U.S. CONST. amend. XV.

52. Chung, *supra* note 49, at 3.

53. U.S. CONST. amend. XV.

disenfranchisement.⁵⁴

In the specific context of disenfranchisement of individuals convicted of felonies, states were explicit in their biases. Mississippi targeted offenses that it believed Black people were more likely to commit, such as burglary, theft, and arson, but excluded robbery and murder, which it believed whites were more likely to commit.⁵⁵ Alabama had a similar philosophy, believing that Black men were more likely to beat their wives than to kill them, thereby attaching disenfranchisement as a collateral consequence to the crime of domestic violence, but not for the murder of one's wife.⁵⁶ These policies had specific racial intent and fell neatly within Equal Protection jurisprudence addressing the disparate impact of laws.

Despite the stark overrepresentation of people of color within the criminal justice system, there is no practical remedy. The constitutionality of racially discriminatory laws and government policies must meet equal protection standards developed by the Supreme Court. During the Civil Rights movement, the Supreme Court began recognizing race discrimination claims under the Equal Protection Clause of the Fourteenth Amendment.⁵⁷ While outlawing segregation under the law, the Court developed a strict scrutiny standard to assess whether states could maintain race-based classifications.⁵⁸ That standard, articulated in *Korematsu v. United States*, essentially deemed suspect "all legal restrictions which curtail the civil rights of a single racial group."⁵⁹ Despite that high burden, which has even been described as "fatal in fact,"⁶⁰ not all racial discrimination perpetuated by the law is inherently unconstitutional.

Some laws do not explicitly classify individuals on the basis of race, but have a discriminatory impact on communities. Those laws do not benefit from "fatal in fact" strict scrutiny, however. The Supreme Court, in *Washington v. Davis*, held that to be analyzed under strict scrutiny, laws that did not explicitly classify individuals on the basis of race would be

54. Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 50, 51 (M. Mauer & M. Chesney-Lind, eds., 2002).

55. *Id.* at 52.

56. Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 *YALE L.J.* 537, 541 (1993).

57. See U.S. CONST. amend. XIV § 1.

58. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

59. *Id.*

60. See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for A Newer Equal Protection*, 86 *HARV. L. REV.* 1, 8 (1972) (describing the strict scrutiny standard as "'strict' in theory and fatal in fact").

required to be a result of intentional racial discrimination.⁶¹ A law that does not explicitly classify based on race, but merely has a disproportionate impact on individuals because of their race would thus not qualify for analysis under strict scrutiny.⁶²

Specific to the criminal justice context, the Supreme Court strengthened the evidentiary burdens on plaintiffs to prove discrimination in *McCleskey v. Kemp*.⁶³ In that case, Warren McCleskey argued that the Court should have been able to infer discriminatory intent on behalf of the Georgia criminal justice system based on the starkly disproportionate numbers of Black people getting sentenced to death in comparison to white people.⁶⁴ In particular, defendants who had been convicted of killing white victims in the state were 4.3 times more likely to be sentenced to death than those convicted of killing Black victims.⁶⁵ McCleskey, a Black man who was convicted of murder for killing a white police officer, challenged his death sentence under the Equal Protection Clause.⁶⁶ Despite the overwhelming empirical evidence that showed a pattern of discriminatory impact on Black defendants, the Supreme Court ruled that the officials associated with the case needed to have been consciously and deliberately biased.⁶⁷ Given that racism and discrimination on the basis of race are often implicit and covert,⁶⁸ this threshold proves to be extremely high. As a result, it has precluded remedies within the criminal justice system against biased applications of the law.

It is precisely the idea that racism must be overt and intentional to be real that makes it possible for the narrative to insist that we live in a “post-racial” society. This pervades even through the contemporary Supreme Court’s understanding of race. Chief Justice John Roberts famously stated: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁶⁹ His understanding of racism is that it is conscious and intentional, and therefore preventable. As Charles

61. *Washington v. Davis*, 426 U.S. 229, 243 (1976).

62. *Id.*

63. *Id.* at 292.

