

REMARKS ON: “ONE YEAR LATER: THE CHANGED LANDSCAPE OF REPRODUCTIVE RIGHTS ON THE ANNIVERSARY OF *DOBBS*”

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REPRODUCTIVE RIGHTS FOR INCARCERATED POPULATIONS PRE-DOBBS

Healthcare for incarcerated individuals has always been less than adequate. I should also note that despite being the fastest growing segment of our prison population, our carceral settings were not/are not designed for women. Yet, pregnancy has always been an issue for both jails and prisons. Additionally, when it comes to having choices and/or autonomy when it comes to their reproductive health and decisions, our incarcerated population very often has very few—if any.

Each year it is estimated, because there is no coordinated or consistent data collected, that about 58,000 pregnant individuals are processed into jails, detention facilities, and prisons every year. These individuals require specialized healthcare that is often not provided or is inconsistently provided inside. Just by virtue of their incarceration, the pregnancy often presents high risk and increased likelihood of miscarriage.

We know that before *Dobbs*, courts recognized that incarcerated individuals had the same constitutional right to abortion as anyone else. Courts consistently recognized that the right to abortion survived incarceration. However, we have found that many incarcerated individuals did not believe that they had the right or ability to seek an abortion. This was driven by misinformation, lack of information, and long-standing beliefs that they were property of their state.

People typically are processed into their local jails first, so pregnancy will most likely be confirmed at this level. Pregnant individuals entering prison are typically further along in their pregnancies as they have transferred from a local jail. Some states and local jurisdictions now require pregnancy tests upon admission; however, the results are rarely and the options available are virtually never

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discussed with the individual. There is a lack of written, comprehensive, and supportive policies across the board which lends itself to adverse maternal health outcomes for this population. They are less likely to receive adequate prenatal care, are forced to give birth without any support and sadly, in some states, in shackles, and then are forced to have their babies taken away immediately after birth.

Should an individual be informed of a positive pregnancy test while incarcerated, they are denied any form of options counseling or long-term planning.

The *Dobbs* decision will have far reaching and potentially dire implications for the estimated 58,000 pregnant people who enter our jails or prisons each year.

CHALLENGES GOING FORWARD

Dobbs has weaponized pregnancy and abortion against our pregnant incarcerated population.

The *Dobbs* decision further complicated and restricted reproductive healthcare for incarcerated pregnant people, and we are genuinely worried about the impending harms to this already marginalized population. In short, it makes an already bad situation so much worse.

As a result of *Dobbs*, pregnant individuals who are incarcerated in states where abortion is now illegal or severely restricted are going to suffer disproportionately. They do not have the means or access to travel and a correctional system is not going to transport someone out of state for a procedure that is illegal in their state.

We are now forcing someone to carry a pregnancy to term which, while incarcerated, could result in incalculable trauma to the mother, in addition to compromising the care of the child. Keep in mind that 95% of those we incarcerate come home, so forcing anyone to carry a pregnancy to full term can make it harder for them to escape poverty post-release.

Dobbs then violates the basic principles of reproductive justice. Incarcerated individuals are stripped of the ability and right to make the determination of if, when, and how they choose to have a family.

The incarceration of individuals within the Bureau of Prisons is equally of concern. There are only 22 facilities for women out of approximately 122 federal correctional institutions across the country. This means that women are going to be placed in institutions that are not within their home state. And of this number, 9 are in states that have full or partial abortion bans.

These individuals are of course subject to federal law, not state law. But when they require medical care, they are subject to state law, and state law will usurp federal law. So, if you have a pregnant individual from a pro-choice state

incarcerated in a state that does not allow abortion, they are in essence screwed—not a technical or legal term, but an advocate’s term.

