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NOTE
INMATE ACCESS TO ELECTIVE ABORTION: SOCIAL POLICY, MEDICINE AND THE LAW

Angela Thomas†

"A society should be judged not by how it treats its outstanding citizens but by how it treats its criminals." – Fyodor Dostoevsky

I. INTRODUCTION

In 1973 the Supreme Court, in deciding the landmark case Roe v. Wade, held that having access to abortion is a constitutionally protected right.1 Choosing to have an abortion prior to fetal viability is a private decision between a woman and her physician that generally should be free from government constraints.2 Any state regulation that creates an "undue burden" on a woman seeking an abortion is unconstitutional.3 However, certain government entities have successfully evaded the law and continue to systematically hinder and even effectively prevent women from obtaining lawful abortions. These government entities are jails and prisons,4 and the women are inmates.

† Case Western Reserve University School of Law, J.D. 2009; Wellesley College, B.A. 2005. I would like to thank Dean Sharona Hoffman for her supervision and assistance with writing this note. I would also like to thank my husband Jimmy for his unwavering support.

2 Id. at 164.
4 Jails and prisons differ in that jails are most often run by sheriffs and/or local governments, and typically hold individuals awaiting trial or those serving short sentences. Conversely, the Federal Bureau of Prisons and state governments run prisons. For purposes of this note I will not distinguish between the two terms but use them interchangeably. See Medscape.com, Incarceration Nation: Who Are the People Behind Bars in the United States?, www.medscape.com/viewarticle/520251_2 (last visited Jan 20, 2008) (defining the difference between jails and prisons before discussing inmate demographics).
Incarceration serves important purposes in society. Although incarceration by its nature entails limiting inmates’ fundamental rights, “no iron curtain [is] drawn between the Constitution and the prisons of this country.” Abortion is a constitutional right that should not be revoked or limited upon entering prison. It is especially important to protect inmates’ right to abortion as inmates tend to experience higher risk pregnancies due to inadequate prenatal care, drug and alcohol abuse, and mental illness. The Court has held that “[t]he States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies.” Correctional institutions, however, under the pretext of penological interests, have implicitly intimidated women into carrying fetuses to term by their prison abortion policies. This violates inmates’ constitutional rights.

In Part II of this Note I will explain fetal development, pregnancy stages and abortion as a medical procedure. Part III will discuss abortion rights’ common law precedent, prisons’ abortion policies, and the current circuit split on the acceptable rules for inmate access to abortion. Part III will also detail the two major arguments in the inmate access to abortion debate: the Fourteenth Amendment reproductive privacy argument and the Eighth Amendment cruel and unusual punishment argument. Part IV will explore the social policy arguments behind altering prisons’ abortion policies, and Part V will suggest an improved abortion prison policy and explore the legal strategies that could accomplish real change.

II. ABORTION AS A MEDICAL PROCEDURE

Understanding prenatal development and abortion as a medical procedure is an important prelude to participating in the abortion debate. Scientists have been able to identify the specific stages of embryonic and fetal development during pregnancy. Medical

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5 The five major rationales for punishment are deterrence, incapacitation, rehabilitation, retribution, and denunciation. See KATE E. BLOCH & KEVIN C. MCMUNIGAL, CRIMINAL LAW: A CONTEMPORARY APPROACH 31 (2005).
9 See Fetal Development: What Happens During the First Trimester,
advances have resulted in fewer complications during surgical procedures, including abortion.\textsuperscript{10} The medical community's understanding of pregnancy has informed public policy and law regarding abortion. Therefore, abortion and fetal development must first be explained from a medical perspective in order to fully understand the social policies behind abortion regulations.

The typical duration of pregnancy is thirty-eight weeks from fertilization, or forty weeks from the date of the woman's last menstruation.\textsuperscript{11} The medical community has divided pregnancy into three broad stages, labeled trimesters.\textsuperscript{12} The first trimester is from the day of the final menstruation to week twelve.\textsuperscript{13} The second trimester is week thirteen to twenty-seven,\textsuperscript{14} and the third trimester lasts from the twenty-eighth week to delivery, typically around week forty.\textsuperscript{15}

Within these trimesters, prenatal development is marked by four significant transitions.\textsuperscript{16} Two weeks after fertilization the pre-embryonic cell mass develops into an embryo: one that is destined to grow into a single baby, barring interference.\textsuperscript{17} Approximately four to five weeks later the embryo is recognizable as a fetus and begins to build up nerve cells and muscles allowing motility.\textsuperscript{18} At approximately twenty-four weeks into development, the fetus has produced a basic neocortex, although many synapses are not yet linked.\textsuperscript{19} Also at around twenty-four weeks the fetus is viable: its organs are developed

\textsuperscript{10} GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, THE RIGHT TO ABORTION: A PSYCHIATRIC VIEW 33-34 (1970) ("While abortion at one time constituted a serious surgical procedure, involving considerable morbidity and some death, modern surgical techniques together with antibiotics have minimized these risks.").

\textsuperscript{11} First Trimester Fetal Development, supra note 9.

\textsuperscript{12} Id.

\textsuperscript{13} Id.

\textsuperscript{14} Second Trimester Fetal Development, supra note 9.

\textsuperscript{15} Third Trimester Fetal Development, supra note 9.


\textsuperscript{17} Id. at 445.

\textsuperscript{18} Id.

\textsuperscript{19} Id.
enough to survive outside the womb with medical intervention.\textsuperscript{20} Lastly, approximately between twenty-eight and thirty-two weeks,\textsuperscript{21} the fetus’s brain activity continues to increase, and the fetus enters sleep and wake cycles similar to that of a newborn baby.\textsuperscript{22}

Abortion is the removal or expulsion of the fetus and placenta from the mother’s uterus.\textsuperscript{23} Spontaneous abortion is not induced and is otherwise known as a miscarriage.\textsuperscript{24} A therapeutic abortion is a procedure performed by a doctor when the pregnancy endangers the woman’s health, while elective abortions are executed because of the mother’s desire to terminate her pregnancy.\textsuperscript{25} An abortion can be performed one of two ways: surgically or by medication.\textsuperscript{26} In a non-surgical abortion doctors give the woman hormonal medication that induces the uterus to expel the fetus as if the woman were having a miscarriage.\textsuperscript{27} A woman can obtain a non-surgical abortion only up until seven weeks after the first day of her last menstrual period.\textsuperscript{28} After seven weeks, surgical abortion is the sole option.\textsuperscript{29}

