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Punishment and Prejudice: Reproductive Coercion in Immigration and Customs Enforcement Detention Centers

Inka Skłodowska Boehm

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PUNISHMENT AND PREJUDICE: REPRODUCTIVE COERCION IN IMMIGRATION AND CUSTOMS ENFORCEMENT DETENTION CENTERS

INKA SKŁODOWSKA BOEHM*

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I. INTRODUCTION

Pauline Binam arrived in the United States from Cameroon as a toddler, with no notion of the dangers her new home had in store.¹ At twenty-eight years old, Pauline found herself separated from her daughter and awaiting deportation in the Irwin County Detention Center in Ocilla, Georgia.² Pauline consented to what she believed was a minor procedure after suffering from irregular menstrual bleeding, an ailment likely triggered by her two-year confinement.³ Unbeknownst to Pauline, the doctor removed one of her fallopian tubes, barring her ability to give birth to more children.⁴ A year later, Pauline came forward following a whistleblower report by former Irwin facility nurse, Dawn Wooten.⁵ Wooten alleged serious medical

1. See Nicole Narea, *A Woman in ICE Detention Says Her Fallopian Tube Was Removed Without Her Consent*, VOX (Sep. 17, 2020, 12:40 PM), <https://www.vox.com/2020/9/17/21440001/ice-hysterectomies-whistleblower-irwin-fallopian> (describing Pauline’s story in conjunction with the whistleblower report by nurse Dawn Wooten alleging that a doctor in the U.S. Immigration and Customs Enforcement Detention Facility performed a disturbing number of hysterectomies without clear consent) [hereinafter “ICE”].

2. See *id.* (noting that Pauline’s daughter is a U.S. citizen).

3. See *id.* (describing that the consented-to surgery should have been limited to minor scraping of the uterine lining).

4. See *id.* (recognizing the impact of sterilization as a violation of bodily autonomy).

5. See Letter from Project South, et al. to the U.S. Dep’t of Homeland Sec., Immigr.

misconduct by the medical staff and guards at the Immigration and Customs Enforcement (“ICE”) facility, including an alarming rate of coerced hysterectomies conducted on people detained there.⁶

Black, Brown, and Indigenous peoples’ bodies continue to be regulated, policed, and violated by the U.S. government.⁷ The U.S. Department of Justice requires both prisons and immigration detention facilities to provide detainees with adequate healthcare.⁸ These services must also include reproductive care.⁹ By neglecting to do so, these institutions demonstrate deliberate indifference towards the needs of people under their care.¹⁰

Reproductive coercion involves behaviors that manipulate, impede, and interfere with an individual’s control over their reproductive health-related decisions.¹¹ In detention and incarceration contexts, where bodily autonomy

Customs & Enf’t, & the Irwin Cnty. Det. Ctr. (Sept. 14, 2020), <https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf> (advocating for detained immigrants at Irwin County Detention Center)[hereinafter Public Letter].

6. *See id.* A note on the language: as reproductive health restrictions and procedures impact individuals who do not necessarily identify with a specific gender, this article will predominantly use non-gendered language. Gendered language will only be used in quotes, statistics, or in acknowledging the disproportionate impact these policies have on specific groups, such as Black or Indigenous women. When gendered language is used, please remember that Transgender and Gender Non-Conforming individuals (TGNC) are included.

7. *See, e.g.*, Fact Sheet, Nat’l P’ship for Women and Families, Past as Present: America’s Sordid History of Medical Reproductive Abuse and Experimentation (Oct. 2020), <https://www.nationalpartnership.org/our-work/resources/health-care/past-as-present-americas-sordid-history-of-medical-reproductive-abuse-and-experimentation.pdf> (listing abuses such as the forced sterilizations of institutionalized women with disabilities who were primarily Black, Latina, or Indigenous).

8. *See* 28 C.F.R. §§ 551.20-551.24 (2017) (mandating incarcerated individuals have access to reproductive healthcare).

9. *See id.* (mandating incarcerated individuals have access to reproductive healthcare); *see also* U.S. DEP’T OF JUSTICE, FEMALE OFFENDER MANUAL 3 (2018), https://www.bop.gov/policy/progstat/5200.02_cn1.pdf (requiring incarcerated individuals’ access to obstetrician and gynecological services, including birth control).

10. *See* *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976) (holding prison officials’ “deliberate indifference” to an incarcerated individual’s serious illness or injury constitutes cruel and unusual punishment and notes that the individual must solely rely on prison officials to treat medical needs) [hereinafter “deliberate indifference standard”].

11. *See generally* Karen T. Grace & Jocelyn C. Anderson, *Reproductive Coercion: A Systematic Review*, 19 TRAUMA, VIOLENCE, & ABUSE 371, 371-72 (2018) (defining reproductive coercion). Note: while originating in cases of intimate partner violence, both individuals and institutions can perpetuate reproductive coercion.

is already limited, reproductive coercion is cruel and unusual punishment.¹² Pauline's sterilization procedure stripped her of autonomous decision-making regarding having biological children.¹³ Meanwhile, the Supreme Court has not declared that forced sterilizations are unconstitutional, nor has the Court found these procedures to be punitive in nature.¹⁴

This Comment argues that the punitive nature of reproductive coercion requires consideration under the Eighth Amendment's framework. Part II describes the racist history of reproductive coercion in confinement in the United States.¹⁵ Part II details current practices and standards of healthcare in detention, the constitutional framework for reproductive freedoms, and the landmark case, *Skinner v. Oklahoma*.¹⁶ Part III argues that coercive sterilization constitutes punishment and, because of this, lawmakers must analyze it under the Eighth Amendment of the U.S. Constitution.¹⁷ Part III further asserts that reproductive coercion in an immigration detention context amounts to eugenics.¹⁸ Part IV recommends an elevated standard of consent and suggests eliminating constraints to reproductive care in detention.¹⁹ Part IV additionally describes proposed legislation as a vehicle for such change.²⁰ Part V reiterates that coercive sterilization procedures are inherently punitive and that individuals in immigration detention must be protected under the Eighth Amendment.²¹

12. See generally OHCHR ET AL., ELIMINATING FORCED, COERCIVE AND OTHERWISE INVOLUNTARY STERILIZATION: AN INTERAGENCY STATEMENT at 1-7, 9-15(2014) (stating that while sterilization is a method of contraception that should be accessible, sterilization without informed consent is recognized by multiple human rights bodies as cruel and inhumane punishment).

13. See, e.g., Narea, *supra* note 1 (describing impact of these procedures).

14. See generally Kimberly Manas, *Could Forced Sterilization Still be Legal in the US?*, LEGAL PULSE, BLOG BLOG (Oct. 15, 2020), <https://lawreview.syr.edu/could-forced-sterilization-still-be-legal-in-the-us/> (analyzing current laws indicating that the legality of forced sterilizations has not been overturned).

15. See *infra* Part II (relating the history of coercive sterilization in prisons, immigrant detention centers, and psychiatric institutions).

16. See *infra* Part II (describing current standards, practices, and legal frameworks).

17. See *infra* Part III (arguing coercive sterilization is inherently punitive).

18. See *infra* Part III (arguing reproductive coercion is punitive and on the precipice of qualifying as eugenics).

19. See *infra* Part IV (recommending improved standards of care within both the ICE detention and prison contexts).

20. See *infra* Part IV (describing the EACH Woman Act and the Black Maternal Health Omnibus Act as supporting the fight for reproductive justice in detention contexts).

21. See *infra* Part V (arguing that under the Eighth Amendment, sterilizing

II. BACKGROUND

A. *Historical Reproductive Coercion and Medical Abuses*

The United States' history is riddled with medical abuses targeting marginalized communities.²² Since the country's genesis, Black women, in particular, have been exploited in pursuit of improving their white counterparts' lives.²³ For example, Dr. James Marion Sims, the "father of modern gynecology," developed his surgical techniques by experimenting on enslaved Black women without anesthesia.²⁴ Additionally, researchers used women from one of Puerto Rico's housing projects to develop the first oral contraceptive pill without informing them of the full risks.²⁵

The U.S. has historically used coercive sterilization to target people of color and immigrants.²⁶ Due to a lack of official records, it is difficult to ascertain the precise number of Indigenous people who the Indian Health Service sterilized.²⁷ Still, one organization estimates a rate almost three times that of white women.²⁸ Multiple state legislatures proposed policies involving mandatory sterilization of people relying on government assistance programs with "too many" children.²⁹ Residents at training hospitals practiced hysterectomies on financially vulnerable Black American

individuals in detention facilities is unconstitutional).

22. See NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 7 (listing medical abuses such as early experimentation on enslaved Black women and the forced sterilizations of institutionalized women with disabilities who were mostly Black, Latina, or Indigenous).

23. See generally HARRIET A. WASHINGTON, *MEDICAL APARTHEID: A DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* 1, 63-5 (2008) (describing the racist origins of gynecology); see also DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE REPRODUCTION, AND THE MEANING OF LIBERTY*, 4-5, 19 (1998) (reporting the systemic abuses suffered by Black people through a reproductive justice lens).

24. See *id.* at 65 (detailing Dr. Sims' performance of experimental surgeries on Black women without anesthesia).

25. See *The Puerto Rico Pill Trials*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/pill-puerto-rico-pill-trials/> (last visited Jan. 18, 2021) (noting the lack of fully informed consent).

26. See generally WASHINGTON, *supra* note 23, at 202-13 (describing the history of reproductive coercion targeting Black people).

27. See LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* 50 (2017) (showing that the Indian Health Service did not keep complete records of sterilization).

28. See *id.* (referencing findings of the Native Organization, Women of All Red Nations, as the Indian Health Service did not keep complete records).

