

**UCLA**

**UCLA Women's Law Journal**

**Title**

Creating the Bad Mother: How the U.S. Approach to Pregnancy in Prisons Violates the Right to Be a Mother

**Permalink**

<https://escholarship.org/uc/item/4v93j2hd>

**Journal**

UCLA Women's Law Journal, 18(1)

**Authors**

Levi, Robin  
Kinakemakorn, Nerissa  
Zohrabi, Azadeh  
[et al.](#)

**Publication Date**

2010

**DOI**

10.5070/L3181017816

**Copyright Information**

Copyright 2010 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

Peer reviewed

# ARTICLES

## CREATING THE “BAD MOTHER”<sup>1</sup>: HOW THE U.S. APPROACH TO PREGNANCY IN PRISONS VIOLATES THE RIGHT TO BE A MOTHER

Robin Levi, Nerissa Kunakemakorn,  
Azadeh Zohrabi, Elizaveta Afanasieff,  
and Nicole Edwards-Masuda\*

I. INTRODUCTION.....	3
II. METHODOLOGY.....	4
III. BACKGROUND.....	6
A. <i>History of the State’s Role in Restricting         Mothering</i> .....	9
B. <i>Mothers in California Prisons</i> .....	14
IV. ROLE OF U.S. LEGAL FRAMEWORK IN DEFINING WHO IS A BAD MOTHER.....	16
A. <i>Constitutional Standards</i> .....	16
1. Eighth Amendment Protections.....	17
2. Due Process Protections and the Right to Family under U.S. Law.....	21
3. Recent Legal Initiatives.....	23
B. <i>California State Law and Regulations</i> .....	24

---

1. We are using the term “bad mother” as a reference to the societal response to upper middle class – especially White – mothers who do not live up to their expectation of how a “good mother” would act. *See generally* AYELET WALDMAN, *BAD MOTHER: A CHRONICLE OF MATERNAL CRIMES, MINOR CALAMITIES, AND OCCASIONAL MOMENTS OF GRACE* (2009).

\* This article was written by the following members of the Human Rights Program at Justice Now in Oakland, California: Robin Levi, Human Rights Director; Nerissa Kunakemakorn, Reigle Human Rights Staff Attorney; Azadeh Zohrabi, Student, UC Hastings College of the Law; Elizaveta Afanasieff; and Nicole Edwards-Masuda, Student, Golden Gate University School of Law.

1.	Assembly Bill 478 and Implementing Regulations .....	24
2.	Mental Health Care Regulations .....	26
V.	ABUSES .....	27
A.	<i>Prenatal Care</i> .....	28
1.	Overview .....	28
2.	Unhealthy Diet .....	30
3.	Poor Physician-Patient Relations and Lack of Information .....	33
4.	Inadequate Response to Pregnancy Complications and Risk of Maternal & Fetal Death .....	36
B.	<i>Labor and Delivery Care</i> .....	39
1.	Shackling .....	40
2.	Lack of Informed Consent and Control ...	42
C.	<i>Postpartum Care</i> .....	46
1.	Inadequate Postpartum Medical Care.....	50
2.	Lack of Mental Health Services .....	51
3.	Forced Separation of Parent and Child ....	54
a.	<i>Child Placement Process &amp; the Termination of Parental Rights</i> .....	56
b.	<i>Mother-Infant Programs</i> .....	59
VI.	INTERNATIONAL HUMAN RIGHTS LAW AND THE RIGHT TO MOTHERHOOD .....	63
A.	<i>Overview</i> .....	63
B.	<i>Right to Family</i> .....	64
C.	<i>Right to Health</i> .....	65
1.	Availability .....	68
2.	Accessibility .....	69
3.	Acceptability.....	69
4.	Quality .....	70
D.	<i>Right to Information</i> .....	70
E.	<i>Right to Be Free from Torture and Cruel, Inhuman or Degrading Treatment</i> .....	71
F.	<i>Right to Life</i> .....	73
VII.	CONCLUSION & A CALL TO ACTION.....	74

*I got pregnant on September 28th, and was locked up on the 30th . . . . I was five months pregnant here. It's torture living here. I didn't receive care. They sent me to the OB but they didn't give me anything I needed. They don't care . . . . [The doctor] flirts with the MTAs [Medical Technical Assistants] and all the ladies back there, and eats all day. He don't want to give you anything. He don't give a damn. And then he sits up and laughs when he makes us upset. Makes comments to pregnant women like, "Yeah, you just wobble on out of here." I feel that he gets off on that . . . . They refuse to let you know the sex of the baby here. They said they only saw my baby with two or three fingers . . . . My baby had all his fingers.*

Valerie Herrell, Valley State Prison for Women<sup>2</sup>

## I. INTRODUCTION

Valerie, like many other people, entered prison while she was pregnant and gave birth while still in custody. Hundreds of others enter prison pregnant each year and face the risk of considerable mental and physical harm to themselves and their babies. This is especially true for people of color, who are more likely to enter prison<sup>3</sup> and to face abuses while they are there. The impact of imprisonment on pregnant individuals and their communities is devastating and sometimes irreparable. For example, imprisoned populations and their children are institutionalized, relocated and dispersed, sometimes permanently. Children are taken into custody by the state, or left struggling in a single income home, increasing their risk of imprisonment. Underlying these abuses is the public perception, supported by the media and government policies, that people in prison are not worthy of being mothers - that they are essentially 'bad' mothers who will produce 'bad' children.

This article will set forth how U.S. state and federal law enforces and reifies the perception that people in prison are not suited to be mothers. First, this article will present relevant background information regarding the government's involvement in

---

2. Due to security concerns, throughout this report, we have changed the names of interviewees still in prison and omitted the names of interviewers. Unless otherwise noted, all interviews were conducted at Valley State Prison for Women in Chowchilla, California. See Interview with Valerie Herrell at California's Valley State Prison for Women (July 16, 2004) [hereinafter Interview with Herrell].

3. See MEDA CHESNEY-LIND & LISA PASKO, *THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME* 155-56 (2nd ed. 2004) ("[T]he surge in women's imprisonment has disproportionately hit women of color in the United States . . . . [M]uch of this increase can be laid at the door of the war on drugs, which many now believe has become a war on women, particularly on women of color").

restricting people's mothering rights, especially with regard to people of color, as well as statistics on pregnant people<sup>4</sup> in California's women's prisons. Second, this discussion is followed by an analysis of the legal obligations of the United States with regard to the rights of individuals, and of the failure of the United States to meet such obligations. Specifically, the article examines how the U.S. government does not protect the mothering rights of people in prison, and in some cases, reinforces discrimination against parents in prison. Third, the article discusses the abuses of the rights of pregnant and post-partum individuals in California's women's prisons, including abysmal prenatal care, poor physician-patient relationships, deficient responses to complications, and inadequate postpartum care. Fourth, the article examines how international human rights law provides a challenge to these abuses by supporting a person's right to safe motherhood. We also set forth how the U.S. government has failed to uphold the human rights to family, information, health, bodily integrity, dignified treatment, life, and the right to be free from cruel, inhumane or degrading treatment. Finally, the article concludes with a call for all people, especially mothers, to work together to protect the rights of mothers by bringing the U.S. into compliance with international law by opposing stereotypical notions of who is a good or bad mother. This work must include providing real prison alternatives and reducing the number of people in prison.

## II. METHODOLOGY

Justice Now was founded in 2000 with a vision of working with people in women's prisons and local communities to build a safe, compassionate world without prisons. In addition to providing direct legal services, Justice Now launched its Human Rights Documentation Program in September 2003 to expose and challenge the experiences of people in women's prisons using an international human rights framework.

Co-researchers in prison (called "documenters") are trained via one-on-one, in-person trainings with staff from the Human Rights Documentation Program ("Program") in international

---

4. While our understanding is that all of the individuals we surveyed and interviewed for this report identified as women at that time, our constituency is comprised of people across the gender spectrum. In order to recognize the fluidity of gender identity as well as the fact that not all pregnant people inside prison identify as women, we use the term "pregnant person/people" or "pregnant individual," rather than "pregnant woman/women," in this report.

human rights doctrine and standards, information-gathering approaches, and documentation procedures. At the time of the publication of this article, forty-three people in California's women's prisons have been trained as documenters, despite the risk of retaliation against them by prison staff for their participation, since any advocacy or action that may seem political is strongly discouraged by the correctional system. Twenty-four more individuals are on a waiting list to be trained.

To collect information for this article, the documenters worked with Program staff to develop and distribute a survey on legal violations surrounding prison conditions, policies, and programs for people who are pregnant, deliver, and/or receive postpartum care in prison. The legal surveys were distributed between 2006 and 2007 in the two California prisons that hold pregnant people: Valley State Prison for Women ("VSPW") in Chowchilla and the California Institution for Women ("CIW") in Corona. CIW houses people on methadone maintenance and is slated to open a prison nursery.<sup>5</sup> We worked with five documenters and received fifty-three completed surveys: forty-nine from people imprisoned at VSPW, three from people at CIW, and one from a respondent at an unidentified prison. All survey respondents were either pregnant at the time they completed the survey or were recently pregnant during their period of imprisonment; almost all respondents described pregnancy experiences that occurred in 2006 and 2007, with two respondents describing events in 2005.<sup>6</sup> After the completed surveys were collected, they were reviewed for errors and inconsistencies by Program staff using StatCrunch,<sup>7</sup> a web-based data analysis tool.

To supplement our survey data on legal violations, Program staff and interns employed several methods. First, we interviewed twenty-six people – some of whom had previously filled out surveys – who were pregnant or had been pregnant inside

---

5. See CAL. CODE REGS. tit. 15, § 3355.2(e) (2008); Women's Prison Ass'n, *Mothers, Infants and Imprisonment: A National Look at Prison Nurseries and Community-Based Alternatives* 27 (2009), available at <http://wpaonline.org/pdf/Mothers%20Infants%20and%20Imprisonment%202009.pdf>. As of December 2009, the prison nursery had not yet opened.

6. In September 2008, after all surveys had been collected and interviews had been conducted, the Human Rights Program received eight additional surveys relating to pregnant, birthing, and postpartum people at VSPW. Quantitative data from these eight additional surveys have not been included in our findings. However, quotes and stories from these surveys have been included where appropriate.

7. StatCrunch, Data Analysis on the Web, <http://www.statcrunch.com> (last visited Oct. 15, 2008).

VSPW, CIW, and the Central California Women's Facility ("CCWF"), where some women who had recently given birth while at CIW or VSPW were transferred. We also interviewed activists and medical specialists with expertise in these issues. Additionally, to ascertain generally accepted standards of medical care and treatment for pregnant, birthing, and postpartum people, we relied heavily on publications and guidelines produced by the American College of Obstetricians and Gynecologists and other medical professionals.

### III. BACKGROUND

The role of imprisonment in constraining an individual's choices and options regarding reproduction and motherhood cannot be fully understood without first considering the disproportionate imprisonment of people of color. Due to the increased prosecution of drug offenses and other low level crimes,<sup>8</sup> the dismantling of the nation's mental health care system,<sup>9</sup> the trend toward imposing long prison sentences,<sup>10</sup> and the popularity of three strikes legislation,<sup>11</sup> the population of women's prisons in the United States is now eight times greater than it was thirty-two years ago.<sup>12</sup> According to the Bureau of Justice Statistics, as of December 31, 2007 there were 105,500 people (this number does not include people in jail or awaiting trial) serving sentences in over-populated, poorly-designed women's prisons in the U.S., approximately two-thirds of whom are the primary caretakers of minor children.<sup>13</sup> Twenty-eight percent of these people are

---

8. RYAN S. KING & MARC MAUER, *THE SENTENCING PROJECT, DISTORTED PRIORITIES: DRUG OFFENDERS IN STATE PRISONS 1-2* (2002), available at [http://www.sentencingproject.org/doc/publications/dp\\_distortedpriorities.pdf](http://www.sentencingproject.org/doc/publications/dp_distortedpriorities.pdf).

9. *Grading the States 2009: A Report on America's Health Care System for Adults with Serious Mental Illness*, NATIONAL ALLIANCE ON MENTAL ILLNESS 15 (2009).

10. See Solomon Moore, *Number of Life Terms Hits Record*, N.Y. TIMES, July 22, 2009, at A24, available at <http://www.nytimes.com/2009/07/23/us/23sentence.html>.

11. See generally Kelly Ann Cheeseman, Rolando V. del Carmen & Robert Worley, *Three Strikes and You're In: The Effect of Ewing v. California and Three Strikes Legislation on Prison Population and Resource Management*, 3 JUST. POL'Y J. 1-35 (2006), available at [http://www.cjcj.org/files/three\\_strikes.pdf](http://www.cjcj.org/files/three_strikes.pdf).

12. THE SENTENCING PROJECT, *WOMEN IN THE CRIMINAL JUSTICE SYSTEM: BRIEFING SHEETS* (May 2007), available at [http://www.sentencingproject.org/doc/publications/womenincj\\_total.pdf](http://www.sentencingproject.org/doc/publications/womenincj_total.pdf).

13. *Id.*

Black<sup>14</sup> and 48 percent are White, despite the fact that these two groups comprise approximately 13 percent and 75 percent of the female population of the United States, respectively.<sup>15</sup> In California, White women, who make up 76.2 percent of the female population in California generally, are underrepresented in the prison system.<sup>16</sup> The California Department of Corrections and Rehabilitation ("CDCR") reported that, as of June 2008, of the 11,401 people in California's women's prisons,<sup>17</sup> the minority of the population is White (36.1 percent), while people of color make up the majority (63.9 percent).<sup>18</sup> Although Black women make up approximately 7.6 percent of the general women's population in California,<sup>19</sup> they represent 29.3 percent of the women's prison population.<sup>20</sup> Latinas represent the largest racial group in California's women's prison system, making up 29.4 percent of people inside the state's women's prisons, compared to 35.2 percent in the general women's population in California.<sup>21</sup> The CDCR does not keep specific track of the numbers of people of Native American and Asian/Pacific Islander descent in women's prisons, and lumps both of these groups into the category of "other."<sup>22</sup> Thus, it is impossible for us to clearly determine the rate of imprisonment in these categories. This lack of information is particularly troubling because significant evidence exists

---

14. We use the adjective "Black" to describe all people of African descent, including those whose families have lived in the United States for generations and those who have arrived more recently and may not identify as African-American.

15. POPULATION DIVISION, U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SEX, RACE, AND HISPANIC ORIGIN FOR STATES: Apr. 1, 2000 to July 1, 2008, at tbl. 3 (2009) [hereinafter U.S. CENSUS BUREAU], available at <http://www.census.gov/popest/states/asrh/SC-EST2008-03.html> (follow "California" hyperlink).

16. *Id.*

17. DATA ANALYSIS UNIT, CAL. DEP'T OF CORR. & REHAB., PRISON CENSUS DATA AS OF JUNE 30, 2008, at tbl. 4 (2008) [hereinafter PRISON CENSUS DATA], available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Annual/Census/CENSUSd0806.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/Census/CENSUSd0806.pdf).

18. *Id.*

19. U.S. CENSUS BUREAU, *supra* note 15.

20. PRISON CENSUS DATA, *supra* note 17; U.S. CENSUS BUREAU, *supra* note 15.

21. PRISON CENSUS DATA, *supra* note 17; U.S. CENSUS BUREAU, *supra* note 15.

22. PRISON CENSUS DATA, *supra* note 17. The percentage of Native American and Asian American people inside prison could not be accurately determined because statistics provided by the Department of Corrections and Rehabilitation categorize people in prison as "Black," "Hispanic," "White," or "Other." We find it particularly disturbing that the government fails to track the numbers of Native American and Asian American people, even in these large categories.



that Native Americans, Pacific Islanders, and people from certain Asian ethnic groups are imprisoned at disproportionate rates.<sup>23</sup>

The fact that people of color are imprisoned at disproportionate rates in California and the rest of the country is particularly significant in light of the prison system's effect on the reproductive rights of people. Our research does not indicate that current prison policies and practices regarding pregnancy target people of color specifically,<sup>24</sup> but the reality of disproportionate imprisonment means that even actions of reproductive oppression not specifically directed at people of color will still disproportionately impact people of color. This disproportionate impact, coupled with the historic devaluing of mothering of people of color and poor people,<sup>25</sup> as described below, leads us to believe that racial and class animus underlies some, if not most, of the disrespectful and dangerous treatment pregnant people receive in prison.

Historically, the state has worked actively to restrict or destroy the maternal choices and rights of sections of the population deemed 'unfit,' most notably through the eugenics movement<sup>26</sup> and more recently in its punitive response to mothers suffering from drug dependency and people receiving welfare.<sup>27</sup> The people most systematically affected by such campaigns have been people of color.<sup>28</sup> Consequently, it is useful to

---

23. Stormy Ogden, *The Prison Industrial Complex in Indigenous California*, WOMEN AND PRISON: A SITE FOR RESISTANCE, <http://www.womenandprison.org/prison-industrial-complex/stormy-ogden.html> ("One devastating outcome of land dispossession today is the disproportionate rates of incarceration of Native adults and children"); RONALD BARRI FLOWERS, MINORITIES AND CRIMINALITY 111 (1990) ("Native Americans are overrepresented in U.S. correctional institutions"); BARRY KRISBERG, JUVENILE JUSTICE: REDEEMING OUR CHILDREN 101 (2005) (describing the disproportionate rates of arrest in California for Samoan, Vietnamese, Thai, Laotian, and Cambodian young people in particular).

24. In contrast, our research on destruction of reproductive capacity in prison, including questionable hysterectomies and oophorectomies (removal of one or both ovaries), demonstrated that people of color were far more likely to face destruction of reproductive capacity. Robin Levi, *Doing What is Medically Necessary*, 36 OFF OUR BACKS 77 (2006); Robin Levi et al., *Prisons as a Tool of Reproductive Justice*, STAN. J. CIV. RTS. & CIV. LIB. (forthcoming).

25. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1436-1444 (1991).

26. Levi, *Doing What is Medically Necessary*, *supra* note 24, at 78.

27. While punitive responses to welfare can affect all parents, mothers often experience a greater impact because they are usually the primary caretakers of their children. *See supra* note 12.

28. *Id.*

briefly examine the government's historical involvement in deciding who should be a mother.

A. *History of the State's Role in Restricting Mothering*

One of the ways the state has communicated its position on who should or should not be a mother was through the eugenics movement in the early 20th century, which was based on the idea that socially undesirable characteristics were hereditary and could be eliminated by destroying the reproductive capacity of those with so-called undesirable traits.<sup>29</sup> These ideas, combined with the dominant racist ideology of the time, provided the context in which people of color and other marginalized populations were deemed unfit to be parents. Thousands of women of color were "routinely sterilized without their consent and for no valid medical reason."<sup>30</sup>

As the first nation to legalize and execute mass sterilization through its eugenics policy, the U.S. provided inspiration for other national social and political movements, including the racist immigration policies embodied in the Immigration Act of 1924.<sup>31</sup> In fact, U.S. eugenics techniques and philosophies were later adopted by Nazi Germany.<sup>32</sup>

The government's interference with mothering went beyond attempting to prevent segments of the population from becoming mothers. Towards the end of the twentieth century, the U.S. government began to heavily police motherhood, by, for example, prosecuting women who used drugs and chose to give birth. In the mid-1980's, the government poured billions of dollars into the "War on Drugs,"<sup>33</sup> which had a disproportionate impact on

---

29. See, e.g., RICKIE SOLINGER, *PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA* 89-90 (2005) ("The eugenicists counseled reproductive strategies that would ensure higher rates of reproduction among the fit and lower rates among the unfit. . . . They believed that only by applying the principles of this science to the reproductive behavior of Americans, especially women, would this country avoid 'race suicide,' that is, the decline of Anglo-Saxon numerical superiority and power.").

30. Dorothy Roberts, *Forum: Black Women and the Pill*, 32 *FAM. PLAN. PERSP.* (2000), available at <http://www.guttmacher.org/pubs/journals/3209200.html#3>.

31. See, e.g., SOLINGER, *supra* note 29, at 90-91.

32. See Jael Silliman, Marlene Gerber Fried, Loretta Ross & Elena R. Gutierrez, *Undivided Rights: Women of Color Organize for Reproductive Justice* 53 (2004) ("[E]ugenics philosophies and techniques were discredited by their association with and use in Nazi Germany . . .").

33. David Boaz, *A Drug-Free America – Or a Free America?* 24 *U.C. DAVIS L. REV.* 617, 620 (1991), available at [http://lawreview.law.ucdavis.edu/issues/Vol24/Issue3/DavisVol24No3\\_Boaz.pdf](http://lawreview.law.ucdavis.edu/issues/Vol24/Issue3/DavisVol24No3_Boaz.pdf) ("Federal drug war outlays tripled between 1980

people of color and triggered an enormous surge in their incarceration rates.<sup>34</sup> The act of declaring war, whether domestic, international, or imaginary, demands a conceptualization of an enemy. In the "War on Drugs," this enemy was the "monstrous crack smoking mother" and the accompanying "permanently damaged and abandoned" crack baby who would grow up to prey on society and depend on the state for assistance.<sup>35</sup> This sensationalizing of the War on Drugs by the media was particularly persuasive, and worked to create a common sense perception associating Black people with drugs and violence. Yet statistics show that Black people are not accountable for the majority of violent crimes, nor do they represent the majority of drug users.<sup>36</sup> Perhaps even more damaging than the media's projected stereotypes was the government's role in passing and enforcing legislation that codified what was becoming the common belief that poor Black women should not be trusted with motherhood. Legislators across the nation rushed to draft legislation<sup>37</sup> concerning drug use during pregnancy. The stated intent of this legislation was the protection of the fetus from the "irresponsible and selfish woman who put her love for crack above her love for her children."<sup>38</sup>

The judicial response to these mothers was also highly punitive. Mothers of drug exposed babies were routinely separated from their children by force and, in some cases, permanently lost custody because the "unfitness to parent was based on a single, unconfirmed positive drug test rather than a thoughtful evaluation of whether drug use or any other factor has rendered someone incapable of parenting."<sup>39</sup> Studies on the practices of drug

---

and 1988, and the federal government spent more than \$20 billion on antidrug activities during the decade. Adjusted for inflation, the federal government spends ten times as much on rug-law enforcement every year as it spent on Prohibition enforcement throughout the Roaring Twenties).