In a surgical abortion, a doctor uses a vacuum device to remove the fetus and placenta.\textsuperscript{30} If a surgical abortion is performed before twelve weeks of pregnancy, the doctor will not usually dilate the woman’s cervix.\textsuperscript{31} Rather, the doctor may numb the cervix to limit discomfort and give the woman a slight sedative.\textsuperscript{32} If a surgical abortion is performed after twelve weeks of pregnancy, the doctor must first dilate the cervix and place small sticks—laminaria tents—into the

\begin{thebibliography}{99}
\bibitem{20} Second Trimester Fetal Development, supra note 9.
\bibitem{21} Flower, supra note 16, at 446.
\bibitem{22} Id.
\bibitem{23} AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, INDUCED ABORTION (2007) [hereinafter ACOG].
\bibitem{24} AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, EARLY PREGNANCY LOSS: MISCARRIAGE AND MOLAR PREGNANCY (2007). For purposes of this note, I do not intend to include “miscarriage” within the meaning of “abortion” unless otherwise stated.
\bibitem{25} ACOG, supra note 23.
\bibitem{26} Stanley K. Henshaw & Lawrence B. Finer, The Accessibility of Abortion Services in the United States, 2001, 35 PERSP. ON SEXUAL & REPROD. HEALTH 16, 16 (2003), available at http://www.guttmacher.org/pubs/psrh/full/3501603.pdf (“Thus, for a woman who decides early in pregnancy that she wants an abortion, quality of care may be enhanced if she can choose between a medical and a surgical procedure. . . . ”).
\bibitem{27} Id. at 20.
\bibitem{28} Id.
\bibitem{29} Id.
\bibitem{30} ACOG, supra note 23.
\bibitem{31} See id.
\bibitem{32} Id.
\end{thebibliography}
cervix to cause it to open. In some instances this is done one or two days before the doctor performs the actual abortion. Once the cervix is sufficiently dilated, the fetus and placenta are removed by vacuum. The doctor may place the woman under general anesthesia during second trimester surgical abortions.

The risks associated with abortion vary according to timing and method. As a generality, "[a]bortions performed early in pregnancy are associated with lower risks for mortality and morbidity." The later in a pregnancy the abortion is performed, the higher the risk of complications. During the first trimester, the most common side effects of surgical abortion are "endometri[osis] (0.75%), excessive bleeding and retained products of conception (0.61%)." Other risks include infection of the uterus or fallopian tubes, damage to the uterus or cervix, and emotional or psychological distress. Second trimester abortions carry a significantly higher risk of complications, especially if performed after the sixteenth week. Potential side effects of anesthesia include adverse reactions to the medication and breathing irregularity.

The risks of non-surgical abortion are "prolonged bleeding, the fetus not passing completely from the body [necessitating] surgery, nausea, vomiting, diarrhea, and pain." The occurrence of serious side effects is low, however, with the most serious—the body failing to expel the fetus, necessitating a surgical abortion—happening to approximately 1% of patients.
Abortions rarely cause death, and "the mortality from induced abortion during the first 15 weeks of pregnancy is one-seventh the risk of dying from pregnancy and childbirth." Furthermore, there is no concrete proof that a single abortion will negatively affect a woman's future reproductive capabilities, although some controversial studies claim that there is a higher risk of miscarriage for women who have had two or more abortions.

After an abortion a small amount of bleeding and cramping is normal, and depending on the stage of the woman's pregnancy at termination, a full physical recovery typically occurs within a few days. Most women who have an abortion will recover without any serious complications, as long as the abortion is performed at a suitable medical facility.

III. ABORTION AND THE LAW

 Courts have played an important role in shaping abortion rights in the United States. The Supreme Court, in devising its opinion in Roe v. Wade, examined abortion as a medical procedure. In deciding the case, the Court balanced the medical nature of the procedure with important social factors. The Court found two social factors particularly essential to the issue: the pregnant woman's privacy rights and the impact on society in general. The Court examined the issue of whether a fetus enjoys protection under the Constitution as an individual, a question the Court perceived as different from the philosophical and moral question of when life begins. In answering this question, the Court weighed the government's interest in protecting fetal life against the woman's right to privacy.

In Roe v. Wade the Court held that a Texas state law criminalizing abortion was unconstitutional under the Due Process clause of the Fourteenth Amendment. The Court further held that states cannot restrict abortion access during the first trimester. The state can, however, regulate abortion in the second trimester as it relates to

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45 Id. at 581 (citing S. A. LeBolt et al., Mortality from Abortion and Childbirth: Are the Populations Comparable?, 248 J.AMA 188 (1982)).
46 Id. at 581.
47 ACOG, supra note 23.
48 See id.
49 See id.
51 Id. at 160-62.
52 Id. at 151-52.
53 Id. at 164.
54 Id.
maternal health, and prohibit abortion altogether in the third trimester except for "preservation of the life or health of the mother." Also, the Court found that the correct standard to apply to state laws restricting abortion is strict scrutiny: the law must be narrowly tailored to a compelling state interest.

In determining the framework for abortion regulation, the Court decided that after the first trimester, the state had a compelling interest in fetal life because at that point the fetus could potentially live outside the womb, independent of the mother. Before fetal viability, however, the state interest in fetal life is outweighed by the woman's privacy concerns.

Although the Court has repeatedly reaffirmed the essential holding of Roe v. Wade, it has at the same time widened the scope of permissible regulation and created an alternate constitutional test. In Planned Parenthood of Se. Pennsylvania v. Casey, the Court upheld several provisions of a Pennsylvania law that included consent requirements, a 24-hour waiting period, parental consent for minors, and reporting and recordkeeping requirements. In reaching its decision the Court eliminated the trimester framework, focusing instead on fetal viability. The Court also replaced the prior strict scrutiny standard of review of state abortion regulations with an "undue burden" test. A restriction places an "undue burden" on a woman when the law has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."

A. Prisons' Elective Abortion Policies and the Current Circuit Split

Although many states have enacted abortion regulations similar to Pennsylvania's, abortion is, generally speaking, freely available to

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55 Id. at 164-65.
56 Id. at 155-56.
57 Id. at 163.
58 Id.
60 Id. at 838-839. The sole provision the court invalidated was a spousal consent requirement. Id. at 838.
61 Id. at 876.
62 Id. at 874 ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").
63 Id. at 877.
women in the United States. Female inmates, on the other hand, automatically face obstacles when seeking an abortion that other women do not. Inmates are incarcerated; they are behind bars, unable to leave on their own volition for any reason. They are at the mercy of the sheriffs, wardens and other prison personnel who determine prison policy. Abortions may not be performed in prisons, but must be performed off-site by a third party. Moreover, many prisons and jails refuse to fund any aspect of an elective abortion—the procedure, transportation or security—placing the financial onus on inmates who are likely to be poor. Prison policies placing additional obstacles in the way of inmates seeking elective abortions compound their already substantial hardships.

One of the most common prison policies concerning inmate access to elective abortion is the court order policy. Under this rule, an inmate who desires an elective abortion must file a motion with the court requesting either supervised release or temporary release on her own recognizance in order to obtain the abortion. Since most court cases have dealt with this particular type of prison policy, this will be the focus of my discussion.

State officials themselves have admitted to the restrictive nature of these policies, and have even used them to effectively prevent

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66 See Webster v. Reprod. Health Servs., 492 U.S. 490, 511 (1989) (holding that a state can prohibit public facilities or medical personnel from performing elective abortions).

67 Roth, supra note 65, at 423.

68 This assertion is based on the frequency of lawsuits challenging the court order policy. Monmouth County Corr. Inst. Institutional Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987); Victoria W. v. Larpenter, 369 F.3d 475 (5th Cir. 2004), Doe v. Barron, 92 F. Supp. 2d 694 (S.D. Ohio 1999). Since many prisons’ abortion policies are unwritten, determined on a “case by case” basis, or not released to the public, it is difficult to determine with certainty the exact frequency of any given policy. See Roth, supra note 65, at 422.

69 Under supervised release, a prison guard escorts and remains with the inmate throughout the procedure and recovery. See, e.g., Doe v. Barron, 92 F. Supp. 2d 694, 697 (S.D. Ohio 1999).

