

Pregnancy Behind Bars: The Constitutional Argument for Reproductive Healthcare Access in Prison

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I. INTRODUCTION

Across the United States, prisoners¹ are routinely denied adequate reproductive healthcare. Because such people are out of sight, they are also out of mind — rarely explored in reproductive rights² literature and rarely represented in reproductive rights impact litigation suits. This Note aims to bring reproductive health issues of Massachusetts inmates out of the darkness, to explore prisoners' right and ability to access reproductive healthcare, and to suggest litigation strategies for those who wish to expand that right.

Part II of this Note will provide background information about the modern reproductive justice movement and the way in which it challenged the narrow framework of earlier feminist and reproductive rights movements. This section will also explore the special reproductive justice problems that incarcerated women face, and the way in which those burdens fall disproportionately on poor women and women of color.

Part III of this Note will lay out the current situation in Massachusetts prisons, focusing on the challenges that female prisoners face in accessing reproductive healthcare based on data collected after the anti-shackling law was passed and on conversations with healthcare workers in Massachusetts institutions. This information will provide the basis for Eighth Amendment arguments in support of expanded reproductive healthcare rights for prisoners in Massachusetts.

Part IV will lay out current jurisprudence on reproductive healthcare for incarcerated individuals, recognizing that much of this jurisprudence focuses on the right to abortion based on privacy as defined in *Roe v. Wade*. Because incarceration itself is inconsistent with privacy to a great degree, a reliance on the privacy right as the basis of the right to reproductive healthcare necessarily limits the right with respect to prisoners.

Part V will argue that, in order to lay the groundwork for an expansive right to access reproductive healthcare, including prenatal care and transition-related care, litigators in Massachusetts should propose a right to reproductive healthcare under the Eighth Amendment rather than the Fourteenth Amendment by arguing that prohibiting access to such healthcare is deliberate indifference to a serious medical need based on the effect of denying reproductive healthcare in the prison context. An Eighth Amendment argument allows litigators a greater opportunity to use the context of the prison setting and the dangers of lack of access to reproductive healthcare facing Massachusetts inmates, described in detail in section III, to further their ar-

¹ Throughout the Note, "prisoners" is used to refer to individuals who are incarcerated in either prisons or jails.

² This Note uses "reproductive rights" to refer to advocacy and litigation that focuses on a narrow privacy right such as the right to abortion and the right to be sterilized, and "reproductive justice" to refer to that which focuses on broader rights and principles such as those explored in Section II. See Jael Silliman et al., *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE* 4 (2004).

gument. In addition, the narrowly defined Fourteenth Amendment privacy right does not carry with it any affirmative obligation on the part of the state, an obligation that is necessary to effectuate the rights of prisoners. The Eighth Amendment, on the other hand, does require prisons and jails to provide care to inmates, so that theoretical rights to healthcare do not end up out of practical reach. Part VI concludes.

II. HISTORY OF THE REPRODUCTIVE JUSTICE MOVEMENT

Historically, groups concerned with “reproductive rights” have focused on the right to legally access birth control and abortion.³ Reproductive justice advocates, in contrast, focus on a broader array of rights that includes economic, criminal, racial, and disability justice. Advocates for greater access to prison reproductive healthcare must take into consideration the history and context of women of color and poor women when formulating litigation strategies.

A. *Problems with the Conceptualization of the Privacy Right*

White women of economic means — and the reproductive rights movement — have traditionally been concerned with the paternalistic attitudes of doctors or the state encouraging pregnancy and distrusting women who seek to prevent or terminate pregnancies.⁴ Thus, reproductive rights cases have been driven by those concerned with establishing the right to access birth control and abortion. The Court ultimately found that such a right exists in *Griswold v. Connecticut*⁵ and *Roe v. Wade*.⁶ Both of these cases found a personal privacy right in a relationship, either the marital relationship⁷ or the relationship between a woman and her doctor.⁸ This right to privacy is the right to be free from active state intrusion; however, there is no corresponding affirmative obligation of the government to help women effectuate the right to birth control or abortion by helping women obtain actual access to birth control and abortion.⁹

³ See Susan Stefan, *Whose Egg is it Anyway? Reproductive Rights of Incarcerated, Institutionalized, and Incompetent Women*, 13 NOVA L. REV. 405, 406 (1989).

