

NOTES

Abortion Access for Women in Custody in the Wake of *Dobbs v. Jackson Women's Health*

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Abstract

The United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* made it drastically harder for women to access abortions. The *Dobbs* decision has had a disproportionate impact on women who are incarcerated or on some form of community supervision such as probation or parole. This Note analyzes a potential right to an abortion for women involved in the criminal justice system, even those living in states that have banned or deeply restricted abortion access after the *Dobbs* decision. In doing so, this Note looks for different constitutional avenues to protect incarcerated women's right to an abortion, including under the Eighth Amendment to the U.S. Constitution.

Keywords: pregnancy; abortion; prison; jail; healthcare; women's rights

Introduction

"You lose a lot of rights when you're in jail, whether it's trying to get an abortion or watching R-rated movies or sex movies or smoking or coffee."¹ Maricopa County Sheriff Joe Arpaio made this statement in 2005 to justify his refusal to take incarcerated women to a medical facility for abortion care.² Arpaio's position was legally incorrect at the time³ but demonstrated the immense obstacles that incarcerated women faced in obtaining abortions, even when the right was constitutionally protected. These obstacles included deliberate interference by corrections officials and a widespread failure of states and their correctional institutions to adopt effective statutes or policies to protect an incarcerated woman's ability to get an abortion.⁴

Incarcerated women's access to abortion is in even greater jeopardy after *Dobbs v. Jackson Women's Health* eliminated all federal constitutional protections for abortion.⁵ With the shuttering of abortion clinics in fourteen states⁶ and new restrictions added in countless more, the *Dobbs* decision has made it significantly harder, if not impossible, for millions⁷ of non-incarcerated women

¹Howard Fischer, *Ruling Clears Way for Women Inmates Seeking Abortions*, ARIZONA DAILY SUN (Aug. 24, 2005), http://azdailysun.com/ruling-clears-way-for-womeninmates-seeking-abortions/article_0801abc6-3164-5cbc-9290-f605bacc3cb.html [<https://perma.cc/5TT4-7U59>].

²*Id.*

³Rachel Roth, "She Doesn't Deserve to Be Treated Like This": Prisons as Sites of Reproductive Injustice 6, in *RADICAL REPRODUCTIVE JUSTICE: FOUNDATIONS, THEORY, PRACTICE, CRITIQUE* (The Feminist Press 2017).

⁴*Id.* at 5.

⁵*Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

⁶*Tracking the States Where Abortion is Now Banned*, N.Y. TIMES (last updated May 23, 2023, 3:00 PM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/SJ5R-SG8B>] [hereinafter *Tracking the States*].

⁷The population of women of reproductive age in the thirteen U.S. states that have banned abortion is roughly 16.5 million. *Interactive Map: U.S. Abortion Policies and Access After Roe*, GUTTMACHER INSTITUTE (June 20, 2023), <https://states.guttmacher.org/policies/alabama/demographic-info> [<https://perma.cc/VFA5-MMVG>].

to get abortions.⁸ If that much is true, one can imagine that the effect of *Dobbs* is even greater for incarcerated women and those on probation or parole.⁹ Since these women's movements are restricted by incarceration or by the terms of their supervision agreements, they often cannot seek out abortions on their own but depend entirely on the support of state agents. *Dobbs* removed all constitutional obligations requiring these state agents to support abortion access.¹⁰

Moreover, decreased access to abortion will harm the incarcerated even more than it will harm women on the outside. Women in U.S. jails and prisons have worse health than the U.S. population overall, making them at much greater risk for complications during their pregnancies.¹¹ And incarcerated pregnant women generally receive inadequate prenatal care, raising additional risks to their health and the health of their babies.¹²

For these reasons, this note argues that women in custody and on all forms of supervision should have adequate abortion access in all states and the federal system. In particular, this note argues that all incarcerated pregnant women — even in states that have banned abortion after *Dobbs* — have an Eighth Amendment right to abortion care under *Estelle v. Gamble* because the psychological and physical harms of forcing a woman to carry a pregnancy to term while incarcerated is pain and suffering that does not serve any legitimate penological interest.¹³

Part I of this note provides background information on the recent rise in women's incarceration and the treatment of women while incarcerated. Part II discusses access to abortion services that women in both state and federal custody have had before and after *Dobbs*. Part III argues that all incarcerated women should have the right to an abortion under the Eighth Amendment regardless of whether free women have the same right. Parts IV and V argue for abortion rights for women not protected by the Eighth Amendment, namely those detained pretrial or on community supervision.

Notes About Language

To be consistent with most case law and other scholarly sources discussing pregnancy and reproductive rights for incarcerated people, I use the terms “women” and “woman” as well as “she/her” pronouns throughout this note. I acknowledge that not all of those who are pregnant or have reproductive needs identify as female or women, but I intend to use these words to encompass all people who can become pregnant to maintain consistency.

I. Background on Incarcerated Women in the United States

Pregnancy during incarceration is a large and growing problem. The number of women incarcerated in the United States has increased 525 percent since 1980, totaling 168,449 in 2021.¹⁴ Increases in men's

⁸Since the *Dobbs* decision the number of abortion procedures done in the United States has decreased by over 5000 per month. See SOCIETY OF FAMILY PLANNING, #WECOUNT REPORT 9 (Oct. 28, 2022), https://www.societyfp.org/wp-content/uploads/2022/10/SFPWeCountReport_AprtoAug2022_ReleaseOct2022-1.pdf. [<https://perma.cc/MT2J-7P3W>].

⁹See generally Joshua Sharfstein, *Jailed and Pregnant: What the Roe Repeal Means for Incarcerated People*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Sept. 21, 2022), <https://publichealth.jhu.edu/2022/abortion-care-for-incarcerated-people-after-dobbs> [<https://perma.cc/Y6NG-BC3V>].

¹⁰*Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

¹¹Cynthia Chandler, *Death and Dying in America: The Prison Industrial Complex's Impact on Women's Health*, 18 BERKELEY WOMEN'S L.J. 40, 42 (2003); Min Kyoung Kim et. al., *Socioeconomic Status can Affect Pregnancy Outcomes and Complications, Even with a Universal Healthcare System*, 17 INT'L J. FOR EQUITY IN HEALTH 1, 1-2 (2018).

¹²Carolyn Sufirin, Alexa Kolbi-Molinas & Rachel Roth, *Reproductive Justice, Health Disparities and Incarcerated Women in the United States*, 47 PERSPS. ON SEXUAL & REPRODUCTIVE HEALTH 213, 215 (2015).

¹³*Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

¹⁴*Incarcerated Women and Girls*, THE SENTENCING PROJECT, (May 2022), <https://www.sentencingproject.org/app/uploads/2022/11/Incarcerated-Women-and-Girls.pdf> [<https://perma.cc/RXH5-E3J5>] [hereinafter *Incarcerated Women*]. The number of women incarcerated in the United States in 2019 was higher at 231,000. See Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019>

incarceration rates are smaller.¹⁵ The increase of incarcerated women in the United States has disproportionately been in local jails.¹⁶ Approximately four-to-six percent¹⁷ of women who enter state prisons each year are pregnant.¹⁸ The rate of pregnancy is likely even higher¹⁹ in local or county jails²⁰ because more women cycle through jails than prisons²¹ and jails have seen a more dramatic increase in their female population.²²

As a result of *Dobbs*, the number of incarcerated pregnant women will increase. Since the *Dobbs* decision, sixteen states have banned or deeply restricted the right to an abortion.²³ Severe restrictions and abortion bans in these states could lead to 50,000 more births annually in the United States.²⁴ However, the increase in annual births will not affect women equally; the increased births will disproportionately be among low-income people and women of color.²⁵ As Black and Latinx women are incarcerated at 1.6 and 1.3 times the rate of white women, respectively,²⁶ the populations most at risk for increases in unintended pregnancies are precisely the populations overrepresented in U.S. prisons and jails.²⁷ Racial disparities are not the only reason that *Dobbs* has had an increased disparate impact on incarcerated women. Nine of the ten states with the highest imprisonment rates have banned or deeply restricted abortion access in the wake of *Dobbs*.²⁸

Lack of prenatal treatment in jails and prisons and the presence of underlying conditions makes pregnancy high risk for any incarcerated woman.²⁹ Different facilities provide different levels of care and treatment for pregnant women. For the approximately forty-four percent of incarcerated women housed in local jails, less than half of pregnant women received an obstetric exam and less than one-third

women.html [<https://perma.cc/D2U9-HK2J>]. The drop between 2019 and 2020 is due to women being released due to the COVID-19 pandemic. *Incarcerated Women supra*.

¹⁵*Incarcerated Women, supra note 14.*

¹⁶Kajstura, *supra note 14.*

¹⁷Due to a lack of centralized data determining the exact percentage of women who enter jail or prison is very difficult to determine. Some sources have found that up to 6-10% of women entering jails and prisons are pregnant. See Diana Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict with Constitutional Standards*, 41(1) PERSPS. ON SEXUAL AND REPRODUCTIVE HEALTH 59, 59 (2009).

¹⁸Carolyn Sufirin, Lauren Beal, Jennifer Clarke, Rachel Jones & William D. Mosher, *Pregnancy Outcomes in US Prisons, 2016-2017*, 109(5) AM. J. PUB. HEALTH 799, 803 (2019).

¹⁹*Id.*; see Kajstura, *supra note 14.*

²⁰Jails are county- or municipality-run facilities which confine people sentenced to a short sentence of a year or less, convicted of a longer sentence and awaiting transfer to prison, accused of violating the terms of their probation or parole, individuals held waiting for resolution of a federal criminal charge or immigration hearing, and most commonly individuals who are charged with a state criminal offense and held awaiting the disposition of their offense, either because they were not offered bail or were unable to post bail. See Elizabeth Swavola, Kristine Riley & Ram Subramanian, *Overlooked: Women and Jails in an Era of Reform*, VERA INST. OF J. (2016), www.vera.org/overlooked-women-and-jails-report [<https://perma.cc/VU8G-AFK3>].

²¹*Id.*

²²The number of women in jails has increased from 8,000 to 110,000 from 1970 to 2015, a much greater rate than the increase of women incarcerated overall. Swavola et al., *supra note 20*, at 6. A discussion of the implications of the cash bail system in the United States and its impact on mothers and pregnant people while deeply tied to the issues I will discuss is beyond the scope of this note.

²³*Tracking the States, supra note 6.*

²⁴Melissa Jeltsen, *We Are Not Prepared for the Coming Surge of Babies*, ATLANTIC (Dec. 16, 2022), <https://www.theatlantic.com/family/archive/2022/12/abortion-post-roe-rise-in-births-baby-care/672479/> [<https://perma.cc/N4R8-KFDH>].

²⁵Katrina Kimport, *Abortion After Dobbs: Defendants, Denials, and Delays*, 8 SCI. ADV. 1, 1 (2022).

²⁶*Incarcerated Women, supra note 14.*

²⁷Swavola et al., *supra note 20*, at 11.

²⁸U.S. Criminal Justice Data, THE SENTENCING PROJECT (2022), <https://www.sentencingproject.org/research/us-criminal-justice-data/> [<https://perma.cc/Y5JZ-J58L>]. These nine states are Mississippi, Louisiana, Oklahoma, Arkansas, Texas, Georgia, Kentucky, Alabama, and Idaho (listed in order by incarceration rate). The incarceration rates in these nine states range from 5.67 to 3.86 times higher than the state with the lowest incarceration rate, Massachusetts.