29. See *id.* at 50-51 (noting that most of the individuals in this demographic were African American, Puerto Rican, or Mexican).

and Puerto Rican women who only had “minimal indications” of gynecological problems.³⁰ Instances of coercive acts targeting certain socioeconomic and racial groups continue to this day, albeit often hidden away from the public in prisons, detention centers, and mental health institutions.³¹

B. *The Legacy of Buck v. Bell & Institutionalization*

“Three generations of imbeciles are enough,” wrote Justice Oliver Wendell Holmes in the 1927 decision of *Buck v. Bell*, holding that the forced sterilization of “feeble-minded” Carrie Buck was constitutional.³² Those six words promoted the ongoing eugenics movement that would continue well into the 20th century and strip at least 70,000 U.S. citizens of their reproductive autonomy.³³ Officials do not always tell patients they will be sterilized; thus, the exact number of individuals impacted by these eugenicist policies is indeterminable.³⁴

Carrie Buck was a decent student until her foster family removed her from school so she could help around the house.³⁵ An unwanted pregnancy prompted the family to commit her to the Virginia State Colony for Epileptics and Feeble-Minded.³⁶ The colony’s superintendent selected her as someone with alleged hereditary “feeblemindedness” to test the constitutionality of Virginia’s sterilization statute.³⁷ Buck’s defense argued the Fourteenth Amendment Due Process Clause protected her from drastic

30. *See id.* at 51 (highlighting the danger of this practice).

31. *See generally* Rachel Roth & Sara L. Ainsworth, “If They Hand You A Paper, You Sign It”: A Call to End the Sterilization of Women in Prison, 26 HASTINGS WOMEN’S L.J. 7, 8-10 (2015) (arguing that the inherently coercive environment in prisons mandates a higher standard of consent for sterilizations).

32. *See Buck v. Bell*, 274 U.S. 200, 205-07 (1927) (holding the state may sterilize an inmate the state considered “feeble-minded.”)

33. *See Fresh Air: The Supreme Court Ruling That Led to 70,000 Forced Sterilizations*, NPR (Mar. 7, 2016), <https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations> (interviewing Adam Cohen, author of *Imbeciles*, discussing the long-lasting impact of *Buck v. Bell*).

34. *See id.* (reiterating the legacy of U.S. eugenics policies).

35. *See* J. David Smith, *Buck, Carrie (1906-1983)*, ENCYCLOPEDIA VIRGINIA, <https://encyclopediaofvirginia.org/entries/buck-carrie-1906-1983/> (last visited July 23, 2021) (describing Carrie Buck’s life preceding the trial).

36. *See id.* (noting that Carrie, like her mother, was institutionalized under terms that have since lost validity).

37. *See id.* (noting the sterilization law understood incompetence, alcoholism, promiscuity, among other ‘traits’ as being hereditary); *see also Buck*, 274 U.S. at 206.

restrictions in her right to bodily autonomy.³⁸ The Court supported the superintendent's argument that the multi-step process afforded Buck with all the Due Process she was entitled to.³⁹ Justice Holmes emphasized that other citizens sacrificed more for public welfare and that preventing future "imbeciles" from "sap[ping]" the State's resources is like getting a flu shot.⁴⁰ While Carrie Buck was white, the vast majority of people directly impacted by her case to this day are Black people.⁴¹

Bolstered by the Supreme Court's decision, over half the country implemented sterilization laws authorizing and encouraging medical officials to sterilize patients with hereditary mental ailments.⁴² These laws were often intentionally open-ended to allow room for interpretation, creating a legal mechanism by which medical officials could target anyone deemed unfit for societal norms and standards.⁴³ Given broad discretion, California psychiatric institution superintendents sterilized 20,000 patients, a third of all sterilizations in the U.S. at the time.⁴⁴ Historian Alexandra Minna Stern, who researches the systemic nature of California's sterilizations, suspects most Californian patients were of "Hispanic heritage."⁴⁵

1. Sterilizations and Obtaining Consent in Prisons

Prior to 1942, states had free reign regarding sterilization as a form of

38. *See Buck*, 274 U.S. at 201 (laying out Buck's legal argument).

39. *See id.* at 207 (stating that "so far as procedure is concerned the rights of the patient are most carefully considered . . . there is no doubt that in that respect the plaintiff in error has had due process of law").

40. *See id.* (stating "[t]he principle [sustaining] compulsory vaccination is broad enough to cover cutting the Fallopian tubes").

41. *See WASHINGTON*, *supra* note 23, at 203 (showing that by 1983, 43% of women sterilized in federally funded family planning programs were Black, despite Black women being only 12% of the U.S. population).

42. *See generally* Rob Wilson, *USA: State Sterilization Laws*, EUGENICS ARCHIVE, <https://eugenicsarchive.ca/discover/tree/535d39a37095aa00000000f8> (last visited July 23, 2021) (listing sterilization laws enacted in over thirty states).

43. *See generally* Sarah Zhang, *A Long-Lost Data Trove Uncovers California's Sterilization Program*, THE ATLANTIC (Jan. 3, 2017), <https://www.theatlantic.com/health/archive/2017/01/california-sterilization-records/511718/> (referencing the standard of "improv[ing] [patients'] 'physical, mental, or moral condition'" and how it was applied to anyone considered "mentally ill, handicapped, sexually deviant, criminal").

44. *See id.* (reporting California sterilization statistics).

45. *See id.* (quoting historian Alexandra M. Stern and discussing efforts to determine the precise proportions of Hispanic patients to non-Hispanic patients).

criminal punishment.⁴⁶ *Buck v. Bell* gave states the green light to control the populations they claimed ‘undesirable’ and quickly extended their sterilization programs within prisons.⁴⁷ In 1935, Oklahoma enacted the Habitual Criminal Sterilization Act, allowing punitive sterilization of any individual convicted for a specific classification of crimes in either Oklahoma or any other state.⁴⁸

After the first would-be subject of this new act escaped prison, Oklahoma’s attorney general filed for the sterilization of Jack Skinner, a Black inmate, under the Oklahoma Act.⁴⁹ Skinner’s lawyers appealed the decision under the Equal Protection Clause of the Fourteenth Amendment, but the Supreme Court of Oklahoma upheld the ruling.⁵⁰ Granting certiorari, the U.S. Supreme Court held that compulsory sterilization laws are subject to strict scrutiny, as the right to procreation is fundamental.⁵¹ Justice William O. Douglas emphasized the inherent dangers of allowing such laws to stand, writing “[t]he power to sterilize . . . can cause races or types which are inimical to the dominant group to wither and disappear.”⁵² Justice Douglas reemphasized that equal protection of the law applies regardless of one’s identity.⁵³

Despite the monumental ruling in *Skinner*, the criminal justice system continues to weaponize sterilizations against incarcerated populations.⁵⁴ In addition to forced sterilizations in state prisons, some state legislatures have rolled out new parole requirements involving the chemical castration of certain classes of sex offenders.⁵⁵ Several sterilization procedures are used

46. See generally *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942) (holding the Habitual Criminal Sterilization Act violated the Equal Protection Clause of the Fourteenth Amendment and referencing “undesirable offspring”).

47. See *id.* at 538 (noting the Court’s view on who is “undesirable.”).

48. See *id.* at 536 (citing to the Habitual Criminal Sterilization Act).

49. See Rachel Gur-Arie, *Skinner v. Oklahoma (1942)*, THE EMBRYO PROJECT ENCYCLOPEDIA (Aug. 27, 2016), <https://embryo.asu.edu/handle/10776/11350> (providing more in-depth factual background on *Skinner*).

50. See *id.* (describing *Skinner*’s procedural history).

51. See *Skinner*, 316 U.S. at 541 (holding that sterilization laws demand strict scrutiny “lest unwittingly or otherwise invidious discriminations are made”).

52. See *id.* (establishing the right to procreate as fundamental).

53. See *id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

54. See, e.g., BELLY OF THE BEAST (ITVS & Idle Wild Films 2020) (detailing systemic abuses in California women’s prisons, including coercive sterilizations despite banning the practice in the 1970s).

55. See generally Marisa Iati, *Alabama Approves ‘Chemical Castration’ Bill for Some Sex Offenders*, THE WASHINGTON POST (June 11, 2019), <https://www.washingtonpost.com/health/2019/06/11/alabama-chemical-castration-bill/>

on individuals with uteri: tubal ligation involves closing the fallopian tubes.⁵⁶ At the same time, hysterectomies require the complete removal of the uterus.⁵⁷ Both procedures are permanent forms of birth control.⁵⁸ Vasectomies are performed on people with a Y chromosome and are generally reversible.⁵⁹

Chemical castration procedures involving anaphrodisiac drugs are used on individuals assigned male at birth to reduce sexual activity and are reversible.⁶⁰ An irreversible medical procedure with long-term consequences, like a hysterectomy, requires informed and meaningful consent without outside influence.⁶¹ For this reason, federal law prohibits forced sterilizations as birth control on any individual under a civil or criminal statute in a correctional or rehabilitative facility.⁶² However, states and federal facilities continue to practice sterilizations on confined individuals.⁶³

2. Failings of Reproductive Healthcare in Immigration Detention Facilities

Although immigration detention is generally for civil detainees, these facilities operate like prisons.⁶⁴ Notably, the Trump administration changed the resources available to individuals detained by Immigration and Customs Enforcement (“ICE”) seeking reproductive healthcare.⁶⁵ While the laws of the United States should afford immigration detainees the same freedoms and protections as incarcerated individuals, the constraints on immigration

(describing § 15-22-27.4 of Alabama State Code requiring persons convicted of certain sex offenses to undergo chemical castration prior to parole).

56. Melissa C. Stöppler, *Birth Control: Surgical Sterilization*, MEDICINE NET, BLOG, https://www.medicinenet.com/surgical_sterilization/article.htm#tubal_ligation_tubes_tied (last visited Feb. 16, 2021) (describing sterilization procedures).

57. *See id.* (defining what hysterectomies are).

58. *See id.* (emphasizing procedures that have permanent effects).

59. *See id.* (differentiating chemical castration and vasectomies).

60. *See* Iati, *supra* note 55 (noting the reversibility of chemical castration).

61. *See* Roth & Ainsworth, *supra* note 31, at 10 (arguing the coercive nature of prison undermines meaningful consent).

62. *See* 42 C.F.R. §§ 50.202-207 (2007) (prohibiting sterilizations of institutionalized individuals).

