

## FRUIT OF THE POISONOUS TREE: POTENTIAL EIGHTH AMENDMENT PROTECTIONS FOR INMATES SUBJECT TO SEXUAL VICTIMIZATION IN THE POST-*DOBBS* WORLD

For years, federal courts have recognized the sexual victimization of inmates as cruel and unusual punishment under the Eighth Amendment.<sup>1</sup> But it is unclear what relief inmates who experience that victimization have. These questions are particularly alarming in the post-*Dobbs* world in which many sexually victimized inmates are held in states that prohibit abortions in the early weeks of pregnancy or prohibit abortions entirely with no exceptions for rape or incest.<sup>2</sup>

This Note argues that forced pregnancy resulting from unconstitutional rape constitutes a violation of an inmates' Eighth Amendment rights that is independent from, but corollary to, the excessive use of force inherent in the sexual assault of inmates. Previous Eighth Amendment challenges to abortion restrictions based on deliberate indifference to serious medical need have had some success in practice, including in the Third Circuit,<sup>3</sup> while other circuits maintain that abortion does not constitute a serious medical need.<sup>4</sup> While these challenges should not be conceded, future Eighth Amendment challenges to forced pregnancy should avoid this narrower box and instead consider claims of deliberate indifference to conditions of confinement or remedy-based claims of excessive force—claims that will enable courts to recognize the full impacts of forced pregnancy. Courts looking to justify the forced pregnancy of rape victims in prison would need to find some legitimate penological interest in doing so.<sup>5</sup>

This Note proceeds in five parts. Part I reviews the prevalence of sexual violence in U.S. correctional institutions and previous attempts to address that violence through the Prison Rape Elimination Act. Part II examines the impact of forced pregnancy, or the inability to access a wanted abortion, and

---

1. Farmer v. Brennan, 511 U.S. 825, 839 (1994).

2. See generally *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state> [<https://perma.cc/4FX4-DM9F>] (surveying abortion-related laws in all fifty states).

3. See *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987).

4. *Roe v. Crawford*, 514 F.3d 789, 801 (8th Cir. 2008); *Victoria W. v. Larpenter*, 205 F. Supp. 2d 580, 600–01 (E.D. La. 2002), *aff'd*, 369 F.3d 475 (5th Cir. 2004).

5. See *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (“Today the Eighth Amendment prohibits punishments which, although not physically barbarous, ‘involve the unnecessary and wanton infliction of pain’ or are grossly disproportionate to the severity of the crime. Among ‘unnecessary and wanton’ inflictions of pain are those that are ‘totally without penological justification.’” (citations omitted)).

the uniquely devastating impacts of forced pregnancy behind bars. Part III examines the Supreme Court's Eighth Amendment jurisprudence and its applications to incidents of sexual victimization in prison. Part IV posits that so long as sexual assault of inmates is recognized as an Eighth Amendment violation, it follows that pregnancy resulting from that violation could itself constitute a continued or additional violation that creates a right to abortion care. It proposes potential routes for relief through Eighth Amendment claims based on (1) continued challenges based on deliberate indifference to serious medical need, (2) deliberate indifference to conditions of confinement, and/or (3) excessive force (using the original force used in the sexual victimization). Part V addresses the implications of the theory posited in Part IV; it then, finally, addresses and responds to potential objections and limitations.

#### I. THE ENDEMIC OF SEXUAL VIOLENCE IN U.S. CORRECTIONAL FACILITIES

Sexual violence is a public health problem that plagues every sect of the American public—and those being held in correctional facilities are no exception.<sup>6</sup> Sexual violence is defined by the CDC as a “sexual act that is committed or attempted by another person without freely given consent of the victim or against someone who is unable to consent or refuse.”<sup>7</sup> This definition includes a broad range of nonconsensual sexual activity including unwanted touching, harassment, child sexual abuse, trafficking, and rape, among other forms of violence.<sup>8</sup> Experts in the field recognize that sexual violence is not motivated by sex or sexual desires, but rather is “motivated by a desire for power and control, working to uphold systems of oppression.”<sup>9</sup> “[T]o say that sex and rape are unrelated, however, is to both ignore the deep scars across the sexual selves of masses of people and avoid the dismantling of symbiotic relationship between a sex-negative culture and a culture that supports sex in the absence of consent.”<sup>10</sup> Sexual violence,

---

6. Nancy Wolff, Cynthia L. Blitz, Jing Shi, Ronet Bachman & Jane A. Siegel, *Sexual Violence Inside Prisons: Rates of Victimization*, 83 J. URB. HEALTH 835, 835. The Department of Justice estimates that in 2021, 324,500 people were the victim of rape or sexual assault. ALEXANDRA THOMPSON & SUSANNAH N. TAPP, U.S. DEP'T OF JUST., CRIMINAL VICTIMIZATION, 2021, at 2 (2022), <https://bjs.ojp.gov/content/pub/pdf/cv21.pdf> [<https://perma.cc/Z6TB-3HP4>].

7. KATHLEEN C. BASILE, SHARON G. SMITH, MATTHEW J. BREIDING, MICHELE C. BLACK & RESHMA MAHENDRA, CTRS. FOR DISEASE CONTROL & PREVENTION, SEXUAL VIOLENCE SURVEILLANCE: UNIFORM DEFINITIONS AND RECOMMENDED DATA ELEMENTS 11 (2014), [https://www.cdc.gov/violenceprevention/pdf/sv\\_surveillance\\_definitions-2009-a.pdf](https://www.cdc.gov/violenceprevention/pdf/sv_surveillance_definitions-2009-a.pdf) [<https://perma.cc/P479-Y246>].

8. *See id.* at 11–16.

9. JACLYN FRIEDMAN & JESSICA VALENTI, YES MEANS YES!: VISIONS OF FEMALE SEXUAL POWER & A WORLD WITHOUT RAPE 109 (2d ed. 2019).

10. *Id.*

then, must be understood as an exertion of power and control, fueled in part by rape-permissive cultures.<sup>11</sup>

*A. Sexual Violence in U.S. Correctional Facilities: The Scope of the Problem*<sup>12</sup>

*“Who was I going to tell? . . . The same people that were oppressing me? The same people that had the keys to my cell?”*<sup>13</sup>

Measuring the full extent of sexual violence in United States prisons is not without difficulty. Even outside of correctional facilities, the crime is severely underreported. Crimes of “rape and sexual assault” are the least reported of any crime examined by the Bureau of Justice Statistics criminal victimization survey.<sup>14</sup> Just 21.5% of rapes and sexual assaults are reported, meaning that four of five such crimes go unreported.<sup>15</sup> The most common reasons survivors<sup>16</sup> do not report incidents of sexual violence include: the belief that the assault is a personal matter, fear of re-victimization or reprisal, and a desire to avoid consequences for the perpetrator.<sup>17</sup> Other reasons survivors do not report concern police negligence and cover ups—survivors fear improper investigations, destruction of evidence, and

11. *See id.*

12. Sexual violence is just one of the many problems that plague U.S. correctional facilities and is often compounded with other forms of oppression and abuse committed by prison officials. This Note does not address serious and notable concerns about correctional institutions as they exist more broadly, nor does it detail the potential for prison abolition. For further reading on prison abolition, see generally Dorothy E. Roberts, *The Supreme Court 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); and Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019).

13. Val Kiebal, *‘It’s an Emergency’: Tens of Thousands of Incarcerated People Are Sexually Assaulted Each Year*, APPEAL (Apr. 18, 2022), <https://theappeal.org/cynthia-alvarado-sexual-assault-in-prisons> [<https://perma.cc/8JFH-6NUK>]. Cynthia Alvarado, the speaker of the cited quote, was raped by a correctional officer for the City of Philadelphia at least once during her twelve years in prison. *Id.* Her conviction was later overturned on writ of habeas corpus based on a due process violation during her trial. *Id.*

14. THOMPSON & TAPP, *supra* note 6, at 5.

15. *Id.* The second least-reported crime is “other theft” at 26.1%, and the third least-reported crime is trespassing at 39.4%. *Id.*

16. This Note is intentional about its use of the term “survivor” where practicable to refer to people who have experienced sexual victimization. While some individuals prefer the term “victim,” neither term can “perfectly encompass[] the experiences” of individuals who experience sexual victimization. Kathryn Augustine, *The Difference Between ‘Victim’ and ‘Survivor’*, DAILY NW. (May 13, 2019), <https://dailynorthwestern.com/2019/05/13/lateststories/augustine-the-difference-between-victim-and-survivor> [<https://perma.cc/HE3J-L5BX>]. Many services-based organizations prioritize the use of the word “survivor” because it centers a sense of empowerment. *See, e.g., The Language We Use*, WOMEN AGAINST ABUSE, <https://www.womenagainstabuse.org/education-resources/the-language-we-use> [<https://perma.cc/E78G-VBRE>].

17. CALLIE MARIE RENNISON, U.S. DEP’T OF JUST., RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000, at 3 (2002), <https://bjs.ojp.gov/content/pub/pdf/rsarp00.pdf> [<https://perma.cc/97WW-3RXC>].

persuasions to not bring charges against the perpetrator, among others.<sup>18</sup> And those fears are not unfounded.<sup>19</sup> Indeed, bringing crimes of sexual violence to light in public forums seems to “provoke hostility . . . even in the most straightforward cases.”<sup>20</sup>

In correctional facilities, isolation, distrust, and abuse at the hands of prison officials exacerbate underreporting.<sup>21</sup> In addition to other survivors’ concerns about reporting, inmates cite additional fears of being put into protective custody or of being labeled a “snitch.”<sup>22</sup> The longer an individual serves in a correctional facility, the less likely they are to report an incident of sexual violence.<sup>23</sup>

Inmates’ willingness to report a victimization depends in part on who committed the assault. Inmates are the party most likely to report their own sexual victimization when they are assaulted by another inmate.<sup>24</sup> However, when an inmate is sexually victimized by a prison official, the party who reports the crime is only survivors themselves 25.8% of the time.<sup>25</sup> Advocates who work with survivors in prison report that even when inmates do report sexual violence, incarcerated survivors are “never really alone” which can make it difficult to provide effective and confidential services.<sup>26</sup> These statistics suggest that inmates experience unique cultural and systemic pressures to refrain from reporting their experiences of sexual violence.

The context of correctional institutions also exacerbates victim-blaming rhetoric that centers accusations on the survivor’s behavior rather than that of the perpetrator.<sup>27</sup> As a group, inmates are often conceptualized as morally

18. *Id.*

19. See KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* 236 (2017).

20. *Id.*

21. See Shannon K. Fowler, Ashley G. Blackburn, James W. Marquart & Janet L. Mullings, *Would They Officially Report an In-Prison Sexual Assault? An Examination of Inmate Perceptions*, 90 PRISON J. 220, 224–26 (2010). “For every year served, there is a 2.7% decrease in the likelihood that an inmate would self-report [their] own victimization.” *Id.* at 232.

22. *Id.* at 224–25.

23. *Id.* at 232. This is likely because the longer an individual spends in a correctional facility, the more time they spend observing this “prison culture and deprivation[.]” *Id.*

24. EMILY D. BUEHLER, U.S. DEP’T OF JUST., *SUBSTANTIATED INCIDENTS OF SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2016–2018*, at 5 (2023), <https://bjs.ojp.gov/document/sisvraca1618.pdf> [<https://perma.cc/M5PD-HDHS>].

25. *Id.* at 10. Other sources of reports of inmates’ sexual victimization include other correctional officers (24.3%), another nonvictim inmate (19.8%), and investigation and monitoring protocols (19.2%). *Id.*

26. *Prison Rape Elimination Act (PREA) and Supporting Incarcerated Survivors in Maryland*, MCASA ON GO, at 17:23 (Apr. 20, 2023), <https://open.spotify.com/episode/5x68yRdxo0HOuZBnsQBevN?si=61336e2f46644131> [<https://perma.cc/FS6G-6LP6>].

27. See MANNE, *supra* note 19, at 227–28 (“As soon as the focus shifts from what was done to someone, to ways in which her (perhaps genuine) imprudence or even morally problematic behavior contributed causally to the wrongs done to her, her role as a victim in the narrative is liable to be

bad and, in some cases, less than human.<sup>28</sup> Dehumanization is furthered by media and popular culture renditions that make prison sexual violence into a joke.<sup>29</sup> The normalization and minimization of sexual violence in correctional facilities “send[s] the message that . . . inmates ‘ha[ve] it coming,’” which only furthers the tendency to place the blame on the shoulders of the survivor.<sup>30</sup> Sexual violence against incarcerated people is, at best, tolerated—and at worst, enabled.

Despite the difficulty of estimating rates of sexual violence in U.S. correctional facilities, governmental and nonprofit organizations make regular attempts to quantify inmates’ experiences. Even in the midst of severe underreporting, inmates made 27,826 allegations of sexual victimization in 2018 alone.<sup>31</sup>

In January 2023, the Bureau of Justice Statistics released its in-depth report on sexual victimization in U.S. correctional facilities from 2016 to 2018.<sup>32</sup> The report showed that there were 2,496 victims of substantiated incidents of sexual victimizations committed by prison staff.<sup>33</sup> Of the instances perpetrated by prison staff, 1,705 constituted “staff sexual misconduct,” which includes acts of a sexual nature including physical touching.<sup>34</sup> Of those 1,705 individuals who experienced staff sexual misconduct, victimized inmates were 71.3% men, 28.5% women (equating to approximately 496 women), and 0.2% intersex or transgender inmates

---

compromised. It may then be difficult to see her as a victim whatsoever.”). One 2018 study demonstrated that when members of the public were asked to recommend reporting or punishment of a sex crime, participants relied on numerous legally insignificant factors in making such determinations. Susan Schwarz, Matthew A. Baum & Dara Kay Cohen, (*Sex Crime and Punishment in the #MeToo Era: How the Public Views Rape*, 44 POL. BEHAV. 75, 99–102 (2020)). For example, when study participants were told that a victim had multiple sexual partners, the participants were less likely to recommend reporting the crime and less likely to recommend a severe punishment. *Id.* at 90–91.

