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OBSTRUCTING JUSTICE: PRISONS AS BARRIERS TO MEDICAL CARE FOR PREGNANT WOMEN

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For the growing numbers of women imprisoned in the United States, reproductive health and rights are pressing concerns. This article examines prisons as barriers to abortion care and medical attention for pregnancy, describing how prison employees, policies, and environments impede access to this critical medical care.¹ It also examines how courts have interpreted women's claims to pregnancy-related care as a "serious medical

* Rachel Roth, PhD, is an independent scholar in Boston. I would like to thank the symposium organizers and my co-panelists for the opportunity to discuss the role of prisons in perpetuating reproductive injustice; Sara Ainsworth and Deborah Kacanek for their thoughtful comments on a draft of this article; and the Soros Justice Fellowship program of the Open Society Institute for research support.

As I was completing this article, I learned that Dr. George Tiller of Wichita, Kansas had been murdered. Dr. Tiller endured decades of harassment, including previous attempts on his life, because he dared to provide women with safe, compassionate abortion care. Without people willing to provide abortions, women cannot exercise their right to have one. I hope that this article honors Dr. Tiller's memory and commitment to women's lives.

1. Prisons, jails, and immigration "detention centers" are distinct types of institutions administered by different government agencies. For simplicity, I sometimes use the term "prison" generically to encompass all forms of involuntary confinement by the state.

need” worthy of regard under the Eighth Amendment prohibition of cruel and unusual punishment. Too often, judicial interpretations fail to appreciate the ways that confinement limits women’s access to medical care, raising the question of whether pregnancy in prison should always be considered a serious medical need. Prisons do not, and in all likelihood cannot, consistently provide pregnant women with appropriate care. The violations of women’s rights to medical care and reproductive decision-making, the disproportionate impact of the harms of imprisonment on the most disadvantaged women, and the cost of maintaining the largest prison system in the world breach our constitutional ideals and undermine the prospects for social justice.

I. THE PROBLEM OF ACCOUNTABILITY FOR WOMEN’S MEDICAL NEEDS IN PRISON

The United States imprisons more women and men than any other country in the world.² More than 200,000 women are imprisoned, and over a million are under the supervision of criminal justice authorities when probation and parole are taken into account.³ The number of women in prison and jail has increased more than eightfold since 1980, due in large part to mandatory sentencing laws, including harsh penalties for non-violent drug-related offenses.⁴ In addition, federal legislation adopted since 1996 and law enforcement priorities instituted under the Bush

2. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1 (explaining that the U.S. has both the highest reported number of people in prison and the highest rate of imprisonment; with less than 5 percent of the world’s population, the U.S. has almost 25 percent of the world’s prisoners); see also INT’L CENTRE FOR PRISON STUDIES, INT’L PROFILE OF WOMEN’S PRISONS 9-10 (2008) (showing that these trends hold for women as well as for men), available at http://www.hmprisonservice.gov.uk/assets/documents/10003BB3womens_prisons_int_review_final_report.pdf.

3. Press release, U.S. Dep’t of Justice, Bureau of Justice Statistics, Growth in Prison and Jail Populations Slowing: 16 States Reported Declines in the Number of Prisoners (Mar. 31, 2009) (reporting that an estimated 207,700 women were imprisoned in 2008), available at <http://www.ojp.usdoj.gov/bjs/pub/press/pimjim08stpr.htm>; LAUREN E. GLAZE & THOMAS P. BONCZAR, PROBATION AND PAROLE IN THE UNITED STATES, 2006 (U.S. Dep’t of Justice, Bureau of Justice Statistics, 2007) (reporting that over one million women were on probation or parole in 2006), available at <http://www.ojp.usdoj.gov/bjs/abstract/ppus07st.htm>.

4. AM. CIVIL LIBERTIES UNION, BREAK THE CHAINS & THE BRENNAN CENTER FOR JUSTICE, CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 16 (2005); see also Bernardine Dohrn, *All Ellas: Girls Locked Up*, 30 FEMINIST STUDIES 302 (2004) (documenting the imprisonment of girls in the criminal legal system).

Administration have led to a sharp increase in the number of women imprisoned for immigration violations.⁵

Women who face the greatest likelihood of being arrested and imprisoned – economically disadvantaged women and women of color – are also the most likely to experience unintended pregnancies and consequently to need prenatal care or abortion care.⁶ In a study of women imprisoned in Rhode Island, for example, 84 percent reported that they had experienced an unplanned pregnancy, compared with about 50 percent of women in the general population.⁷ Most imprisoned women are in their reproductive years, a group for whom reproductive health care and pregnancy care are by definition very important. The majority of imprisoned women are also mothers of children under eighteen.⁸ Imprisoned women have by and large experienced a great deal of hardship in their lives. Overwhelmingly poor, most have had limited educational opportunities and work experience. Disproportionately women of color from cities, many have lived in impoverished urban neighborhoods subjected to high degrees of police surveillance. Women inside prison walls are also likely to have chronic health problems, including mental illness and addiction to drugs or alcohol, and to have experienced physical or sexual violence as children or as adults – although they are not especially likely to have committed crimes of violence.⁹

The U.S. Bureau of Justice Statistics estimates that 4 to 5 percent of women are pregnant when they are processed into

5. Women in the custody of the U.S. Bureau of Immigration and Customs Enforcement are imprisoned for violations of immigration law, including being in the U.S. without proper documentation when seeking asylum or overstaying a visa. The organization Human Rights Watch points out that the U.S. government considers confinement on immigration charges to be “administrative rather than punitive;” however, from the perspective of people so confined, the distinction between “administrative detention” and “imprisonment” is not a meaningful one (HUMAN RIGHTS WATCH, *DETAINED AND DISMISSED: WOMEN’S STRUGGLES TO OBTAIN HEALTH CARE IN U.S. IMMIGRATION DETENTION* 13) (Human Rights Watch 2009).

6. HEATHER BOONSTRA ET AL., *ABORTION IN WOMEN’S LIVES* 25-29 (Jared Rosenberg ed. Guttmacher Institute 2006).

7. Jennifer Clarke et al., *Reproductive Health Care and Family Planning Needs Among Incarcerated Women*, 96 AM. J. PUB. HEALTH 834, 836-37 (2006).

8. AM. CIVIL LIBERTIES UNION, *supra* note 4, at 49.

9. *Id. passim*; POLICING THE NATIONAL BODY: SEX, RACE, AND CRIMINALIZATION, 1-81 (Jael Silliman & Anannya Bhattacharjee eds., South End Press 2002); Beth Richie, *The Social Impact of Mass Incarceration on Women*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 136-49 (Marc Mauer & Meda Chesney-Lind eds., New Press 2002).

prison or jail.¹⁰ These estimates are based on periodic, nationally representative surveys that ask women whether they were pregnant at the time of “admission.” In addition, some women become pregnant while they are in prison. Women can become pregnant during private (“conjugal”) visits with their husbands in the few states where such visits are permitted, or if they are allowed to participate in work release programs, home visits, or any other activity that affords them time outside of prison.¹¹ Women also become pregnant because they are raped by prison employees and volunteers.¹² Nobody tracks the number of women who become pregnant in these circumstances.

Given the profile and needs of the women in their custody, prison and jail administrators should be accustomed to providing pregnancy and abortion care. Yet women's rights to this medical care are routinely violated or obstructed by a number of signifi-

10. Laura M. Maruschak, *MEDICAL PROBLEMS OF JAIL INMATES 1,7* (U.S. Dep't of Justice, Bureau of Justice Statistics, 2006) (reporting that 5 percent of women said they were pregnant when they entered jail), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mpji.pdf>; Laura M. Maruschak, *MEDICAL PROBLEMS OF PRISONERS* (U.S. Dep't of Justice, Bureau of Justice Statistics, 2008) (reporting that 4 percent of women said they were pregnant when they entered state prison), available at <http://www.ojp.usdoj.gov/bjs/pub/html/mpp/mpp.htm>. Only 3 percent of women reported being pregnant when they entered federal prison. *Id.* Women in federal prison represent a much smaller group than either women in state prisons or women in jails. Heather C. West and William J. Sabol, *Prison Inmates at Midyear 2008 – Statistical Tables* (U.S. Dep't of Justice, Bureau of Justice Statistics, 2009), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim08st.pdf>.