63. *See* BELLY OF THE BEAST, *supra* note 54 (describing the difficulties of recording all incidents given the unwritten nature of prison state policy).

64. *See e.g.*, Meghan Koushik, Note, *Undue Burdens at the Border: Garza v. Azar and the Limits on Regulating the Right to Choose in the Immigration Detention Context*, 15 STAN. J. CIV. RTS. & CIV. LIBERTIES 253, 256 (2019) (describing the “functional equivalence between immigration detention and criminal incarceration”).

65. *See id.* at 264 (examining the Trump administration’s policy).

detainees often evoke the “undue burden” standard from *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁶⁶

ICE’s handling of immigration detainees’ reproductive care was spotlighted in the Summer of 2020, when a public complaint detailed concerns relating to coerced hysterectomies in a Georgia detention facility.⁶⁷ As a result, fourteen women from the facility filed a class-action suit, *Oldaker v. Giles*, against ICE officials and the Irwin County Detention Center.⁶⁸ The complaint documented the reports of mishandling of COVID-19 outbreaks in the center and numerous stories of individuals subjected to medical abuse and coercion.⁶⁹

C. Legal Frameworks for Reproductive Justice in Civil Detention and Criminal Incarceration

Forced sterilizations in ICE detention facilities are best understood through a reproductive justice framework, which goes beyond legal rights to access reproductive healthcare by considering the socioeconomic constraints on accessing those rights.⁷⁰ SisterSong Women of Color Reproductive Justice Collective defines reproductive justice as the fundamental right “to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities.”⁷¹ An example of an ongoing reproductive justice issue is the perpetuation of family separation.⁷²

66. See *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) (establishing the undue burden test and defining an undue burden as a provision that poses a substantial obstacle to obtaining an abortion); see also Koushik, *supra* note 64, at 275-80 (assessing the government’s claims in *Azar v. Garza*, 138 S. Ct. 1790 (2018) by using frameworks established in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Whole Women’s Health v. Hellerstedt*, 136 S.Ct. 2292 (2016)).

67. See Public Letter, *supra* note 5, at 18-20 (articulating concerns relating to the large number of hysterectomies performed in immigrant detention facilities).

68. See Petition for Writ of Habeas Corpus at 4-6, *Oldaker v. Giles et al* (No. 7:20-cv-00224-WLS-MSH), (M.D. Ga. Complaint filed Dec. 21, 2020 (filing a class action against individuals involved in medical malpractice at the Irwin County facility).

69. See *id.* at 21 (alleging that one petitioner was pressured into a hysterectomy that was only avoided due to a positive diagnosis for COVID-19).

70. See *Reproductive Justice*, SISTERSONG <https://www.sistersong.net/reproductive-justice/> (last visited July 23, 2021) (establishing the reproductive justice mission).

71. See *id.* (defining reproductive justice).

72. See Priscilla Alvarez & Kaitlan Collins, *Record Number of Kids Are in Border Patrol Custody and Shelter Beds Are Scarce, Documents Show*, CNN (Mar. 9, 2021, 7:58 AM) <https://www.cnn.com/2021/03/08/politics/children-us-border-patrol/index.html> (noting the Biden administration’s reopening of a facility for children).

The movement's foundation centers the voices of Black, Indigenous, and transgender people, who were left out of mainstream white women's rights lobbying efforts.⁷³ By centering these voices, reproductive justice aims to improve access to abortion care and other resources, including reproductive health care, sex education, domestic violence support, and adequate pregnancy care.⁷⁴ SisterSong and similar advocacy groups look at the power structures in the U.S. healthcare system that perpetuate this oppression and the legal remedies that provide relief.⁷⁵

Under international law and the U.S. Constitution, the U.S. government must protect an individual's right to express reproductive autonomy.⁷⁶ The Supreme Court acknowledged the right to family in *Skinner*, but lower courts do not consistently consider that right in civil detention contexts.⁷⁷ The U.S. has also ratified the Convention on the Prevention and Punishment of the Crime of Genocide, which prohibits any means intended to prevent births within a national, ethnic, or religious group.⁷⁸

The Trump administration worked against international standards by restricting abortion services through U.S.-supported international family planning groups.⁷⁹ The Biden administration overturned this so-called "Global Gag Rule" and called for a pro-reproductive autonomy platform, but the sentiment has yet to turn into action.⁸⁰ The Convention Against Genocide emphasizes family separation as a potential manifestation of genocidal intent, yet the United States continues to engage in family separation

73. See SISTERSONG, *supra* note 70 (discussing origins of the terminology).

74. See *id.* (analyzing how accessibility has consistently been an issue for marginalized communities).

75. See *id.* (describing SisterSong's mission).

76. See *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding the Due Process Clause of the Fourteenth Amendment provision of the right to privacy protects the right to choose whether to have an abortion); see also International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (establishing the right to family as fundamental regardless of identity).

77. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (establishing the fundamental right to reproduce).

78. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 (signed and ratified by the United States, including restrictive measures on childbirth as an element of genocide).

79. See *Memorandum on Protecting Women's Health at Home and Abroad*, THE WHITE HOUSE, (Jan. 28, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/memorandum-on-protecting-womens-health-at-home-and-abroad/> (describing the "Global Gag Rule" and overturning it).

80. See *id.* (listing the Biden administration's goals to improve reproductive health care access).

policies.⁸¹ Despite U.S. membership in the Convention Against Genocide and the international customary norms surrounding reproductive rights, federal courts appear to be at odds regarding incarcerated peoples' right to abortions.⁸²

Federal judicial courts identify the minimum protections and medical services officials must provide to incarcerated and detained individuals.⁸³ In *Monmouth County Correctional Institutional Inmates v. Lanzaro*, the Court of Appeals for the Third Circuit found that elective abortions qualify as a serious medical need, despite being "elective."⁸⁴ Denying pregnant individuals the right to abortion poses actual harm, as *Roe v. Wade* thoroughly details.⁸⁵

Together, the *Roe* and *Skinner* decisions create a constitutional standard of reproductive justice for incarcerated and detained individuals.⁸⁶ Despite the inability for courts to unanimously agree that denial of elective abortion automatically constitutes deliberate indifference, the Supreme Court opened

81. See Press Release, U.S. Dep't of Health & Hum. Servs., Carrizo Springs Influx Care Facility (March 23, 2021), <https://www.hhs.gov/programs/social-services/unaccompanied-children/carrizo-springs-temporary-influx-facility-update.html> (showing Biden administration policy regarding unaccompanied minors); see also 78 U.N.T.S. 277, *supra* note 76, at 3 (listing potential indicators of genocidal intent).

82. Compare *Roe v. Crawford*, 514 F.3d 789, 801 (8th Cir. 2008) (holding that the Fourteenth Amendment protects an incarcerated person's right to elective abortion, not the Eighth Amendment, with *Victoria W. v. Carpenter*, 369 F.3d 475, 485 (5th Cir. 2004) (holding that neither amendment protects an incarcerated person's right to abortion), and *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 346-47 (3d Cir. 1987) (holding both the Fourteenth and Eighth Amendments protect the right to abortion in incarceration).

83. See *Estelle*, 429 U.S. at 104 (holding the government is obligated to provide medical care for individuals in its carceral institutions); see also *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 534-35 (8th Cir. 2009) (holding indifference during an incarcerated person's labor and delivery or infliction of pain and discomfort violates the Eighth Amendment).

84. See *Monmouth Cnty. Corr. Institutional Inmates*, 834 F.2d at 349 (holding an elective abortion may still be considered a serious medical need when denial would render the inmate's condition "irreparable"); see also Avalon Johnson, Note, *Access to Elective Abortions for Female Prisoners Under the Eighth and Fourteenth Amendments*, 37 AM. J. L. & MED. 652, 663-64 (2011) (describing the circuit split regarding incarceration, abortion rights, and the Eighth Amendment).

85. See e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (listing physical, psychological, and financial harms relating to childbirth).

86. See *Monmouth Cnty. Corr. Institutional Inmates*, 834 F.2d at 349 (establishing the right to abortion does not diminish upon incarceration); see also *Roe*, 410 U.S. at 169 (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942) as one of "several decisions" establishing the right to family).

the door to analyzing reproductive issues through the Eighth Amendment.⁸⁷

1. *The Eighth Amendment*

The Eighth Amendment of the U.S. Constitution protects people in the criminal justice system from excessive bail and cruel and unusual punishment.⁸⁸ Court interpretations of what is cruel and unusual vary but adapt to “evolving standards of decency.”⁸⁹ To identify Eighth Amendment violations, courts use the “deliberate indifference” standard, which considers whether the individual had a serious medical need and whether the prison was deliberately indifferent to that need.⁹⁰

Immigration detention is seen as an administrative procedure under civil law, which poses difficulties when applying the Eighth Amendment.⁹¹ The Supreme Court has held the Eighth Amendment to apply in either civil or criminal cases, so long as a form of punishment is involved.⁹² The parallels between pretrial and civil immigration detainees suggest that noncitizens held for immigration law purposes are entitled to at least the bare minimum of Eighth Amendment protections.⁹³

2. *Due Process and Equal Protection in Immigration Detention*

The Fifth Amendment grants the right to Due Process, which protects an individual’s substantive and procedural rights undergoing a federal judicial

87. See Johnson, *supra* note 84, at 673-74 (outlining that given the risks of pregnancy, an incarcerated individual’s need for an elective abortion qualifies as a “serious medical need”).

88. *E.g.*, U.S. CONST. amend. VIII (alluding to the malleability of the amendment).

89. See, *e.g.*, Trop v. Dulles, 356 U.S. 86, 101-02 (1958) (holding denaturalization as punishment was cruel and unusual); see also, Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (eliminating death penalty for minors under evolving standards of decency).

90. See *Estelle*, 429 U.S. at 104-05 (establishing the two-prong test for deliberate indifference).

91. See generally Koushik, *supra* note 64, at 281 (detailing constitutional protections for those in ICE detention).

92. See *Austin v. United States*, 509 U.S. 602, 610 (1993) (holding the Eighth Amendment limits the government’s ability to punish, regardless of the civil or criminal context).