70 See Monmouth, 834 F.2d at 334-35.
inmates from obtaining an abortion while in jail. For example, one staunchly pro-life sheriff in charge of operating a county jail admitted that under the court order policy, "[t]he gal may have the baby by the time it gets through the court system." In another instance, the Ohio Supreme Court suspended a judge for six months who, in *State v. Kawaguchi*, gave a pregnant defendant an unusually harsh sentence only after discovering that she intended to have an abortion. The judge’s sentence successfully prevented the inmate from receiving an abortion, and she eventually gave birth.

The Supreme Court has yet to decide the constitutionality of the court order prison policy. Several appellate courts have heard the issue, however, and there is currently a circuit split. The Third Circuit invalidated this particular policy in *Monmouth County Corr. Institutional Inmates v. Lanzaro*. Alternatively, the Fifth Circuit later held in *Victoria W. v. Larpenter* that such a policy is indeed constitutional. In *Roe v. Crawford*, the Eighth Circuit recently decided a case not involving a court order policy, but a blanket ban on transporting inmates to clinics to receive elective abortions. Although the prison policy at issue in *Roe* did not involve a court order, the court discussed the court order prison policy in dicta and referred to both *Victoria* and *Monmouth*.

B. The Fourteenth Amendment Right to Privacy and Due Process

In determining whether the court order policy violates the Fourteenth Amendment, courts must first apply the *Casey* "undue burden" test. A restriction places an "undue burden" on a woman when the regulation has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." If the regulation fails the *Casey* test, and therefore violates the inmate’s constitutional right to an abortion, the court must apply the *Turner v.*
Safley standard of review for prison regulations to determine whether the violation is permissible.\textsuperscript{82} The Turner Court held that prisons may infringe upon inmates' constitutional rights as long as the restriction is reasonably related to a legitimate prison interest.\textsuperscript{83} Not only does the court order policy violate the Fourteenth Amendment under Casey, but it improperly infringes upon inmates’ constitutional rights under Turner.

1. The Court Order Policy as an Undue Burden

States may not enact abortion legislation that has the effect or purpose of "placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."\textsuperscript{84} A prison’s court order policy creates an administrative burden for inmates seeking elective abortions. Once an inmate discovers she is pregnant—which in many prisons may not be for several weeks after incarceration because most prisons do not automatically administer pregnancy tests upon entry—\textsuperscript{85} she must inform officials of her desire to terminate her pregnancy. This may not occur for several weeks since most prisons do not automatically administer pregnancy tests upon incarceration.\textsuperscript{86} Oftentimes she is required to meet with a prison doctor or nurse, which may not take place for several days.\textsuperscript{87} Then, the inmate must contact her lawyer and ask him to file a motion to request a court ordered release.\textsuperscript{88} Once the attorney actually files the motion and a hearing is scheduled, additional time inevitably passes.\textsuperscript{89} Furthermore, depending on the judge’s docket, even more time may elapse before the judge is able to schedule the hearing.

In Monmouth, inmate Jane Doe was given a pregnancy test on February 19, 1986, seven days after she entered Monmouth County

\textsuperscript{82} Turner v. Safley, 482 U.S. 78, 89 (1987).
\textsuperscript{83} Id.
\textsuperscript{84} Casey, 505 U.S. at 877.
\textsuperscript{86} See Victoria W. v. Larpenter, 369 F.3d 475, 478 (5th Cir. 2004).
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Logically, it seems unlikely that an attorney would be able to draft and file a motion for temporary release the same day she learns of her client’s request.
The pregnancy test showed that Jane Doe was pregnant. Upon indicating to MCCI staff on or about March 3, 1986 that she desired an abortion, she was informed that MCCI would only provide inmates with an abortion in emergency life-threatening situations. Otherwise, Jane Doe would have to first apply for a court order before MCCI would provide her with abortion access. Inmates at MCCI had previously instituted a class action against MCCI administrators and other county officials, and on April 4, 1986, on behalf of Jane Doe and other class members, the inmates sought temporary and preliminary injunctive relief. In particular, the inmates requested that the county provide Jane Doe, who at the time was already nine weeks pregnant, with access to abortion services. While the preliminary injunction was pending, Doe was released from prison to obtain an abortion. Doe received an abortion more than a month after she first alerted prison officials of her desire to terminate her pregnancy.

Under *Casey*, states may not create abortion regulations that have the effect or purpose of "placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." In *Monmouth*, Jane Doe was forced to wait for almost a month while prison staff ignored her request for an abortion, effectively preventing her from obtaining the elective abortion she desired in a timely manner. Therefore, a month long administrative delay clearly constitutes an "undue burden" under *Casey*.

Similarly, in *Victoria W. v. Larpenter*, the prison’s court order policy placed an "undue burden" on an inmate seeking an elective abortion. On July 28, 1999, upon entering the Terrebonne Parish Criminal Justice Complex, Victoria underwent a physical examination. The exam results indicated that she was pregnant. Victoria immediately informed the medical personnel of her desire to terminate

91 Id.
92 Id.
93 Id.
94 Id.
95 Id.
96 Id. at 329.
97 Id.
99 Victoria W. v. Larpenter, 369 F.3d 475 (5th Cir. 2004).
100 Id. at 478.
101 Id.
the pregnancy. Medical personnel told her at that time to ask for a meeting with the head nurse, and Victoria requested the meeting. During the interim, prison officials transported Victoria to a local medical center several times and paid for her prenatal care. On August 6, an ultrasound confirmed that Victoria was fifteen weeks and two days into her pregnancy. On August 12, the head nurse and the prison’s medical administrator met with Victoria and told her that she would need to get a court order before the prison would allow her to obtain an abortion. At this meeting Victoria called her lawyer and instructed him to file for the court order.

Although Victoria’s lawyer created further delays by waiting several weeks to file for the court order, the prison, in creating an almost two week delay, already placed an “undue burden” on Victoria. Courts have held that “delays of a week or more do indeed increase the risk of abortion to a statistically significant degree.” The prison court order policy creates inevitable delays of at least a week, and as Victoria and Monmouth show, often longer. Delays that increase the risks associated with abortion to a statistically significant degree create an undue burden under Casey. Consequently, a prison court order policy places an undue burden on inmates seeking an abortion in violation of their Fourteenth Amendment right to reproductive privacy under Casey.

2. Applying the Turner Standard

Incarceration, however, by its very nature, requires violation of certain fundamental rights. In Turner v. Safley, the Supreme Court held that jails may enact policies that infringe on prisoners’ constitutional rights when the regulation is reasonably related to a legitimate penological interest. The four factors that the Court considered in

\[102\] Id.
\[103\] Id.
\[104\] Id.
\[105\] Id.
\[106\] Id. at 479.
\[107\] Id.
\[108\] Id. at 479-80.
\[109\] Doe v. Barron, 92 F. Supp. 2d 694, 697 (S.D. Ohio 1990) (quoting Zbaraz v. Hartigan, 763 F.2d 1532, 1537 (7th Cir. 1985). Abortions become significantly riskier after week 16, and generally the later the abortion is performed the higher the risk to the health of the mother. ACOG, supra note 23. The difference a week can make in a pregnancy, and therefore an abortion, is also illustrated by the constant developments a fetus undergoes during pregnancy. See, e.g., First Trimester Fetal Development, supra note 9.
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*Turner* are: 1) whether the prison regulation has a "valid, rational connection" to the legitimate government interest, 2) whether "other avenues" remain open for inmates to exercise the right, 3) the impact on prison personnel and other inmates, and on the allocation of prison resources of implementing the claimed constitutional right, and 4) whether there are ready alternatives to the regulation. This rational basis test requires only a low level of judicial scrutiny and is largely deferential to prison policy. Despite the lower level of judicial scrutiny, courts can—and should—find regulations unconstitutional under the rational basis standard of review.