²⁹Nicolette Wolfrey, *Incarceration Harms Moms and Babies*, NAT'L P'SHIP FOR WOMEN & FAMILIES: MOMS AND BABIES SERIES (June 2021), <https://nationalpartnership.org/report/incarceration-harms-moms-and-babies/> [<https://perma.cc/2KT5-P776>].

received any other pregnancy care.³⁰ Pregnant women housed in state prisons fare better with ninety-four percent receiving an obstetrics exam and fifty-four percent receiving other pregnancy care.³¹ Such inadequate care is exacerbated in the twelve states that continue to allow the shackling of pregnant women despite the ban on shackling pregnant women in federal custody established by the First Step Act.³² Shackling women and denying them essential pregnancy care puts them at increased risk for miscarriages, stillbirths, and other pregnancy-related complications.³³ These risks are enhanced by the fact that the average health of women entering prisons is already much worse than the health of the average American woman.³⁴ Two-thirds of incarcerated women have a chronic medical condition compared to twenty-seven percent of the general population, and incarcerated women suffer from higher rates of obesity and substance use disorder.³⁵ Incarceration during pregnancy is linked to low birth weight and preterm births.³⁶ Finally, incarceration presents serious health risks of violence, sexual assault, communicable diseases, and poor nutrition, all of which have a more significant effect on pregnant women.³⁷ Altogether, these risk factors and treatment disparities make pregnancy high risk for any incarcerated person.³⁸

Beyond the risks to physical health, there are serious risks to women's mental health. For example, after an incarcerated woman gives birth she is typically allowed no more than twenty-four hours to bond and spend time with her newborn before they are separated.³⁹ Rapid separation can be very traumatizing for the mother and can negatively impact both the mother's and baby's wellbeing.⁴⁰ The American College of Obstetricians and Gynecologists strongly recommends a longer bonding period, but few jails and prisons offer such programs.⁴¹ Rapid separation from their newborn and a quick return to the jail or prison can also increase the risk of developing postpartum depression.⁴² More than one-third of women who give birth while incarcerated suffer from moderate or severe postpartum depression.⁴³

II. Access to Abortions for Incarcerated Women Before and After the 2022 *Dobbs* Decision

Individuals do not automatically lose all of their constitutional rights while incarcerated. The Constitution guarantees prisoners all fundamental rights not inconsistent with the objectives of incarceration

³⁰See Swavola et al., *supra* note 20, at 17.

³¹Swavola et al., *supra* note 20, at 17.

³²First Step Act of 2018, Pub. L. No. 115-391, § 301, 132 Stat. 5194, 5217; Joe Hernandez, *More States are Restricting the Shackling of Pregnant Inmates, but It Still Occurs*, NPR (Apr. 22, 2022, 8:48 AM), <https://www.npr.org/2022/04/22/1093836514/shackle-pregnant-inmates-tennessee> [<https://perma.cc/Z8EJ-SY4H>].

³³Hernandez, *supra* note 32.

³⁴Chandler, *supra* note 11, at 42.

³⁵Swavola et al., *supra* note 20, at 9; LAURA M. MARUSCHAK, MARCUS BERZOFSKY & JENNIFER UNANGST, U.S. DEP'T OF JUST., *MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES*, 2011-2012 8 (Oct. 4, 2016).

³⁶Wolfrey, *supra* note 29.

³⁷Sufrin et al., *supra* note 12, at 213.

³⁸Wolfrey, *supra* note 29, at 2.

³⁹Ginette G. Ferszt, Michelle Palmer & Christine McGrane, *Where Does Your State Stand on Shackling of Pregnant Incarcerated Women?*, 22 *NURSING FOR WOMEN'S HEALTH* 17, 19 (2018).

⁴⁰Swavola et al., *supra* note 20, at 17.

⁴¹*Id.* Only nine states offer nurse programs that allow a mother to stay in contact with her child for a more extended period. For a sampling of programs that allow longer contact between an incarcerated mother and her baby, see *Residential Parenting Program Fact Sheet*, WASH. STATE DEP'T OF CORR. (May 2017). Further, even in states with these programs, the number of women and babies they can accommodate is limited, and they typically have restrictions on which inmates can participate. Hendrik DeBoer, *Prison Nursery Programs in Other States*, CONN. OFF. OF LEGIS. RSCH. (Mar. 30, 2012), <https://www.cga.ct.gov/2012/rpt/2012-R-0157.htm> [<https://perma.cc/QL4G-35LV>].

⁴²Kimberly Erin Gillette, *The Psychological and Emotional Experiences of Pregnant and Postpartum Incarcerated Women* (2011) (Master's thesis, Smith College) (Smith ScholarWorks).

⁴³Mariann Howland et al., *Depressive Symptoms Among Pregnant and Postpartum Women in Prison*, 66 *J. OF MIDWIFERY & WOMEN'S HEALTH* 494, 494 (2021).

and incarceration itself.⁴⁴ From 1973⁴⁵ through 2021, both state and federal courts held that incarcerated women do not lose their right to terminate a pregnancy.⁴⁶ The courts⁴⁷ typically applied the four-part test established in *Turner v. Safley*, 482 U.S. 78 (1987), to determine if the prison's policy restricting abortion was constitutional. *Turner* was a class action lawsuit in which inmates alleged the Missouri Division of Corrections' regulations on inmate communication and inmates' ability to marry were unconstitutional.⁴⁸ The four factors of the *Turner* test are: (1) the existence of a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) the existence of other avenues for the inmate to exercise the right; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) the existence of alternatives that can fully accommodate the inmate's rights.⁴⁹ Applying this test, the Second, Third, Fifth, and Eighth Circuits Courts of Appeals, and several federal district and state appeals courts, found that a woman's right to choose under the Fourteenth Amendment was not inconsistent with the means or objectives of incarceration.⁵⁰ Incarcerated women thus retained their right to terminate a pregnancy before *Dobbs*.⁵¹

In addition to finding a Fourteenth Amendment right for inmates to receive abortions, the Third Circuit Court of Appeals in *Monmouth County Correctional Institutional Inmates v. Lanzaro* found inmates have an Eighth Amendment right to abortions.⁵² The Third Circuit used the *Estelle v. Gamble*⁵³ standards to find that the prison officials were deliberately indifferent to the inmate's serious medical need when they denied her abortion request.⁵⁴ The Third Circuit stated pregnancy was a unique health condition where women must choose one of two avenues for treatment, abortion or prenatal care and childbirth.⁵⁵ If a woman elects to not give birth, then denial of abortion care is deliberate indifference to a serious medical need.⁵⁶ Denial of such care violates the Eighth Amendment because it is "inconsistent with contemporary standards of decency," and "will likely result in tangible harm to the inmate," as the adverse effects recognized by *Roe v. Wade* are likely exacerbated for incarcerated women.⁵⁷ The Third Circuit even held that it was the county's burden to pay for the abortions of incarcerated women who were unable to pay or find an alternative means of funding because *City of Revere v. Massachusetts*

⁴⁴Hudson v. Palmer, 468 U.S. 517, 523 (1984).

⁴⁵Roe v. Wade, 410 U.S. 113, 164 (1973) opened up a Fourteenth Amendment right for women to terminate their pregnancies.

⁴⁶Rachel Roth, *Abortion Access for Imprisoned Women: Marginalized Medical Care for a Marginalized Group*, 21 WOMEN'S HEALTH ISSUES S14, S14 (2011) [hereinafter *Abortion Access for Imprisoned Women*].

⁴⁷See *Roe v. Crawford*, 514 F.3d 789, 793 (8th Cir. 2008); *Victoria W. v. Larperter*, 369 F.3d 475, 484 (5th Cir. 2004); *Monmouth Cnty. Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 331-32 (3d Cir. 1987); *Doe v. Arpaio*, 150 P.3d 1258, 1261-62 (Ariz. Ct. App. 2007).

⁴⁸*Turner v. Safley*, 482 U.S. 78, 78-79 (1987).

⁴⁹*Id.* at 89-91.

⁵⁰Facilities denying incarcerated women abortions work against the objectives of incarceration, as the anxiety of the woman's unwanted pregnancy could harm her reintegration into society once released and will create another financial burden on the woman, which could lead to greater recidivism. *Lanzaro*, 834 F.2d at 342 n.25.

⁵¹See *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008); *Victoria W. v. Larperter*, 369 F.3d 475 (5th Cir. 2004); *Bryant v. Maffucci*, 923 F.2d 979 (2d Cir. 1991); *Lanzaro*, 834 F.2d 326; *Doe v. Barron*, 92 F. Supp.2d 694 (S.D. Ohio 1999); *Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007). For an in-depth discussion of female inmates' access to abortion under the Fourteenth Amendment, see Angela Thomas, Note, *Inmate Access to Elective Abortion: Social Policy, Medicine and the Law*, 19 HEALTH MATRIX 539 (2009).

⁵²*Lanzaro*, 834 F.2d at 349.

⁵³*Estelle v. Gamble* stated that the government is required "to provide medical care for those whom it is punishing by incarceration" because inmates are completely reliant on prison authorities to treat their medical needs. Therefore, the *Estelle* Court held that deliberate indifference by prison officials to an inmate's serious medical need is an "unnecessary and unwanted infliction of pain" that violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

⁵⁴*Lanzaro*, 834 F.2d at 349; *Estelle v. Gamble*, 429 U.S. 97 (1976).

⁵⁵*Lanzaro*, 834 F.2d at 348.

⁵⁶*Id.*

⁵⁷*Lanzaro*, 834 F.2d at 348-349; *Roe v. Wade*, 410 U.S. 113 (1973).

General Hospital, 463 U.S. 239, 245 (1983) established that the governmental entity must pay for medical care if it is the only way the detainee would be able to get the care.⁵⁸

Despite the constitutional protections, it was difficult for incarcerated women to access abortions pre-*Dobbs*. A woman's access to abortion heavily depended on the institution where she was housed.⁵⁹ Even in facilities that allowed inmates to get abortions, accessing this right was not easy because prison staff and transport officers often felt entitled to voice their opposition to the inmate's rights and decision to terminate.⁶⁰ And of course, *Dobbs* now appears to leave incarcerated women's right to abortion constitutionally unprotected.⁶¹

A. Abortion Access for Women in Federal Custody

For women in federal custody, the U.S. Department of Justice *Female Offender Manual* defines the protocol for women seeking abortions.⁶² The manual states it is the pregnant inmate's decision whether to have an abortion or carry the pregnancy to term.⁶³ The most recent pre-*Dobbs* edition of the *Female Offender Manual* offered incarcerated women counseling in making their decision, an important change from the Bureau of Prisons' former policy that required "medical, religious, and social counseling" before an incarcerated woman could obtain an abortion.⁶⁴ The policy also states that the Bureau of Prisons will only expend funds to pay for an abortion when the mother's life is in danger or the pregnancy results from rape or incest.⁶⁵

The Hyde Amendment complicates the funding of abortions for incarcerated women. The Bureau of Prisons will not expend funds for most abortions because of the Hyde Amendment.⁶⁶ Congress first passed the Hyde Amendment in 1976 and has reenacted it annually to prohibit federal funds from being used for abortions.⁶⁷ When Congress first enacted the Hyde Amendment, there were no circumstances in which the federal government would expend funds to pay for an abortion.⁶⁸ In its current form, the Hyde Amendment allows federal funds to be used for abortions when the pregnancy endangers the mother's life or resulted from rape or incest.⁶⁹ Separately, Medicaid has an Inmate Exclusion Policy, which prohibits Medicaid from covering medical services for individuals who are in jail or prison, meaning that federally incarcerated women cannot use state Medicaid funding for

⁵⁸*Lanzaro*, 834 F.2d at 350-51.