34. CHESNEY-LIND et al, *supra* note 3, at 156.

35. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE REPRODUCTION, AND THE MEANING OF LIBERTY* 157 (1997).

36. See generally Judith A.M. Scully, *Killing the Black Community: A Commentary on the United States War on Drugs*, in *POLICING THE NATIONAL BODY: RACE, GENDER, AND CRIMINALIZATION* 55 (Jael Silliman & Anannya Bhattacharjee eds., 2002).

37. Barry M. Lester, Lynne Andreozzi & Lindsey Appiah, *Substance Use During Pregnancy: Time for Policy to Catch up with Research*, 1 Harm Reduction J. 5, 12 (2005).

38. ROBERTS, *supra* note 35, at 156.

39. JEANNE FLAVIN, *OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN'S REPRODUCTION IN AMERICA* 116 (2009).

testing, reporting, and subsequently arresting drug-using mothers reveal that the entire process was highly racialized.<sup>40</sup> A particularly egregious example of the increasing collaboration between law enforcement and hospitals that served the poor and people of color took place in South Carolina hospitals, which created a heavily policed and punitive setting and allowed for "nonconsensual drug testing of pregnant patients, reporting results to police, and the use of arrest for drug abuse charges as punishment or intimidation."<sup>41</sup> Many women were arrested while pregnant or within hours or days of giving birth. At the public hospital operated by the Medical University of South Carolina,

[a]bout 30 women who tested positive were reported to the police by the nurse who oversaw the program and other health care workers. The hospital then helped to coordinate their arrests on charges of possession, drug delivery, or child abuse. All but one of these women were [B]lack. The exception was a [W]hite woman who was identified by a nurse as someone who "lived with her boyfriend who is a Negro."<sup>42</sup>

Despite clear, empirical evidence that the rates of drug use among White and Black pregnant women were 15.4 percent and 14.1 percent respectively, one study found that among the women "reported to health authorities after delivery for substance abuse during pregnancy . . . [B]lack women were reported at approximately 10 times the rate for [W]hite women."<sup>43</sup> A survey conducted by the National Institute on Drug Abuse revealed that the percentages of White women who used alcohol and cigarettes during pregnancy were significantly higher than the percentages of Black or Hispanic women who used alcohol and cigarettes during pregnancy.<sup>44</sup> Many laws concerning prenatal drug use focus on the kinds of drugs that are most accessible to poor people and people of color, not the issue of illegal substances as a whole.<sup>45</sup> Both the abuse of illicit and legal drugs are potentially

---

40. Scully, *supra* note 36.

41. ROBERTS, *supra* note 35, at 165.

42. FLAVIN, *supra* note 39, at 109.

43. I.J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202 (1990), available at <http://content.nejm.org/cgi/content/abstract/322/17/1202>.

44. See Robert Mathias, *NIDA Survey Provides First National Data on Drug Use During Pregnancy*, NIDA NOTES (Nat'l. Inst. on Drug Abuse, Bethesda, Md.), Jan.-Feb. 1995, at fig.1, [http://www.drugabuse.gov/NIDA\\_notes/NNVol10N1/NIDA\\_Survey.html](http://www.drugabuse.gov/NIDA_notes/NNVol10N1/NIDA_Survey.html).

45. Roberts, *supra* note 25, at 1432-36.

harmful to the fetus.<sup>46</sup> In effect, these laws “can be said to focus more on policing drug choice than paying attention to fetal health.”<sup>47</sup> While we do not approve of policing people for any of their choices during pregnancy, and we would oppose punishing people for such choices, the state’s decision to criminalize certain potentially harmful actions while ignoring others reveals a great deal about its interest in selectively preventing particular populations from mothering.

Punitive policies continue after the parent gives birth. Individuals, including mothers, who are convicted of drug felonies or have a history of drug use face a wide spectrum of punitive federal laws that limit their access to social services and thereby their ability to be effective parents. For example, Section 115 of the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) permanently bars individuals with felony drug convictions from receiving cash benefits and food stamps.<sup>48</sup>

Each state can “opt out” of enforcing this ban, or modify its enforcement. In its February 2002 report, The Sentencing Project, a D.C.-based advocacy organization, documented the implementation, non-implementation, or modified implementation of PRWORA on a state by state basis (including the District of Columbia) and analyzed its overall national impact. According to the report, as of December 2001, twenty-two states fully enforced PRWORA’s ban, and twenty states enforced a modified version of the ban.<sup>49</sup> In order to determine the ban’s impact according to race, the report examined the felonious drug conviction rates of Black, Hispanic and White women in twenty-one states. Due to the disproportionate convictions of women of color for drug offenses, 48 percent of women affected by the ban were Black and

---

46. COMM. ON PATIENT EDUC., AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, (ACOG), ACOG EDUCATION PAMPHLET AP 170: TOBACCO, ALCOHOL, DRUGS, AND PREGNANCY (2008), available at [http://www.acog.org/publications/patient\\_education/bp170.cfm](http://www.acog.org/publications/patient_education/bp170.cfm).

47. Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1678 (2008).

48. 21 U.S.C. §862a. The following federal benefits cannot be denied: Emergency medical service under Title XIX of the Social Security Act, short-term, non-cash emergency disaster relief, public health assistance for immunizations, public health assistance for testing and treatment of communicable diseases if the Secretary of Health and Human Services determines that it is necessary to prevent the spread of such disease, prenatal care, job training programs, and drug treatment programs.

49. PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 3 tbl. 1 (2002), available at [http://www.soros.org/initiatives/baltimore/articles\\_publications/publications/lifesentences/03-18-03patriciaAllardReport.pdf](http://www.soros.org/initiatives/baltimore/articles_publications/publications/lifesentences/03-18-03patriciaAllardReport.pdf).

Latina.<sup>50</sup> As of April 2006, fifteen states fully enforced PRWORA’s ban and twenty-three enforced a modified version of the ban.<sup>51</sup> Although the decrease in the number of states fully enforcing the lifetime ban may lower the total number of women affected, it does not impact the proportions of women affected by full or partial bans on welfare benefits according to race. This ban continues to have a severe impact on many individuals, especially women of color who are disproportionately imprisoned for drug offenses and represented in the welfare system.

Access to housing is also impacted by these punitive policies. Public housing authorities may deny admission—based on an applicant’s past drug conviction—to both project-based public housing and programs such as the Section 8 Tenant Based Housing Assistance Program, which pays private landlords the difference between the fair market value of a unit and the rent that is affordable to a tenant with limited income.<sup>52</sup> In the case of drug treatment history, the authority must infer current use before eviction.<sup>53</sup>

In addition, the “One Strike” housing policy provides that “any violent or drug-related activity, on or off the premises engaged in by a public housing tenant, any member of the tenant’s household or *any guest or other person under the tenant’s control* shall be cause for termination of tenancy.”<sup>54</sup> These policies survived a legal challenge with a unanimous decision at the U.S. Supreme Court level.<sup>55</sup> Moreover, in *Campbell v. Minneapolis Public Housing Authority*, the Eighth Circuit held that questions about drug and alcohol abuse on housing applications and release of information requirements did not violate anti-discrimination laws.<sup>56</sup>

---

50. *Id.* at 6-7 tbl. 3.

51. PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES note tbl. 1 (Supp. 2006), [http://www.sentencingproject.org/doc/publications/women\\_smy\\_lifesentences.pdf](http://www.sentencingproject.org/doc/publications/women_smy_lifesentences.pdf).

52. Housing Opportunity Program Extension Act of 1996, 42 U.S.C. § 1437d(s)-(t) (2006) (This provision authorizes public housing agencies to: 1) access criminal records of the applicant or current tenant, and 2) access records from drug treatment facilities where that information is solely related to whether the applicant is currently engaging in the illegal use of a controlled substance).

53. ALLARD, *supra* note 51, at 11-12.

54. 42 U.S.C. 1437d(1)(6) (2006) (emphasis added).

55. *See* Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 127 (2002).

56. *Campbell v. Minn. Pub. Hous. Auth.*, 168 F.3d 1069 (8th Cir. 1999).

Finally, in recent years the child welfare system in some states has increasingly been used to remove children from parents suspected of using drugs, including the children of women in prison. A positive drug test can send a child into foster care, regardless of any evidence of neglect or abuse, requiring parents to fulfill an often onerous reunification plan that requires, among other things, drug treatment, testing and parenting classes while their children remain in foster care.<sup>57</sup>

The federal Adoption and Safe Families Act, passed in 1997, has also made it difficult for certain people to parent their children. This law, which will be discussed further in Section III, requires that governments file for termination of parental rights when a child has been in foster care for fifteen of the last twenty-two months. The time limit can be even shorter for children under three. For example, in California the time limit is six months for children under three and their siblings.<sup>58</sup> Some states, including California<sup>59</sup>, have passed revisions that allow judges more flexibility with this timeframe, but the majority of states have not.<sup>60</sup>

The combination of policies regarding housing and welfare, and the lack of drug treatment facilities in general (especially those able to accommodate pregnant women or individuals with child care needs) make it very difficult for a formerly imprisoned, low-income woman to be the parent she wants to be, thus turning her into a “bad mother.”

### B. *Mothers in California Prisons*

In addition to the disproportionate imprisonment of people of color, there are an astounding number of parents in prison. In February 2003, the California Research Bureau estimated that 79

---

57. Memorandum from the Office of Legal Affairs, Drug Policy Alliance to the Drug Policy Alliance Staff (May 20, 2002) (on file with Justice Now).

58. *Infra* note 308.

59. Justice Now, *They Treat you Like an Animal: Pregnancy, Delivery, and Postpartum abuses Inside California Women's Prisons*, 1 RIGHT TO FAMILY SERIES at 64 (forthcoming). (“On January 1, 2009, Assembly Bill 2070. . .took effect, and began to address the distinct needs of parents in prison and in resident drug treatment programs who are working to retain their parental rights. Under this new law, social workers are required to document, and courts need to consider, the barriers that parents in prison and residential drug treatment programs routinely face while attempting to meet court-mandated reunification requirements”).

60. See generally Emily K. Nicholson, Comment, *Racing Against the ASFA Clock: How Incarcerated Parents Lose More Than Freedom*, 45 DUQ. L. REV. 83 (2006).

percent of people in California's women's prisons were parents and that about two-thirds of those parents were the primary caretakers of their children before entering prison.<sup>61</sup> The majority of people surveyed for this report had between one and three children, and 32 percent reported having between four and six children.<sup>62</sup> Based on that small sample, the imprisonment of more than 11,000 people in California's women's prisons likely impacts the lives of many thousands of children and their families.

While official statistics on pregnant and postpartum individuals in California women's prisons are not made publicly available as a matter of policy, according to the California Prison Health Care Receivership Corporation ("Receivership"), at any given time there are anywhere from fifty-five to over 100 pregnant people, out of a total population of almost 4,000, in Valley State Prison for Women ("VSPW").<sup>63</sup> As of September 2008, VSPW reported holding seventy pregnant people.<sup>64</sup> The Receivership estimates that there are currently sixty to ninety pregnant people in the California Institution for Women ("CIW")<sup>65</sup> with sixty-eight pregnant people reported at CIW in September 2008.<sup>66</sup> Overall, approximately 7 percent of people in California's women's prisons give birth while serving their sentence.<sup>67</sup> In 2007, there were 208 deliveries, seventy-one caesarean-sections, and one stillbirth in California women's prisons.<sup>68</sup> Nationally, around 5 percent of people enter state women's prisons pregnant.<sup>69</sup> An additional 15 percent of individuals entering prison are estimated to have infants under six weeks old.<sup>70</sup> In 2000, the Department of Justice's Bureau of Justice Statistics reported that almost 1.5 million children had a parent in state or

---

61. Charlene Wear Simmons, *California Law and the Children of Prisoners*, CAL. RES. BUREAU, 5, 8 (2003) available at <http://www.library.ca.gov/crb/03/03/03-003.pdf>.

62. Justice Now Survey (on file with Justice Now).

63. Communication from Tim Rougeux, Chief Operating Officer, Medical Services of California Prison Health Care Receivership Corp. (Sept. 10, 2008) [hereinafter Communication from Rougeux].

64. *Id.*

65. *Id.*

66. *Id.*

67. Simmons, *supra* note 61, at 2.

68. Communication from Rougeux, *supra* note 63.

69. Rachel Roth, *Justice Denied: Violations of Women's Reproductive Rights in the United States Prison System*, PSYCHOL. & REPROD. CHOICE, Sept. 2004, available at [http://www.prochoiceforum.org.uk/psy\\_ocr10.asp](http://www.prochoiceforum.org.uk/psy_ocr10.asp).

70. WOMEN IN PRISON FACT SHEET, CHI. LEGAL ADVOC. FOR INCARCERATED MOTHERS, (2007), <http://www.claim-il.org/thirdcoast/claim-il.org/about.html>.



federal prison.<sup>71</sup> The same data shows that in United States in 2000, 7 percent of all Black children had a parent in prison, 2.6 percent of Latino children had a parent in prison and only 0.8 percent of White children had a parent in prison.<sup>72</sup> This means that Black children were almost nine times more likely to have a parent in prison than White children, and Latino children were three times more likely than White children to have an imprisoned parent or parents.<sup>73</sup>

#### IV. ROLE OF U.S. LEGAL FRAMEWORK IN DEFINING WHO IS A BAD MOTHER

As we have described above, rather than challenging the obstacles around finances, housing and family reunification that face parents in prison or formerly in prison, the U.S. legal system in many cases facilitates and enforces these obstacles, thus legitimizing society's view that people inside women's prisons are undeserving of motherhood. In addition, despite a constitutional right to adequate health care in prison established in *Estelle v. Gamble*,<sup>74</sup> the legal system rarely addresses the insufficient maternal care provided to those in prison, both because of reluctance on the part of the judiciary to acknowledge such abuses and because of significant procedural hurdles that we will discuss in this section. Furthermore, although procreation and the right to family are held to be fundamental rights,<sup>75</sup> over the last twenty years U.S. courts have severely eroded such rights for people inside prison. As of 2010, even specific laws relating to providing care to people inside prison do not result in adequate pregnancy care.<sup>76</sup>

##### A. *Constitutional Standards*

The federal law governing medical and mental health care for pregnant and postpartum individuals in prison falls under the Eighth Amendment to the Constitution, while protection of parental rights is provided by the Due Process Clause. However,

---

71. CHRISTOPHER J. MUMOLA, U.S. DEPT' OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN 1 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>.

72. *Id.* at 2.

73. *Id.*

74. *Estelle v. Gamble*, 429 U.S. 97 (1976).

75. International Covenant on Civil and Political Rights, art. 2, 6, Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171 [hereinafter ICCPR].

76. See *infra* note 125-129.

courts have not yet interpreted either constitutional provision to provide sufficient protection for the rights of pregnant and post-partum individuals in prison.

### 1. Eighth Amendment Protections

The Supreme Court in *Estelle v. Gamble* held in 1978 that prison authorities need to provide adequate medical care to people in prison for “serious medical needs,”<sup>77</sup> as a necessary means to avoid inflicting “cruel and unusual punishment.”<sup>78</sup> Courts have interpreted the prohibition against cruel and unusual punishment to “[embody] ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency.’”<sup>79</sup> As a necessary consequence of imprisonment, people in prison “must rely on prison authorities to treat . . . medical needs; if the authorities fail to do so, those needs will not be met.”<sup>80</sup> Even “[i]n less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.”<sup>81</sup> Consequently, the Eighth Amendment’s prohibition of cruel and unusual punishment is violated when a plaintiff in prison demonstrates an unattended, serious medical need. A serious medical need has been defined as one that a physician has diagnosed as such; “one that is so obvious that even a layperson would easily recognize the necessity for a doctor’s attention,” one that causes substantial pain, “significantly [affecting] an individual’s daily acts,” or one that poses a risk of a lifelong handicap or permanent loss.<sup>82</sup>

Once a serious medical need is established, the court must find “deliberate indifference” to this medical need by prison medical or non-medical staff to prove a violation of the Eighth

---

77. A serious medical need has been defined as: one that a physician has diagnosed as such; “one that is so obvious that even a layperson would easily recognize the necessity for a doctor’s attention”; one that causes chronic and substantial pain; or one that “significantly affects an individual’s daily activities.” *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 208 (1st Cir. 1990); *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992).

78. *Estelle v. Gamble*, *supra* note 75.

79. *Id.* at 102 (citing *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

80. *Id.* at 103.

81. *Id.*

82. Pamela K. Sutherland & David C. Fathi, *Litigation Behind Bars: For Prisoners Suffering from Hepatitis C and Other Effects of Incarceration, the Trial Lawyer is Often their only Hope*, 39 TRIAL 26, 29 (2003) (quoting MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS, 376-77 (2002)).

Amendment.<sup>83</sup> The U.S. Supreme Court defined the deliberate indifference standard in 1994, nearly twenty years after *Estelle*, in *Farmer v. Brennan*.<sup>84</sup> The *Farmer* Court found deliberate indifference to lie “somewhere between the poles of negligence at one end and purpose or knowledge at the other.”<sup>85</sup> In 1999, the Third Circuit further clarified the deliberate indifference standard by stating that the deliberate indifference requirement is met “where the prison official (1) knows of a prisoner’s need for medical treatment, but intentionally refuses to provide it, (2) delays necessary medical treatment based on a non-medical reason, or (3) prevents a prisoner from receiving needed or recommended medical treatment.”<sup>86</sup>

However, as a result of the Prison Litigation Reform Act (PLRA), passed by U.S. Congress in 1996, people in prison are extremely limited in their ability to challenge their pregnancy care under the Eighth Amendment. The PLRA provides that people in prison are not eligible to sue unless they have first exhausted all administrative grievance procedures and can show that they have suffered physical injury.<sup>87</sup> In California prisons, the exhaustion requirement means that an administrative grievance process<sup>88</sup> must be completed properly, with all deadlines met, in order for a person in prison to file suit.<sup>89</sup> Completing the process can be extraordinarily difficult, regardless of the merits of a claim.<sup>90</sup> Moreover, under the PLRA, federal court supervi-

---

83. *Estelle v. Gamble*, *supra* note 74 at 104–05.

84. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994).

85. *Id.* at 836.

86. *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999).

87. 42 U.S.C. § 1997e(a) (2000); *id.* § 1997e(e).

88. HEATHER MCKAY & THE PRISON LAW OFFICE, *THE CALIFORNIA STATE PRISONERS HANDBOOK: A COMPREHENSIVE PRACTICE GUIDE TO CALIFORNIA PRISON & PAROLE LAW 1* (4th ed. 2008) (“Prisoners may have legitimate complaints about the actions of a prison or parole official or the substance or application of a rule or policy. A prisoner with such a complaint may file a written grievance with . . . (CDCR). Such a grievance is known as an ‘administrative appeal.’ The CDCR’s administrative appeal process involves filling out a form called a ‘CDCR 602’ and ‘going up the ladder’ by submitting the form for review by increasingly high-ranking officials”).

89. *See Woodford v. Ngo*, 548 U.S. 81, 87 (2006).

90. A significant level of sophistication and facility of language is necessary to write a successful 602 appeal, as the form is written in formal language that is difficult to understand. Telephone interview by Lynsay Skiba with Allison Forth, MSW candidate, Hunter College, Former Client Coordinator, Justice Now in Oak., Cal. (Oct. 17, 2006). At every level of the process the complainant is at a disadvantage. People have 15 working days to appeal the response of the prison system, while the prison system has 20 working days to respond to second level appeals (unless the

sion over prison systems is extremely limited unless there are documented findings of a current and on-going constitutional violation.<sup>91</sup>

Even when plaintiffs are able to get into court to challenge the medical care they receive in prison, the results rarely, if ever, provide an adequate remedy. In 1997, the CDCR settled a class action lawsuit, *Shumate v. Wilson*, which was brought by people in two California women’s prisons to challenge the medical care they were receiving under the Cruel and Unusual Punishment Clause of the Eighth Amendment.<sup>92</sup> Among other things, the settlement provided that the CDCR agree to screen people for contagious diseases upon their entry into Central California Women’s Facility (“CCWF”) or California Institution for Women (“CIW”),<sup>93</sup> protect patient privacy in the screening process to the extent possible given security considerations,<sup>94</sup> and ensure the continuous provision of necessary medications.<sup>95</sup> A subsequent audit of the two prisons found substantial compliance with the requirements of the *Shumate* settlement; however, the independent assessor in charge of gauging compliance with the agreement identified continuing problems with medication continuity, and the physician who later performed the audit found problems at CIW with inadequate medical screening at reception and a lack of confidentiality.<sup>96</sup> California’s prison health care system is as troubled as ever, more than a decade after the *Shumate* settlement agreement.

---

first level is waived, in which case the prison has 30 working days to respond), and 60 working days for the third and final level of appeal. Not only do prison staff members have more time at each stage to prepare their response, but they may deviate from the timeframe if 1) the appealing individual or a witness is unavailable; 2) the decision, action, or policy is considered complex; or 3) other agencies or jurisdictions need to be involved. In addition to the slow process, numerous people we interviewed reported being told that their 602 forms were lost, effectively ending their complaint. While forms can get lost, their loss should not result in the end of the grievance process.