11. Prisons and jails do not necessarily make contraception available to women in all of these circumstances.

12. For example, a woman who suffered from a debilitating lung disease was repeatedly raped by a group of guards in a state prison in Illinois; after she spoke up about the abuse, she was put in segregation, where the rapes continued. She became pregnant and had a baby. Gary Hunter, *Sexual Abuse by Prison and Jail Staff Proves Persistent, Pandemic*, 20 *PRISON LEGAL NEWS* 1, 5 (2009). Sexual harassment, abuse, and rape are endemic in prison. As one example, in a long-running case in Michigan, 500 women have sued the Department of Corrections for failing to protect them from sexual abuse. After juries awarded the first 18 women almost \$24 million in damages, the judge ordered the parties to try to settle, citing concern about the fiscal impact that damage awards for all 500 women would have on the state. Jeff Seidel, *Special Report: Hostages to Justice* (pts. 1-5), *DETROIT FREE PRESS*, Jan. 4-8, 2009. Congress and all fifty states now prohibit sexual contact between people being held in prison and people who work in prisons, although many of these laws betray ignorance of the unequal power dynamics inherent in prison life. For example, fully half the states allow employees to cite a woman's consent as a defense to sexual misconduct, failing to acknowledge the limits of consent in the coercive environment of the prison. National Prison Rape Elimination Commission Report at 37, 167 (National Prison Rape Elimination Commission, 2009), available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

cant barriers.¹³ One overarching barrier is the lack of transparency and accountability in the closed world of prison policy-making. Medical policies for prisons and jails are not readily available to the public, the way that statutes and ordinances are. Legislatures are not actively involved in designing medical policies for people in prison. Departments of Correction may develop such policies internally, without public comment or input, leave such decisions to individual prison administrators or personnel, or even defer to private companies and personnel that are paid to provide medical services.¹⁴ Motivated by profits, these private companies may operate without any meaningful public oversight. Although non-governmental organizations and professional associations have developed standards for medical care in prison settings, adherence to such standards is often voluntary and not rigorously enforced, and there is no national policy mandating any particular set of standards.¹⁵

The prison itself is a barrier to abortion care, because abortions are not provided on-site and always necessitate a trip outside the jail or prison.¹⁶ So too are prisons barriers to other forms of pregnancy-related care within prison walls. Typically, women are not allowed to go from point A to point B without permission, which means they will always have to convince a guard that they are sick enough or injured enough to see a health care provider in the medical unit.¹⁷

While people who run prisons and jails interfere with women's access to abortion for political and ideological reasons, that doesn't necessarily mean they make it a priority to foster a healthy environment for pregnant women. Indeed, the structure

13. See *infra* notes 28-29 and accompanying text (discussing the constitutional right to medical care in prison).

14. See, e.g., THE CORRECTIONAL ASSOCIATION OF NEW YORK, HEALTHCARE IN NEW YORK PRISONS 2004-2007, at 77-78, 86 (The Corr. Ass'n of N. Y. 2009) (explaining that the New York Department of Correctional Services, which writes its health services policy manual without public comment or outside review, should have greater oversight); see also Rachel Roth, *Searching for the State: Who Governs Prisoners' Reproductive Rights?* 11 SOC. POL. 411, 418-20 (2004).

15. The American Correctional Association, National Commission on Correctional Health Care, and American Public Health Association, for example, all publish standards for medical care for incarcerated people. The American Correctional Association and National Commission on Correctional Health Care also operate programs to accredit jails and prisons.

16. See *infra* Part II.

17. See *infra* Part III; see, e.g., N.Y. COMP. CODES R. & REGS. Tit. 7, 270.2 (2009) (specifying that in New York, being "out of place" is an infraction that can land someone in solitary confinement).

of prison almost guarantees that prison systems will fail to deliver appropriate pregnancy-related care¹⁸.

Parts II and III of this article describe policies, practices, rules, and routines that impede access to abortion care and medical attention for pregnancy, respectively. Parts II and III also examine debates in the courts about the extent to which abortion and pregnancy-related care constitute "serious medical needs" for the purpose of Eighth Amendment analysis. Part IV considers how harmful dynamics in prison, including the willingness of prison officials to defy legal authority, underscore the need to reevaluate the U.S. approach to imprisonment.

Readers should bear in mind three important points about the broader context of reproductive control in prison. First, prison institutions exert control over a vast range of conditions, from access to basic reproductive health care to access to one's children.¹⁹ Prison and jail rules and personnel govern many facets of a woman's relationship with her children, from how much time a woman can spend with a newborn baby in the hospital after giving birth to whether she can hold her children on her lap when they visit her. Second, research on reproductive rights violations in prison presents a "tip of the iceberg" problem – we only know about those instances that have come to light through the court system, the press, or primary research. Other instances have doubtless occurred but have not been reported. The cases discussed here are meant to be illustrative, not exhaustive. Finally, while this article focuses on prisons as *barriers* to medical care, it is important to understand that prisons can also be sites of medical coercion. Women in prison have reported being pressured to have an abortion, especially when the person who got them pregnant is a prison employee.²⁰ Other women have reported being sterilized without their consent, or even without

18. See *infra* Parts II, III, and IV.

19. See, e.g., Catherine Magee et al., *Preventive Care for Women in Prison: A Qualitative Community Health Assessment of the Papanicolaou Test and Follow-Up Treatment at a California State Women's Prison*, 95 AM. J.PUB. HEALTH 1712 (2005) (documenting haphazard access to fertility-preserving cancer screenings).

20. For example, a woman in the Delaware prison who was raped by a guard and became pregnant said, "They were trying to get me to get an abortion. . . They said if my family couldn't pay for an abortion, they would pay for it." Steven Holmes, *With More Women in Prison, Sexual Abuse by Guards Becomes Greater Concern*, N.Y. TIMES, Dec. 27, 1996, at 18. It is notable that the "offer" to pay for an abortion runs contrary to standard practice in Delaware, where women are required to pay for abortions and related costs. Rachel Roth, *Do Prisoners Have Abortion Rights?*, 30 FEMINIST STUDIES 353, 364 (2004).

their knowledge.²¹ These violations of women's bodily integrity and right to informed consent have devastating consequences and should not be tolerated any more than withholding needed medical care.²²

II. BARRIERS TO ABORTION CARE

Women do not lose the right to have an abortion simply because they are imprisoned. The right to abortion, rooted in concepts of personal liberty guaranteed by the Fourteenth Amendment, is well-established as a matter of law (if not as a matter of practical access).²³ The Supreme Court has consistently held that women retain the ultimate right to decide whether to continue a pregnancy.²⁴ When jails or prisons restrict a constitutional right, such as the right to make reproductive decisions, they must have a "legitimate penological reason" to do so, that is, a legitimate reason related to prison security, deterrence, or "rehabilitation."²⁵ Forcing women to continue pregnancies against their will does not meet that test.²⁶ Moreover, there is no alternative means of exercising this particular right: Either a woman will get an abortion or she won't.²⁷

21. Rachel Roth, *Prisons as Sites of Reproductive Injustice*, 36 OFF OUR BACKS 69, 69 (2006) (describing the situation of a woman in a California prison who had an ovarian tumor and was given a hysterectomy to which she did not consent); see also Robin Levi, *Making the Silent Heard and the Invisible Visible: Reproductive Justice for Women in Prison*, 2 COLLECTIVE VOICES 5 (2006) (documenting the destruction of women's reproductive capacity in the California prison system).

22. Abuses of women's reproductive rights in prison fit into a long history of reproductive control in the United States. See generally RICKIE SOLINGER, *PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA* (N.Y. Univ. Press 2005); ELAINE TYLER MAY, *BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS* 61-95 (Basic Books 1995).

23. See generally Marlene Gerber Fried, *Abortion in the United States – Legal But Inaccessible*, in *ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000*, at 208-26 (Rickie Solinger ed., Univ. of Cal. Press 1998).

24. After viability, the state may prohibit abortion, unless the pregnancy threatens a woman's life or health. See *Roe v. Wade* 410 U.S. 113 (1973), *Planned Parenthood v. Casey* 505 U.S. 833 (1992).

25. *Turner v. Safley*, 482 U.S. 78, 78 (1987).

26. See Diana Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict With Constitutional Standards?*, 40 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 59, 60 (2009); Roth, *supra* note 20, at 357-60; *infra* Part II(b) on specific cases.

27. *Turner v. Safley*, 482 U.S. 78 (1987), at 90-91 (establishing a four-part test to evaluate restrictions on the constitutional rights of people in prison, including the existence of alternative means to exercise a right).