⁵⁹Kasdan, *supra* note 16, at 59.

⁶⁰See Lauren Kuhlik & Carolyn Sufirin, *Pregnancy, Systematic Disregard and Degradation, and Carceral Institutions*, 14 HARV. L. & POL'Y REV. 417, 435 (2020) (transport officers told inmate on her way to an abortion that she was "murdering her baby").

⁶¹*Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022); *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008); *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2004); *Bryant v. Maffucci*, 923 F.2d 979 (2d Cir. 1991); *Lanzaro*, 834 F.2d 326.

⁶²U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT, NO. 5200.07: FEMALE OFFENDER MANUAL (2021) [hereinafter FEMALE OFFENDER MANUAL 2021].

⁶³*Id.*

⁶⁴*Id.*; see Avalon Johnson, Note and Comment, *Access to Elective Abortions for Female Prisoners Under the Eighth and Fourteenth Amendments*, 27 AM. J.L. & MED. 652, 655-56 (2011) (discussing the negative implications of these past counseling requirements).

⁶⁵FEMALE OFFENDER MANUAL 2021, *supra* note 58.

⁶⁶Rebecca Grant, *Abortion Behind Bars*, VICE NEWS (Mar. 16, 2017), https://news.vice.com/en_us/article/3kp9b5/abortion-behind-bars-terminating-a-pregnancy-in-prison-can-be-next-to-impossible [<https://perma.cc/TMD6-JTRK>].

⁶⁷*Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/other/access-denied-origins-hyde-amendment-and-other-restrictions-public-funding-abortion#:~:text=Wade%20was%20decided%2C%20Congress%20passed,carrying%20the%20pregnancy%20to%20term> [<https://perma.cc/VWF4-34Y5>] (last visited Apr. 2, 2023).

⁶⁸Julie Rovner, *Abortion Funding Ban Has Evolved Over the Years*, NPR (Dec. 14, 2009, 6:00 AM), <https://www.npr.org/2009/12/14/121402281/abortion-funding-ban-has-evolved-over-the-years> [<https://perma.cc/YE3L-KLBR>].

⁶⁹*Id.*

abortions.⁷⁰ However, the Bureau of Prisons can expend funds to transport women to abortion procedures.⁷¹

The Bureau of Prisons updated its *Female Offender Manual* in the wake of the *Dobbs* decision and has maintained that it is the inmate's responsibility to decide whether to have an abortion or to carry the pregnancy to term. The update retains all of the language regarding inmate abortions as before *Dobbs*, except for eliminating the sentence: "Staff shall have knowledge of, and shall be guided by, applicable federal and state laws and regulations."⁷² This is significant because it shows the Bureau of Prisons' deference to state laws instead of ensuring all women in federal custody have equal access to abortions.

Despite the transparency in the Bureau of Prisons' written policy, accessing abortions for women in federal custody has been difficult both before and after *Dobbs*. Prison staff may decline to participate in the scheduling or transportation of a woman to an abortion if they are morally opposed, which can delay the procedure.⁷³ For the many women who are held in county jails before sentencing for a federal conviction, the different rules between institutions and the heavy influence of prison staff can cause a woman to be denied her right to an abortion.⁷⁴ For example in *Gibson v. Matthews*, Gibson was held in Harris County Jail awaiting sentencing from a federal district court for a robbery conviction.⁷⁵ She requested an abortion while in Harris County Jail, but officials told her she would receive one when she arrived at a federal prison.⁷⁶ Gibson bounced between different federal prison facilities over several days before arriving at FCI Lexington where officials could schedule an abortion.⁷⁷ However, by the time she arrived at FCI Lexington it was too late for her to get an abortion.⁷⁸ Another complicating factor for women in federal custody is that eight out of twenty-seven federal facilities that house women are located in states that have banned abortions.⁷⁹ The amended *Female Offender Manual* is silent on whether the Bureau of Prisons will expend funds to transport women housed in one of these eight facilities to an abortion procedure out of state.⁸⁰

B. Abortion Access for Women in State Custody

The *Dobbs* decision eradicated the constitutional right to an abortion and eliminated constitutional recourse for most incarcerated women whose abortion requests are denied.⁸¹ Jails and prisons now have a greater ability to delay or deny abortion care even in states where abortion is still legal because inmates are now unable to bring a lawsuit under the Fourteenth Amendment.⁸² However, even before *Dobbs* abortions were not easily accessible for incarcerated women in state custody. Of the forty-one states that had pregnancy-specific correctional policies or laws in place,⁸³ only twenty-three had policies that

⁷⁰42 U.S.C. §1396d(a)(30)(A); *State Funding of Abortions Under Medicaid*, KFF, <https://www.kff.org/medicaid/state-indicator/abortion-under-medicaid/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [<https://perma.cc/8WZP-U2DM>] (last visited Sep. 29, 2023).

⁷¹FEMALE OFFENDER MANUAL 2021, *supra* note 58.

⁷²FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., PROGRAM STATEMENT, No. 5200.07 CN-1: FEMALE OFFENDER MANUAL (2022) [hereinafter FEMALE OFFENDER MANUAL 2022].

⁷³*Id.*; see Kuhlik & Sufrin, *supra* note 60, at 432.

⁷⁴*Gibson v. Matthews*, 926 F.2d 532 (6th Cir. 1991).

⁷⁵*Id.* at 533.

⁷⁶*Id.* at 533-34.

⁷⁷*Id.* at 534.

⁷⁸*Id.*

⁷⁹*Female Offenders*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/female_offenders.jsp#female_facilities [<https://perma.cc/7RC8-YWS4>] (last visited Jan. 11, 2023); *Tracking the States*, *supra* note 6.

⁸⁰FEMALE OFFENDER MANUAL 2022, *supra* note 72.

⁸¹Except for facilities located in Delaware, New Jersey or Pennsylvania where the Eighth Amendment framework in *Lanzaro* would be binding.

⁸²*Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022); Sharfstein, *supra* note 9.

⁸³*State Standards for Pregnancy-Related Health Care and Abortion for Women in Prison*, AM. CIVIL LIBERTIES UNION (last updated July 2012), <https://www.aclu.org/state-standards-pregnancy-related-health-care-and-abortion-women-prison-0#top> [<https://perma.cc/64EY-A69D>] [hereinafter *State Standards*].

included information about abortion access,⁸⁴ despite courts routinely recognizing the right to abortion for incarcerated people.⁸⁵ Without these policies, many women could not obtain abortions because they were unaware the option existed.⁸⁶ Even when an inmate is aware of the option, lack of policies can lead to unnecessary delays and complications in obtaining the abortion.

In one Texas jail, a woman held for a probation violation requested an abortion; however, the jail delayed for three weeks claiming she needed a court order.⁸⁷ After the woman contacted the American Civil Liberties Union (“ACLU”) and filed a federal lawsuit, she was transferred to the state prison where she was able to obtain the procedure.⁸⁸ The delays and hurdles the Texas woman faced show how easy it is for jail officials to deny the right to an abortion to all but the most informed and determined women. Finally, abortions were inaccessible for many incarcerated women before *Dobbs* for financial reasons because the majority of state prisons required the incarcerated woman to arrange and pay for the procedure.⁸⁹ In eleven states these costs include paying all transportation and security costs to and from the procedure as well as any subsequent appointments.⁹⁰ The transportation and security costs can be extensive because prisons are predominantly located in rural areas, and abortion providers are typically concentrated in urban areas.⁹¹ The lack of policies and burdensome costs that inmates were responsible for made abortions difficult to access even when the right was constitutionally protected.

Additionally, the Third Circuit’s strong stance in protecting abortion rights for incarcerated women in *Lanzaro* has done little to incentivize states in the Third Circuit to adequately protect abortion access for incarcerated women. State legislatures in Delaware and Pennsylvania have not statutorily protected incarcerated women’s access to abortion.⁹² Twenty of the fifty-seven county jails that house women in Pennsylvania do not have an abortion policy.⁹³ The lack of abortion policies at these institutions could leave pregnant women’s right to choose to the whim of prison officials, violating rights established in *Lanzaro*.⁹⁴ Of the Pennsylvania jails with abortion policies, seventy-three percent state that the medical provider, correctional facility, and county will not pay for “elective” abortions.⁹⁵ This violates the Eighth

⁸⁴*Id.* These states were Alaska, Arkansas, California, Colorado, Delaware, Idaho, Illinois, Kansas, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Washington, and the District of Columbia.

⁸⁵See *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008); *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2004); *Bryant v. Maffucci*, 923 F.2d 979 (2d Cir. 1991); *Monmouth Cnty. Corr. Inst’l Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987); *Doe v. Barron*, 92 F. Supp.2d 694 (S.D. Ohio 1999); *Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007).

⁸⁶*Abortion Access for Imprisoned Women*, *supra* note 44 at S15. As jails and prisons in their very nature restrict the information inmates can receive, and inmates’ ability to obtain materials and information on their own is limited, inmates are often at the mercy of jail or prison staff informing them about their right to an abortion and the process.

⁸⁷Rachel Roth, *Searching for the State: Who Governs Prisoners’ Reproductive Rights?*, 11 SOC. POLS.: INT’L STUD. IN GENDER, STATE & SOC’Y 412, 421 (2004).

⁸⁸*Id.*

⁸⁹Carolyn Sufrin et al., *Abortion Access for Incarcerated People: Incidence of Abortion and Policies at U.S. Prisons and Jails*, 138 OBSTETRICS & GYNECOLOGY 330, 332 (2021) [hereinafter *Incidence of Abortion and Policies at U.S. Prisons and Jails*]; Kasdan, *supra* note 16, at 59.

⁹⁰*Abortion Access for Imprisoned Women*, *supra* note 44, at S15. See Katie Rose Quandt & Leah Wong, *Recent Studies Shed Light on what Reproductive “Choice” Looks Like in Prisons and Jails*, PRISON POL’Y INITIATIVE: BRIEFINGS (Dec. 8, 2021), https://www.prisonpolicy.org/blog/2021/12/08/reproductive_choice/ [<https://perma.cc/P4RB-WZ7Y>].

⁹¹*Abortion Access for Imprisoned Women*, *supra* note 44, at S15.

⁹²*State Standards*, *supra* note 83; *Monmouth Cnty. Corr. Inst’l Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987).

⁹³Many Pennsylvania jails also do not have any policies on how to deal with pregnancy overall. The lack of policies has led to tragedy. In one case, a prison repeatedly refused medical attention to a plaintiff who was seven-and-a-half-months pregnant and vaginally bleeding during a high-risk pregnancy. When she finally arrived at the hospital it was discovered she had suffered a placental abruption, and the baby subsequently died. *Mori v. Allegheny Cnty.*, 51 F.Supp.3d 558, 564 (W.D. Pa. 2014).

⁹⁴See *id.*; *Lanzaro*, 834 F.2d 326.

⁹⁵JENNY VANYUR ET AL., AM. CIVIL LIBERTIES UNION OF PA., REPRODUCTIVE HEALTH LOCKED UP 35-39 (2012), <https://www.aclupa.org/sites/default/files/RHLUrpt.pdf> [<https://perma.cc/N3G7-MEW5>].