⁴ See Rachael N. Pine, *Envisioning A Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407, 416 (1992) (noting that “advocates of reproductive choice have argued that the right of bodily integrity is violated by laws that force unwanted pregnancy on women or that distort the informed consent dialogue between a woman and her physician”).

⁵ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking down a state law prohibiting even married women from using birth control).

⁶ *Roe v. Wade*, 93 S.Ct. 705, 732 (1973) (finding that the Fourteenth Amendment contains a privacy right which protects against state interference in terminating a pregnancy), *modified by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁷ *Griswold*, 381 U.S. at 485.

⁸ *Roe*, 410 U.S. at 155–56.

⁹ See Susan F. Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*,

The notion of privacy as expounded in *Griswold* and *Roe* does not address the reality of poor women, who are disproportionately women of color in this country. Specifically, “[p]rivacy assumes access to resources and a level of autonomy that many people do not have. A privacy approach cannot accommodate the fact that many people rely on government support for their daily activities [including] family formation[.]”¹⁰ A focus on the privacy right centers and elevates the role of certified medical professionals in the realization of women’s individual autonomous choices.¹¹ For example, reproductive rights groups fought against the paternalistic attitudes of doctors who would refuse to perform wanted sterilization procedures on women, without recognizing abusive sterilization of poor women and women of color.¹² The privacy right, with its focus on access to birth control, abortion, and sterilization, obscures a history in which white women were pressured to reproduce, but black and poor women were pressured or even forced¹³ to avoid pregnancy and reproduction.¹⁴ These fears are not the bygones of a distant past. Modern politicians, commentators, and others fear that immigrants will out-reproduce whites, leaving them a minority in America.¹⁵ Sterilization without the consent of women on public assistance still takes place today.¹⁶ Although women of color have more control over their reproductive ability than they used to,¹⁷ they are still targets of reproductive coercion and control.¹⁸

In addition, women who use state-provided services, such as Medicaid, simply do not have the kind of legal privacy rights envisioned by *Griswold* and *Roe*.¹⁹ Women have no right to public funding for abortion procedures²⁰ and they may also face scrutiny if they use state-funded prenatal services, if

81 COLUM. L. REV. 721, 737 (1981). To the extent that the government criminalizes self-induced abortion, a refusal to pay for abortion access is in fact tantamount to blocking abortion access altogether.

¹⁰ See Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANNU. REV. LAW SOC. SCI. 327, 329 (2013).

¹¹ See *id.* at 333 (noting that *Roe* made “clear that the right to privacy was created by physicians rather than women”).

¹² See *id.* at 334.

¹³ *Id.*

¹⁴ See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 59–60 (1997).

¹⁵ See Hua Hsu, *The End of White America?*, THE ATLANTIC (Jan./Feb. 2009).

¹⁶ See Constantino Diaz-Duran, *Sterilized for Being Poor?*, THE DAILY BEAST, (Jan. 16, 2010) <http://www.thedailybeast.com/articles/2010/01/16/sterilized-for-being-poor.html>, archived at <https://perma.cc/2C53-NZ6Z>.

¹⁷ See e.g. Camille A. Nelson, *American Husbandry: Legal Norms Impacting the Production of (Re)productivity*, 19 YALE J.L. & FEMINISM 1, 30–31 (2007) (describing a 19th-century physician’s nonconsensual experimentation on black slave women in order to develop gynecological procedures for wealthy white women).

¹⁸ For example, coercive sterilization of Puerto Rican women continued until at least 1965, when 35% of Puerto Rican women were sterilized, and the continued high rate of sterilization of Puerto Rican women is likely a result of those coercive policies. SILLIMAN ET AL., *supra* note 2 at 220–21.