The success or failure of a *Turner* argument depends on the sequence of events and corresponding prison policies. For example, if a jail singles out elective abortions for treatment that is different from the way other elective medical procedures are handled, then it is more likely that a court would find that the policy fails the reasonably related test. If the prison uniformly applies regulations governing elective medical procedures, the court may be more likely to find that the policy passes muster under the *Turner* test. Also, the prison’s stated interests—i.e., security, cost, or liability—will affect the outcome of the court’s decision.

The first factor of the *Turner* test is whether the prison policy has a reasonable relationship to legitimate penological interests. If the prison’s interest in requiring a court order is to avoid “unspecified, yet insurmountable, administrative and financial burdens,” the court will likely find that this interest is not sufficiently related to the regulation, as the court did in *Monmouth*. The *Monmouth* court found that restricting Constitutional rights based on the lone interest of limiting prison costs would counter prior precedent and violate the spirit of the Constitution. Courts are hesitant to consider prison costs as a determinative factor in deciding cases involving constitutional challenges to prison regulations because prisons could use the cost argu-

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111 Id. at 89-90.
112 See *Romer v. Evans*, 517 U.S. 620, 623 (1996) (holding under rational basis review that a Colorado law denying equal protection to homosexuals was unconstitutional).
113 See *Roe v. Crawford*, 514 F.3d 798, 798 (8th Cir. 2008) (holding that a prison’s blanket ban on providing elective abortions contrasted to the prison’s alternate policy regarding other elective procedures was unconstitutional).
114 See *Victoria W. v. Larpenter*, 369 F.3d 475, 488 (5th Cir. 2004).
115 See id.
117 Id. at 336 n.17 (finding that upholding the cost argument “impugns the sanctity of the Constitution and finds no support in the case law”).
ment to justify denying inmates such basic provisions as food, medical care and humane living conditions. 118

The defendants in Victoria were more successful at showing a reasonable relationship, however, because they stated different penological interests. The Victoria court held that the state’s interests in limiting their security and liability risks by requiring court orders for elective medical procedures were legitimate. 119 Although the Victoria court also held that the court order policy had a rational relationship to security and liability interests, 120 this opinion may have ignored certain facts. Given that prisons normally transport inmates outside of the prison for prenatal care and birth, the frequency and duration of which is greater than that of a single elective abortion, court order prison policy for elective abortions does not actually further the state’s interest in limiting security and liability risks. 121

The second Turner factor is “whether there are alternative means of exercising the right that remain open to the prison inmates.” 122 Clearly, there is no other way for inmates to exercise the right to obtain an elective abortion except by adhering to the prison’s abortion policy. The Victoria court concluded, however, that the second Turner factor is not singularly dispositive. Rather, the court found that the regulation’s overall reasonableness was the most important consideration. 123

Conversely, the Monmouth court found that while prison officials are not required to implement the best way of accommodating constitutional rights, “the opportunity they provide inmates to exercise the asserted right must be meaningful.” 124 The court further held that the prison’s court order policy “effectively deprives maximum security inmates who seek [elective] abortions of any opportunity to exercise their option of choosing to abort their pregnancies.” 125 The court also

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118 Id. at 336 (quoting Hamm v. DeKalb County, 774 F.2d 1567, 1573 (11th Cir. 1985) (“state’s interest in limiting the cost of detention ... will justify neither the complete denial of ... [food, living space, and medical care] nor the provision of those necessities below some minimally adequate level”), cert. denied, 475 U.S. 1096 (1986)).
119 Victoria W., 369 F.3d at 486-87.
120 Id. at 487.
123 Victoria, 369 F.3d at 487.
125 Id. at 337.
found that the possibility that minimum security offenders could be effectively denied a “reasonable opportunity safely to terminate their pregnancies” is more important than the state’s concerns with cost and administrative efficiency.\textsuperscript{126}

The \textit{Monmouth} court found that the prison’s arguments as to the third factor—the effect that accommodating the prisoner’s constitutional right would have on guards, other inmates and the allocation of prison resources—were without merit.\textsuperscript{127} The impact on the greater inmate population from allowing prisoners to obtain elective abortions without a court order would be minimal, if not nonexistent.\textsuperscript{128} Since the prison has an obligation to pay for necessary medical care, including all prenatal care, the prison would actually expend fewer resources on providing elective abortions than it would if the inmate chose to carry the fetus to term.\textsuperscript{129}

The \textit{Victoria} court disagreed, however, and held that paying for guards to escort Victoria to an abortion provider an hour away and remain with her for three days during recovery is a sufficient burden on prison resources.\textsuperscript{130} The court further decided that limiting potential liability by avoiding unnecessary prison transports was reasonable.\textsuperscript{131} The question, however, is not whether a policy is reasonable based on minimizing prison costs, but whether the asserted right “will have a significant ‘ripple effect’ on fellow inmates or on prison staff...”\textsuperscript{132} Allowing inmates to obtain an elective abortion without a court order would not detrimentally affect other inmates or prison staff. Prisons must pay for all necessary medical care, including prenatal care and childbirth.\textsuperscript{133} Many prisons refuse to pay for transportation to an abortion clinic or for the abortion itself.\textsuperscript{134} Even if prisons were to pay for abortion services, a single abortion costs less than nine months of prenatal care and delivery. On average, the cost of a surgical abortion performed at a nonhospital facility is $523 at 10 weeks gestation and $1,339 at 20 weeks gestation.\textsuperscript{135} The average cost of an

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{126}] \textit{Id.} at 337-38.
\item[\textsuperscript{127}] \textit{See id.} at 340-44.
\item[\textsuperscript{128}] \textit{Id.} at 341-42.
\item[\textsuperscript{129}] \textit{See id.}
\item[\textsuperscript{130}] \textit{Victoria W. v. Larpenter}, 369 F.3d 475, 487 (5th Cir. 2004).
\item[\textsuperscript{131}] \textit{Id.}
\item[\textsuperscript{133}] \textit{Victoria W.}, 369 F.3d at 478.
\item[\textsuperscript{134}] Federal funds may not be used to pay for abortions. \textit{See GUTTMACHER INST., STATE POLICIES IN BRIEF: STATE FUNDING OF ABORTION UNDER MEDICAID} (2009), \textit{available at} http://guttmacher.org/statecenter/spibs/spib_SFAM.pdf. Also, states are permitted to refuse to expend funds on abortions. \textit{Id.}
\item[\textsuperscript{135}] \textit{Access to Abortion Services, WHAT YOU NEED TO KNOW} (Ass’n Reprod.
early medical abortion performed before the seventh week of gestation is $490. Conversely, an uncomplicated pregnancy's average cost for prenatal care and hospital delivery is $7,600. As a group, inmates suffer from higher instances of substance abuse; therefore, the chances of inmates suffering from complications during pregnancy are also higher. Higher risk pregnancies can translate to increased costs.