Amendment rights established in *Lanzaro*, which states that it is the responsibility of the county to pay for the procedure if the woman is unable to pay or secure other outside funding.⁹⁶

Despite the lack of abortion protections for incarcerated women in the majority of the United States, a few states have codified abortion rights for incarcerated women. Even before the *Dobbs* decision, New Jersey required health care providers to make arrangements for the procedure “without undue delay” when an inmate decided to terminate.⁹⁷ California also codified the right to an abortion for women detained in city, county, or regional facilities before *Dobbs*.⁹⁸ California’s law also requires facilities to place a notice of this right in a conspicuous place where all female prisoners have access.⁹⁹ However, despite California’s codification of inmates’ right to an abortion while incarcerated, inmates still face additional hurdles that free women do not face, namely filling out a form that requires them to describe in detail their reasons for wanting an abortion.¹⁰⁰ Additionally, New York and Illinois have also established greater protections for abortion rights for incarcerated women after the *Dobbs* decision.¹⁰¹ On August 8, 2022, New York expanded the rights afforded to pregnant inmates by adding a new provision that required facilities to inform pregnant women of their rights to counseling and abortion services.¹⁰² A few months later, Illinois Governor J.B. Pritzker announced a policy change that would go into effect immediately, which would no longer require incarcerated women seeking an abortion to pay for the procedure and wages of the correctional officer who accompanied them to the appointment.¹⁰³

III. Incarcerated Women Should Have Access to Abortion Even if Free Women Do Not

The Supreme Court should recognize an Eighth Amendment abortion right for incarcerated women. The treatment of incarcerated pregnant women makes their needs different from the needs of free women. The circumstances which pregnant women must endure while incarcerated are far beyond what free women must endure because incarceration exacerbates the severe distress and other recognized adverse effects of being forced to carry an unwanted child.¹⁰⁴ An Eighth Amendment right to an abortion for incarcerated women should stand regardless of whether free women have access to abortion in the state where the institution is located, because free women are not provided the same Eighth Amendment protections as incarcerated women, and do not face the same circumstances as incarcerated women.¹⁰⁵ Being sentenced to a term of incarceration in the United States does not mean that you can be subject to any punishment, because the Eighth Amendment prohibits the infliction of cruel and unusual punishment, and the denial of abortion access is a cruel and unusual punishment.¹⁰⁶

⁹⁶*Lanzaro*, 834 F.2d 326.

⁹⁷N.J. ADMIN. CODE § 10A:16-6.4(b) (2019).

⁹⁸CAL. PENAL CODE § 4028 (West 2019).

⁹⁹*Id.*

¹⁰⁰MELISSA GOODMAN, RUTH DAWSON & PHYLLIDA BURLINGAME, REPRODUCTIVE HEALTH BEHIND BARS IN CALIFORNIA: A REPORT FROM THE ACLU OF CALIFORNIA 10 (2016), <https://www.aclunc.org/sites/default/files/Reproductive%20Health%20Behind%20Bars%20in%20California.pdf> [<https://perma.cc/256Z-YRSM>].

¹⁰¹Shefali Luthra & Barbara Rodriguez, *Blue States Have Passed Laws to Shore up Abortion Access, but It May Not Be Enough to Address Potential Surge*, THE 19TH* (May 3, 2022, 6:07 PM), <https://19thnews.org/2022/05/blue-states-laws-codify-abortion-access-protections/> [<https://perma.cc/6DY5-HTKT>].

¹⁰²N.Y. CORRECT. §611.

¹⁰³Sam Dier, *Illinois Gov. JB Pritzker Moves to Make Abortion More Accessible to People in Prisons*, NPR ILL. (Nov. 3, 2022, 5:43 PM), <https://www.nprillinois.org/illinois/2022-11-03/illinois-gov-jb-pritzker-moves-to-make-abortion-more-accessible-to-people-in-prisons> [<https://perma.cc/396Y-P62Q>].

¹⁰⁴*See* Monmouth Cnty. Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 349 (3d Cir. 1987).

¹⁰⁵Mark Egerman, *Roe v. Crawford: Do Inmates Have an Eighth Amendment Right to Elective Abortions?*, HARV. J. L. & GENDER 423, 425 (2008).

¹⁰⁶U.S. Const. amend. VIII.

A. Abortion Rights for Incarcerated Women Under the Eighth Amendment

1. Estelle Framework

Estelle v. Gamble established that the government is required to provide medical care to incarcerated individuals.¹⁰⁷ The government is required to provide medical care because the practicalities of incarceration make it impossible for prisoners to receive care unless prison authorities provide it.¹⁰⁸ Failure to provide such care can violate the Eighth Amendment's prohibition on the "unnecessary and wanton infliction of pain," if prison officials are deemed to be deliberately indifferent to a prisoner's serious medical need.¹⁰⁹

There are several different ways to meet the *Estelle* deliberate indifference threshold. When prison officials intentionally refuse to provide care that they know the inmate needs, they are deliberately indifferent.¹¹⁰ Delay or denial of medical treatment for non-medical reasons also establishes deliberate indifference.¹¹¹ Requiring inmates to pay for treatment they cannot afford or enacting arbitrary or burdensome hurdles that result in delays establishes deliberate indifference.¹¹² Finally, prison officials can be deliberately indifferent when they provide an inmate with a less effective treatment for a serious medical condition.¹¹³

Beyond showing that prison officials were deliberately indifferent, inmates must also show that their health concern is a serious medical need.¹¹⁴ Serious medical needs include more than just the most extreme medical conditions.¹¹⁵ If denial or delay of treatment causes an "unnecessary and wanton infliction of pain" or causes an inmate to endure "a life-long handicap or permanent loss," the condition is serious.¹¹⁶ Alternatively, conditions a doctor would diagnose as requiring treatment or that a lay person would easily recognize as requiring care from a doctor are serious.¹¹⁷

2. Abortion is a Serious Medical Need for Incarcerated Women and Prison Officials' Delay or Denial of Abortion Care Constitutes Deliberate Indifference

Abortion is a serious medical need for incarcerated women. Abortion is a serious medical need because of its time-sensitive nature and the physical, emotional, and psychological impacts of carrying an unwanted pregnancy to term in a carceral setting. If a woman does not have an abortion before the viability threshold, she forever loses the possibility of obtaining the procedure to alleviate her current medical condition of an unwanted pregnancy, causing her to endure "a life-long handicap or permanent loss."¹¹⁸ If a woman does not obtain an abortion prior to fetal viability she will be forced to carry the pregnancy to term, give birth, and recover postpartum in harsh prison conditions.¹¹⁹

Forcing any woman to carry an unwanted pregnancy to term can cause profound psychological harm.¹²⁰ This psychological harm is exacerbated for incarcerated women, two-thirds of whom have a history of mental health problems, a rate far higher than incarcerated males and non-incarcerated females.¹²¹ Both carrying an unwanted pregnancy and a history of mental health problems increases the risk of the mother

¹⁰⁷*Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

¹⁰⁸*Id.*

¹⁰⁹*Estelle*, 429 U.S. at 104 (quoting *Gregg v. Georgia* 428 U.S. 153, 173 (1976)).

¹¹⁰*Monmouth Cnty. Correctional Institution Inmates v. Lanzaro*, 834 F.2d 326, 346 (1987).

¹¹¹*Id.*

¹¹²*Id.* at 347.

¹¹³*Id.*

¹¹⁴*Estelle v. Gamble*, 429 U.S. 97, 105 (1976).

¹¹⁵*Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977).

¹¹⁶*Lanzaro*, 834 F.2d at 347.

¹¹⁷*Id.*

¹¹⁸*See id.*

¹¹⁹*See generally* Egerman, *supra* note 105, at 433.

¹²⁰*Roe v. Wade*, 410 U.S. 113, 153 (1973).

¹²¹Manuel Villa, *The Mental Health Crisis Facing Women in Prison*, MARSHALL PROJECT, (June 22, 2017, 2:29 PM), <https://www.themarshallproject.org/2017/06/22/the-mental-health-crisis-facing-women-in-prison> [<https://perma.cc/8YVT-E4AK>].

developing postpartum depression after birth.¹²² Postpartum depression increases a mother's risk of suicide and increases a mother's risk of having future episodes of severe depression.¹²³ Several circuits have held that under *Estelle v. Gamble* psychological harms can be just as serious as a physical injury.¹²⁴ The conditions of incarceration for pregnant women, including solitary confinement and shackling in some jurisdictions, are very distressing for any inmate and especially so for a pregnant inmate.¹²⁵ Both the shackling of pregnant women and placing them in solitary confinement is seen internationally as a form of torture.¹²⁶ Neither medical treatment nor adoption after birth is adequate to alleviate the psychological damage created by forcing women to carry unwanted pregnancies while incarcerated, which demonstrates that abortion is a serious medical need.¹²⁷

There are also profound emotional impacts of forcing women to carry children to term that will be immediately taken away from them after birth, and in some circumstances that the mother will have limited to no ability to raise. Forcing a woman with a life or decades-long sentence to carry to term a child whom she cannot raise amounts to the state using her as a chattel for procreation. For women serving shorter sentences, it can be challenging for a mother to reunite with her child after she is released if the child is placed into foster care during the mother's period of incarceration.¹²⁸

Even ignoring the adverse psychological and emotional effects that arise from carrying an unwanted pregnancy to term, the lack of adequate prenatal and postpartum care in U.S. jails and prisons makes carrying the pregnancy to term a "less effective treatment" for a serious medical condition which shows deliberate indifference.¹²⁹ Less than half of pregnant women housed in local jails received an obstetric exam and less than one-third received any other pregnancy care.¹³⁰ Almost half of pregnant women in state prisons receive no other pregnancy care besides an obstetrics exam.¹³¹ Because incarcerated women have worse health than free women, their pregnancies are much more likely to be high risk, making adequate prenatal care vital to protect the mother's health and prevent miscarriage.¹³² Insufficient prenatal care, like what is provided at many jails and prisons the United States, is a "less effective treatment"¹³³ for the serious medical condition of pregnancy, which demonstrates the necessity of an Eighth Amendment right to abortions for incarcerated women.

In addition to inadequate prenatal and postpartum care, the conditions of confinement themselves can have adverse consequences on pregnant women. The health of pregnant women is impacted by jails and prisons' deep restrictions on the freedoms of those incarcerated, including regulating mealtime and meal options, restrictions on the movements of inmates within the facilities, and the accommodations

¹²²Postpartum Depression, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/postpartum-depression/symptoms-causes/syc-20376617?p=1> [<https://perma.cc/C3CC-S37Q>] (last visited Jan. 14, 2023).

¹²³*Id.*

¹²⁴*Partridge v. Two Unknown Police Officers of City of Houston, Tex.*, 791 F.2d 1182, 1187 (5th Cir. 1986); *Woodall v. Foti*, 648 F.2d 268, 272 (5th Circuit 1981); *Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 763 (3d. Cir. 1979); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977).

¹²⁵AM. CIVIL LIBERTIES UNION, STILL WORSE THAN SECOND-CLASS SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES 9 (2019), https://www.aclu.org/sites/default/files/field_document/062419-sj-solitaryreportcover.pdf [<https://perma.cc/424K-VDEV>]; Hernandez, *supra* note 32.

