

# REPRODUCTIVE HEALTHCARE FOR INCARCERATED WOMEN: FROM “RIGHTS” TO “DIGNITY”

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## INTRODUCTION

It is no secret that more Americans are behind bars today than ever before. Academics, politicians, and journalists have for years harshly and publicly criticized exploding rates of incarceration and stressed the need for widespread reform. Most of this conversation has focused on the plight of men, particularly men of color. This is unsurprising, as men comprise approximately ninety percent of the overall incarcerated population, now estimated to be close to be nearly 2.3 million.<sup>1</sup> Frequently ignored, however, is the United States’ fastest growing incarcerated population: women. Over the last thirty years, the population of women in the country’s jails and prisons has increased seven fold—a rate fifty percent higher than that of men—from approximately 26,000 in 1980 to more than 220,000 in 2014.<sup>2</sup> These women are more likely than men to be incarcerated for drug or property offenses, with close to sixty-five percent of female inmates convicted of non-violent crimes.<sup>3</sup> Like their male counterparts, this expansion in mass incarceration of women has disproportionately affected women of color: black women are imprisoned at a rate of 2.3 times that of white women, and Hispanic women are incarcerated at a rate of 1.5 times that of white women.<sup>4</sup>

The massive increase in the number of women imprisoned in the United States creates serious concerns about access to mental and physical healthcare.<sup>5</sup> Most women who enter the prison system have been victims of physical and sexual violence or other trauma, and frequently suffer from depression, addiction, and other mental health conditions.<sup>6</sup> Most of these women are also in their peak reproductive

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1. Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, PRISON POLICY INITIATIVE (March 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>; Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2018*, PRISON POLICY INITIATIVE (November 13, 2018), <https://www.prisonpolicy.org/reports/pie2018women.html>.

2. See *Fact Sheet: Incarcerated Women and Girls*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf> (last visited March 24, 2019).

3. E. Ann Carson, *Prisoners in 2013*, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS 15 (Sept. 30, 2014), <https://www.bjs.gov/content/pub/pdf/p13.pdf>.

4. Carolyn Sufrin et al., *Reproductive Justice, Health Disparities and Incarcerated Women in the United States*, 47 PERSP. IN SEXUAL AND REPROD. HEALTH 213, 213 (2015).

5. See generally THE REBECCA PROJECT FOR HUMAN RIGHTS & NAT’L WOMEN’S LAW CTR., *MOTHERS BEHIND BARS: A STATE-BY-STATE REPORT CARD AND ANALYSIS OF FEDERAL POLICIES ON CONDITIONS OF CONFINEMENT FOR PREGNANT AND PARENTING WOMEN AND THE EFFECT ON THEIR CHILDREN 9–10* (Oct. 2010), <https://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf>.

6. See *id.* at 9.

years, between the ages of eighteen and forty-four, and are at greater risk of experiencing unintended pregnancies.<sup>7</sup> In fact, it is estimated that six to ten percent of incarcerated women are pregnant when they enter the prison system and that 1400 babies are born to women in custody each year.<sup>8</sup> Further, due to histories of trauma, abuse, and substance abuse, incarcerated women also tend to have higher incidences of other serious medical conditions, including H.I.V., hepatitis, diabetes, and cervical cancer.<sup>9</sup> These issues create serious concerns about reproductive rights, pregnancy care, and access to women's health services in the prison context.

This Note examines the current state of reproductive rights for incarcerated women in the United States.<sup>10</sup> Part I looks at the general constitutional framework governing women's healthcare in correctional facilities. Part II looks at three specific areas: (1) access to abortion while incarcerated; (2) the shackling of female prisoners during childbirth; and (3) access to menstrual hygiene products in prisons and jails. A close examination of these issues makes clear that both the courts and state and federal policies have fallen short in protecting incarcerated women's reproductive needs. Despite these shortcomings, legislative and grassroots efforts have seen some success in recent years. Part III of this Note examines these successes and the ways in which these efforts have shifted away from a traditional focus on reproductive rights to a more holistic focus on dignity for incarcerated women. It argues that these legislative efforts may bolster constitutional protections by bringing attention to the unique medical needs of female inmates. These trends are positive, and this Note concludes by suggesting that future legislative efforts should build upon the recent success to raise awareness for—and provide solutions to—the unique healthcare problems that incarcerated women face.

## I. THE CONSTITUTIONAL FRAMEWORK FOR INCARCERATED WOMEN'S HEALTH

It is impossible to address the topics listed above without first discussing the broad constitutional framework for reproductive rights in the prison context. This section outlines this framework, specifically looking to the courts' Eighth and Fourteenth Amendment jurisprudence as it relates to incarcerated women's health claims. This analysis makes it clear that the courts, using a constitutional framework developed for a male prison population, do not adequately protect the

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7. See Sufrin et al., *supra* note 4, at 214.

8. Ginette Ferszt, Michelle Palmer & Christine McGrane, *Where Does Your State Stand on Shackling of Pregnant Incarcerated Women?*, NWHJOURNAL.ORG 17–18 (2018), [https://nwhjournal.org/article/S1751-4851\(17\)30335-5/pdf?code=nwh-site](https://nwhjournal.org/article/S1751-4851(17)30335-5/pdf?code=nwh-site).

9. See Sufrin et al., *supra* note 4, at 213–14.

10. The author acknowledges the limitations of this gender-binary language. However, considering both the way in which our prison system categorizes incarcerated people and the courts' use of gender-binary language in constitutional case law, the author uses the words "women" and "female" when referring to people who can get pregnant throughout this article. This is not intended to exclude trans women and non-binary individuals who are also incarcerated. Those individuals' experiences are beyond the scope of this Note.

reproductive needs of incarcerated women. Though it is well established that Americans do not lose constitutional rights because they are imprisoned,<sup>11</sup> the courts have found that in the prison context, rights can be limited in many cases.<sup>12</sup> Further, this section demonstrates that certain reproductive health issues have simply been found to be outside the realm of constitutional protection.<sup>13</sup>

*Estelle v. Gamble* established the constitutional right to medical care in prison.<sup>14</sup> In *Estelle*, a Texas prisoner sustained an injury during a work assignment and alleged that prison officials subjected him to cruel and unusual punishment by not adequately treating his injury.<sup>15</sup> According to the Supreme Court, because “an inmate must rely on prison authorities to treat his medical needs[,]” the government is obligated “to provide medical care for those whom it is punishing by incarceration.”<sup>16</sup> Failing to provide such care “may result in pain and suffering” that serves no penological purpose and would thus be “incompatible with the evolving standards of decency that mark the progress of a maturing society.”<sup>17</sup> The Court therefore held that “deliberate indifference to serious medical needs” constitutes a violation of the Eighth Amendment.<sup>18</sup> Under this standard, a prisoner alleging that his or her Eighth Amendment rights have been violated must show: (1) that a medical condition constitutes an objectively serious medical need and (2) that prison officials were deliberately indifferent to that need.<sup>19</sup> In *Farmer v. Brennan*, the Court clarified that the second step of this test is a subjective standard, meaning a prison official “must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”<sup>20</sup>

In the context of incarcerated women’s health, Eighth Amendment litigation has had some success in punishing prison officials’ obvious and egregious actions.<sup>21</sup> For example, several circuits have been sympathetic to constitutional challenges in situations where women have made it clear that they are pregnant and are

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11. *Turner v. Safley*, 482 U.S. 78, 84 (1987) (“Prison walls do not form a barrier separating prison inmates from the protections of the Constitution . . . [F]or example, prisoners retain the constitutional right to petition the government for the redress of grievances; they are protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment; and they enjoy the protections of due process.”).

12. *See id.* at 89 (holding that constitutional rights may be limited if reasonably related to legitimate penological objectives).

13. *See, e.g., Semelbauer v. Muskegon Cty.*, No. 1:14-CV-1245, 2015 WL 9906265 at \*8–10 (W.D. Mich. Sept. 11, 2015) (dismissing claims made by a group of female inmates that denial of feminine hygiene products for hours or days, resulting in bleeding through clothing, constituted an Eighth Amendment violation).

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

15. *Id.* at 98–102.

16. *Id.* at 103.

17. *Id.* at 102.

18. *Id.* at 104.

19. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

20. *Id.* at 837.

21. *See* Lauren Kuhlik, Note, *Pregnancy Behind Bars: The Constitutional Argument for Reproductive Healthcare in Prison*, 52 HARV. CIV. RTS. L. REV. 502, 531 (2017) (discussing how cases with particularly shocking fact patterns tend to “gain traction” in the courts).

obviously undergoing miscarriages or other pregnancy-related health issues.<sup>22</sup> Applying the deliberate indifference standard, the Eleventh Circuit found that a pretrial detainee who told prison officials and doctors that she was leaking amniotic fluid, but was denied medical care, could establish a constitutional violation.<sup>23</sup> The Eighth Circuit came to a similar conclusion when it held that a pregnant and hemorrhaging inmate who was prescribed mere bed rest—despite screaming for help from prison staff—had a viable constitutional claim.<sup>24</sup>

However, legal and feminist scholars criticize Eighth Amendment jurisprudence for failing to adequately protect incarcerated women, arguing that the deliberate indifference standard does not account for the uniquely gendered nature of reproductive health claims.<sup>25</sup> Courts have been hesitant to classify certain reproductive issues as objectively serious—including pregnancy, elective abortions, or breast pumping—despite the potential health consequences of failing to treat or respond to these issues.<sup>26</sup> Some argue that this is because women’s health issues often have no easy comparison with health issues affecting men, which makes it difficult for courts to analyze reproductive health claims under existing precedent.<sup>27</sup> When it comes to abortion, for instance, courts tend to compare the need for the procedure with other elective medical procedures, rather than examining the need in its own right.<sup>28</sup> As a consequence, when it comes to complex reproductive health issues, the *Estelle* framework forces courts to draw arbitrary lines about what may or may not be objectively serious.