28. See FRIEDMAN & VALENTI, *supra* note 9, at 22. (“Prison populations are especially at risk, and especially invisible . . .”).

29. See *Sexual Violence in Detention*, MD. COAL. AGAINST SEXUAL ASSAULT (Apr. 2020), [https://mcasa.org/assets/files/Sexual\\_Violence\\_in\\_Detention\\_Fact\\_Sheet.pdf](https://mcasa.org/assets/files/Sexual_Violence_in_Detention_Fact_Sheet.pdf) [<https://perma.cc/SF58-ES56>].

30. *Id.*

31. EMILY D. BUEHLER, U.S. DEP’T OF JUST., SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2016–2018, at 1 (2021), <https://bjs.ojp.gov/content/pub/pdf/svraca1618.pdf> [<https://perma.cc/5ZRY-XEMB>].

32. BUEHLER, *supra* note 24, at 1. This report is mandated by the Prison Rape Elimination Act. See *infra* Part I.B.

33. BUEHLER, *supra* note 24, at 12. According to the report, substantiated incidents of sexual violence are those allegations that were “investigated and determined to have occurred, based on a preponderance of the evidence (per 28 C.F.R. Part 115.72).” *Id.* at 2.

34. *Id.* at 2, 12. Reports were sorted between two categories: (1) staff sexual misconduct which “includes any consensual or nonconsensual behavior or act of a sexual nature directed toward an inmate by staff,” and (2) staff sexual harassment which “includes repeated verbal comments or gestures of a sexual nature.” *Id.* at 2.

(equating to approximately three transgender or intersex inmates).<sup>35</sup> All the while, women made up just 7.6% of the prison population in 2018.<sup>36</sup>

In addition to sexual victimizations perpetrated by prison staff, there were 2,886 victims of substantiated incidents of sexual victimization by other inmates.<sup>37</sup> Of those victims, 1,101 incidents involved “nonconsensual sexual acts,” which include penetration.<sup>38</sup> Out of those victims, 72.6% were men, 24.8% were women (equating to approximately 273 women), and 2.6% were transgender or intersex (equating to approximately twenty-six transgender or intersex inmates).<sup>39</sup> Notably, all of the statistics provided by the Department of Justice are limited to incidents that are reported, investigated, and determined to have occurred by prison staff.<sup>40</sup> In limiting the statistics in this way, the Department leaves out a great deal of inmates’ experiences.

But however it is measured, “sexual assaults and threats of sexual assault occur on a daily basis” in U.S. correctional facilities.<sup>41</sup> Estimates that do not rely solely on corroborated reports suggest that rates of sexual violence are significantly higher than those evidenced by corroborated reports, though studies provide a wide range of estimates.<sup>42</sup> One study of a state correctional institution found that 28.8% of the female inmates experienced sexual victimization in *just the six months preceding the study*.<sup>43</sup> This endemic of sexual violence implicates inmates’ Eighth Amendment rights—rights that courts, and Congress, must be poised to protect.

### *B. Attempts to Address Sexual Victimization in Correctional Facilities Through the Prison Rape Elimination Act*

In 2003, Congress did recognize the dangers of sexual violence in correctional facilities with the passage of the Prison Rape Elimination Act (PREA).<sup>44</sup> Among its purposes, PREA touted a new “zero-tolerance

---

35. *Id.* The report does not distinguish between transgender and intersex inmates. *Id.*

36. E. ANN CARSON, U.S. DEP’T OF JUST., PRISONERS IN 2018, at 3 (2020), <https://bjs.ojp.gov/content/pub/pdf/p18.pdf> [<https://perma.cc/CJ93-F5SJ>].

37. BUEHLER, *supra* note 24, at 6.

38. *Id.* at 2.

39. *Id.* at 6. The Department of Justice Bureau of Justice Statistics categorizes sexual violence perpetrated by staff differently than sexual violence perpetrated by other inmates. Violence perpetrated by other inmates is classified as “nonconsensual sexual acts” (the “most serious sexual victimizations”), “abusive sexual contact” (other intentional touching), or “sexual harassment” (unwelcome sexual advances, requests, or other verbal comments or gestures). *Id.* at 2.

40. *Id.* at 2.

41. Fowler et al., *supra* note 21, at 224.

42. See Wolff et al., *supra* note 6, at 836. Estimates of the rates of sexual violence in prisons have ranged from less than 1% to as high as 41%. *Id.*

43. See *id.* at 841.

44. 34 U.S.C. §§ 30301–09.

standard for the incidence of prison rape in prisons in the United States.”<sup>45</sup> In order to accomplish this purpose, the Act mandated the collection of prison rape statistics,<sup>46</sup> provided for periodic trainings of staff who were described as “not adequately trained or prepared,”<sup>47</sup> authorized grants for states to prevent sexual violence in prisons,<sup>48</sup> established the National Prison Rape Elimination Commission,<sup>49</sup> prescribed the adoption and effect of new national standards to be promulgated by the Attorney General,<sup>50</sup> and required the adoption of accreditation standards related to the purposes of the Act.<sup>51</sup>

The Act explicitly recognized that this action was a necessary step in preventing continued violations of prisoners’ Eighth Amendment rights.<sup>52</sup> As explained in the legislative findings:

The high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution. In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners’ rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Eighth Amendment rights of State and local prisoners are protected through the Due Process Clause of the Fourteenth Amendment.<sup>53</sup>

PREA’s legislative findings also reported that conservative estimates of the rates of sexual violence hovered at around 13% of all inmates, many of whom suffered repeated assaults.<sup>54</sup>

After PREA’s passage, many were grateful for the long-needed attention to sexual violence in prisons.<sup>55</sup> However, many critics viewed PREA as an “empty gesture” that failed to provide sufficient mechanisms to address sexual violence, and further failed to address the larger breadth of violence

---

45. *Id.* § 30302(1); *see also* 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 3:48 (5th ed. 2022) (“The standards are designed to assure that each institution has a ‘zero tolerance’ [standard] for sexual abuse of inmates either by staff or by other inmates.”).

46. 34 U.S.C. § 30303(a).

47. *Id.* §§ 30301(5), 30304(a)(2).

48. *Id.* § 30305(a).

49. *Id.* § 30306.

50. *Id.* § 30307.

51. *Id.* § 30308.

52. *Id.* § 30302(7) (describing one of PREA’s purposes as “protect[ing] the Eighth Amendment rights of Federal, State, and local prisoners”).

53. *Id.* § 30301(13) (*italics added*); *see also infra* Part II.B.

54. 34 U.S.C. § 30301(2).

55. Carla I. Barrett, Note, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Prison Overcrowding? If Not, What Will?*, 39 NEW ENG. L. REV. 391, 426 (2005) (“PREA, in supporters’ minds, signifies a major step toward ending prison rape because it represents recognition of the problem and the first of what will hopefully be many steps toward making prisons safer for all inmates.”).

prisoners face.<sup>56</sup> Indeed, at fourteen years after PREA's passage, just nineteen states achieved full compliance.<sup>57</sup> In short, while PREA may have provided some support for change in U.S. correctional facilities, it has by no means eliminated the problem of sexual violence. And that violence has consequences.

## II. THE CONSEQUENCE(S) OF SEXUAL VICTIMIZATION: PREGNANCY AND FORCED PREGNANCY

One of the numerous consequences of sexual victimization is pregnancy. Studies estimate that about 5% of rapes committed against girls and women ages twelve to forty-five result in pregnancy.<sup>58</sup> For many women in prison, this statistic becomes a reality,<sup>59</sup> marred by dangerous pregnancies, miscarriages, or forced pregnancies.<sup>60</sup>

### A. Impacts of Forced Pregnancy Generally

All rape survivors, in and out of prison, are at risk of severe physical, emotional, social, financial, and other impacts from the assault. The

---

56. *Id.* at 427.

57. COLETTE MARCELLIN & EVELYN F. MCCOY, URB. INST., PREVENTING AND ADDRESSING SEXUAL VIOLENCE IN CORRECTIONAL FACILITIES: RESEARCH ON THE PRISON RAPE ELIMINATION ACT 8 (2021), <https://www.urban.org/sites/default/files/publication/104230/preventing-and-addressing-sexual-violence-in-correctional-facilities.pdf> [<https://perma.cc/7SVA-Y7HN>]. Other states submitted assurances or were not in compliance. *Id.*

58. Melisa M. Holmes, Heidi S. Resnick, Dean G. Kilpatrick & Connie L. Best, *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 AM. J. OBSTETRICS & GYNECOLOGY 320, 322 (1996).

59. The Bureau of Prisons has only recently begun efforts to track the number of pregnant individuals held in U.S. correctional facilities. I am not aware of any efforts to track the number of pregnant individuals who became pregnant in prison as a result of sexual violence. For anecdotal reports of such incidents, see, for example, Chelsia Rose Marcius, *Hundreds of Women Set to Sue New York Over Allegations of Prison Sex Abuse*, N.Y. TIMES (Nov. 16, 2022), <https://www.nytimes.com/2022/11/16/nyregion/new-york-prison-sex-abuse.html> [<https://perma.cc/C2D9-8CWZ>]; Kristine Phillips, *A Woman Claims She Was Denied an Abortion While in Jail. Now She's Suing for \$1.5 Million.*, WASH. POST (Jan. 11, 2017, 7:00 AM), <https://www.washingtonpost.com/news/post-nation/wp/2017/01/11/a-woman-claims-she-was-denied-an-abortion-while-in-jail-now-shes-suing-for-1-5-million/> [<https://perma.cc/6C7Z-76NM>]; and Phil Helsel, Maya Brown & Corky Siemaszko, *28 Female Inmates in Indiana Jail Claim They Were Sexually Abused by Mob of Male Inmates: Lawsuits*, NBC NEWS (July 28, 2022, 3:00 PM), <https://www.nbcnews.com/news/amp/rcna40380> [<https://perma.cc/7S5J-WTEB>].

60. "Forced pregnancy" is a term used often in the context of war crimes, but has been used increasingly often in lay conversation to discuss the inability of women, girls, transgender men, and others capable of becoming pregnant to access reproductive healthcare even outside the confines of armed conflict. See, e.g., *End Forced Pregnancy*, ACLU (Sept. 20, 2022), <https://www.aclu.org/news/topic/end-forced-pregnancy> [<https://perma.cc/8RDN-6P5Z>]; *Forced Pregnancy*, EQUAL. NOW, [https://www.equalitynow.org/forced\\_pregnancy/](https://www.equalitynow.org/forced_pregnancy/) [<https://perma.cc/QXA4-EG9R>] (defining forced pregnancy as "when a woman or girl becomes pregnant without having sought or desired it, and abortion is denied, hindered, delayed or made difficult"). These definitions are not limited to individuals who are pregnant as a result of sexual violence; they also include people who have become pregnant as a result of consensual sex, but cannot terminate an unwanted or unsafe pregnancy.

Department of Justice reports that 68% of survivors of sexual violence experience socio-emotional problems resulting from their experience, 91% of whom experience those problems for at least one month after the assault.<sup>61</sup> Emotional symptoms of socio-emotional impact include feelings of worry or anxiety, anger, lack of safety, violation, vulnerability, distrustfulness, sadness, and depression.<sup>62</sup> Socio-emotional impacts also manifest as physical symptoms including difficulty sleeping, fatigue, upset stomach, muscle tension, headaches, problems with eating or drinking, and hypertension.<sup>63</sup> For 61% of those individuals, physical problems persist for one month or more after the victimization.<sup>64</sup> Survivors' rates of post-traumatic stress disorder hover around 94% in the first two weeks after the assault, with a lifetime prevalence for women around 50%.<sup>65</sup> Victimization is also associated with diagnoses of depression, substance abuse, psychosis, and other mental illnesses.<sup>66</sup>

Individuals who become pregnant as a result of their assault and are forced to carry the pregnancy to term will experience additional risks and harms through childbirth itself. Childbirth is levels of magnitude more dangerous than legal abortion.<sup>67</sup> Between 1998 and 2005, there was an average of 0.6 deaths per 100,000 induced abortions in the United States.<sup>68</sup> By contrast, recent statistics show an average of 32.9 deaths per 100,000 live births.<sup>69</sup> Maternal mortality rates are particularly high in the United States as compared to other high-income countries,<sup>70</sup> and maternal mortality was on the rise in the years leading up to the *Dobbs* decision.<sup>71</sup>

---

61. LYNN LANGTON & JENNIFER TRUMAN, U.S. DEP'T OF JUST., SOCIO-EMOTIONAL IMPACT OF VIOLENT CRIME I (2014), <https://bjs.ojp.gov/content/pub/pdf/sivc.pdf> [<https://perma.cc/UWV2-837M>].

62. *Id.* at 4.

63. *Id.*

64. *Id.*

65. Kaitlin A. Chivers-Wilson, *Sexual Assault and Posttraumatic Stress Disorder: A Review of the Biological, Psychological and Sociological Factors and Treatments*, 9 MCGILL J. MED. 111, 112 (2006).