93. See, *e.g.*, Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000) (noting that while the Fifth Amendment protects civil detainees, they are still afforded Eighth Amendment protections); see generally Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L. J. 146, 165 (2020) (arguing that individuals held in private immigration detention are entitled to the same protections as those in federal detention).

proceeding.⁹⁴ The Fourteenth Amendment reaffirms this right under state law.⁹⁵ The implicit Equal Protection of the Fifth Amendment and its explicit Fourteenth Amendment counterpart form the basis of civil rights protections, as they require impartial governance.⁹⁶ While the government is still allowed to discriminate, it must first satisfy requirements of the equal protection analysis under strict scrutiny, intermediate scrutiny, or rational basis review.⁹⁷ An additional layer of protection is found in the *Bivens* doctrine, established in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, acts as a fail-safe for civilians seeking civil damages against federal agents who violated their Fourth, Fifth, or Eighth Amendment rights.⁹⁸

Under these constitutional provisions, courts agree that authorities should treat civil immigration detainees similarly to pretrial detainees.⁹⁹ The Ninth Circuit ruled that immigration detention centers should be held to an even higher standard.¹⁰⁰ The Supreme Court has evaded explicitly answering whether ICE detainees are persons protected by the Fifth and Fourteenth Amendments' rights to Due Process and Equal Protection.¹⁰¹ Still, implicit precedent points to at least some extension of these rights.¹⁰² Under the Equal Protection and Due Process clauses, ICE must provide its detainees

94. *E.g.*, U.S. CONST. amend. V (articulating "... nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law").

95. *E.g.*, U.S. CONST. amend. XIV (declaring "... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

96. *See id.* (noting the "equal protection of the laws").

97. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that the Fourteenth and Fifth Amendment apply to everyone within the territory, regardless of identity).

98. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (holding a federal agent may be sued for civil damages for actions committed through his role); *but see Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020) (indicating a shift away from this mechanism of holding federal officials accountable for constitutional violations).

99. *See Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000) (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)) (holding that a civil detainee is equivalent to a pretrial detainee, whose rights are considered under the Fifth Amendment).

100. *See, e.g.*, *Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004) (examining 'pre-punitive' confinement and holding that "purgatory cannot be worse than hell").

101. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (holding indefinite detention of a noncitizen raises serious Due Process concerns).

102. *See Jennings v. Rodriguez*, 138 S.Ct. 830, 864-67 (2018) (Breyer, J., dissenting) (applying the history of Due Process and its broad scope to civil immigration cases).

with adequate medical care, as mandated by the U.S. National Detention Standards for Non-Dedicated Facilities.¹⁰³ These guidelines call for informed consent and ensure accessible translation services, particularly for medical procedures.¹⁰⁴

D. Inherently Coercive Environments and Bodily Autonomy

Academics and activists have argued that prisons, detention centers, and other institutions in which government authorities directly control an individual are inherently coercive.¹⁰⁵ Cynthia Chandler, a reproductive justice advocate, cautions against a push for blanket reproductive healthcare, as certain structural loopholes may lead to state-sanctioned eugenics.¹⁰⁶ Some prison abolitionists, who purport that nothing can be consensual in confinement, echo Chandler's concerns.¹⁰⁷ Reformists' views differ as they aim to increase consent standards to avoid human rights abuses—such as sterilizations—but protect a person's right to abortion.¹⁰⁸ These opposing beliefs acknowledge that, at the bare minimum, voluntary and informed consent of invasive reproductive health procedures is necessary in carceral detention settings.¹⁰⁹

103. *See Plyler v. Doe*, 457 U.S. 202, 230 (1981) (holding individuals are granted equal protection and due process in the right to education context regardless of citizenship status); *see also* U.S. IMMIGR. & CUSTOMS ENF'T, 2019 NATIONAL DETENTION STANDARDS FOR NON-DEDICATED FACILITIES 112 (2019) (declaring medical care requirements in facilities that house solely ICE detainees as well as those that may house other populations).

104. *See id.* (requiring availability of translators).

105. *See, e.g.*, ABA Panel Discussion on *Belly of the Beast*, AMERICAN BAR ASSOCIATION (Feb. 4, 2021), https://www.americanbar.org/groups/diversity/racial_ethnic_justice/projects/bellyofthebeast/ (describing expert views on inherent coercion in carceral settings).

106. *See id.* (discussing Chandler's work in shedding light on the routine forced sterilizations in the California prison system).

107. *See id.* (elaborating on the prison abolitionist framework).

108. *See id.* (featuring attorney Cynthia Chandler describing reformism); *see also* *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269-70 (1990) (noting the importance of right to bodily autonomy and the nature of informed consent regarding non-resuscitation).

109. *See Belly of the Beast*, *supra* note 105 (advocating for long-term solutions combatting coercion).

III. ANALYSIS

A. Reproductive Coercion Constitutes Cruel and Unusual Punishment.

Prisons, detention centers, and other institutions in which government authorities control an individual are inherently coercive.¹¹⁰ These institutions exist solely to inhibit their charges' liberty to varying degrees.¹¹¹ With these power dynamics, individuals in these environments cannot escape reproductive coercion and abuse.¹¹²

Most courts only apply the Eighth Amendment's cruel and unusual punishment clause to punitive measures in an explicit criminal justice context.¹¹³ Immigration detention cases have evoked Eighth Amendment concerns through the Fifth and Fourteenth Amendments of the U.S. Constitution.¹¹⁴ While the Supreme Court refuses to grant blanket protections regarding immigrants' rights to Due Process, a slew of decisions rely on the implication that noncitizens are still granted some Due Process rights.¹¹⁵

The nature of coerced sterilization deprives individuals of their fundamental rights.¹¹⁶ Such a deprivation surely must be punitive when contextualized by the criminal justice process.¹¹⁷ The use of chemical

110. See generally *BELLY OF THE BEAST*, *supra* note 54 (contextualizing 'consent' in California prisons).

111. See *id.* (decrying how prisons uphold white supremacist structures by subjecting people of color, particularly Black individuals, to a continuous cycle of oppression).

112. See *id.* (showing the hurdles to seeking redress for forced sterilizations in prisons).

113. E.g., U.S. CONST. amend. VIII (stating "... nor cruel and unusual punishments inflicted"); see generally, *Padilla v. Kentucky*, 559 U.S. 356, 365-66 (2010) (linking deportation to punishment when resulting from a criminal conviction).

114. See generally *Petition for Writ of Habeas Corpus at 575, Oldaker*, (No. 7:20-cv-00224-WLS-MSH) (listing substantial risk of serious harm that could rise to level of an Eighth Amendment violation as a claim for relief).

115. Compare *Zadvydas*, 533 U.S. at 690 (noting that a "statute permitting indefinite detention of a [noncitizen] would raise a serious constitutional problem" and holding that "where detention's goal is no longer practically attainable" the government cannot perpetuate an individual's detention unless there is an alternative reason), *with* *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1963 (2020) (implying noncitizens who have spent a significant amount of time in the United States are afforded broader Due Process rights than those who are intercepted at ports of entry).

116. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (stating a forcibly sterilized individual is "forever deprived of a basic liberty").

117. See *id.* (although not explicitly stating that coerced sterilization is punitive, stating that the contested legislation's sole purpose is imposing sterilization as a punishment on certain criminal offenders).

castrations to lessen parole requirements shows states are all too aware of how punishment can consist of temporary procedures relating to reproductive autonomy.¹¹⁸ Incarceration, parole, and anything an individual endures post-sentencing are instruments of punishment, not rehabilitation, regardless of what these institutions claim.¹¹⁹ Punishment is all-encompassing and includes a range of circumstances such as having restricted freedom of movement and not watching one's children grow up.¹²⁰

The cruel and unusual standard is broad and describes extreme intrusions on human rights, excessive deprivation of a fundamental liberty, and punishments disproportionate to the crime.¹²¹ Punishment calls for diminished rights, not complete eradication.¹²² Constitutional protections still give incarcerated individuals certain guarantees relating to health and personhood.¹²³ These assurances of basic protections are judicial precedent and acknowledged in prison handbooks and federal standards alike.¹²⁴

While the quality of that care may be subjected to Eighth Amendment analysis under *Estelle v. Gamble*, medical malpractice in prisons does not immediately give plaintiffs a constitutional claim.¹²⁵ U.S. courts must apply the standard of deliberate indifference in addition to the test for medical malpractice.¹²⁶ Knowingly taking away a crucial medical service or

118. See generally Ala. Code §§ 15-22-27.4 (2019) (mandating chemical castration of parolees convicted of a sex offense involving a minor under the age of 13). Note: Alabama is one of a handful of states using chemical castration and similar procedures as a punitive measure or as an option to lessen parole requirements.

119. See, e.g., Mission Statement, FED. BUREAU OF PRISONS, https://www.bop.gov/about/agency/agency_pillars.jsp (last visited July 23, 2021) (describing the goal “to assist offenders in becoming law-abiding citizens”).

120. E.g., 18 U.S.C.A. § 3621 (West) (codifying types of punishment post-sentencing, specifically detailing imprisonment).

121. See, e.g., *Solem v. Helm*, 463 U.S. 277, 284 (1983) (holding the cruel and unusual punishment clause “prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed”).

122. See *id.* (proscribing limits on punishment).

123. See *Estelle*, 429 U.S. at 103 (establishing the government’s obligation to provide medical care to those punished by incarceration).

124. See, e.g., § 3621 (describing factors to be considered in imprisonment, including proximity to primary residence, access to substance abuse treatment, and other resources indicating prison officials must still treat those in their care as human beings).

125. See *Estelle*, 429 U.S. at 106 (stating that in order to have a constitutional claim, the plaintiff must establish “deliberate indifference”); see also *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (solidifying the standard of “deliberate indifference”).