Furthermore, the cost of paying prison guards to escort the inmate to the abortion clinic would be lower for one, or at most two visits, versus several prenatal doctor appointments plus a hospital stay for childbirth. The security interest argument can be discarded by the same logic. Allowing an inmate to leave prison for one abortion procedure creates less of a security risk than for multiple prenatal doctor visits plus a hospital stay. Therefore, if prisons were to provide elective abortions upon request, the new policy would not significantly affect the allocation of prison resources, other prisoners or prison staff. On the contrary, the prison would probably expend fewer resources.

The fourth 

The fourth Turner factor is the presence of a ready alternative to current prison policy. Despite not employing a "least restrictive alternative" test, "easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." Again, the Monmouth and Victoria courts came to different conclusions on this factor. The Monmouth court found that providing abortion services to inmates would not disrupt the prison's valid interests given that the prison is required to provide all pregnancy related services to inmates.


136 Id.
138 See infra, notes 185-193 and accompanying text.
139 See Barbara Morse, et al., Screening for Substance Abuse During Pregnancy: Improving Care, Improving Health, National Center for Education in Maternal and Child Health 1, 3 (1997).
140 See ACOG, supra note 23 (explaining that sometimes doctor recommend a follow up visit after the abortion is performed to ensure that all products of conception have been passed through the body).
142 Id. A "least restrictive alternative" test would require prisons to adopt the policy that infringes the least upon the prisoners' constitutional rights.
143 Id.
144 Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326,
The *Victoria* court, however, found that prisons are not bound by a "least restrictive means" standard, meaning that prisons are not required to formulate policies that limit inmates' constitutional rights as little as possible. Despite the fact that prisons are not required to implement the least constitutionally-restrictive policies they can devise, an overly limiting policy is unacceptable. The policy fails to satisfy the fourth *Turner* factor because there is an easy alternative to the court order policy: prisons could choose to classify elective abortions in the same way as prenatal care or childbirth.

Considering all four prongs of the *Turner* test together, prisons' court order policies should be invalidated because they are not reasonably related to a legitimate penological interest. Although some courts have upheld prison abortion policies under the *Turner* test, the Fourteenth Amendment due process argument may prove more successful than the alternative Eighth Amendment claim. Nevertheless, when opposing court order abortion policies, both constitutional arguments are valid and should be presented to courts for consideration.

C. The Eighth Amendment Prohibition on Cruel and Unusual Punishment

The Eighth Amendment was originally intended to prevent torture and other barbaric punishments. Over time, the Supreme Court has held that the Eighth Amendment prohibits more than conventionally barbarous punishment. The Eighth Amendment forbids punishments that are contrary to "evolving standards of decency that mark the progress of a maturing society..." or which "involve the unnecessary and wanton infliction of pain." Therefore, according to the Court in *Estelle v. Gamble* the Eighth Amendment has created an obligation for the government to provide medical care for incarcerated individuals.

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344 (3d Cir. 1987).


148 Id. at 102; see Gregg v. Georgia, 428 U.S. 153, 171 (1976).


150 Gregg, 428 U.S at 173 (citations omitted).

151 *Estelle*, 429 U.S. at 103.
1. The Deliberate Indifference Standard

In order to succeed on an Eighth Amendment cruel and unusual punishment claim, an inmate must meet both prongs of the test articulated in Estelle v. Gamble: 1) the inmate experienced an objectively serious medical need and 2) the prison officials actually knew about the serious medical need and were deliberately indifferent to it.\textsuperscript{152} To prove deliberate indifference one must show that a state official acted knowingly, not merely negligently.\textsuperscript{153} In Bryant v. Maffuci, prison officials failed to schedule an abortion for an inmate until she was too far along in her pregnancy to have an abortion.\textsuperscript{154} In spite of the inmate’s persistent requests to obtain an abortion since her first day in prison and despite the fact that medical staff had been tracking the duration of her pregnancy and had marked her file as an “emergency,” the court held that prison officials merely acted negligently in failing to schedule a timely abortion.\textsuperscript{155} Therefore, the officials did not act with deliberate indifference.\textsuperscript{156}

The mental element of “deliberate indifference” can also be difficult to prove where several state actors are involved. In Gibson v. Matthews, prison officials had scheduled an abortion for Gibson, a pregnant inmate.\textsuperscript{157} After traveling for several days, through multiple federal prison facilities, Gibson arrived at a federal prison in West Virginia only to discover that abortions were not performed there.\textsuperscript{158} By the time she reached an appropriate facility, doctors informed her that she was too far along in her pregnancy to have an abortion.\textsuperscript{159} The court held that since no particular official was responsible for Gibson not receiving the abortion and because the officials paid prompt and serious attention to the inmate’s needs as soon as each of them became aware of Gibson’s desire for an abortion, there was no deliberate indifference, “at most, the actions . . . amounted to negligence. . . .”\textsuperscript{160}

Although the state actors in Bryant seemingly worked hard to facilitate the inmate’s abortion request,\textsuperscript{161} under the Bryant and Gibson holdings, almost any imaginable state action effectively pre-

\textsuperscript{152} Id.
\textsuperscript{153} Bryant v. Maffucci, 923 F.2d 979 (2d Cir. 1991).
\textsuperscript{154} Id. at 980-81.
\textsuperscript{155} Id. at 986.
\textsuperscript{156} Id.
\textsuperscript{157} 926 F.2d 532, 534 (6th Cir. 1991).
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Bryant, 923 F.2d at 982-83.
venturing or unnecessarily delaying an inmate from obtaining an abortion would qualify as mere negligence. Because the risk of complications from abortion increases as the pregnancy progresses,\(^{162}\) once prison officials are aware of an inmate’s desire to terminate her pregnancy, they should act with all deliberate speed to facilitate the procedure. Slow communication between prison officials and outside clinics should not serve as an excuse for nonperformance. Some courts have found that when prison officials refuse to provide transportation to an inmate seeking an abortion, or otherwise delay or deny her request absent a court order, their actions automatically constitute deliberate indifference.\(^{163}\) Given that state actors could easily dodge liability in cases of real deliberate indifference by arguing that they were merely negligent, all courts should adopt this stricter definition of deliberate indifference.

2. Serious Medical Need

Elective abortions constitute a serious medical need not only for women in general, but inmates in particular. The defendants in Monmouth attempted to argue, in regards to their duty to provide medical care, that an elective abortion is essentially similar to a “face-lift or the removal of varicose veins for purely cosmetic reasons. . . .”\(^{164}\) Making the decision to terminate a pregnancy bears no resemblance whatsoever to undergoing elective cosmetic surgery. Although elective abortion is not necessary in a strict sense—by its definition elective abortion is not performed to preserve the physical health or life of the woman—it can be necessary to the women who choose it.

Black’s Law Dictionary defines “serious” as “dangerous; [or] potentially resulting in death or other severe consequences.”\(^{165}\) Elective abortion constitutes a serious medical need for inmates in particular\(^{166}\) because of the horrendous treatment inmates suffer.

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\(^{162}\) See supra notes 37-38 and accompanying text.