¹⁹ See e.g. Diaz-Duran, *supra* note 16 (describing a case in which a woman on state assistance was sterilized, and internet comments stated their agreement with compulsive steriliza-

they have access to those services at all.²¹ Even women on public health insurance may have little access to prenatal care for a variety of reasons, including immigration status,²² but they tend to be able to access better prenatal care than women who are uninsured.²³ Women who do have access to prenatal care through Medicaid may not only have to submit to more tests and appointments, during which they may be compelled to provide significant amounts of private information, than women on private insurance,²⁴ but are subject to other indignities as well. At least one large hospital in New York City may actually have kept newborn babies from mothers on Medicaid until they could prove they are prepared to take the baby home if they have not attended a sufficient number of prenatal appointments.²⁵ Women on public health insurance, then, are caught between the pressure to terminate pregnancies because of the shame of having a family that is too large or too dependent on welfare and the pressure to carry to term because abortion is expensive or considered immoral. A woman's ultimate decision in this matter may have little to do with privacy or even choice, the guiding principles of the early reproductive rights movement.

The privacy right is even more attenuated in the case of prisoners, who necessarily have to give up a significant amount of privacy because of incarceration. Because prison and jail healthcare is publicly funded,²⁶ the scrutiny to which women on public healthcare are subjected is ever-present. If states are able to use Medicaid to control reproductive choices, prisons can do the same — and the context of coercion is relevant to litigation strategies seeking to increase access to reproductive healthcare. Attorneys should recognize the challenges of coercion that go beyond a narrow privacy right and must take into context the history of reproductive coercion, particularly against women of color and women on public welfare.

B. Intersectional Reproductive Rights

This oppressive history of reproductive injustice against poor women and women of color has led to guiding principles other than privacy —

tion of women on public assistance, thus implying that such women should not have control over their bodies or reproductive choices).

²⁰ See *Maher v. Roe*, 432 U.S. 464, 479 (1977).

²¹ See Charlotte Rutherford, Esq., *Reproductive Freedoms and African American Women*, 4 *YALE J.L. & FEMINISM* 255, 266 (1992).

²² See Tracy Hyams & Laura Cohen, BRIGHAM AND WOMEN'S HOSPITAL, *Massachusetts Health Reform: Impact on Women's Health* 18 (June 2010), http://www.brighamandwomens.org/Departments_and_Services/womenshealth/ConnorsCenter/Policy/July29%20-%20Issue%20Brief.pdf, archived at <https://perma.cc/589F-QXD7> (explaining why undocumented immigrants might refuse to seek legally available care in Massachusetts).

²³ See Catherine Hoffman & Julia Paradise, *Health Insurance and Access to Healthcare in the United States*, *ANNALS OF THE N.Y. ACADEMY OF SCIENCE* 149, 151 (2008).

²⁴ See KHIARA M. BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* 49–50 (2011).

²⁵ See *id.* at 48–49.

²⁶ See, e.g., 103 MASS. CODE REGS. § 932.01.

namely, the right not to have children, the right to have children, and the right to parent with dignity.²⁷ The content of these rights is far broader than the narrowly constructed, privacy-based, abortion-focused reproductive rights that appear to exist mostly in the doctor's office. Because white feminists have not pushed the privacy right to encompass broader decisions around reproduction and parenting, feminists of color have instead used the language and idea of reproductive justice and freedom. One black feminist suggested a list of reproductive freedoms that would permit poor women to realize the full spectrum of reproductive rights. Those freedoms include access to reproductive healthcare, infertility services, contraception, and nutrition services, in addition to access to legal and affordable abortion services.²⁸ The specifics of these freedoms also depend on the community seeking reproductive freedom. For example, a Native American conception of reproductive justice may include sovereignty-based freedoms that would allow Native Americans to independently develop policies regarding perinatal care, childbirth, and birth control.²⁹ Asian American reproductive justice advocates may envision reproductive freedom to include the freedom to access holistic healthcare provided by culturally sensitive providers.³⁰