91. See 18 U.S.C. § 3626(a)(1) (2000); *Benjamin v. Jacobson*, 935 F. Supp. 332, 354 (S.D.N.Y. 1996) (stating in dictum “[i]n the PLRA, Congress sought to ensure that federal courts return control over prison management to democratically accountable state and local governments as soon as federal court supervision became unnecessary to remedy a demonstrated, ongoing constitutional violation.”).

92. Settlement Agreement, *Shumate v. Wilson*, CIV S-95-619 WBS JFM, (E.D. Cal. Aug. 11, 1997).

93. *Id.* at 8–9.

94. *Id.* at 9.

95. *Id.* at 14.

96. See *Plata v. Davis*, 329 F.3d 1101, 1103 (9th Cir. 2003) (describing the assessor’s findings and audit of the *Shumate* settlement).

Despite the limitations imposed by the Prison Litigation Reform Act, the federal court system has instituted supervision over California's prison health delivery system through a federal receivership. However, the results thus far have been limited. The federal receivership, which has been in place since 2005, was a product of a 2001 federal court case, *Plata v. Davis*. The plaintiffs in that case were people in California's men's prisons (although the case now applies to the entire prison system) who argued that they were not receiving adequate medical care, in violation of the Eighth Amendment, the Americans with Disabilities Act, and the Rehabilitation Act.<sup>97</sup> The case was settled with an agreement in 2002 requiring the CDCR to overhaul its health delivery system in line with Eighth Amendment minimum requirements.<sup>98</sup>

Three years later, however, in the same case (now called *Plata v. Schwarzenegger*) district court judge Thelton Henderson made the dire observation that "[b]y all accounts, the California prison medical care system is broken beyond repair."<sup>99</sup> Judge Henderson placed the CDCR medical delivery system under federal receivership because California had failed to remedy the constitutional violations complained of by the *Plata* plaintiffs; the harm done to people "could not be more grave" and the potential for future harm was "virtually guaranteed in the absence of drastic action."<sup>100</sup> The receiver, appointed by Judge Henderson, is charged both with bringing prison medical care up to constitutional standards and with coordinating health care delivery with mental health, dental, and disability programs,<sup>101</sup> each of which, as indicated below, is the subject of ongoing litigation.<sup>102</sup> The current federal receiver, J. Clark Kelso, highlighted the dysfunc-

---

97. First Amended Complaint at 2, *Plata v. Davis*, 329 F.3d 1101 (9th Cir. 2003) (No. C-01-1351 TEH).

98. Stipulation for Injunctive Relief, *Plata*, 329 F.3d 1101 (No. C-01-1351 THE).

99. Findings of Fact and Conclusions of Law *re* Appointment of Receiver, *Plata v. Schwarzenegger*, No. C01-13510, 2005 WL 2932253, at 1:21 (N.D. Cal. Oct. 3, 2005) (not reported in F.2d).

100. *Id.* at \*1.

101. Letter from J. Clark Kelso, Receiver, Cal.'s Dep't of Corr. & Rehab., to Thelton E. Henderson, Judge, U.S. Dist. Court of the N. Dist. of Cal. (Apr. 21, 2008).

102. The lawsuits addressing mental health, dental, and disability care in the California prison system are, respectively, *Coleman v. Schwarzenegger*, 2008 U.S. Dist. LEXIS 37193 (E.D. Cal. Mar. 18, 2008), *Perez v. Tilton*, 2006 U.S. Dist. LEXIS 63318 (N.D. Cal. Aug. 21, 2006), and *Armstrong v. Schwarzenegger*, 2007 U.S. Dist. LEXIS 70289 (N.D. Cal. Sept. 11, 2007).

tion that characterizes the relationships between prison medical staff and patients. In his April 21, 2008 Second Draft Strategic Plan, he observed that, “health care within CDCR consists of episodic and often untimely encounters between patients and clinicians who, given the lack of reliable patient information and support systems, are placed in a responsive position with no incentives or feedback loops to encourage good medical practices.”<sup>103</sup>

This lack of good medical care becomes evident when pregnant people seek treatment in prison. While a normal pregnancy in and of itself does not constitute a serious medical need as required by *Estelle*, a pregnancy can lead to complications. Left unaddressed, these complications can result in serious medical needs for both the parent and the fetus – thereby satisfying the first prong of *Estelle*. Where prison staff is aware of such pregnancy complications and fails to respond with prompt and proper medical treatment, the second prong of *Estelle*, requiring “deliberate indifference,” is also satisfied.<sup>104</sup>

## 2. Due Process Protections and the Right to Family under U.S. Law

Like U.S. courts’ interpretation of Eighth Amendment requirements for prison medical, dental and mental health care, courts’ application of the extended right of parents to be with and care for their children fails to protect people in prison from violations of these parenting rights.

All parents have a constitutionally-protected, fundamental right to make decisions about the care, custody, management and upbringing of their children.<sup>105</sup> A state may not interfere with a parent’s right to make these decisions without a compelling state

---

103. Letter from J. Clark Kelso, *supra* note 101.

104. Because plaintiffs bear the burden of showing that a prison official drew the inference that a substantial risk of serious harm existed, in practice, it is very difficult to meet the “deliberate indifference” standard of *Estelle*. See Christine Peek, Comment, *Breaking out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1244 (2004) (“The fact that plaintiffs bear this burden creates an incentive for guards to ignore problems. . . Even if a guard could be held liable for failure to investigate facts underlying a substantial risk . . . higher prison officials would still be insulated on the ground that they had no knowledge of the omission.”).

105. See *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). See generally U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; *Meyer v. Neb.*, 262 U.S. 390 (1923) (demonstrating the basis for and development of the doctrine surrounding this Constitutional right).

interest,<sup>106</sup> such as when a child's health and safety are at risk.<sup>107</sup> In *Michael H. v. Gerald D.*, the Supreme Court emphasized the importance of preserving the family, stating that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."<sup>108</sup>

Similarly, in *Troxel v. Granville*, the Court determined that a Washington nonparental visitation statute, which allowed courts to overturn any parental decision that violated the visitation interests of third parties, was unconstitutional because it violated the fundamental rights of the petitioner to make parental decisions about the rearing of her children.<sup>109</sup> The statute permitted any third party seeking visitation to "subject any decision by a parent concerning visitation of the parent's children to state-court review."<sup>110</sup> Because the Court had previously recognized the fundamental due process right of parents to make decisions regarding the care, custody and control of their children, the Court held, "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."<sup>111</sup>

Despite the protection of parental rights and the recognition of the importance of family preservation under constitutional law, parental rights of those in prison have been consistently abridged in court decisions. This abridgement is generally premised on the view that imprisonment involves the abridgement of many rights, including the right to procreate,<sup>112</sup> which is necessary to exercise the right to parent, and the constitutionally protected right to association<sup>113</sup>—which includes the right to visits from children and the power to make decisions as to their upbringing.<sup>114</sup>

---

106. *Troxel*, 530 U.S. at 66.

107. See *Santosky v. Kramer*, 455 U.S. 745 (1982); *Prince v. Mass.*, 321 U.S. 158, 167 (1944) (explaining that the state has power to limit parental freedom in things affecting the child's welfare).

108. *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1938)).

109. *Troxel*, 530 U.S. at 71-72.

110. *Id.* at 67.

111. *Id.* at 68-69.

112. *Gerber v. Hickman*, 291 F.3d 617 (2002).

113. *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003).

114. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984).

For example, the Ninth Circuit held in *Gerber v. Hickman* that a plaintiff sentenced to 100 years to life plus an additional eleven years did not have a constitutional right to artificially inseminate his wife for the purposes of procreation.<sup>115</sup> In examining whether "the right to procreate is fundamentally inconsistent with incarceration," the court determined that due to a person's "inmate" status, they lose the right of intimate association.<sup>116</sup> Even though the right to intimate association has been identified as "a fundamental element of personal liberty" by the Supreme Court,<sup>117</sup> the Ninth Circuit stated that "the loss of the right to intimate association is simply part and parcel of being imprisoned for conviction of a crime."<sup>118</sup> Thus, although the Supreme Court found that the right to family is a fundamental right and requires strict scrutiny analysis prior to any abridgement, the full spectrum of parental rights, including the right and ability to become a parent, for people in prison has found little protection from U.S. courts. In addition, recent rulings by the U.S. Supreme Court in the area of criminal justice suggest that raising constitutional claims regarding the rights of people in prison to create and support families could lead to further restriction rather than expansion of these rights

### 3. Recent Legal Initiatives

Activists are trying to provide more rights through legislation. Efforts currently are underway to draft federal legislation encouraging states to send pregnant and parenting adults who have been convicted of non-violent offenses<sup>119</sup> to comprehensive, family-based substance abuse treatment services, instead of sentencing them to prison.<sup>120</sup> The draft legislation would also amend the Adoption and Safe Families Act ("ASFA") by modifying the existing strict requirement that proceedings for termination of parental rights be initiated if a child has been in foster

---

115. *Gerber*, 291 F.3d at 620-621.

116. *Id.* at 621.

117. *Id.* (quoting *Roberts v. Jaycees*, 468 U.S. at 618).

118. *Id.*

119. Nonviolent crimes are defined as property, drug, and public order offenses that do not involve a threat of harm or an actual attack upon a victim. See Christopher J. Mumola & Matthew Durose, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROFILE OF NONVIOLENT OFFENDERS EXITING STATE PRISONS (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pnoesp.pdf>.

120. Telephone Conference Call with The Rebecca Project & the Mothering Initiative Coalition (Apr. 7, 2009).



care for fifteen out of the previous twenty-two months.<sup>121</sup> Instead, the legislation would give the courts discretion to: (1) consider the barriers that parents in prison or parents in residential drug treatment face in accessing services and maintaining contact with their children; (2) take into account any good faith efforts that parents make to maintain contact with their children; and (3) allow the possibility of an extension of reunification services for up to twenty-four months.<sup>122</sup> Finally, the legislation would also encourage state prisons and jails to implement the Bureau of Prison's recently formalized reforms restricting the shackling of pregnant mothers in custody. The proposed legislation addresses the type of restraints used and prohibits the use of any restraints on women during labor, delivery and post-delivery, except in situations of where there is a threat of violence.<sup>123</sup>

## B. California State Law and Regulations

### 1. Assembly Bill 478 and Implementing Regulations

Recently there have been some attempts to improve the standard of care provided to pregnant and postpartum individuals inside California's women's prisons. Assembly Bill 478, A.B. 478, was signed into law in October 2005 and went into effect in January 2006 in California.<sup>124</sup> The contents of A.B. 478 are described throughout this report. In addition to prohibiting the shackling of pregnant and birthing people in prison under almost all circumstances, the new law requires that people in prison "have access to complete prenatal health care," regular prenatal appointments, a "balanced, nutritious diet approved by a doctor," prenatal vitamins, information on childbirth and infant care, as well as postpartum information and health care.<sup>125</sup> People in state prison should also receive one dental cleaning during their

---

121. *Id.*

122. *Id.*

123. *Id.*

124. Assembly Bill 478 modified Penal Code Sections 3419, 3423, and 6030, and added Penal Code Sections 3424 and 5007.7. *See* A.B. 478, 2005 Leg., 2005-2006 Sess. (Cal. 2005). It also amended Sections 222 and 1774 of the Welfare and Institutions Code. *Id.*

125. CAL. PENAL CODE § 3424 (West 2008); CAL. CODE REGS. tit. 15, § 3355.2(h) (2008). These regulations establish a schedule for prenatal care, requiring that pregnant people receive obstetric visits with an obstetrician or nurse practitioner every 4 weeks in the first trimester up to 24 - 26 weeks gestation, every 3 weeks thereafter up to 30 weeks gestation, every 2 weeks thereafter up to 36 weeks gestation, and weekly after 36 weeks up to delivery CAL. CODE REGS. tit. 15, § 3355.2(c) (2008).

pregnancy.<sup>126</sup> Specifically, the California Department of Corrections and Rehabilitation (CDCR) regulations promulgated to implement A.B. 478 require that, during the second trimester of pregnancy, pregnant people receive a dental examination and cleaning, and "the necessary dental care that will maintain periodontal health during the gestation period."<sup>127</sup>

As of now, it is still too early to evaluate the effectiveness of A.B. 478's implementation. However, based upon the lack of long-term change from previous efforts to improve care for pregnant people in prison,<sup>128</sup> Justice Now remains concerned that the actual changes resulting from A.B. 478 will not extend far beyond reducing shackling and fulfilling the most specific dental care requirements. For example, reports from prisons subsequent to implementation in 2008 indicate that despite the clear requirement for complete prenatal care and a balanced, nutritional diet, both prenatal care and diet fell below the accepted standard of care.<sup>129</sup> Problems with implementation may be indications of a larger problem that legislation cannot effectively address: the fundamental disrespect for people in prison and their desire to be mothers. This problem of disrespect underlies many of the abuses pregnant individuals endure in prison. Thus, while attempts to acknowledge the humanity of people in prison are welcome, A.B. 478 is only the first step toward fulfilling the right of people in prison to be mothers. Achieving such a goal requires much deeper reform, including a dramatic reduction in the number of people in prison and having non-prison staff provide pregnancy care, along with a change of attitude toward people in prison.

---

126. CAL. CODE REGS. tit. 15, § 3355.1(c) (2008); A.B. 478, 2005 Leg., 2005–2006 Sess. (Cal. 2005).

127. CAL. CODE REGS. tit. 15, § 3355.1(c) (2008); *see* CAL. CODE OF REGS. tit. 15, art. 8 (2008) (defining regulations governing general mental and dental care in prison).

128. Brief of Opposition for Legal Services for Prisoners with Children at 5-7, *Plata v. Davis*, 329 F.3d 1101, 1103 (9th Cir. 2003), *available at* <http://www.prisonerswithchildren.org/news/plata.htm> ("the Stipulation for Injunctive Relief - an important victory for prisoners generally in its expansion of medical staff positions and the beginning of a health services delivery model that focuses on prevention and early intervention - fails in many important respects to adequately address serious medical needs that are unique to female reproductive health or that otherwise disproportionately affect women").

129. Interview by Justice Now with Diane Wegener, *A New Way of Life*, in Los Angeles, California (March 10, 2008).

## 2. Mental Health Care Regulations

California also has state regulations that set forth specific guidelines for the treatment of people with mental illness in California prisons.<sup>130</sup> Under these regulations, all CDCR prisons are required to provide treatment that includes a wide variety of mental health services, including specialized programs, sufficient mental health staff and facilities, and a system of outpatient clinics for people on parole.<sup>131</sup> Additionally, a person in prison must receive a mental health evaluation if her or his attorney, relative, or guardian requests to have an evaluation by a mental health professional, unless the warden is able to point to specific factors warranting a denial.<sup>132</sup> State regulations also require that all CDCR prisons have a suicide prevention program and that staff be trained to recognize signs of suicide risk.<sup>133</sup> Similarly, the CDCR Department Operations Manual<sup>134</sup> outlines detailed procedures for the treatment of mentally ill people in prisons, including having sufficient staff, equipment, supplies and 24-hour emergency care.<sup>135</sup>

However, based on our research described above, these regulations have not led to pregnant people receiving adequate and appropriate mental health care. In fact, we have heard of two cases where prison staff gave people psychotropic drugs upon entering CIW, prior to receiving a pregnancy test. Both women were pregnant and miscarried shortly thereafter.<sup>136</sup> Similar to the reforms to pregnancy care provided by A.B. 478, we view the current mental health regulations as inadequate, and their non-implementation as evidence of the prison system's continuing inability to provide appropriate health care. Again, although ac-

---

130. CAL. CODE REGS. tit. 15, art. 9 (2008).

131. CAL. CODE REGS. tit. 15, art. 9, § 3360 (2008).

132. CAL. CODE REGS. tit. 1, art. 3, § 2684(a) (West 2008). These regulations do not specify which factors are considered. Instead they read, "If, in the opinion of the Director of Corrections, the rehabilitation of any mentally ill, mentally deficient, or insane person confined in a state prison may be expedited by treatment at any one of the state hospitals under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the Director of Corrections, with the approval of the Board of Prison Terms for persons sentenced pursuant to subdivision (b) of Section 1168, shall certify that fact to the director of the appropriate department who shall evaluate the prisoner to determine if he or she would benefit from care and treatment in a state hospital."

133. CAL. CODE REGS. tit. 15, art. 9, § 3365 (2008).

134. CAL. DEP'T CORR. & REHAB. OPERATIONS MANUAL, ch. 9, art. 2.

135. *Id.* § 91020.4.

136. Interview by Justice Now with Cynthia Chandler, Co-Founder of Justice Now, Justice Now office, in Oakland, Cal. (Nov. 20, 2009).

knowledge of the responsibility to provide care represents progress, without outside supervision and enforcement the reality of humiliating and inadequate mental health services remain.

## V. ABUSES

*"We get treated like animals, not people."*<sup>137</sup>

The treatment of pregnant, birthing, and postpartum people in California's women's prisons violates several human rights. Pregnant people are deprived of adequate prenatal and postpartum care, critical information about their pregnancies and effective relationships with their health care providers.<sup>138</sup> They are not provided adequate diets and are frequently subjected to degrading treatment by medical and non-medical prison staff.<sup>139</sup> In addition, both pregnant and postpartum individuals may be forced to perform prison work duties when they are medically unable to do so.<sup>140</sup> Not only do pregnant and postpartum people lack access to proper mental health care, they often do not receive the treatment they need when pregnancy complications or birth injuries occur.<sup>141</sup> The lack of concern for the well being of these individuals is especially problematic when there are obvious warning signs of complications, because in these situations there is greater risk of serious injury, including fetal and maternal death. Labor and delivery occur with little respect for or acknowledgment of the role of the mother.<sup>142</sup> Finally, within days of giving birth, people are almost always separated from their newborns, sometimes permanently.<sup>143</sup>

The majority of the abuses described in this article reflect the U.S. and state governments' arbitrary determination of who is fit to be a mother and allowed to make decisions concerning their own reproduction. They also illustrate the punitive dynamics that shape the prison environment and undermine the provision of quality pregnancy care. Underlying this treatment is an apparent sense that people in prison do not deserve respectful and professional treatment. As one person inside prison pointed

---

137. Interview with Herrell, *supra* note 2.

138. *See infra* pp. 27-35.

139. *Id.*

140. *Id.*

141. *See infra* pp. 35-39.

142. *See infra* pp. 35-39.

143. *See infra* pp. 54-61.

out when describing the proper role of prison medical staff, "Their job isn't to judge but to care for me."<sup>144</sup>

### A. Prenatal Care

*"They didn't listen to me or care about my problems because I'm an inmate."*<sup>145</sup>

#### 1. Overview

In the free world, pregnancy is a time greeted with excitement and many rituals and responsibilities. Since the first publication of America's best-selling pregnancy book, "What to Expect When You're Expecting"<sup>146</sup> in 1984, many more competing books, websites, blogs, and products have arisen around the cult of pregnancy. For example, the website, WhatToExpect.com, touted as the "online companion to the What to Expect Books," encourages new members to join the website's online community with the following:

Moms and moms-to-be love company — and support — and you'll find plenty of both at WhatToExpect.com, the online companion to the What to Expect books. Join author Heidi Murkoff and a whole community of moms and dads who know exactly what you're going through — friends to share the excitement and anticipation, the miraculous milestones, the surprising symptoms, and the wonderful (and often unexpected) experience of pregnancy and beyond. Sign up for free today!<sup>147</sup>

In contrast, pregnancy in prison is marked by what you cannot do and know, and there is comparatively little support. Our research suggests that the majority of pregnant people in California's women's prisons are receiving prenatal appointments at medically acceptable intervals;<sup>148</sup> however, numerous people—especially those requiring more frequent care because of high risk pregnancies—reported not seeing a doctor promptly

---

144. Interview by Justice Now with Cindy Tran, Valley State Prison for Women, in Chowchilla, Cal. (Aug. 4, 2006) [hereinafter Interview with Tran].

145. Interview by Justice Now with Margaret Elliott, Valley State Prison for Women, in Chowchilla, Cal. (Nov. 17, 2006) [hereinafter Interview with Elliott].

146. HEIDI MURKOFF ET AL., WHAT TO EXPECT WHEN YOU'RE EXPECTING 17 (3rd ed. 2002).

147. What to Expect When You're Expecting, <http://www.whattoexpect.com/what-to-expect/landing-page.aspx> (last visited Sep. 10, 2009).

148. Justice Now Survey (on file with Justice Now); see also AM. ACAD. OF PEDIATRICS & AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, GUIDELINES FOR PERINATAL CARE 100 (2007) [hereinafter GUIDELINES].

or frequently enough, and not receiving the care they believed they needed.<sup>149</sup> In addition, people in prison described not having a consistent relationship with a health care provider, the absence of respectful interactions with health care providers, and a resulting lack of important information about their pregnancies.<sup>150</sup> A poor diet is also the norm.<sup>151</sup> Finally and significantly, medical attention for complications is frequently delayed and inadequate, with potentially life-threatening results.<sup>152</sup> Driving all of these abuses is a glaring—and dangerous—lack of concern on the part of medical and non-medical prison staff for the health and well-being of pregnant people.

In addition to degrading treatment, pregnant people in prison are often expected to work on hazardous and strenuous work assignments almost up to the day they give birth. Some of these pregnant people are threatened with disciplinary action or longer prison sentences when they attempt to modify their work duties.<sup>153</sup> “I was in B-3 working as a porter right up to the day I gave birth,” explained Carol Perez, who is imprisoned at Valley State Prison for Women (VSPW).<sup>154</sup> Perez stated:

I was working the whole time I was pregnant. I wasn’t supposed to, but they made me. I could have hurt myself too. I didn’t want to be working at that point, but I was too far along in my job, and if I would have stopped I would have been fired and given a 115 [a disciplinary citation]. I didn’t have to ask. I just knew. I was lying in my bed one morning and felt a strong contraction. I got up and got ready for work. Then I walked over to that unit. I started to grab a bottle of cleaner and a towel to clean the rails. My arm couldn’t reach up. I had about five contractions then. I couldn’t do that, so I tried to take out the trash.