126. See *Estelle*, 429 U.S. at 106 (establishing a minimum threshold of indifference); see also *Farmer*, 511 U.S. at 835 (establishing and reaffirming the deliberate indifference test).

infringing on a patient's ability to understand the nature of their condition and possible remedies must surely constitute deliberate indifference.¹²⁷

Stripping away the right to procreate infringes on a fundamental liberty and sense of personhood.¹²⁸ The established right to an elective abortion implies the freedom to choose whether to have children.¹²⁹ Sterilizations without consent remove all semblance of that choice and thus violate those constitutional freedoms and protections.¹³⁰

1. Despite Government Claims, Immigration Detention is More Akin to Carceral Punishment Than Pretrial Detention

While immigration policy shifts with each administration, the past few decades have shown an obvious criminalization of immigration.¹³¹ Through xenophobic rhetoric, particularly after the September 11, 2001 attacks, immigrants have been cast as criminals, threats, and a harm to society.¹³² The discourse surrounding immigration frequently conflates race and nationality, leading to subsequent "othering" of non-white U.S. citizens.¹³³ These individuals are targeted by the same microaggressions and violence

127. See *Estelle*, 429 U.S. at 106 (establishing deliberate indifference); see also Petition for Writ of Habeas Corpus at 17, *Oldaker*, (No. 7:20-cv-00224-WLS-MSH) (showing interference on access to informed consent by not providing translation services in doctor-patient conversations).

128. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (establishing the right to procreate as fundamental and subject to strict scrutiny).

129. See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (establishing the right to privacy includes other fundamental personal rights such as right to family and to contraception).

130. See *id.* at 114 (stating the Due Process Clause of the Fourteenth Amendment protects state action against an individual's right to terminate their pregnancy).

131. Compare The Refugee Assistance Act of 1980, 18 U.S.C.A. §1522 (1997) (noting deportation, removal, and incarceration as only for a specific group of Cuban refugees), with The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751, 100 Stat. 3207, 3247 (1986) (amending the Immigration & Naturalization Act ("INA") by explicitly stating that law enforcement has the power to detain any individual it suspects of violating immigration laws, broadening reasons immigrants may be detained or incarcerated).

132. See Homeland Security Act of 2002, Pub. L. 107-296, §441, 116 Stat. 2135 (2002) (transferring immigration enforcement from the U.S. Department of Justice to the newly created Department of Homeland Security in the wake of 9/11 and adding tasks such as regulating border crossing movement, investigating immigration law violations, and detaining individuals awaiting court decisions on immigration status).

133. See e.g., *Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later*, U.S. DEPT' OF JUSTICE (Oct. 19, 2011) (describing xenophobia and racism following 9/11).

faced by immigrants.¹³⁴ The laws governing immigration reflect that perception and perpetuate the stigma, leading to a vicious cycle of harmful policies.¹³⁵ While the Trump administration did not create these policies on its own, it exacerbated the criminal-immigration law convergence that the Biden administration has already adapted less brazenly.¹³⁶

As immigration law becomes more shaded with criminal law undertones, civil immigration detention closely resembles criminal incarceration.¹³⁷ Pretrial detainees in criminal proceedings are protected from conditions that constitute punishment.¹³⁸ Conditions qualify as punitive when a court determines whether a restriction is simply a means to some legitimate governmental end other than punishment.¹³⁹

Of course, even in the non-immigration context, jails continue to enact policies that appear punitive but are written off by courts as in pursuit of a legitimate interest under the *Bell* standard.¹⁴⁰ Concerns such as overcrowding are shared by both pretrial detainees and criminally incarcerated individuals, but the standard of protection afforded under the Eighth Amendment only applies to the latter.¹⁴¹ If individuals are going to be held in detention throughout their immigration proceedings, at the bare minimum, they require the same protections afforded people subject to

134. See *id.* (listing examples of hate crimes and incidents targeting people perceived to practice Islam or be of Arab, Middle Eastern, or South Asian origin).

135. See *e.g.*, *Arizona v. United States*, 567 U.S. 387, 411-15 (2012) (holding that a provision of an otherwise unconstitutional Arizona state legislation authorizing law enforcement asking lawfully detained individuals about their status was permissible).

136. See *e.g.*, *Make the Road N.Y. v. Wolf*, 962 F.3d 612, 620 (D.C. Cir. 2020) (describing the Trump administration's expedited removal procedure and the procedural history of the injunction).

137. See *Arizona*, 567 U.S. at 397 (highlighting the increased powers of ICE in criminal investigation).

138. See *Bell v. Wolfish*, 441 U.S. 520, 535 (1970) (protecting pre-trial criminal procedure detainees under Due Process from criminal punishment like confinement).

139. See *id.* at 539 (stating that "if a restriction or condition is not reasonably related to a legitimate goal -- if it is arbitrary or purposeless -- a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.").

140. See, *e.g.*, *Block v. Rutherford*, 468 U.S. 576, 588-90 (1984) (using the *Bell* standard to determine pre-trial detainees in jails have no constitutional right to contact visits and to observe cell searches as security and contraband concerns are a legitimate interest).

141. Compare *Brown v. Plata*, 563 U.S. 493, 499-502, 545 (2011) (calling for a reduction in prison crowding in light of Eighth Amendment concerns), with *Buck v. Bell*, 274 U.S. 200, 207 (1927) (noting that while extreme overcrowding may raise concerns, there is no inherent protection against overcrowding in the Due Process clause).

criminal incarceration.¹⁴²

The Eighth Amendment grants incarcerated individuals heightened protections despite courts claiming pretrial detainees and civil immigration detainees have higher protection standards in their favor.¹⁴³ The distinction between criminal incarceration and pretrial or civil detention hinges on what is considered punishment.¹⁴⁴ As immigration detention has grown more intertwined with criminal incarceration, individuals in civil immigration detention must receive the same protection standards, especially where punishment is the only purpose.¹⁴⁵

2. *By Eliminating a Key Facet of Reproductive Autonomy, States are Punishing Civil Detainees Without Legitimate Government Objectives*

The state's interest in impeding on reproductive autonomy of non-confined individuals is related to ensuring the pregnant person's health and safety and preserving potential life at later stages of pregnancy.¹⁴⁶ Court precedent generally calls for strict scrutiny of state interests restricting abortion access.¹⁴⁷ While not necessarily subject to strict scrutiny, the state's interest in incarceration is prevention and punishment of crime.¹⁴⁸

142. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 865-66 (2018) (Breyer, J., dissenting) (noting the similar conditions between ICE facilities and prisons).

143. See *Brown*, 563 U.S. at 545 (protecting criminally incarcerated individuals under the Eighth Amendment); see also *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000) (equating civil immigration and pretrial detention and noting Fifth Amendment protections).

144. See *Punishment*, Black's Law Dictionary (11th ed. 2019) (defining punishment as a sanction – such as a fine, penalty, confinement, or loss of property, right, or privilege – assessed against a person who has violated the law”).

145. Cf. *Arizona v. United States*, 567 U.S. 387, 397 (2012) (emphasizing ICE's increased powers of criminal investigation relating to immigration law violations). Note: As this comment is focused on immigration detention conditions, the aim is to highlight those concerns, not to overshadow the legitimate need for clearer protections in the criminal pretrial detention context, which is worthy of an article of its own right.

146. See *Roe v. Wade*, 410 U.S. 113, 150 (1973) (stating that “[i]n assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone”).

147. See *id.* at 170 (questioning whether state interests can survive the ‘particularly careful scrutiny’ of the Fourteenth Amendment); but see *Box v. Planned Parenthood of Ind. & Ky, Inc.*, 139 S. Ct. 1780, 1782 (2019) (using rational basis review in considering an abortion restriction, indicating the Court's growing leniency in defending abortion rights).

148. *Contra*, Samuel R. Gross et al., *Race and Wrongful Convictions in the United States*, National Registry of Exonerations, 1 (U. of Cal. Irvine) (2017) (describing the

The courts and the U.S. Department of Homeland Security state that civil immigration detention ensures an individual goes through relevant immigration proceedings, such as deportation hearings or general compliance with an immigration judge's orders.¹⁴⁹ Despite the Due Process clause protecting people from anything resembling punishment in a civil detention context, civil detainees are almost universally treated to the same conditions as their criminally incarcerated counterparts.¹⁵⁰ The Eighth Amendment's protection against disproportionate punishment calls into question what state interest is being served through reproductive coercion.¹⁵¹

By cultivating a coercive environment in immigration detention, detention officials dehumanize individuals under their care.¹⁵² Furthermore, without the guaranteed presence of a medical translator, detained patients cannot give their informed consent.¹⁵³ Officials refusing translation services discriminate against and target immigrants who do not speak English, are economically disadvantaged, and are not white.¹⁵⁴ The white supremacist structures of our immigration systems prefer white English-speaking immigrants who can put money directly into the U.S. economy.¹⁵⁵

The eugenic undertones of *Buck v. Bell* declare forced sterilizations to be a necessary sacrifice to improve quality of life, reduce reliance on welfare,

all-too-common occurrence of innocent people, particularly Black men being incarcerated despite not having committed an offense).

149. See, e.g., *United States v. Salerno*, 481 U.S. 739, 741 (1987) (describing the purposes of detaining someone while undergoing immigration proceedings); see also, *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (holding that the sentencing of noncitizens to hard labor despite committing no crime violated due process and posed Eighth Amendment concerns).

150. See U.S. IMMIGR. & CUSTOMS ENF'T, *Performance Based National Detention Standards*, §7.5, at 472 (2011) (defining Non-Dedicated Facilities as institutions that house both ICE detainees and general inmate populations).

151. See generally *Solem v. Helm*, 463 U.S. 277, 284 (1983) (finding punishment must not be disproportionate to the crime).

152. See *Koushik*, *supra* note 64, at 309-10 (discussing inhumane conditions and the dehumanizing process of detention).

153. See Petition for Writ of Habeas Corpus at 11, *Oldaker*, (No. 7:20-cv-00224-WLS-MSH) (noting translators were not present despite patients' requests).

154. Cf. *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942) (referencing "undesirable offspring," and "inheritability of criminal traits").