The reproductive justice movement may also encompass a number of other movements in its attempt to fully realize these rights, as individuals cannot freely make reproductive and parenting decisions when they face coercion and danger in other areas of their lives. For example, reproductive justice advocates can work with environmental justice advocates to promote healthy environments in which individuals can raise their children.³¹ Reproductive justice advocates also intersect with disability advocates,³² as both want to ensure that disabled women do not lose custody of their children because they are assumed to be unfit mothers.³³ These intersections can show the effects of denial of reproductive healthcare on individuals and their children — for example, an unhealthy prison environment may reverberate in the health of a pregnant prisoner's children, and disabled women may

²⁷ See Loretta Ross, *Understanding Reproductive Justice*, SISTERSONG (Nov. 2006), <http://www.trustblackwomen.org/our-work/what-is-reproductive-justice>, archived at <https://perma.cc/C8TB-5FQG>.

²⁸ See Charlotte Rutherford, *Reproductive Freedoms and African American Women*, 4 YALE J. L. & FEMINISM 255, 258–59 (1992) (listing ten reproductive freedoms for poor women).

²⁹ See SILLIMAN ET AL., *supra* note 2, at 147.

³⁰ See *id.* at 182.

³¹ See generally Angie McCarthy, *On Fertile Ground: The Environmental and Reproductive Justice Movements As A Unified Force for Reforming Toxic Chemical Regulation*, 13 SUSTAINABLE DEV. L. & POL'Y 20 (2013); see also SILLIMAN ET AL., *supra* note 2, at 135 & 186–87 (describing how Native American and Asian American reproductive justice advocates have fought against toxic environments).

³² See generally IF/WHEN/HOW, REPRODUCTIVE JUSTICE & WOMEN WITH DISABILITIES, <http://www.ifwhenhow.org/resources/what-is-reproductive-justice-and-women-with-disabilities/>, archived at <https://perma.cc/3X5Z-7B76>.

³³ See Stefan, *supra* note 3, at 447.

have particular healthcare-related needs that include recognition that they deserve custody of their children. Litigators may take into account the effects of denial of reproductive healthcare in Eighth Amendment arguments in particular, whereas a focus on the limited Fourteenth Amendment right to abortion may not be able to include the far-reaching consequences of denial of reproductive healthcare.

C. *Reproductive Justice and the Criminalization of Pregnancy*

Reproductive justice advocates are also concerned about the extent to which actions taken during pregnancy by certain women are penalized and even criminalized.³⁴ Fear of prosecution and incarceration prevents pregnant women who may be addicted to drugs or involved in any type of criminal activity from making informed and un-coerced choices about having children, terminating their pregnancies, and raising their children. Criminalization of the reproductive choices of women of color and poor women bring them disproportionately into the criminal justice system. A sufficiently wealthy woman who faces an unwanted pregnancy can access legal abortion in a clinic, although she may have to overcome some obstacles such as walking through a crowd of protestors³⁵ and being forced to view and hear a description of an ultrasound before the procedure.³⁶ If one state has excessive regulations on abortion, a wealthy woman could choose to travel to another state in order to avoid those obstacles. Massachusetts law may make it difficult for low-income women to get abortions at healthcare facilities³⁷ or to afford the procedure at all.³⁸ They may resort to self-induced abortion with unregulated drugs instead.³⁹ Those who remain pregnant face greater

³⁴ In Massachusetts, pregnant women who are substance abusers are often diverted from traditional criminal justice sentencing, see Meredith Derby Berg, *Massachusetts Mobilizes to Treat Addicted Moms*, THE MARSHALL PROJECT (Jan. 19, 2016, 7:15 a.m.), <https://www.themarshallproject.org/2016/01/19/massachusetts-mobilizes-to-treat-addicted-moms#hIZCoJ7dN>, archived at <https://perma.cc/55G7-JZ64>, but drug tests performed during pregnancy can be admitted into evidence in criminal prosecutions as “probative of neglect[.]” see *Com. v. Pellegrini*, 414 Mass. 402, 409 (1993).

³⁵ See generally *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (striking down a law prohibiting anti-abortion protestors from standing within 35 feet of an abortion clinic on the theory that sidewalks are public fora in which those individuals have the First Amendment right to share their anti-abortion ideas).