---

149. Justice Now Survey (on file with Justice Now).

150. *Id.*

151. *Id.*

152. Interview by Justice Now with Dawn Jones, Valley State Prison for Women, in Chowchilla, Cal. (Oct. 8, 2004) [hereinafter Interview with Jones]; Interview by Justice Now with Bonnie Rollins, Valley State Prison for Women, in Chowchilla, Cal. (Feb. 2, 2007) [hereinafter Interview with Rollins]; Interview by Justice Now with Michelle Rawlson, Valley State Prison for Women, in Chowchilla, Cal. (Nov. 10, 2007) [hereinafter Interview with Rawlson]; Interview by Justice Now with Ellen Perry, Valley State Prison for Women, in Chowchilla, Cal. (Nov. 11, 2007) [hereinafter Interview with Perry].

153. Interview by Justice Now with Carol Perez, Valley State Prison for Women, in Chowchilla, Cal. (Nov. 5, 2004) [hereinafter Interview with Perez].

154. *Id.*

I couldn't lift it up. I went to my supervisor and asked to go to the infirmary.<sup>155</sup>

Carol Perez's child was born hours later.<sup>156</sup> In another example, Kara Graham also was unable to obtain a work modification despite the inappropriateness of the work for a pregnant person:

When I tried to transfer out of the cosmetology department because of the fumes, my counselor told me I could get a medical reassignment, but they told me I'd lose my half time<sup>157</sup> and . . . not get out when I was supposed to . . . One of the other two pregnant people in cosmetology just had a baby and the whole time she was pregnant and couldn't transfer. There are three of us in cosmetology. The other is still trying to transfer.<sup>158</sup>

These work conditions are problematic not only because of the potential for harm to the mother and infant, but also because the policy punishes people who prioritize their own health and the health of their babies by subjecting them to longer sentences.<sup>159</sup> Additionally, when doctors prescribe bed rest to patients with health complications, it is not uncommon for the orders to be ignored once those individuals return to the yards they are housed on.<sup>160</sup>

## 2. Unhealthy Diet

*"If you don't shop, you're gonna starve. If you don't have someone putting money orders on your books, you're gonna starve."*<sup>161</sup>

Nearly every person with whom we spoke raised concerns about her prenatal diet. According to the American College of Obstetricians and Gynecologists ("ACOG"), pregnant people should maintain a healthy diet that includes grains, protein, and

---

155. *Id.*

156. *Id.*

157. THE CALIFORNIA STATE PRISONERS HANDBOOK *supra* note 88 at 184 ("Half-time or work-time credits can be earned by people in prison who participate in 'full-time credit-qualifying work or education program[s]' and applied towards their sentence").

158. Interview by Justice Now with Kara Graham, Valley State Prison for Women, in Chowchilla, Cal. (June 25, 2008) [hereinafter Interview with Graham].

159. *See supra* notes 157-158.

160. Interview with Rollins, *supra* note 152; Interview with Long, *infra* note 169.

161. Interview by Justice Now with Vanessa Thompson, Valley State Prison for Women, in Chowchilla, Cal. (Nov. 17, 2006) [hereinafter Interview with Thompson].

multiple servings of vegetables and fruit a day.<sup>162</sup> Similarly, pregnancy books marketed to middle class people outside of prison caution that "[w]omen who wisely nourish themselves during pregnancy are more likely to give birth to healthy babies. Babies of well-fed mothers tend to be less premature, grow at an appropriate pace, have fewer congenital defects, and show better brain growth."<sup>163</sup> The extra milk, snacks, and vitamin supplements that California's women's prisons sometimes provide to pregnant people cannot make up for the very poor prison diet.<sup>164</sup>

As described above, A.B. 478 requires that the Department of Corrections and Rehabilitation ("CDCR") establish health care standards for pregnant people, including "a balanced, nutritious diet approved by a doctor."<sup>165</sup> To implement this provision, CDCR passed regulations that went into effect on April 5, 2008, providing that pregnant people in prison be given two extra eight-ounce cartons of milk (or a calcium supplement if lactose intolerant), two additional servings of fresh fruit, and two extra servings of fresh vegetables each day.<sup>166</sup> The regulations also indicate that "[a] physician may order additional nutrients as necessary."<sup>167</sup> In addition, Department regulations require that prison kitchens meet food sanitation standards established by state law and that regular inspections be made of food preparation areas and kitchen workers.<sup>168</sup>

---

162. COMM. ON PATIENT EDUC., AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, ACOG PAMPHLET NO. AP001, NUTRITION DURING PREGNANCY (2008), available at [http://www.acog.org/publications/patient\\_education/bp001.cfm](http://www.acog.org/publications/patient_education/bp001.cfm).

163. WILLIAM SEARS & MARTHA SEARS, THE BIRTH BOOK: EVERYTHING YOU NEED TO KNOW TO HAVE A SAFE AND SATISFYING BIRTH 69 (1994).

164. Several people we spoke with – including nine survey respondents – reported receiving at least extra milk and, often, extra servings of vegetables and fruit while pregnant. However, these additions are not sufficient to compensate for the deficiencies in the diet provided to pregnant and non-pregnant people alike in California's women's prisons. A menu we received from Valley State Prison for Women in 2006 showed that a lunch of peanut butter and jelly was slated to be served repeatedly. The menu was dominated by starches and carbohydrates, and fruits (especially fruit juices) and vegetables were provided in small amounts as side dishes. *See* Menu, dated Nov. 13, 2006–Nov. 19, 2006 (on file with Justice Now); *see also* Justice Now interview with Jenny Pauley (Nov. 2, 2007) ("The only thing they don't do is feed us [pregnant women] enough. An [extra] apple, carrot, and milk [each day]").

165. CAL. PENAL CODE § 3424(a) (West 2009).

166. CAL. CODE REGS. tit. 15, § 3050(a)(3) (2009).

167. *Id.*

168. CAL. CODE REGS. tit. 15, § 3052 (2009).



Alarming, multiple people we interviewed described being served not only foods low in nutritional value, but also food that was not fit to consume due to spoilage.<sup>169</sup> One person told us,

We had fish for dinner and fruit cocktail. I ate the fruit cocktail. It was not so fresh—it tasted like something was rotting—and I vomited almost immediately. In May 2006 there was a food poisoning outbreak. The fish they gave us was bad. Everyone was having diarrhea and throwing up, so they locked down A-yard.<sup>170</sup>

In addition to extra milk and snacks, California prisons are required to provide pregnant people prenatal vitamins and iron and folic acid supplements, but these supplements are not always provided as frequently as necessary.<sup>171</sup> In light of the critical role proper nutrition plays in fetal development and maternal health,<sup>172</sup> the inadequate and often hazardous diet provided to pregnant people in California's women's prisons is cause for serious concern. The prison system's failure to provide pregnant people with adequate prenatal diets, including access to safe, fresh food, implies that the state perceives pregnant people in prison as undeserving of a healthy pregnancy. In contrast, according to a person formerly imprisoned at Central California Women's Facility ("CCWF"), the prison provides fresh vegetables through its kosher kitchen, suggesting that the provision of nutritious food is possible, at least on a small scale.<sup>173</sup> Thus the prisons' failure to provide fresh fruits and vegetables is not based upon availability but willingness.

---

169. Interview by Justice Now with Patricia Allen, Valley State Prison for Women, in Chowchilla, Cal. (Apr. 20, 2007) [hereinafter Interview with Allen]; Interview by Justice Now with Kate Long, Valley State Prison for Women, in Chowchilla, Cal. (Mar. 30, 2007) [hereinafter Interview with Long]; Interview by Justice Now with Angela O'Neill, Valley State Prison for Women, in Chowchilla, Cal. (Aug. 6, 2004) [hereinafter Interview with O'Neill]; Interview with Rollins, *supra* note 153; Interview with Thompson, *supra* note 161.

170. Interview with Thompson, *supra* note 161.

171. Interview with Thompson, *supra* note 161; Interview with Rollins, *supra* note 152; Interview with Allen, *supra* note 169; Interview with Long, *supra* note 169; Interview with O'Neill, *supra* note 169.

172. GUIDELINES, *supra* note 148, at 89.

173. Interview by Justice Now with Misty Rojo, formerly imprisoned in Central California Women's Facility, in Oakland, Cal. (June 9, 2009).

### 3. Poor Physician-Patient Relations and Lack of Information

*"They don't care. You gotta be dying or you gotta be bleeding."*<sup>174</sup>

The theme of poor physician-patient relationships—understood here to include the relations between other medical staff and patients as well—permeates all aspects of pregnancy care addressed here, impeding the effective provision of information and administration of medical and mental health care to pregnant people inside California's women's prisons. Underlying the absence of effective communication between pregnant people and their health care providers is a sense that the prison medical staff has neither the time nor the interest to respond to patients' questions and concerns. On the other hand, books, experts, websites, and other sources of information for upper and middle class people encourage expectant parents to write questions down before each doctor's appointment to ensure that all their concerns are adequately addressed.<sup>175</sup> Identifying these parents as "partners" in their own health care, pregnancy books offer comforting advice such as: "Don't be afraid that your concerns will sound silly" and "If you suspect that your practitioner may be mistaken about something. . .speak up."<sup>176</sup>

The abysmal bedside manner of medical practitioners in prison is another key factor in the problematic physician-patient relations. The majority of the people we surveyed and interviewed described rushed, apathetic, and sometimes rude practitioners who gave no indication of concern for the welfare of their patients.<sup>177</sup> According to one person, "[y]ou can tell by the way they treat you when you're pregnant that they don't care."<sup>178</sup> Especially for someone pregnant for the first time, this inability to share one's concerns and have questions answered constitutes a serious oversight, and one with troubling ramifications. For example, prison medical staff's poor communication with patients engenders a potentially dangerous lack of trust. Two people told us that they did not take the antibiotics they were prescribed because they were not confident that the medical staff checked or

---

174. Interview by Justice Now with Sheila Carey, Valley State Prison for Women, in Chowchilla, Cal. (Nov. 17, 2006) [hereinafter Interview with Carey].

175. MURKOFF ET AL., *supra* note 146.

176. *Id.* at 17-18.

177. *See, e.g.*, Interview with Thompson, *supra* note 161.

178. Interview with Perez, *supra* note 153.

cared whether the drugs were safe to take during pregnancy.<sup>179</sup> Pregnant and postpartum individuals who do not feel confident in, and comfortable with, their health care providers may also be less likely to share crucial information about their medical history, further undermining the quality of care they receive.<sup>180</sup> Unless pregnant people can trust the information and medical guidance they are given, they may not follow important instructions out of concern for their health and that of their child.

When pregnant people in Valley State Prison for Women (“VSPW”) do get information, it is often from volunteer doulas who act as pregnancy educators and birth attendants inside the prison.<sup>181</sup> The doulas at VSPW—members of an organization called “Free to Give Life,” which is affiliated with March of Dimes—provide the only childbirth classes in the prison, as well as critical physical and emotional support for people in labor and delivery.<sup>182</sup> Interviewees described receiving childbirth “ducats” to attend a series of four childbirth education classes where the doulas covered what to expect during labor and delivery.<sup>183</sup> During the classes, the doulas also describe their work as birth attendants, explained further in the section on delivery care.<sup>184</sup> For close to six years, the doulas have provided childbirth education and labor and birthing support to approximately 300 pregnant or

---

179. Interview by Justice Now with Hope Faith, Valley State Prison for Women, in Chowchilla, Cal. (Dec. 8, 2006) [hereinafter Interview with Faith]; Interview by Justice Now with Melissa Farley, Valley State Prison for Women, in Chowchilla, Cal. (Dec. 8, 2006) [hereinafter Interview with Farley].

180. GUIDELINES, *supra* note 148, at 88. According to the American College of Obstetricians and Gynecologists, during the initial prenatal visit, a pregnant person should be given materials on and educated about the scope of care that will be provided throughout her pregnancy, “the laboratory studies that may be performed,” the “[e]xpected course of her pregnancy,” and “[s]igns or symptoms to be reported to a physician,” including, “vaginal bleeding, membrane rupture, and preterm labor.”

181. A doula is a person knowledgeable about childbirth who provides non-medical, non-clinical physical and emotional support during labor, birth, and the postpartum period, and may also provide prenatal and postpartum education. See American Pregnancy Association, Having a Doula, *available at* <http://www.americanpregnancy.org/labornbirth/havingadoula.html> (last visited Oct. 14, 2008); Dona International, What is a Doula?, <http://www.dona.org/mothers/index.php> (last visited Oct. 14, 2008).

182. Interview with Allen, *supra* note 169; Interview by Justice Now with Jasmine Dowd, Valley State Prison for Women, in Chowchilla, Cal. (July 6, 2007) [hereinafter Interview with Dowd]; Interview with Thompson, *supra* note 161.

183. Interview with Allen, *supra* note 169; Interview with Dowd, *supra* note 183; Interview with Thompson, *supra* note 161.

184. Justice Now Survey (on file with Justice Now).

birthing people per year at VSPW.<sup>185</sup> The doulas are not affiliated with the CDCR but are an independent social service organization – a fact that may underlie their success in connecting with the people in prison who they teach and support. Yet the stability of “Free to Give Life” is uncertain because the program is an organization comprised wholly of volunteer doulas, and is not affiliated with or funded by the State of California.

For example, doulas in a state outside of California who work with pregnant, birthing, and postpartum people in prison described being refused access to their clients during labor and not being contacted when their clients went into labor because of obstructive prison practices.<sup>186</sup> Similar barriers to doulas’ access could be erected inside California’s women’s prisons. Already, doulas for people in California prisons are no longer able to take pictures of parents and their babies right after birth to document this once in a lifetime experience. Thus, other changes such as restricting doula access to their patients could occur.<sup>187</sup>

The ACOG timeframe for regular prenatal visits is consistent with both the current CDCR regulations and the frequency of prenatal appointments that multiple people we spoke with received. However, according to the American Academy of Pediatrics and ACOG, people with medical or obstetric complications as well as very young people may require more frequent appointments.<sup>188</sup> Most disturbingly, despite ACOG standards to the contrary, twenty-four hour access to unscheduled and emergency obstetric care is not made available to people in California prisons. In fact, our research suggests that pregnant people have difficulty accessing obstetric care outside of regular prenatal appointments to address concerns or unusual symptoms; individuals requiring more than the standard frequency of regular prenatal appointments because of their personal medical histories do not always receive them.<sup>189</sup>

Even if California’s prisons are providing prenatal medical appointments in most cases with the frequency called for by

---

185. Telephone Interview by Nerissa Kunakemakorn with Sandy Williamson, Director, Free to Give Life, in Oak., Cal. (Nov. 7, 2008). Sandy Williamson is certified as a birth attendant, a lactation educator and counselor, and a childbirth educator.

186. Interview by Justice Now with doulas in another state. Due to confidentiality concerns, we cannot disclose the name of these doulas or their location (interview on file with Justice Now).

187. *Id.*

188. GUIDELINES, *supra* note 148.

189. Justice Now Surveys (on file with Justice Now).

ACOG and other authoritative bodies in the field, the impression among so many pregnant people that they are receiving too few appointments suggests that *effective* health care is not being administered. About half of the people told us that they did not see their obstetrician as frequently as needed. This feeling of dissatisfaction may be attributed in part to the poor physician-patient communication that prevents pregnant people from getting their questions answered and concerns addressed during medical appointments. It may also be attributable to a failure to provide doctor's appointments to people as often as necessary given their medical history or current complications.<sup>190</sup>

#### 4. Inadequate Response to Pregnancy Complications and Risk of Maternal Death

*"Complaints aren't addressed until they get harmful to the baby."*<sup>191</sup>

While parents outside of prison who are concerned about possible pregnancy complications are comforted by knowing, "with today's technology. . . early diagnosis and treatment can usually resolve [complications], allowing the pregnancy to have a happy ending,"<sup>192</sup> people in prison do not have the same confidence that they will be treated in a timely and effective manner. The general neglect of pregnant people's medical and mental health needs, compounded by the punitive prison environment, means that when complications arise the health of the mother and child may be placed in jeopardy, leading to grave injury or even death. To begin with, as discussed above, people experiencing pregnancy complications often do not receive sufficient information about their condition to be in a position to care for themselves properly. In addition, our research shows that when worrisome symptoms arise, non-medical prison staff members have impeded pregnant people's access to medical attention, medical assistants have failed to refer people to doctors or nurse practitioners, and prison doctors have failed to take necessary ac-

---

190. When asked what prevented them from seeing their "pregnancy doctors" often enough, several survey respondents cited a shortage of obstetricians for the number of pregnant people, prison procedures for setting up appointments (the "ducat" system in which people are provided passes to see their doctor rather than participate in their regular prison programming), and the co-pay requirement. Justice Now Surveys (on file with Justice Now).

191. Interview with Graham, *supra* note 158.

192. SEARS ET AL., *supra* note 163, at 491.

tion. Finally, pregnancy complications are exacerbated by day-to-day prison conditions, such as security policies and programming requirements. A common theme in the reports we received is a neglectful approach toward pregnant people's emergency medical needs, a tendency that our research suggests extends beyond any particular category of medical practitioner or the wrongdoing of select individuals.

For example, Michelle Rawlson reported that after experiencing abnormal bleeding during the first trimester of pregnancy, she was escorted to see a nurse and was told "that it was normal to see spotting" and "to elevate my legs."<sup>193</sup> Rawlson continued to bleed heavily and experienced other health complications including hair loss, discoloration of the toe nails, and severe abdominal swelling before she was permitted to see an OB/GYN.<sup>194</sup> Before examining Rawlson, the doctor asked her how many children she had.<sup>195</sup> When Rawlson replied that she had seven children, she was told, "As you can see I was going to examine you but I've changed my mind. I will see you in a week. . . No, make that two weeks."<sup>196</sup> Three weeks later, after having numerous medical requests denied, Rawlson collapsed and underwent emergency surgery.

For well over a month, I was carrying inside of me a fetus with no heartbeat – a dead baby. Having been dead inside of my body, the fetus was decaying, thus the debris floating in the toilet every time I used the restroom and the reason for the inflation of my stomach. . . I had to undergo surgery for my baby to be removed.<sup>197</sup>

Despite the fact that people in women's prisons are known to face a higher risk of poor pregnancy outcomes—due to histories of poverty, drug use, and physical and sexual abuse<sup>198</sup>—California prisons have failed to provide the care necessary to address this risk. Almost a third of the people we spoke to in prison reported having a pre-existing medical condition that could affect pregnancy, such as asthma, diabetes, anemia, seizure

---

193. Interview with Rawlson, *supra* note 152.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. GUIDELINES, *supra* note 148, at 87; Am. Coll. of Obstetricians and Gynecologists (ACOG), SPECIAL ISSUES IN WOMEN'S HEALTH 92-95 (Am. Coll. of Obstetricians and Gynecologists ed., 2005).

disorder, and a history of cancer.<sup>199</sup> Additionally, almost a third of them indicated that they felt they experienced unusual symptoms during their pregnancies.<sup>200</sup>

Numerous pregnant people who experienced complications including pain, bleeding, and cramping reported being sent back to their rooms without receiving comprehensive medical care. They also experienced long delays in receiving treatment once referred to the prison's medical department.<sup>201</sup> Overall, the refusal of prison medical staff to provide prompt and adequate care for pregnancy emergencies reflects an apparent unsympathetic and unprofessional attitude toward their patients. One woman who was taken to the infirmary due to unbearably painful cramping reported that when she asked the nurses to call the doctor, they refused and said to her, "Why do you want the doctor called when the pain you're feeling you brought on yourself?"<sup>202</sup>

Prison staff's failure to provide prompt and proper treatment for pregnancy complications can be life-threatening. Several people we spoke with were treated indifferently by medical staff even when they were facing potentially fatal complications. Among the people we spoke with, one person reported complaining to the medical staff for weeks before she was diagnosed with a potentially fatal tubal pregnancy that resulted in the removal of her affected fallopian tube.<sup>203</sup> Another person was sent back to her unit when she complained of intense back pain and pressure. A few days later she was diagnosed with a serious kidney infection,<sup>204</sup> a condition that can lead to life-threatening blood poisoning<sup>205</sup> and can also lead to low birth weight and premature birth in pregnant people.<sup>206</sup> A third woman, who was suffering from pain and bleeding, ultimately suffered a miscarriage after being sent back to her unit by the prison clinic's medical staff.<sup>207</sup>

---

199. Justice Now Survey (on file with Justice Now).

200. *Id.*

201. Interview with Graham, *supra* note 158; Interview by Justice Now with Lynette Norris, Valley State Prison for Women, in Chowchilla, Cal. (June 23, 2006) [hereinafter Interview with Norris]; Interview with Thompson, *supra* note 161.

202. Interview with Thompson, *supra* note 161.

203. Interview with Norris, *supra* note 201.

204. Interview with Long, *supra* note 169.

205. See *Kidney Infection: Complications*, Mayo Clinic, Aug. 9, 2007, <http://www.mayoclinic.com/health/kidneyinfection/DS00593/DSECTION=complications>.