While there is no serious debate about whether the Fourteenth Amendment protects a woman's right to abortion, the promise of the Eighth Amendment to protect women's abortion rights seems to be receding into the distance. The Eighth Amendment establishes – again as a matter of law – the state's obligation to provide for the serious medical needs of people in its custody.²⁸ This obligation stems from the right to be free from cruel and unusual punishment. Prison employees violate this right when they act with “deliberate indifference” by knowingly denying or delaying people's access to needed medical care.²⁹ Applying the Eighth Amendment to abortion would mean protecting women's access to abortion because it is a form of needed medical treatment as well as a constitutionally protected reproductive right.

A. *Practical Realities*

Before examining the court decisions, it is helpful to understand the kinds of barriers that imprisoned women encounter when they try to get an abortion. One major hurdle is cost: Women usually have to pay for an abortion.³⁰ They often have to pay for transportation and staff time as well. This can be very expensive, because so many jails and prisons are in rural areas, while abortion providers are concentrated in urban areas.³¹ There is also the problem of limited access to second-trimester abortions in some states, and whether a prison or jail administrator would be willing to transport a woman across state lines for an abortion.

Jail personnel often tell women to get a judge's order authorizing the jail to take them to a clinic, or releasing them temporarily to obtain an abortion on their own, something that would be unlikely for anyone who is considered dangerous or a

28. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). International human rights standards on the treatment of people in prison promote a higher standard, including community standards of care and the right to the “highest attainable standard of physical and mental health” (HUMAN RIGHTS WATCH, *supra* note 5, at 64).

29. The bar to prove deliberate indifference in prison is higher than to prove negligence or malpractice in the outside world. On the evolution of the deliberate indifference standard, see *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Farmer v. Brennan*, 511 U.S. 825 (1994).

30. See Roth, *supra* note 20 at 364, 375 (discussing how organizations like the National Network of Abortion Funds can assist women who need money, but this depends on someone knowing that such help is available).

31. BOONSTRA ET AL., *supra* note 6, at 18, 31 (Jared Rosenberg ed. Guttmacher Institute 2006).

flight risk.³² Moreover, it is clear that some jails require court involvement only when someone asks for an abortion, and not for other kinds of outside medical care.³³

Prison staff need not locate an abortion provider. In Texas, for example, the state prison policy requires a friend or family member to facilitate all of the arrangements.³⁴ Why isn't this the prison's responsibility? As with court order requirements, abortion is singled out and excluded from standard procedures to obtain outside medical care. What if a woman's family can't afford to accept her collect phone calls? What if someone simply wishes to keep her decision private? Is she out of luck?³⁵

Corrections officials tell women they have no right to an abortion because it is an "elective" procedure, like a "nose job" or plastic surgery.³⁶ Private companies that win contracts to provide medical services refuse to arrange for abortions as they

32. *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 328 (3rd Cir. 1987); *Doe v. Barron*, 92 F. Supp. 2d 694, 695 (S.D. Ohio 1999); *Roe v. Leis*, 2001 U.S. Dist. LEXIS 4348, at *3 (S.D. Ohio Jan. 10, 2001); *Doe v. Arpaio*, 150 P.3d 1258, 1259-1260 (Ariz. Ct. App. 2007); *Victoria W. v. Larpenter*, 369 F.3d 475, 479 (5th Cir. 2004). Women in Texas and Idaho jails have also had to contend with court order requirements. Roth, *supra* note 14, at 421; The Abortion Report, *Idaho: Sheriff Says Inmate May Now Receive Abortion*, DAILY REPORTS, (Jan. 31, 1996), available at <http://kaisernetnetwork.org/reports/1996/01/a960131.9.html>. See also Carolyn Sufrin et al., *Incarcerated Women and Abortion Provision: A Survey of Correctional Health Providers*, 41 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 6, 9 (2009).

33. *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 334 (3rd Cir. 1987); *Doe v. Arpaio*, 150 P.3d 1258, 1264 (Ariz. Ct. App. 2007); The Abortion Report, *supra* note 32 (about a jail in Idaho); Ben L. Kaufman, *Inmate Can Have Abortion*, THE CINCINNATI ENQUIRER, Aug. 13, 1999 (describing how a jail director in Ohio singled out abortion for different treatment in the case *Doe v. Barron*, 92 F. Supp. 2d 694, 697 (S.D. Ohio 1999) available at http://www.enquirer.com/editions/1999/08/13/loc_inmate_can_have.html).

34. TEX. DEP'T OF CRIMINAL JUSTICE CORRECTIONAL MANAGED HEALTH CARE POLICY MANUAL G-55.1, "Pregnant Offenders" (formulated in 1985, reviewed in 2007) (on file with author).

35. Many other restrictions in the Texas policy suggest that women may be denied access to abortion: a woman bears total responsibility for the cost, including transportation (if transportation is "available"), must obtain security clearance, and must identify an abortion provider whose office is "easily accessible" to the prison. *Id.*

36. Officials have raised this claim in a New Jersey jail, an Arizona jail, and a Missouri jail. On New Jersey, see *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 334 (3rd Cir. 1987); on Arizona, see *Doe v. Arpaio*, 150 P.3d 1258, 1260 (Ariz. Ct. App. 2007), and Howard Fischer, *Ruling Clears Way for Women Seeking Abortions*, Ariz Daily Sun, Aug. 25, 2005; on Missouri, see Roth, *supra* note 14, at 421-22. See *infra* Part (II)(b) (regarding the problematic nature of the term "elective").

would any other outside medical care.³⁷ And finally, individuals who work in jail or prison can tell a woman she can't have an abortion, for no reason at all.³⁸

All of these situations can create substantial delays from the time women ask for an abortion until the time they actually get one. In Phoenix, Arizona, and Vandalia, Missouri, for example, two women endured almost eight weeks of delays. Both women had to bring lawsuits in order to be taken for an abortion.³⁹ In Luzerne County, Pennsylvania, a woman who asked for an abortion during the fourth week of her pregnancy was denied access until she was so far along that she could feel the fetus move. She ultimately decided to continue to term, even though a judge had ordered the jail to honor her request and take her for an abortion.⁴⁰ The longer a woman has to wait for an abortion, the more expensive the procedure becomes, and the greater the emotional toll.⁴¹

Situations like these may be the result of policies that explicitly violate women's rights or the result of unwritten policies and policy vacuums. Among federal prison systems, the U.S. Bureau of Prisons has clear regulations to arrange for abortion appoint-

37. For example, in Missouri, the company Correctional Medical Services does not arrange appointments for abortions, even though its staff arranges for all other medical appointments outside of the prison. Instead, the caseworker assigned to pregnant women is required to submit a written request to the prison superintendent, who in turn seeks approval from division directors within the Department of Corrections; if approved, the caseworker contacts the clinic to schedule an appointment. Brief of Petitioner at 17-19, *Roe v. Crawford*, No. 05-4333-CV-C-DW (W.D. Mo. May 15, 2006). See also MO. DEP'T OF CORR. INSTITUTIONAL SERVICES POLICY AND PROCEDURES MANUAL, 1S11-58 "Pregnancy Counseling" (Oct. 15, 1999) (on file with author).

38. See, e.g., Roth, *supra* note 14, at 421-22, 429 (discussing a woman's struggle to obtain an abortion while jailed in St. Louis).

39. The Arizona case is *Doe v. Arpaio*, 150 P.3d 1258, 1260 (Ariz. Ct. App. 2007); see also Lorraine Kenny, *Women Don't Check Their Reproductive Rights at Jailhouse Door*, Women, Girls & Crim. Justice, Feb./March 2007, at 21 (recounting how "Jane Doe" found out she was pregnant the night before she was to be sentenced and the prosecutor refused her request to stay out of jail in order to get an abortion, telling her that she could do so in jail and taking her immediately into custody). The Missouri case is *Roe v. Crawford* 514 F.3d 789, 789 (8th Cir. 2008), *reh'g en banc denied*, No. 06-3108 (8th Cir. Feb. 27, 2008), discussed *infra* Part II(b).

40. Tamar Lewin, *A Prisoner Is the Focus of an Abortion Debate* N.Y. TIMES, Jan. 10, 1999 (explaining how the woman's request for an abortion became public knowledge in the jail and in the community, and led to harassment and intimidation, including of her children); see also *Inmate Changes Mind About Abortion After Successful Court Battle*, ERIE TIMES-NEWS Dec. 3, 1998.