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22. See, e.g., *Geobert v. Lee County*, 510 F.3d 1312 (11th Cir. 2007) (“Technically, the Fourteenth Amendment Due Process Clause, not the Eighth Amendment prohibition on cruel and unusual punishment, governs pretrial detainees like Geobert. However, the standards under the Fourteenth Amendment are identical to those under the Eighth.”); *Pool v. Sebastian County*, 418 F.3d 934, 939 (8th Cir. 2005) (affirming denial of defense motion for summary judgment).

23. See *Geobert*, 510 F.3d at 1326.

24. See *Pool*, 418 F.3d at 939.

25. See generally Estalyn Marquis, “*Nothing Less Than The Dignity of Man*: Women Prisoners, Reproductive Health, and Unequal Access to Justice Under the Eighth Amendment”, 106 CALIF. L. REV. 203, 203 (2018) (“By implicitly requiring that women prisoners compare their medical needs to those of men, the current standard for evaluating prisoners’ claims of inadequate medical care, though gender-neutral on its face, creates barriers for women that do not exist of men . . . present[ing] an often-insurmountable obstacle for women prisoners seeking justice under the Eighth Amendment.”); Priscilla Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1246 (2012) (arguing that the Eighth Amendment jurisprudence developed in *Estelle* is inadequate “not only because of its focus on individual actors, but also because of its inability to uproot the structural dynamics around race and gender that facilitate the continuation of harsh practices such as shackling during labor and childbirth.”).

26. See, e.g., *Villegas v. Nashville*, 709 F.3d 563, 579 (6th Cir. 2013) (finding that failing to provide a woman with a breast pump after she gave birth did not constitute deliberate indifference); *Roe v. Crawford*, 514 F.3d 789, 801 (8th Cir. 2008) (holding that an elective abortion is not an objectively serious medical need because it is, by definition, not necessary).

27. See, e.g., Marquis *supra* note 25, at 221 (“Without a ready comparison to a man’s condition, courts have struggled to define when pregnancy constitutes a serious medical need.”).

28. See generally *Victoria W. v. Larpenter*, 369 F.3d 475, 486 n.52 (5th Cir. 2004) (finding that medical attention for an elective abortion was not urgent in the way it was for “heart attacks, severe hemorrhaging, and labor pains less than seven minutes apart”).

To illustrate, a federal court in Georgia found that a woman's pregnancy complications were not severe enough to constitute an obviously serious medical need.<sup>29</sup> In that case, the plaintiff, who was twenty-four weeks pregnant, cried and screamed for help from prison staff after experiencing severe pelvic pain, cramping, and vomiting.<sup>30</sup> After being left alone for hours, she was taken to an infirmary, but not given a physical exam or an ultrasound and was not seen by a doctor.<sup>31</sup> Her child died when she later gave birth alone in the infirmary bathroom.<sup>32</sup> The court found that there was no objectively serious medical need present because the plaintiff's symptoms "[were] not as serious or obviously pregnancy-related as amniotic fluid leakage, vaginal discharge, or vaginal bleeding—conditions which have been found to present objectively serious medical needs in pregnant inmates."<sup>33</sup> The court thus held that there had been no Eighth Amendment violation.<sup>34</sup>

In a similar vein, the Sixth Circuit found that failing to provide women with breast pumps after they had given birth did not constitute deliberate indifference to a serious medical need.<sup>35</sup> In that case, prison officials refused to allow a woman who had just given birth to return to the correctional facility with the breast pump that the hospital provided to her.<sup>36</sup> According to the Court, absent an explicit prescription from a doctor, to qualify as an objectively serious medical need, the need for the pump would have to be "so obvious that even a lay person would easily recognize the necessity for a doctor's attention."<sup>37</sup> Though the court found that the plaintiff's expert sufficiently outlined the need for a breast pump after giving birth, it found that her testimony failed to speak to the obviousness of this need.<sup>38</sup>

Moreover, even when courts do identify an objectively serious medical need, they frequently fail to find that corrections officials were subjectively aware of such a need or that the indifference rises above mere negligence. For example, in *Webb v. Jessamine County Fiscal Court*, a district court in Kentucky found that a jail guard who did not call for help when a pregnant woman gave birth in her holding cell was not subjectively aware of a serious medical need because it "[could not] say with any certainty that [the guard] was aware that [the woman's] amniotic sac had ruptured."<sup>39</sup> This was despite the fact that the guard knew the woman was nine-months pregnant, the woman had stated that she was in labor and—in response to the woman's claims that her water had broken—the guard had told her

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29. *Hogan v. Wellstar Health Network, Inc.*, No. 1:12-CV-1418-RWS, 2013 U.S. Dist. LEXIS 35841, at \*24–25 (N.D. Ga. Mar. 14, 2013).

30. *Id.* at \*3–6.

31. *Id.*

32. *Id.*

33. *Id.* at \*24–25.

34. *Id.*

35. *See Villegas*, 709 F.3d at 578–79.

36. *Id.* at 579.

37. *Id.*

38. *Id.*

39. *Webb v. Jessamine Cty. Fiscal Ct.*, 802 F. Supp. 2d 870, 882 (E.D. Ky. 2011).

to “put her clothes back on” and to “stop acting like a child.”<sup>40</sup> In *Van Horn v. Hornbeak*, the Eastern District of California also found that the plaintiff failed to satisfy the subjective prong of the deliberate indifference test.<sup>41</sup> In that case, prison doctors failed to request records on or test a pregnant inmate for Group B *Streptococcus*, as is generally accepted medical practice.<sup>42</sup> This failure resulted in the death of the woman’s infant shortly after delivery.<sup>43</sup> The court held that this inaction fell below the standard of care for a pregnant patient, but did not amount to deliberate indifference because the plaintiff did not demonstrate that the doctors acted “in conscious disregard to an excessive risk to [her] health.”<sup>44</sup>

Aside from the Eighth Amendment, women may bring healthcare claims under other constitutional provisions as well, though these claims may be even less likely to succeed. For instance, a woman’s right to access an abortion while incarcerated is protected by the Fourteenth Amendment’s liberty guarantee.<sup>45</sup> Generally, prison officials’ restrictions on constitutional rights are evaluated under the test developed by the Supreme Court in *Turner*.<sup>46</sup> In *Turner*, the Court held that a prison inmate does not lose his constitutional rights when incarcerated, so long as “those [constitutional] rights . . . are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”<sup>47</sup> As such, restrictions on inmates’ constitutional rights are allowable so long as they are “reasonably related” to a prison’s interests. In assessing the reasonableness of a prison regulation, courts analyze four factors: (1) whether there is a “valid, rational connection” between the regulation and a “legitimate governmental interest”; (2) “whether there are alternative means” for a prisoner to exercise that right; (3) the impact of accommodating the exercise of the right on guards, inmates, and prison resources; and (4) the absence of any reasonable alternatives to the regulation.<sup>48</sup> Under this test, prison officials are given considerable deference when determining whether a restriction satisfies a particular “penological interest.” Consequently, critics have accused the *Turner* test of under-enforcing constitutional rights including those that limit access to reproductive healthcare, particularly abortion access.<sup>49</sup>

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40. *Id.*

41. *Van Horn v. Hornbeak*, No. CV F 08-1622 LJO DLB, 2010 U.S. Dist. LEXIS 14321, at \*38–45 (E.D. Cal. Feb. 17, 2010).

42. *Id.* at \*3–4.

43. *Id.*

44. *Id.* at \*44–45. (“Merely presenting evidence that the hospital was poorly managed at the time of the incident, failing to request records and losing records, and failing to follow the standard of care is insufficient to establish a deliberate violation of plaintiff’s constitutional rights.”).

45. See Diana Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict with Constitutional Standards?*, 41 *PERSP. ON SEXUAL AND REPROD. HEALTH* 59, 60 (2009).

46. *Turner v. Saffley*, 482 U.S. 78, 89 (1987).

47. *Id.* at 95.

48. *Id.* at 90.

49. See generally Thomas Blumenthal et al., *The Absence of Penological Rationale in the Restrictions on the Rights of Incarcerated Women*, 32 *U. ARK. LITTLE ROCK L. REV.* 461, 480 (2010) (“Under the *Turner* rationality test, . . . improper motives could easily be justified through deference to prison officials’ expertise on efficient

Although this constitutional framework protects some rights to a limited degree, it has not provided sufficient protection for the reproductive needs of incarcerated women. In addition to permitting prison officials to curtail certain constitutional rights under *Turner*, Eighth Amendment legal precedent—which developed with regards to the needs of male prisoners—fails to adequately address unique health issues facing incarcerated women. As such, women’s unique healthcare needs are largely left to the mercy of inconsistent federal, state, and local law and policies.

## II. CASE STUDIES: ABORTION, SHACKLING, AND ACCESS TO MENSTRUAL HYGIENE PRODUCTS

This Section addresses the current state of three reproductive health issues: abortion access; the practice of restraining pregnant women prior, during, and after childbirth; and the provision of menstrual hygiene products in prisons and jails. By surveying the case law and federal, state, and local policies on these issues, this section asserts that our current system falls short of meeting the unique medical needs of incarcerated women.