206. *Id.*

207. Interview with Thompson, *supra* note 161.

Complications like those described above, in addition to imperiling the life of the pregnant person, can threaten the pregnancy or lead to infant mortality. When Dawn Jones complained of intense pain and intermittent bleeding, a prison guard told her, "Shut up. It does not hurt that much."<sup>208</sup> Her infant died soon after birth, the death reportedly attributed to a bladder infection that spread from mother to child through the placenta.<sup>209</sup> Similarly, Margaret Elliot was not given a blanket while in labor and described being treated like she was lying about her condition. When she told her obstetrician that she was experiencing a lot of pressure, he responded, "It's all part of being pregnant." He was going to send her back to her unit. However, a nurse spoke up, pointing out that the infant's heart rate was dropping with each contraction. Because of the nurse's intervention, Margaret Elliot was taken to the hospital, where it was discovered that the umbilical cord was wrapped around the infant's neck.<sup>210</sup>

In addition to these events, we are extremely concerned about multiple unconfirmed reports we have received of stillbirths and infants dying during or shortly after birth.<sup>211</sup> While most of these reports came from people who did not know the names of the mothers involved and thus cannot be verified, we have, as described above, spoken directly with one person who lost her child soon after birth.<sup>212</sup> Moreover, even if these statements cannot be substantiated, the fact that such rumors are commonplace and accepted as fact by people in California's women's prisons illustrates, at a minimum, a dramatic lack of confidence in prison pregnancy care.

#### B. *Labor and Delivery Care*

*"The whole experience was horrible . . . It's scary and they're yelling at you. They treat you like an animal."*<sup>213</sup>

For people outside prison, especially those who are middle to upper class, childbirth is a time of great joy filled with many choices, including rituals to memorialize this once-in-a-lifetime moment. Because childbirth can also be a tumultuous time, peo-

---

208. Interview with Jones, *supra* note 152.

209. *Id.*

210. Interview with Elliott, *supra* note 145.

211. Interview with Jones, *supra* note 152; Interview with Rollins, *supra* note 152; Interview with Rawlson, *supra* note 152; Interview with Perry, *supra* note 152.

212. Interview with Jones, *supra* note 153.

213. Interview with O'Neill, *supra* note 169.



ple are urged to develop a birth plan where they state whether they want to use painkillers, and where they can articulate their thoughts on different interventions.<sup>214</sup> They are asked to think about who they would want in the room with them during birth and what they want to happen right after giving birth.<sup>215</sup> After giving birth, they are encouraged to breastfeed immediately and to room with their child.<sup>216</sup>

In contrast, our research indicates that pregnant individuals are subject to prison staff's slow response to prison labor, lack of informed consent and control over delivery conditions for birth, and continued shackling in transport to the hospital. People in Valley State Prison for Women are transported to Madera Community Hospital to give birth and people at California Institution for Women are taken to Riverside Hospital.<sup>217</sup> Several people we spoke with described prison staff's apparently apathetic, and, at times, punitive attitude when they went into labor. According to Valerie Herrell, "When I went into labor, they didn't do nothing. They said I wasn't having bad enough contractions. I told them I don't have contractions with my first baby . . . They don't rush. They never rush."<sup>218</sup>

### 1. Shackling

Although California and five other states have enacted laws restricting the shackling of pregnant, birthing, and postpartum people held by Corrections Departments,<sup>219</sup> shackling still takes place in other states during transport to and from the hospital, in violation of international law, which will be discussed later. The practice of shackling directly threatens the safety of both the pregnant woman and her child by unnecessarily making the

---

214. MURKOFF ET AL., *supra* note 146, at 274-75 ("The typical plan combines the parents' wishes and preferences with what the practitioner and hospital or birthing center find acceptable – and what is feasible from a practical point of view").

215. *Id.*

216. *Id.* at 398, 393.

217. Interview by Lynsay Skiba with Karen Shain, Co-Director, Legal Services for Prisoners with Children, in S.F., Cal. (Dec. 14, 2007).

218. Interview with Herrell, *supra* note 2.

219. These states are Illinois, Vermont, Texas, New York and New Mexico. CAL. PENAL CODE §§ 3423, 5007.7 (West 2009); 730 Ill. Comp. Stat. Ann. 125/17/5 (West 2000); Vt. Stat. Ann. tit. 28, 801(a) (2006); V.T.C.A., Government Code § 501.066; 2009 Sess., Law News of N.Y. Ch. 411 (S. 1290-A) (McKinney's); N. M. S. A. 1978, § 33-1-4.2. See also The Rebecca Project for Human Rights Memorandum on the Shackling of Pregnant Women in Custody, *available at*: [http://www.rebeccaproject.org/index.php?option=com\\_content&task=blogcategory&id=64&Itemid=181](http://www.rebeccaproject.org/index.php?option=com_content&task=blogcategory&id=64&Itemid=181).

birthing process more difficult and painful, and by placing a needless barrier between a woman and her health care provider that may result in sub-standard medical care. In addition, shackling during pregnancy and childbirth violates the basic rights to health, safety and freedom from cruel and degrading treatment guaranteed to all people in prison under international law.

As a result of the passage of A.B. 478, discussed earlier, which in part modified pregnancy medical and dental care requirements, California law currently requires that people in the state’s prisons who give birth “shall not be shackled by the wrists, ankles, or both during labor, including during transport to a hospital, during delivery, and while in recovery after giving birth,” unless the “legitimate security needs” of the individual woman require otherwise.<sup>220</sup> A.B. 478 also requires that pregnant people be “temporarily taken to a hospital outside the prison for the purposes of childbirth” and “transported in the least restrictive way possible.”<sup>221</sup> Transportation to and from the hospital is a necessary component of prison health care, and shackling pregnant and postpartum individuals during that time is disrespectful and contrary to maintaining the dignity of patients. Additionally, this blatant disregard for the health and safety of pregnant people in prison is evidence of society’s presumption that these people are not fit to be mothers in the first place.

Policies toward shackling of pregnant women vary greatly from state to state. Although California, Illinois, New York, New Mexico and Vermont all have legislation restricting shackling,<sup>222</sup> most of the other states use department policy, rather than legislation, so it is difficult to get an accurate survey of these policies. This difficulty is compounded by the fact that some individual states’ restraint policies are not publically available.<sup>223</sup> In response to this patchwork of state law and policies, several groups have organized in order to pass laws in all states prohibiting shackling during pregnancy to ensure that all state and federal prisons and detention centers do not shackle pregnant people.

---

220. CAL. PENAL CODE §§ 3423, 5007.7 (West 2008).

221. *Id.*

222. See Memorandum from Anna Enisa Carpenter, Intern, The Rebecca Project for Human Rights on State Shackling Policies (Aug. 20, 2008), available at [http://www.rebeccaproject.org/images/stories/policypapers/state\\_shackling\\_policies\\_memo.pdf](http://www.rebeccaproject.org/images/stories/policypapers/state_shackling_policies_memo.pdf). This information regarding state by state policy on shackling of pregnant people in prison is derived from an Aug. 20, 2008 memorandum prepared by the Rebecca Project for Human Rights. *Id.*

223. *Id.*

While these efforts have been met with some success, gains have been very limited and slow. A Tennessee anti-shackling bill has passed through the Senate unanimously, and is awaiting passage through the House of Representatives.<sup>224</sup> Groups in Georgia are currently organizing to propose anti-shackling legislation to Georgia's Congress.<sup>225</sup> An Arkansas anti-shackling measure introduced in March 2009 died in Senate Committee only two months later.<sup>226</sup>

The international human rights community has come down clearly against the shackling of pregnant people. For example, in 2006, the United Nations Human Rights Committee, which interprets and enforces the International Covenant on Civil and Political Rights, and the United Nations Torture Committee, which interprets and enforces the Convention Against Torture, both criticized the U.S. government for its continued allowance of shackling of pregnant people in prison.<sup>227</sup>

## 2. Lack of Informed Consent and Control

*"[The doctor] just said what he was going to do. Either way you're going to get induced to have this baby. Better get it now. They don't care."*<sup>228</sup>

As described earlier, outside prison, experts advise expectant parents to actively plan their births in partnership with their doctors and birth attendants and to empower themselves "with all the tools to increase [their] chances of a satisfying birth experience."<sup>229</sup> However, these "tools" are not available to people in prison and the experience of labor and delivery illustrates the lack of respect given to pregnant people in prison. Our research suggests that the failure of the prison system to provide adequate information to people about their pregnancies extends to child-birth and delivery care, hindering people's capability to make informed choices about their treatment. We also found that the punitive prison environment—and particularly the threat of pun-

---

224. *Id.*

225. *Id.*

226. ARK. STATE LEG. Bill SB839, available at: <http://www.arkleg.state.ar.us/assembly/2009/R/Pages/BillInformation.aspx?measureno=SB839> (last visited on Nov. 13, 2009).

227. U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, ¶33, U.N. Doc. CCPR/C/USA/CO/3 (July 28, 2006).

228. Interview with Allen, *supra* note 169.

229. SEARS ET AL., *supra* note 163, at 29.

ishment for challenging the care provided—severely limits people’s ability to exercise control over their birth experiences and find joy in birth, even after they have been taken to the hospital for delivery.

Several people we spoke with described giving birth without sufficient information to make informed decisions and in one case, under coercive conditions. Because pregnant, birthing, and postpartum people remain under the control of the CDCR even while at the hospital, their hospital experiences—including their ability to have a birth attendant present at the birth—are often shaped by CDCR policies and practices,<sup>230</sup> which are arbitrary and applied inconsistently. We spoke with a Black woman who said she was able to have her sister and mother attend the birth after filling out an “inmate request form,” which prison staff apparently faxed to the hospital.<sup>231</sup>

Telling a very different story, another Black woman described a breakdown of communication when she tried to have her sister-in-law present during her birth.

I had to go to [the nurse] [to find out when the c-section was scheduled to take place] because my sister-in-law is far away and she had approval to be there. She said the better end of next week . . . When I got to the hospital, they had no idea what was going on and no one had told my sister-in-law. I was told by [the nurse] that the watch notified my sister-in-law the day before. There was no reason why my sister-in-law was not there. I asked the nurses [at the hospital] and they said “It’s not my job.” I asked to speak to someone in charge and the hospital director came down and said there would not be a social worker until that afternoon. The hospital director called my sister-in-law, and she told them they were calling her one hour before [the c-section] and it was ridiculous they didn’t notify her before . . . It’s a scheduled ordeal; there should be no delay.<sup>232</sup>

The lack of information provided to patients and the inability of patients to control their treatment shapes the experience of childbirth. Patricia Allen explained that she received an epidural during labor without having been told how it would affect her: “I didn’t know it would make [me] feel like I was paralyzed. They

---

230. See generally STATE OF CALIF. DEPT. OF CORR. AND REHAB., ADULT INSTITUTIONS, PROGRAMS AND PAROLE, OPERATIONS MANUAL (Updated through Jan. 1, 2009).

231. Interview with Allen, *supra* note 169.

232. Interview with Long, *supra* note 169.

didn't explain it. I felt helpless. When I got back to VSPW I said, 'How come you guys didn't tell me I was going to feel paralyzed?'"<sup>233</sup> Better informed, but still prevented from making her own decision regarding her delivery, Kate Long was given a caesarean section - a major abdominal surgery<sup>234</sup> requiring subsequent removal of staples and monitoring of the wound - after requesting, unsuccessfully, a vaginal birth after c-section (VBAC). She had successfully delivered by VBAC in a prior birth.

I wanted to do vaginal with this one but they denied it. When I first saw [the O.B.] he asked about my history and I told him. He said I had to have a c-section because I had one before. I told him that was not true. He said that they just changed the law. I said that was not so and I had just had my son. He said that different hospitals do different things . . . When I went back [to VSPW after going out to court in December, 34 weeks pregnant at that point] I told [the nurse that] I did not want a c-section. She said I would have to sign a refusal . . . I spoke with [the nurse practitioner] at that point and she said that she would see me the next week and we would talk [this was at 37 weeks]. I came back, and [the nurse practitioner] told me, "You don't want to have this baby naturally because he's going to rip you from end to end."<sup>235</sup>

We realize that the problem of coerced caesarean sections—as well as the aggressive use of induction—exists in the so-called “free world” as well, especially when a person has previously delivered by caesarean.<sup>236</sup> But regardless of the availability of the VBAC procedure at that particular hospital,<sup>237</sup> the nurse practi-

---

233. Interview with Allen, *supra* note 169.

234. See also MARSDEN WAGNER, BORN IN THE USA: HOW A BROKEN MATERNITY SYSTEM MUST BE FIXED TO PUT WOMEN AND CHILDREN FIRST 44 (2006) (“Women choosing C-section also face many other risks that come with major abdominal surgery—anesthesia reactions and/or accidents, damage to blood vessels with massive hemorrhage, frequent infections, accidental extension of the uterine incision, damage to the bladder and other abdominal organs, and internal scarring with adhesions, leading to painful bowel movements and painful sexual intercourse.”).

235. Interview with Long, *supra* note 169.

236. See WAGNER, *supra* note 234, at 29-31, 37-43.

237. See generally Vaginal Birth After C-Section (VBAC) Guide, Mayo Clinic, Apr. 18, 2008, <http://www.mayoclinic.com/health/vbac/VB99999>. VBAC is generally a viable option unless a classical, T-shaped, inverted T-shaped, or J-shaped incision was made in the prior C-section. *Id.* Vaginal delivery, including VBAC, is generally safer, with a lower risk of infection, blood loss, or adverse reactions to anesthesia. *Id.* Recovery times are also considerably shorter with a vaginal delivery than with a

tioner’s language is troubling and did not provide room for informed consent. Like Kate Long, Patricia Allen understood the medical intervention she was given—in this case, the rupture of her membrane (to cause her water to break) and administration of Pitocin—and, like Kate Long, she was not able to refuse the intervention. When asked whether she was given the option of declining induction, Patricia Allen responded, “No . . . [the doctor] just said what he was going to do. That made me scared. I had no say so.”<sup>238</sup>

In another case, Karen Thompson’s doctor told her that he was going to induce her when she was approximately five days past her due date. When she insisted that she wanted to give birth to her baby naturally, she reported being patronized by a nurse and locked in a holding cell for hours without food.<sup>239</sup> This account reflects a basic assumption that people inside prison do not have a right or the ability to make decisions about their pregnancies and the birth of their children.

As stated earlier, some people at Valley State Prison for Women have had the opportunity to have volunteer doulas attend their births, a service that garnered glowing praise from all of the people we spoke with. Karen Thompson explained, “When you go to the hospital, you ask the nurse to call [the doulas], and whoever is on that day comes to the hospital. And they bring lavender lotion, soothing music, a birthing ball. They take a picture of you with your baby. That’s the best program in prison. It’s wonderful.”<sup>240</sup> Jasmine Dowd described being “scared” during her pregnancy at VSPW “because no one was here, no family.” But Dowd continued,

[T]he doula eased everything and had five of us in one day. She was da bomb. She stood in the hospital all night with me. She also fell asleep in the chair . . . They were so helpful. They couldn’t take the place of my family but came so close.<sup>241</sup>

---

C-section. *Id.* However, many community hospitals do not offer VBAC because they do not have the staff or resources to handle any emergency C-sections required by pregnancy complications. *Id.*

238. Interview with Allen, *supra* note 169.

239. Interview with Thompson, *supra* note 161.

240. *Id.* Note that the doulas at VSPW no longer take pictures of the parents with their newborns, due to “confidentiality concerns.” *Id.* Telephone Interview by Nerissa Kunakemakorn with Sandy Williamson, Director, Free to Give Life, in Oakland, Cal. (Nov. 7, 2008).

241. Interview with Dowd, *supra* note 182.

Despite the availability of doulas to some pregnant individuals at VSPW, our research indicated that the overriding experience of being pregnant while in prison was characterized by the basic lack of information and respect we previously described. The prison system's failure to ensure that birthing people are able to consent to medical procedures in an informed way, and to control their delivery experiences to the greatest extent possible, violates several international human rights laws and devalues the importance of the mother's informed role in the birthing process.<sup>242</sup>

### C. *Postpartum Care*

*"I think . . . the women are seen as vessels while they're pregnant. And after [delivery], who cares."*<sup>243</sup>

According to leading pregnancy books, the period after birth is a time for focusing on bonding with your child and on your physical recovery.<sup>244</sup> Maternity or family leave is often three to five months, and popular media<sup>245</sup> frowns upon anything shorter. The experience in prison does not just fall below that ideal—it is the exact opposite. This is particularly problematic because many pregnancy complications, in particular those related to mental health, occur postpartum.<sup>246</sup> In addition, the experience

---

242. CENTER FOR REPRODUCTIVE RIGHTS BRIEFING PAPER, *infra* note 409 at 4-10.

243. Interview with Shain, *supra* note 217.

244. SEARS ET AL., *supra* note 163, at 54.

245. How Much Time Should I Take for My Maternity Leave? (Posted July 25, 2002) available at [http://www.babycenter.com/400\\_how-much-time-should-i-take-for-my-maternity-leave\\_500394\\_1001.bc](http://www.babycenter.com/400_how-much-time-should-i-take-for-my-maternity-leave_500394_1001.bc); NICOLE PALACIOS, Work After Baby: Should You Stay Home or Should You Go Back? (Last visited on Nov. 18, 2009) available at [http://www.babyzone.com/pregnancy/maternity\\_leave/article/work-after-baby-what-should-you-do](http://www.babyzone.com/pregnancy/maternity_leave/article/work-after-baby-what-should-you-do); TODD NEALE, Maternity Leave Good for Mother and Baby (Posted on Jan. 6, 2009) available at <http://www.medpagetoday.com/OBGYN/Pregnancy/12336>.

246. Up to ten percent of people who have just given birth experience postpartum depression. Pregnancy: Postpartum Depression, Mayo Clinic, June 7, 2008, <http://www.mayoclinic.com/health/postpartum-depression/DS00546>. Given the consistent difficulties in accessing mental health services that many pregnant people reported experiencing while imprisoned, it is highly likely that the treatment available for postpartum depression is minimal. Furthermore, after vaginal births, pregnancy complications can include vaginal infections from episiotomies or vaginal tears, uterine infections, urinary tract infections, and hemorrhoids. *See also*, Pregnancy: C-Section-Risks, Mayo Clinic, Nov. 15, 2008, <http://www.mayoclinic.com/health/c-section/MY00214/DSECTION=risks>. In addition, C-sections bring increased risk of infection at the incision site, endometriosis, decreased bowel function, and blood clots. *Id.*

of the vast majority of postpartum individuals in prison is deeply colored by the quick separation from their newborn infants.

The problem starts almost immediately after birth. For example, although the language of prison rules supports ongoing breastfeeding, the reality of imprisonment does not. Outside prison there is enormous public, political and academic pressure for 'good mothers' to breastfeed their babies.<sup>247</sup> For people in prison however, barriers such as restrictions on contact and rules around access to public resources prevent them from providing the critical nutrients and other benefits of breast milk to their children. While in the hospital, a new parent may have the option of breastfeeding, but the prospect of nursing may be a difficult one because of the impending separation from her child. Of the thirteen survey respondents who indicated that they gave birth while in prison, only eight reported being given the option to nurse their children.<sup>248</sup> The California Department of Corrections and Rehabilitation Operations Manual provides,

[People in prison] shall be informed of the benefits of breastfeeding . . . Offenders who choose to breastfeed their baby shall be allowed access to a breast pump and refrigerator/freezer to store the pumped milk . . . Coordination for the milk to be picked-up by the child's care giver shall be arranged prior to pumping and storing the milk.<sup>249</sup>

Moreover, our data suggest that the mother herself, regardless of what prison rules say, may decide, like several people we have spoken with, that it is "pointless" or too painful to nurse knowing the child will be taken away and bottle fed in just a couple of days.<sup>250</sup> One person explained, "It would . . . be too hard bonding with the baby. Hard enough the way it was—I couldn't do it."<sup>251</sup>

International law, which will be discussed in more detail later in this article, strongly supports the right to breastfeed. The United Nations, regional treaty organizations, courts, and many state legislatures have recognized breastfeeding as an important

---

247. KIDSHEALTH, Breastfeeding v. Formula Feeding (posted November 2008) available at [http://kidshealth.org/parent/growth/feeding/breast\\_bottle\\_feeding.html](http://kidshealth.org/parent/growth/feeding/breast_bottle_feeding.html).

248. See Interview with Dowd, *supra* note 182; Interview with Carey, *supra* note 174. Interview with Farley, *supra* note 179; Interview with Perez, *supra* note 153; Interview with Tran, *supra* note 144.

249. CAL. DEP'T CORR. & REHAB. § 54045.19.

250. Interview with Carey, *supra* note 174; Interview with Farley, *supra* note 179; Interview with Tran, *supra* note 144.

251. Interview with O'Neill, *supra* note 169.



or fundamental right.<sup>252</sup> The right to breastfeed is encompassed in the rights to privacy,<sup>253</sup> family,<sup>254</sup> health,<sup>255</sup> and in the rights of the child.<sup>256</sup> While the International Covenant on Civil and Political Rights, which is ratified by the U.S. and thus legally binding, does not explicitly mention breastfeeding as part of the right to privacy and family, the European Court of Human Rights has interpreted near-identical language found in the European Convention on Human Rights (ECHR)<sup>257</sup> to include a very strong right to breastfeed. It states that separating a child and mother after birth is “traumatic for the mother . . . and deprive[s] the new-born baby of close contact with its natural mother and . . . the advantages of breastfeeding” and called the practice “draconian.”<sup>258</sup> This decision is important because interpretations of

---

252. See N.Y. CORRECT. LAW § 611 (2)–(3) (2003) (guaranteeing imprisoned women in New York State Prisons the right to continue breastfeeding children under one year of age); Convention on the Rights of the Child art. 24 (e), Nov. 20, 1989, 1577 U.N.T.S. 3 (ensuring parents the right to proper education on the benefits of breastfeeding) [hereinafter CRC]; Convention on the Elimination of all Forms of Discrimination Against Women, U.N. Res. 34/180, art. 12 ¶ 2 (Dec. 18, 1979) (ensuring women the right to health including adequate health care during pregnancy and lactation) [hereinafter CEDAW]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 E.T.S. 222 [hereinafter ECHR]; *Dike v. School Bd. of Orange County, Fla.*, 650 F.2d 783, 787 (5th Cir. Unit B July 17, 1981) (citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)) (internal citation omitted) (finding that breastfeeding is included in the fundamental right to privacy encompassed in the liberty interest of the Fourteenth Amendment to the Constitution of the United States); *Hasse et al. v. Germany*, 2004 ECHR 1057/02, at ¶ 101, 103, 105 (finding interference with breastfeeding to be a violation of the right to privacy found in ECHR at art. 8; this right has an analogue in the International Covenant on Civil and Political Rights, which the United States has ratified); *P, C and S v. United Kingdom*, 2002 ECHR 5647/00, at ¶ 131,133 (agreeing with *Hasse*, 2004 ECHR 1057/02); Committee on Economic, Social, and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, ¶ 1, 21 U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter CESCR, *General Comment 14*]; (elaborating on the right to health encompassed in ICESCR, *infra* note 257, at art. 12); Melissa R. Vance, *Breastfeeding Legislation in the United States: A General Overview and Implications for Helping Mothers*, LEAVEN, 51, 51, June–July 2005, available at <http://www.lli.org/llleaderweb/LV/LVJunJul05p51.html> (indicating that as of June 2005, thirty-nine states have passed laws regarding breastfeeding).