41. While abortion is a very safe medical procedure, the risk of complications increases as the pregnancy progresses. BOONSTRA ET AL., *supra* note 6, at 17, 30-31.

ments; women bear the cost, unless the pregnancy is the result of rape or endangers their life.⁴² In contrast, the U.S. Bureau of Immigration and Customs Enforcement does not have an explicit policy about abortion, even for women who have been raped, a not uncommon experience for refugee and migrant women.⁴³ About a quarter of state prison systems have no official written policy; others have written policies that are ambiguous, incomplete, or buried in provisions that are not directly related to women's health.⁴⁴ State prison policies are almost entirely silent on paying for abortions for women who have been raped.⁴⁵ These omissions and ambiguities leave ample room for interpretation and the arbitrary denial of access.⁴⁶

Less is known about reproductive health policy at the local level, where thousands of municipal governments operate jails. One exception is New York. The New York Civil Liberties Union conducted an investigation of reproductive health policies in every county jail in the state. They found that almost half of New York counties had some sort of written policy addressing abortion; however, only half of them clearly provided access.⁴⁷ County jail abortion policies contained several problematic features, including the lack of referral procedures to abortion providers, the lack of specific time frames within which to schedule an appointment, language that appears to give jail officials discretion over the decision, and the requirement that women provide the money before jail staff will even schedule an appointment.⁴⁸

A recent survey of almost 300 nurses and doctors who work in jails and prisons around the country asked whether women "are allowed" to obtain an abortion "if they request one." Only 68 percent of respondents said yes.⁴⁹ The authors of the survey do not report whether the remaining respondents said, "no, women can't get an abortion," or whether they said they didn't know, but in either case, it is cause for concern when one-third of

42. Roth, *supra* note 20, at 360-61.

43. HUMAN RIGHTS WATCH, *supra* note 5, at 53-55.

44. Roth, *supra* note 20, at 365.

45. Minnesota and Wisconsin are the exceptions. In contrast, federal and state Medicaid policies list rape as a criterion that would qualify for abortion funding. Roth *supra* note 20, at 368.

46. See Roth, *supra* note 20; Roth, *supra* note 14; see also Sufrin, et al., *supra* note 32, at 9.

47. N. Y. CIVIL LIBERTIES UNION, ACCESS TO REPRODUCTIVE HEALTH CARE IN NEW YORK STATE JAILS 12 (2008).

48. *Id.* at 21-24.

49. Sufrin, et al., *supra* note 32.

the people answering the survey indicate that women may not be able to get an abortion.⁵⁰

B. *Judicial Understandings*

Although women have fought for their abortion rights in jail and prison for more than twenty years, their conflicts with corrections administrators have resulted in only a handful of federal appellate decisions. The first came in 1987 in *Monmouth County Correctional Institutional Inmates v. Lanzaro*. In that case, the Third Circuit overturned a restrictive abortion policy in a New Jersey jail.⁵¹ Women at the jail challenged the policy because it imposed a unique bureaucratic obstacle: They had to obtain court orders to be released on their own recognizance in order to visit an abortion provider.⁵² This hurdle created so much risk of delay that a woman might be too far along to terminate her pregnancy by the time she obtained clearance. It also completely foreclosed the possibility of abortion for anyone considered high-security.⁵³

In its decision, the court found that all pregnancy-related care constitutes a serious medical need under the Eighth Amendment, including abortions not necessary to save a woman's life. Therefore, denying or delaying access to abortion effectively deprives women of their constitutional rights and amounts to deliberate indifference. Whether or not an abortion is characterized as "elective" is of "little or no consequence" in the context of Eighth Amendment considerations, the court held, because an "elective" abortion "may nonetheless constitute a 'serious medical need' where denial or undue delay in provision of the proce-

50. The survey did not ask who pays for abortion care. *Id.* at 10. This survey makes an important contribution to our knowledge about imprisoned women's uneven access to abortion care. The authors' discussion, however, tends to oversimplify the variegated nature of prison health care administration. They inadvertently suggest that the American Public Health Association (APHA) and the National Commission on Correctional Health Care (NCCHC) publish joint standards; each organization publishes its own standards for health care for incarcerated people, and the APHA standards for women's health care are stronger. The authors also suggest that "the" correctional health system "operates under a set of guidelines and policies enumerated in most cases by the National Commission on Correctional Health Care," but only a minority of jails and prisons are accredited by the NCCHC. *Id.*

51. *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3rd Cir. 1987). Women had previously challenged the adequacy of prenatal care at the jail as part of a class action lawsuit on unconstitutional conditions.

52. *Id.* at 328.

53. *Id.* at 337, 339-40, 345.

ture will render the [woman's] condition 'irreparable.'"⁵⁴ Consequently, imprisoned women have a right to safely terminate their pregnancies, independent from the constitutional right to abortion recognized in *Roe v. Wade*.⁵⁵

The court also held that the jail must pay for abortion care if the woman cannot raise the money, because women are completely dependent on the jail for medical care, and deprived of resources, such as income, as a result of being incarcerated.⁵⁶

Monmouth was the definitive decision for almost twenty years. Recent decisions have departed from some of its reasoning and holdings. In 2004, the Fifth Circuit upheld a restrictive jail policy in *Victoria W. v. Larpenter*.⁵⁷ In that case, a woman being held in a Louisiana jail asked for an abortion. She was told she would have to get a court order, a requirement – albeit an unwritten one – that jail officials said they imposed on all people seeking non-emergency or “elective” medical treatment outside the jail. Victoria W. tried obtain a court order but was not able to. Released from jail too late for an abortion in Louisiana, she was effectively forced to continue her pregnancy to term. She needed emergency cesarean surgery to deliver the baby, whom she placed for adoption.⁵⁸

The Fifth Circuit decision did not turn on the question of whether abortion is a serious medical need, finding instead that the jail's policy was reasonably related to security and liability concerns, and therefore a legitimate constraint on women's abortion rights.⁵⁹

In 2008, in *Roe v. Crawford*, the Eighth Circuit overturned a Missouri policy that categorically banned abortions for women in

54. *Id.* at 349.

55. *Id.*; see Kasdan, *supra* note 26; see Mark Egerman, *Roe v. Crawford: Do Inmates Have an Eighth Amendment Right to Elective Abortions?*, 31 Harv. J.L. & Gender 423 (2008).

56. *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3rd Cir. 1987), at 345, 350-51.

57. *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2004).

58. Doug Simpson, *Lawyer: Louisiana Jail Prevented Abortion, Violating Pregnant Inmate's Rights*, ASSOCIATED PRESS, Sept. 3, 2003.

59. The district court addressed and rejected both Victoria W.'s Eighth Amendment and Fourteenth Amendment claims. *Victoria W. v. Larpenter*, 369 F.3d 475. Notably, the court did not find the Terrebonne Parish policy to be particularly onerous; it stated that the policy “ensure[s] that a pregnant inmate who wants an abortion will obtain a court order” and that Victoria W. “successfully” navigated the policy, despite the fact that she never obtained an abortion. *Id.* at 488, 490. The court's discussion of abortion uses a dichotomy of emergency vs. elective care. *Id.* at 487 n. 52.

the state prison system.⁶⁰ This policy had been put in place after an anti-choice governor took office in 2005, and was implemented by internal memos without notice to the public. Before this time, women had been able to get an abortion if they could come up with the money. A woman's request for an abortion in July 2005 catalyzed the change in policy: The official in charge of the Department of Corrections denied her request, and went further, issuing a memo instructing that no other trips outside the prison for an abortion would be authorized.⁶¹

On September 5, 2005, a new "Pregnancy Counseling" policy, revised to comply with the internal memo, formally went into effect. This new policy retained a provision for approving abortions deemed necessary to save a woman's life – if approved by three officials. But it excised the provision explaining what to do when a woman asks for an abortion, literally erasing the possibility that someone might ask for an abortion for reasons other than to save her life or health. Where the previous policy had "ensure[d] that comprehensive counseling and assistance are given to a pregnant offender in keeping with her desires in *planning for her expected child, whether she desires abortion, adoption service, or to keep the child,*" the new policy ensures only that "comprehensive counseling and assistance will be provided to a pregnant offender in *planning for her expected child.*"⁶²

As this policy change was getting underway, another woman asked for an abortion. Prison staff told her she could not have one. Determined to carry out her decision, "Jane Roe" eventually contacted the ACLU, which helped her challenge the policy in court. Other pregnant women who wanted abortions came forward to join her in a class action.

The Eighth Circuit needed little convincing that the prison's ban on abortion violated women's Fourteenth Amendment

60. *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008), *reh'g en banc denied*, No. 06-3108 (8th Cir. Feb. 27, 2008).