64. *Id.* at 286.

65. *Id.*

66. *Id.* at 283-84.

67. *Id.* at 292 (explaining that McCleskey offered no evidence “specific to his own case” that racial considerations factored into his sentence).

68. See generally Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23, 330 (1987) (arguing that much racist behavior is unconscious).

69. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

Lawrence theorized as early as 1987 however, not all forms of racial bias are spoken, overt, and facial.⁷⁰ The problem is, however, as Michelle Alexander explains, “[t]he colorblind public consensus that prevails in America today—i.e., the widespread belief that race no longer matters—has blinded us to the realities of race in our society and facilitated the emergence of a new caste system.”⁷¹

Yet the Equal Protection jurisprudence of racial disparity cannot even be applied to the felon disenfranchisement context. In *Richardson v. Ramirez*, three ex-offenders who had been disenfranchised as a result of their felony convictions argued that such disenfranchisement violated the Equal Protection Clause.⁷² While Section 1 of the Fourteenth Amendment requires states to show a compelling interest in restricting rights to groups, Section 2 allows states to restrict voting rights based on prior convictions.⁷³ The Supreme Court upheld the disenfranchisement policy based on Section 2—finding that its principles covered Section 1.⁷⁴ As a result, the state was not required to show a compelling interest in denying the right to vote to ex-offenders. States, then, find it much easier to abridge the right. Despite the racial impact and general equal protection concerns raised by offender disenfranchisement, denying the vote remains constitutionally sound, at least according to the Supreme Court.

While the history of disenfranchisement tied to felony convictions was explicitly racial, today, even if such intent is no longer clearly stated, the racial impact persists. According to the Sentencing Project, African Americans lose the right to vote four times more than the non-African American population.⁷⁵

C. Women of Color and Felony Disenfranchisement

As described above, women of color are becoming increasingly influential in national elections. As history has predicted, an increase in electoral influence has correlated with an increase in the impact of voter suppression efforts like felony disenfranchisement on that very group.⁷⁶

70. See generally Lawrence, *supra* note 67, at 322-23 (asserting that most people are unaware of their own racism).

71. ALEXANDER, *supra* note 16, at 11-12.

72. 418 U.S. 24, 26-27 (1974).

73. *Id.* at 54.

74. *Id.* at 54-56.

75. CHRISTOPHER UGGEN, SARAH SHANNON & JEFF MANZA, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010, SENTENCING PROJECT 12 (2012), available at http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.

76. I prefer the use of the term “felony disenfranchisement” to “felon

While disenfranchisement rates are not broken down by gender, an examination of incarceration rates shows that women face similar rates. Black women are three times more likely than white women to be incarcerated.⁷⁷ Latina women are 1.6 times more likely than white women to be incarcerated.⁷⁸ Like with much polling and data collection, while it is understood that Asian American, Pacific Islander, and Native American⁷⁹ women are overrepresented in the prison system,⁸⁰ breakdowns of their representation are unavailable.

Michelle Alexander has done a great deal to expose the detrimental effects of the criminal justice system and mass incarceration upon men of color. However, she deliberately declines to make a similar assessment for incarcerated women, calling instead for others to perform that analysis.⁸¹ In her choice, she both leaves room for a nuanced analysis, but also implicitly marginalizes the importance of the issue for women. While scholars and activists like Kimberlé Crenshaw, Dorothy Roberts, and Juanita Diaz-Cotto have argued for foregrounding women—especially women of color—in the mass incarceration conversation, the specific consequence of disenfranchisement remains unexplored.⁸² This lack of

disenfranchisement” because these laws cover individuals serving sentences or under criminal justice supervision for felony convictions, as well as those who have served their sentences in full but remain disenfranchised. For a fuller discussion of terminology, see Eric J. Miller, *Foundering Democracy: Felony Disenfranchisement in the American Tradition of Voter Exclusion*, 19 NAT’L BLACK L.J. 32, 41-42 (2005).