### A. Abortion Access

Though the Supreme Court has never specifically addressed abortion access for female inmates, no federal court has held that a woman loses the constitutional right to an abortion while incarcerated.<sup>50</sup> As established in *Roe v. Wade*, a woman’s right to choose to have an abortion stems from the Fourteenth Amendment’s liberty guarantee.<sup>51</sup> Generally, states may limit this right in certain ways, so long as these limitations do not place an “undue burden” on a woman’s right to choose to have an abortion.<sup>52</sup> Despite these constitutional guarantees, however, restrictions on abortion access in the prison context are not analyzed under this “undue burden” standard, but under the *Turner* test—which allows for “reasonable” restrictions on constitutional rights that may conflict with valid penological interests.<sup>53</sup> Consequently, many prison regulations that have the practical effect of limiting the ability of an incarcerated woman to access an abortion have been upheld.<sup>54</sup>

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operation of the prison system. This is particularly dangerous given the fact that these policies are often implemented by men who may not fully understand the implications of denying the freedom of choice to female inmates. The right to choose is a constitutional right whether one agrees with it or not and should not be subject to the deference of prison officials”).

50. See, e.g., *Roe v. Crawford*, 514 F.3d 789, 794 n.2 (8th Cir. 2008) (stating that defendants were incorrect in their conclusion that the “privacy right to terminate a pregnancy does not survive incarceration”); *Monmouth Cty. Corr. Institution Inmates v. Lonzaro*, 834 F.2d 326, 334 n.11 (3d Cir. 1987) (“the Supreme Court has held that significant rights of privacy survive in the prison context”). But see *Victoria W.*, 369 F.3d at 478 (holding that prison policy of requiring court order for elective medical procedure, abortion, serves a legitimate penological interest).

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

52. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 875–77 (1992).

53. See *Turner v. Saffley*, 482 U.S. 78, 89 (1987).

54. See, e.g., *Victoria W.*, 369 F.3d at 486 (holding that a Louisiana prison’s policy requiring women to seek a court order to be transported offsite for an abortion was reasonably related to “legitimate government interests,”

Just two federal circuits have struck down prison regulations that restricted abortion access.<sup>55</sup> In *Roe v. Crawford*, the Eighth Circuit invalidated a Missouri Department of Corrections policy that denied pregnant women offsite transportation for elective abortions.<sup>56</sup> Prison administrators argued that such a policy was a necessary response to security risks created by transporting a woman to an abortion provider.<sup>57</sup> Applying the *Turner* factors, the Court held that although the policy was rationally related to the security interests of the prison, it entirely eliminated the ability of an inmate to seek an elective abortion while incarcerated.<sup>58</sup> It found that less restrictive alternatives were available to the facility, including requiring women to seek a court order that authorized the transport.<sup>59</sup> The policy was thus invalidated as a violation of the Fourteenth Amendment.<sup>60</sup> At the same time, however, the court rejected the district court's finding that an elective abortion constituted a serious medical need under *Estelle*.<sup>61</sup> It found that, "[l]ogically, if a procedure is not medically necessary, then there is no *necessity* for a doctor's attention."<sup>62</sup> It thus held that "a prison institution's refusal to provide an inmate with access to an elective, nontherapeutic abortion does not rise to the level of deliberate indifference to constitute an Eighth Amendment violation."<sup>63</sup> Significantly, the court analyzed the seriousness of the need to seek an abortion as it applied to non-incarcerated women, rather than in the prison context, which meant that "[t]he court did not address . . . the harms that incarcerated women may face in continuing a pregnancy, such as fearing being shackled, having their children taken away, and not being provided adequate prenatal care."<sup>64</sup>

In contrast, in *Monmouth County*, the Third Circuit found that a prison policy that required women get a court order to seek an abortion (a process that was found to be time consuming and burdensome), was unconstitutional under both the Fourteenth and Eighth Amendments.<sup>65</sup> First, under the four *Turner* factors, the Court found the policy was not a valid restriction on the right to access an abortion and that there was no valid security concern at issue, since prisoners were authorized to seek other medical services without such an order.<sup>66</sup> It also held that cost

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including "ensur[ing] inmate security and avoid[ing] unnecessary liability"); *Gibson v. Matthews*, 926 F.2d 532, 536 (6th Cir. 1991) (dismissing the claim of a federal prisoner who was forced to give birth after her repeated efforts to receive an abortion were thwarted by prison officials).

55. See *Crawford*, 514 F.3d at 801; *Monmouth Cty.*, 834 F.2d at 351.

56. *Crawford*, 514 F.3d at 801.

57. *Id.* at 795.

58. *Id.* at 796–797 (rejecting defendant's argument that obtaining an abortion prior to incarceration constituted a viable alternative means of exercising one's right to seek an elective abortion).

59. *Id.* at 798.

60. *Id.* at 801.

61. *Id.* at 798–801.

62. *Id.* at 799.

63. *Id.* at 801.

64. Kuhlik, *supra* note 21, at 526.

65. *Monmouth Cty.*, 834 F.2d at 336.

66. *Id.* at 338.



was not a valid justification because the cost of prenatal care far exceeded the financial burden of allowing female inmates to access abortion.<sup>67</sup> Even more significantly, however, the Court ruled that elective abortions constitute a “serious medical need” under *Estelle* and that denying access to an abortion “will likely result in tangible harm to the inmate who wishes to terminate her pregnancy.”<sup>68</sup> As such, the Third Circuit held that a policy that refuses to eliminate obstacles that keep women from accessing the procedure in practice constitutes deliberate indifference on behalf of prison officials.<sup>69</sup> The court further found an obligation on the prison to fund the abortion if a woman was unable to pay for the procedure herself.<sup>70</sup>

In the thirty years since *Monmouth County* was decided, the Third Circuit remains the only court to have found that restrictions on abortion access in the prison context can constitute cruel and unusual punishment under the Eighth Amendment, despite the obvious and serious hardships of pregnancy, birth, and parenthood experienced by women while incarcerated.<sup>71</sup> Consequently, courts have upheld a variety of restrictions on abortion access under *Turner*.<sup>72</sup> For example, the Fifth Circuit upheld an “innocuous” policy requiring women to seek court orders to be transported offsite for an abortion despite the fact that the practice kept the plaintiff from accessing an abortion.<sup>73</sup> In that case, the Fifth Circuit held that the plaintiff’s failure to effectively pursue the court order, and not the policy itself, resulted in her inability to access the procedure.<sup>74</sup> The Sixth Circuit ruled that bureaucratic delays that kept one inmate from seeking an abortion meant that she was a “victim of the bureaucracy” and that the prison guard defendants were not individually liable for the delay.<sup>75</sup> The Sixth Circuit further stated that the prison guards were protected from liability under the doctrine of qualified immunity because it was not “a clearly established constitutional right . . . that federal prison employees were required to facilitate prisoners in their requests for an abortion.”<sup>76</sup> Similarly, the Second Circuit held a woman’s inability to access an abortion as a result of prison officials’ failure to schedule the procedure in a timely manner did not constitute more than “mere negligence” and was thus not a constitutional violation.<sup>77</sup>

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67. *Id.* at 341.

68. *Id.* at 349.

69. *Id.* at 345.

70. *Id.* at 350–351 (“in the absence of alternative methods of funding, the County must assume the cost of providing inmates with elective, nontherapeutic abortions.”).

71. See generally Sufrin et al., *supra* note 4.

72. See, e.g., *Victoria W.*, 369 F.3d at 4778 (upholding a prison policy that required women seek a court order to be transported offsite for an abortion); *Gibson*, 926 F.2d at 536–537 (finding that failure by prison officials to schedule a woman’s elective abortion, which resulted in forcing the woman to bring her pregnancy to term, was not a constitutional violation).

73. *Victoria W.*, 369 F.3d at 489.

74. *Id.* at 490.

75. *Gibson*, 926 F.2d at 534–535.

76. *Id.* at 535.

77. *Bryant v. Maffucci*, 923 F.2d 979, 985 (2d Cir. 1991).

These cases demonstrate that the courts have failed to protect the right to an abortion in the prison context. According to one reproductive rights advocate, these decisions “signify a consensus in the courts that imprisoned women retain the right to an abortion” but “do not offer a clear consensus on the precise contours of that right.”<sup>78</sup> Consequently, the actual ability of a woman to access an abortion while incarcerated is not always guaranteed, and abortion access varies wildly by prison and jail. As opposed to enacting legislation to regulate access, nearly all legislatures have left policy choices to state and local departments of corrections, and many facilities have no policy in place at all for facilitating abortions.<sup>79</sup> Those that do have policies often have convoluted or ambiguous rules and procedures.<sup>80</sup> Even in Pennsylvania, where the Third Circuit held that facilities were constitutionally required to facilitate abortions for those who elected to have them, a 2012 survey found that thirty-five percent of the state’s jails had no explicit policy on abortion.<sup>81</sup>

Regardless of whether a facility has an explicit abortion policy, numerous burdens exist to accessing the procedure while incarcerated. Nearly everywhere, abortions are performed offsite and women must be transported to clinics, many of which are significant distances from typically rural prisons.<sup>82</sup> Similar to the policies struck down by the Third and Eighth Circuits, many prisons require a court order for such transportation, despite the fact that women are routinely transported offsite for other medical appointments.<sup>83</sup> Many prisons refuse to fund any aspect of an elective abortion—not just the procedure itself but also the transportation and security that accompany it.<sup>84</sup> Furthermore, the majority of states impose some form of waiting period on women seeking an abortion, which may require at least two trips to a provider: the first for counseling and the second for the procedure itself.<sup>85</sup> Though this waiting period has been upheld as a valid restriction outside of

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78. Rachel Roth, *Obstructing Justice: Prisons as Barriers to Medical Care for Pregnant Women*, 28 UCLA WOMEN’S L.J. 89, 94 (2010).