61. Memorandum from Steve Long, Acting Director of the Division of Adult Institutions for the Department of Corrections, to Cyndi Prudden, Superintendent of Women's Eastern Reception, Diagnostic & Correctional Center (July 19, 2005) (on file with author).

62. Memorandum from Sheila A. Scott, Administrative Analyst III, to Institutional Services Policy and Procedure Manual Holders (Aug. 4, 2005) (outlining changes and attaching new procedure) (on file with author). Compare MO. DEP'T OF CORR. INSTITUTIONAL SERVICES POLICY AND PROCEDURES MANUAL, 1S11-58 "Pregnancy Counseling" (Oct. 15, 1999) (emphasis added) with MO. DEP'T OF CORR. INSTITUTIONAL SERVICES POLICY AND PROCEDURES MANUAL, 1S11-58 "Pregnancy Counseling" (Sept. 5, 2005) (emphasis added).

rights. Indeed, it “completely eliminate[d]” them.⁶³ However, the court rejected the plaintiffs’ argument that an “elective” abortion is a “serious medical need” warranting Eighth Amendment protection. “Logically,” the court stated, “if a procedure is not medically necessary, then there is no *necessity* for a doctor’s attention.”⁶⁴ The court adopted the Department of Corrections’ reasoning and ignored the women’s argument, backed by leading medical authorities, that abortion is part of the standard of care for women’s health.⁶⁵

This definitional dispute has a counterpart in the political struggle over Medicaid funding for low-income women, and highlights the problematic terms of abortion policy. From the perspective of a woman who has decided to terminate her pregnancy, what do these terms mean? “Elective” medical care typically refers to care that is optional and can be delayed, perhaps indefinitely, a description that doesn’t apply to pregnancy.⁶⁶ Not only is a woman pregnant for a finite amount of time, but delaying either an abortion or prenatal care can lead to complications and adverse physical and emotional consequences.⁶⁷

Or consider the question from a different angle: If a woman were to try to give herself an abortion, she would be putting her health at risk, and quite possibly breaking the law. Doesn’t that make a doctor’s attention “necessary”? In Massachusetts and South Carolina, women have been prosecuted for giving themselves abortions with the drug misoprostol, so this is not merely a hypothetical question.⁶⁸

Taking a cue from the decision in *Victoria W.*, the Eighth Circuit also suggested that the prison could require women to get an order from a judge authorizing an abortion before taking

63. *Roe v. Crawford*, 514 F.3d 789, 797 (8th Cir. 2008).

64. *Id.* at 799, emphasis in original.

65. Brief for American College of Obstetricians & Gynecologists et al. as Amici Curiae Supporting Plaintiffs-Appellees, *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008) (No. 06-3108).

66. The South Carolina Department of Corrections, for example, defines “elective” medical care as “a treatment or surgical procedure which is optional and does not require attention.” S.C. DEP’T OF CORR. POLICY HS-18.15, “Levels of Care,” Definitions (8) (on file with author).

67. BOONSTRA ET AL., *supra* note 6, at 17, 30-31; Brief for American College of Obstetricians & Gynecologists et al., *supra* note 65.

68. Self-inducing abortion with misoprostol (also known by the brand name Cytotec) is common practice in many Latin American and Caribbean countries, and women bring the practice with them when they come to the U.S. Jennifer 8. Lee and Cara Buckley, *For Privacy’s Sake, Taking Risks to End Pregnancy*, N.Y. TIMES, Jan. 5, 2009.

them for an appointment. This is something that the Department of Corrections had not even proposed, preferring instead to defend its blanket prohibition. The prison routinely brings women to outside medical appointments, about 150 times each month, as well as to other outside appointments, including the state cosmetology exam.⁶⁹ Although there had never been a problem with security during the infrequent trips for abortion care, the court decided that “prison officials should not be required to wait until a problem occurs before addressing the risk.”⁷⁰ The Department of Corrections claimed that taking women to a clinic in St. Louis posed a special security risk because of the presence of anti-choice protestors. It seems doubly unfair that protest activities designed to intimidate women would be further used to burden women’s rights in this way.

Together, these decisions signify a consensus in the courts that imprisoned women retain the right to an abortion; however, they do not offer a clear consensus on the precise contours of that right, nor on how solicitous courts will be of restrictions, short of outright bans, that jails and prisons may try to impose.

III. BARRIERS TO PREGNANCY CARE

While women who have decided to have an abortion always need to see an outside health care provider, women who are continuing their pregnancies may rely on providers inside of prison, outside, or both. Regardless of the particular arrangement, they must contend with a variety of gates and gatekeepers inside. Women must follow the prison’s rules and deal with prison staff, including guards, in order to obtain routine, urgent, or emergency care. This can prove extremely difficult, as sociologist Nancy Stoller explains, because prisons are places where “health care access is continually thwarted by rules, custodial priorities, poor health care management, and indifference.”⁷¹ The following case illustrates what can go wrong, highlighting structural barriers that block women’s access to the medical attention they need.

69. Recording of Oral Argument, *Roe v. Crawford*, No. 06-3108 (8th Cir. Nov. 24, 2007) available at <http://www.ca8.uscourts.gov/oralargs/oaFrame.html>.

70. *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008), at 795.

71. Nancy Stoller, *Space, Place, and Movement as Aspects of Health Care in Three Women’s Prisons*, 56 SOC. SCI. & MED. 2263, 2273-74 (2003).

A. *Insurmountable Obstacles*

Pamela Clifton went into labor on Christmas morning, 1998, in the Women's Correctional Facility in *Cañon* City, Colorado. She was approximately eight months pregnant. When she felt her first contraction at 10:55 a.m., Clifton asked a guard if she could go to the prison's medical facility, but the guard did not send her, because it was during "count," when prison staff restrict everyone to a designated place while they account for each person. Clifton could not go on her own because prison rules prohibited anyone from seeking medical care without first obtaining a guard's permission. The prison rules were made clear by a sign on the medical facility door that warned, "If you knock on this door, you will receive a write-up."⁷²

So Clifton waited. Around lunchtime, she asked a different guard for permission to go to the medical facility. Her contractions were now five minutes apart. That guard told her to get back to her unit, saying "there's plenty of women down there that know how to birth babies."⁷³ Finally, at 6:30 that evening, with the help of another woman serving time in the prison, Clifton was able to persuade a third guard to let her see the nurse.

When the nurse examined Clifton for signs of amniotic fluid, Clifton explained that there wouldn't be any; she had had to have her water broken with her two previous pregnancies. Clifton suggested the fetal monitor, but the nurse didn't know how to use it. After touching Clifton's belly—and feeling a contraction—the nurse concluded that Clifton was having a "false alarm" and sent her back to her unit, even though the Department of Corrections had a policy to transport any woman in labor to a hospital.⁷⁴

The nurse's decision to send Clifton back to her unit proved tragic. By the time Clifton saw the nurse again the next evening, she could no longer feel the fetus move. The nurse called in a physician's assistant to examine Clifton. The physician's assistant could not find a fetal heartbeat, and sent Clifton to a hospital in the community, where the staff determined that her fetus had died. She later delivered a stillborn baby.⁷⁵

72. *Clifton v. Eubank*, No. 00-cv-02555-JLK, 2006 U.S. Dist. LEXIS 91043, at *3 (D. Colo. Dec. 18, 2006).

73. *Id.* at *4.

74. *Id.* at *6.

75. *Id.*

A spokesperson for the Colorado Department of Corrections defended its record, telling a reporter that the Department is audited by the American Correctional Association every year, and “consistently exceeds” the standards for clinical care.⁷⁶

Clifton sued two guards and the nurse for monetary damages for depriving her of her right to adequate medical care. They eventually settled six years later.⁷⁷ Prior to the settlement, the proceedings in federal district court addressed two related issues: whether the defendants were deliberately indifferent to Clifton’s serious medical needs, and whether Clifton had suffered a “physical injury.”