253. *Dike*, 650 F.2d 783, 787; *Hasse*, 2004 ECHR 1057/02, at ¶ 101, 103, 105; *P, C & S*, ECHR 5647/00, at ¶ 131,133; see also ICCPR, *supra* note 75 at art. 2, 6.

254. ICCPR *supra* note 75 at art. 17 ¶1.

255. See CEDAW, *infra* note 254, at art. 12 ¶ 2; International Convention on Economic, Social and Cultural Rights [hereinafter ICESCR], G.A. Res. 2200A (XXI), art. 12, U.N. Doc. A/6316 (Dec. 16, 1966).

256. CRC, *infra* note 252.

257. ECHR, *supra* note 252.

258. *Hasse*, 40 Eur. H.R. Rep. ¶¶ 101, 103, 105; accord *P, C & S*, 35 Eur. H.R. Rep. ¶ 131, 133.

the ECHR are often treated as persuasive authority by courts interpreting parallel sections of the ICCPR.<sup>259</sup> At least one U.S. federal appellate court has also recognized that breastfeeding is a fundamental right encompassed in the Fourteenth Amendment of the United States Constitution.<sup>260</sup> Other courts have held that the right to breastfeed may be trumped by penological interests in the prison setting.<sup>261</sup> However, not all states are in agreement that breast feeding does in fact undermine penological interests.<sup>262</sup>

The inability of people in prison to breastfeed may be viewed as a violation of the right to family<sup>263</sup>—preventing a parent from being with and caring for her child—and, given the key role that breastfeeding plays in an infant's development and a mother's well-being,<sup>264</sup> a violation of both the newborn's and the mother's right to health.<sup>265</sup> In light of the size of California and the remote locations of its women's prisons, it would not be surprising to find that many caregivers are unable to travel to the prison regularly to pick up breast milk, assuming that prison staff informs postpartum individuals that ongoing breastfeeding is a possibility. In fact, we are not aware of any cases in which people were able to continue breastfeeding once they returned to prison from the hospital or were even told this was a possibility. This double standard between how breastfeeding is highly encouraged outside of prison and made virtually unavailable to mothers in

---

259. David Sloss, *Using International Law to Enhance Democracy*, 47 VA. J. INT'L L. 1, 19; John Cerone, *Inappropriate Renderings: The Danger of Reductionist Resolutions*, 33 BROOK. J. INT'L L. 357, 363.

260. Dike, *supra* note 253.

261. *Southerland v. Thigpen*, 784 F.2d 713, 717 (5th Cir. 1986).

262. New York State has a statute guaranteeing people in New York State Prisons the right to continue breastfeeding children under one year of age. N.Y. CORRECT. LAW § 611 (2)–(3). This policy recognizes the importance of the right to breastfeed as part of an individual's right to health, privacy, and family. *Id.*

263. See Corey Silberstein Shdaimah, *Why Breastfeeding is (Also) a Legal Issue*, 10 HASTINGS WOMEN'S L.J. 409 (1999).

264. See Am. Acad. of Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496 (2005).

265. See Organization of American States, American Convention on Human Rights, art. 11, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, available at <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> [hereinafter ACHR,]; ICESCR, *supra* note 257, at art. 12(2)(a); ICCPR, *supra* note 255, art. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 15*, 17, ¶ 1, 21, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); U.N. Human Rights Comm., CCPR General Comment 19, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.1 (July 27, 1990) [hereinafter CCPR General Comment 19].

prison further demonstrates that they are not taken seriously as mothers.

### 1. Inadequate Postpartum Medical Care

*"When I came back from having the baby, they prescribed me antibiotics, told me I had an infection in my blood, but they never said what the infection was. They never called me back to check on it, and it's been a month. They act like just because we're in here we have no rights."*<sup>266</sup>

Once back at the prison, medical care for postpartum individuals is spotty at best. According to survey respondents and the people we spoke with, hospital stays for people who gave birth while imprisoned at VSPW were generally two days following vaginal delivery and four days following caesarean section,<sup>267</sup> which basically conforms to the approved standard of care.<sup>268</sup> But even while still at the hospital, prison practices—including a demonstrated lack of respect and consideration on the part of some prison staff—may intrude on recovery. Patricia Allen described the correctional officers assigned to guard her at the hospital as "rude," explaining that, "One brought a DVD player. He played it really loud. When the shooting started [in the movie he was watching], the baby woke up and started crying."<sup>269</sup> Once pregnant peoples' hospital stays were over, the mothers were quickly separated from their children.

This failure to provide adequate postpartum treatment is likewise contrary to accepted medical standards. According to ACOG, someone who has experienced an uncomplicated birth should have a postpartum check-up four to six weeks after delivery.<sup>270</sup> Individuals who have undergone complicated deliveries or caesarean sections should be seen within seven to fourteen days of delivery.<sup>271</sup>

Many people we spoke with indicated that they either did not receive a four or six week follow-up appointment following delivery or that they had to fight to receive this appointment. Others indicated that the "check-up" was cursory and inadequate, sometimes with no physical examination administered.

---

266. Interview with Farley, *supra* note 179.

267. Justice Now survey (on file with Justice Now).

268. GUIDELINES, *supra* note 148, at 154.

269. Interview with Allen, *supra* note 169.

270. GUIDELINES, *supra* note 148, at 171.

271. *Id.* at 172.

Margaret Elliott described being seen by request six weeks after delivering because she wanted birth control. Although she received the birth control, she was not given a physical examination despite another doctor's recommendation that she be assessed for her cervical dysplasia. Cervical dysplasia is a condition in which cells on the cervix become irregular, and which can lead to cervical cancer.<sup>272</sup> The doctor she saw for the follow-up appointment told her not to worry about it.<sup>273</sup>

Even in the case of caesarean section deliveries, medical attention is strikingly lax. Angela O'Neill explained that, following her c-section, "it took me weeks to get the staples out . . . I didn't want them to grow in."<sup>274</sup> Elizabeth Mendez, who received a caesarean section in 2006, explained that, despite a number of complications, she was provided no postpartum care beyond the standard six week check-up. "That is when the problems kicked in. The headaches would come. The staples were left in too long. Then, the skin grew over them until they were yanked at. I got no pain relief."<sup>275</sup> This absence of comprehensive follow-up care demonstrates a shocking lack of interest in the physical well-being of people in prison and basically ignores the event of the birth.

## 2. Lack of Mental Health Services

*"I put a request in to see mental health but by the time they put a ducat for me to see them I already went through my depression."*<sup>276</sup>

Another indication of the lack of interest in pregnant and postpartum individuals in prison is the absence of real mental health care and emotional support available to them. Mental health problems are extremely common among people in prison. The federal Bureau of Justice Statistics in late 2006 released a report concluding that 73 percent of people in state women's

---

272. See COMM. ON PATIENT EDUC., AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, ACOG EDUCATION PAMPHLET NO. AP11, LOOP ELECTROSURGICAL EXCISION PROCEDURE (1999) (stating that irregular cells on the cervix can lead to cervical cancer).

273. Interview with Elliott, *supra* note 145.

274. Interview with O'Neill, *supra* note 169; see also Videotape: What to Expect During a C-section, Mayo Clinic (2008), available at <http://www.mayoclinic.com/health/c-section/> (for the proposition that staples are typically removed between 72 to 90 hours after a Caesarean section is performed)

275. Justice Now interview with Elizabeth Mendez (July 28, 2006).

276. Interview with Rollins, *supra* note 152.

prisons had mental health problems.<sup>277</sup> Add the physical and emotional stresses of pregnancy, which can lead to mental health problems, to the constant stresses of imprisonment, and it becomes clear that a failure to provide mental health care to pregnant and postpartum individuals in California's women's prisons seriously harms these individuals.

Pregnant people in prison are particularly susceptible to developing mental health problems and, consequently, particularly in need of adequate mental health care. During pregnancy and up to a year after giving birth, people are very vulnerable to mental disorders, including anxiety disorders, eating disorders, depression, and psychosis.<sup>278</sup> Depression, which is the most-studied of pregnancy-related mental disorders, is prevalent among 10 to 20 percent of pregnant people.<sup>279</sup> Some characteristics which are common to pregnant individuals in women's prisons also create an elevated risk for the development of pregnancy-related mental disorders. These characteristics include: a history of psychiatric illness and high levels of stress, including the stress caused by pregnancy itself, as well as the stress provoked by separation from one's partner; low economic status; a feeling of lack of control over one's life; and the trauma of moving to a new location.<sup>280</sup> The stress of imprisonment in particular has been found to aggravate mental health problems in many cases.<sup>281</sup> Additionally, for both pregnant and postpartum individuals, the anticipation and experience of being separated from their babies

---

277. DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006).

278. M. Howard et al., *A Psychiatric Mother-Baby Day Hospital for Pregnant and Post Partum Women*, 9 ARCHIVES OF WOMEN'S MENTAL HEALTH 213, 213 (2006); see also NATIONAL COLLABORATING CENTRE FOR MENTAL HEALTH, ANTENATAL AND POSTNATAL MENTAL HEALTH: THE NICE GUIDELINES ON CLINICAL MANAGEMENT AND SERVICE GUIDANCE 67-80 (2006)

279. Margaret G. Spinelli, & Jean Endicott, *Controlled Clinical Trial of Interpersonal Psychotherapy Versus Parenting Education Program for Depressed Pregnant People*, 160 AM. J. PSYCHIATRY 555, 555 (2003); Howard et al., *supra* note 278.

280. AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, EDUC. PAMPHLET NO. AP091, POSTPARTUM DEPRESSION (1999); NATIONAL COLLABORATING CENTRE FOR MENTAL HEALTH, *supra* note 283, at 92; Avalene Bateman, *Healthwatch: Postpartum Depression*, AGENDA, Nov. 22, 1994, at 57, 60; E. Robertson et al., *Antenatal Risk Factors for Postpartum Depression: a Synthesis of Recent Literature*, 26 GEN. HOSP. PSYCHIATRY 289, 291 (2004).

281. See HUMAN RIGHTS WATCH, ILL-EQUIPPED U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 145 (2003) [hereinafter HRW, ILL-EQUIPPED] (explaining that both the physical and mental health of people in prison tends to deteriorate when they are placed in solitary confinement).

and the uncertainty surrounding their infants' well-being causes profound anguish.

Even though there is a high risk that women who are separated from their babies will experience feelings of anxiety and depression, there is a severe lack of mental health services available to people in prison. While a prison mental health specialist receives a weekly update of the pregnant people at her or his prison,<sup>282</sup> the converse is not true. As a rule, pregnant people are not told that there is a mental health specialist that they can access.<sup>283</sup> In the rare cases when people are able to access mental health support services, such services are often provided by volunteer doulas or peer counselors.<sup>284</sup> "I broke down when I was back here [at VSPW]," said Carol Perez. "I was exhausted, angry, and heartbroken. There wasn't any psychological support. I didn't get any counseling at the hospital or when I got back to Valley State. I slept for three days and they gave me two days off."<sup>285</sup> Angela O'Neill also spoke of the absence of mental health services: "They don't give you postpartum classes to talk about your loss."<sup>286</sup> As in the case of prenatal mental health care, the failure to provide postpartum treatment for psychological and psychiatric problems violates the right to health, which includes a right to mental health care, and may in some cases also constitute inhumane or degrading treatment.<sup>287</sup> Every survey respondent who reported suffering from mental illness indicated that they were not provided any information about treatment options for emotional or mental stress during pregnancy. In fact, based upon our surveys and interviews, peer grief counselors

---

282. Communication from Rougeux, *supra* note 63.

283. Justice Now surveys (on file with Justice Now).

284. Justice Now, Op-Ed, *This is Not a Dog Kennel* (unpublished) (written by person in prison at VSPW: "In 2003, a group of us started the grief counseling program through the Long Termers Organization in order to address the overwhelming need for these services").

285. Interview with Perez, *supra* note 153.

286. Interview with O'Neill, *supra* note 169.

287. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT]; ICCPR, *supra* note 254, at art. 7; CESCR, *General Comment* 14, *supra* note 259, at ¶ 1, 12, 14; Keenan v. United Kingdom, 33 Eur. H. R. Rep. 38 (2001) (holding that imprisonment of a mentally insane person can amount to a violation of Article 3 of the Convention Against Torture, although the facts of this particular case did not amount to such a violation); Denmark, Norway, Sweden & Netherlands v. Greece, App. Nos. 3321/67; 3322/67; 3323/67; 3344/67, [hereinafter the Greek Case], 12 Y.B. Eur. Conv. on H.R. 1 (1969) (Commission Report) [hereinafter ECHR]; CESCR, *General Comment* 14, *supra* note 259.

provide the vast majority of mental health support to people who have recently given birth.<sup>288</sup>

Considering the surplus of mental support directed at middle class parents, including new parents groups of all kinds—moms' groups, dads' groups, stay-at-home dads' groups, non-birth lesbian moms' groups—this approach shows how little we value mothers “inside.” It appears that we do not consider the severe impact that being pregnant inside prison could have on one's mental health, especially since such support groups would require little financial investment. Outside prison, mental health services are considered essential to one's overall health, especially for new parents and parents that have lost a child.<sup>289</sup> If these services are critical, they should be available to everyone, regardless of whether one is in prison or not. Another disturbing component is that once they are released, mothers who were friends in prison cannot keep in contact with each other because of parole regulations.<sup>290</sup> This goes against the support systems developed by mothers' groups and leaves these women without a supportive cohort.

### 3. Forced Separation of Parent and Child

*“[O]nce they told me I had to give [the baby] to them I started crying. My baby felt it and she started crying too. Then they took her and went out the door. That was it.”<sup>291</sup>*

Similar to parents everywhere, a primary concern for many pregnant people in California's women's prisons—and a nearly universal source of anxiety and distress—is what will happen to their children once they are born. This concern is more severe and poignant for people in prison because their children will almost certainly be removed from their care shortly after birth.<sup>292</sup> Thus, while child placement and prison mother-infant programs are not the focus of this article and cannot be examined comprehensively here, we could not have written about how U.S. law and society views mothers in prison without at least addressing

---

288. Justice Now surveys (on file with Justice Now).

289. MURKOFF ET AL., *supra* note 146, at 529 (“There's probably no greater pain than that inflicted by the loss of a child. And though nothing can banish the hurt you're feeling, there are steps you can take now to make the future more bearable, and to lessen the inevitable depression that follows such a tragedy. . .”).

290. STATE OF CAL. DEPT. OF CORR. AND REHAB., ADULT INSTITUTIONS, PROGRAMS AND PAROLE, OPERATIONS MANUAL, at 670 (Updated through Jan. 1, 2009).

291. Interview with Perez, *supra* note 153.

292. *See infra* notes 300-299.

these issues. Our research illustrates the profound trauma experienced by pregnant people facing imminent separation from their newborns, a separation that may be made permanent due to current state and federal law, as described below. Most existing programs<sup>293</sup> designed to allow people in prison to stay with their infants and young children are extremely limited, difficult to access, and, in some cases, abusive. The policies and practices in these programs constitute violations of the human rights to family and health, and illustrate that society, as reflected by U.S. law, has decided that these women are 'bad' mothers.<sup>294</sup> A constant, often overwhelming theme in our conversations with the people we spoke with was the intense pain they felt when they were separated from their newborn infants. "My son is my world," explained Kara Graham. "I'm married. I have a house, have a child. Emotionally it's extremely rough."<sup>295</sup> Sheila Carey described being separated from her child two days after delivery, saying that it was "a pain I would not wish on my worst enemy."<sup>296</sup> Carol Perez, whose child was placed in foster care, described the day her newborn was taken away:

Two women social workers came and talked to me on my last day [at the hospital]. I had never seen them before. They told me that I had five minutes. I didn't know that was going to be the day, although I did know that at some point we would be separated. I didn't want to give her up, but they told me I had to. There was one other new mom in the room [also from VSPW] when the social workers came in. They didn't give me any more than five minutes.<sup>297</sup>

Being separated from one's child can be a very painful experience. Many studies describe the difficulty of giving your child up for adoption and in these cases, the separation is not voluntary, making it even more difficult.<sup>298</sup> The fact that the prison system and state government ignore the emotional distress that

---

293. These programs will be discussed later in this article.

294. A further examination of the human right to family and safe motherhood will be discussed later in this article.

295. Interview with Graham, *supra* note 158.

296. Interview with Carey, *supra* note 174.

297. Interview with Perez, *supra* note 153.

298. Deborah Fravel, Ruth McRoy & Harold Grotevant, *Birthmother Perceptions of the Psychologically Present Adopted Child: Adoption Openness and Boundary Ambiguity*, 49 *FAMILY RELATIONS* 425, 426 (Oct. 2000) (quoting B. Lifton, *TWICE BORN: MEMOIRS OF AN ADOPTED DAUGHTER* (McGraw-Hill 1977); ". . . adoption [is like] an amputation for the birthmother due to the child's being psychologically connected to her").



separation causes and do little to prepare parents for separation or to address the impact on parents after separation shows they do not value the parent-child relationship when the parent is in prison.

*a. Child Placement Process & the Termination  
of Parental Rights*

*"They're not interested in reuniting you with your baby."<sup>299</sup>*

In California, as described previously, a person who gives birth while serving a prison sentence will generally have their child with them for two to four days while they are in the hospital, depending on whether they give birth vaginally or have a caesarean section.<sup>300</sup> Around the time when the mother is discharged, her child is taken away. The parent is able to designate a relative or a friend with a foster care license to pick up the infant, but that person must pass a criminal background check in order to receive the child.<sup>301</sup> The majority of people we surveyed and interviewed who had already given birth indicated that their children were with family members, most often with the child's father or maternal grandmother. If, however, the mother does not have such a person in her life, like several other people we spoke with for this report, Child Protective Services (CPS) will take and transport the infant to the county of the mother's last legal residence, and place the child in foster care.<sup>302</sup>

It is at this point that the clock starts running on a person's parental rights. As a result of a federal 1997 law called the Adoption and Safe Families Act (ASFA), the State must file a recommendation to terminate parental rights for children who have been in foster care for fifteen out of the last twenty-two months.<sup>303</sup> Once parental rights are terminated, the parent has no legal rights or duties in relation to the child, and the child is

---

299. Interview with Long, *supra* note 169.

300. This was the case with all people we surveyed who reported giving birth while serving their sentence. See Justice Now Surveys (on file with Justice Now).

301. See CAL. R. CT. 5.678(e)(1); Cassie Pierson, *Legal Corner: Community Based Programs for Mothers*, California Coalition for Women Prisoners, THE FIRE INSIDE (Cal. Coalition for Women Prisoners, S.F. Cal), Spring 2003, available at <http://www.womenprisoners.org/fire/000115.html>.

302. Interview by Lynsay Skiba with Cassie Pierson, Staff Attorney, Legal Services for Prisoners with Children, in San Francisco, Cal. (Dec. 14, 2007); Justice Now Survey (on file with Justice Now).

303. 42 U.S.C. § 675(5)(E) (2000).

eligible for adoption.<sup>304</sup> Because the average prison sentence exceeds the fifteen-month timeframe,<sup>305</sup> it is clear that the circumstance of parents in prison was not taken into account or valued sufficiently when the law was drafted.<sup>306</sup> Predictably, a 2005 study suggested that ASFA has had a disproportionate effect on parents in prison, based on the significant overall increase between 1997 and 2002 in the number of cases in which the parental rights of parents in prison were terminated permanently.<sup>307</sup>

Because of ASFA and other provisions of state law, a relatively short prison sentence may result in permanent severing of the legal relationship between parent and child. This is especially the case where the child is under the age of three. California law limits reunification services to six months for children who are under the age of three, and for their siblings.<sup>308</sup> The cut-off for services for older children is twelve months.<sup>309</sup> Services may be extended for up to eighteen months for children of all ages if they are likely to be reunified with their parents within that period.<sup>310</sup> Once this time is up and the parent has not reunified with the child—which would be the case when a parent is still in prison—the state may terminate parental rights.<sup>311</sup> Most prison sentences exceed these timeframes for reunification set out in ASFA and California state law.<sup>312</sup> In addition, due to conditions of confinement it may be impossible for parents in prison to sat-

---

304. See CHARLENE WEAR SIMMONS, CAL. RESEARCH BUREAU, CRB 03-003, CALIFORNIA LAW AND THE CHILDREN OF PRISONERS 37 (2003) (stating that termination of parental rights is irreversible. Thus, once a parent's rights have been severed, an adoption may follow).

305. PATRICIA E. ALLARD & LYNN D. LU, BRENNAN CTR. FOR JUST, REBUILDING FAMILIES, RECLAIMING LIVES: STATE OBLIGATIONS TO CHILDREN IN FOSTER CARE AND THEIR INCARCERATED PARENTS 16 (2006).