79. According to the American Civil Liberties Union, twenty-three states have correctional laws or policies that mention abortion; twelve states have laws or policies that mention pregnancy care but not abortion access; eight states have no law or policy on reproductive healthcare for incarcerated women. See *State Standards for Pregnancy-Related Health Care and Abortion for Women in Prison*, ACLU, <https://www.aclu.org/state-standards-pregnancy-related-health-care-and-abortion-women-prison-0#hd4> (last visited Oct. 5, 2018).

80. See Rachel Roth, “*She Doesn’t Deserve to Be Treated Like This*”: *Prisons as Sites of Reproductive Injustice*, CTR. FOR WOMEN’S POL’Y STUD., at 6 (2012), [https://www.prisonpolicy.org/scans/CWPS\\_Roth\\_Reproductive\\_Injustice\\_7\\_13\\_2012.pdf](https://www.prisonpolicy.org/scans/CWPS_Roth_Reproductive_Injustice_7_13_2012.pdf) (noting that California is the only state that has a statute that guarantees the right of incarcerated women to access abortion care).

81. See Sufrin et al., *supra* note 4, at 215.

82. *Id.*

83. See Roth, *supra* note 78, at 94 (discussing how prisons claim that abortion transport poses additional security risks because of the presence of anti-choice protestors).

84. See Sufrin et al., *supra* note 4, at 215.

85. See *id.*

the prison context,<sup>86</sup> it imposes an additional financial burden on incarcerated women who may be required to pay for offsite transportation.

These examples illustrate how abortion rights are restricted in correctional facilities. The courts, both by framing abortion as an “elective” procedure and by analyzing abortion restrictions under the deferential *Turner* test, have failed to protect the ability of incarcerated women to choose to terminate their pregnancies. While some state governments provide clear access to the procedure through laws or administrative policies, others erect burdensome hurdles or provide no guidance at all. The result is variable access to abortion for pregnant women in prisons and jails across the country.

### *B. The Shackling of Women Before, During, and After Childbirth*

Shackling—the use of handcuffs, leg irons, waist chains, and other restraints on women during, prior, and after giving birth—has garnered a great deal of national attention in recent years.<sup>87</sup> Though the use of restraints on both male and female inmates is common in prisons and jails nationwide, the practice poses unique risks to women during pregnancy, labor, and postpartum recovery.<sup>88</sup> This section demonstrates that although the courts have found shackling during certain periods of labor and pregnancy to constitute cruel and unusual punishment, they have stopped short of banning the practice altogether. As such, the practice is largely regulated by federal, state, and local laws and policies that have fallen short of prohibiting the practice in its entirety.

The shackling of pregnant women is surprisingly common and prison officials typically justify the practice by citing concerns about the safety of corrections officers, other inmates, and other patients seeking care in hospitals.<sup>89</sup> Courts tend to accept these justifications despite the fact that guards frequently restrain nonviolent offenders<sup>90</sup> and despite the fact that few women in labor have escaped—or attempted to escape—from a correctional facility or hospital.<sup>91</sup> Myriad medical associations, including the American Medical Association, the American Public Health Association, and the American Congress of Obstetricians and Gynecologists

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86. See *Casey*, 505 U.S. at 885–86.

87. See, e.g., Justin Jouvenal, *Bipartisan bill would outlaw shackling of pregnant inmates in federal prisons*, WASH. POST (Sept. 13, 2018), <https://www.washingtonpost.com/local/public-safety/bipartisan-bill-would-outlaw-shackling-of-pregnant-inmates-in-federal-prisons/2018/09/12/26fd0988-b5cd-11e8-a7b5-adaaa5b2a57f>; Melissa Jeltsen, *Cory Booker and Elizabeth Warren Want to Treat Women in Prison Like Human Beings*, HUFFPOST (July 11, 2017), [https://www.huffingtonpost.ca/entry/cory-booker-and-elizabeth-warren-want-to-treat-women-in-prison-like-human-beings\\_us\\_5964cce5e4b005b0fdc84b00](https://www.huffingtonpost.ca/entry/cory-booker-and-elizabeth-warren-want-to-treat-women-in-prison-like-human-beings_us_5964cce5e4b005b0fdc84b00); Audrey Quinn, *Opinion, In Labor, in Chains*, N.Y. TIMES (July 26, 2014), <https://www.nytimes.com/2014/07/27/opinion/sunday/the-outrageous-shackling-of-pregnant-inmates.html>.

88. An “Act to prohibit the shackling of pregnant prisoners” model state legislation, AMA ADVOC. RESOURCE CTR., <https://perma.cc/ST4N-FKG8>.

89. Ocen, *supra* note 25, at 1255.

90. AMA ADVOC. RESOURCE CTR., *supra* note 88, at 1.

91. Ocen, *supra* note 25, at 1256; AMNESTY INT’L USA, “Not Part of My Sentence”—Violations of the Human Rights of Women in Custody, <https://perma.cc/GD47-L8PK>.

have issued clear opposition to the practice, stating that shackling women is “unacceptable,” “must never be” done “during labor and delivery,” and is “demeaning and unnecessary.”<sup>92</sup> Not only can shackles interfere with a doctor’s work during labor and delivery, but leg restraints and handcuffs increase the risk for pregnant women—whose centers of gravity are already impaired by pregnancy—of tripping and falling and harming the fetus.<sup>93</sup> In 2006, the U.N. Committee against Torture expressed concern about incidents of shackling in the United States<sup>94</sup> and in 2010 the U.N. General Assembly adopted the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, which explicitly states, “[i]nstruments of restraint shall *never* be used on women during labour, during birth and immediately after birth.”<sup>95</sup> Despite this widespread condemnation and the seemingly “anachronistic” and barbaric nature of the practice to those outside the prison context, the shackling of pregnant inmates is “routine.”<sup>96</sup>

Though the Supreme Court has not addressed the practice, federal courts have held that shackling women during active labor constitutes cruel and unusual punishment under the Eighth Amendment.<sup>97</sup> In *Nelson v. Correctional Medical Services*, the Eighth Circuit found that using leg cuffs to shackle a pregnant woman to opposite sides of her hospital bed during labor, which caused her hip to dislocate during childbirth, constituted a constitutional violation.<sup>98</sup> The D.C. District Court came to a similar conclusion in 1994 in a class-action brought by a group of women prisoners.<sup>99</sup> In that case, the court found that “the physical limitations of a woman in the third trimester of pregnancy and the pain involved in delivery make complete shackling redundant and unacceptable in light of the risk of injury to a woman and baby” and, as such, the practice “poses a risk so serious that it violates contemporary standards of decency.”<sup>100</sup>

However, the courts have stopped short of finding the practice to be per se unconstitutional, and have universally accepted that shackling may be necessary

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92. See ACLU BRIEFING PAPER: THE SHACKLING OF PREGNANT WOMEN & GIRLS IN U.S. PRISONS, JAILS, & YOUTH DETENTION CENTERS, ACLU REPRODUCTIVE FREEDOM PROJ., ACLU NAT’L PRISON PROJECT, [https://www.aclu.org/files/assets/anti-shackling\\_briefing\\_paper\\_stand\\_alone.pdf](https://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf).

93. Jane E. Allen, *Shackled: Women Behind Bars Deliver in Chains*, ABC NEWS MED. UNIT, Oct. 21, 2010, <http://abcnews.go.com/Health/WomensHealth/pregnant-shackled-women-bars-deliver-chains/story?id=11933376>.

94. Consideration of Reps. Submitted by States Parties Under Art. 19, Conclusions and recommendations of the Comm. Against Torture, 33, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

95. Economic and Social Council Res. 2010/16 (July 22, 2010) (emphasis added).

96. Ocen, *supra* note 25, at 1251.

97. See, e.g., *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 532–33 (8th Cir. 2009); *Women Prisoners of the D. C. Dep’t of Corr. v. District of Columbia*, 877 F. Supp. 634, 668–69 (D.D.C. 1994), *vacated in part, modified in part*, 899 F. Supp. 659 (D.D.C. 1995).

98. *Nelson*, 583 F.3d 522, 534.

99. *Women Prisoners*, 877 F. Supp. at 668.

100. *Id.*

when inmates pose a threat of harm to themselves or to others.<sup>101</sup> Similar to the *Turner* test, the use of restraints on pregnant women is evaluated by balancing the dangers of the practice against the prison's competing institutional concerns.<sup>102</sup> This balancing test has emerged because courts have classified instances of shackling as "unusual" situations where medical care and security concerns clash.<sup>103</sup> As a result, these claims are not analyzed squarely under *Estelle*'s deliberate indifference standard, which does not evaluate constitutional violations in light of competing institutional concerns.<sup>104</sup> For instance, though the Sixth Circuit in *Villegas* looked to statements from medical professionals and international human rights standards to find that shackling women during labor "offends contemporary standards of human decency such that the practice violates the Eighth [Amendment,]" it also found that "the right to be free from shackling during labor is not unqualified."<sup>105</sup> It thus held that the practice could be tolerable in instances where an inmate is a "security or flight risk."<sup>106</sup>

Though the above cases have addressed the specific practice of shackling women during active labor, there is little consensus on the constitutionality of shackling at other points of pregnancy or during postpartum recovery. For example, in *Women Prisoners*, the D.C. District Court held that restraining women with leg shackles during the third-trimester does not create an "inhumane condition of confinement[,]" though shackling immediately after birth does.<sup>107</sup> The court in *Mendiola-Martinez*, on the other hand, held that no reasonable jury could find that a prison official committed a constitutional violation when he attached the plaintiff's ankle to her bed with a six- to eight-foot metal chain immediately after a Caesarean section.<sup>108</sup> It found that the length of the chain allowed the woman to walk around and that the fact that the county provided her with a chain of this length meant it was aware of the post-surgery medical risks of restraints.<sup>109</sup> This was despite testimony from the plaintiff that the weight of the chain aggravated her

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101. See, e.g., *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1254–55 (9th Cir. 2016) (holding that when evaluating shackling claims, juries must balance the risk of harm to pregnant inmates with prison officials' legitimate disciplinary and security concerns); *Villegas*, 709 F.3d at 574 ("the right to be free from shackling during labor is not unqualified").