The court found it self-evident that a woman in labor presents a serious medical need: “Although a physician might not always diagnose pregnancy labor as requiring medical treatment, I find, however, that any lay person would recognize the obvious need a woman in labor has for a doctor’s attention.”⁷⁸ The court also found that a reasonable jury could be persuaded that each of the defendants had treated Clifton with deliberate indifference, by delaying her access to medical care in the case of the guards, and by denying her adequate medical care in the case of the nurse.⁷⁹ The actions of all three prison employees prolonged her pain and suffering. Moreover, thirty years of case law, beginning with *Estelle v. Gamble*, as well as the Department of Corrections’ own policies, should have put the defendants on notice that they were violating Clifton’s rights: The Department maintained policies and procedures requiring guards to send pregnant women to the medical facility upon request, as well as to send pregnant women in labor to the hospital.⁸⁰

For their part, the nurse and guards argued that the court should dismiss Clifton’s lawsuit, claiming that she had experienced nothing more than the normal pains of childbirth or stillbirth, and thus had not suffered a “physical injury,” as required by the Prison Litigation Reform Act (PLRA).⁸¹ Explaining that

76. Quoted in Karen Abbott, *Inmates Allege Poor Medical Care; Attorney: State Hasn't Kept Up with Rise in Female Prisoners*, ROCKY MOUNTAIN NEWS, Sept. 23, 2002.

77. Personal communication, attorney David Lane, Feb. 6, 2009.

78. *Clifton v. Eubank*, 2006 U.S. Dist. LEXIS 91043, at *10 (finding that labor is a “sufficiently serious condition requiring medical care”).

79. *Id.* at *11-12, *14, *16.

80. *Id.* at *4, *7 (denying defendants’ motion for summary judgment on the basis of qualified immunity).

81. *Clifton v. Eubank*, 418 F. Supp. 2d 1243 (D. Colo. 2006), at 1244-45. In 1996, Congress rolled back prisoners’ rights and limited access to the courts by en-

the PLRA does not define the term “physical injury,” the court looked to prison case law, tort law, and “common sense” to determine what sorts of injuries would qualify as physical injuries. While it is the job of the fact-finder to determine the precise “degree to which [Clifton’s stillbirth] resulted in physical harm,” the court concluded that Clifton’s experience “far surpass[es]” other harms that have met the threshold requirement of what constitutes an “injury.”⁸² In the court’s words, the “egregious, permanent, and, indeed, lethal physical effects of prolonged labor, the death of a fetus, and stillbirth” warrant consideration.⁸³

Sadly, Clifton’s case is not unique. Other women have been denied medical care during count or lockdowns. Women in a large county jail in Illinois reported missing their prenatal care appointments because of the jail’s policy requiring that everyone be in her cell for count.⁸⁴ A woman in labor in California was not allowed out of her cell until count was complete. As a result, she gave birth alone, twenty minutes after she got to the prison infirmary, instead of at the hospital; no one at the prison assisted her.⁸⁵ A woman in Mobile, Alabama was five to six months pregnant when she told a guard that she needed to see the nurse for bleeding and pain. She was told she would have to wait until the staff completed a lockdown imposed to search for a piece of stolen clothing. She wound up giving birth to a premature infant who died later that night at the hospital.⁸⁶ These incidents highlight the ways that jail and prison staff subordinate women’s need for medical attention to prison rules and routines, regardless of the urgency of women’s needs.

Court documents, news reports, and other sources recount stories of women who tell prison staff that they are in labor,

acting the Prison Litigation Reform Act. One of the Act’s provisions bars lawsuits for mental and emotional injuries without a prior showing of physical injury. Because of this provision, people cannot sue for such injuries as sexual harassment, pat searches, or strip searches, even when these are intended to cause emotional distress. Intentional infliction of emotional or mental injury is actionable outside of prison. For a critique of the PLRA, see HUMAN RIGHTS WATCH, *NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES* (Human Rights Watch 2009), especially Section VI.

82. Clifton v. Eubank, 418 F. Supp. 2d 1243 (D. Colo. 2006), at 1248.

83. *Id.* at 1253. The court also described Clifton’s injury as “undeniabl[y]” having “tangible, physical effects.” *Id.* at 1248.

84. Diana J. Mertens, *Pregnancy Outcomes of Inmates in a Large County Jail Setting*, 18 PUBLIC HEALTH NURSING 45, 51 (2001).

85. Roth, *supra* note 14, at 428.

86. Robinson v. City of Mobile, No. 89-0793-BH-M, 1990 U.S. Dist. LEXIS 4082, at *2 (S.D.Ala. 1991).

bleeding, or can no longer feel their fetus move, only to be disregarded, denied access to medical care, or sent back to their housing units without proper evaluation.⁸⁷ In some cases, they are locked in solitary "observation" cells, where no one actually observes them until after they miscarry or give birth all alone. When this happened in Lackawanna County, Pennsylvania, officials accused the woman of planning to give birth so that she could sue the jail.⁸⁸

B. *Is Pregnancy A Serious Medical Need?*

Just as some courts have found that abortion is not a "serious medical need," so have some courts found that pregnancy does not constitute a serious medical need. By this they mean "pregnancy alone" or "pregnancy in and of itself," absent complications. Pregnancy is not an illness or disability; however, pregnancy is a medical condition with its own set of risks that are exacerbated by the conditions of confinement. These conditions include limited access to information, substandard prenatal care, arbitrary denials of medical care, inadequate food and nutrition, uncomfortable and unsanitary living conditions, and indifferent attitudes. Pregnant women in the King County Jail in Seattle, Washington, for example, relayed "being uncomfortable, lacking pillows and chairs, having to sit on cold cement, being exposed to toxic cleaning materials, and feeling constantly hungry."⁸⁹

Pregnant women in a Midwestern state prison described feeling powerless amidst the prison routine and bureaucracy, and de-humanized by practices such as pat searches and strip searches. More than one woman worried about getting to the hospital on time to give birth. As one explained, "If you are having trouble with your pregnancy, they act like they don't care or

87. "How does somebody have a baby in jail without anybody noticing?" asked Terra Keil, who gave birth alone in her cell in an Iowa jail. Bekah Porter, *Dubuquer Gives Birth Alone in Jail Cell*, TELEGRAPH HERALD, May 15, 2009; see also, e.g., Ellen Barry, *Women Prisoners and Health Care: Locked Up and Locked Out*, in MAN-MADE MEDICINE 249-72 (Kary Moss ed., Duke Univ. Press 1996); and Julie B. Ehrlich & Lynn Paltrow, *Jailing Pregnant Women Raises Health Risks*, WOMEN'S NEWS, Sept. 20, 2006, <http://www.womensnews.org/article.cfm/dyn/aid/2894>.

88. Borys Krawczeniuk, *Inmate Accused of Planning Birth*, TIMES-TRIBUNE, Aug. 22, 2007.

89. Carole Schroeder & Janice Bell, *Doula Birth Support for Incarcerated Pregnant Women*, 22 PUBLIC HEALTH NURSING 53, 55 (2005); see also Barry, *supra* note 87; Zulficar Gregory Restum, *Public Health Implications of Substandard Correctional Health Care*, 95 AM. J. PUB. HEALTH 1689 (2005) (on the transmission of communicable diseases in prison).

it's not a big deal. I had an incident of vaginal bleeding 2 weeks ago (at 29 weeks gestation). Health Care told me to go back and lay down. When they finally took me to the hospital, I was having contractions." Summing up the situation, another said, "They make it real evident they don't care for me or my baby."⁹⁰ Taking into account these inhospitable conditions, as well as the strict control of people's movements, the nature of prison environments would seem to make the idea of "pregnancy alone" a meaningless legal concept, raising the question of whether courts should always consider pregnancy in prison to pose a serious medical need.

This is the approach the Third Circuit took in 1987, when it held that pregnancy presents a serious medical need, whether it calls for abortion care or for prenatal care and childbirth. The court found pregnancy to be a unique medical condition because the decision a woman makes about whether to continue a pregnancy determines the necessary course of care. The court rejected the jail's view that pregnancy, not being an "abnormal" medical condition, falls outside the purview of serious medical need.⁹¹

Few other courts have followed this line of reasoning. The Ninth Circuit, for instance, found that April Jamison had not presented facts that would persuade a reasonable jury that her rights had been violated, "*even if* Jamison could show that the condition of being two or three months pregnant were 'sufficiently serious' in itself to form the basis of an Eight Amendment claim."⁹² Stage of pregnancy is not determinative, however, as another case shows. A federal district court in Indiana considering a claim by a woman who had been jailed during her seventh month of pregnancy concluded, "The knowledge of [the plaintiff's] advanced stage of pregnancy is insufficient by itself to put a reasonable jail commander on notice that an inmate has a serious medical condition."⁹³

90. Judith M. Wismont, *The Lived Pregnancy Experience of Women in Prison*, 45 JOURNAL OF MIDWIFERY & WOMEN'S HEALTH 292, 295 (2000) (study of health care in prison through interviews with women and analysis of journals they kept).