155. Cf. Elizabeth Oh, American Immigration Laws Have Always Been About Preserving Whiteness, *NEW AMERICA* (Sept. 22, 2020), <https://www.newamerica.org/weekly/american-immigration-laws-have-always-been-about-preserving-whiteness/> (interviewing NYU law professor Alina Das on the racism of immigration law from the Chinese Exclusion Act to modern deportation structures).

and “prevent our being swamped with incompetence.”¹⁵⁶ White, wealthy, natural-born citizens have routinely used reproductive coercion to eliminate populations they view as “socially undesirable,” whether that meant economically disadvantaged individuals, Black communities, people with mental illnesses, or—as seen in the Irwin County Detention Center—immigrants.¹⁵⁷ *Buck* allowed state officials to deprive generations of underrepresented groups of their fundamental rights as punishment for being not white, not wealthy, and not born in the United States.¹⁵⁸

3. *Skinner’s Protections Highlight the Punitive Nature of Forced Sterilizations*

Justice Douglas emphasized an essential tenet of reproductive justice: the right to have a family or not to have a family is a fundamental human right.¹⁵⁹ A permanent deprivation of that right impacts a person long after they are released.¹⁶⁰ Given little recourse, survivors of these systemic sterilizations pick up the pieces on their own.¹⁶¹ Formerly incarcerated individuals already suffer extended punishment through felon disenfranchisement, unemployment, and familial strain.¹⁶² Sterilizations without consent add further injury to a constant stream of punishment for formerly incarcerated populations.¹⁶³

Skinner marks one of the first occasions where the Supreme Court

156. See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (describing what purpose forced sterilizations serve).

157. See WASHINGTON, *supra* note 23, at 202-13 (describing systemic abuses targeting the reproductive freedom of Black, Indigenous, and immigrant individuals); see also *Skinner*, 316 U.S. at 538 (referencing a desire to eliminate the chance of “socially undesirable offspring”).

158. See, e.g., Petition for Writ of Habeas Corpus at 103-104, *Oldaker*, (No. 7:20-cv-00224-WLS-MSH) (showing a legacy of systemic targeting underrepresented groups); see also *Buck*, 274 U.S. at 208 (allowing forced sterilizations in non-criminal confinement).

159. See *Skinner*, 316 U.S. at 536 (describing the case as “touch[ing] on a sensitive and important area of human rights”).

160. See *id.* (discussing the importance of right to family).

161. See generally BELLY OF THE BEAST, *supra* note 54 (telling stories of individuals reintegrating into society following release).

162. See generally *Collateral Consequences*, THE SENTENCING PROJECT (<https://www.sentencingproject.org/issues/collateral-consequences/> (last accessed Feb. 8, 2021) (stating 1.4 million children have a parent in prison and felony disenfranchisement laws barred approximately 5.2 million individuals from voting).

163. See generally *id.* (demonstrating the extent of the harm posed by mass incarceration).

recognized the right to family as fundamental and something that the state cannot infringe upon.¹⁶⁴ As part of the punitive element of sentences, prisons function to momentarily deprive an individual from enjoying their constitutional right to family.¹⁶⁵ Forced sterilizations erase any chance of someone exercising that right once their period of incarceration ends.¹⁶⁶

This long-term effect does not serve the state's alleged interest in ensuring people like Pauline Binam attend their deportation proceedings.¹⁶⁷ The point of these sterilizations is to punish individuals simply for existing in a country that does not want them by taking away a critical right.¹⁶⁸ In doing so, detention facility supervisors fail to provide the heightened protections owed in civil detention centers where the conditions are explicitly prohibited from being "designed to punish."¹⁶⁹

4. *Reproductive Coercion in Civil Detention Creates Punitive Conditions That Must be Analyzed Under the Eighth Amendment*

Despite their different classifications, the experiences of criminally incarcerated people and civilly detained people bear an uncanny resemblance to one another.¹⁷⁰ Both groups have an equal need for greater protections, yet those in civil confinement are not granted the substantive and procedural rights as their criminally incarcerated counterparts.¹⁷¹ Immigrants do not

164. See *Skinner*, 316 U.S. at 536 (holding that the right to family is fundamental); see also *Obergefell v. Hodges*, 576 U.S. 644, 665-6 (2015) and *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (both holding the right to marriage is fundamental regardless of the sex or race of your partner).

165. See 18 U.S.C.A § 3621 (West) (detailing imprisonment guidelines).

166. See generally *Skinner*, 316 U.S. at 541 (holding "[t]here is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury.").

167. See *United States v. Salerno*, 481 U.S. 739, 741 (1987) (reiterating the purpose of immigration detention); see also *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (holding an immigrant did not have effective counsel when he was not informed of the deportation risks associated with a guilty plea on a criminal charge).

168. See generally *Skinner*, 316 U.S. at 541 (stating "the power to sterilize" has devastating effects on entire groups).

169. See *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982) (distinguishing individuals in civil detention "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish").

170. See *Lyon v. U.S. Immigr. & Customs Enf't*, 171 F. Supp. 3d 961, 977 (N.D. Cal. 2016) (noting the overlap between carceral and civil detention conditions, including the frequent dual use a specific institution may have in holding both civil detainees and criminal incarceration detainees).

171. See, e.g., *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004) (stating there is no Sixth Amendment right to counsel in immigration hearings).

have the Sixth Amendment right to counsel, are not protected against retroactive changes in the law, and cannot seek a remedy through the Eighth Amendment.¹⁷²

Exemplifying how courts conflate immigration and criminal law, in *Padilla v. Kentucky*, the Supreme Court held that immigration removal proceedings were classified as civil, but deportation is “intimately related to the criminal process.”¹⁷³ Recognizing protections for immigrants under the Eighth Amendment would allow for accountability and remedies against constitutional torts.¹⁷⁴ Additionally, Due Process does not include the Eighth Amendment’s proportionality principles, which require examining whether a punishment with overly severe consequences fits the crime.¹⁷⁵

Forced sterilizations are a disproportionate punishment to any possible charge an individual in civil immigration detention may face.¹⁷⁶ The criminal incarceration context acknowledges certain rights are inherently restricted in confinement, either for security concerns, punitive reasoning, or a combination.¹⁷⁷ *Skinner* shows that removing reproductive autonomy, which serves no security interest, goes far beyond simple rights restrictions inherent within confinement.¹⁷⁸

Detention on its own serves government interests broader than punishment, which has led to a concerning precedent of letting recognized rights slide by the wayside.¹⁷⁹ The incomplete Due Process protections that

172. *See id.* (showing Sixth Amendment protections do not apply); *see also* *Harisiades v. Shaughnessy*, 342 U.S. 580, 593-94 (1952) (holding the Due Process clause protection against *ex post facto* laws does not apply in the immigration context).

173. *See Padilla*, 559 U.S. at 365 (holding that lawyers must warn clients of potential deportation because of a guilty plea).

174. *See* *Jefferis*, *supra* note 93, at 147 (calling for increasing remedies available to immigrants in private facilities).

175. *See* *Koushik*, *supra* note 64, at 283 (noting for a “. . . immigrants who face the severe consequences of deportation for minor criminal offenses, there is scant consideration of constitutional proportionality principles under the Eighth Amendment’s prohibition against cruel and unusual punishment.”).

176. *See* *Skinner v. Oklahoma*, 316 U.S. 535, 542-43 (1942) (holding criminally incarcerated individuals have the right not to be involuntarily sterilized); *cf.* *Youngberg v. Romeo*, 457 U.S. 307, 320-24 (holding a higher standard of rights for individuals in civil detention, including immigration, than those in criminal incarceration).

177. *See, e.g.,* *Overton v. Bazzetta*, 539 U.S. 126, 131-3 (2003) (finding the state interest of security, as well as the “very object” of confinement naturally lessened an incarcerated individual’s right to associate with family).

178. *See* *Skinner*, 316 U.S. at 538 (concluding forced sterilizations violated a fundamental right not lost in criminal incarceration).

179. *See* *Demore v. Kim*, 538 U.S. 510, 513, 528 (2003) (deciding detention prevents individuals undergoing removal proceedings from evading the law); *see also* *Reno v.*

lower courts have scraped together for civil immigration detainees do nothing to prevent cruel policies from being implemented, ignored, and perpetuated.¹⁸⁰

Both the deprivation of adequate reproductive healthcare and the destruction of reproductive autonomy meet the punishment threshold in a carceral context.¹⁸¹ Courts have conveniently avoided resolving the paradox of punishment in civil detention.¹⁸² However, if forced sterilizations are disproportionate punishment in the criminal incarceration context, it is clear they are disproportionate to immigration law violations.¹⁸³ Not only is reproductive coercion punitive, but if allowed to consider forced sterilizations in immigration detention under the Eighth Amendment, a court would likely find it cruel and unusual punishment.¹⁸⁴

B. Skinner's Failure to Explicitly Overturn Buck v. Bell Creates a Loophole for the Government to Practice Eugenics in Confinement Contexts

In *Skinner*, Justice Douglas writes, “[i]n evil or reckless hands [the power to sterilize] can cause races or types which are inimical to the dominant group

Flores, 507 U.S. 295, 303 (1993) (holding the detention of minors in immigration facilities is constitutional so long as the conditions are humane, and the purpose is not punitive).

180. *Compare* Ms. L. v. U.S. Immigr. & Customs Enf’t, 310 F. Supp. 3d 1133, 1149-50 (S.D. Cal 2018) (granting motion for class wide preliminary injunction on family separation policies as the Court found a valid Due Process claim), *with* Press Release, U.S. Dep’t of Health & Human Servs., *supra* note 81 (reopening a border facility for minors in immigration detention, showing family separation continues despite violations of Due Process).

181. *See Estelle*, 429 U.S. at 103-05 (holding that deliberate indifference regarding medical care can constitute an Eighth Amendment violation); *see also Skinner*, 316 U.S. at 541 (holding that procreation is a fundamental right that cannot be stripped away for punitive purposes).

182. *See Padilla v. Immigr. & Customs Enf’t*, 953 F.3d 1134, 1143 (9th Cir. 2020) (describing the general justification of immigration detention).

183. *See id.* (noting that civil detention violates Due Process unless the government can provide a clear showing that the confinement is necessary).