102. See *Villegas*, 709 F.3d at 574.

103. See, e.g., *Mendiola-Martinez*, 836 F.3d at 1255.

104. *Villegas*, 709 F.3d at 571.

105. *Id.* at 574.

106. *Id.* The Ninth Circuit also explicitly rejected the argument that shackling constituted a per se constitutional violation. *Mendiola-Martinez*, 836 F.3d at 1254–55. The court made a point of emphasizing, however, that while prisons should receive deference as to their institutional findings on safety and security risks, juries must be instructed to consider whether determinations of risk are "exaggerated." *Id.* at 1257. In this context, the court was highly critical of the idea that women who are giving birth or have just given birth could ever truly constitute a serious security threat. *Id.* at 1255 (discussing expert testimony that stated that "labor contractions are extremely painful and would preclude a woman from absconding in the few minutes in between contractions" and that "abdominal surgery [like a C-section] makes it nearly impossible for someone to run").

107. *Women Prisoners*, 877 F. Supp. at 668.

108. *Mendiola-Martinez*, 836 F.3d at 1256.

109. *Id.*

surgical wound.<sup>110</sup> At the same time, however, that court held that cuffing the plaintiff to other inmates when she left the hospital could be an unjustifiable constitutional violation.<sup>111</sup>

Because the courts have failed to find the practice per se unconstitutional, shackling pregnant women is largely regulated (or not) by state laws and administrative policies. Twenty-two states and the District of Columbia have express laws prohibiting or limiting the practice.<sup>112</sup> Many other states prohibit shackling through prison policies, but not through legislation.<sup>113</sup> Six states have no policies or laws in place that address the practice.<sup>114</sup> Federal agencies, including the Federal Bureau of Prisons (“BOP”), U.S. Immigration and Customs Enforcement (“ICE”), and the U.S. Marshall Services have also developed policies and guidelines regarding the shackling of pregnant prisoners and civil detainees.<sup>115</sup> Though none of these agency policies are codified as federal law, numerous bills have been introduced in recent months that would prohibit shackling in federal prisons and immigration detention facilities.<sup>116</sup>

Despite the existence of piecemeal law and policy, high levels of discretion for prison officials, vague laws and guidance, and inadequate enforcement and monitoring mean the practice continues with some frequency.<sup>117</sup> Echoing concerns raised in the courts about safety and security, all laws and policies banning the use of shackles on pregnant women contain exceptions that allow for the use of

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110. *Id.* at 1244

111. *Id.* at 1257.

112. Ferszt, *supra* note 8, at 20.

113. *The Shackling of Incarcerated Pregnant Women: A Human Rights Violation Committed Regularly in the United States*, INT’L HUM. RTS. CLINIC, UNIV. OF CHI. L. SCH. 10 (2013), <https://www.issueab.org/resources/18329/18329.pdf> (stating that as of 2013, twenty-four states limited the practice by policy alone).

114. These states include: Nebraska, Utah, Kansas, South Carolina, Indiana, and Georgia. Lilian Min, *These Are the States that Still Allow Female Inmates to be Shackled During Childbirth*, THECUT.COM (March 28, 2018), <https://www.thecut.com/2018/03/these-states-still-allow-shackling-inmates-during-childbirth.html>.

115. Ryan C.H. Hall, M.D. et al., *Pregnant Women and the Use of Corrections Restraints and Substance Use Commitment*, 43 J. AM. ACAD. PSYCHIATRY L. 359, 359–60 (2015). In 2008, BOP limited the use of restraints on birthing mothers in federal prisons to those inmates believed to “present[] an immediate, serious threat of hurting herself, staff or others” or if there is a serious threat of “an immediate and credible risk of escape that cannot be reasonably contained through other methods.” *Escorted Trips*, Program Statement 5538.05, U.S. DEP’T OF JUSTICE, FED. BUREAU OF PRISONS (Oct. 6, 2008), [https://www.aclu.org/files/pdfs/prison/bop\\_policy\\_escorted\\_trips\\_p5538\\_05.pdf](https://www.aclu.org/files/pdfs/prison/bop_policy_escorted_trips_p5538_05.pdf).

116. In September, 2018, a bipartisan group of female members of the House of Representatives introduced the Pregnant Women in Custody Act of 2018, which would prohibit the use of restraints on pregnant and postpartum women unless BOP officials, in consultation with senior health officials, determine that the risk posed by the woman “cannot reasonably be prevented by other means.” See *Pregnant Women in Custody Act*, H.R. 6805, 115th Cong. § 5 (b)(1)(A)(i)–(ii) (2018). The Dignity Act, a bill introduced in 2017 by a group of Democratic senators that addresses a variety of issues unique to incarcerated women, prohibits the practice in federal facilities. See *Dignity for Incarcerated Women Act*, S. 1524, 115th Cong. (2017). In July of 2018, a group of Democratic senators introduced a bill that seeks to prevent ICE from detaining and shackling migrant women in immigration custody. See *Stop Shackling and Detaining Pregnant Women Act*, S. 3225, 115th Cong. (2018). See also Emily Birnbaum, *Dems to propose legislation to prevent ICE from shackling pregnant women*, THE HILL (July 17, 2018), <https://thehill.com/homenews/senate/397536-dems-to-propose-legislation-to-prevent-ice-from-shackling-pregnant-women>; Jouvenal, *supra* note 87.

117. See, e.g., AMA ADVOC. RESOURCE CTR., *supra* note 88, at 1.

restraints in certain circumstances.<sup>118</sup> While some states clearly and narrowly define such “extraordinary” circumstances,<sup>119</sup> others leave significant discretion to prison officials.<sup>120</sup> The BOP policy, for one, allows for the use of restraints if a prison official has “reasonable grounds” for believing that a woman poses a risk to herself or others.<sup>121</sup> Further, some laws fail to define key legislative terms. For example, though Illinois was the first state to prohibit shackling, the original statute did not define “labor,” and prison administrators continued to restrain pregnant women by defining labor to refer only to the actual delivery.<sup>122</sup> Similarly, in early 2018 an advocacy group in North Carolina sent a letter to the state Department of Public Safety questioning the use of restraints on two women who had given birth in custody.<sup>123</sup> Though North Carolina instituted a policy in 2015 that prohibited the use of restraints “while in delivery,” the policy did not explicitly state a definition of “in delivery,” which left a great deal of discretion in interpreting medical

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118. See, e.g., ARIZ. REV. STAT. ANN. § 31-601 (West 2012) (prohibiting shackling during transport to delivery, labor, and postpartum recovering unless “[t]he corrections official makes an individualized determination that the prisoner or detainee presents an extraordinary circumstance.”); MASS. GEN. LAWS ANN. ch. 127, § 118 (West 2014) (“An inmate in post-delivery recuperation shall not be placed in restraints, except under extraordinary circumstances.”); D.C. CODE ANN. § 24-276.02 (d)(1) (West 2015) (“[t]he Administrator may authorize the use of restraints on a confined woman in the third trimester of pregnancy or in postpartum recovery after making an individualized determination, at the time that the use of restraints is considered, that extraordinary circumstances apply and restraints are necessary to prevent the confined woman from injuring herself or others, including medical or correctional personnel”). See also INT’L HUM. RTS. CLINIC, UNIV. OF CHI. L. SCH., *supra* note 112.

119. See, e.g., MASS. GEN. LAWS ANN. ch. 127, § 118

For the purposes of this section, “extraordinary circumstances” shall mean a situation in which a correction officer determines that the specific inmate presents an immediate and serious threat to herself or others or in which the inmate presents an immediate and credible risk of escape that cannot be curtailed by other reasonable means. . . . In the event the correction officer determines that extraordinary circumstances exist and restraints are used, the correction officer shall fully document, in writing, the reasons that the officer determined such extraordinary circumstances existed, the kind of restraints used and the reasons those restraints were considered the least restrictive available and the most reasonable under the circumstances. A superintendent shall approve the use of any restraints used due to extraordinary circumstances either before the officer makes the determination or after the correction officer submits documentation detailing the reasons restraints were required. If the attending physician or nurse treating the pregnant inmate requests that restraints be removed for medical reasons, the correction officer shall immediately remove all restraints.

See also Scout Turkel, *Beyond Dignity: Evaluating the Status, and Future, of Incarcerated Mothers*, BERKELEY POL. REV. (March 25, 2018), <https://bpr.berkeley.edu/2018/03/25/beyond-dignity-evaluating-the-status-and-future-of-incarcerated-mothers/>; Chris DiNardo, Note, *Pregnancy in Confinement, Anti-Shackling Laws and the “Extraordinary Circumstances” Loophole*, 25 DUKE J. OF GENDER L. & POL’Y 271, 279–80 (2018).