77. FELONY DISENFRANCHISEMENT RATES FOR WOMEN, SENTENCING PROJECT, 1, available at http://www.sentencingproject.org/doc/publications/fd_bs_women.pdf.

78. INCARCERATED WOMEN, SENTENCING PROJECT 2 (2012), available at http://www.sentencingproject.org/doc/publications/cc_Incarcerated_Women_Factsheet_Sep24sp.pdf.

79. Understanding that American Indian, Alaska Native, and Native Hawaiian indigenous peoples all have different cultural backgrounds and unique issues that their populations face, we attempt to be as specific as possible when describing each population. When referring to them in the aggregate, however, I use the inclusive term “Native American.”

80. See FELONY DISENFRANCHISEMENT RATES FOR WOMEN, *supra* note 76, at 1 n.2; see also Julie C. Abril, *Native American Identities Among Female Prisoners*, 83 PRISON J. 38 (2003) (recognizing that official government statistics do not reflect the true statistics).

81. See ALEXANDER, *supra* note 16, at 15-16.

82. See, e.g., Crenshaw, *supra* note 19, at 1424; Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1476 (2012). But see Julianne Hing, *Beyond the Binary Behind Bars*, GUERNICA 3 (June 17, 2013), available at <http://www.guernicamag.com/interviews/beyond-the-binary-behind-bars/> (“We hear a lot about how African Americans are disenfranchised. You talk about losing voting rights—how all these African Americans who come out of prison can’t vote. That’s happening to Latinos too. No one has started to talk about how

analysis is particularly problematic because women of color are at the intersection of the expanding carceral state and voter suppression attempts.

III. OPPRESSION WITHIN PRISONS

While many rights of incarcerated women are implicated by their imprisonment, the analysis in this Article proceeds under the framework of reproductive justice, a social justice lens that examines the conditions that make it possible for individuals to make decisions to both not have and have children, and to parent the children that they have. It is an inherently intersectional, anti-essentialist frame because it recognizes that many oppressive conditions are part and parcel of these decisions.

The inclusive term grew out of the praxis of intersectionality and anti-essentialism, as theorized by Kimberlé Crenshaw and Angela Harris, and a recognition that on the ground, traditional reproductive rights concerns, such as the substantive due process right to privacy in determining whether to have a child, should include a much broader understanding of the different ways in which reproductive coercion might happen. Included in this understanding is that for many marginalized communities, the right to have and parent a child has been regulated and attacked in ways that parallel the regulation and attacks against the right to not have children. Asian Communities for Reproductive Justice describes the end goal of reproductive justice as follows:

[T]he complete physical, mental, spiritual, political, economic, and social well-being of women and girls, and will be achieved *when women and girls have the economic, social and political power and resources to make healthy decisions about our bodies, sexuality and reproduction for ourselves, our families and our communities in all areas of our lives.*⁸³

SisterSong Women of Color Reproductive Justice Collective describes the scope in this way:

[Reproductive justice] represents a shift for women advocating for control of their bodies, from a narrower focus on legal access and individual choice (the focus of mainstream organizations) to a broader analysis of racial, economic, cultural, and structural constraints on our power.⁸⁴

Latinos are disenfranchised politically.”).

83. ASIAN COMMUNITIES FOR REPRODUCTIVE JUSTICE, A NEW VISION: FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE (2005), *available at* <http://forwardtogether.org/assets/docs/ACRJ-A-New-Vision.pdf> (emphasis in original).

84. *What is Reproductive Justice?*, SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE, http://www.sistersong.net/index.php?option=com_content&

Individuals experience oppression in many forms, some reproductive, and some merely tied to reproduction.⁸⁵ Additionally, reproductive oppression is tied up and layered into many other forms of oppression, including racial oppression. I chose to focus my examination on that particular category, in part because attacks on voting rights have been so racially charged.⁸⁶

Many, though not all, of the injustices perpetrated on incarcerated women implicate their reproduction. As such, the reproductive justice framework is a useful means for interrogating the systems of mass incarceration and felony disenfranchisement, while also recognizing incarcerated women's electoral potential.