¹²⁶G.A. Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) (Dec. 21, 2010); G.A. Res. 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (Dec. 17, 2015).

¹²⁷Anne Vitale, Note, *Inmate Abortions - The Right to Government Funding Behind Prison Gates*, 48 FORDHAM L. REV. 550, 563 (1980).

¹²⁸Sheryl Pimlott Kubiak et al., *Does Subsequent Criminal Justice Involvement Predict Foster Care and Termination of Parental Rights for Children Born to Incarcerated Women?*, 27 SOC. WORK PUB. HEALTH 129 (2012).

¹²⁹*Monmouth Cnty. Correctional Institution Inmates v. Lanzaro*, 834 F.2d 326, 347 (1987).

¹³⁰Swavola et al., *supra* note 20, at 17.

¹³¹*Id.*

¹³²Chandler, *supra* note 11, at 42; Egerman, *supra* note 105, at 434.

¹³³*Lanzaro*, 834 F.2d at 347.

and care that an inmate receives.¹³⁴ Not only do these restrictions negatively impact the health of pregnant inmates, but they can also harm their unborn children.¹³⁵ Scheduled mealtimes can be troublesome for pregnant women, especially those dealing with morning sickness or hyperemesis gravidarum.¹³⁶ In terms of nutrition, few jails and prisons provide specifics on meals fed to pregnant women or healthy options available from the commissary outside of meal times, which can lead to inadequate nutrition in practice.¹³⁷ In terms of accommodations, many jails and prisons lack formal policies regarding sleeping accommodations for pregnant women, and several pregnant women have reported being assigned to a top bunk while pregnant.¹³⁸ Sleeping on a low bunk would protect the pregnant inmate from falling while getting into the top bunk and from the additional strain and effort that is required for a pregnant inmate to climb up the ladder into an upper bunk.¹³⁹ Even in facilities that place pregnant women on a lower bunk, few provide additional necessary accommodations including additional mattresses for women in their third trimester and more frequent access to the bathroom.¹⁴⁰ Finally, pregnant women are at higher risk for blood clots if they do not have adequate space for free movement.¹⁴¹ Blood clot risk can have a profound impact on pregnant inmates because their movement is frequently restricted during counts, lockdowns, and by their placement in solitary confinement.¹⁴² The aforementioned factors make pregnancy risky for incarcerated women. The only way for pregnant inmates to avoid this risk of serious harm from their pregnancies is termination. Therefore, the denial of an abortion to an incarcerated woman constitutes deliberate indifference.

The circumstances surrounding incarceration make abortion a serious medical need for incarcerated women, and forcing a woman to carry a pregnancy to term while incarcerated is deliberate indifference to a serious medical need. There are no alternative medical procedures or therapeutic options that will provide the same relief from the physical, mental, and emotional suffering incarcerated pregnant women face.¹⁴³ Therefore, denial of abortions to incarcerated women violates their Eighth Amendment right against cruel and unusual punishment.¹⁴⁴ Establishing an Eighth Amendment right to abortions for incarcerated women will eliminate many of the cost barriers incarcerated women face as inmates cannot be denied medical care for a serious condition based on inability to pay.¹⁴⁵ Because prisoners are entirely reliant on prison authorities for their medical care, jails and prisons should provide the care required for their pregnancy whether that be prenatal care or abortion care.¹⁴⁶

3. Current Precedent for an Eighth Amendment Right to Abortion for Incarcerated Women

The court in *Monmouth County Correctional Institutional Inmates v. Lanzaro* correctly held that abortion is a serious medical need.¹⁴⁷ However, in the decades since *Lanzaro*, courts have found that

¹³⁴GOODMAN ET AL., *supra* note 100, at 11.

¹³⁵*Id.* at 18.

¹³⁶*Id.* at 15. Hyperemesis gravidarum is when pregnant women suffer from severe nausea and vomiting during pregnancy beyond what is typically understood as morning sickness. *Hyperemesis Gravidarum*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diseases/12232-hyperemesis-gravidarum> [<https://perma.cc/6EAT-KSE9>] (last visited June 1, 2023).

¹³⁷GOODMAN ET AL., *supra* note 100, at 15-16; WOMEN'S JAIL MONITORS, FEMALE INMATES IN SANTA CLARA COUNTY & THE NEED FOR A GENDER RESPONSIVE PROTOCOL 11 (SSC Commission on the Status of Women 2015), <https://womenspolicy.sccgov.org/sites/g/files/exjcpb1076/files/CSW-jail-report-2015-final.pdf> [<https://perma.cc/J32X-U93F>].

¹³⁸GOODMAN ET AL., *supra* note 100, at 15-16.

¹³⁹*Id.*

¹⁴⁰*Id.*

¹⁴¹Sarah McCammon, *Pregnant, Locked up, and Alone*, NPR (June 16, 2019 5:00 AM), <https://www.npr.org/2019/06/16/732109546/pregnant-locked-up-and-alone> [<https://perma.cc/49HE-SWGG>].

¹⁴²*Id.*

¹⁴³Egerman, *supra* note 105, at 433.

¹⁴⁴U.S. Const. amend. VIII; *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

¹⁴⁵*Monmouth Cnty. Correctional Institution Inmates v. Lanzaro*, 834 F.2d 326, 347 (1987).

¹⁴⁶*Id.* at 350.

¹⁴⁷*Id.* at 348-51. The *Lanzaro* court also argues that the prison or jail should pay for the procedure and transportation, overtime, and other costs if the inmate is unable to because the institution completely controls the inmate's ability to work, how much she may work, and her wages, and therefore is directly responsible for whether she can afford the procedure.

incarcerated women have the right to abortion solely on Fourteenth Amendment grounds.¹⁴⁸ Because *Dobbs* has eliminated the Fourteenth Amendment right to abortion, I will analyze several of the courts' reasoning for denying an Eighth Amendment right for incarcerated women to have abortions.

In *Victoria W. v. Larpeneter*, 369 F. 3d 475 (5th Cir. 2004), the Fifth Circuit affirmed the district court's decision that an abortion sought for non-medical reasons was not a medical emergency or a serious medical need.¹⁴⁹ The Fifth Circuit did not find merit in the plaintiff's argument that her need for an abortion was a medical emergency, and stated that medical emergencies are reserved for conditions such as hearts attacks, hemorrhaging, and active labor.¹⁵⁰ This followed the district court's reasoning: "the Court is unpersuaded that a non-therapeutic abortion sought due to financial and emotional reasons is a serious medical need for Eighth Amendment purposes."¹⁵¹ The district court held that abortion could only be a serious medical need when the life of the mother was in danger.¹⁵² The district court went on further to state that abortions are too dissimilar to other medical conditions to be considered serious medical needs.¹⁵³

The District Court's reasoning that abortion can only be a serious medical need when the mother's life is threatened is incompatible with the dangerous and painful conditions that pregnant incarcerated women face. Just because a woman is not at immediate risk of bleeding out or her heart stopping does not mean that her life is not threatened by enduring the conditions of confinement while pregnant. Neither the Eastern District of Louisiana nor the Fifth Circuit made any effort to evaluate the additional burdens that incarcerated women face while pregnant or considered that the need for an abortion may be different in the carceral context, making their argument that abortion is only a serious medical need in a small minority of cases misguided.¹⁵⁴ Pregnancy and abortion are unique medical issues that can only occur to a small subset of the overall carceral population, so comparing them to other medical conditions that can impact any inmate, like heart attacks, undermines the seriousness of the condition and the dangerous impacts denying abortions to inmates can have.

In *Roe v. Crawford*, the Eighth Circuit held that there was no Eighth Amendment right for inmates to access abortions.¹⁵⁵ The court followed the reasoning in *Victoria W.*,¹⁵⁶ and declined to deem abortion a serious medical need, so the officer's deliberate indifference was not an Eighth Amendment violation.¹⁵⁷ In addition to following the reasoning in *Victoria W.*, the court held that abortion was not a serious medical need because the government has no affirmative duty to fund or provide abortions to the population at large.¹⁵⁸ This reasoning is misguided. The government having no affirmative duty to fund or provide abortion care for the population at large does not mean that incarcerated women lack an Eighth Amendment right to abortion because prisoners are entirely reliant on the prison for medical care, whereas free people are not.¹⁵⁹ In addition to their reliance on prison staff for medical care, incarcerated women also face immense obstacles and suffering that pregnant free women do not face, to which the court gave no credence.

The Supreme Court should recognize an Eighth Amendment right for incarcerated women to obtain abortions. Forcing an incarcerated woman to carry a pregnancy to term is an "unnecessary and wanton

¹⁴⁸See *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008); *Victoria W. v. Larpeneter*, 369 F.3d 475 (5th Cir. 2004); *Bryant v. Maffucci*, 923 F.2d 979 (2d Cir. 1991); *Doe v. Barron*, 92 F. Supp.2d 694 (S.D. Ohio 1999); *Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007).

¹⁴⁹*Larpeneter*, 369 F. 3d at 486 n.52.

¹⁵⁰*Id.*

¹⁵¹*Victoria W. v. Larpeneter*, 205 F. Supp. 2d 580, 601 (E.D. La. 2002).

¹⁵²*Id.*

¹⁵³*Id.* at 601.

¹⁵⁴*Victoria W. v. Larpeneter*, 369 F. 3d 475 (5th Cir. 2004); *Victoria W. v. Larpeneter*, 205 F. Supp. 2d 580 (E.D. La. 2002).

¹⁵⁵*Roe v. Crawford*, 514 F.3d 789, 798 (8th Cir. 2008)

¹⁵⁶*Larpeneter*, 205 F. Supp. at 600-01.

¹⁵⁷*Roe v. Crawford*, 514 F.3d 789, 800 (8th Cir. 2008)

¹⁵⁸*Id.*

¹⁵⁹*Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

infliction of pain.”¹⁶⁰ Forced childbirth while incarcerated serves no legitimate penological objectives and can only function to harm women and cause long-term issues with rehabilitation.¹⁶¹ However, I acknowledge that the Supreme Court is unlikely to find an Eighth Amendment right to abortion as the current Supreme Court is particularly hostile to Eighth Amendment protections¹⁶² and to providing a constitutional right to abortion.¹⁶³ To get around the Supreme Court’s hostility, state and circuit court judges should adopt the *Lanzaro* framework to establish an Eighth Amendment right to abortion if the issue comes before them.¹⁶⁴ Further, state legislatures should follow the example of California and New Jersey by codifying abortion rights for incarcerated women.¹⁶⁵

C. In the Alternative, the *Estelle v. Gamble* Framework is Insufficient to Protect the Health of Incarcerated Women and Must Be Amended

The subjective standard for establishing deliberate indifference to a serious medical need found in *Estelle v. Gamble* is insufficient to protect the health of incarcerated women and must be amended to an objective standard. While all of incarcerated women’s health care suffers due to the subjective standard established in *Estelle*, women’s reproductive health care faces the most adverse consequences. These adverse consequences exist because courts have long been hesitant to classify threats to women’s reproductive health, including pregnancy, as serious medical conditions.¹⁶⁶ Courts’ failure to see reproductive and pregnancy-related health concerns as serious medical conditions allows indifference to a lack of adequate pregnancy and abortion-related care to not rise to an Eighth Amendment violation under the *Estelle* standard.¹⁶⁷ Courts have continuously ruled that correctional officers who are majority male, were not deliberately indifferent to pregnancy and abortion concerns because they are health needs that exclusively impact women.¹⁶⁸ To have a serious medical condition, courts have consistently required women to compare their medical needs to men’s.¹⁶⁹ “This standard presents an often insurmountable obstacle for women seeking justice under the Eighth Amendment.”¹⁷⁰ There are countless examples of women in pregnancy-related distress who did not receive the help they needed because male correctional

¹⁶⁰Vitale, *supra* note 127, at 560.