306. *Id.* at 17 (“One of the creators of ASFA and a senior policy advisor in the House of Representatives admits, ‘We looked at prison sentences, but we weren’t that sympathetic.’”) (citing Laurie P. Cohen, *A Law’s Fallout: Women in Prison Fight for Custody*, WALL ST. J., Feb. 27, 2006, at A1).

307. ARLENE F. LEE ET AL., CHILD WELFARE LEAGUE OF AM., THE IMPACT OF THE ADOPTION AND SAFE FAMILIES ACT ON CHILDREN OF INCARCERATED PARENTS 22 (2005).

308. CAL. WELF. & INST. CODE, § 361.5(a) (West 2008) amended by CAL. WELF. & INST. CODE, § 361.5(a) (West Supp. 2009).

309. *Id.*

310. *Id.*

311. See Heidi Rosenberg, *California’s Incarcerated Mothers: Legal Roadblocks to Reunification*, 30 GOLDEN GATE U. L. REV. 285, 291 (2000).

312. See SIMMONS, *supra* note 304, at 38 (“Given the length of average sentence for women prisoners, it is likely that many will have their parental rights terminated absent considerable assistance from correctional officials and social workers”).

isfy court-ordered reunification requirements, which include ongoing parent-child contact and participation in drug treatment, parenting, and other programs.<sup>313</sup> Additionally, a push for policy reforms providing reunification services in prison would likely fail due to limited funding and general lack of public interest.

As there may be no basis for permanent termination of parental rights outside of the fact of imprisonment, ASFA and provisions of state law described above operate to arbitrarily interfere with the families of parents in prison.<sup>314</sup> However, California lawmakers have taken steps to acknowledge and change the implicit statutory interference with people in prison's human right to family. On January 1, 2009, Assembly Bill 2070 ("Keeping Families Whole") took effect, and began to address the distinct needs of parents in prison and in residential drug treatment programs who are working to retain their parental rights.<sup>315</sup> Under this new law, social workers are required to document, and courts must consider, the barriers that parents in prison and residential drug treatment programs routinely face while attempting to meet court-mandated reunification requirements.<sup>316</sup> Reunification services are extended for up to twenty-four months when specified criteria are met, and the previous strict ASFA requirement – that termination proceedings be initiated if a child has been in foster care for fifteen out of the previous twenty-two months – has been modified.<sup>317</sup> In addition, a parent's criminal record may only be considered to the extent that it relates to the

---

313. *Id.* at 35–36; see also Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 N.W.J.L. & SOC. POL'Y 303, 318–19 (2006) ("While these incarcerated mothers are serving their sentences they cannot 'rehabilitate and resume custody' of their children and demonstrate their ability to parent. This makes it easier for a judge to terminate their parental rights and place children of incarcerated black mothers up for adoption.").

314. See also Chieko M. Clarke, *Maternal Justice Restored: Redressing the Ramifications of Mandatory Sentencing Minimums on Women and Their Children*, 50 How. L.J. 263, 271 ("Although there is a constitutional requirement that parental 'unfitness' be proven before rights can be permanently terminated, incarcerated mothers are often presumed to be unfit by virtue of their conviction."). Cf., ACHR, *supra* note 271 at art. 11 ("[N]o one may be the object of arbitrary or abusive interference with his private life, his family, his home . . . ."); ICCPR, *supra* note 75, at art. 17 ("[N]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home . . . .").

315. A. B. 2070, 2008 Leg. 2007–2008 Reg. Sess. (Ca. 2008), available at [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_2051-2100/ab\\_2070\\_bill\\_20080928\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2051-2100/ab_2070_bill_20080928_chaptered.pdf).

316. *Id.*

317. *Id.*

ability to parent.<sup>318</sup> While we have yet to see the practical effects of this bill, the provisions potentially could diminish the arbitrary interference with the families of people in prison in California.

*b. Mother-Infant Programs*

*“They’re run more like mini prisons than alternatives to prison.”<sup>319</sup>*

In a response to the issue of mothers in prison, there has been a growing movement to develop prison nurseries and mother-infant care programs that are controlled by corrections departments.<sup>320</sup> Currently, nine states have prison nurseries in operation or in development, and all except one have opened in the last twenty years.<sup>321</sup> All of the states with prison nursery programs consider applications only when the child is born in state custody.<sup>322</sup> Additionally, the mother cannot have a violent crime conviction or a past history of child abuse or neglect in order to be considered for admittance, and is required to sign a waiver releasing the prison from liability should the child become ill or injured.<sup>323</sup> The length of the baby’s stay in the program is dependent on the length of the mother’s sentence.<sup>324</sup> In a 2009 report, the Institute on Women & Criminal Justice stated that the average maximum length of stay for a child in most programs is between twelve and eighteen months.<sup>325</sup>

In California, two programs, The Family Foundations Program (“FFP”) and the Community Prisoner Mother Program (“CPMP”), or Mother-Infant Care Program (“MIC”), are currently operating and allow a small number of mothers with criminal convictions to stay with their young children. Unlike prison nurseries, MIC is a CDCR-run program that operates off-site.<sup>326</sup> People in prison who qualify for MIC are able to serve the remainder of their sentences in a community halfway house with

---

318. *Id.*

319. Interview with Cassie Pierson, *supra* note 302.

320. INSTITUTE ON WOMEN & CRIMINAL JUSTICE, *MOTHERS, INFANTS AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY-BASED ALTERNATIVES 5* (May 2009) [hereinafter Institute on Women & Criminal Justice].

321. *Id.*

322. *Id.* at 9.

323. *Id.*

324. *Id.*

325. *Id.* at 10.

326. Legal Services for Prisoners with Children, *Mother Infant Care Program*, available at <http://www.prisonerswithchildren.org/issues/pwcmic.htm>.

their children.<sup>327</sup> MIC is available only to people who are currently located in a California state prison.<sup>328</sup> People in county jails must wait until they are transferred to a state prison before they can apply to MIC.<sup>329</sup> These programs are extremely difficult to access and, in some cases, have been the site of serious abuses.<sup>330</sup> A third program, a prison nursery at the California Institution for Women, is not yet in operation. Since these programs are still controlled by the correctional system, they continue the abusive and controlling practices of the prison,<sup>331</sup> which do not support people in prison and their families.

A common source of distress for the pregnant people and mothers we spoke with and surveyed was the difficulty they encountered gaining access to the Community Prisoner Mother Program. Despite its availability on paper, the program accepts very few people. In July 2008, the CDCR reported that there were seventy CPMP beds and that all were filled.<sup>332</sup> As of 2007 FFP had only 140 beds<sup>333</sup> for the more than 6,400 parents with children in California's women's prisons.<sup>334</sup> Additionally, although the CDCR is required by law to provide CPMP applications and a notice containing guidelines for qualification for the program, the application timeframe and the process for appealing a denial from the program<sup>335</sup> are neither straightforward nor swift. People in women's prisons are not issued the applications for the program unless they ask for them<sup>336</sup> and are also rou-

---

327. *Id.*

328. *Id.*

329. *Id.*

330. See Solomon Moore, *California Investigates a Mother and Child Prison Center*, N.Y. TIMES, July 6, 2007, available at [http://www.nytimes.com/2007/07/06/us/06women.html?\\_r=1&scp=1&sq=mother-child%20prison%20center&st=cse&oref=slogin](http://www.nytimes.com/2007/07/06/us/06women.html?_r=1&scp=1&sq=mother-child%20prison%20center&st=cse&oref=slogin).

331. See *supra* Part III.

332. CAL. DEP'T OF CORR. & REHAB., WEEKLY REPORT OF POPULATION, JULY 7, 2008, at 1 (2008), available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/WeeklyWed/TPOP1A/TPOP1Ad080702.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad080702.pdf).

333. Heather L. McCray, *Pregnant Behind Bars: Chapter 608 and California's Reformation of the Medical Care and Treatment of Pregnant Inmates*, 37 MCGEORGE L. REV. 314, 317 (2006); Moore, *supra* note 332.

334. Jennifer Warren, *Rethinking Treatment of Female Prisoners*, L.A. TIMES, June 19, 2005.

335. CAL. PENAL CODE §§ 3418-19 (West 2008), amended by CAL. PENAL CODE §§ 3418-19 (West Supp. 2009); CAL. CODE REGS. tit. 15, § 3355.2(g) (2008).

336. Additionally, people are sometimes faced with long waiting periods of sixty to ninety days to see a counselor who can give them information on programs available. Interview with Norris, *supra* note 191; Interview with Pierson, *supra* note 302.

tinely denied admittance into the programs due to the nature of their crimes<sup>337</sup> or because of medical and dental holds.<sup>338</sup>

For example, Sarah Friend reported that the CPMP Coordinator denied her admission into MIC because there was a "VIO" (violence) Administrative Determinant on her file.<sup>339</sup> However, Friend was never told why she received a "VIO" on her record and she was prevented from challenging this determination.<sup>340</sup> Similarly, Margaret Elliott was told she could not participate in MIC due to an outstanding warrant for her arrest, even though this was the same warrant on which she had been arrested to serve her current prison time.<sup>341</sup> In addition, Kate Long was medically cleared for admittance to MIC but because one of her teeth needed to be removed, a dental hold was placed on her record and she could not participate.<sup>342</sup> Furthermore, although people with clearance for other placements (in MIC, for example) should be placed on a priority list to see a dentist within a week of placement, Long had not heard from the dentist three weeks after putting in a dental request.<sup>343</sup>

Even if a pregnant person or parent of a young child manages to gain entrance into a mother-infant program, whether FFP or CPMP, not only does she remain in "prison," but her ability to care for and protect her child is by no means assured and may in fact be undermined by program staff. FFP has been subject to harsh criticism due to egregious examples of medical neglect,<sup>344</sup> despite the fact that the law requires each FFP program to provide a wide variety of mental health, social welfare and medical resources to children and mothers with the goal of providing "a safe and wholesome environment" for participating children.<sup>345</sup> At one FFP in San Diego, staff denied medical attention for six weeks for a five year-old girl, who was later diagnosed with brain

---

Such delays can prevent otherwise eligible people from entering the program and reuniting with their children.

337. Interview with Farley, *supra* note 179; Interview with Graham, *supra* note 158; Interview with Perez, *supra* note 153; Interview with Thompson, *supra* note 161.

338. Interview with Shain, *supra* note 217.

339. Interview by Justice Now with Sarah Friend, Valley State Prison for Women, in Chowchilla, Cal. (Dec. 8, 2006) [hereinafter Interview with Friend].

340. *Id.*

341. Interview with Elliott, *supra* note 145.

342. Interview with Long, *supra* note 169.

343. *Id.*

344. Moore, *supra* note 330.

345. CAL. PENAL CODE § 3411 (West 2008); CAL. CODE REGS. tit.15, art. 9, § 3074.3(g-h), (j-l) (2008).

cancer, despite complaints by her mother that she had been suffering from blinding headaches and constant nausea.<sup>346</sup> Another resident at the same center was ignored by staff for several days when she reported that her infant had labored breathing, which resulted in her child going into cardiac arrest.<sup>347</sup> The Department of Alcohol and Drug Programs considered pulling the license of the San Diego center.<sup>348</sup>

In addition, CPMP facilities, and the Oakland location in particular, have been found to be unsafe and derelict, so much so that people may choose to remain in prison without their children rather than enter these facilities.<sup>349</sup> According to Angela O'Neill, "My friend came back from there [the CPMP facility in Oakland] because it was so filthy. It was a homeless shelter in Oakland that accepts for Mother-Infant. Babies were infested there. She didn't want to be there."<sup>350</sup> Thus, people in prison or being sentenced face a dilemma: they can either serve their time in prison and be separated from their child, or they can be with their child under often unsafe and degrading conditions.

Despite good intentions, this growing trend towards expanding CDCR-controlled programs for mothers and their young children is highly problematic. While the importance of keeping parents and children together should not be underestimated, the impact of the prison environment on infants and children is a disturbing prospect and thus we think facilities not under the control of the corrections department should be the priority. Infants would be exposed to the high rates of disease and other health risks, as well as the chronic lack of adequate health care associated with imprisonment.<sup>351</sup> Even the best-reviewed programs were cited for not supporting bonding with family members who do not reside in the program, and, more importantly, for having a restrictive and punitive environment.<sup>352</sup> Perhaps even more alarming is the potential psychological and developmental impact that being inside a prison may have on infants and children of all ages.<sup>353</sup> The long-term repercussions of placing newborns in prison environments cannot be predicted,

---

346. Moore, *supra* note 330.

347. *Id.*

348. *Id.*

349. See Interview with O'Neill, *supra* note 169.

350. *Id.*

351. Tammerlin Drummond, *Mothers in Prison*, TIME, Nov. 6, 2000, at 108.

352. Institute on Women & Criminal Justice, *supra* note 320, at 19.

353. *Id.* at 21.

which raises serious concerns about the advisability of a program like the CDCR's proposed prison nursery at CIW.<sup>354</sup> Rather than building nurseries, we should be sending mothers home with their children into supportive communities as discussed in our conclusion.

## VI. INTERNATIONAL HUMAN RIGHTS LAW AND THE RIGHT TO SAFE MOTHERHOOD

### A. Overview

While federal and state laws, prison policies, and social biases enforce notions that people in prisons are bad mothers, international human rights law offers a more comprehensive idea of safe motherhood that challenges government practices which privilege certain mothers over others. This is because human rights law sees all rights as interconnected, including civil, political, economic, social, and cultural rights. While "safe motherhood" has traditionally referred to conditions of care immediately surrounding pregnancy and birth, the concept of safe motherhood encompasses numerous rights, including the rights to health, bodily integrity, information, life, and to be free from cruel, inhuman or degrading treatment. Its principles are also applicable to aspects of care that directly affect prenatal and postpartum health and the health of the infant, such as nutritional and mental health. It covers all pregnant people whether or not they identify as a woman/mother or not, and specifically refers to the idea that pregnancy and childbirth should neither be life-threatening nor lead to permanent injury.

These rights are protected in a number of treaties that the United States has ratified, including the International Covenant on Civil and Political Rights ("ICCPR") and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), as well as in treaties that have not been ratified by the U.S. and are therefore not legally binding on the U.S., but which provide authoritative guidance, including the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), the Convention on the Rights of the Child ("CRC"), and the American Convention on

---

354. Margot Bach, CDCR, *Legislators, Advocates, Partner to Benefit "Bonding with Babies" Prison Nursery Program*, STAFF NEWS: COMMUNICATING WITH PROFESSIONALS IN CORRECTIONS AND PAROLE, Dec. 15, 2006, at 8.



Human Rights ("ACHR").<sup>355</sup> Jurisprudence from regional human rights tribunals, particularly the European Court for Human Rights, offers expert analysis of human rights that are also protected under United Nations human rights instruments.

The rights associated with safe motherhood apply equally to people in prison and people outside of prison. The ICCPR and other international agreements binding on the U.S. specify that rights must be afforded equally to all people, regardless of their status in prison.<sup>356</sup> By failing to provide services in such a way that guarantees safe motherhood within prison, the U.S. government violates these rights and devalues the right of people in prison to be mothers. In addition, although international law only applies to nation-states, it is the responsibility of the federal government to ensure that all states and municipalities follow international law binding upon that country.<sup>357</sup>

### B. *Right to Family*

The right to start a family and the right to private family life are essential components of the right to safe motherhood. The ICCPR provides that the state has affirmative obligations to protect the right to family, which it defines as "fundamental group unit of society."<sup>358</sup> Further, the ICCPR and the American Convention on Human Rights ("ACHR") not only protect family but prohibit "arbitrary" interference with private and family lives.<sup>359</sup> The ICCPR makes clear that in cases of arbitrary interference, people should have the protection of law.<sup>360</sup> Importantly, the United Nations Human Rights Committee, a group of experts charged with interpreting and monitoring the implementation of the ICCPR, has indicated that the right to family "implies, in principle, the possibility to procreate and live together," which in

---

355. When a treaty is ratified, the ratifying state is bound to: (1) apply its provisions; and (2) accept a measure of international supervision. If a state chooses to ratify a treaty, that state is obligated to report regularly on its compliance with the treaty's mandates.

356. ICCPR, *supra* note 75. Additionally, Article 10 of the ICCPR states that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

357. SCOTT WORDEN & PAUL WILLIAMS, U.S. DIPLOMACY, available at <http://www.usdiplomacy.org/diplomacytoday/law/index.php> (last visited on Dec. 3, 2009).

358. ICCPR, *supra* note 75 at art. 23.

359. *Id.*, at art. 17; Organization of American States, American Convention on Human Rights art. 11, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

360. ICCPR, *supra* note 254, at art. 17.

turn “implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.”<sup>361</sup>

Although imprisonment itself separates families in a way that current international human rights jurisprudence may consider to fall within legitimate “political, economic, or similar reasons,” many effects of imprisonment upon the family unit should be considered wholly arbitrary. In the United States for example, imprisonment often leads to the permanent fragmentation of a family through unnecessary termination of parental rights. Furthermore, the forced separation of people in prison from their newborns constitutes a particularly egregious form of government interference in family life, which could be avoided through the use of alternative sentencing procedures for new mothers and expansion of existing non-correctional, community-based treatment facilities.

### C. *Right to Health*

For the right to family to be fully realized—and the right to procreate in particular—the right to health must be protected. Without adequate protection of maternal health and provision of postpartum care, the capacity to establish and care for a biological family is undermined. Protection of the right to health is also essential to and dependent on the realization of other human rights. In 2000, the U.N. Committee on Economic, Social and Cultural Rights, which interprets and enforces the ICESCR, issued General Comment 14, stating that “[h]ealth is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.”<sup>362</sup> The right to health is not limited to the right to health care; instead, it “embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and

---

361. CCPR General Comment 19, *supra* note 265, at ¶ 5.

362. CESCR, *General Comment 14*, *supra* note 252, at ¶ 8

potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”<sup>363</sup>

International agreements such as CEDAW, the ICESCR and the Children’s Convention, while not legally binding on the U.S., recognize that governments have an obligation to ensure adequate medical care during pregnancy, birth, and the postpartum period. These treaties provide important guidance for responsible state action. The ICESCR, for example, provides that “special protection should be accorded to mothers during a reasonable period before and after childbirth.”<sup>364</sup> In 2006, the U.N. Special Rapporteur on the Right to Health, an expert empowered by the U.N. Human Rights Council to assist nations and stakeholders in protecting the right to the highest attainable standard of health, issued a report in which he emphasized:

The right to the highest attainable standard of health entitles women to services in connection with pregnancy and the post-natal period, and to other services and information on sexual and reproductive health. These entitlements encompass the key technical interventions for the prevention of maternal mortality, including access to a skilled birth attendant, emergency obstetric care, education and information on sexual and reproductive health, safe abortion services where not against the law, and other sexual and reproductive health-care services.<sup>365</sup>

In addition to protecting physical health, the right to health incorporates “the right of everyone to the enjoyment of the highest attainable standard of . . . *mental health*.”<sup>366</sup> Through its adoption of the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (“MI Principles”), the United Nations General Assembly emphasized governments’ human rights obligation to provide adequate mental health care as “part of the health and social care system.”<sup>367</sup> Principle 20 of the MI Principles makes clear that people in prison “should receive the best available mental health

---

363. *Id.* at ¶ 4.

364. ICESCR, *supra* note 252, at art. 10.

365. Special Rapporteur, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 13, delivered to the General Assembly, U.N. Doc. A/61/338, Sept. 13, 2006.

366. ICESCR, *supra* note 252, at art. 12.

367. Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care, G.A. Res. 46/119, at princ. 1, U.N. Doc. A/RES46/11 (Dec. 17, 1991) [hereinafter MI Principles]; see HUMAN RIGHTS WATCH, ILL-EQUIPPED, *supra* note 281.

care. . .with only such limited modifications and exceptions as are necessary in the circumstances."<sup>368</sup>

CEDAW, the ICESCR and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") likewise extend the right to health to everyone, regardless of their status in prison or in the free world.<sup>369</sup> CERD, which is binding on the U.S., prohibits racial discrimination in the provision of health care.<sup>370</sup> CERD is relevant in this context because of the disproportionate imprisonment of people of color, discussed in the background section.<sup>371</sup> CEDAW can also be applied to protect the health care rights of people in women's prisons. While CEDAW focuses on eliminating barriers to equality and equal access to care between men and women, it includes opposition to "discrimination against women in the field of health care," regardless of their location in prison.<sup>372</sup> According to CEDAW, equality of health care requires access to services related to pregnancy and to postpartum care, including nutrition, family planning and free services where necessary. CEDAW places an obligation on governments "to ensure women's right to safe motherhood and emergency obstetric services" and to "allocate . . . these services [to] the maximum extent of available resources."<sup>373</sup>

---

368. MI Principles, *infra* note 374, at princ. 20.

369. Convention on the Elimination of All Forms of Racial Discrimination art. 1, Dec. 12, 1966, 660 U.N.T.S. 195 [hereinafter CERD]; CESCR, *General Comment* 14, *supra* note 252, at ¶ 34.

370. Other CERD-protected rights relevant to safe motherhood include right to security of person, freedom of expression and freedom of thought.

371. See Committee on the Elimination of Racial Discrimination, General Recommendation 25: Gender Related Dimensions of Racial Segregation, ¶¶ 1–3, U.N. Doc. HRI/GEN/1/Rev.6 at 214 (Mar. 20, 2000) (explaining the particular incidents of racial discrimination that women face including added gender bias in the legal system). According to the Bureau of Justice Statistics, by mid-year 2006, Black people in the United States were imprisoned at nearly five times the rate of White people relative to their percentage of the general population. In men's prisons, Black people make up 41 percent of people in custody. In women's prisons, Black people are imprisoned at 3.8 times the rate of White people, and Latinas/os are imprisoned at 1.6 times the rate of White people. WILLIAM J. SABOL, ET AL., U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 217675, PRISON AND JAIL INMATES AT MIDYEAR 2006, at 1, 6 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf> (revised Mar. 12, 2008).