66. Sian Oram, *Sexual Violence and Mental Health*, 28 EPIDEMIOLOGY & PSYCHIATRIC SCIS. 592, 592 (2019).

67. See Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 217 (2012).

68. *Id.* at 216.

69. DONNA L. HOYERT, NAT'L CTR. FOR HEALTH STAT., MATERNAL MORTALITY RATES IN THE UNITED STATES, 2021, at 1, 4 (2021), [https://stacks.cdc.gov/view/cdc/124678/cdc\\_124678\\_DS1.pdf](https://stacks.cdc.gov/view/cdc/124678/cdc_124678_DS1.pdf) [<https://perma.cc/WU56-GVD6>].

70. Eugene Declercq, Ruby Barnard-Mayers, Laurie Zephyrin & Kay Johnson, *The U.S. Maternal Health Divide: The Limited Maternal Health Services and Worse Outcomes of States Proposing New Abortion Restrictions*, COMMONWEALTH FUND (Dec. 14, 2022), <https://www.commonwealthfund.org/publications/issue-briefs/2022/dec/us-maternal-health-divide-limited-services-worse-outcomes> [<https://perma.cc/5C4X-ELKC>].

71. NATALIA VEGA VARELA, NANCY L. COHEN, NEISHA OPPER, MYRIAM SHIRAN & CLARE WEBER, GENDER EQUITY POL'Y INST., THE STATE OF REPRODUCTIVE HEALTH IN THE UNITED STATES:

Further, while the rates of complications resulting from childbirth and abortion have been reported as similar in some studies, the severity of risks between the two procedures is starkly dissimilar.<sup>72</sup> Pregnant people who have abortions experience pain, cramps, and bleeding, whereas those who give birth experience more serious complications like preeclampsia, eclampsia, fractured pelvis, and anemia, among others.<sup>73</sup> People who give birth also experience poorer physical health in the years following the procedure.<sup>74</sup>

These statistics are based on averages and neglect to tell the stories of the additional harms caused to Black and Native American pregnant people, and people in particular geographic regions who undergo childbirth. Maternal mortality rates for Black women are about 69.9 deaths per 100,000 live births—a rate 2.6 times higher than the rates for non-Hispanic white women—making an induced abortion *116 times safer* for Black women than childbirth.<sup>75</sup> Native women are estimated to have even higher rates of maternal mortality.<sup>76</sup> These inequities are even more pronounced in states with abortion restrictions, which have 62% higher rates of maternal mortality than states without abortion restrictions.<sup>77</sup>

In addition to physical risks, pregnant people who are denied an abortion often have a difficult path ahead. Women who are denied abortions and forced to carry their pregnancy to term are less likely to have, and meet, aspirational life plans for the following year.<sup>78</sup> They also experience more short-term anxiety, lower self-esteem,<sup>79</sup> and are “more likely to experience violence from the man involved in the pregnancy than women who received an abortion.”<sup>80</sup> While adoption is often proposed as a viable option, few women who are forced to carry a pregnancy actually put their child up for adoption.<sup>81</sup>

---

THE END OF *ROE* AND THE PERILOUS ROAD AHEAD FOR WOMEN IN THE *DOBBS* ERA 6 (2023), <https://thegepi.org/wp-content/uploads/2023/06/GEPI-State-of-Repro-Health-Report-US.pdf> [<https://perma.cc/PPH8-C384>] (“Maternal mortality in the U.S. increased in recent years, a trend that was amplified during the COVID-19 pandemic. In 2020, the maternal mortality rate was 37% higher, compared to 2018. In 2021, it was 89% higher than it had been in 2018.”).

72. DIANA GREENE FOSTER, *THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION* 146 (2020).

73. *Id.*

74. *Id.* at 147–49.

75. HOYERT, *supra* note 69, at 1.

76. VARELA ET AL., *supra* note 71, at 7.

77. Declercq et al., *supra* note 70.

78. FOSTER, *supra* note 72, at 168–70.

79. *Id.* at 108–09.

80. *Id.* at 232–33.

81. *Id.* at 304 (“Few women (9%) will choose to place a child for adoption if they can’t get an abortion.”); *Pregnant People in the United States Seeking Abortion Do Not See Adoption as an Alternative*, GUTTMACHER INST. (Feb. 28, 2023), <https://www.guttmacher.org/news-release/2023>

*B. Uniquely Devastating Impacts of Forced Pregnancy in Correctional Facilities*

Rape survivors who become pregnant in prison face even further trauma<sup>82</sup>—meaning they must face the impacts of the sexual victimization itself, of the unintended and unwanted pregnancy, and of being pregnant while in prison—an experience reported as uniquely horrific both anecdotally and through medical literature.

From 2017 to 2019, there were “at least 1,220 pregnant [individuals] in U.S. Marshals Service (USMS) custody and 524 pregnant [individuals] in Bureau of Prisons (BOP) custody.”<sup>83</sup> A state-by-state review of policies and conditions of confinement for pregnant individuals in correctional facilities conducted by the National Women’s Law Center and the Rebecca Project found that “[o]nly [thirty] states received passing grades.”<sup>84</sup> The report found that “most states lack[ed] prenatal care policies regarding routine medical examinations, nutrition counseling, treatment for women with high-risk pregnancies, HIV screening, and pregnancy outcomes reporting.”<sup>85</sup>

---

/pregnant-people-united-states-seeking-abortion-do-not-see-adoption-alternative [https://perma.cc/KVW8-ZVUP].

82. This Note does not take the position that Eighth Amendment arguments for an abortion right are limited to inmates who are pregnant as a result of rape. Because inmates who become pregnant as a result of rape that is itself an Eighth Amendment violation both (1) have already experienced a violation of their constitutional rights that must be fully remedied and (2) receive special sympathies from the public, inmates with this particular experience may have more success in laying the groundwork for a successful claim. However, pregnancy in prison is uniquely devastating and implicates the Eighth Amendment rights of all inmates—regardless of how they became pregnant. Expansions of this argument should be explored in the future. For previous works considering Eighth Amendment arguments for reproductive healthcare, see Lauren Kuhlik, Note, *Pregnancy Behind Bars: The Constitutional Argument for Reproductive Healthcare Access in Prison*, 52 HARV. C.R.-C.L. L. REV. 501 (2017) (considering an Eighth Amendment argument for inmates generally based on claims of deliberate indifference to serious medical needs, as well as potential Fourteenth Amendment claims); and Mark Egerman, Note, *Roe v. Crawford: Do Inmates Have an Eighth Amendment Right to Elective Abortions?*, 31 HARV. J.L. & GENDER 423 (2008) (considering an Eighth Amendment argument against restrictions on abortion access for inmates generally, alongside claims brought under the *Turner* standard).

83. U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-147, PREGNANT WOMEN IN DOJ CUSTODY: U.S. MARSHALS SERVICE AND BUREAU OF PRISONS SHOULD BETTER ALIGN POLICIES WITH NATIONAL GUIDELINES (2021), <https://www.gao.gov/assets/720/711973.pdf> [https://perma.cc/5QN8-2CJ5].

84. Susan Hatters Friedman, Aimee Kaempf & Sarah Kauffman, *The Realities of Pregnancy and Mothering While Incarcerated*, 48 J. AM. ACAD. PSYCHIATRY & L. 365, 366 (2020) (citing REBECCA PROJECT FOR HUM. RTS. & NAT’L WOMEN’S L. 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 (2010), <https://nwlc.org/wp-content/uploads/2015/08/mothersbehindbars2010.pdf> [https://perma.cc/HX56-BHQX]).

85. *Id.*

Later studies confirm that pregnant inmates lack crucial information about their healthcare options.<sup>86</sup> Even before *Dobbs*,<sup>87</sup> many facilities did not have abortion-related policies, and inmates were often not informed about the availability of abortion.<sup>88</sup> While “counseling” is generally required for pregnant inmates, it is unclear what that counseling entails, especially when, even in the face of such requirements, less than one-third of inmates who become pregnant are informed about their options (including abortion or adoption).<sup>89</sup> Even in facilities where abortion was theoretically available, some facilities did not provide transportation to the abortion (12%), and a larger number did not assist in arranging medical appointments (46%).<sup>90</sup>

Incarcerated women are much more likely to have experienced trauma, to suffer from mental illness or chronic medical conditions, and to come from lower socioeconomic statuses—all of which complicate pregnancy and make childbirth more dangerous.<sup>91</sup> These dangers are exacerbated by unclear prenatal care policies.<sup>92</sup> To the extent that inmates have knowledge of best practices for a safe and healthy pregnancy, pregnant people in prison “do [not] have control over their own bodies, [and] are at the will of the . . . carceral system.”<sup>93</sup> Attempts to sleep, nap, eat, and take medication as necessary are limited by inmates’ lack of control over their own environment and care.<sup>94</sup> Pregnant incarcerated people report being denied prenatal care, and sometimes even food or a bed.<sup>95</sup> Incarcerated pregnant people also lack access to their social support systems,<sup>96</sup> which causes stress associated with maternal depression, preterm delivery, and low birth weights.<sup>97</sup>

---

86. *See id.*

87. In *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2243 (2022), the Supreme Court overturned *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), holding that the Fourteenth Amendment of the United States Constitution does not protect the right to an abortion.

88. Friedman et al., *supra* note 84, at 366.

89. *Id.*

90. *See id.* at 366–67.

91. *See id.* at 366.

92. *See id.*

93. No Body Criminalized, *Unapologetic Abortion Storytelling*, REPRO LEGAL DEF. FUND, at 11:46 (Apr. 23, 2023), <https://no-body-criminalized.simplecast.com/episodes/unapologetic-abortion-storytelling> [<https://perma.cc/RM4A-YPWY>].

94. Friedman et al., *supra* note 84, at 366 (“Pregnant women lack control over their environment in prison, which can have a negative effect on sleeping times, naps, dietary requirements, and medication administration.”).

95. No Body Criminalized, *supra* note 93, at 13:30.

96. Friedman et al., *supra* note 84, at 366–67.

97. *Id. See generally* Melkamu Berhane et al., *Prevalence of Low Birth Weight and Prematurity and Associated Factors in Neonates in Ethiopia: Results from a Hospital-Based Observational Study*, 29 ETHIOPIAN J. HEALTH SCI. 677 (2019) (discussing the risks of preterm deliveries and low birth weights).

Then, childbirth itself is traumatic. Inmates typically cannot have their families present for the birth and are often restrained by cuffs around their arms and/or ankles.<sup>98</sup> Restraining inmates during childbirth has been a particularly controversial aspect of childbirth in custody.<sup>99</sup> The practice has been described as “demeaning and dangerous.”<sup>100</sup> In 2018, Congress prohibited the use of handcuffs or similar restraints during labor and delivery in federal facilities,<sup>101</sup> but the practice—even in states where it is outlawed—continues.<sup>102</sup> “A 2018 study found that, among hospital nurses who said they cared for incarcerated women during pregnancy or the postpartum period, 82.9% reported that their incarcerated patients were shackled ‘sometimes to all of the time.’”<sup>103</sup> Medical organizations including the American College of Obstetricians and Gynecologists and American Medical Association support restrictions or full bans on shackling during childbirth.<sup>104</sup>

Even after the child is born, many inmates are talked into giving their child up to the foster and adoption systems.<sup>105</sup> Inmates who do not have anyone outside the facility to care for the child have no choice but to do so.<sup>106</sup> Meanwhile, incarcerated people are forced to work for low wages that make it difficult to provide support for their children during and after their incarceration.<sup>107</sup>

Incarcerated parents who place their child in seemingly temporary foster care—often because there is no other caretaker available—are unlikely to be reunited with their child.<sup>108</sup> The Adoption and Safe Families Act of 1997 requires that the state file for termination of parental rights if the child has “been in foster care under responsibility of the State for 15 of the most

---

98. Friedman et al., *supra* note 84, at 367.

99. *Id.*

100. Joe Hernandez, *More States Are Restricting the Shackling of Pregnant Inmates, but It Still Occurs*, NPR (Apr. 22, 2022, 8:48 AM), <https://www.npr.org/2022/04/22/1093836514/shackle-pregnant-inmates-tennessee> [<https://perma.cc/RH7G-3XG6>].

101. First Step Act of 2018, 18 U.S.C. § 4322.

102. Hernandez, *supra* note 100. For a discussion of the racial implications of shackling, see Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1239 (2012) (“[Shackling] attaches to Black women in particular through the historical devaluation, regulation, and punishment of their exercise of reproductive capacity in three contexts: slavery, convict leasing, and chain gangs in the South.”).

103. Hernandez, *supra* note 100.

104. *Id.*

105. See, e.g., Seannea Wharton, *Placing a Baby for a MO Adoption While in Prison*, ADOPTION CHOICES MO. (Dec. 10, 2021), <https://adoptionchoicesofmissouri.org/placing-a-baby-for-a-mo-adoption-while-in-prison> [<https://perma.cc/GCT8-54HC>] (“Prison is the last place anyone wants to be when delivering a baby. The pressure of a sentence is hard enough, but societal factors still make things worse. Employment problems after being released are one of many worries. In the meantime, getting care for your baby can’t wait.”).