\(^{164}\) Monmouth, 834 F.2d at 345 (internal quotation marks and citation omitted).

\(^{165}\) BLACK’S LAW DICTIONARY 1398 (8th ed. 2004).

\(^{166}\) I am not suggesting that elective abortion is a serious medical need and therefore all pregnant inmates should terminate their pregnancies; rather, I’m arguing that for inmates who choose to have an abortion, the abortion is a serious medical
during childbirth, the statistically higher chance that pregnant inmates have not received adequate prenatal care, and the increased probability that pregnant inmates suffer from substance abuse or mental health problems.\textsuperscript{167}

Furthermore, the experiences of women giving birth while in custody support the conclusion that elective abortion is a serious medical need. Pregnant inmates are regularly shackled and handcuffed until moments before childbirth.\textsuperscript{168} Women are reportedly restrained even when they have no history of violence or escape attempts.\textsuperscript{169} One pregnant inmate of Cook County jail in Illinois recounted her horrifying experience of giving birth while in custody:

I was taken into the labour room and my leg was shackled to the hospital bed. The officer was stationed just outside the door. I was in labour for almost twelve hours. I asked the officer to disconnect the leg iron from the bed when I needed to use the bathroom, but the officer made me use the bedpan instead. I was not permitted to move around to help the labour along. ... The doctor came and said that ... this baby is coming right now, and started to prepare the bed for delivery. Because I was shackled to the bed, they couldn't remove the lower part of the bed for the delivery, and they couldn't put my feet in the stirrups. My feet were still shackled together, and I couldn't get my legs apart. The doctor called for the officer, but the officer had gone down the hall. No one else could unlock the shackles, and my baby was coming but I couldn't open my legs. Finally the officer came and unlocked the shackles from my ankles. My baby was born then. I stayed in the delivery room with my baby for a little while, but then the officer put the leg shackles and handcuffs back on me and I was taken out of the delivery room.\textsuperscript{170}

Sadly, this woman's experience seems to be typical. Several other women have reported that they were handcuffed during labor and need.

\textsuperscript{167} See infra, notes 185-93 and accompanying text.  
\textsuperscript{169} Id.  
\textsuperscript{170} This inmate was in jail for a drug conviction, and only had one prior shoplifting conviction on her record. She was not violent, and not classified as dangerous. She had never attempted to escape. Id. at 32.
even while giving birth. Another recounts the shame she felt in the hospital when she was forced to wear shackles when she went to the nursery, a public area in the hospital, to see her baby. Yet another woman was continually shackled to the hospital bed after delivering via caesarian section despite the doctor’s request that she be permitted to walk around to aid in her recovery. These are just a few examples of how difficult and terrible childbirth can be for women in custody.

Furthermore, restraining prisoners during labor, delivery and recovery is a hazard to the health of the mother and the baby. Dr. Patricia Garcia, an obstetrician and gynecologist at North Western University’s Prentice Women’s Hospital, attests that:

Women in labour need to be mobile so that they can assume various positions as needed and so they can quickly be moved to an operating room. Having the woman in shackles compromises the ability to manipulate her legs into the proper position for necessary treatment. The mother and baby’s health could be compromised if there were complications during delivery, such as haemorrhage or decrease in fetal heart tones. If there were a need for a C-section (caesarian delivery), the mother needs to be moved to an operating room immediately and a delay of even five minutes could result in permanent brain damage for the baby. The use of restraints creates a hazardous situation for the mother and the baby, compromises the mother’s ability post-partum to care for her baby and keeps her from being able to breast-feed.

Medical opinion evidences the unacceptable and even dangerous treatment of inmates during childbirth and recovery.

If women are effectively prevented from obtaining an abortion due to delays caused by the court order policy, they may be forced to experience these same horrible conditions. Doctors have concluded that restraining women who are about to give birth can endanger the health and safety of the woman and the child. Furthermore, although prisons should strive to improve their treatment of inmates during childbirth and recovery, allowing prisons to institute abortion policies that effectively force women to endure such barbaric treat-

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171 See id.
172 Id.
173 Id.
174 Id. (internal quotation marks omitted).
175 See id.
ment is unacceptable. Since these conditions still exist today, in order to avoid potentially causing the inmate serious harm, inmate access to elective abortion should be recognized as a serious medical need.

Various courts have found that elective abortion constitutes a serious medical need. The Court’s reasoning in *Roe v. Wade* indirectly supports the contention that elective abortion is a serious medical need for the women who chose it. The Court found that:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

The Court found that denying a woman abortion access implicitly leads to severe consequences. Since “potentially resulting in . . . severe consequences” is included in the definition of “serious”, courts should find that elective abortion constitutes a serious medical need.

The *Monmouth* court reasoned that pregnancy automatically presents a woman with two alternatives: “childbirth or abortion.” Both options are acceptable under the law, and both require different medical treatment. Therefore, choosing to abort a fetus versus carrying the fetus to term should not result in a different legal characterization. Prenatal care and childbirth are considered serious medical needs. Abortion is simply an alternate course of action a woman may pursue during pregnancy; therefore, both reproductive options should be treated the same way and both should be characterized as a serious medical need.

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179 *Monmouth*, 834 F.2d at 348.
180 *See Roe*, 410 U.S. at 153.
181 *Id*. 
IV. SOCIAL POLICY

Behind each abortion regulation and court ruling are various social policy concerns. The state must precariously balance the value of fetal life against the privacy rights of the woman.

Abortion necessarily involves the interests of four distinct entities: the unborn fetus, the mother, the family the fetus will be born into if carried to term, and society at large.182 People may choose to give greater weight to one group's interest versus another. Each interest's relative importance determines a person's views on abortion.

Those who believe that true human life begins at conception place a high value on the life of the unborn fetus. If the unborn fetus is a person, then abortion equates to murder. Giving great weight to the fetus' interests, however, does not preclude divergent viewpoints. Another perspective focuses on the potential future life of the baby once it is born: if the fetus would be born with defects that would render it incapable of living a normal life or if it would otherwise be born into a deleterious family environment then, according to this viewpoint, it would be acceptable to terminate the pregnancy.183

Typically, those who place the highest value on the rights of the expectant mother favor reproductive choice: a mother's personal autonomy trumps other interests. The Supreme Court examined women's privacy interests in its constitutional analysis of abortion, and concluded that the expectant mother's interests trump the other relevant interests most of the time.184

Focusing on the interests of the family can result in views either favoring or disfavoring abortion. Those who wish to uphold the traditional family unit may oppose abortion. For example, certain religions preach that intercourse is strictly a means to procreate; therefore, any conceived child, despite being unwanted, is still an integral part of a family.185 Conversely, some people believe that if the family is unable to properly care for a child and would be overly strained by pregnancy and childrearing, then abortion may be an acceptable option.

183 Id. at 5.
184 See also Gonzalez v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.").
185 See George, supra note 182, at 6.
Almost any of the above arguments can be couched in terms of societal good or detriment, e.g., protecting the life of the unborn, granting women the power to control their bodies and family outcomes, maintaining the traditional family unit, etc. Another important aspect of community interest, however, concerns "the freedom of the medical profession to approach termination of pregnancies on the same basis as other medical problems, free from arbitrary controls." As a society we want physicians to give the best care possible to their patients without facing unnecessary obstacles.