372. CEDAW, *supra* note 252.

373. Committee on the Elimination of Discrimination Against Women, General Recommendation 24: Women and Health, ¶ 27, U.N. Doc. A/54/58/Rev.1, at ch. 1 (Feb. 2, 1999) [hereinafter CEDAW, General Recommendation 24].

Importantly, the right to health incorporates the right to health-related information, and information on reproductive and pregnancy-related information in particular. The U.N. Committee on Economic, Social and Cultural Rights has made clear that the right to health requires "the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health."<sup>374</sup> Obligations of state parties include "ensur[ing] reproductive, maternal (pre-natal as well as post-natal) and child health care," which encompasses providing access to "pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information."<sup>375</sup>

According to the U.N. Committee on Economic, Social and Cultural Rights, the right to health includes four elements: *availability, accessibility, acceptability and quality*.<sup>376</sup> All four categories are necessary to achieve the primary goals of ICESCR, which are both immediate and preventative: "A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality."<sup>377</sup> The four-element scheme of the ICESCR is extremely useful when analyzing the treatment of pregnant, birthing, and postpartum people in prison. Even though the ICESCR is not binding on the U.S., its definition of health can be used to provide meaning to CERD's provision requiring the elimination of racial discrimination in the enjoyment of the "right to public health, medical care, social security, and social services," since there is no General Comment explaining those terms.<sup>378</sup>

### 1. Availability

"Availability," as related to health care rights refers to the availability of "functioning public health and health-care facilities, goods and services," programs "in sufficient quantity," and "trained medical and professional personnel."<sup>379</sup> CEDAW requires state parties to make health care available that is specifically related to pregnancy and post-pregnancy periods, including

---

374. CESCR, *General Comment 14*, *supra* note 252, at ¶ 21.

375. *Id.* at ¶¶ 14, 44.

376. *Id.* at ¶ 12; see Rebecca J. Cook & B.M. Dickens, *Ethical and Legal Issues in Reproductive Health: Human Rights to Safe Motherhood*, 76 INT'L J. GYNECOLOGY AND OBSTETRICS 225, 230 (2002).

377. CESCR, *General Comment 14*, *supra* note 252, at ¶ 21.

378. CERD, *supra* note 369, at art. 5(e)(iv).

379. CESCR, *General Comment 14*, *supra* note 252, at ¶ 12(a).

“granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”<sup>380</sup>

## 2. Accessibility

“Accessibility” includes four elements—non-discrimination, physical accessibility, economic accessibility and information accessibility.<sup>381</sup> Non-discrimination requires that health facilities, goods and services be provided “in law and in fact,” particularly to those “most vulnerable or marginalized sections of the population.”<sup>382</sup> Accessibility requires that medical treatment be “timely”<sup>383</sup> and extends beyond immediate and responsive medical care to include “the right to seek, receive and impart information and ideas concerning health issues.”<sup>384</sup>

## 3. Acceptability

The “acceptability” condition requires that “all health facilities, goods and services be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as be designed to respect confidentiality and improve the health status of those concerned.”<sup>385</sup> Significantly, the U.N. Committee on Economic, Social and Cultural

---

380. CEDAW, *supra* note 252, at art. 12. The Standard Minimum Rules for the Treatment of Prisoners (“Standard Minimum Rules”), which are not binding on the United States, but provide authoritative guidelines for adequate care, flesh out this element of the right to health, calling for the provision of prenatal and postpartum care as well as decent food. They establish that “[e]very prisoner shall be provided by the administration at the usual hour with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.” First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, ¶ 20(1), U.N. Doc. A/CONF/611, annex 1 (Aug. 30, 1955) [hereinafter Standard Minimum Rules]. The Standard Minimum Rules also specifically require the provision of necessary prenatal and postpartum care. *Id.* at ¶ 23.

381. CESCR, General Comment 14, *supra* note 252, at ¶ 12.

382. *Id.*

383. *Id.* at ¶ 17.

384. *Id.* at ¶ 12. Barriers to accessibility “include requirements or conditions that prejudice women’s access such as high fees for health care services, the requirement for preliminary authorization by spouse, parent or hospital authorities, distance from health facilities and absence of convenient and affordable public transport.” *Id.*; CEDAW, General Recommendation 24, *supra* note 380, at ¶ 21.

385. CESCR, General Comment 14, *supra* note 252, at ¶ 12. CEDAW describes the elements of “acceptable” services for women in particular, including informed consent, respect for dignity, confidentiality, and sensitivity to particular needs and perspectives. CEDAW, General Recommendation 24, *supra* note 380, at ¶ 22.

Rights has also emphasized that medical treatment must be consensual to be consistent with the right to health.<sup>386</sup>

#### 4. Quality

Quality standards require that services be "scientifically and medically appropriate and of good quality." As with standards of acceptability, "quality" refers to the provision of skilled medical personnel, potable water and sanitation facilities, and the use of unexpired drugs and approved hospital equipment.<sup>387</sup> Based upon the abuses set forth earlier in this article, prenatal and postpartum care in prison falls short of fulfilling any of the above elements.

#### D. *Right to Information*

According to interviews, surveys, and additional research, pregnant people in prison encounter a consistent lack of information regarding medication and the consequences of complications during pregnancy.<sup>388</sup> According to Article 19 of the ICCPR, "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."<sup>389</sup> Under the ICCPR, any restrictions placed on the right to information must be "provided by law" and "necessary" to accomplish at least one of the enumerated purposes listed: protection of others' rights and reputations, national security, public order, public health and morals.<sup>390</sup> Limiting pregnant people's access to pregnancy information in prison cannot be justified as necessary for any of these purposes.

As indicated above, the right to information relating to health, and reproductive health in particular, is necessary to protect the right to health.<sup>391</sup> It also implies an affirmative obligation on the part of governments to provide information that to protects and promotes maternal health. CEDAW requires states

---

386. CESCR, *General Comment* 14, *supra* note 252, at ¶ 8.

387. Cook & Dickens, *supra* note 376.

388. Justice Now surveys (on file with Justice Now).

389. ICCPR, *supra* note 75 at art. 19.

390. *Id.*; U.N. Hum. Rts. Comm., CCPR General Comment 10: Freedom of Expression, U.N. Doc. HRI/GEN/1/Rev.1, at 11 (June. 9, 1983) [hereinafter CCPR General Comment 10].

391. CESCR, *General Comment* 14, *supra* note 252, at ¶ 21.

"to take appropriate legislative, judicial, administrative, budgetary, economic and other measures to the maximum extent of their available resources to ensure that women realize their rights to health care."<sup>392</sup> Unless pregnant, birthing, and postpartum people have information about their medical situations and treatment options such that they can exercise informed consent and access appropriate medical care, they cannot realize their rights to health care. The European Court of Human Rights has elaborated on this concept, indicating that where a restriction of information could pose a threat to a person's health, that restriction may violate the right to information. For example, in *Open Door Counseling and Dublin Well Woman Centre, Ltd. v. Ireland*, an injunction preventing clinics from providing information on where and how to receive abortions was found to violate Article 10 of the European Convention on Human Rights, which protects the right to receive information. According to the court, restricting such information could threaten the health of pregnant people.<sup>393</sup> If pregnant people in prison were given adequate information and the right to make decisions about their own health care, fewer pregnancy-related complications may arise, thereby resulting in reduced health care costs, healthier babies, and lower rates of recidivism among people in women's prisons.

E. *Right to Be Free from Torture and Cruel, Inhuman or Degrading Treatment*

Prohibitions against torture and cruel, inhuman or degrading treatment are binding on the U.S. through the ICCPR and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment ("CAT").<sup>394</sup> Under CAT, torture is defined as the intentional infliction of severe pain or suffering on a person for the purposes of obtaining information, punishment, intimidation or coercion, or for "any reason based on discrimination of any kind," when inflicted, consented, or acquiesced to by a public official.<sup>395</sup> The definition of torture under CAT does not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions."<sup>396</sup> While prohibitions

---

392. CEDAW, *supra* note 372, at art. 12, ¶ 15.

393. *Open Door Counseling, Ltd. v. Ireland*, App. No. 14234/88, 15 Eur. H.R. Rep. 244 (1992).

394. ICCPR, *supra* note 254, at art. 7.

395. CAT, *supra* note 293, at 81.

396. *Id.* at art. 1.



against torture may be relevant in some cases in the context of prison pregnancy care,<sup>397</sup> our findings suggest that current medical conditions in California's women's prisons instead violate the ban on cruel, inhuman, or degrading treatment. Regional treaties include freedom from inhuman and degrading treatment among their protections, highlighting the centrality of this right in human rights law.<sup>398</sup>

Abuses that do not rise to the level of torture may be cruel, inhumane, or degrading treatment or punishment in violation of CAT and the ICCPR if they produce physical or mental harm or a loss of dignity.<sup>399</sup> These concepts are not defined under either treaty. However, reflecting the breadth of these concepts, the U.N. Human Rights Committee, which interprets the ICCPR, has made clear that Article 7 should not be understood as prohibiting only a narrow category of specifically listed practices and that the purpose of the article is "to protect both the dignity and the physical and mental integrity of the individual."<sup>400</sup> The definition of inhuman and degrading treatment has been developed most thoroughly through the interpretation of Article 3 of the European Convention, which mirrors Article 7.<sup>401</sup>

In a foundational 1969 decision, *The Greek Case*, the European Commission on Human Rights found that depriving political detainees of basic human necessities including food, water, and medical care violated Article 3.<sup>402</sup> Similarly, in *Keenan v. UK*, the European Court of Human Rights determined that the inadequate health care provided to a mentally ill prisoner, who ultimately hanged himself, constituted cruel and degrading treat-

---

397. *See Id.* at art. 2 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction").

398. African Charter on Human and Peoples' Rights art. 5, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter ACHPR]; ACHR, *supra* note 267, at art. 4; ECHR, *supra* note 253, at art. 3.

399. CAT, *supra* note 395, at art.16; ICCPR, *supra* note 254, at art. 7.

400. U.N. Hum. Rts. Comm., CCPR General Comment 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, ¶¶ 2, 4, U.N. Doc. HRI/GEN/1/Rev. 1 at 30 (Mar. 10, 1992).

401. Article 3 of the European Convention provides that "[n]o one shall be subject to torture or inhuman or degrading treatment or punishment." ECHR, *supra* note 289, at art. 3; *see* Nigel S. Rodley, *The Definition(s) of Torture in International Law*, 55 CURRENT LEGAL PROBS. 467 (2002) (discussing the reason for widespread reliance on European Convention case law to define "inhuman or degrading treatment").

402. *The Greek Case*, 1969, Y.B. EUR. CONV. ON H.R. 186 (Eur. Comm'n on H.R.).

ment and punishment. The Court noted that “the authorities are under an obligation to protect the health of persons deprived of liberty” and stated that “the lack of appropriate medical care may amount to treatment contrary to Article 3.”<sup>403</sup>

Demeaning language also may violate the prohibition on cruel, inhuman, and degrading treatment or punishment.<sup>404</sup> In *The Greek Case*, The European Commission on Human Rights concluded that verbal harassment toward an imprisoned person can constitute degrading treatment where it serves as “psychological pressure designed to break the [prisoner’s] will.”<sup>405</sup>

The U.S. asserts in its reservations to CAT and the ICCPR that it is obligated to prevent “cruel, inhuman or degrading treatment or punishment” only insofar as the term means treatment or punishment prohibited by the Fifth, Eighth, or Fourteenth Amendments to the U.S. Constitution.<sup>406</sup> Not only does this not include all the abuses covered by CAT and the ICCPR as defined by the committees charged with interpreting those rights, but, as demonstrated in the section on U.S. law, rarely have abuses surrounding pregnancy care in prison, even those that arguably fall within the Eighth Amendment, been held to be cruel and unusual punishment.

#### F. *Right to Life*

As explained by the U.N. Human Rights Committee, the right to life extends beyond the prohibition of arbitrary execution by the state and requires that governments “adopt positive measures,” such as acting to reduce infant mortality and increase life expectancy.<sup>407</sup> In its assessment of the necessary components of reproductive health, the United Nations illuminated the content of these positive measures, calling for “appropriate health-care services that will enable women to go safely through preg-

---

403. *Keenan v. U.K.*, 2001 Eur. Ct. H.R., 913, 915 para. H11.

404. *The Greek Case*, 1969, Y.B. EUR. CONV. ON H.R. (Eur. Comm’n on H.R.) at 462-63; see HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS 16 (1998).

405. *The Greek Case*, *supra* note 404 at 462-63.

406. 136 Cong. Rec. S17486-01 (1990) (U.S. Reservations, Declarations, and Understandings, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); 138 Cong. Rec. S4781-01 (1992) (U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights).

407. U.N. Hum. Rts. Comm., General Comment 6: The Right to Life, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (Apr. 30, 1982) (interpreting ICCPR art. 6).

nancy and childbirth and provide couples with the best chance of having a healthy infant."<sup>408</sup> The European Commission of Human Rights confirmed the role of pregnancy care in the protection of the right to life, emphasizing a state's obligation to protect life by providing necessary maternal health care.<sup>409</sup> All regional treaties include the right to life,<sup>410</sup> and key international agreements cite the need to reduce maternal mortality, indicating the importance of the right to safe motherhood to international human rights.<sup>411</sup>

Our research suggests that pregnancy-related abuses in California's women's prisons seldom result in death; however, the inadequate response of prison staff to life-threatening complications like ectopic pregnancy and placenta previa may constitute a violation of the right to life because they threaten the survival of the mother and fetus.<sup>412</sup>

## VII. CONCLUSION & A CALL TO ACTION

As we have demonstrated, pregnant people in prison experience a range of abuses, including inadequate prenatal and postpartum care, apathetic response to pregnancy complications and labor, lack of informed consent, shackling, lack of mental health services, and forced separation of parent and child. These abuses violate the right to due process, the right to be free from cruel and unusual punishment, the right to family, the right to health and the right to life. Moreover, they are deeply rooted in the punitive nature of prisons. Rather than protecting pregnant people from them, the U.S. federal and state legal systems either look away or, in many cases, actually act through legislation and

---

408. International Convention on Population and Development, Cairo, Egypt, Sept. 5–13, 1994, *Reproductive Rights and Reproductive Health*, ¶ 5, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994); see also Rebecca J. Cook, *Human Rights Law and Safe Motherhood*, 5 EUR. J. HEALTH L. 357, 361 (1998).

409. See CENTER FOR REPRODUCTIVE RIGHTS, BRIEFING PAPER NO. 10, REPRODUCTIVE RIGHTS IN THE EUROPEAN COURT OF HUMAN RIGHTS 9–10 (2004).

410. ACHPR, *supra* note 401, at art. 5; ACHR, *supra* note 267, at art. 4; ECHR, *supra* note 287, at art. 2; Organization of American States, American Declaration of the Rights and Duties of Man art. 1, Apr. 1948, O.A.S. Res. XXX.

411. United Nations Millennium Declaration, G.A. Res. 55/2, ¶ 19, U.N. Doc. A/55/48 (Sept. 8, 2000); Fourth World Conference on Women, Sept. 15, 2004, *Beijing Declaration and Platform for Action*, ¶ 106(i); International Conference on Population and Development, Sept. 5–13, 1994, *Programme of Action*, ¶ 8.19–8.27.

412. MAYO CLINIC STAFF, *Ectopic Pregnancy & Placenta Previa*, available at <http://www.mayoclinic.com/health/ectopic-pregnancy/DS00622>, <http://www.mayoclinic.com/health/placenta-previa/DS00588> (Last visited on Nov. 17, 2009).

the court system to enforce racist and classist notions of who should be a mother. Most domestic efforts to reform the prison system have ultimately failed and have often resulted in reinforcing the system.<sup>413</sup> While we are concerned about the devaluing of certain mothers and potential mothers, we explicitly do not support the recent movement in the U.S. towards "gender responsive" prisons, described below, which proposes building new prisons that purportedly would be more "responsive to the needs of women in prison."<sup>414</sup>

In order to protect the human rights of parents and children and to fulfill the right to safe motherhood, we must eliminate the prejudicial notions of who should be a mother, reduce the number of mothers in prison, and work towards alternatives to prison that do not fall under correctional authority, such as family-based drug rehabilitation centers. Although not currently an official alternative to prison, the Los Angeles-based A New Way of Life Reentry Project demonstrates the potential of truly community-based, non-prison programs to support people—including pregnant people—facing addiction, unemployment and other problems that often lead to imprisonment.<sup>415</sup> It is a program that strengthens families instead of breaking them apart. The organization, founded in 1998 by Susan Burton, provides housing and reentry services to people recently released from women's prisons and jails, as well as programming for their children. With five sober living homes, the organization assists people working to return successfully to their communities, and to stay out of the criminal legal system, by offering counseling, job and leadership training, political education, and other support services. Three of the houses are for parents and their children. The average stay is nine months to a year, after which time people are assisted in finding permanent housing. A New Way of Life also spearheads community organizing efforts, partnering with people who have been in prison and other community members to remove barriers to reentry and to challenge society's reliance on imprisonment.<sup>416</sup>

Programs that promote whole-family treatment outside of the prison environment offer a better alternative than "gender

---

413. These efforts include the previously described litigation and legislative efforts for better prenatal care. See *supra* pp. 14-23.

414. Justice Now, *supra* note 59.

415. Interview by Lynsay Skiba with Susan Burton, Executive Director, A New Way of Life, in Los Angeles, Cal. (Mar. 10, 2008).

416. *Id.*

responsive” prisons. For example, the Center for Substance Abuse Treatment reported promising outcomes from their Pregnant and Postpartum Women and Their Infants Program, which provides comprehensive, family-based treatment for substance abusing mothers and their children.<sup>417</sup> In 2001, 60 percent of the mothers who participated in the program remained alcohol and drug-free, while 38 percent obtained employment and 21 percent enrolled in educational and vocational training.<sup>418</sup> In addition, a 2003 cross-site evaluation of 24 family-based treatment programs found that 60 percent of the mothers remained sober six months after discharge and 88 percent of children treated in the programs with their mothers remained stabilized and living with their mothers six months after discharge.<sup>419</sup> Furthermore, the Rebecca Project for Human Rights reports that while it costs approximately \$14,000 a year to put a mother and her children in a family-based treatment program, it costs \$30,000 to put a parent in prison, not including an additional \$35,000 for foster care placement.<sup>420</sup> Therefore, whole-family substance abuse treatment programs are examples of cost-efficient and effective prison alternatives. Sending people with non-violent convictions to alternative programs would reduce these exorbitant costs, and research has shown that these programs benefit both parents in prison and their children.<sup>421</sup>

In contrast, “gender responsive” prisons have been proposed as a means of addressing the needs of people in women’s prisons. These programs are problematic because they adopt an essentialist view of gender that views “women” as an innately different category of people –more emotional, more nurturing, and less deserving of harsh treatment.<sup>422</sup> As a result, “gender responsive” programs and policies have subjected people inside women’s prisons who do not conform to societal ideals of how a “woman” should present, act, or behave, to punishment and har-

---

417. The Rebecca Project, Family Treatment Outcomes, *available at* [http://www.rebeccaproject.org/index.php?option=com\\_content&task=view&id=71&Itemid=151](http://www.rebeccaproject.org/index.php?option=com_content&task=view&id=71&Itemid=151) (last visited on October 19, 2009).

418. *Id.*

419. *Id.*

420. Malika Saada Saar, *When the Victim is Jailed*, THE DAILY BEAST, (Oct. 1, 2009), *available at*: <http://www.thedailybeast.com/blogs-and-stories/2009-10-16/when-the-victim-is-jailed/full/>.

421. Institute on Women & Criminal Justice, *supra* note 320, at 5 (“Women who participate [in these programs] show lower rates of recidivism, and their children show no adverse affects as a result of their participation”).

422. Justice Now, *supra* note 59.

assessment.<sup>423</sup> Furthermore, "gender responsiveness" assumes that all people in women's prisons identify as "women." In fact, many people identify along a spectrum of gender identity, including transgender, gender variant, and gender non-conforming. Because people in California are assigned to prisons based on genitalia regardless of how they self-identify, they are often subjected to various types of human rights abuses once in prison.<sup>424</sup> Thus, the construction of "gender responsive" prisons is not an example of prison reform, but an illustration of prison expansion. In our view, this new movement threatens to grossly expand the reach of imprisonment and its resulting harms on women, girls, transgender and gender non-conforming people, and their communities without addressing the underlying racism and classism that create and feed these abuses.

Programs such as A New Way of Life provide opportunity for structured yet supportive nurturing of the individual and the family that is critical for building strong families and communities. These are the sort of programs we must support. As Sandy Williamson, director of the volunteer doula program at VSPW, stated, "A lot of the women [in prison] are drug addicts, they don't belong there, and they shouldn't be separated from their babies . . . . [We should have] qualified people, as parenting advisors, counselors, rehab people, that will give them good skills to transition back to society. They should have a transition house when they get out, before they're brought into society."<sup>425</sup> Since many of these women are in prison for non-violent charges, many of them drug-related, developing similar programs for women and their families makes financial and moral sense.

To achieve the goal of developing real alternatives to prison and to fully respect the human rights of all mothers, mothers and potential mothers must band together to challenge stereotypical impressions of mothers and the laws and policies that they enforce, for middle and upper class mothers and mothers in prison. Only through the combined efforts of all women, whether they are rich or low-income, in prison or free, can we make the state and federal governments channel funds away from prisons and into marginalized communities that have historically sent people to prison. Then we can support all people in their goal to be the mothers that they want to be.

---

423. *Id.*

424. *Id.*

425. Telephone interview with Williamson, *supra* note 240.