106. Friedman et al., *supra* note 84, at 370.

107. See No Body Criminalized, *supra* note 93, at 13:15.

108. Friedman et al., *supra* note 84, at 370–71.

recent 22 months.”<sup>109</sup> Even where the time limit itself is not a bar, one study found that “incarcerated mothers were half as likely to regain custody of children in foster care compared with nonincarcerated women.”<sup>110</sup> Another study found that 31% of incarcerated mothers had their parental rights terminated despite all of the mothers “expressing the intent to parent upon release.”<sup>111</sup> “In practice, the mere condition of incarceration, irrespective of the reason for incarceration or the ability to parent, can lead to a mother’s losing her parental rights . . . .”<sup>112</sup>

Inmates also suffer worse postpartum mental health. Outside of correctional facilities, one in seven women develop postpartum depression after childbirth which includes symptoms like depressed mood, worthlessness or guilt, loss of energy or fatigue, suicidal ideation, and impaired concentration, among others.<sup>113</sup> In correctional facilities, inmates’ symptoms are worsened by separation from their recently born children.<sup>114</sup> In some cases, miscarriage or pregnancy is followed by a period of solitary confinement which may further worsen inmates’ experiences of postpartum depression.<sup>115</sup>

Beyond these increased risks and negative impacts, inmates’ confinement itself restricts their movement in a way that precludes them from seeking care in other places where abortion may be legal. After *Dobbs*, questions have remained about states’ powers to limit their residents’ interstate travel for purposes of an abortion.<sup>116</sup> At the time of this writing,

---

109. 42 U.S.C. § 675(5)(E). This provision also requires the state file for termination of parental rights when a parent has committed certain crimes against the child or the child’s other parent. *Id.*

110. Friedman et al., *supra* note 84, at 371. “This is partly because of the requirements placed on formerly incarcerated women to regain custody of their children, including proof of employment that can support their children, adequate housing for children, and participation in various parenting programs.” *Id.*

111. *Id.*

112. *Id.* at 370.

113. Saba Mughal, Yusra Azhar & Waqar Siddiqui, *Postpartum Depression*, NAT’L LIBR. MED. (Oct. 7, 2022), <https://www.ncbi.nlm.nih.gov/books/NBK519070> [<https://perma.cc/76WH-CZUL>]. In recent years, focus has shifted to a wider range of perinatal mood and anxiety disorders (PMAD) that impact women in the year after childbirth. See Lorraine Byrnes, *Perinatal Mood and Anxiety Disorders*, 14 J. FOR NURSE PRACS. 507, 507 (2018).

114. See Friedman et al., *supra* note 84, at 371–72. “[O]nly four nations routinely separate inmate mothers from their newborns, including the United States, the Bahamas, Liberia, and Suriname.” *Id.* at 368.

115. See, e.g., Katja Ridderbusch, *Solitary Confinement Condemns Many Prisoners to Long-Term Health Issues*, KFF HEALTH NEWS (Oct. 5, 2021), <https://khn.org/news/article/solitary-confinement-effects-on-prisoner-mental-health> [<https://perma.cc/W989-39Q7>].

116. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2337 (2022) (Breyer, J., Sotomayor, J. & Kagan, J., dissenting) (“Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising out-of-state abortions or helping women get to out-of-state providers? Can a State interfere with the mailing of drugs used for medication abortions?”). The only Justice siding with the majority to address questions of interstate travel is Justice Kavanaugh who states in concurrence that “the answer is no,” states cannot ban citizens from traveling to another state to obtain an abortion. *Id.* at 2309 (Kavanaugh, J., concurring).

no state has criminalized adults' movement across state lines for the purposes of an abortion,<sup>117</sup> though at least one state Attorney General has suggested that the authority exists for cross-border restrictions and prosecutions.<sup>118</sup> In the time since the *Dobbs* decision, news outlets and court filings have documented many women's efforts to leave their state to seek elective abortions, and also to seek lifesaving care, which they were denied in their state (although costs are prohibitive for some).<sup>119</sup> Inmates have no such options. Those limited options threaten the ability of inmates to exercise reproductive self-determination, which is particularly important in a setting that is so dangerous for pregnant people.<sup>120</sup> In some cases, that lack of choice could be deadly. If the doctors in a correctional facility will not perform lifesaving abortion care until an inmate is at serious risk of death—or will not perform an abortion at all for fear of liability—inmates have no way to leave the facility to seek the lifesaving care they need.

But some inmates are not held in the state they were convicted<sup>121</sup>—and that transfer has an impact. Some inmates who need these lifesaving abortion procedures may have access, or rights, to abortion care in the state in which they were convicted, but cannot access the care in the state in which they are being held. For example, a resident of Vermont enjoys constitutional and statutory protection of their right to abortion<sup>122</sup> and public funding for medically necessary abortions.<sup>123</sup> Between May 2015 and

---

117. For a discussion of the constitutional issues raised by attempts to restrict interstate travel, see generally Seth F. Kreimer, *"But Whoever Treasures Freedom . . .": The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907 (1993) (pre-*Dobbs*); and David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023) (post-*Dobbs*).

118. See, e.g., Complaint at 8–9, *Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky. v. Labrador*, No. 1:23-cv-142, 2023 WL 2895576 (D. Idaho Apr. 5, 2023).

119. See, e.g., Plaintiffs' Motion for Temporary Restraining Order Followed by Preliminary Injunction; Request for Hearing, *Preterm-Cleveland v. Yost*, No. A2203203, 2022 WL 4279753 (Ohio Ct. C.P. Sept. 2, 2022); Susan Szuch, *She Had 'a Baby Dying Inside' Her. Under Missouri's Abortion Ban, Doctors Could Do Nothing.*, USA TODAY (Oct. 15, 2022, 8:00 AM), <https://www.usatoday.com/story/news/nation/2022/10/15/missouri-abortion-ban-pregnancy-complications/10496559002> [<https://perma.cc/6L9S-QTF2>] ("Farmer describes herself as 'pretty pro-life' and Christian. She then did something she never thought she would do: Begin looking for abortion clinics."). Even abortion bans that purport to offer limited exceptions chill providers from providing care, forcing pregnant people to wait until they are on the brink of death to receive lifesaving care. See, e.g., Plaintiffs' Original Petition for Declaratory Judgement & Application for Permanent Injunction, *Zurawski v. Texas*, No. D-1-GN-23-000968, 2023 WL 2403722 (Tex. Dist. Ct. Mar. 6, 2023).

120. See *supra* notes 82–115 and accompanying text.

121. See Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1819–20, 1845 (2020) (detailing the largely unregulated "prison trade" through which "almost all states ship at least some of their prisoners beyond state borders").

122. VT. CONST. ch. I, art. 22; VT. STAT. ANN. tit. 18, §§ 9493–98 (2019).

123. MEMORANDUM FROM BRYNN HARE, STATE OF VT. OFF. OF LEGIS. COUNCIL, TO THE HOUSE COMM. ON HUM. SERVS., MEMORANDUM ON H.57: SUMMARY OF EXISTING RIGHT TO ABORTION AND RESPONSES TO QUESTIONS (2019), <https://legislature.vermont.gov/Documents/2020/WorkGroups>

February 2019, 15% of Vermont’s prisoners were exported out of state<sup>124</sup> and “[t]here is a Kentucky facility that holds [only] Vermont prisoners.”<sup>125</sup> A Vermont inmate held in Kentucky is held in a state which enforces its ban at all stages of pregnancy.<sup>126</sup> These prisoner transfers “raise thorny legal questions about jurisdiction and liability for illegal conduct.”<sup>127</sup> It is unclear what rules would apply to prisoners in the “constructive custody” of a state that is hostile to abortion.<sup>128</sup> But one rule does clearly apply to pregnant inmates held anywhere in the United States: that of the Eighth Amendment.

### III. THE EIGHTH AMENDMENT AND SEXUAL VIOLENCE PERPETRATED IN PRISON

#### A. Supreme Court Eighth Amendment Jurisprudence

*“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”*<sup>129</sup>

“While the State has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards.”<sup>130</sup> The language of the Eighth Amendment can be traced back to the English Bill of Rights of 1689, which the Court has read to outlaw punishments that were unauthorized or “beyond the jurisdiction of the sentencing court.”<sup>131</sup> But the framers adopted the language of the English Bill of Rights with a different concern in mind: The framers were “primarily

---

/House%20Human%20Services/Bills/H.57/Drafts,%20Amendments%20and%20Summaries/H.57~Brynn%20Hare~H.57%20%20summary%20of%20existing%20right%20to%20abortion%20and%20responses%20to%20questions~1-29-2019.pdf [https://perma.cc/PRP8-48UR] (citing *Doe v. Celani*, No. S81-84CnC (Vt. Super. Ct. May 23, 1986)).

124. Kaufman, *supra* note 121, at 1870 tbl.1. And “[t]o the extent that states declined to provide information on transfers to private prisons, these figures undercount the number of exported prisoners.” *Id.* at 1870.

125. Clarke Merrefield, *Uncovering the US Prison Transfer System and Alleviating Coronavirus Outbreaks in Prison: Q and A with Emma Kaufman*, JOURNALIST’S RES. (Apr. 23, 2020), <https://journalistsresource.org/home/prisoner-transfer-emma-kaufman/> [https://perma.cc/JSU6-BMGR].

126. KY. REV. STAT. ANN. § 311.772 (West 2019). Conversely, if a Kentucky prisoner were held in a Vermont prison, they may have access to reproductive healthcare that constitutes a crime in Kentucky. *Id.*; tit. 18, §§ 9493–98.

127. Kaufman, *supra* note 121, at 1831. For example, “[w]hich state’s criminal code applies when a prisoner commits a crime in an out-of-state prison?” *Id.* at 1831–32.

128. *See id.*

129. U.S. CONST. amend. VIII.

130. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.”).

131. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

concerned with proscribing ‘tortures’ and other ‘barbarous’ methods of punishment.”<sup>132</sup>

In its first substantive case examining the language of the Eighth Amendment, the Court found that the Amendment proscribes both torture and other “unnecessary cruelty,” which it evaluates based on evolving societal views about what practices were unnecessarily cruel.<sup>133</sup> In the years since, the Court has made clear that the Eighth Amendment prohibits government actors from subjecting inmates to “unnecessary and wanton inflictions of pain,”<sup>134</sup> which includes those that are “totally without penological justification.”<sup>135</sup>

The Eighth Amendment commands that courts invalidate punishments that “are incompatible with the evolving standards of decency that mark the progress of a maturing society.”<sup>136</sup> These standards “necessarily embod[y] a moral judgment,” and change as society’s moral judgment matures.<sup>137</sup> Eighth Amendment claims can seemingly be grouped into two separate categories: (1) claims of excessive force,<sup>138</sup> and (2) claims of “deliberate indifference,” which can include deliberate indifference to (a) serious medical needs<sup>139</sup> or (b) conditions of confinement.<sup>140</sup>

*1. Claims of Excessive Force.* The “core judicial inquiry” of Eighth Amendment claims of excessive force is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”<sup>141</sup> When force is applied maliciously and sadistically to cause harm, “contemporary standards of decency always are violated,” regardless of whether there was significant injury sustained.<sup>142</sup> Purported requirements of significant injury are “unacceptable”<sup>143</sup> given the

---

132. *Id.* (quoting Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted:” *The Original Meaning*, 57 CALIF. L. REV. 839, 841 (1969)).

133. *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1879); *see also* *Furman v. Georgia*, 408 U.S. 238, 322 (1972) (Marshall, J., concurring) (“It is apparent that the Court felt it could not dispose of the question simply by referring to traditional practices; instead, it felt bound to examine developing thought.” (discussing *Wilkerson*)).

134. *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)).

135. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Gregg*, 428 U.S. at 173).

136. *Hudson v. McMillian*, 503 U.S. 1, 10 (1992) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

137. *Graham v. Florida*, 560 U.S. 48, 58 (2010) (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008)).

138. *See Hudson*, 503 U.S. at 6–7.

139. *See Estelle*, 429 U.S. at 104.

140. *See Hope v. Pelzer*, 536 U.S. 730, 737–38 (2002).

141. *Hudson*, 503 U.S. at 7.

142. *Id.* at 9.

143. *Id.*

Amendment's intended purpose of preventing torture and barbarous punishment.<sup>144</sup>

At the same time, prison officials are given significant deference when using force. Whether pain is sufficiently unnecessary and wanton as to sustain a claim depends in part on the context of its infliction.<sup>145</sup> The Court has reasoned that because prison officials must often act quickly to maintain or restore discipline, officials should be given great deference in determining what is necessary to retain order, especially in the context of a disturbance or riot.<sup>146</sup> These situations are not implicated in cases of sexual victimization. But even unnecessary force does not always qualify as cruel and unusual.<sup>147</sup> In order to find a violation, force must be either greater than de minimis or "repugnant to the conscience of mankind."<sup>148</sup>

2. *Claims of Deliberate Indifference.* The Eighth Amendment "proscribes more than physically barbarous punishments."<sup>149</sup> It also proscribes deliberate indifference by prison officials to serious medical needs, health and safety, and prison conditions.<sup>150</sup> Claims of deliberate indifference must satisfy both objective and subjective standards.<sup>151</sup> In order to satisfy the objective component, plaintiffs alleging violations of their Eighth Amendment right must establish that the "alleged wrongdoing was . . . 'harmful enough' to establish a constitutional violation."<sup>152</sup> The objective component ensures conduct violates the contemporary standards of decency for which the Eighth Amendment stands.<sup>153</sup> The subjective component addresses whether "officials act[ed] with a sufficiently culpable state of mind" to incur liability.<sup>154</sup> The subjective component is evaluated under a standard of deliberate indifference or "subjective recklessness" which prescribes liability when an official disregards a risk of which they were aware or should have been aware.<sup>155</sup>

In *Estelle v. Gamble*, the Court found that "deliberate indifference to serious medical needs of prisoners constitutes . . . 'unnecessary and wanton

---

144. See *Estelle*, 429 U.S. at 102.

145. *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986).

146. *Id.* at 321–22; *Hudson*, 503 U.S. at 6–7.