A. Sterilization

As soon as [the doctor] found out that I had five kids, he suggested that I look into getting it done. The closer I got to my due date, the more he talked about it. He made me feel like a bad mother if I didn't do it Today I wish I would have never had it done. —Christina Cordero⁸⁷

Throughout the history of the United States, women of color have faced multiple forms of sterilization abuse. Whether explicitly sanctioned by the

view=article&id=141&Itemid=81.

85. See Harris, *supra* note 33, at 612 n.149 (explaining that sex, race, and class are inter-related forms of oppression).

86. In the period leading up to the 2012 election, officials were blatant with their racist attempts to limit votes from people of color. An Ohio elections board member, for example, in discussing his vote against weekend voting hours, stated: "I guess I really actually feel we shouldn't contort the voting process to accommodate the urban—read African-American—voter-turnout machine." Darrel Rowland, *Voting in Ohio: Fight Over Poll Hours Isn't Just Political*, THE COLUMBUS DISPATCH (Aug. 19, 2012, 07:35 PM), <http://www.dispatch.com/content/stories/local/2012/08/19/fight-over-poll-hours-isnt-just-political.html>; Ray Rivera, *Racial Comment by Republican Official in Ohio Rekindles Battle Over Early Voting*, N.Y. TIMES (Aug. 22, 2012), <http://www.nytimes.com/2012/08/23/us/politics/ohio-early-voting-battle-flares-after-racial-comment-by-republican-official.html>. In South Carolina, racial animus was made clear in an email discussion involving a South Carolina lawmaker. In the email exchange, the lawmaker affirmed a constituent's racially charged statement that if the legislature offered potential voters money to obtain identification cards, "it would be like a swarm of bees going after a watermelon," by replying with an "Amen." Rebecca Cohen, *S.C. Lawmaker Admits Positive Response to Racist Email on Voter ID Bill*, McCLATCHY NEWSPAPERS (Aug. 28, 2012), <http://www.mcclatchydc.com/2012/08/28/163886/sc-lawmaker-admits-positive-response.html>.

87. See Corey G. Johnson, *Female Inmates Sterilized in California Prisons Without Approval*, THE SACRAMENTO BEE (July 7, 2013, 12:00 AM), <http://www.sacbee.com/2013/07/07/5549696/female-inmates-sterilized-in-california.html>.

state or a product of social norms that sanctioned medical paternalism that stemmed certain kinds of childbearing, women of color have been the targets of coerced sterilization.⁸⁸ While such widespread abuse is much more rare today, it continues unabated in prisons.

A 2013 report from The Center for Investigative Reporting documented at least 148 unapproved tubal ligations of female inmates from two California prisons from 2006-2010.⁸⁹ Because federal and state laws ban the use of federal funds for sterilizing prisoners unless certain preconditions are satisfied, state funds must be used absent these preconditions.⁹⁰ 42 C.F.R. § 50.209 does permit the use of federal funds if the preconditions are met, however. These laws presumably exist because of a history of, and concern for coerced and inappropriate sterilization of women in California prisons. When state funds are used, however, prison rules require a case-by-case approval system to ensure that sterilization is only used in limited circumstances.⁹¹ The report showed that in flagrant violation of that system, at least 148 inmates received tubal ligations.⁹²

B. Shackling During Childbirth

Because I was shackled to the bed, they couldn't remove the lower part of the bed for the delivery, and they couldn't put my feet in the stirrups. My feet were still shackled together, and I couldn't get my legs apart. The doctor called for the officer, but the officer had gone down the hall. No one else could unlock the shackles, and my baby was coming but I couldn't open my legs. —Maria Jones⁹³

88. These practices were routine through the 1970s, where African American, American Indian, Alaska Native, Mexican American and Puerto Rican women were sterilized with neither their knowledge nor their consent. Their reproduction was inherently devalued through such practices, and there was an assumption that these women would procreate, and then rely on the state to care for these children. As a result, among other goals in pursuing such policies was the political end of “reducing welfare roles.” See Thomas Volscho, *Sterilization and Women of Color*, RACISM REVIEW.COM (Sept. 22, 2011), <http://www.racismreview.com/blog/2007/09/22/sterilization-and-women-of-color/>.