184. *See Roe v. Crawford*, 514 F.3d 789, 799-801 (8th Cir. 2008) (recounting that while restricting elective abortions does not violate the Eighth Amendment, restricting a medically necessary abortion meets the deliberate indifference standard); *cf. Harris v. Hegmann*, 198 F.3d 153, 159 (5th Cir. 1999) (holding a broken jaw is a serious medical need); *see also Nelson v. Corr. Med. Serv.*, 538 F.3d 522, 529-30 (8th Cir. 2009) (holding the prison warden should have been aware of the psychological and physical harm shackling a pregnant incarcerated woman thus constituting deliberate indifference and violating the Eighth Amendment).

to wither and disappear.”¹⁸⁵ U.S. history is rife with systemic oppression of individuals not conforming with the white power-holding groups.¹⁸⁶ The over-policing and over-incarcerating of Black, Brown, and Indigenous bodies uphold white supremacy through eradicating family connections and eliminating means of upwards mobility.¹⁸⁷

International law recognizes forced sterilization as, at the very least, a crime against humanity, and at an extreme, genocide.¹⁸⁸ The United States created the eugenics programs that Germany’s Nazi Party adapted to destroy a devastating majority of European Jews and other ethnic minorities, disabled people, queer, and non-gender-conforming individuals.¹⁸⁹ The Court decided *Skinner* amidst those ongoing atrocities.¹⁹⁰

Placing predominantly marginalized individuals into positions where they have no control over their reproductive autonomy creates an undeniable risk of exploitation.¹⁹¹ Language barriers in immigration detention factor into making an environment full of medical abuses.¹⁹² Had Justice Douglas written *Skinner* today, he likely would have expressly overturned *Buck v. Bell* to eliminate the loophole eugenics law.¹⁹³

The United States cannot ignore the eugenicist frameworks underpinning most of its policies, including mass incarceration, welfare provisions, and

185. See *Skinner*, 316 U.S. at 541 (showing Justice Douglas knew the consequences of giving officials full disclosure to sterilize who they wanted to).

186. See generally WASHINGTON, *supra* note 23, at 202-13 (detailing horrors suffered by Black and Indigenous people).

187. See, e.g., *Schuetz v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 338-41 (2014) (Sotomayor, J., dissenting) (listing the moments of history that served to suppress and eliminate fundamental rights of racial minorities; the case was later overturned).

188. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 (signed and ratified by the United States prohibiting government practices intended to prevent births within a group).

189. See WASHINGTON, *supra* note 23, at 192-95 (detailing origins of the eugenicist movement).

190. See *Skinner*, 316 U.S. at 535 (noting the year the case was decided).

191. See *id.* at 541 (holding that “in evil or reckless hands [forced sterilizations] can cause races or types which are inimical to the dominant group to wither and disappear”).

192. See generally Petition for Writ of Habeas Corpus at 11, *Oldaker*, (No. 7:20-cv-00224-WLS-MSH) (noting patients were not given access to interpreters despite federal requirements).

193. See *In re Commitment of Schulpis*, 678 N.W.2d 369, 383 (Wis. Ct. App. 2004) (stating “[f]or example, although the U.S. Supreme Court once sanctioned the involuntary sterilization of persons with severe mental deficiencies it is doubtful whether the eugenics law upheld in *Buck* would pass scrutiny today, irrespective of the procedural safeguards”).

immigration detention.¹⁹⁴ Racial biases are engrained in every societal construct, particularly the judicial system.¹⁹⁵ Immigration enforcement and detention are no different, as race continues to be a determining factor in legal proceedings, from police questioning to obtaining a certain immigration status.¹⁹⁶ The Supreme Court continues to spew contradictory decisions that leave room for later misinterpretations of precedent.¹⁹⁷ Judicial courts and immigration courts alike fail to see the systemic racism that is both blatantly and subconsciously embedded into the very institution that they are a part of.¹⁹⁸

Judicial complacency and complicity regarding systemic oppression lead to a conglomeration of isolated incidents that uphold white supremacy and work to eradicate marginalized communities.¹⁹⁹ No authority gave the doctor at Irwin County Detention Center the power to punish the people under his care.²⁰⁰ The power to decide who gets sterilized does not lie with a prison official, a doctor, or a detention guard.²⁰¹ Only a completely

194. See WASHINGTON, *supra* note 23, at 192-94, 203-04 (describing origins of eugenics policies and their manifestation in welfare programs, sterilizations, as well as the mass incarceration of Black people).

195. See *e.g.* *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) (stating “[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice”).

196. *E.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975) (permitting race as a factor for reasonable suspicion); see *Farag v. United States*, 587 F. Supp. 2d 436, 460 (E.D.N.Y. 2008) (holding an officer’s racially based motivations in stopping individuals of Arab descent were irrelevant once probable cause was established; see also *United States v. Bhagat Singh Thind*, 261 U.S. 204, 206 (1923) (determining a man from India could not naturalize as he was not a “free white” person); *cf.* *In re Halladjian*, 174 F. 834, 836 (D. Mass. 1909) (determining immigration status on appearing white).

197. See *United States v. Montero-Camargo*, 208 F.3d 1122, 1131 (9th Cir. 1999) (holding that “Hispanic appearance” is not a relevant factor when determining reasonable suspicion for a stop in an area with a high Hispanic population); *but see United States v. Garcia*, 23 F.3d 1331, 1335 (8th Cir. 1994) (allowing race, suspected nationality, and language spoken to be relevant factors in determining reasonable suspicion).

198. *Cf.* *Utah v. Strieff*, 136 S. Ct. 2056, 2069-71 (2016) (Sotomayor, J., dissenting) (finding “this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged”).

199. *Cf. id.* at 2071 (Sotomayor, J., dissenting) (concluding, “it is no secret that people of color are disproportionate victims of [police] scrutiny”).

200. See Petition for Writ of Habeas Corpus at 12, *Oldaker*, (No. 7:20-cv-00224-WLS-MSH) (describing Respondent Dr. Amin as the primary abuser regarding reproductive injustices).

201. See U.S. IMMIGR. & CUSTOMS ENF’T, *supra* note 103, at 119 (detailing the

informed individual gets to make such a decision regarding their bodily autonomy and reproductive health.²⁰² Sworn to “to not play at God,” doctors, in particular, are meant to be a source of medical treatment and counsel, regardless of who their patients may be.²⁰³ Depriving individuals of their reproductive autonomy without their informed consent is not only doing individual harm but, taken together, can have a devastating impact on specific communities.²⁰⁴

An isolated incident does not establish liability, but one perpetrator can contribute to the systemic abuses that work to destroy a specific community.²⁰⁵ ICE detention centers hold predominantly Black and Brown immigrants.²⁰⁶ As a result, there is a higher statistical probability that Black and Brown immigrants are more likely to be targeted by these systemic attacks, such as forced sterilizations and medical neglect.²⁰⁷ The unwritten nature of these sterilization policies and cover-ups complicate efforts to hold prison and immigration detention officials accountable for their flagrant human rights abuses.²⁰⁸ Immigrants in detention cannot afford the assumption that the forced sterilizations in Georgia were an isolated incident. If unchecked, ICE officials may perpetuate these harms with no form of

necessity of informed consent for detained individuals undergoing medical procedures).

202. *See id.* (stating that “[i]f the detainee refuses to consent to treatment, medical staff will explain the medical risks to the detainee of declining treatment and make reasonable efforts to convince the detainee to voluntarily accept treatment in a language or manner that the detainee understands”).

203. *See generally*, Louis Lasagna, *Hippocratic Oath (modern version)*, PBS, (1964), https://www.pbs.org/wgbh/nova/doctors/oath_modern.html (describing the infamous oath doctors must adhere to).

204. *See* U.S. IMMIGR. & CUSTOMS ENF’T, *supra* note 103, at 119 (detailing the necessity of informed consent for detained individuals undergoing medical procedures); *see also* *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (noting that such power can lead to the “eradication” of races).

205. *See* *Avery v. County of Burke*, 660 F.2d 111, 114 (4th Cir. 1981) (noting that omissions of supervising officials may establish official policy, and while an isolated incident normally is insufficient to establish liability through supervisory inaction, if an identifiable group of people are impacted, liability may be established).

206. *See* U.S. Immigr. Customs, & Enf’t, *FY 2019 Enforcement and Removal Operations Report*, Appendix B (comparing removal rates of citizens of countries with majority white populations (i.e., Croatia, Poland, Austria) to those with majority Black or Brown populations (i.e., Haiti, Honduras, Guatemala)).

207. *See id.* (implying the disproportionate harms on Black and Brown immigrants).

208. *See* *Belly of the Beast*, *supra* note 105 (describing how due to the sheer number of instances individuals who do not even realize they have been sterilized, it is difficult to know the exact number of instances of forced sterilizations in both immigration detention and criminal incarceration).

recourse for victims.²⁰⁹ Family separation policies and medical healthcare indicate an intentional governmental indifference towards the same populations the United States has targeted with eugenics policies since its inception.²¹⁰

IV. POLICY RECOMMENDATIONS

Current standards of consent and healthcare in civil immigration detention do not adequately protect individuals from systemic abuses, such as forced sterilizations.²¹¹ Furthermore, the COVID-19 pandemic has made it even more apparent that the immigration detention system is inherently cruel and unjust.²¹² Immigrant justice advocates declare the only true solution to immigration detention's human rights problems is to free all people to maneuver the process with their family and community.²¹³

ICE detention facilities are teeming with abuse, medical neglect, and conditions that prove fatal.²¹⁴ Commonly cited security and procedural concerns simply do not apply in most cases of civil immigration detainees.²¹⁵ Releasing immigrant detainees to their families to undergo legal proceedings at home with community support does no harm.²¹⁶ As that goal remains

209. *See, cf. Skinner*, 316 U.S. at 541 (noting the devastating impact of forced sterilizations).

210. *See WASHINGTON, supra note 23*, at 192-95 (describing U.S. eugenics policy and practice); *see also* Press Release, U.S. Dep't of Health & Human Servs., *supra* note 81 (showing family separation will continue despite political promises).