147. *Hudson*, 503 U.S. at 9.

148. *Id.* at 10 (quoting *Whitley*, 475 U.S. at 327).

149. *Estelle*, 429 U.S. at 102.

150. *Id.* at 104; *Hope v. Pelzer*, 536 U.S. 730, 737–38 (2002).

151. *Hudson*, 503 U.S. at 8 (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

152. *Id.* (quoting *Wilson*, 501 U.S. at 298, 303).

153. *Id.* (quoting *Estelle*, 429 U.S. at 103).

154. *Id.* (quoting *Wilson*, 501 U.S. at 298, 303); see also *Farmer v. Brennan*, 511 U.S. 825, 839 (1994).

155. *Farmer*, 511 U.S. at 839 ("[T]o act recklessly . . . a person must 'consciously disregar[d]' a substantial risk of serious harm." (citation omitted) (alteration in original)). This standard is also used more broadly in criminal law. *Id.*

infliction of pain” in violation of the Eighth Amendment.<sup>156</sup> In *Helling v. McKinney*, that reasoning was extended to cases involving risk of future medical conditions.<sup>157</sup> The *Helling* Court reasoned that inmates must be provided with reasonably safe conditions and need not wait until tragedy strikes in order to challenge unsafe conditions.<sup>158</sup> So, inmates may bring Eighth Amendment claims alleging deliberate indifference to serious medical need, including harm that increases risk of future medical need.

The “deliberate indifference” standard is also used more broadly in Eighth Amendment challenges based on deliberate indifference to conditions of confinement or inmates’ health and safety.<sup>159</sup> “[H]arsh ‘conditions of confinement’ may constitute cruel and unusual punishment unless such conditions ‘are part of the penalty that criminal offenders pay for their offenses.’”<sup>160</sup> In these cases, courts introduce a balance between the harm the condition imposes upon inmates and the legitimate penological interests in imposing the condition, including interests in maintaining prison security, examining security threats, and the relative success or failure of attempts to temper forceful responses.<sup>161</sup> Some harms are “so obvious” that courts can infer that prison officials are acting with deliberate indifference.<sup>162</sup>

### *B. Application of Eighth Amendment Jurisprudence to Incidents Involving Sexual Victimitizations*

The Court first explicitly held sexual victimization in correctional facilities to be impermissible under the Eighth Amendment in *Farmer v. Brennan*.<sup>163</sup> The plaintiff, Dee Farmer, was a transgender woman who was placed in a men’s facility where she was beaten and raped by another inmate.<sup>164</sup> The plaintiff brought a *Bivens* action alleging that the prison officials’ decision to transfer her to that particular facility, or to place her in

156. 429 U.S. at 104 (internal quotations and citations omitted) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

157. 509 U.S. 25, 35 (1993) (holding that the plaintiff stated a cognizable Eighth Amendment claim when he suffered from alleged exposures to environmental tobacco smoke because of his placement with another inmate who was allowed to smoke in their shared cell).

158. *Id.* at 33.

159. See *Wilson v. Seiter*, 501 U.S. 294, 304–05 (1991); *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

160. *Whitley*, 475 U.S. at 319 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

161. *Id.* at 320–22.

162. *Hope v. Pelzer*, 536 U.S. 730, 733–35, 738, 741 (2002) (holding that harm to an inmate was “obvious” when the inmate was handcuffed to a hitching post in the hot sun for hours at a time without water or bathroom breaks, even after safety concerns subsided).

163. 511 U.S. 825, 842 (1994).

164. *Id.* at 829–30. The Court described the individual as a “transsexual” who “project[ed] feminine characteristics.” *Id.* at 831. At the time, transsexuality was classified by the American Medical Association as a “psychiatric disorder.” *Id.* at 829.

the general population at that facility, constituted deliberate indifference under the Eighth Amendment.<sup>165</sup> The plaintiff argued that officials should have known that the inmate would be particularly vulnerable to attack because of her gender identity.<sup>166</sup>

The *Farmer* Court held that in order to find a prison official liable for inhumane conditions of confinement, the official must be aware of and disregard an excessive risk.<sup>167</sup> The Court then remanded the case for a determination of whether prison officials' conduct rose to this level in the case at issue.<sup>168</sup> On remand, the district court entered summary judgment for the officials rather quickly, but was then overturned by the Seventh Circuit.<sup>169</sup> The Seventh Circuit remanded again for further discovery and proceedings at the district court level, explaining that the speedy grant of summary judgment was "not . . . the kind of remand that the Supreme Court contemplated."<sup>170</sup>

The *Farmer* decision marked the first time the Court dealt with the Eighth Amendment implications of sexual victimizations in prison.<sup>171</sup> And as the Court plainly put it: "Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'"<sup>172</sup> But it was Justice Blackman's concurrence that captured the full range of harm inflicted by sexual victimizations in correctional facilities.<sup>173</sup> Blackmun described violence among prison inmates as "unimaginable," equivalent to torture, lacking any penological justification, and "offensive to any modern standard of human decency."<sup>174</sup> Such affronts

---

165. *Id.* at 830. *Bivens* actions are suits for monetary damages under constitutional provisions that do not explicitly authorize such recovery. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). The Court has worked to severely limit the availability of *Bivens* actions in recent years. *See Egbert v. Boule*, 142 S. Ct. 1793, 1809 (2022) ("[W]e have indicated that if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution." (citations omitted)).

166. *Farmer*, 511 U.S. at 830–31.

167. *Id.* at 837.

168. *Id.* at 851.

169. *Farmer v. Brennan*, 81 F.3d 1444, 1448–50 (7th Cir. 1996) (finding that "it [wa]s the duty of the district court to assist [the plaintiff], within reason, to make the necessary investigation" where the inmate "could not reasonably be expected to identify the wrongdoers without the aid of pretrial discovery" (quoting *Billman v. Ind. Dep't of Corr.*, 56 F.3d 785, 790 (7th Cir. 1995))).

170. *Id.* at 1452–53.

171. *See* Ruth G. Allen, *Recent Developments: Farmer v. Brennan: Prison Officials May Be Held Liable Under the Eighth Amendment for "Deliberate Indifference" to an Inmate's Health and Safety in Prison Condition Claims*, 25 U. BALT. L.F. 43, 45 (1994) ("[T]he opinion . . . makes clear that prison rape is constitutionally intolerable under the Eighth Amendment.").

172. *Farmer*, 511 U.S. at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

173. *Id.* at 851–58 (Blackmun, J., concurring).

174. *Id.* at 852–53 (quoting *United States v. Bailey*, 444 U.S. 394, 423 (1980) (Blackmun, J., dissenting)).

are “potentially devastating to the human spirit” and subject victims to “perpetual terror.”<sup>175</sup>

The *Farmer* decision implicates incidents of sexual victimization committed by both other inmates and those committed by prison staff. Prison officials have responsibility for sexual violence committed by inmates because “prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.”<sup>176</sup> When prison staff does not protect inmates from violence at the hands of other inmates, an Eighth Amendment claim for deliberate indifference to conditions of confinement may lie.<sup>177</sup> Prison officials also have a, perhaps (and hopefully) more obvious obligation to refrain from perpetrating sexual violence against inmates.<sup>178</sup> Prisons may be particularly dangerous places with harsh conditions, but beatings and sexual violence do not serve any legitimate penological interest—a hallmark of an Eighth Amendment violation.<sup>179</sup>

In the almost twenty years since *Farmer*, federal courts have come to varying standards to determine when sexual victimization is sufficient to constitute an Eighth Amendment violation for which a government actor is responsible. For example, the District of Delaware has held that as a matter of law, the power imbalance between an inmate and prison official renders any purported consent ineffective.<sup>180</sup> Therefore, in the District of Delaware, “an act of vaginal intercourse and/or fellatio between a prison inmate and a prison guard, whether consensual or not, is a per se violation of the Eighth Amendment.”<sup>181</sup>

The American Law Institute took a similar stance in its recent overhaul of the Model Penal Code (MPC) provisions on sexual assault and related offenses. The revised Code defines the crime of “sexual assault of a legally restricted person” as a felony of the fourth degree.<sup>182</sup> The crime includes an act “without effective consent because at the time of the act, the other person is: . . . in custody, incarcerated, on probation, on parole . . . or in any other status involving a state-imposed restriction on liberty.”<sup>183</sup>

By contrast, the Eighth Circuit has found that a prisoner can consent to sexual contact with the guard and requires that an inmate experience

---

175. *Id.* at 853.

176. *Id.* at 833 (majority opinion) (citation omitted).

177. *See id.*

178. *See id.*

179. *Id.*

180. *Carrigan v. Davis*, 70 F. Supp. 2d 448, 452–53 (D. Del. 1999).

181. *Id.* (footnote omitted).

182. MODEL PENAL CODE § 213.3(3) (AM. L. INST., Tentative Draft No. 6, 2022) (approved during the 2022 Annual Meeting of the American Law Institute).

183. *Id.* § 213.3(3)(b)(i). The crime also includes instances in which the consent is ineffective because “the actor is in a position of actual or apparent authority or supervision over the restriction on the other person’s liberty.” *Id.* § 213.3(b)(ii).

nonconsensual “pain” to find a constitutional violation.<sup>184</sup> Other courts, like the Ninth and Tenth Circuits, attempt to strike a balance. The Tenth Circuit treats cases of sexual violence committed by prison guards as a “species of excessive-force claims” that require some form of coercion.<sup>185</sup> The Ninth Circuit similarly uses a standard that assumes consent is ineffectual based on the coercive nature of the inmate-prison official relationship, with an opportunity for the state to rebut that presumption with evidence that there were no “coercive factors.”<sup>186</sup> Regardless of how determinations are made, all federal courts must recognize in accordance with *Farmer* that there are situations in which sexual violence gives rise to a violation of the Eighth Amendment.<sup>187</sup>

#### IV. FRUIT OF THE POISONOUS TREE:<sup>188</sup> FORCED PREGNANCY RESULTING FROM SEXUAL VICTIMIZATION AS CRUEL & UNUSUAL PUNISHMENT

*“Security is no less protected, crime is no less deterred, retribution is not undermined, and rehabilitation is not hindered by the exercise of a prisoner’s right to elect an abortion.”<sup>189</sup>*

This Note posits that when an inmate becomes pregnant as a result of a sexual victimization that is itself deemed unconstitutional, denial of abortion care would constitute a violation of the inmate’s Eighth Amendment right.<sup>190</sup> Previous attempts to challenge restrictions on abortion care in correctional facilities have been brought as challenges of deliberate indifference to serious medical need, and have been successful in some

184. *Freitas v. Ault*, 109 F.3d 1335, 1338 (8th Cir. 1997).

185. *Graham v. Sheriff of Logan Cnty.*, 741 F.3d 1118, 1126 (10th Cir. 2013).

186. *Wood v. Beauclair*, 692 F.3d 1041, 1047–49 (9th Cir. 2012) (“The power dynamics between prisoners and guards make it difficult to discern consent from coercion.”). *See generally* Nika Arzoumanian, *Consent Behind Bars: Should It Be a Defense Against Inmates’ Claims of Sexual Assault?*, 2019 U. CHI. LEGAL F. 415 (advocating for this “mixed approach” to whether inmates can consent to sexual contact with prison officials).

187. *See Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

188. “Fruit of the poisonous tree” also refers to a legal doctrine that allows the exclusion of evidence discovered as the result of an unconstitutional search and seizure. *See Fruit of the Poisonous Tree*, LEGAL INFO. INST. (Dec. 2022), [https://www.law.cornell.edu/wex/fruit\\_of\\_the\\_poisonous\\_tree](https://www.law.cornell.edu/wex/fruit_of_the_poisonous_tree) [<https://perma.cc/9TVH-JRPW>]. The doctrine alludes to the biblical story of Adam and Eve. *See Genesis* 3. In the tale, Adam and Eve ignore God’s commands to not eat fruit from the “tree of knowledge of good and evil” and are thereafter banished from the Garden of Eden. *Id.* This story is seen as the roots of the corruption of mankind. *See, e.g., The Forbidden Fruit and the Origins of Poverty*, COMPASSION, <https://www.compassion.com/christian-faith/forbidden-fruit.htm> [<https://perma.cc/PNL4-JSTB>].

189. *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 338 (3d Cir. 1987) (quoting Anne T. Vitale, Note, *Inmate Abortions—The Right to Government Funding Behind the Prison Gates*, 48 FORDHAM L. REV. 550, 556 (1980) (alterations to text omitted)).

190. This Note focuses on abortion care given the efforts to even further restrict abortion in and out of correctional facilities after *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), but inmates’ need for healthcare, including reproductive healthcare, following an unconstitutional sexual victimization are indeed much broader than just abortion care.

circuits.<sup>191</sup> However, other circuits have maintained that abortion is not a serious medical need, or that policies restricting access to the care are not “restrictive enough” to constitute a violation.<sup>192</sup> Challenges based on serious indifference to serious medical need should not be conceded. In fact, advocates in circuits that will hear these claims should continue to bring them on behalf of inmates. However, even in the circuits that will accept them, these claims are limited in what they enable courts to consider—only the aspects of pregnancy and forced pregnancy related to medical needs. As discussed, the needs and risks of pregnant inmates go well beyond those which are solely medical.<sup>193</sup>

Rather than cabining challenges to claims based on deliberate indifference to serious medical need, Eighth Amendment challenges should be framed anew as remedy-based claims of excessive force or deliberate indifference to conditions of confinement. Inmates could bring claims of excessive force arguing that their forced pregnancy is essentially a continuation of the unconstitutional force originally used against them—fruit of the poisonous tree, so to say.