89. Johnson, *supra* note 87, at 1.

90. Sterilization of Persons in Federally Assisted Family Planning Projects, 42 C.F.R. § 50.201 et seq (1978).

91. *Id.* at § 50.209.

92. Johnson, *supra* note 86.

93. AMNESTY INTERNATIONAL, “NOT PART OF MY SENTENCE:” VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 10 (1999), available at <http://www.amnesty.org/en/library/asset/AMR51/019/1999/en/7588269a-e33d-11dd-808b-bfd8d459a3de/amr510191999en.pdf>.

Shackling pregnant prisoners is an inhumane practice that violates the right against cruel and unusual punishment. It is, however, an ongoing practice in detention facilities throughout the United States. Medical professionals have decried the practice, not only because it compromises health care, but also because it is “demeaning and rarely necessary.”⁹⁴ While the Federal Bureau of Prisons (BOP) no longer permits shackling pregnant inmates,⁹⁵ state and local facilities do not need to conform their standards to match the BOP. As a result, in thirty-six states, as well as in immigration detention facilities for those facing deportation due to violation of civil immigration laws, shackling of pregnant prisoners is permissible.⁹⁶

A few recent court cases have brought into the spotlight the policy of shackling pregnant prisoners during childbirth.⁹⁷ These practices have come under question in federal courts under the Eighth Amendment to the Constitution.⁹⁸ These challenges face high hurdles, often because they are civil rights challenges to the conditions of confinement, which legislation and case law have made extraordinarily difficult to reach the merits.⁹⁹ Procedural rules then often preclude analysis of and rulings on the practice. In addition, because these are civil rights challenges, they occur long after the shackling occurred, with the hope that a favorable outcome for the shackled plaintiff will deter prison and jail officials from future similar behavior, but offering no such guarantees. Circuits are currently split on recognizing the unconstitutionality of shackling.¹⁰⁰ Priscilla Ocen explores

94. AMERICAN COLLEGE OF OBSTETRICS AND GYNECOLOGISTS, HEALTH CARE FOR PREGNANT AND POSTPARTUM INCARCERATED WOMEN AND ADOLESCENT FEMALES, COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN 1 (Nov. 2011).

95. See THE REBECCA PROJECT FOR HUMAN RIGHTS & THE NAT’L. WOMEN’S LAW CTR., MOTHERS BEHIND BARS: A STATE-BY-STATE REPORT CARD AND ANALYSIS OF FEDERAL POLICIES ON CONDITIONS OF CONFINEMENT FOR PREGNANT AND PARENTING WOMEN AND THE EFFECT ON THEIR CHILDREN 11 (2010) [hereinafter THE REBECCA PROJECT].

96. See *id.* at 6.

97. See *Villegas v. Metro. Gov’t of Nashville*, 709 F.3d 563, 566 (6th Cir. 2013) (challenging a jail’s shackling of a pregnant prisoner during childbirth in a § 1983 suit); *Nelson v. Corr. Med. Serv.*, 583 F.3d 522, 534 (8th Cir. 2009) (en banc) (holding that a prison correction officer’s conduct in shackling a pregnant inmate during childbirth was unconstitutional).

98. *Id.*

99. The combination of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §2244 (d)(1) (1996) (placing strict restrictions on the ability of prisoners to seek habeas corpus), and the standard elucidated in case law of “deliberate indifference” essentially requires that prison officials act with motives akin to malicious intent, which is an extraordinarily high standard.