¹⁶¹Monmouth Cnty. Corr. Inst’l Inmates v. Lanzaro, 834 F.2d 326, 342-43 (3d Cir. 1987).

¹⁶²Despite their newer tenure on the Supreme Court, a look at Justices Coney Barrett, Gorsuch, and Kavanaugh’s opinions show they have not been interested in protecting and expanding prisoners’ Eighth Amendment rights. See *McCottrell v. White*, 933 F. 3d 651 (7th Cir. 2019) (Barrett, J., dissenting) (while majority held that there was an eighth amendment violation when corrections officer shot into a crowd and injured two inmates, Barrett dissented and stated there was “no evidence officers shot into the crowd” despite video footage to the contrary); *Bucklew v. Precythe*, 139 S.Ct. 1112, 1124 (2019) (finding that the Eighth Amendment does not guarantee death row inmates a painless death); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1136 (2019) (Kavanaugh, J., concurring) (showing his support for extending the *Glossip* alternative-procedure requirement). Throughout his thirty-one years on the Supreme Court Justice Thomas has consistently opined that the Eighth Amendment should be restrained even in the most egregious cases. See *Hudson v. McMillian*, 503 U.S. 1, 17-18 (1992) (Thomas, J., dissenting) (writing that guards’ use of excessive physical force in beating an inmate did not violate the Eighth Amendment because the inmate’s broken teeth, cracked dental plate and facial swelling were not a serious physical injury). Justice Alito has never voted to expand Eighth Amendment rights as a Supreme Court Justice.

¹⁶³Justices Kavanaugh, Barrett, Gorsuch, Alito, and Thomas declined to constitutionally protect abortion in *Dobbs v. Jackson Women’s Health*. Chief Justice Roberts reached the same conclusion but declined to vote to overturn the precedents set in *Dobbs* and *Casey*. *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2310-11 (2022) (Roberts, C.J., concurring).

¹⁶⁴*Lanzaro*, 834 F.2d at 342-43.

¹⁶⁵N.J. ADMIN. CODE § 10A:16-6.4(b) (2019); CAL. PENAL CODE § 4028 (West 2019).

¹⁶⁶Samantha Laufer, *Reproductive Healthcare for Incarcerated Women: From “Rights” to “Dignity,”* 56 AM. CRIM. L. REV. 1785, 1788 (2019).

¹⁶⁷*Id.*

¹⁶⁸For an in-depth discussion of the *Estelle v. Gamble* standard inadequacy to protect the health interests of women in carceral settings, see Estalyn Marquis, “Nothing Less Than the Dignity of Man”: Women Prisoners, Reproductive Health, and Unequal Access to Justice Under the Eighth Amendment 106 CAL. L. REV. 203 (2018).

¹⁶⁹*Id.* at 205.

¹⁷⁰*Id.*

officers failed to recognize the signs and symptoms of this distress, which resulted in delayed or nonexistent medical attention.¹⁷¹ The failures of the *Estelle* standard causes women to give birth in jails and prisons too frequently when staff fails to take quick and appropriate action to transport the mother to a hospital.¹⁷² This failure to transport can have deadly consequences, and can be traumatic even when the mother and baby escape unharmed.¹⁷³

Ensuring that incarcerated women's health needs are adequately addressed requires modification of the *Estelle* and *Farmer v. Brennan*¹⁷⁴ standards. Requiring a prison official to have a culpable subjective state of mind for a prisoner to succeed on deliberate indifference is too high a bar for liability. Over seventy percent of correctional officers are men,¹⁷⁵ and many lack knowledge and training of whether conditions that only impact women are serious.¹⁷⁶

There are countless examples in case law and news stories of pregnant women denied care that endangered the inmate or their baby's lives because the correctional officers were unaware of the urgency and seriousness of their condition. One of these women was Lauren Kent, who had a miscarriage in Collin County Jail in McKinney, Texas in 2019.¹⁷⁷ Kent entered Collin County Jail when she was approximately three and a half months pregnant.¹⁷⁸ A few days after she arrived, she met with a physician assistant at the jail who scheduled her for an appointment in one month and also informed her that she would see an offsite doctor within a week.¹⁷⁹ However, over the next four weeks Kent began having increased abdominal pain, cramping, and bleeding, but was never transported offsite to see a doctor, despite repeated requests.¹⁸⁰ In denying Kent's repeated requests to see a doctor, jail officials stated her failure to follow the pad count requirement, which required her to fill a certain number of pads within twenty-four hours to see a doctor.¹⁸¹ Kent struggled to follow the pad count requirement because she was losing most blood when she was using the restroom.¹⁸² She attempted to rectify this by showing officers the amount of blood in the toilet, but they refused to look.¹⁸³ Kent then called the adoption agency she began working with before her incarceration, who contacted the jail on her behalf.¹⁸⁴ Despite

¹⁷¹For cases where male correctional officials failed to adequately provide medical attention to pregnant women that courts have held did not rise to an Eighth Amendment violation, see Laufer, *supra* note 166, at 1788-90.

¹⁷²See Deanna Paul, *A Pregnant Inmate Came to Term in Jail. Lawyers Say She Was Forced to Give Birth There – Alone.*, WASH. POST (May 6, 2019, 3:38 PM), <https://www.nytimes.com/2022/02/16/us/georgia-birth-clayton-county.html> [<https://perma.cc/3DR9-5YJ4>]; Eduardo Medina, *Woman Sues Over Death of Child Born in Georgia Jail*, N.Y. TIMES (Feb. 16, 2022), <https://www.nytimes.com/2022/02/16/us/georgia-birth-clayton-county.html> [<https://perma.cc/93YN-ZZTE>]; Grant Lancaster, *Inmate at Pulaski County Jail Gives Birth Alone in Cell*, ARK. DEMOCRAT-GAZETTE (Nov. 21, 2022, 9:16 AM), <https://www.arkansasonline.com/news/2022/nov/21/inmate-at-pulaski-county-jail-gives-birth-in-cell/> [<https://perma.cc/QC2C-SCNF>]; Diana Claitor & Burke Butler, *Pregnant Women in Texas County Jails Deserve Better Than This*, DALLAS MORNING NEWS (June 26, 2014, 10:22 PM), <https://www.dallasnews.com/opinion/commentary/2014/06/27/pregnant-women-in-texas-county-jails-deserve-better-than-this/> [<https://perma.cc/EE95-8FHK>].

¹⁷³*Id.*

¹⁷⁴*Farmer v. Brennan*, 511 U.S. 825, 827 (1994) (requiring prisoner to show that prison official had a subjectively culpable state of mind to prove deliberate indifference).

¹⁷⁵LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, U.S. BUREAU OF LAB. STATS., (last modified Jan. 25, 2023) [<https://perma.cc/5LTD-E6CY>] <https://www.bls.gov/cps/cpsaat11.htm>.

¹⁷⁶Marquis, *supra* note 159, at 217.

¹⁷⁷Lauren Kent & Nicole Lewis, *A Texas Jail Delayed My Prenatal Care to Keep Costs Down, Then I Had a Miscarriage*, MARSHALL PROJECT: LIFE INSIDE (July 7, 2023, 6:00 AM), https://www.themarshallproject.org/2023/07/07/texas-miscarriage-collin-county-jail-wellpath?utm_source=TMP-Newsletter&utm_campaign=2c3c8a8b0a-EMAIL_CAMPAIGN_2023_07_07_03_55&utm_medium=email&utm_term=0_5e02cdad9d-2c3c8a8b0a-%5B%5D_EMAIL_ID%5D [<https://perma.cc/8FT8-GMDP>].

¹⁷⁸*Id.*

¹⁷⁹*Id.*

¹⁸⁰*Kent v. Collin Cnty.*, No. 4:21-CV-412-SDJ, 2022 WL 949963, at *2 (E.D. Tex. Mar. 29, 2022).

¹⁸¹*Id.* at *3.

¹⁸²*Kent*, *supra* note 177.

¹⁸³*Id.*

¹⁸⁴*Id.*

jail staff accusing Kent of lying about her symptoms during the phone call with the adoption agency, Kent was moved to the infirmary.¹⁸⁵ During her second day in the infirmary Kent was diagnosed with a severe urinary tract infection (UTI), after she was given a pre-planned urine sample.¹⁸⁶ Later that day, Kent delivered a stillborn while on the toilet in the infirmary.¹⁸⁷ Kent currently has a lawsuit pending in the Eastern District of Texas.¹⁸⁸ Unfortunately, her lawsuit will likely be an uphill battle as courts have found no Eighth Amendment violation following *Estelle's* and *Brennan's* subjective standards for many women who have brought similar lawsuits.¹⁸⁹

An objective standard would allow women who have received woefully inadequate care to have an Eighth Amendment claim, allowing incarcerated women to access adequate reproductive care. In Kent's case, correctional officers and nursing staff failed to recognize that she had a UTI despite her complaints and symptoms. Once her UTI was diagnosed during a pre-planned urine test and not due to her complaints, the physician assistant and nurses attending to her failed to recognize the risk a severe UTI can have on a pregnancy and failed to seek proper treatment by bringing Kent to a doctor or hospital.¹⁹⁰ The officers, nurses, and physician assistant's actions led to Kent's pregnancy loss and traumatic birthing experience. The officers', nurses', and physician assistant's subjective failure to recognize the harm Kent was facing should not be a reason why Kent and others like her cannot recover for the harm suffered under the Eighth Amendment. An objective standard would allow Kent to recover, as blood during urination is a telltale sign of a UTI,¹⁹¹ which can be extremely dangerous for a pregnant woman when left untreated.¹⁹²

IV. Abortion Access for Women Held Pretrial Who Do Not Have the Protections of the Eighth Amendment

Pregnant women in pretrial detention face many of the same hardships as imprisoned women but are not covered by the Eighth Amendment. The Eighth Amendment does not protect individuals held pretrial because they have not been formally adjudicated guilty under the law.¹⁹³ Women detained pretrial should get the same protections as imprisoned women, even if those protections must rest on the Due Process Clause rather than the Eighth Amendment.

Pathways to accessing abortions for those detained pretrial are essential given the number of women detained pretrial and the time-sensitive nature of abortions. More than sixty percent of defendants in the United States are detained pretrial because they cannot afford the bail set for their release.¹⁹⁴ Although women are more likely to be released on their own recognizance and cash bail for women is typically lower than for men charged with similar crimes, the cash bail system still has a severe negative effect on women because they are less likely to afford bail.¹⁹⁵ Women's lack of solvency, can mean they are reliant on friends or family to raise money for their bail or their attorney getting their bail reduced to an amount

¹⁸⁵*Id.*

¹⁸⁶*Kent v. Collin Cnty.*, No. 4:21-CV-412-SDJ, 2022 WL 949963, at *4 (E.D. Tex. Mar. 29, 2022).

¹⁸⁷*Id.*

¹⁸⁸*Kent v. Collin Cnty.*, Docket No. 4:21-cv-00412 (E.D. Tex. May 29, 2021).