Inmates could also bring claims based on deliberate indifference to conditions of confinement, a broader category of claims that has encapsulated even exposure to secondhand cigarette smoke.<sup>194</sup> Claims of deliberate indifference to conditions of confinement are the most favorable option for inmates experiencing forced pregnancy that resulted from sexual victimization because the claim allows courts the flexibility necessary to consider the full range of harm imposed by a forced pregnancy in prison—including more social and relational aspects of pregnancy. Courts looking to justify the forced pregnancy of rape victims in prison would need to find some legitimate penological interest in doing so.<sup>195</sup> Without a justification, the punishment meets the objective standard of the Eighth Amendment as “unnecessary and wanton.”<sup>196</sup>

Regardless of the posture or framing of an inmate’s claim, inmates who become pregnant as a result of an unconstitutional sexual victimization should be able to seek and receive the remedy of abortion care in federal court.

---

191. This challenge is based on the standard set by the Supreme Court in *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

192. *Roe v. Crawford*, 514 F.3d 789, 801 (8th Cir. 2008); *Victoria W. v. Larpenter*, 205 F. Supp. 2d 580, 600–01 (E.D. La. 2002), *aff’d*, 369 F.3d 475 (5th Cir. 2004).

193. *See supra* Part II.B.

194. *Helling v. McKinney*, 509 U.S. 25, 35 (1993).

195. *See Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

196. *See id.*

A. *Eighth Amendment Claims Based on Serious Medical Need Are Viable in Some Circuits, but Insufficient Alone*

1. *Previous Challenges*

Previously, some courts have recognized that denying inmates abortion care violates the Eighth Amendment based on deliberate indifference to serious medical need.<sup>197</sup> Successful claims did not rely on *Roe* and *Casey*'s constitutionalization of abortion,<sup>198</sup> meaning inmates can continue to bring these claims in circuits that recognize them, including the Third Circuit.

In *Monmouth County*, the Third Circuit held that a prison demonstrated deliberate indifference to inmates' serious medical needs in violation of the Eighth Amendment when it imposed a policy that required pregnant inmates seeking abortions to undergo court-ordered release proceedings.<sup>199</sup> The proceedings caused severe delays for inmates seeking abortions and did not take into account inmates' gestational period, duration of incarceration, or likelihood of release.<sup>200</sup> The court reasoned that a medical need is serious "where denial or delay causes an inmate to suffer a life-long handicap or permanent medical loss"—*Estelle* recognized that the inmate "need not suffer 'physical torture or lingering death.'"<sup>201</sup> That pregnancy offers at least two options for care (childbirth or abortion) does not "affect the legal characterization of the nature of the medical treatment necessary to pursue either alternative."<sup>202</sup>

The court finally concluded: "That pregnancy itself is not an 'abnormal medical condition' requiring remedial, medical attention does not place it beyond the reach of *Estelle*."<sup>203</sup> Accordingly, advocates in the Third Circuit can, and should, continue to bring claims challenging restrictions on abortion care as deliberate indifference to inmates' serious medical needs.

By contrast, the Eighth Circuit held in *Crawford* that non-therapeutic abortions do not constitute a serious medical need for purposes of the Eighth

---

197. These challenges are brought under the standard set out in *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

198. *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 349 (3d Cir. 1987) ("[T]he seriousness of the medical care needed to terminate a pregnancy—*notwithstanding the fact that the choice to do so is constitutionally protected*—is evidenced by the effect of the denial of such care." (emphasis added)).

199. *Id.* at 347, 347 n.32 (finding that the policy "evinced a deliberate indifference to the medical needs of inmates desiring abortions"). Judge Mansmann's concurrence would have deferred the Eighth Amendment question and instead decided the case under the Fourteenth Amendment. *Id.* at 355 (Mansmann, J., concurring).

200. *Id.* at 347 (majority opinion).

201. *Id.* at 348–49 (quoting *Estelle*, 429 U.S. at 103).

202. *Id.* at 348.

203. *Id.* See *supra* notes 149–58 and accompanying text for a discussion of the *Estelle* standard.

Amendment and are therefore not subject to the *Estelle* standard.<sup>204</sup> The court found that the procedure is not sufficiently serious because non-therapeutic abortions are purportedly different in character than other qualifying procedures like “herniated discs, broken jaws, life-threatening ulcers, risk of suicides, and heart attacks.”<sup>205</sup> Therefore, policies restricting access to abortion care do not violate the Eighth Amendment.<sup>206</sup> Notably, the plaintiff was still rewarded relief under the *Turner* standard.<sup>207</sup>

## 2. *The Turner Standard and Dobbs v. Jackson Women’s Health Organization*

The *Crawford* court was unwilling to recognize non-therapeutic abortions as a serious medical need, but still recognized the prison’s abortion restrictions as a violation of the plaintiff’s constitutional rights under the *Turner* standard.<sup>208</sup>

The *Turner* standard allows for prison regulations to impinge on inmates’ constitutional rights so long as the regulation is “reasonably related to legitimate penological interests.”<sup>209</sup> In *Turner*, the Court laid out four factors to aid the determination of whether a regulation is reasonably related to a legitimate penological interest.<sup>210</sup> Those four factors are: (1) whether there is a “‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it,” (2) “whether there are alternative means of exercising the right that remain open to prison inmates,” (3) “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally,” and (4) the existence or non-existence of ready alternatives.<sup>211</sup>

At the time of the *Crawford* decision, the *Turner* standard applied to inmate challenges to abortion restrictions because inmates still had a federally recognized constitutional right to abortion protected by *Roe*<sup>212</sup> and *Casey*.<sup>213</sup> Courts could, and did, strike down restrictions on inmates’ Fourteenth Amendment right to abortion that were not reasonably related to

---

204. *Roe v. Crawford*, 514 F.3d 789, 801 (8th Cir. 2008).

205. *Id.* at 799 (citing *Victoria W. v. Larpenter*, 205 F. Supp. 2d 580, 600–01 (E.D. La. 2002), *aff’d*, 369 F.3d 475 (5th Cir. 2004)).

206. *Id.* at 801.

207. *Id.*

208. *Id.*

209. *Turner v. Safley*, 482 U.S. 78, 89 (1987). For an in-depth discussion of the applicability of the *Turner* standard and the circuit split on the issue in the pre-*Dobbs* era, see Egerman, *supra* note 82, at 426–31.

210. 482 U.S. at 89–91.

211. *See id.*

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

213. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

penological interests in violation of the Eighth Amendment.<sup>214</sup> Other courts struck down restrictions on access to abortion where they found the restrictions violated the Eighth Amendment.<sup>215</sup> Inmates had two routes of relief through which to challenge these restrictions of which courts made varied use.

Then came *Dobbs v. Jackson Women's Health Organization*.<sup>216</sup> In a historic and, for many, devastating decision, the Supreme Court did away with *Roe* and *Casey*, holding that the Fourteenth Amendment does not protect the right to abortion.<sup>217</sup> With the vitiation of explicit protections of the right to abortion in the name of "history and tradition," *Dobbs* did away with any traditional challenge to abortion restrictions for pregnant inmates.<sup>218</sup>

But the *Dobbs* decision may not remove the *Turner* standard from the discussion of forced pregnancy forever. As recently articulated by a D.C. Circuit Court judge, "the 'issue' before the Court in *Dobbs* was not whether any provision of the Constitution provided a right to an abortion. Rather, the question before the Court in *Dobbs* was whether the *Fourteenth Amendment* to the Constitution provided such a right."<sup>219</sup> Perhaps at some point in the future, the *Turner* standard will again become an avenue for inmates' claims against forced pregnancy where such claims are recognized. For now, however, inmates must rely solely on the potential of the Eighth Amendment in the circuits that allow it.

### 3. *More than Serious Medical Need*

In previous attempts to address pregnant inmates' challenges to correctional facilities' abortion restrictions, courts have been divided in where they determine inmates' right to access abortion arises from; but regardless of the law used to invalidate the policies, courts seem concerned with forcing pregnant inmates to carry their pregnancies to term. This Note suggests that a significant reason why courts struggle within the existing framework is because advocates have previously framed abortion as a serious medical need.

---

214. See, e.g., *Roe v. Crawford*, 514 F.3d 789, 795–96, 801 (8th Cir. 2008).

215. See, e.g., *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 349 (3d Cir. 1987).

216. 142 S. Ct. 2228 (2022).

217. *Id.* at 2243.

218. See *id.* 2259–60.

219. *United States v. Handy*, No. 22-096 (CKK), 2023 WL 1777534, at \*2 (D.D.C. Feb. 6, 2023).

While abortion is plainly healthcare,<sup>220</sup> and courts acknowledge it as such,<sup>221</sup> to describe pregnancy *solely* as healthcare is to ignore the forced emotional bonds and social implications pregnancy imposes upon pregnant people.<sup>222</sup> Framing forced pregnancy more broadly as a condition to confinement would allow courts to survey the broader range of consequences imposed on inmates who become pregnant in correctional facilities.

Indeed, “[b]earing a child creates a profoundly intimate relationship between the woman and the child, even when that relationship ends shortly after birth.”<sup>223</sup> This forced intimate relationship is not one that courts have been quick to dismiss in other contexts.<sup>224</sup> When deciding questions of custodial visits or religious upbringing, for example, the Court has instead found that the state cannot “supply” such obligations.<sup>225</sup> Concerns arise in these cases not only about privacy,<sup>226</sup> but also about the impact of those decisions on the best interest and well-being of those involved.<sup>227</sup> An Illinois appellate court said it best: “[A] court simply cannot order a parent to love his or her children or to maintain a meaningful relationship with them.”<sup>228</sup>

---

220. See *Know Your Rights: Reproductive Health Care*, U.S. DEP’T HEALTH & HUM. SERVS. (June 25, 2022), <https://www.hhs.gov/about/news/2022/06/25/know-your-rights-reproductive-health-care.html> [<https://perma.cc/RGB2-KKDV>]; *Facts Are Important: Abortion Is Healthcare*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare> [<https://perma.cc/L2Q7-FBGZ>]; *Abortion*, WORLD HEALTH ORGANIZATION [WHO], <https://www.who.int/health-topics/abortion#tab=tab1> [<https://perma.cc/7EXR-BSKC>].

221. See, e.g., *Mayor of Balt. v. Azar*, 973 F.3d 258, 288 (4th Cir. 2020) (finding that an administrative rule that would require providers to give patients a list of providers “without telling them which ones actually perform abortions . . . ‘impedes timely access’ to health care services” (quoting 42 U.S.C. § 18114(1), (2))).

222. See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 325 (1992); Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 361 (2010).

223. Hendricks, *supra* note 222, at 362 (quoting Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1017–18 (1984)). However, “just because such a bond might seem natural does not necessarily mean it should have legal significance.” *Id.* at 365.

224. See Hendricks, *supra* note 222, at 368 (“For example, . . . advocates could point to courts’ abhorrence, in family law cases, for imposing mandatory visitation on non-custodial parents.”).

225. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

226. See *id.*

227. See *In re Marriage of Mitchell*, 745 N.E.2d 167, 172 (Ill. App. Ct. 2001). Additionally, when deciding the custody of a child, many states consider the factors outlined in the Uniform Marriage and Divorce Act:

(1) [T]he wishes of the child’s parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest; (4) the child’s adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved.

UNIF. MARRIAGE & DIVORCE ACT § 402 (AM. BAR ASS’N 1974). These factors show clear reverence to the child’s existing intimate relationships, though the context is distinguishable because parents fighting for custody are not at risk of unwanted custodial responsibilities or visitation.

228. *In re Marriage of Mitchell*, 745 N.E.2d at 172.

And yet, previous challenges asserting that abortion restrictions violate inmates' Eighth Amendment rights have done nothing to address these burdens of parenthood.<sup>229</sup> For the purpose of evaluating harm to members of the group in focus here—those with pregnancies resulting from cruel and unusual sexual victimization—these social and emotional burdens outside of the medical context should be even more concerning. The pregnancies themselves would not exist but for the sexual victimization, nor would the forced intimate relationship. The pregnancy is a consequence resulting directly from the unconstitutional act. And many of these forced intimate relationships will end with coerced or forced termination of parental rights because of the parent's confinement.<sup>230</sup>

Overreliance on the physiological aspects of pregnancy, to the exclusion of the numerous and material social burdens, enables courts to ignore pregnant inmates in their consideration of the abortion debate.<sup>231</sup> As Reva Siegel explains in *Reasoning from the Body*, courts' reliance on physiological burdens of pregnancy to justify the regulation of women's conduct enables ignorance of the "ways in which assumptions about women's roles can prompt or structure regulation of the pregnant woman's conduct."<sup>232</sup>

For a long time, the law has tolerated such ignorance of the dignitary interests of pregnant people. Early anti-abortion campaigns worked in large part to defend abortion bans and restrictions by enforcing and justifying gender roles that aligned with women's capacity for pregnancy, rendering the associated social burdens of pregnancy itself nearly invisible.<sup>233</sup> The reliance on the physical differences between men and women, then, justified differential treatment and regulation of women's conduct—such treatment was fair and justified given those biological differences.<sup>234</sup> As Siegel explains:

From the standpoint of the law, the fact that unborn life exists from the point of conception is sufficient to explain social interest in protecting it, and the fact that women alone may gestate life provides a sufficient and unimpeachable reason for regulating their conduct. In law, it now appears a mere happenstance of nature that women's conduct must be regulated to protect unborn life—a "distinction . . .