120. See also Turkel, *supra* note 118; DiNardo, *supra* note 118, at 282–83.

121. FED. BUREAU OF PRISONS, Program Statement, *supra* note 114, at 10.

122. Alex Ruppenthal, *Project Examines Pregnancy in Illinois, Cook County Prisons*, WTTW (July 17, 2017), <https://news.wttw.com/2017/07/17/project-examines-pregnancy-illinois-cook-county-prisons>.

123. Anne Blythe et al., *NC prisons reconsider whether to strap pregnant inmates to their beds during childbirth*, NEWS & OBSERVER (Feb. 17, 2018), <http://www.newsobserver.com/news/politics-government/state-politics/article200724414.html>.

terminology to prison officials.<sup>124</sup> In response to the complaints, in March 2018, North Carolina instituted a new policy that explicitly states that restraints are to be removed once contractions begin.<sup>125</sup>

### C. *The Provision of Menstrual Hygiene Products*

Women are routinely denied basic access to menstrual hygiene products while incarcerated. While some prisons and jails provide unlimited free access to tampons and pads,<sup>126</sup> others provide a severely limited number or none at all.<sup>127</sup> As a consequence, women may be forced to go without these products, resulting in the humiliation of bleeding through clothing. Or women may be required to purchase menstrual hygiene products from prison commissaries, though it can take more than 20 hours of work at prison wages to earn enough money to purchase a one-month supply of pads or tampons.<sup>128</sup> Other women have reported using whatever materials they can acquire to make their own menstrual hygiene products. For example, women in Jessup prison in Maryland reported using rags and stretch cotton materials to make pads and to using mattress stuffing to create make-shift tampons.<sup>129</sup> These DIY strategies are risky: health experts have warned that using these improper materials can lead to infection and other severe health problems.<sup>130</sup> Incarcerated women also report that the process of being strip searched by prison officials without proper hygiene products was so humiliating that they would turn down visits with family and attorneys.<sup>131</sup>

Despite the Eighth Amendment implications of failing to provide menstrual hygiene products to incarcerated women, little case law exists that addresses this issue. Courts have found that personal hygiene and sanitary living conditions may

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124. *Id.*

125. Anne Blythe et al., *NC prisons change restraints policy for pregnant inmates after complaints*, NEWS & OBSERVER (Mar. 26, 2018), <http://www.newsobserver.com/news/local/crime/article206877024.html>.

126. See, e.g., Lydia O'Connor, *Federal Prisons Made Menstrual Products Free. Now Some States May Follow Suit*, HUFFPOST (Feb. 7, 2018), [https://www.huffingtonpost.com/entry/state-prison-free-pads-tampons\\_us\\_5a7b427be4b08dfc92ff5231](https://www.huffingtonpost.com/entry/state-prison-free-pads-tampons_us_5a7b427be4b08dfc92ff5231).

127. See *id.*

128. See, e.g., *id.* (describing testimony from Arizona state representative Athena Salman that women in Arizona prisons must work twenty-one hours in order to purchase a sixteen-pack box of pads and twenty-seven hours to purchase a twenty-pack of tampons).

129. Rachel Baye, *State Lawmakers Seek to Give Tampons to Prisoners*, WYPR (Feb. 13, 2018), <http://wypr.org/post/state-lawmakers-seek-give-tampons-prisoners>.

130. *Id.* Poor menstrual hygiene has been linked to a range of health problems, including high rates of cervical cancer in developing countries, infertility, and infection. See Jennifer Weiss-Wolf, *America's Very Real Menstrual Crisis*, TIME (Aug. 11, 2015), <http://time.com/3989966/america-menstrual-crisis/>; Padma Das et al., *Menstrual Hygiene Practices, WASH Access and the Risk of Urogenital Infection in Women from Odisha, India*, PLOS ONE (June 30, 2015), <http://doi.org/10.1371/journal.pone.0130777>; Tazeen Saeed Ali et al., *Are Unhygienic Practices During the Menstrual, Partum and Postpartum Periods Risk Factors for Secondary Infertility?*, 25 J. OF HEALTH POPULATION & NUTRITION 189, 191 (2007).

131. Baye, *supra* note 128.



constitute basic needs deserving of Eighth Amendment protection.<sup>132</sup> For example, the Southern District of New York refused to dismiss claims that prison officials had unconstitutionally failed to provide female plaintiffs with access to feminine hygiene products.<sup>133</sup> It held that a failure to regularly provide prisoners with toilet articles, including sanitary napkins for female prisoners, is a “denial of personal hygiene and sanitary living conditions,” violating the Eighth Amendment’s required conditions of confinement.<sup>134</sup> However, a recent decision in the Western District of Michigan indicates that courts may be hesitant to find that these deprivations rise to the level of constitutional violations.<sup>135</sup> In 2014, the ACLU of Michigan filed a class action lawsuit on behalf of inmates in one Michigan county jail alleging a variety of Eighth Amendment claims over unsanitary living conditions.<sup>136</sup> The suit alleged, among other things, that female inmates were forced to shower and use the toilet in front of male guards and were denied exercise and access to menstrual hygiene products, underwear, and toilet paper.<sup>137</sup> Though the court refused to dismiss several of these claims, it held that short-term deprivation of pads and tampons “lead to the conclusion that Plaintiffs have not stated a plausible Eighth Amendment violation.”<sup>138</sup> In reaching this conclusion, the court did not address “incidents where Defendants ignored or mocked Plaintiffs’ pleas for sanitary supplies, leaving them to go as long as two days without supplies and causing them to bleed into their clothes.”<sup>139</sup>

Because the courts offer very little guidance on the issue, policies on the provision of pads and tampons to inmates are left entirely to the discretion of corrections administrators and federal, state and local legislators. As discussed above, these policies frequently fall short of meeting women’s needs and often require women to burden heavy financial costs. For example, prior to this year, women in Arizona prisons were allotted twelve free sanitary pads per month.<sup>140</sup> A woman could put in a special request with an officer for twelve additional pads, which would be granted if the pads were considered necessary.<sup>141</sup> To be approved for unlimited pads, a woman would have to pay \$4.00 to see a medical professional which, on an

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132. See, e.g., *Atkins v. Cty. of Orange*, 372 F. Supp. 2d 377, 406 (S.D.N.Y. 2005), *aff’d on other grounds sub nom. Bellotto v. Cty. of Orange*, 248 F. App’x 232 (2d Cir. 2007).

133. *Id.*

134. *Id.*

135. *Semelbauer*, 2015 WL 9906265, at \*12.

136. *Id.*

137. *Id.*

138. *Id.* at \*9.

139. See Kate Walsh, Note, *Inadequate Access: Reforming Reproductive Health Care Policies for Women Incarcerated in New York State Correctional Facilities*, 50 COLUM. J.L. & SOC. PROBS. 45, 67 (2016).

140. See Kaila White, *12 pads a month, no tampons: Is that enough for Arizona’s incarcerated women?*, AZCENTRAL.COM (Feb. 7, 2018), <https://www.azcentral.com/story/news/politics/legislature/2018/02/07/arizona-female-inmates-get-12-menstrual-pads-month-bill-proposes-more-legislature/312152002/>.

141. *Id.*

average salary of \$0.15 per hour, amounts to 27 hours of work.<sup>142</sup> Women could also purchase products from commissary for a similar cost.<sup>143</sup> After widespread protests, Arizona's corrections department increased its quota to thirty-six pads per month, though the state legislature declined to consider a bill that would provide unlimited sanitary products.<sup>144</sup> The legislative hearings surrounding the failed bill revealed that it would cost the state just \$80,000 per year to provide women with unlimited feminine hygiene products.<sup>145</sup> For reference, the department requested over a billion dollars in appropriations for the 2019 fiscal year, meaning this cost would represent a mere 0.008% of the overall correctional budget.<sup>146</sup>

Similar to these recent changes in Arizona, progress has been made in this area with the emergence of national campaigns that seek to draw attention to this issue. In 2017, the federal BOP announced that free pads and tampons would be guaranteed in federal prisons.<sup>147</sup> Colorado, Maryland, Virginia, Louisiana, Kentucky, Connecticut, and New York City all passed laws in the last two years to require free menstrual hygiene products in state and local correctional institutions, and similar legislation is pending elsewhere.<sup>148</sup> However, these new laws and policies are piecemeal, and have not yet been widely adopted by state legislatures. Further, some laws and guidelines mandating free menstrual hygiene have failed to provide instruction as to how tampons and pads should be distributed, resulting in inconsistent availability across correctional facilities.<sup>149</sup> In September 2018, the Department of Justice Office of the Inspector General issued a report that found that despite BOP's official position, the "policy lack[s] specificity in

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142. See *id.*; Kaila White, *Arizona legislator kills bill that would have given female inmates free feminine products*, AZCENTRAL.COM (Feb. 12, 2018), <https://www.azcentral.com/story/news/politics/legislature/2018/02/12/mail-pads-tampons-arizona-rep-tj-shope-stall-bill-inmates-free-menstrual-products-rep-athena-salman/330496002/>.

143. White, *supra* note 141.

144. Amy Held, *Arizona Department Of Corrections Changes Sanitary Pad Policy Following Backlash*, NAT'L PUB. RADIO (Feb. 15, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/15/586134335/arizona-department-of-corrections-changes-sanitary-pad-policy-following-backlash>; White, *supra* note 141.

145. See White, *supra* note 139. Similarly, in 2017 the Colorado legislature passed the "tampon amendment," which gave incarcerated women free access to unlimited tampons at no charge. The amendment cost the state just \$40,000 out of a budget of nearly \$27 billion. See Jesse Paul, *Women in Colorado prisons will get free tampons under amendment that offers "a small piece of dignity,"* DENVER POST (May 3, 2017), <https://www.denverpost.com/2017/05/03/colorado-prisons-free-tampon-amendment/>.