¹⁸⁹Laufer, *supra* note 166, at 1788-90.

¹⁹⁰Robyn Horsager-Boehrer, *UTIs During Pregnancy Are Common and Treatable*, UT SW. MED. CTR.: YOUR PREGNANCY MATTERS (Sept. 20, 2021), <https://utswmed.org/medblog/utis-during-pregnancy/> [<https://perma.cc/R6F5-EG3G>].

¹⁹¹*Is It Normal to Pee Blood with a UTI?*, PLANNED PARENTHOOD: ASK THE EXPERTS (June 22, 2018, 8:36 PM), <https://www.plannedparenthood.org/blog/is-it-normal-to-pee-blood-with-an-uti> [<https://perma.cc/R35K-ZQGX>].

¹⁹²Robyn Horsager-Boehrer, *UTIs During Pregnancy Are Common and Treatable*, UT SW. MED. CTR.: YOUR PREGNANCY MATTERS (September 20, 2021), <https://utswmed.org/medblog/utis-during-pregnancy/#:~:text=UTIs%20are%20equally%20common%20in,delivery%2C%20or%20even%20fetal%20loss> [<https://perma.cc/R6F5-EG3G>].

¹⁹³*United States v. Lovett*, 328 U.S. 303, 317-28 (1946).

¹⁹⁴U.S. COMM'N ON CIV. RTS., *THE CIVIL RIGHTS IMPLICATIONS OF CASH BAIL 11* (2022), <https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf> [<https://perma.cc/Y23H-CH9V>].

¹⁹⁵Swavola et al., *supra* note 20, at 29.

they can afford.¹⁹⁶ Both of these processes can take up valuable time which can bring the woman outside of the window where she can legally obtain an abortion.

Unaffordable cash bail is what prevented Kei'Choura Cathey from obtaining an abortion in 2015.¹⁹⁷ Cathey was detained pretrial in Maury County, Tennessee for almost six months as she was unable to post the one-million-dollar bond.¹⁹⁸ While detained pretrial, Cathey discovered she was pregnant and informed the Sheriff via her attorney that she wanted to terminate her pregnancy.¹⁹⁹ The Sheriff called Cathey's attorney and stated that the Sheriff's department would not provide funding or transportation for an abortion unless Cathey's life was in danger or the pregnancy was the result of rape or incest.²⁰⁰ As the only way Cathey could obtain an abortion was to be released pretrial which was impossible as she could not afford the one-million-dollar bail, Cathey suffered "needless physical pain, mental anguish and emotional suffering" for nearly five months while she was detained pretrial.²⁰¹ Despite Cathey's attorney's best efforts, the court did not lower Cathey's bail to an amount she could pay, \$8,000, until January 19, 2016, which was too late for her to obtain an abortion.²⁰² After the birth of her child on April 6, 2016, Cathey suffered from severe postpartum depression and required counseling as a result.²⁰³ Cathey brought a Fourteenth Amendment claim in the U.S. District Court for the Middle District of Tennessee, but the case was dismissed with prejudice as it was time-barred.²⁰⁴

A. Fourteenth Amendment Framework

Individuals who are detained pretrial are not permitted to be subject to punishment as they have not been found guilty, but they can be subject to conditions and restrictions that are necessary to maintain the detention facility.²⁰⁵ Despite the prohibition on punishment for those detained pretrial, the Supreme Court says that "loss of freedom of choice and privacy are inherent incidents of confinement in such a facility."²⁰⁶ But when objectives of pretrial detention could be accomplished in several different manners, choosing a harsher manner than necessary supports the conclusion that the purpose of the decision was to punish, which is prohibited by the Due Process Clause of the Fourteenth Amendment.²⁰⁷

Although the United States Supreme Court has not directly taken up the issue, several circuits have held that the protections provided to pretrial detainees under the Fourteenth Amendment are at least the same if not greater than those provided to convicted prisoners under the Eighth Amendment.²⁰⁸ As a result many circuits including the Second Circuit in *Inmates of Allegheny County Jail v. Pierce*, have held that the institutions detaining individuals pretrial must meet "at a minimum, the 'deliberate indifference' standard of *Estelle v. Gamble*."²⁰⁹

¹⁹⁶Bernadette Rabuy & Daniel Kopf, *Detaining the Poor*, PRISON POL'Y INITIATIVE (May 10, 2016).

¹⁹⁷Maya Yang, *Abortion Bans Create "Insurmountable Barriers" for Incarcerated Women in US*, GUARDIAN (Oct. 21, 2022, 04:00 PM), <https://www.theguardian.com/us-news/2022/oct/21/us-abortion-bans-insurmountable-barriers-incarcerated-women> [<https://perma.cc/ZFP2-9T9F>].

¹⁹⁸*Id.*

¹⁹⁹Complaint at 2, *Cathey v. Maury Cnty. Sheriff's Dep't*, No. 1:16-cv-00115 (M.D. Tenn. May 5, 2017).

²⁰⁰*Id.*

²⁰¹*Id.*

²⁰²*Id.* at 3-4; Yang, *supra* note 197.

²⁰³Complaint at 3, *Cathey v. Maury Cnty. Sheriff's Dep't*, No. 1:16-cv-00115 (M.D. Tenn. May 5, 2017).

²⁰⁴*Cathey v. Maury Cnty. Sheriff's Dep't*, No. 1:16-cv-00115, slip op. at 3-6 (M.D. Tenn. May 5, 2017).

²⁰⁵*Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979).

²⁰⁶*Id.* at 537.

²⁰⁷*Id.* at 539 n.20.

²⁰⁸*See* *Hubbard v. Taylor*, 399 F. 3d 150, 167 n.23 (3d Cir. 2005) (protections for pretrial detainees greater than convicted prisoner); *Campbell v. McGruder*, 580 F.2d 521, 527 n.9 (D.C. Cir. 1978) (protections for pretrial detainees greater than convicted prisoner); *Patten v. Nichols*, 274 F.3d 829, 834 (4th Cir. 2001) (protections for pretrial detainees at least as great as convicted prisoner); *Board v. Farham*, 394 F.3d 469, 477 (7th Cir. 2005) (protections for pretrial detainees at least as great as convicted prisoner).

²⁰⁹*Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979).

B. Application of Fourteenth Amendment on Abortion Access for Women Detained Pretrial

Applying the rule in *Inmates of Allegheny County Jail v. Pierce*²¹⁰ to the abortion context, women detained pretrial have the same abortion rights as those convicted and serving their sentences. As they have the same rights as women who have been convicted, their abortion rights should be protected as a serious medical need under the *Estelle* framework.²¹¹ However, even if the *Lanzaro* Eighth Amendment framework is not adopted, denying a woman the opportunity to leave the facility to receive an abortion is undoubtedly a “punishment” that the Due Process Clause does not permit.²¹² Not allowing a woman detained pretrial to leave to seek an abortion is a punishment because there are many less harsh mechanisms the institution could implement to ensure the woman remains in custody, including the institution transporting her to the procedure or using some form of GPS monitoring while the woman obtains the procedure.²¹³

Establishing a Fourteenth Amendment right in the vein of *Inmates of Allegheny County Jail v. Pierce* will eliminate many of the cost barriers pretrial detainees face as government entities must pay for needed medical care for detainees who are unable to pay.²¹⁴ Requiring the government to pay is critical to protecting abortion rights for women detained pretrial since they are likely unable to afford the transportation, security, and medical costs involved with the procedure.²¹⁵ These transportation and security costs have likely increased after the *Dobbs* decision, as dozens of abortion clinics nationwide have stopped providing abortions which creates an even greater hardship.²¹⁶

V. Access to Abortion for Women Released Pretrial and on Community Supervision in States that Have Banned Abortion

On March 7, 2019, a Tennessee woman who the Hamilton County²¹⁷ Mental Health Court placed on house arrest in Chattanooga, requested to leave the state so she could get an abortion in Atlanta, as the city of Chattanooga had not had an abortion clinic since 1993.²¹⁸ Her request was denied by Judge Lila Statom, whose reasons for the denial were that the woman had once failed to turn in proper documentation for a visit to the local hospital to see her mother,²¹⁹ and because she failed to tell the court she was pregnant when she entered the Mental Health Court and pled guilty.²²⁰ Statom claimed she would have rejected the woman’s guilty plea if she had known about her plans to get an abortion.²²¹ On appeal Judge Tom Greenholtz wrote a ten page opinion admonishing Statom’s decision.²²² Judge Greenholtz stated

²¹⁰Institutions where individuals are detained pretrial must meet at a minimum the deliberate indifference standard of *Estelle v. Gamble* when dealing with the constitutional protections of those detained pretrial.

²¹¹*Monmouth Cnty. Corr. Inst’l Inmates v. Lanzaro*, 834 F.2d 326, 342-43 (3d Cir. 1987).

²¹²*See Bell v. Wolfish*, 441 U.S. 520, 537 (1979).

²¹³*See id.* at 539 n.20.

²¹⁴*Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979); *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 345 (1983).

²¹⁵*Lanzaro*, 834 F.2d at 350.

²¹⁶Marielle Kirstein et al., *100 Days Post-Roe: At Least 66 Clinics Across 15 States Have Stopped Offering Abortion Care*, GUTTMACHER INST. (Oct. 6, 2022), <https://www.guttmacher.org/2022/10/100-days-post-roe-least-66-clinics-across-15-us-states-have-stopped-offering-abortion-care> [https://perma.cc/YE6G-UX3W].

²¹⁷Hamilton County, Tennessee encompasses the city of Chattanooga. *City of Chattanooga*, MUN. TECH. ADVISORY SERV., <https://www.mtas.tennessee.edu/city/Chattanooga> [https://perma.cc/F4DP-ARZN] (last visited Jan. 20, 2023).

²¹⁸Zack Peterson, *Hamilton County Judge Scolded for Not Allowing a Woman to Drive to Atlanta for an Abortion She Has a Legal Right to*, CHATTANOOGA TIMES FREE PRESS (Mar. 14, 2019, 6:23 PM), <https://www.timesfreepress.com/news/2019/mar/14/judge-rebukes-colleague-denying-chattanooga-wom/> [https://perma.cc/8GEM-KH6C].