211. *See generally, e.g.*, Petition for Writ of Habeas Corpus at 99, *Oldaker*, (No. 7:20-cv-00224-WLS-MSH) (detailing the forced sterilizations and COVID-19 concerns in Irwin County).

212. *See generally, Hotbeds of Infection: How ICE Detention Contributed to the Spread of COVID-19 in the United States*, DETENTION WATCH NETWORK (Dec. 2020), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN_Hotbeds%20of%20Infection_2020_FOR%20WEB.pdf (quantifying the impact of COVID-19 in immigration detention).

213. *See id.* (recommending permanently shutting down ICE detention as a long-term solution).

214. *See Alan Gomez, The Detainees*, USA TODAY NEWS (Dec. 19, 2019) <https://www.usatoday.com/in-depth/news/nation/2019/12/19/ice-asylum-under-trump-exclusive-look-us-immigration-detention/4381404002/> (identifying atrocities faced by immigration detainees in ICE detention).

215. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 865-66 (Breyer, J., dissenting) (applying the history of Due Process and its broad scope to civil cases, specifically civil immigration cases).

216. *See Hotbeds of Infection: How ICE Detention Contributed to the Spread of COVID-19 in the United States, supra note 212* (discussing the benefits of releasing immigrant detainees).

unlikely in the current Biden administration, other policy suggestions may improve existing conditions and prevent future reproductive abuses.²¹⁷

A. Apply the Already Existing Federal Standard of Consent for Sterilization Procedures in Immigration Detention

The need for reproductive autonomy in immigration detention is multifaceted, as a complete moratorium on reproductive-related medical procedures would severely inhibit an individual's constitutional right to an abortion.²¹⁸ These nuances complicate efforts of abolitionists and reformists alike.²¹⁹ A potential short-term solution is enforcing standards already codified in federal regulations, which mandate an interpreter's presence.²²⁰

Language accessibility is essential in institutions that frequently work with immigrants, but even screening and assessment protocols of interpreters leave a lot to be desired.²²¹ Interpreters have to be knowledgeable in the language they are interpreting *and* its subject matter.²²² Medical interpretation calls for understanding medical terms, procedures, individual medical rights, and comprehension of potential cultural differences that may lead to a misunderstanding.²²³ Guaranteeing access to a qualified medical interpreter who could act as a human rights observer would reduce the potential for bodily autonomy and individual human rights violations.²²⁴

217. See Press Release, U.S. Dep't of Health & Human Servs., *supra* note 81 (showing family separation will continue despite political promises).

218. See Koushik, *supra* note 64, at 273-80 (noting the importance of access to abortion and reproductive healthcare for individuals in detention, particularly minors).

219. See *Belly of the Beast*, *supra* note 105 (describing complications in reform and abolition due to the different conceptions of consent).

220. See 42 C.F.R. §§ 50.204-207 (1978) (standardizing consent).

221. See Laura Abel, *Language Access in Immigration Courts*, BRENNAN CTR. FOR JUST. (2011) 1, 1 (discussing the "meaningful access" to interpretation in the context of immigration courts).

222. See *id.* at 5, 7 (detailing impediments to proper interpretation).

223. See Yana Fisher, *Medical Interpreters Impact Immigrant's Lives*, INTERPRETER TRAINING PROGRAM, BLOG, <https://interpretertrain.com/medical-interpreters-impact-immigrants-lives/> (last accessed Feb. 28, 2021) (listing the importance of medical interpreters).

224. See generally Cristobal Ramón & Lucas Reyes, *Language Access in the Immigration System: A Primer*, BIPARTISAN POL'Y CTR. (Sep. 18, 2020) <https://bipartisanpolicy.org/blog/language-access-in-the-immigration-system-a-primer/> (describing the impact of inadequate interpretation, particularly with the rise of migrants speaking Indigenous languages such as K'iche).

B. Eliminate Financial and Administrative Constraints to Reproductive Care in Detention

Within the first week of his administration, President Biden repealed the “Global Gag Rule.”²²⁵ In the same order, he called for the Secretary of Health and Human Services to investigate Title X for regulations posing an undue burden on “women’s access to complete medical information.”²²⁶ This commitment to reproductive and sexual health must carry over into passing the Each Woman Act, which would reverse the discriminatory Hyde Amendment and other restrictive programs.²²⁷

State and federal legislatures should enact pieces of legislation specifically geared to combat the racial and socioeconomic disparities in maternal healthcare, such as the Black Maternal Health Momnibus Act.²²⁸ These laws must be expanded to include individuals held in ICE custody and civil detention as reproductive rights are human rights regardless of citizenship status.²²⁹

Finally, Congress must acknowledge the ongoing and historical systemic human rights abuses that target Black, Brown, and Indigenous individuals by enacting reparations legislation.²³⁰ Congress must also combat the Supreme Court’s narrowing of circumstances in which an individual can seek civil damages from a federal agent who violated their constitutional

225. See *Memorandum on Protecting Women’s Health at Home and Abroad*, The White House (Jan. 28, 2021) (proclaiming Biden’s policy to support reproductive health and rights in the U.S. and abroad).

226. See *id.* (noting a number of treaties, conventions, and pieces of legislation that would be thoroughly reviewed in light of Biden’s reproductive health stance).

227. See *Equal Access to Abortion Coverage in Health Insurance Act (EACH Woman Act)* of 2019, H.R. 1692, 116th Cong. § 3 (2019) (ensuring abortion coverage through federal government sponsored healthcare and prohibiting restrictions on insurance coverage).

228. See *Black Maternal Health Momnibus Act* of 2021, H.R. 959, 117th Cong. (2021) (proposing twelve individual bills geared towards providing Black individuals, non-Black people of color, incarcerated individuals, veterans, and others impacted by disparities in maternal healthcare with maternal healthcare as well as combatting climate and COVID-19 relating risks).

229. See generally, *Breaking Ground: Treaty Monitoring Bodies on Reproductive Rights*, CTR. FOR REPROD. RTS. 1, 16-19 (2019) (naming human rights conventions calling for reproductive justice).

230. See generally *Commission to Study and Develop Reparation Proposals for African-Americans Act*, H.R. 40, 117th Cong. (2021) (introduced) (calling for compensation for the historical atrocities the United States committed in its institution of slavery).

rights.²³¹ Nothing can compensate for the incredibly invasive actions ICE detention agents subject people to under their power.²³² Still, by bolstering a form of accountability and redress, Congress can work to prevent future atrocities.²³³

V. CONCLUSION

The Court decided *Skinner* as Europe witnessed the horrors of eugenicist and genocidal policies firsthand, but it failed to overturn *Bell* unequivocally.²³⁴ That mistake led to implicit policies targeting non-white and lower-income communities through reproductive coercive tactics, including a culture of coercion in immigration detention centers.²³⁵

The right to Due Process protects those individuals in civil detention from anything remotely resembling an environment designed for punishment.²³⁶ Yet, courts routinely look away as the inherently coercive environment of immigration detention centers creates an opportunity for abuse.²³⁷ Sterilizations without informed consent are just one form of punishment immigrants in these centers suffer.²³⁸ By enforcing and increasing the standards of informed consent in confinement contexts, legislators can fight back against these systemic abuses while ensuring detainees still can exercise reproductive autonomy.²³⁹

231. See *Roadmap for Renewal: Protect the Courts as a Check on the Other Branches in Order to Uphold the Constitution*, PROTECT DEMOCRACY (2019) <https://protectdemocracy.org/roadmap-for-renewal/bivens-remedy/> (arguing courts fail their constitutional obligation to check executive wrongdoing by narrowing the *Bivens* doctrine).

232. See, *cf.* *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (noting the harm forced sterilizations have on individuals).

233. See *id.* (noting qualified immunity and similar doctrines have effectively eliminated justice for those individuals subjected to federal agents' abuse of power).

234. See *Skinner*, 316 U.S. at 535 (noting the decision came down the same year the United States discovered Nazi Germany's genocidal intentions).

235. See generally Petition for Writ of Habeas Corpus at 7, *Oldaker*, (No. 7:20-cv-00224-WLS-MSH) (detailing abuses in an ICE Detention Center).

236. See *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (holding Due Process protects individuals from punishment under the assumption that where punishment already exists, that individual would be protected under the Eighth Amendment).

237. See, *e.g.*, Petition for Writ of Habeas Corpus at 122, *Oldaker*, (No. 7:20-cv-00224-WLS-MSH) (protesting civil confinement).

238. See *id.* at 24 (citing an array of medical concerns, like COVID-19).

239. See 42 C.F.R. §§ 50.204-207 (1978) (defining institutionalized individuals and prohibiting sterilizations for the purpose of birth control, as well as establishing terms of consent); see also, Office of Refugee Resettlement, *Children Entering the United States*

Buck v. Bell has not been overturned, and while federal law prohibits forced sterilizations in institutions, that protection is not enough.²⁴⁰ Acknowledging the Eighth Amendment applies in immigration detention will allow for more legal remedies and, eventually, a clear precedent of a higher standard of protection in civil immigration detention.²⁴¹ Legal precedent needs to unequivocally catch up to our collective understanding that forced sterilizations are cruel and unusual punishment.²⁴² Our evolving standards of humanity call for both immigrants and incarcerated individuals to be free from such punishment.²⁴³

Unaccompanied §3.3 Care Provider Required Services (2016) (requiring availability and access of reproductive care).

240. See §§ 50.204-207; see also *Buck v. Bell*, 274 U.S. 200, 207 (1927) (continuing to be precedent).

241. See generally *Jennings v. Rodriguez*, 138 S. Ct. 830, 864-67 (Breyer, J., dissenting) (advocating for protections for those in civil detention).

242. E.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (detailing the harms of forced sterilizations); see also, *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (adapting what is cruel and unusual to evolving standards of decency).

243. See generally, *Skinner*, 316 U.S. at 535 (demonstrating concern for implications of forced sterilizations as punishment); see also Narea, *supra* note 1 (decrying injustices faced by Pauline and countless individuals in detention).