Regardless of where we incarcerate someone, prison is the punishment—when we force individuals to carry unwanted or unsafe pregnancies against their will, we are in essence adding an addition onto their punishment. To further cause trauma and expand the weaponization of *Dobbs*, when individuals are denied the ability to have an abortion, they are further penalized by being denied the ability to parent because the infant is taken away almost immediately after birth. And, if the parent does not have continuous physical custody of the child for fifteen consecutive months, in the State of Maryland, the state can seek to terminate parental rights.

Punishment upon punishment, indignity upon indignity, trauma upon trauma.

But let us look larger than just those we have incarcerated in our jails and prisons. On any given day, there are millions of women on probation, parole, and pre-trial release who are subject to all kinds of supervision and control. From GPS-equipped ankle monitors to two-way audio tracking, this surveillance has not just undermined, it has outright eliminated privacy, reproductive freedom, and bodily autonomy.

Women under court supervision such as parole, probation, specialty courts, or pre-trial release are not allowed to leave the state. It is generally the first line of the agreement they sign to remain in the community, “shall not leave the state.”

As states continue to criminalize abortion and go as far as to offer bounties to people who identify those who help women get abortions, the digital trail is one that is easy to use in criminal prosecutions.

Women in the criminal legal system, especially poor women, rural women, and women of color, have long been ignored and blamed for their own predicaments. As a result, our country’s carceral state continues to explode, and this allows for the perfect detection and prosecution of illegal abortions and other related crimes.

ACTION ITEMS

Reproductive liberty is not something that ends at the prison gate. People do not lose their constitutional right to reproductive autonomy when they are incarcerated.

The *Dobbs* decision only served to weaken the below-par system of healthcare in our prisons and jails. As a result, we are undoubtedly going to see spikes in miscarriages, deaths due to complications, infertility, and a host of societal impacts.

Additionally, the growing effort to criminalize abortion and pregnancy loss will again disproportionately impact Black and Brown communities and those

who lack the financial means to access care across state lines. In states where we have criminalized poverty, individuals will now find themselves without any recourse for getting even the most basic reproductive healthcare.

And while people on the outside can—if they have the means—travel to a non-hostile state for abortion care, those in jails and prisons are held captive to the policies of their states. We believe that prisons and jails must expand access to reproductive healthcare in both policy and practice.

This includes:

- States should focus on diversion and decarceration strategies as many states did during COVID. States can develop off-ramps that will divert from the front end as well as expand the early release of pregnant people from jail and prison. As they look to beat back “soft on crime” rhetoric, recognizing the existing, serious risks to parental and infant health and well-being in prisons that lead to poor outcomes.
- Implement the Model Pregnancy Manual that was developed by Reproductive Justice Inside which would standardize reproductive healthcare and mandates oversight and accountability to ensure the provision of best practices for reproductive health services. The manual can provide guidance to correctional facilities regarding the best practices, written policies, and regulations regarding the healthcare of pregnant incarcerated individuals and detainees in a correctional setting. While the guidance currently is specific to comply with the laws and regulations of the State of Maryland, it can also serve as a model policy for other correctional institutions, systems, and states.
- Remove financial barriers to needed services for incarcerated people. State and local authorities should cover the cost of abortions and contraception for incarcerated people. When this is not possible, Reproductive Justice Inside developed a model where connections were facilitated with appropriate abortion funds and outside medical providers.
- Create and support continuity of care programs that begin prior to release. These programs connect pregnant people with needed services upon release from jail or prison in the jurisdiction they will return to.
- Demand data collection. It is imperative that states collect more data, disaggregated by race, ethnicity, gender, identity, and other individual characteristics, on pregnancy prevalence, outcomes, policies, practices, and individual experiences.

Finally, engaging with, listening to the voices of, and learning from the lived experiences of women and those we advocate for should act as an immediate call to action to end our reliance on the carceral state. The impending and potentially disastrous circumstances that face pregnant people caught up in the criminal legal system must also serve as tacit marching orders for all of us to support and vote for leaders who will pass laws that will ensure reproductive freedom for us all.