²¹⁹The woman’s attorney provided the Judge with timesheets showing the woman’s initial and entrance and exit times as documentation, but Stanton said this was insufficient and requested video footage from the facility. *Id.*

²²⁰*Id.*

²²¹*Id.*

²²²*Id.*

Judge Statom's reasoning in denying the woman's request to leave the state for an abortion were problematic.²²³ He additionally questioned whether Judge Statom followed her personal values instead of what the Constitution²²⁴ required in denying the woman's request to travel to Atlanta for the abortion.²²⁵ In response to Statom's reasoning, Greenholtz stated that the woman's previous failure to turn in proper documentation could have been rectified with either GPS monitoring or a state escort to the procedure, as the government must place the "least restrictive" measure on the exercise of a constitutional right.²²⁶ Greenholtz next argued Statom's statement that she would have denied the woman's guilty plea and house arrest sentence under the Mental Health Court because of her pregnancy violated the canon of judicial ethics.²²⁷ Greenholtz ultimately sent the case back to Statom and requested that she reach a new conclusion quickly, to avoid seriously violating the woman's constitutional rights.²²⁸ However, Statom did not rule again on the issue, as the woman's attorney personally escorted her to Atlanta for the appointment given the time-sensitive nature of the procedure and his lack of faith in a change of heart from Statom.²²⁹

The Hamilton County Mental Health Court case is not the first time that a judge attempted to use their power to override a woman's constitutional right to an abortion and impose their personal beliefs on the woman. In 1998, after pleading guilty, Yuriko Kawaguchi wrote to Judge Cleary before sentencing to inform her that she was pregnant and requested either a term of probation where the court could transfer to her home state of California, where she could get an abortion, or to allow her to bond out to get the procedure in Ohio.²³⁰ At sentencing after Kawaguchi stated she intended to have an abortion, Judge Cleary sentenced her to six months in the Ohio State Reformatory, but also stated:

If you want to tell me that you would like to serve a term of probation up here in Cuyahoga County and that you have got someplace to stay, and you can sign up for Welfare and receive Medicare and place your child for adoption, if you would rather work that out, I'll consider that.²³¹

When Kawaguchi's attorney asked Judge Cleary to clarify she stated, "I'm saying she is not having a second term abortion."²³² In an off-record discussion, Cleary confirmed her intent to sentence Kawaguchi to probation if she was willing to keep the child but sentence her to a term of incarceration if she was planning to seek an abortion.²³³ Eventually, with the assistance of the ACLU, Kawaguchi was released but it was too late for her to obtain an abortion in Ohio.²³⁴ Several months later, the Cleveland Bar Association filed a four-count disciplinary complaint against Cleary.²³⁵ The Board of Commissioners of Grievances and Discipline recommended a two-year suspension with one year stayed, for Cleary misusing her judicial office to impose her personal beliefs on Kawaguchi by forcing her to carry an unwanted pregnancy to term.²³⁶ Cleary objected to the Board's findings and sanctions and the Supreme Court of Ohio took the case.²³⁷ The Supreme Court of Ohio adopted the Board's findings of fact but changed the sentence to a six-month suspension.²³⁸

²²³*Id.*

²²⁴In 2019, the right to an abortion was still constitutionally protected by *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

²²⁵Peterson, *supra* note 218.

²²⁶*Id.*

²²⁷*Id.*

²²⁸*Id.*

²²⁹*Id.*

²³⁰Cleveland Bar Ass'n v. Cleary, 754 N.E.2d 235, 238 (Ohio 2001).

²³¹*Id.* at 239.

²³²*Id.*

²³³*Id.* at 240. This was despite Kawaguchi's PSI stating she was a good candidate for probation. *Id.* at 240-41.

²³⁴*Id.* at 240-41.

²³⁵*Id.* at 242.

²³⁶*Id.*

²³⁷*Id.*

²³⁸*Id.* at 250.

Despite the increasing number of women incarcerated in the United States, even more women are on some form of community supervision.²³⁹ As of January 1, 2020, there were approximately 416,710 women on some form of community supervision including probation and parole.²⁴⁰ A customary condition of probation, parole, or supervised release is that the individual is not able to leave the state or judicial district.²⁴¹ For individuals on federal probation or supervised release after a term of incarceration, they must get permission from the court or their probation officer to leave the federal judicial district where they reside.²⁴² Most states follow a similar policy.²⁴³ Travel restrictions are permissible because the Supreme Court has stated that probation is a privilege, not a right, and that the original jurisdiction can establish terms and conditions “they deem best.”²⁴⁴ Considering probation a privilege allows states and U.S. Probation departments to restrict the constitutional right to interstate travel for those on a term of supervision.²⁴⁵ Restricting the constitutional right to interstate travel for those on community supervision impacts their access to abortion services if they are on supervision in one of the fifteen states that have banned or deeply restricted access to abortion.²⁴⁶ As the average term of probation is just under two years, a woman on community supervision cannot wait to obtain the procedure after her term supervision has ended.²⁴⁷

While the Biden Administration has put in great efforts to ensure that free women living in states that have banned abortion can travel across state lines to get abortion care, it is unclear how his executive orders impact individuals on community supervision and individuals released pretrial.²⁴⁸ Continued efforts to make FDA approved abortion medication including mifepristone legal nationwide would help those on community supervision, but would be unhelpful for women more than eleven weeks pregnant.²⁴⁹ Another complicating factor is that the future availability of mifepristone²⁵⁰ is uncertain depending on the outcome of the appeal of *Danco Laboratories, LLC v. Alliance for Hippocratic Medicine*, to the Fifth Circuit.²⁵¹

²³⁹Wanda Bertram & Wendy Sawyer, *What the End of Roe v. Wade Will Mean for People on Probation and Parole*, PRISON POLY INITIATIVE (June 30, 2022), <https://www.prisonpolicy.org/blog/2022/06/30/roe/> [<https://perma.cc/DBA8-QT9Y>].

²⁴⁰DANIELLE KAEBLE, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., PROBATION AND PAROLE IN THE UNITED STATES, 2020, 2, 28 (2021).

²⁴¹See *Learn About Your Probation Sentence*, MASS. PROBATION SERV., <https://www.mass.gov/service-details/learn-about-your-probation-sentence> [<https://perma.cc/4WBR-CZTH>] (last visited Jan. 20, 2023); TEX. CODE CRIM. PROC. ANN. art. 42A.154 (2017); *Adult Court FAQs*, NYC PROB., <https://www.nyc.gov/site/probation/services/adult-court-faqs.page> [<https://perma.cc/T444-UU4B>] (last visited Jan. 20, 2023); *Chapter 2: Leaving the Judicial District, in PROB. & PRETRIAL SERVS. OFF., U.S. CTS., OVERVIEW OF PROBATION AND SUPERVISED RELEASE CONDITIONS* (2016), <https://www.uscourts.gov/services-forms/leaving-judicial-district-probation-supervised-release-conditions> [<https://perma.cc/QEC6-NLBH>].

²⁴²U.S. CTS., *supra* note 241.

²⁴³See MASS. PROB. SERV., *supra* note 241; TEX. CODE CRIM. PROC. ANN. art. 42A.154 (2017); *Adult Court FAQs*, NYC PROBATION, <https://www.nyc.gov/site/probation/services/adult-court-faqs.page> [<https://perma.cc/T444-UU4B>] (last visited Jan. 20, 2023); *Chapter 2: Leaving the Judicial District (Probation and Supervised Release Conditions)*, UNITED STATES COURTS, <https://www.uscourts.gov/services-forms/leaving-judicial-district-probation-supervised-release-conditions> [<https://perma.cc/QEC6-NLBH>] (last visited Jan. 20, 2023).

²⁴⁴*Burns v. United States*, 287 U.S. 216, 220-21 (1932).

²⁴⁵See *id.*; see also David S. Cohen, Greer Donley & Rebouché, *The New Abortion Battleground*, 123 COLUMBIA L. REV. (forthcoming 2023) (manuscript at 20).

²⁴⁶Bertram & Sawyer, *supra* note 239.

²⁴⁷*Id.*

²⁴⁸Exec. Order No. 14076, 3 C.F.R. 14076 (Jan. 1, 2023); Exec. Order No. 14079, 3 C.F.R. 14079 (Jan. 1, 2023).

²⁴⁹Exec. Order No. 14076, *supra* note 248; *The Abortion Pill*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/the-abortion-pill> (last visited Jan. 15, 2023).

²⁵⁰Mifepristone is the first of two medications typically used in a medication abortion. *Facts on Mifepristone*, PLANNED PARENTHOOD (2019), https://www.plannedparenthood.org/uploads/file_public/42/8a/428ab2ad-3798-4e3d-8a9f-213203f0af65/191011-the-facts-on-mifepristone-d01.pdf [<https://perma.cc/FS96-M5Y6>].

²⁵¹*Alliance Hippocratic Medicine v. FDA*, 2023 WL 2825871 (2023). The United States Supreme Court issued a stay on April 21, 2023, allowing the abortion bill to remain widely available. The stay will last until the disposition of the appeal pending in the 5th Circuit and disposition of a timely writ of certiorari. “Should certiorari be denied, this stay shall terminate automatically. In

Due to mifepristone's limitations, when setting pretrial release conditions, judges should allow women to leave the state for abortion care if they are pregnant or may become pregnant while released pretrial. All of the Chiefs of Probation and Pretrial Services for the ninety-four U.S. Districts should make it a policy at their offices that women are allowed to travel outside of the judicial district to get abortion care if needed.²⁵² State probation departments should also establish policies that allow women under community supervision to leave their state for abortion care. But if state probation departments fail to establish such policies, the U.S. Supreme Court should rule that the restrictions on travel provided to those under a term of supervision should not be so strict that terms of supervision prevent women from leaving the state to receive a needed medical procedure. Although a favorable Supreme Court ruling perhaps sounds unlikely following the court's recent ruling in *Dobbs v. Jackson Women's Health*, Kavanaugh's concurrence explicitly stated his support and belief that there was a constitutional right for people to travel to a different state to get an abortion, perhaps providing at least four votes in favor of protecting the right of women on supervision to leave the state for an abortion.²⁵³

Conclusion

Protecting abortion access for women involved in the criminal justice system is a growing issue because of the increasing number of pregnant women involved in the criminal justice system and increasing barriers to abortion access. Over the past several decades, the rate of women involved in the criminal justice system has increased rapidly, and this trend is not likely to decrease in the coming years.²⁵⁴ Not only has the number of women involved in the criminal justice system increased, but the number of pregnant women in the criminal justice system is also increasing due to the disproportionate impact *Dobbs* has on poor women of color, who are overrepresented in the criminal justice system.²⁵⁵

Protecting the abortion rights of women in custody and on community supervision would require a multi-faceted approach due to the differences in levels of physical restriction and constitutional protections. As there is no longer a recognized Fourteenth Amendment right to abortion in the United States, if the issue of abortion rights for incarcerated women comes before a circuit court, the court should adopt the *Lanzaro* framework and find that incarcerated women have an Eighth Amendment right to terminate their pregnancies. Abortion rights should be guaranteed under the Eighth Amendment regardless of free women's rights in the state. Courts should also recognize abortion rights for women detained pretrial under the Fourteenth Amendment as women detained pretrial have the same if not more protections than those convicted and serving a sentence.²⁵⁶ In addition, women released on bail pretrial and women on community supervision post-conviction should be allowed to leave the state to seek abortion care if they cannot access the right in the state where they live.

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the event certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court." *Danco Laboratories, LLC v Alliance for Hippocratic Medicine*, 143 S. Ct. 1075, 1075 (2023).

²⁵²*Probation and Pretrial Services – Mission*, U.S. Cts., <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-mission> (last visited Feb, 6, 2023) [<https://perma.cc/DQE5-3RNJ>].

²⁵³*Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2309 (2022).

²⁵⁴*Incarcerated Women*, *supra* note 14.

²⁵⁵Kimport, *supra* note 24, at 1.

²⁵⁶*See* *Hubbard v. Taylor*, 399 F. 3d 150, 167 n.23 (3d Cir. 2005) (protections for pretrial detainees greater than convicted prisoner); *Campbell v. McGruder*, 580 F.2d 521, 527 n.9 (D.C. Cir. 1978) (protections for pretrial detainees greater than convicted prisoner); *Patten v. Nichols*, 274 F.3d 829, 834 (4th Cir. 2001) (protections for pretrial detainees at least as great as convicted prisoner); *Board v. Farham*, 394 F.3d 469, 477 (7th Cir. 2005) (protections for pretrial detainees at least as great as convicted prisoner).

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