91. *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 333 (3rd Cir. 1987).

92. *Jamison v. Nielsen*, 32 Fed. Appx. 874, 876 (9th Cir. 2002) (emphasis added). The condition of "threatening miscarriage," however, would be considered sufficiently serious. Jamison had sued the Banock County Sheriff in Idaho.

93. Arrested and held for eight days during her seventh month of pregnancy, Shirley Jean Hartbarger was unable to sleep, in pain and discomfort, and denied

The case of Elizabeth Patterson against the Carroll County Detention Center in Kentucky provides a more extensive discussion of this issue. In that case, Elizabeth Patterson went into premature labor, somewhere between 17 and 21 weeks, resulting in the loss of her premature fetus. The opinion notes that the record is unclear about how far along she was. The court flatly rejects Patterson's argument that because she was pregnant, her condition was serious:

Plaintiffs attempt to define the context of "serious" in terms of Patterson's condition generally, referring only to her pregnancy as the serious condition requiring treatment. This untenable application of the legal standard is an effort by Plaintiffs to suggest that because Patterson was pregnant, she was in a permanently serious medical condition and, therefore, once the guard ignored her painful calls of cramping, she was acting with deliberate indifference. However, the general condition of being pregnant does not necessarily constitute a serious medical need at any given moment in time during incarceration absent a development that "must require immediate attention."⁹⁴

The court did find that Patterson's situation once her water broke was manifestly serious, but that her condition prior to that event – a reportedly problem-free pregnancy – could not have put the jail staff on notice to take her initial complaints of cramping as evidence of a serious medical need.⁹⁵

In a troubling move, the court cites *Coleman v. Rahija* as support. *Coleman* is a problematic case because the courts assert that pregnancy "alone" is not a serious situation, without actually analyzing the proposition. After a bench trial, the lower

access to a doctor despite requesting to see one. Significantly for her case, she did not appear to suffer any lasting consequences from her incarceration. *Hartbarger v. Blackford County Dep't of Pub. Welfare*, 733 F. Supp. 300, 301-02 (N.D. Ind. 1990).

94. *Patterson v. Carroll County Det. Ctr.*, No. 05-101-DLB, 2006 U.S. Dist. LEXIS 92057, at *13 (E.D. Ky. 2006).

95. *Id.* at *19. The court also rejects Patterson's "totality of circumstances" argument, through which she sought to assert her "unique needs as a pregnant woman in jail." Those circumstances include sleeping on a thin mat on the concrete floor and eating the standard jail diet, instead of a pregnancy diet. Here, the court takes Patterson to task for purchasing cigarettes at the canteen instead of the nutritious snacks, like milk and peanut butter, that she asked the jail to provide. *Id.* at *21. By constructing her as a "bad mother," the court deflects responsibility away from the jail to provide for the nutritional needs of those in its custody, regardless of the ability of any given individual to purchase supplemental items at the canteen. *See, e.g., "BAD" MOTHERS: THE POLITICS OF BLAME IN TWENTIETH CENTURY AMERICA* (Molly Ladd-Taylor & Lauri Umansky eds., N.Y. Univ. Press 1998); *HELENA MICHIE & NAOMI CAHN, CONFINEMENTS: FERTILITY AND INFERTILITY IN CONTEMPORARY CULTURE*, 24-31 (Rutgers Univ. Press 1997).

court noted that both sides “appear to agree that pregnancy is not a serious medical need alone,” but that certain circumstances may exist in any given case that would make pregnancy a serious medical need – as was true in this case. Despite her history of very fast labors and premature births, Gloria Coleman had to spend all day and night trying to persuade the nursing staff to take her bleeding and pain seriously as signs of labor. She barely made it to the hospital in time to give birth.⁹⁶ On appeal, the Eighth Circuit simply restates the proposition that “a woman’s pregnancy is generally not, alone, a serious medical need.”⁹⁷

The assumption that pregnancy itself is not serious underlies many decisions in which courts explain that something other than pregnancy alone was at play. In Pamela Clifton’s case against Colorado, for example, the court took the defendants to task for “disingenuously” characterizing the issue they sought to appeal as “whether pregnancy, alone, is a sufficiently serious medical condition” to trigger Eighth Amendment scrutiny. The court explained, “‘pregnancy alone’ was and is not the issue in this case[;] under the facts marshaled by Plaintiff, the issue was labor with complications.”⁹⁸

The court in *Patterson* is surely right that in the course of an ordinary pregnancy, a woman is not in a “permanently serious medical condition.” But imprisonment is not an ordinary situation, and can transform a “normal” or low-risk pregnancy into a high-risk one, by virtue of the constraints and obstacles inherent in prison life.

Given these obstacles, courts reviewing claims of inadequate care for pregnant women seem to be missing something: Jail and

96. *Coleman v. Rahija*, No. 4-91-CV-50260, 1996 U.S. Dist. LEXIS 21702, at *7 (S.D. Iowa Jan. 2, 1996). The district judge awarded Coleman \$1,000 in compensatory damages for the two hours of “fear and physical suffering accompan[ying] the prospect of having a baby on the floor of a penal institution,” based on a determination that the jail nurse should have sent her to the hospital at least two hours earlier than she did, as well as \$3,500 in punitive damages for the nurse’s inexcusable conduct which put Coleman in the terrifying situation in the first place. *Id.* at *29. The court of appeals vacated the punitive damages award. *Coleman v. Rahija*, 114 F.3d 778 (8th Cir. 1997).

97. The court notes that the defendant nurse cited the decision in *Boswell v. Sherburne* as support, but *Boswell* nowhere states that pregnancy in and of itself is not serious. Charlene Boswell, like Gloria Coleman, experienced complications late in pregnancy. *Boswell v. County of Sherburne*, 849 F.2d 1117, 1119 (8th Cir. 1988), cert. denied, 488 U.S. 1010 (1989); and *Boswell v. County of Sherburne*, 717 F. Supp. 686 (D. Minn. 1989).

98. *Clifton v. Eubank*, No. 00-K-2555, 2007 U.S. Dist. LEXIS 9061, at *3 (D. Colo. Feb. 8, 2007).

prison staff appear unprepared for pregnancy-related emergencies, and their dismissive attitudes toward pregnant women who say they need medical attention only increase the likelihood of delaying and denying care.⁹⁹ Consider the case of Consuela Bingham against a Mississippi jail. In her case, the court “assumes that the repeated complaints of a pregnant woman who is bleeding vaginally is sufficiently serious” to meet the Eighth Amendment standard.¹⁰⁰ But as we have seen, jail and prison staff do not always assume that bleeding or other signs of miscarriage, stillbirth, or labor are serious.¹⁰¹

Faced with this reality, the argument that courts should take pregnancy seriously doesn't reflect ideas of pregnant women as essentially weak or ill. Rather, it recognizes that imprisonment renders pregnancy a serious condition and puts women at risk for complications and poor outcomes.

IV. PRISON DYNAMICS AND THE NEED FOR CHANGE

Whatever the strengths or weaknesses of various interpretations of women's Fourteenth and Eighth Amendment rights to pregnancy-related care, formidable obstacles remain to ensuring

99. As one example of being unprepared, the Carroll County Detention Center staff went into a “panicked frenzy” because they did not know which hospital they were authorized to take Patterson to after her water broke. *Patterson v. Carroll County Det. Ctr.*, No. 05-101-DLB, 2006 U.S. Dist. LEXIS 92057, at *6 (E.D. Ky. 2006).

100. *Bingham v. Webster County*, No. 1:05CV220-D-D. 2007 U.S. Dist. LEXIS 73333, at *23 (N.D. Miss. Oct. 1, 2007). When she was five months pregnant, Bingham fell in an unlit shower and several hours later began to bleed. She “lay bleeding and in pain for over twenty hours before she was released on the street to seek her own medical care,” contrary to jail protocol. *Id.* at *3.