146. Jimmy Jenkins, *Department of Corrections Seeks Billion Dollar Budget*, 91.5 KJZZ (Feb. 13, 2018), <https://kjzz.org/content/607110/departement-corrections-seeks-billion-dollar-budget>.

147. See O'Connor, *supra*, note 125.

148. *Id.*; Nila Bala, *Female prisoners deserve dignity*, BALT. SUN (June 18, 2018), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0619-prisoner-dignity-20180618-story.html>; Brian Witte, *No tampons in prison? #MeToo helps shine light on issue*, ASSOCIATED PRESS (March 27, 2018), <https://www.apnews.com/6a1805c4e8204e5b84a0c549ff9b7a31>. As of April, 2018, fifteen states had passed laws giving women access to free feminine hygiene products; see Derek Gilna, *New Policies for Federal and State Prisoners Guarantee Feminine Hygiene Products*, PRISON L. NEWS (April 2, 2018), <https://www.prisonlegalnews.org/news/2018/apr/2/new-policies-federal-and-state-prisoners-guarantee-feminine-hygiene-products/>.

149. EVALUATIONS & INSPECTIONS DIV. 18-05, U.S. DEP'T OF JUSTICE OFF. OF INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MANAGEMENT OF ITS FEMALE INMATE POPULATION 29 (2018).

how institutions should distribute the products.”<sup>150</sup> As a consequence, there remains wide variation in the practical availability of menstrual hygiene products across federal institutions.<sup>151</sup>

#### D. *The State of Incarcerated Women’s Health*

The above issues demonstrate some of the ways in which female prisoners have not received adequate healthcare under modern constitutional doctrine. Under presumably gender-neutral standards, courts have failed to find uniquely female medical needs to qualify as serious medical conditions deserving of Eighth Amendment protection. In the areas of abortion and shackling, courts have upheld policies that otherwise violate constitutional rights, as such rights are balanced against the institutional concerns of correctional facilities. Consequently, women’s health needs are almost entirely protected (or restricted) through federal, state, and local policies, which tend to be inconsistent, under-enforced, and leave significant discretion to prison officials. As Part III will demonstrate, however, recent legislative and public relations campaigns may indicate a shift towards more uniform and robust protections for the healthcare needs of incarcerated women.

### III. MOVING FORWARD: A SHIFT FROM “RIGHTS” TO “DIGNITY”

Despite the shortcomings described above, there is reason to be optimistic about recent efforts to protect the rights of women in custody. In recent months, emerging grassroots movements have successfully pushed for legislation that will do more to permanently and more comprehensively protect the reproductive health of female inmates.<sup>152</sup> Broadly speaking, support for these legislative campaigns is likely due in part to the increase in attention to the injustices of the American criminal justice system generally as well as to broader movements on women’s rights and equality. Though many believe that incarcerated women have been excluded from the #MeToo movement—particularly on issues relating to sexual violence and issues facing women of color<sup>153</sup>—others credit progress to the rise in the national women’s movement for bringing gender-specific

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150. *Id.*

151. *Id.*

152. See, e.g., *Dignity For Incarcerated Women*, #CUT50.ORG, <https://www.cut50.org/dignity> (last visited Oct. 1, 2018); Van Jones & Topeka K. Sam, Opinion, *The powerful movement for incarcerated women*, CNN (March 10, 2018), <https://www.cnn.com/2018/03/09/opinions/justice-for-female-prisoners-jones-sam-opinion/index.html>.

153. See, e.g., #MeToo (but Not You): Black women are being left out of the conversation on violence, says El Jones, CBC RADIO (Feb. 21, 2018), <http://www.cbc.ca/radio/thecurrent/the-current-for-february-21-2018-1.4543540/metoo-but-not-you-black-women-are-being-left-out-of-the-conversation-on-violence-says-el-jones-1.4543704> (“[w]hen we’re talking about #MeToo, we’re not talking about the state violence that women are experiencing in prisons”); Kim Brown, *Women In Prison Are Still Waiting For Their Me Too Moment*, HUFFPOST (April 11, 2018), [https://www.huffingtonpost.com/entry/opinion-brown-me-too-women-prisons\\_us\\_5ac28e1de4b00fa46f854abf](https://www.huffingtonpost.com/entry/opinion-brown-me-too-women-prisons_us_5ac28e1de4b00fa46f854abf) (discussing the prevalence of sexual abuse and retaliation for resisting such abuse in women’s prisons).

issues into the mainstream.<sup>154</sup>

This section examines these recent public relations campaigns and legislative efforts, focusing on the ways in which they are grounded in the language of “dignity” rather than “rights.” It argues that this rhetorical shift is significant in that it more comprehensively addresses the reproductive needs of incarcerated women. It then discusses the ways in which the proliferation of “dignity” legislation will not only provide for more robust and uniform treatment of female prisoners, but may shift constitutional jurisprudence by making it clear to courts that reproductive health issues constitute “serious medical needs” under the Eighth Amendment.

### A. *From “Rights” to “Dignity”*

Emerging campaigns for incarcerated women are unique in that they are seeking to reshape the traditional approach to reproductive justice. As opposed to calling for action using the language of rights (which, as the above discussion indicates, has been insufficient), activists and lawmakers are calling for change using language of dignity and empathy.<sup>155</sup> The focus is not on whether women are entitled to certain rights in the prison context, but about how all women—including those living behind bars—are entitled to a basic level of humanity and to live lives free from shame.<sup>156</sup> This rhetorical shift is significant, as it has the potential to get at issues that the courts have deemed to be outside the realm of constitutional protection, but are implicated by general principles of morality and justice.<sup>157</sup> While courts may not find that women are constitutionally entitled to free menstrual hygiene products, basic conceptions of dignity and humanity dictate otherwise. Dignity-based legislation also mandates that pregnant women are kept out of solitary confinement.<sup>158</sup> Additionally, proposed legislation guided by dignity has

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154. See, e.g., Witte, *supra* note 147, (“Amy Fettig, deputy director for the American Civil Liberties Union’s National Prison Project, says the issue has emerged in the past year as part of a larger conversation about women in prison that simply wasn’t happening five to 10 years ago.”).

155. See, e.g., Cory Booker & Elizabeth Warren, Opinion, *Booker and Warren: Women in Prison Deserve Dignity*, CNN (Sept. 5, 2017), <https://www.cnn.com/2017/09/05/opinions/female-prisoners-dignity-act-booker-warren-opinion/index.html> (“By treating incarcerated women with dignity and giving them basic support, we not only improve public safety and reduce recidivism, we live out our values, making our criminal justice system more just.”); Press Release, Senators Booker, Warren, Durbin, Harris Introduce Landmark Bill to Reform the Way Women Are Treated Behind Bars (July 11, 2017), <https://www.warren.senate.gov/newsroom/press-releases/senators-booker-warren-durbin-harris-introduce-landmark-bill-to-reform-the-way-women-are-treated-behind-bars> (quoting Senator Elizabeth Warren, “The Dignity for Women Act starts to change our country’s approach to helping women in prison. It’s about living up to our nation’s commitment that every person is treated with dignity and has a real opportunity to build a future.”).

156. This focus on dignity echoes broader human rights principles that have shaped criminal justice policy, sentencing, and prison theory elsewhere in the world, particularly in Northern Europe. For example, Article 1 of the German constitution holds that “human dignity shall be inviolable.” This fundamental principle guides prison policy in the country and reflects the idea that all people, including those convicted of crimes, are entitled to a basic level of humanity. Grundgesetz [Constitution], May 23, 1949, art. 1 (Ger.).

157. Van Jones & Topeka Sam, *supra* note 151.

158. See, e.g., Dignity for Incarcerated Women Act, *supra* note 115.

reached beyond what courts are willing to do by prohibiting the shackling of pregnant women without exception.<sup>159</sup>

The primary organization behind this movement is #cut50, a criminal-justice advocacy group, which in 2017 established “The Dignity Campaign” as a way “to restore dignity to tens of thousands of incarcerated women.”<sup>160</sup> The organization, led by formerly incarcerated women, is focused on bringing national attention to a range of issues facing women in custody and passing legislation (referred to as “Dignity Acts”) at the federal, state, and local levels.<sup>161</sup> It is focused not just on health issues, but more holistically on the broader issues facing incarcerated women, including the challenges of mothering in prison, cross-gender strip searching, and family visitation.<sup>162</sup> To engage lawmakers and the public in these discussions of empathy and dignity, the Campaign uses social media to spotlight the stories of formerly incarcerated women. It has also featured famous women—primarily women of color—to spotlight the unique issues facing female inmates. In one viral advocacy video, Alicia Keys is seen holding her young son, wondering out loud what it would be like to be pregnant in prison, to be forced to choose between purchasing tampons or phoning home, or to give birth while chained to a bed. She concludes by asking, “What if we decide as a society that this is not okay?”<sup>163</sup>

### B. *The Benefits of “Dignity” Legislation*

This new dignity-based movement has specifically focused on passing laws at the state and federal level and has had some early successes—particularly when it comes to state laws prohibiting shackling and legislation mandating the provision of menstrual hygiene products. Dignity Acts have been introduced by legislatures across the United States, from California to Maryland to Louisiana and, significantly, these bills have had largely bipartisan support.<sup>164</sup> For example, in early 2018, Kentucky’s Dignity Act passed unanimously in its state house of representatives.<sup>165</sup> This state level legislation is extremely significant to overall reform, as

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159. *Id.*

160. *Dignity For Incarcerated Women*, *supra* note 152.