The most compelling social policy arguments in the inmate access to elective abortion debate concern the interests and welfare of the pregnant inmate. Over the past fifteen years, the number of incarcerated women has increased by 92%. Due to the United States' "war on drugs," drug related offenses caused almost 40% of this increase. Also, "the number of women receiving sentences of more than one year has increased by 80% since 1990." More women are in prison today than ever before and serving longer sentences.

In 2005, there were 107,518 female prisoners in state or federal correctional institutions. Given the upward trend of incarceration, this number is probably slightly higher today. As of 2004, 60.2% of female inmates in state prisons and 42.8% of female inmates in federal prisons met the criteria for drug abuse or dependence. Of both male and female federal inmates, 78.7% reported using drugs at least once, with 64.3% admitting to using drugs regularly. The figures for drug use are slightly higher among state prisoners. There is also a high instance of mental health issues among female prisoners. Of female inmates, 73.1% in state prison, 61.2% in federal prisons and 75.4% in local jails suffered from mental health problems. Finally,
approximately 6% of female inmates are pregnant during incarceration.\footnote{196}

Pregnancy is unique.\footnote{197} Deciding whether to abort a fetus or carry a pregnancy to term has significant financial, medical, emotional, psychological and social consequences.\footnote{198} Reproductive decisions not only affect a woman in the present, but will affect her life in ongoing and innumerable ways.\footnote{199} Deciding whether to carry a fetus to term not only impacts the pregnant woman, but the unborn fetus as well.\footnote{200}

If the mother abuses illicit substances or alcohol while pregnant or does not seek proper prenatal care, the fetus has a higher probability of being born with severe disabilities.\footnote{201} This not only reduces the baby's quality of life, but places extra strain on the caregivers. Doctors have found that abortion can be a particularly appropriate choice for inmates who suffer from drug addiction and mental instability.\footnote{202} Given that female inmates are more likely to abuse drugs and alcohol, suffer from mental conditions, and have access to less wealth and resources,\footnote{203} prisons should not adopt abortion policies that could effectively prevent inmates from obtaining an abortion. If the choice to terminate a pregnancy is given to all women, it should be most stringently protected for this specific group.

\footnote{196 Baldwin & Jones, \textit{supra} note 85, at 5.}
\footnote{197 Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 348 (3d Cir. 1987) ("There is no other medical condition known to this Court that involves at the threshold an election of options that thereafter determines the nature of the necessary medical care. In other words, the condition of pregnancy, unlike cancer, a broken arm or a dental cavity, will require very separate and distinct medical treatment depending upon the option—childbirth or abortion—that the woman elects to pursue.")}.
\footnote{198 Nancy Felipe Russo, \textit{Psychological Aspects of Unwanted Pregnancy and Its Resolution, in Abortion, Medicine, and the Law} 593, 593 (J. Douglas Butler & David F. Walbert eds., 1992).}
\footnote{199 Group for the Advancement of Psychiatry, \textit{supra} note 10, at 19 ("Mothering is a task that requires enormous human and emotional resources. . . . [W]hen the child is unwanted, the task may become onerous, and the obligations created may become a lifetime sentence, an ordeal emotionally destructive to the mother and disastrous for the child.").}

\footnote{200 Id.; See also Russo, \textit{supra} note 198 at 595 ("Unwanted children are more likely to have chaotic and insecure family lives, perform more poorly in school, exhibit delinquent behavior and require treatment for symptoms of psychological distress and psychopathology.")}.
\footnote{201 Morse, \textit{supra} note 139, at 3.}
\footnote{202 Doctors who examined inmate Doe found that terminating the pregnancy was particularly appropriate because Doe was a "chronic drug abuser" and "not emotionally equipped to carry a child to term. . . ." Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 329 (3d Cir. 1987).}
\footnote{203 See \textit{supra} notes 192-95 and accompanying text.}
Lastly, reproductive rights are human rights. Article 12 of the United Nations' Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") mandates:

1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2) Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.\(^{204}\)

CEDAW establishes reproductive choice as a human right.\(^{205}\) Out of the 185 Parties to have signed the treaty, the United States is the sole country to have signed the treaty, but not ratified it. Therefore, the United States is not bound to uphold its provisions. Being the pariah, the United States should seek to align itself with what over 90 percent of the member countries in the United Nations believe is in line with modern standards of decency concerning reproductive rights. In order to remain in accordance with international standards of human rights, prisons should voluntarily abolish the court order policy in favor of policies protecting free reproductive choice. Courts should also look to international standards when deciding cases involving inmate access to elective abortion.\(^{206}\)

V. SUGGESTIONS FOR AFFECTING CHANGE IN PRISON POLICY

The widely accepted court order prison policy impermissibly violates inmates’ Fourteenth and Eighth Amendment rights. Therefore, political activists and lawyers should try to persuade jails and

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\(^{206}\) For an example of the U.S. Supreme Court examining international standards in deciding a constitutional question, see Roper v. Simmons, 543 U.S. 551 (2005) where the court held that the Eighth and Fourteenth Amendments preclude juvenile capital punishment.
prisons to embrace policies that provide inmates with pregnancy tests upon incarceration, counseling in the event of a pregnancy, and an elective abortion if requested. If prisons are unwilling to alter their current policies, then civil rights lawyers should represent inmates seeking elective abortions and challenge unconstitutional prison policies.

Currently, only 47 percent of prisoners routinely receive medical exams upon incarceration. Along with a routine medical examination, prisons and jails should screen female inmates for pregnancy upon incarceration. This would allow the inmate to seek the proper care as soon as possible, whether pre-natal care or an abortion. Early pregnancy notification would shorten delays for women seeking abortions. Prisons should also provide counseling services for pregnant inmates. Many suffer from problems such as drug dependence, mental illness, and lack of education, which makes them particularly ill-equipped to face difficult pregnancy decisions alone.

The sooner an abortion is performed, the lower the risk of harm to the woman. The time between the inmate requesting an abortion and prison officials making an appointment with an abortion provider should be no longer than a week. In order to minimize unnecessary delays, prisons should arrange for inmates to receive an abortion without a court order. As part of providing the inmate with proper medical care, prison officials should schedule the abortion at an appropriate medical facility and provide transportation for the procedure. Also, as abortion is a serious medical need, the prison should pay for the prisoner’s transportation and abortion procedure rather than compel the inmate to pay for it herself.

States would argue that the cost of providing pregnancy tests, counseling, the abortion procedure and transportation to the abortion provider would create too much of a burden. Compared to what the state would pay for pre-natal care and childbirth services, however, the state may spend less money on inmates who opt to terminate their pregnancies than on those who carry the fetus to term. Nine months of medical care and childbirth costs the state more money than one

207 Baldwin & Jones, supra note 85, at 4.
208 See supra notes 185-193 and accompanying text.
209 See supra notes 37-38 and accompanying text.
210 Zbaraz v. Hartigan, 763 F.2d 1532, 1537 (7th Cir. 1985) ("[D]elays of a week or more do indeed increase the risk of abortion to a statistically significant degree.") (citation omitted).
211 The international standard dictates that prisons should pay for inmates’ necessary medical care. See AMNESTY INT’L, supra note 168.
abortion.\textsuperscript{212} Even though there are significantly fewer abortion providers than there are obstetricians,\textsuperscript{213} which translates into a higher probability of traveling longer distances to obtain an abortion versus pre-natal care, the cost to the state would probably still be less.