101. See, e.g., *Coleman*, 1996 U.S. Dist. LEXIS 21702 (ignored bleeding and pain), *Boswell*, 849 F.2d. 1117 (ignored bleeding and pain), *Patterson*, 2006 U.S. Dist. LEXIS 92057 (ignored cramping, dismissed it as normal), and *Wismont*, *supra* note 90 (“they act like they don't care or it's not a big deal”). A woman in an Iowa jail was told by a guard that bleeding is normal; she spent the weekend crying and asking to see the nurse, but was denied medical attention until Monday, when the nurse came on duty and sent her to the emergency room to receive treatment for miscarriage. Bekah Porter, *Miscarriage of Justice for Pregnant Inmates?*, TELEGRAPH HERALD, May 31, 2009. Similarly, a woman in a California state prison was told by a Medical Technical Assistant that “all pregnant women bleed” before losing her pregnancy (a Medical Technical Assistant is a guard trained as a licensed vocational nurse); Roth, *supra* note 14, at 428. News exposes of medical neglect in jail and prison frequently feature stories of women who have miscarriages or stillbirths or give birth inside of prison. See, e.g., Paul von Zielbauer, *As Health Care in Jails Goes Private, 10 Days Can Be a Death Sentence*, N.Y. Times, Feb. 27, 2005, (Metropolitan Desk) at 1 (including a story of a woman who gave birth prematurely in her jail cell; the baby died two days later).

that women will receive the care they need. First is the problem of limited compliance with court decisions. In the case of abortion access, this means that women are still subject to the arbitrary whims of their keepers, and need outside allies and a great deal of personal resolve to carry out their decisions. In Pennsylvania, for example, when the Department of Corrections instituted an official policy on abortion, it defied the Third Circuit by imposing all of the costs on women, contrary to the court's decision.¹⁰² In Arizona, courts repeatedly struck down a restrictive abortion policy in the Maricopa County jails. Yet that did not stop the sheriff from interfering with women's rights. Just weeks after losing his final court battle, he denied access to a woman who asked for an abortion. It took her four weeks to secure legal help and terminate her pregnancy. Because of the delay, she needed a more expensive, two-day procedure.¹⁰³

The second problem is limited compliance with prison policies, where such policies exist to begin with. In the case of access to medical attention for pregnancy, one response might be to institute a policy that all requests for pregnancy-related care be treated as medical emergencies.¹⁰⁴ But it's not clear that adopting such a policy would make any difference. After all, in prisons like the one in Colorado where Pamela Clifton's pregnancy en-

102. The policy on "elective termination of pregnancy" states that: "The inmate and her family shall be responsible for all costs related to the diagnostic work-up, assessment, treatment, surgical intervention, medical complications, security officer and transportation costs associated with the elective termination of pregnancy procedures." PA. DEP'T OF CORR. POLICY STATEMENT 13.2.1, ACCESS TO HEALTH CARE, §13, (2004), available at http://www.cor.state.pa.us/standards/lib/standards/13.02.01_Access_Health_Care.pdf.

The Third Circuit decision is clear that the prison must bear these costs if the woman cannot. *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3rd Cir. 1987). An earlier policy on pregnancy management did not contain any provisions about abortion. Roth, *supra* note 20, at 363-64; PA. DEP'T OF CORR. POLICY STATEMENT 13.2.7, ACCESS TO HEALTH CARE, §2 (1999) (on file with author).

103. The ACLU has filed a motion to hold the sheriff in contempt. See Press Release, ACLU, ACLU Reminds 'America's Toughest Sheriff' that He's Not Above the Law (Aug. 7, 2008), available at <http://www.aclu.org/reproductiverights/abortion/36261prs20080807.html>. The original case is *Doe v. Arpaio*, described *supra* note 39.

104. This would address a widespread policy vacuum. The Lackawanna County Prison in Pennsylvania, for example, where a woman gave birth alone in an "observation cell," had no policy on sending pregnant women in labor to the hospital; Borys Krawczeniuk, *LCCF Official Says Procedure in Place for Pregnant Inmates*, TIMES-TRIBUNE, July 20, 2007. In New York, the problem is state-wide: Not a single county has a written policy explaining when to take a woman in labor to the hospital; N. Y. CIVIL LIBERTIES UNION, *supra* note 47, at 12. The idea of treating requests for pregnancy-related care as medical emergencies emerged in discussions with Kaaryn Gustafson.

ded in a stillbirth, policies were in place to ensure appropriate treatment of pregnant women, but neither the corrections staff nor the medical staff followed them.¹⁰⁵ The willingness of prison officials and staff to disregard their own policies and court rulings demonstrates how difficult it is to hold prisons accountable.¹⁰⁶ As a result, women are put in the position of having to fight for access to the medical attention they need, over and over again.

These problems of defiance lead us to the third obstacle, the structural and cultural dynamics of prisons themselves. Scott Allen describes how these dynamics affect medical practitioners. Allen spent seven years working for the Rhode Island Department of Corrections, in a culture he describes as punitive, isolating, and dehumanizing. As a physician, he felt complicit in propping up a failed system, and eventually left his position as medical director. Drawing on the perspective he gained as an insider, Allen questions the excuse that only "renegade staff" are to blame for the abuse that goes on in prison, arguing that this stance "minimizes the effect of prison culture on otherwise good human beings."¹⁰⁷

Taken together, these problems, along with all the other structural barriers and poor conditions that characterize imprisonment, strongly suggest that the best way to preserve women's health and prevent violations of their reproductive rights is to keep them out of prison to begin with.

105. The American Correctional Association's seal of approval for clinical care didn't ensure compliance, either. See Abbott, *supra* note 76.

106. As another example, women in different parts of the country brought lawsuits in the summer of 2009 because they were shackled while they were in labor, contrary to state statute in Illinois and contrary to state Department of Corrections policy in Washington. See *Jail Inmates Shackled During Childbirth*, UNITED PRESS INT'L, June 16, 2009, available at http://www.upi.com/Top_News/2009/06/16/Jail-in-mates-shackled-during-childbirth/UPI-64061245179696/; and *Complaint for Damages and Declaratory Relief, Brawley v. State of Washington* (W. D. Wash. June 25, 2009) available at http://www.nwwlc.org/pdf/Brawley_v_DOC_Complaint.pdf. The Eighth Circuit held such shackling to be unconstitutional a few months later. See *Nelson v. Correctional Medical Services*, 583 F.3d 522 (8th Cir. 2009).

107. Scott A. Allen, presentation at *Advocating for Prisoner Health Care: Healthier Prisons for Healthier, Safer Communities*, Mar. 11, 2009, Boston; Scott A. Allen, *Abuse in Prison: Stanford Revisited*, PROVIDENCE JOURNAL (op-ed), July 17, 2006. Nancy Stoller also analyzes the ethical dilemmas facing health care providers who work in carceral institutions. She describes how the nature of prison and "the feelings, attitudes, and beliefs" of those who enter the prison clinic's doors inevitably affect what goes on there, as do "the walls, barbed wire, locks, and rules" that separate the prison clinic "both literally and metaphorically from the wider medical community." Stoller, *supra* note 71, at 2263, 2265.

Preventing imprisonment and reducing its scale would require widespread, systemic change at many levels. It would require changing policing practices, drug policy and sentencing laws, and bail, probation, and parole policies. It would further require implementing a universal health care system that encompasses both the full range of reproductive health services and access to drug treatment, including residential treatment where parents can live with their children. Fundamentally, it would require reevaluating why we have so many people in prison in the first place, and why we keep so many people in prison for so long, especially compared to other countries.¹⁰⁸

The unprecedented expansion of the prison system over the last three decades currently costs about \$68 billion per year, draining resources from public education, health care, and other priorities essential to a more just and equal society.¹⁰⁹ But it is not just the monetary cost that is a concern. It is the harm inflicted on people on whom it is spent, as the cases and examples in this article demonstrate, as well as the relegation of an ever-growing number of people to permanent second-class citizenship, even after they have served their time.¹¹⁰

No woman's sentence includes a term of "medical neglect" or "forced pregnancy," yet this is undeniably the result of imprisonment for some women. Courts promise us that "prison walls do not form a barrier separating [people in prison] from the protections of the Constitution," and yet undeniably they do.¹¹¹ The violations inflicted on pregnant women in prison betray the ideals in the Constitution, and call upon us to reconsider our country's approach to punishment and justice.

108. People in the U.S. are far more likely to spend time in prison for minor nonviolent offenses such as shoplifting or using drugs than are people in other countries. Liptak, *supra* note 2. In the words of Supreme Court Justice Anthony Kennedy, "Our resources are misspent, our punishments too severe, our sentences too long." *Justice Criticizes Lengthy Sentences*, N.Y. TIMES, Aug. 10, 2003.

109. Jim Webb, *Why We Must Fix Our Prisons*, PARADE, Mar. 29, 2009.

110. On second-class citizenship, *see, e.g.*, AM. CIVIL LIBERTIES UNION, *supra* note 4; INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., New Press 2002).

111. *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 333 (3rd Cir. 1987), quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987).