161. *Id.*

162. *Id.*

163. *Id.*

164. *See, e.g.*, Sandra Gomez-Aceves, *Bill Would Provide Fair Treatment For Incarcerated Women, Advocates Say*, HARTFORD COURANT (March 28, 2018, 4:50 PM), <http://www.courant.com/politics/hc-pol-fair-treatment-incarcerated-women-20180328-story.html>; Jouvenal, *supra* note 87. #Cut50, the campaign leading the push for state and federal legislation, works with a range of partners and collaborators to deliver its messages. Under the “partners” section of its website, it lists collaborators ranging from the ACLU and the Sentencing Project to Koch Industries and Gingrich Productions. *See Partners*, #CUT50.ORG, <https://www.cut50.org/partners> (last visited Oct. 5, 2018).

165. *Kentucky Becomes First State to Pass “Dignity” Law for Incarcerated Women*, JUST. ACTION NETWORK, <http://www.justiceactionnetwork.org/kentucky-becomes-first-state-pass-dignity-law-incarcerated-women/> (last visited Feb. 1, 2019).

ninety percent of incarcerated people are housed at state or local facilities.<sup>166</sup>

There has also been some progress at the federal level. In July of 2017, a group of Democratic senators introduced the “Dignity for Incarcerated Women Act of 2017” (“Dignity Act”).<sup>167</sup> The bill is far-reaching, and not only addresses the unique medical needs of incarcerated women, but seeks to improve more generally “the treatment of Federal prisoners who are primary caretaker parents.”<sup>168</sup> It would prohibit the placement of pregnant or postpartum inmates into solitary confinement, prohibit shackling of pregnant inmates (without exception), mandate the availability of sanitary products free of charge in “a quantity that is appropriate to the healthcare needs of each prisoner,” and require that all women have access to a gynecologist.<sup>169</sup> Other bill provisions include increasing visitation times for primary caretaker mothers, providing parenting and substance abuse courses, and requiring the use of sex-appropriate correctional officers for strip searches.<sup>170</sup> The bill also creates a pilot program for primary caretakers to be allowed overnight visits from children.<sup>171</sup> Though this legislation applies only to federal prisoners, and therefore only approximately ten percent of incarcerated women would benefit directly from the legislation, its introduction signifies an important first step in bringing mainstream attention to issues that have largely been excluded from the discussion of prison reform. The bill has also acted as a model for new state legislation.<sup>172</sup>

These legislative efforts have numerous benefits. As opposed to the unclear judicial guidance and piecemeal policies that currently govern medical care for incarcerated women, official state and federal laws may ensure more permanent, uniform treatment for incarcerated women.<sup>173</sup> While administrative policies frequently apply only to those individual prisons and jails which choose adopt them, state laws would apply to all correctional facilities in a large geographic area.<sup>174</sup> This would not only provide for more consistent treatment, but would make it easier for women to know their own rights. Further, unlike many prison policies, which may be unclear or difficult to access, state and federal laws are easily available to both incarcerated women and to the general public.<sup>175</sup> This would help to provide for transparency and accountability, which have been largely absent from

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166. Wagner & Rabuy, *supra* note 1.

167. Dignity for Incarcerated Women Act, *supra* note 115.

168. *Id.*

169. *Id.* § 2(d), (j).

170. *Id.* § 2 (b)-(c), (e), (k).

171. *Id.* § 3.

172. See Chandra Bozelko, Opinion, *Incarcerated Women Need the Dignity of Freedom More than Free Tampons*, NBC NEWS (Mar. 8, 2018, 4:44 AM), <https://www.nbcnews.com/think/opinion/incarcerated-women-need-dignity-freedom-more-free-tampons-ncna854631>.

173. INT’L HUM. RTS. CLINIC, UNIV. OF CHI. L. SCH., *supra* note 112, at 13–14 (2013).

174. *Id.*

175. *Id.*

institutional policies.<sup>176</sup>

The proliferation of federal and state laws that address certain women's health practices (such as shackling, providing free menstrual hygiene products, or requiring a women to pay for the costs of an abortion in all circumstances) may also have the added benefit of bolstering women's constitutional rights by making it clear to courts that reproductive health issues constitute "serious medical needs" for purposes of the Eighth Amendment.<sup>177</sup> In its *Estelle* analysis, the Supreme Court emphasized that courts must look to "evolving standards of decency" when determining whether state action constitutes cruel and unusual punishment in violation of the Eighth Amendment. As more state legislatures adopt laws protecting women's health needs in prison, it will become more difficult for prison administrators to argue that such needs are not objectively serious under contemporary standards. Further, as the number of laws addressing these issues increases, it will become more difficult for courts to find that prison officials are not "subjectively aware" of a serious women's health issue. This would make it easier for women to bring cases challenging prison policies, practices, and cases of individual wrongdoing by prison officials.

Similarly, such policies may also help to hold prison officials liable for constitutional violations by removing the shield of qualified immunity.<sup>178</sup> Under the doctrine of qualified immunity, prison officials cannot be held liable for damages on constitutional claims unless their actions violate a "clearly established" statutory or constitutional right of which they were aware.<sup>179</sup> When looking to whether a right is clearly established, courts look to established case law as well as federal, state, and local law and policy. For example, in its discussion of whether shackling a pregnant woman constituted violation of a "clearly established constitutional right to be free from restraints during labor" for purposes of qualified immunity, the Eighth Circuit looked to—among other factors, including other case law—legislation and policies on the practice.<sup>180</sup> Therefore, the more state, federal, and local prison administrators mandate the provision of adequate healthcare, and prohibit inhumane policies that allow for shackling or block abortion access, the easier it will be to hold prison officials accountable for constitutional violations.

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176. Roth, *supra* note 78, at 82–83.

177. See Marquis, *supra* note 25, at 203, 228 ("State and federal laws requiring adequate reproductive healthcare for women prisoners would make it clear to reviewing courts that women's reproductive health needs constitute serious medical needs."). See also Rachel Falek, *Birth Behind Bars: Shackling Women During Labor*, AWOL MAGAZINE (Jan. 25, 2017), <https://awolau.org/1795/print/politics/birth-behind-bars-shackling-women-during-labor>.

178. A comprehensive discussion of qualified immunity is outside the scope of this Note. For an explanation and critical analysis of the doctrine of qualified immunity, see Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).

179. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

180. See *Nelson*, 583 F.3d at 539 (Riley, J., dissenting) (finding that the individual officer responsible for the shackling should be granted qualified immunity because Nelson's right to not be restrained during labor "was not clearly established, and a reasonable officer . . . would not have understood it was a constitutional violation . . .").

There has been some criticism of this legislative-focused agenda, however. Some question whether this movement merely obscures the broader issue regarding skyrocketing incarceration of women, particularly women of color, in this country.<sup>181</sup> As one former inmate stated, “as activists and lawmakers have discussed tampons, shackles and phone call rates, we’ve downplayed one of the most important facts about women in prison: being incarcerated is an affront to people’s dignity, period.”<sup>182</sup> Instead, she stated, the focus should be on whether most of these women should be incarcerated at all, and how we can address the broader problem of mass incarceration. Though there has been some success in decarceration<sup>183</sup> nationwide, progress been almost exclusive to men.<sup>184</sup> According to one recent study by the Prison Policy Initiative, the number of men in state prisons fell by five percent between 2009 and 2015, while the number of women fell by just 0.29% during that same period.<sup>185</sup> Further, fewer state diversion programs are available to women, meaning female first-time offenders may serve prison sentences in instances where male offenders would not.<sup>186</sup> Thus, while this movement may help to improve the experience of incarceration of those housed in our country’s prisons and jails, it does little to address the root causes of mass incarceration more broadly.

#### CONCLUSION

This Note has demonstrated the ways in which courts have fallen short of protecting the health needs of incarcerated women. Examining a range of reproductive health issues, it is clear that the constitutional jurisprudence governing incarcerated individuals does little to account for the unique medical needs of women in custody. Consequently, women’s health needs are addressed almost entirely through federal, state, and local policies, which tend to be inconsistent, under-enforced, and leave significant discretion to prison officials.

However, there is some reason for optimism: with the recent emergence of dignity-based campaigns that focus on holistically improving the experiences of incarcerated women, progress has been made and legislation is being introduced and passed at the state and federal level that does more to protect women’s health. In addition to providing more protection for incarcerated women’s reproductive health needs, this legislation may also have the effect of bolstering constitutional protections by making it clear that woman’s health needs are deserving of Eighth

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181. See Wendy Sawyer, *The Gender Divide: Tracking Women’s State Prison Growth*, PRISON POL’Y INITIATIVE (Jan. 9, 2008), [https://www.prisonpolicy.org/reports/women\\_overtime.html](https://www.prisonpolicy.org/reports/women_overtime.html).

182. Bozelko, *supra* note 171.

183. “Decarceration” is the “[g]overnment policy of reducing either the number of persons imprisoned or the rate of imprisonment in a given jurisdiction.” *Decarceration*, CORNELL LEGAL INFO. INST., <https://www.law.cornell.edu/wex/decarceration> (last visited Nov. 14, 2018).

184. Bozelko, *supra* note 171.

185. Sawyer, *supra* note 180.

186. *Id.*



Amendment protection. Despite valid criticism that this legislative movement does little to address the underlying issues with mass incarceration in America, this Note argues that this shift is positive, not just in changing the legal landscape, but in bringing widespread attention to issues that have long been excluded from public discourse.