100. Compare *Nelson v. Corr. Med. Serv.*, 583 F.3d 522, 534 (8th Cir. 2009) (en

the case law in great depth, and argues persuasively that based on the doctrine of qualified immunity, which provides broad protections for the conduct of governmental actors, the law does not adequately protect women.¹⁰¹

C. Removal of Children

An overwhelming number of incarcerated women are mothers.¹⁰² As Dorothy Roberts has documented, the prison and child welfare systems in conjunction make it exceedingly hard for women who have been imprisoned to retain custody of their children.¹⁰³ The child welfare system is already heavily skewed against parents of color,¹⁰⁴ and through increased surveillance and punishment of poverty, presumes them to be unfit parents.¹⁰⁵ This presumption carries into and is compounded in the incarceration context. Not only do the racial stereotypes precede mothers of color, but these mothers are also assumed to be unfit parents because they engaged in criminal activity.¹⁰⁶

Through the reproductive justice framework, we see that not only have some people been unable to prevent unwanted pregnancies, but often, people who desire becoming parents are precluded from doing so. In the incarceration context, not only are women precluded from having safe, consensual reproductive procedures, but they are also prevented from retaining custody of their children while and after they are incarcerated. Within the framework, it is equally important to advocate for women to

banc) (holding that a prison official's conduct in shackling a pregnant inmate during childbirth was unconstitutional), *with Villegas*, 709 F.3d at 578 (explaining the right to be free from shackling during pregnancy is not unqualified, especially if the pregnant inmate is considered a flight risk).

101. See Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1249 (2012). The thrust of her argument is much broader—that shackling has both racialized foundations and today disproportionately affects black women. These realities, she argues, make the practice unconstitutional, especially through an antisubordination lens.

102. At least sixty percent of women in state prisons are mothers. See LAUREN E. GLAZE & LAUREN M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, PARENTS IN PRISON AND THEIR MINOR CHILDREN 14 app. tbl.4 (2008), available at <http://bjs.gov/content/pub/pdf/pptmc.pdf>.

103. See Roberts, *Punishment of Black Mothers*, *supra* note 82, at 1493.

104. See DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 6-7 (2003).

105. Roberts, *Punishment of Black Mothers*, *supra* note 82, at 1486; see also MELISSA V. HARRIS-PERRY, SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA 114 (2011).

106. Roberts, *Punishment of Black Mothers*, *supra* note 82, at 1486, 1492.

have reproductive choices that permit them to have wanted children, as it is to ensure that they can make choices to not have unwanted children.

IV. NEXT STEPS

With both an understanding of the electoral power of women of color, but also of the injustices perpetrated on women in prison, the next steps seem fairly obvious. Discussing and implementing them remain crucial as first steps toward justice for formerly incarcerated women.

A. Rights Restoration

As a first step, rights restoration is necessary to ensure democratic participation of women of color. Rights restoration is the process by which persons who have completed their prison sentences, and often, other terms of supervision, petition to regain the right to vote. The process varies from state to state. In some states, no mechanism exists at all, meaning that the right to vote can be lost for the remainder of one's life.

While civil rights organizations and activists have focused on regaining the right to vote for men of color, by centering on women, and particularly women of color, in the debate surrounding felon disenfranchisement, we gain valuable voices. Women of color, especially those who have been formerly incarcerated, stand to gain the ability to hold accountable the systems that have oppressed them. We also ensure that their votes are not diluted. This is particularly important because we have seen that their votes have been crucial to progressive victories that protect reproductive rights, and stand to have even broader influence on the national polity as demographics continue to shift.

A number of individuals and organizations, including civil rights activists,¹⁰⁷ voting rights advocates,¹⁰⁸ and public defenders offices,¹⁰⁹ provide a range of services and advocacy tools to ex-offenders to help them regain their voting rights. In Virginia, the Advancement Project, a voting rights organization, has an example of a multi-pronged campaign to both advocate for more automatic rights restoration for ex-offenders who have completed their sentences, and also provide direct services to ex-offenders

107. Jotaka Eaddy, *Virginia Restores Voting Rights for Returning Citizens*, NAACP (May 29, 2013), <https://donate.naacp.org/blog/entry/virginia-restores-voting-rights-for-returning-citizens>.

108. Advancement Project, *Rights Restoration*, <http://www.advancementproject.org/issues/voting-rights-restoration> (last visited Sept. 26, 2013).