---

229. See, e.g., *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008).

230. See *supra* notes 105–12 and accompanying text.

231. See Siegel, *supra* note 222, at 324–32.

232. *Id.* at 332.

233. *Id.* at 323.

234. *Id.* at 331; see also Hendricks, *supra* note 222, at 335 ("Some of the best evidence of the relationship between abortion rights and sex equality is negative evidence—not an affirmative account of women's liberty, but an observation that opponents of sex equality generally oppose abortion as well.").

based on the reality that only the female of the human species is capable of childbearing.”<sup>235</sup>

In other words, abortion restrictions and regulations enacted solely for the purpose of protecting fetal life have very real and serious consequences for women, but those consequences are overlooked and ignored in favor of total and unyielding “respect” to the fetus.<sup>236</sup> In reality, forced pregnancy is not simply a benign side effect of the protection of fetal life.<sup>237</sup>

While Eighth Amendment claims seeking an abortion right for rape survivors need not be confined to claims based on serious medical need, the claim remains a viable route for relief in jurisdictions that will recognize it. Still, claims based on serious medical need fail to offer courts a framework sufficiently broad to examine the full range of harm of forced pregnancy.<sup>238</sup> This shortcoming undermines inmates’ reproductive freedom and subjugates pregnant inmates through ignorance of harms they suffer when they cannot exercise that freedom. Advocates must recraft arguments for the abortion right to incorporate the full impact and harms of forced pregnancy. Challenges based on deliberate indifference to conditions of confinement offer that flexibility.

#### *B. Directing Courts’ Attention to the Broader Impacts of Forced Pregnancy with Claims Based on Conditions of Confinement*

While prison conditions may be harsh, all prisoners are entitled to reasonable safety that goes beyond the provision of medical care for serious medical needs—even where attaining safety requires affirmative protection from the state.<sup>239</sup> As the Court held in *Farmer*, inmates are owed protection

---

235. Siegel, *supra* note 222, at 332–33 (quoting *UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 883 (7th Cir. 1989), *rev’d*, 499 U.S. 187 (1991)).

236. *See id.* at 333–35.

237. *See id.* at 334. Khiara Bridges poses that the abstracted notion of pregnancy is the most safe and accurate characterization of the injury of pregnancy, questioning why such injuries are so difficult to construe in a purely physical sense. Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 489–90 (2013). “The answer may lie in the subordination of women’s experiences, as a general matter, as well as the persuasiveness of positive constructions of pregnancy that are sustained by political, religious, and other powerful institutions.” *Id.* at 490.

238. *See supra* Part II for a discussion of the harms of forced pregnancy. Equal protection challenges to abortion restrictions have been made for decades. *See, e.g.*, Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents at 5, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (“The right to make decisions about whether to end a pregnancy is grounded in both the Due Process and Equal Protection Clauses.”); Brief for New Women Lawyers et al. as Amici Curiae Supporting Appellants at 26, *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-40) (“Man and woman have equal responsibility for the act of sexual intercourse. Should the woman accidentally become pregnant, against her will, however, she endures in many instances the entire burden or ‘punishment.’”). But, the Court continues to reject them. *See Dobbs*, 142 S. Ct. at 2246.

239. *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

from sexual victimization at the hands of prison staff and, in many cases, other inmates.<sup>240</sup> So too must it apply to the forced pregnancies that result from that sexual victimization. Eighth Amendment challenges based on deliberate indifference to conditions of confinement offer courts the flexibility necessary to analyze all of the impacts of forced pregnancy rather than just those that constitute “serious medical need.”

Previously successful claims of deliberate indifference to conditions of confinement have involved risks sufficiently less serious than those associated with forced pregnancy. In *Helling v. McKinney*, the Court found that an inmate who was regularly exposed to his cellmate’s secondhand cigarette smoke stated a claim under the Eighth Amendment because the exposure could pose an “unreasonable risk of serious damage to his future health.”<sup>241</sup> If an inmate who is exposed to secondhand smoke states a claim for an unsafe condition of confinement, surely an inmate who is raped and impregnated by a prison official, and then forced to endure the risks of forced pregnancy in prison, states a cause of action as well. In contrast to the risk of future harm the plaintiff in *Helling* faced,<sup>242</sup> harm posed to inmates who are pregnant as a result of unconstitutional sexual victimization goes well beyond speculative concerns.<sup>243</sup>

In examining the objective component of the Eighth Amendment—whether punishment is “bad enough” to rise to the level of a constitutional violation—courts can observe special sympathies reserved for survivors of rape who become pregnant.<sup>244</sup> Even in the post-*Dobbs* era, the general public has a unique understanding of the hardships of forced pregnancy for survivors of rape. About 69% of Americans support exceptions to abortion bans for cases of rape—including 56% of Republicans.<sup>245</sup> At the time of this writing, eleven states have total abortion bans on the books, nine of which are enforceable.<sup>246</sup> Out of the nine states that are enforcing total abortion

---

240. *Farmer v. Brennan*, 511 U.S. 825, 843 (1994).

241. *Helling*, 509 U.S. at 35.

242. *Id.*

243. See *supra* Part II.B and accompanying text.

244. See *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)); *Helling*, 509 U.S. at 36 (“[T]he prisoner must show that the risk of which he complains is not one that today’s society chooses to tolerate.”).

245. Hannah Hartig, *Wide Partisan Gaps in Abortion Attitudes, but Opinions in Both Parties Are Complicated*, PEW RSCH. CTR. (May 6, 2022), <https://www.pewresearch.org/fact-tank/2022/05/06/wide-partisan-gaps-in-abortion-attitudes-but-opinions-in-both-parties-are-complicated> [<https://perma.cc/Z3QX-G4K7>].

246. See *After Roe Fell: Abortion Laws by State*, *supra* note 2. The nine states with total abortion bans that are currently in force include Alabama, Arkansas, Indiana, Missouri, North Dakota, Oklahoma, South Dakota, Texas, and West Virginia. Utah and Wyoming have passed total bans, but the bans are currently enjoined by court order. *Id.* Notably, this number leaves out other states that have banned abortion at six, eight, twelve, eighteen, twenty, or twenty-two weeks since last menstrual period. “[Abortion] is at risk of being severely limited or prohibited in twenty-six states and three territories.” *Id.*

bans, three include an exception for rape or incest.<sup>247</sup> So, even in the post-*Dobbs* era, abortion remains *theoretically* available to rape survivors in forty-four (88% of) states.<sup>248</sup> These numbers are not offered to suggest that abortion is actually available to rape survivors; rather, they are to suggest that anti-abortion rhetoric relies on the illusion that abortion is available to this particularly sympathetic group.

This national recognition is bolstered by a broad range of international support of abortion access for survivors of rape. The United Nations has recognized that denial of abortion and post-abortion care may amount to torture.<sup>249</sup> Its Committee on Torture has “repeatedly expressed concerns about restrictions on access to abortion and about absolute bans on abortion as violating the prohibition of torture and ill-treatment.”<sup>250</sup> Further, the United Nations Human Rights Committee has “explicitly stated that breaches of article 7 of the International Covenant on Civil and Political Rights include . . . denial of access to safe abortions to women who have become pregnant as a result of rape.”<sup>251</sup> International governing bodies cite concerns about the great levels of physical and mental distress caused by the stigma attached to abortions necessitated by sexual violence.<sup>252</sup>

As for the subjective analysis, prison officials are liable for exposing prisoners to “a sufficiently substantial ‘risk of serious damage to his future health,’” regardless of the source of the risk or the risk factors of the inmate at issue.<sup>253</sup>

---

247. Mabel Felix, Laurie Sobel & Alina Salganicoff, *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KFF (May 18, 2023), <https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortion-bans-implications-for-the-provision-of-abortion-services/> [<https://perma.cc/7HLT-6NZW>]. Indiana has an exception for rape or incest; North Dakota and West Virginia have exceptions for rape or incest, but they are only available up until a set gestational age. *Id.* Alabama, Arkansas, Missouri, Oklahoma, South Dakota, and Texas do not offer any exception for rape or incest. *Id.*

248. See *After Roe Fell: Abortion Laws by State*, *supra* note 2. Even when abortion is available under a state law exception for rape and incest, few abortions are actually performed on victims of rape and incest. This is because some state laws require reporting rape to the police in order to qualify for the exception and many providers fear potential legal consequences. Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted.*, N.Y. TIMES (Jan. 21, 2023), <https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html> [<https://perma.cc/4MLG-SHUK>]; Strict Scrutiny, *The Originalist Case for Terrorizing Women*, CROOKED, at 21:18 (Feb. 13, 2023), <https://crooked.com/podcast/the-originalist-case-for-terrorizing-women/> [<https://perma.cc/U8DB-FYSD>].

249. See Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 46, 50, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013), [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf) [<https://perma.cc/R8WN-6J7L>].

250. *Id.* ¶ 50.

251. *Id.*

252. *Id.* ¶ 49.

253. *Farmer v. Brennan*, 511 U.S. 825, 843 (1994) (quoting *Helling v. McKinney*, 509 U.S. 25, 35 (1993)).

If, for example, prison officials were aware that inmate “rape was so common and uncontrolled that some potential victims dared not sleep [but] instead . . . would leave their beds and spend the night clinging to the bars nearest the guards’ station,” it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom.<sup>254</sup>

Prison rape resulting in pregnancy offers a close parallel. Prison officials are aware that rape is common and uncontrollable, and they are aware (or should be aware) that such rape has a genuine chance of resulting in pregnancy.<sup>255</sup> It would then obviously be irrelevant to liability that the officials could not guess beforehand precisely who would become pregnant as a result of their rape.<sup>256</sup> Policies, then, that delay or restrict abortions for inmates who became pregnant as a result of an unconstitutional victimization will subject inmates to substantial risk of serious damage to future health.<sup>257</sup>

Framing forced pregnancy as a condition of confinement rather than serious medical need also gives courts a more accurate picture of the full range of consequences for inmates who are subjected to it beyond just the lack of safer medical care.<sup>258</sup> This approach would fill gaps left by challenges based on deliberate indifference to serious medical need by recognizing pregnancy as “both a bodily invasion and a forced social relationship of caretaking.”<sup>259</sup> This approach would be a refreshing step toward the “relationship model of pregnancy,” advocated by Jennifer Hendricks, which prioritizes non-severance of the physiological and social aspects of pregnancy.<sup>260</sup> “The harm of forced pregnancy should be understood *in toto*, as hijacking the body to force the creation of an intimate caretaking relationship.”<sup>261</sup> Attempts to separate these two unyielding aspects of pregnancy mean that analysis will necessarily fall short of recognizing the full extent of its impacts.<sup>262</sup>

---

254. *Id.* at 843–44 (alteration in original) (citation omitted) (quoting *Hutto v. Finney*, 437 U.S. 678, 681–82 n.3 (1978)).

255. *See Holmes et al.*, *supra* note 58, at 320.

256. *See Farmer*, 511 U.S. at 843–44.

257. *Id.* at 843; *see also supra* Part II.B and accompanying text (discussing the harms of forced pregnancy in prison).

258. *See supra* Part II.B and accompanying text.

259. Hendricks, *supra* note 222, at 364.

260. *Id.* at 362–66.

261. *Id.* at 362.

262. *See id.* at 361. In support of this argument, Hendricks cites the string of unwed father cases in which the Court applied a “biology-plus-relationship” test that enables fathers to acquire parental rights in a way that compensates for their inherent biological disadvantage. *Id.* at 363–65; *see, e.g.*, *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

The example of inmates who are pregnant in prison specifically as a result of an unconstitutional sexual victimization is an especially poignant example of why a broader framework is necessary to examine the impacts of pregnancy in prison. The social and emotional tolls of carrying a pregnancy resulting from rape to term have been recognized as especially torturous both nationally and internationally. It is only through the broader framework of conditions of confinement that courts could take that moral concern into account.

While Eighth Amendment arguments benefit from their lack of reliance on equal protection concerns,<sup>263</sup> these theories demonstrate that Eighth Amendment arguments for abortion can, and should, go beyond challenges based solely on deliberate indifference to serious medical need. In fact, future arguments *must* incorporate non-physiological impacts of pregnancy in order to harness the full range of protections of the Eighth Amendment.

*C. Remedying Pregnancy that Results from Unconstitutional Excessive Force with Access to Reproductive Care*

Finally, in addition to arguments made under the standard of deliberate indifference, inmates may bring a claim of excessive force specific to the pregnancy itself. An inmate pregnancy that results from an unconstitutional rape is inextricable from the original use of excessive force itself. When an inmate brings a claim of excessive force against a prison official who sexually victimized them, the court must analyze the continued injury in the form of pregnancy, the remedy to which should be an option to terminate the pregnancy. Not only is the pregnancy itself a remnant of the unconstitutional sexual victimization, it subjects inmates to further violence during their time in the correctional facility.

Excessive force claims based on sexual victimization in correctional facilities are brought under 42 U.S.C. § 1983, which provides monetary and injunctive relief to individuals deprived of constitutional or statutory rights by an individual acting under color of law.<sup>264</sup> In the context of a sexual victimization, remedies may include compensatory damages for physical and/or emotional injuries.<sup>265</sup> Inmates facing a “contemporary violation of a nature likely to continue,” like the plaintiff in *Farmer*, may also seek an

---

263. See Egerman, *supra* note 82, at 425.

264. 42 U.S.C. § 1983.