Furthermore, as long as the prison acts quickly to facilitate the inmate's receiving an abortion, the costs associated with the abortion will most likely be low. If the rate of complications and length of recovery increases the longer the woman waits to have an abortion, the state has an interest and responsibility in ensuring that the inmate seeking an abortion receives one quickly in order to minimize potential costs. The state should not be able to promulgate a policy that creates delays for the inmate, and then argue that the costs of an abortion are too high. In order to further the state's interest in reducing cost, the prison should provide the inmate with the opportunity to obtain an abortion as soon as she expresses a wish for one.

Concerning prisons that refuse to alter their unconstitutional court order prison policies, activists should turn to the courts for redress. In the Third Circuit, plaintiffs challenging the court order policy would undoubtedly succeed because lower courts are bound by precedent to follow the \textit{Monmouth} court's ruling. In the Fifth Circuit, which upheld the elective abortion prison court order policy as constitutionally sound,\textsuperscript{214} challenging prison policy on similar factual grounds may fail. Initiating lawsuits that are factually distinguished from \textit{Victoria} may prove successful, however. The \textit{Victoria} majority specifically highlighted the factual differences between its case and \textit{Monmouth}.\textsuperscript{215} The ideal plaintiff in a case challenging a prison's court order policy in the Fifth Circuit would be one whose attorney did not delay in filing for a court order. In \textit{Victoria}, the inmate's lawyer further delayed her from obtaining a court order by failing to file a request for temporary release in a timely manner, thereby creating a causation issue.\textsuperscript{216} Also, a model plaintiff would have followed the steps required by prison officials and would have either been effectively denied an abortion because the policy's inherent delays pushed her past fetal viability, or suffered from complications from the abortion procedure.

Since the Eighth Circuit has not actually decided a case involving the court order policy, it is difficult to say with certainty whether challenges to the policy in the Eighth Circuit may prove successful. The

\textsuperscript{212} \textit{See supra} notes 135-37 and accompanying text.  
\textsuperscript{213} \textit{See supra} note 65 and accompanying text.  
\textsuperscript{214} \textit{Victoria W. v. Larpenter}, 369 F.3d 475, 487 (5th Cir. 2004).  
\textsuperscript{215} \textit{Id.} at 487-88.  
\textsuperscript{216} \textit{Id.} at 479-80.
court in *Roe v. Crawford* cited with approval the Fifth Circuit's reasoning in *Victoria*. Given the Eighth Circuit's leanings toward finding the court order policy constitutional, it may be wise to avoid challenging the policy in the courts of this circuit. No ruling is preferable to an unfavorable one that creates a negative precedent. In any case, it would be unwise to appeal cases regarding prisoner access to abortion to the Supreme Court given the Court's recent trend of restricting abortion rights. Waiting until the Court's composition changes may be strategically wise.

Ideally, all courts hearing this issue would find the prison court order policy unconstitutional. However, if challenging prison abortion policies fails in the courts, another strategy could be encouraging reproductive rights organizations to increase involvement in aiding prisoners in obtaining court orders. Attorneys in these organizations could help inmates apply for court orders, thereby expediting the process. Also, disseminating a publication that explains the necessary steps inmates must take in order to secure an abortion in prison would be helpful. Organizations could make the publication available over the internet. Also, the publications could be sent to prisons and jails across the country and added to the prisons' law libraries.

If an attorney representing a woman seeking an abortion is responsible for creating an unacceptable delay in filing the motion, or if he chooses to file a different motion without discussing it with his client first, he should be reported to the ethics board and reprimanded. Attorneys have a duty to zealously represent their clients' interests. The *Victoria* court found that the plaintiff's attorney created the delay that resulted in Victoria's being unable to obtain an abortion while in prison. Generally, given the time sensitive nature of abortions, it is important to facilitate the process so that inmates can obtain the desired abortion in a timely manner. The very last person who should stand in the inmates' way of having a lawful abortion is her lawyer.

Finally, disseminating information to the public at large on the inhumane conditions pregnant prisoners suffer during childbirth and

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217 *Roe v. Crawford*, 514 F.3d 789, 797 (8th Cir. 2008).
218 *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007) (upholding in a 5-4 decision the Partial Birth Abortion Ban Act, which restricts the intact dilation and extraction abortion method, even in cases where the health of the mother is in jeopardy).
221 *Victoria W.*, 369 F.3d at 490.
the lack of adequate medical care in general may increase interest in this issue. Currently, the opaque nature of unwritten prison policies frustrates accountability. If the public became more aware that pregnant inmates' constitutional rights are being unacceptably violated, perhaps there would be more support for policy change. Raising public awareness was a successful tactic for opponents of lethal injection. A Google news archives search of “lethal injection” limited to the year 2003 resulted in 2,390 hits. This number dramatically increased for 2004 (2,930), 2005 (3,820), 2006 (5,110) and 2007 (9,690). In 2008, the Supreme Court decided a case challenging the constitutionality of lethal injection. Public opinion is a strong force in the political process, so disseminating information could affect positive change in prisons’ abortion regulations.

VI. CONCLUSION

Convicted criminals are perhaps the most disfavored group in society. No one race, gender, religion, nationality or creed is so universally despised. Reproductive rights scholar Rachel Roth stated that “[i]f political science tends to ignore prisons, research on prisons tends to ignore women.” I would take her assertion one step further and argue that if research on prisons tends to ignore women, inmates’ reproductive rights are steadfastly overlooked. The disfavored status of female inmates coupled with the controversial nature of abortion results in general apathy toward the plight of pregnant inmates.

Many prisons have instituted the “court order policy,” which forces a pregnant inmate desiring an abortion to first obtain a court order of release. Although at first glance these policies seem acceptable—inmates are convicted criminals and must remain incarcerated—in actuality they can create dangerous delays that result in higher risk abortions. These policies have also effectively prevented inmates from obtaining elective abortions because by the time the inmate is able to secure a court order, she is past the point of fetal viability.

As a society, we have a duty to defend the Constitutional rights of all of our citizens, not only the ones we favor. Performing this duty is the mark of a civilized society. In the case of incarcerated individuals, society must infringe upon their Constitutional rights due to the nature of their punishment, but the infringements should not occur recklessly or carelessly. Prisons should create their restrictions with great cau-

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223 Roth, supra note 65 at 415.
tion. The Supreme Court has ruled that "no iron curtain [is] drawn between the Constitution and the prisons of this country."\textsuperscript{224} Serving prisons’ interests such as safety, cost, and security, while protecting inmates’ Constitutional rights is a delicate balance to strike. Currently, court order policies do not strike the appropriate balance.

Rather than instituting an arbitrary policy that does nothing but create unnecessary burdens on inmates seeking abortions, prisons could still serve penological interests by qualifying elective abortion as a serious medical need. Instead of forcing the inmate to go through the rigmarole of obtaining a court order of release, the prison could easily provide the inmate with an abortion, the same as if it were to provide prenatal care to the inmate had she chosen to carry the fetus to term. In order to uphold the integrity of our Constitution, prisons should abolish the court order policy and replace it with a policy protecting inmates’ free reproductive choice.