109. Miami Dade Public Defender, *Miami Dade Public Defender Martinez Honored by the Florida Rights Restoration Coalition for the "Redemption Project,"* http://www.pdmiami.com/FL_Rights_Restoration_Coalition.htm (last visited Sept. 24, 2013).

seeking to have their voting rights restored.¹¹⁰

Such efforts should be scaled up to cover additional states to expand rights restoration. It is crucial, in those advocacy efforts, to lift up the voices of formerly incarcerated women. Voting rights, and felon disenfranchisement in particular, is often gendered as a male issue and framed as only affecting men. With the massive growth of the female prison population, however, it is crucial that women's voices are heard. Women's rights groups, and in particular reproductive justice groups, are well poised to amplify the voices of women in these efforts, and can be vital partners in the effort to restore rights.

B. Human Rights Documentation

Human rights violations, including reproductive oppression, within prisons is woefully under-documented. Justice Now's human rights documentation of the California prison system was a crucial first step to understanding the scope of the problem of reproductive oppression within prison.¹¹¹ Without documentation, it is difficult to conceptualize the scope of the problem, much less have productive discourse around remedying it. To the extent that prison and jail systems in other states are woefully understudied, it is crucial to obtain more information from prisoners on a state-by-state basis.

While organizations such as the American Civil Liberties Union,¹¹² the National Women's Law Center, and the Rebecca Project for Human Rights¹¹³ have all surveyed the state of the law in each state on a number of crucial measures, the work should not stop there. Per the discussion of unconscious bias above,¹¹⁴ not all forms of reproductive oppression are necessarily written into law or administrative regulations. For many prisoners, the human rights violations that they experience are due to informal policy decisions made by health care providers,¹¹⁵ or occur merely because there are no delineated prohibitions *against* such action.

110. Advancement Project, *supra* note 108.

111. See Human Rights Program at Justice Now, *Prisons as a Tool of Reproductive Oppression*, 5 STAN. J. C.R. & C.L. 309, 310-311 (2009).

112. AMERICAN CIVIL LIBERTIES UNION, THE SHACKLING OF PREGNANT WOMEN & GIRLS IN U.S. PRISONS, JAILS & YOUTH DETENTION CENTERS (2012), available at <http://www.aclu.org/womens-rights/aclu-briefing-paper-shackling-pregnant-women-girls-us-prisons-jails-youth-detention>; AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, REPRODUCTIVE HEALTH LOCKED UP: AN EXAMINATION OF PENNSYLVANIA JAIL POLICIES (2012).

113. THE REBECCA PROJECT, *supra* note 95.

114. See *supra* Part II.B.

115. See Johnson, *supra* note 87.

Incarcerated individuals may fear retaliation if they report such violations while they are imprisoned because they are already under such high levels of surveillance. As a result, it is crucial for advocates from non-profit organizations to document, thus ensuring more accurate reporting.

C. Research Support

There is a shortfall in knowledge and statistics both on the number of women and the number of women of color who are affected by felony disenfranchisement. A 2002 study by Chris Uggen and Jeff Manza found that felony disenfranchisement has resulted in a number of changed election outcomes—including the outcome of the 2000 Presidential election—and changed the outcomes of at least seven Senate races since 1978.¹¹⁶ It is essential to have analysis that speaks specifically to women and how their disenfranchisement would affect elections. Their turnout rates differ substantially from men's, as do their voting patterns. As a result, it would be beneficial to have findings specific to women and women of color to document the precise impact of disenfranchisement through felony convictions.

CONCLUSION

Women's votes matter. The 2012 election cycle made that decisively clear. It is essential to look at not only which women's votes made the difference, but also which women had no ability to vote at all. Women of color stand at the center of both growing political power and increasing levels of disenfranchisement. By focusing on that intersection, I hope to raise up their experiences as a means to ensure that we protect not only their crucial votes, but also the ability of all people to vote.

116. Uggen & Manza, *supra* note 48, at 789-90.