265. See, e.g., *Wilkins v. Gaddy*, 559 U.S. 34, 38, 40 (2010); see also *Hudson v. McMillian*, 503 U.S. 1, 17 (1992) (Blackmun, J., concurring) (“[P]sychological pain can be more than *de minimis*. Psychological pain often may be clinically diagnosed and quantified through well-established methods, as in the ordinary tort context where damages for pain and suffering are regularly awarded.”).

injunction under § 1983.<sup>266</sup> Indeed, “[t]hat the Eighth Amendment protects against future harm to inmates is not a novel proposition.”<sup>267</sup>

When the unconstitutional rape of an inmate results in pregnancy, that inmate is put at risk for a wide range of future harms that would not occur but for the unconstitutional rape.<sup>268</sup> Pregnancy may not be thought of often in layman’s terms as an “injury” per se, but many state criminal codes explicitly recognize that when the crime of rape occurs, pregnancy is, or should be treated as, a serious bodily injury.<sup>269</sup> Still other states allow juries to decide whether the crime of rape led to pregnancy as an “injury” based on the facts of the case.<sup>270</sup> The majority of states appear to agree that pregnancy resulting from rape “can warrant an increased punishment if caused by a sexual assault.”<sup>271</sup>

Khiara Bridges suggests that criminal law reflects an understanding of pregnancy as an actual injury that imposes harm in the form of an “abstracted notion of pregnancy.”<sup>272</sup> The criminal law is concerned with a woman’s knowledge that she is pregnant, making it an “identity- or dignity-based injury.”<sup>273</sup> Some federal judges have, even recently, expressed doubts that pregnancy is an “illness” let alone an “injury,”<sup>274</sup> although it is unclear how their analysis would change in the context of pregnancies that result from unconstitutional rape. Even where pregnancy itself is not considered an “injury,” however, inmates face additional force.

In addition to the identity-based injury that rape survivors experience, inmates experience the additional force and harms that are associated with being pregnant in prison—including higher risk pregnancies and shackling during childbirth, among other forms of force.<sup>275</sup>

---

266. *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (quoting *United States v. Or. State Med. Soc’y*, 343 U.S. 326, 333 (1952)).

267. *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

268. See *supra* Part II.B and accompanying text.

269. Bridges, *supra* note 237, at 466–68.

270. *Id.* at 467.

271. *Id.* at 469.

272. *Id.* at 488–89. Alternative characterizations of the injury could include childbirth, abortion, physical changes, or the fetus itself, but all of these possibilities rely on how the pregnancy ends or a “countercultural understanding” of the fetus. *Id.* at 485–89. Bridges instead analogizes the harms to those reflected by rape law, observing that “the injury of rape—that which makes rape a horrific act—is an abstracted identity- or dignity-based injury,” the harm of which is that a victim knows that they are a rape survivor. *Id.* at 489.

273. See *id.*

274. Oral Argument at 56:54, *All. for Hippocratic Med. v. FDA*, No. 23-10362 (5th Cir. 2023), <https://www.courtlistener.com/docket/67164167/alliance-hippocratic-medicine-v-fda/> [<https://perma.cc/DKL7-FUFR>] (statement and question of Judge Ho) (“Pregnancy is not a serious illness. . . . When we celebrated Mother’s Day, were we celebrating serious illness?”).

275. See *supra* Part II.B and accompanying text for a discussion of the impacts of forced pregnancy in prison.

Additionally, when an inmate who is raped becomes pregnant against their will, the prison staff continues to exert their institutional power and control to inflict harm upon the inmate.<sup>276</sup> These tactics of control can be examined more broadly in the context of domestic abusers, who also often use tactics of pregnancy coercion and unintended pregnancies.<sup>277</sup> Abusive partners sometimes non-consensually remove a condom or otherwise sabotage birth control methods to coerce their partner into becoming pregnant and to maintain control over the relationship.<sup>278</sup> Prison officials whose rapes result in pregnancy need not use these traditional tactics of birth control sabotage or manipulation. Instead, they wield the power of the state, which steps in to stop inmates from accessing abortion care.<sup>279</sup>

## V. IMPLICATIONS AND OBJECTIONS

### A. *Implications: Creating a Right for Pregnant Inmates and Opportunities for Expansion*

Some scholars have commented that securing a right to abortion under the Eighth Amendment protects the right in a “very limited sense.”<sup>280</sup> But in the post-*Dobbs* era, *any* pregnant person who can exercise her, or their, own reproductive self-determination should be celebrated. All people, including inmates, deserve the dignity that reproductive justice care and options bring.<sup>281</sup> If courts are willing accept the very real harms of forced pregnancy in prison, beyond just those who are pregnant as a result of sexual victimization,<sup>282</sup> access could expand to others being held in U.S. correctional facilities.

Outside of correctional facilities, securing a right to abortion for rape survivors in confinement may lend itself to political arguments for a right to abortion, rather than a negative right against criminalization or unnecessary restrictions.<sup>283</sup> Especially because of the largescale

---

276. See *supra* notes 9–11 and accompanying text.

277. See Elizabeth Miller et al., *Pregnancy Coercion, Intimate Partner Violence and Unintended Pregnancy*, 81 *CONTRACEPTION* 316, 317, 320–21 (2010); Karen Trister Grace & Jocelyn C. Anderson, *Reproductive Coercion: A Systematic Review*, 19 *TRAUMA, VIOLENCE & ABUSE* 371, 385 (2018).

278. Grace & Anderson, *supra* note 277, at 377–78.

279. See Joshua Sharfstein, *Jailed and Pregnant: What the Roe Repeal Means for Incarcerated People*, *JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH* (Sept. 21, 2022), <https://publichealth.jhu.edu/2022/abortion-care-for-incarcerated-people-after-dobbs> [<https://perma.cc/25AF-FU7X>].

280. Egerman, *supra* note 82, at 443.

281. See Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, *Human Dignity as the Guiding Principle*, *VERA INST.* (Sept. 2018), <https://www.vera.org/reimagining-prison-web-report/human-dignity-as-the-guiding-principle> [<https://perma.cc/R333-J25W>].

282. See *supra* Part I.B and accompanying text.

283. See Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 *YALE L.J.* 1394, 1403–04 (2009).

dehumanization of prisoners in the United States,<sup>284</sup> securing this right for inmates while non-incarcerated rape victims do not have such a right may be enough to move the political needle. In fact, political efforts to secure the abortion right would likely provide greater security and longevity to the existence of the right.<sup>285</sup>

*B. Limitations: Necessity of an Intentional Focus on Reproductive Autonomy and Questions About Standing*

One limiting concern in working toward recognition of a right to abortion for inmates in particular is potential eugenics-like attempts to not only make abortion available, but to encourage inmates to get abortions and terminate their pregnancies.

The eugenics movement, based in the fake science of “good breeding,” began in the twentieth century and operated under the assumptions that “criminality, sexual promiscuity, and mental health problems were inherited traits.”<sup>286</sup> Eugenicist thought influenced the structure of the penal system with assertions that “criminals[’] hereditary propensity toward crime” must not be ignored during sentencing.<sup>287</sup>

Attempts to prevent certain populations from reproducing were sustained by the Supreme Court in the horrifying opinion issued in *Buck v. Bell*, holding that the compulsory sterilization of “feeble minded” women did not violate the Equal Protection or Due Process clauses of the Fourteenth Amendment.<sup>288</sup> The opinion described the plaintiff as a “probable potential parent of socially inadequate offspring, likewise afflicted [by feeble-mindedness],” and further stated that the plaintiff could be “sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization.”<sup>289</sup> Fifteen years later in *Skinner v. Oklahoma*, the Supreme Court held that the compulsory sterilization of criminals was unconstitutional, describing such injuries as both irreparable and in furtherance of eugenics principles.<sup>290</sup> “Yet *Skinner*

---

284. See *supra* notes 27–30 and accompanying text.

285. See West, *supra* note 283, at 1404–05.

286. Kevin E. Grady, *A Review of Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell*, 26 GA. ST. U. L. REV. 1295, 1296–97 (2010).

287. Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL’Y 1, 12 (1996).

288. 274 U.S. 200, 205, 208 (1927).

289. *Id.* at 207.

290. 316 U.S. 535, 541 (1942) (“In evil or reckless hands [forced sterilization] can cause races or types which are inimical to the dominant group to wither and disappear. . . . Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.”).

did not lead to the end of forced sterilization in the United States.”<sup>291</sup> Communities of color in particular—which represent a disproportionate percentage of the prison population<sup>292</sup>—have faced decades of coerced and forced sterilization that has been largely ignored by the courts.<sup>293</sup>

Inmates today do cite instances of their rapists attempting to convince or coerce them into aborting their pregnancy.<sup>294</sup> Reproductive justice includes both the right to have children *and* the right to not have children.<sup>295</sup> Accordingly, advocates working to secure an Eighth Amendment right to abortion must be mindful to ensure the choice to decline an abortion remains available to inmates as well.<sup>296</sup> As Melissa Murray addressed in *Race-ing Roe*, however, eugenics-based concerns have been largely co-opted by the conservative right and members of the Court including Justice Thomas.<sup>297</sup> Concerns sounding in eugenics should not rest simply on out-of-context cites to demographic and anecdotal examples. Rather, these concerns should remain attentive “to both the structural dynamics that shape Black people’s reproductive choices and the prospect of abortion as an act of individual autonomy.”<sup>298</sup>

Limitations may also come in the form of claims for standing. An Eighth Amendment claim against a prison policy banning (or effectively banning) abortions could be brought as a § 1983 claim seeking to enjoin the policy.<sup>299</sup> Challenges of this breed would face obstacles in satisfying the constitutional requirements of standing which require, among other things, that plaintiffs’ claims are actual or imminent.<sup>300</sup> Plaintiffs do not have standing where their

291. Maya Manian, *Coerced Sterilization of Mexican-American Women: The Story of Madrigal v. Quilligan*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 98, 99 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019) (ebook); *see also* Samuel R. Bagenstos, *The New Eugenics*, 71 SYRACUSE L. REV. 751, 752–53 (2021) (“highlight[ing] the persistence of eugenics in the politics, law, and culture of the United States, nearly a century after the end of the original eugenics era”).

292. ASHLEY NELLIS, SENT’G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITIES IN STATE PRISONS 6 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/3JQA-JUWL>].

293. *See, e.g.*, Manian, *supra* note 291, at 110–13.

294. *See, e.g.*, Laura Berry, *I Got a Life Sentence at 17. Then I Became Pregnant in Prison.*, BUZZFEED NEWS (Nov. 1 2018, 9:02 PM), <https://www.buzzfeednews.com/article/lauraberry/lauraberry-life-prison-rape-baby-murder-sentence> [<https://perma.cc/7QFP-B3X9>].

295. *Reproductive Justice*, SISTERSONG WOMEN OF COLOR REPROD. JUST. COLLECTIVE, <https://www.sistersong.net/reproductive-justice> [<https://perma.cc/K7UN-4GEY>].

296. Such considerations are especially necessary in light of the white feminist movement’s hesitance to fully recognize and incorporate the needs of Black and Latino/a/x people who have been historically targeted by coerced sterilization practices. *See* Manian, *supra* note 291, at 106–07.

297. *See generally* Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021).

298. *Id.* at 2089.

299. *See* 42 U.S.C. § 1983; *see also* Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 330–31 (3d Cir. 1987) (seeking an injunction against a policy interfering with the availability of abortion care).

300. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983).

alleged future injury “rest[s] on speculation about the decisions of independent actors.”<sup>301</sup> However, given the demonstrated prevalence of rape in prison and the resulting likelihood of pregnancy, plaintiffs may argue that there is a “substantial risk” the harm will occur that is sufficient to convey standing.<sup>302</sup> Plaintiffs need only show that the injury is not “too speculative for Article III purposes” so that the dispute is sufficiently concrete for judicial resolution.<sup>303</sup>

#### CONCLUSION

The continued endemic of sexual victimization in prisons inherently comes with a risk of pregnancy for women, transgender men, and other gender-fluid individuals in prison who have the capacity for pregnancy. Inmates who become pregnant as a result of unconstitutional sexual victimizations are left with the after-effects of not only the sexual victimization itself, but of an unintended pregnancy and pregnancy in prison. Whereas non-inmates do not have to navigate the additional stressors of prison and may be able to travel out-of-state to get abortion care if necessary, inmates have no such option. Future Eighth Amendment challenges to forced pregnancy should avoid the narrower box of challenges based on deliberate indifference to serious medical need and instead consider remedy-based claims of excessive force or claims of deliberate indifference to conditions of confinement—claims that will enable courts to recognize the full impacts of forced pregnancy. Federal courts have recognized that sexual victimization serves no legitimate penological justification.<sup>304</sup> Courts must recognize the same for the consequences of that victimization.

*Elena LeVan\**

---

301. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 (2013).

302. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (finding that parties established standing when they intended to engage in substantially similar conduct in the future).

303. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992). While theoretically an inmate could bring a claim for a preliminary injunction, seeking an abortion in contravention of prison policy, it is unclear whether a court would be willing to grant an abortion as part of a preliminary injunction. *See Asa v. Pictometry Int’l Corp.*, 757 F. Supp. 2d 238, 243 (W.D.N.Y. 2010) (“Because ‘the limited purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held,’ the court’s task when granting a preliminary injunction is generally to restore, and preserve, the status quo . . . .” (citation omitted) (quoting *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005))).

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

\* J.D. Candidate, Washington University School of Law (2024); B.A., University of Maryland (2020). Thank you to Hannah Swanson, Professor Susan Appleton, Frances Maurer, and Michelle Wolk for their valuable comments and feedback; thank you also to the Volume 101 staff for their work on this publication. Endless love and thanks to my parents for their love, support, and many nights spent reviewing everything from my fifth grade social studies project to this publication. This would not be possible without you.