³⁶ See Guttmacher Institute, *Requirements for Ultrasound* (2016), <https://www.gutmacher.org/state-policy/explore/requirements-ultrasound>, archived at <https://perma.cc/XBC2-BUVZ>.

³⁷ See Mass. Gen. Laws Ann. ch. 112, § 12I (West) (allowing employees of abortion-performing health centers to abstain from providing abortions or providing referrals to abortion providers in all circumstances).

³⁸ MassHealth (Massachusetts public health insurance) pays for medically necessary abortions, see 130 Mass. Code Regs. 484.001, but for women who are uninsured, the cost can run to hundreds of dollars. See NARAL Pro-Choice Massachusetts, *Abortion Providers in Massachusetts* (July 2, 2013), <http://www.prochoicemass.org/assets/bin/pdfs/providerchart.pdf>, archived at <https://perma.cc/UN22-X799>.

³⁹ See Michele Goodwin, *The Pregnancy Penalty*, 26 HEALTH MATRIX 17, 24 (2016) (describing the case of Purvi Patel, sentenced to 30 years for a self-induced abortion).

police scrutiny and threat than wealthy white women as well, if they engage in drug use or otherwise engage in activities that a police officer might believe would endanger a fetus.⁴⁰

Public health service providers also contribute to the penalization and criminalization of pregnancy through supposedly neutral policies, both in Massachusetts and across the United States. The Massachusetts Department of Public Health uses facially race- and health insurance-neutral criteria for drug screening pregnant women.⁴¹ Because Massachusetts physicians and other healthcare professionals are mandatory reporters, any positive result has to be reported to the Department of Children and Families along with a report of suspected abuse or neglect.⁴² However, at least one study conducted in an unnamed urban setting found that either being black or using public health insurance independently predicted drug screening.⁴³ In other words, black women and women who use public health insurance are more likely to be drug screened — and therefore more likely to be reported to the Department of Children and Families as possible abusers — than white women or women who have private health insurance, holding other factors (such as signs of intoxication) constant.⁴⁴ Because medical personnel are conscripted into the police state by incurring “criminal law enforcement responsibilities” with respect to pregnant women⁴⁵ and make decisions to treat black women based partly on racist views,⁴⁶ they help to disproportionately bring black women into the criminal justice system.

The fact that black women are disproportionately brought into the prison system because of their reproductive choices is no accident. Black women’s bodies in particular have been singled out for reproductive control for much of this nation’s history. Women’s bodies were conscripted into service for slave-owners, providing sexual gratification and producing more property.⁴⁷ After slavery ended, black women were disproportionately ex-

⁴⁰ See *id.* at 24–25 (describing the case of Maria Guerra, arrested for child endangerment for driving under the influence even though she was not legally intoxicated at the time).

⁴¹ See MASS. DEP’T OF PUB. HEALTH GUIDELINES FOR CMTY. STANDARD FOR MATERNAL/NEWBORN SCREENING FOR ALCOHOL/SUBSTANCE USE (DEP’T. OF PUB. HEALTH 2013), <http://www.mass.gov/eohhs/docs/dph/quality/hcq-circular-letters/2013/dhcq-1305586-sen-guidelines.pdf>, archived at <https://perma.cc/DDZ7-TZQG>.

⁴² See *id.* at 5.

⁴³ See Hillary Veda Kunins et al., *The Effect of Race on Provider Decisions to Test for Illicit Drug Use in the Peripartum Setting*, 16 J. WOMEN’S HEALTH 245 (2007); see also Bonnie D. Kerker et al., *Patients’ Characteristics and Providers’ Attitudes: Predictors of Screening Pregnant Women for Illicit Substance Use*, 28 CHILD ABUSE & NEGLECT 209, 218 (2004) (finding that being black predicted the likelihood of being selected to be tested for drug use, holding other factors constant).

⁴⁴ See *id.*

⁴⁵ See Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CAL. L. REV. 781, 813 (2014).

⁴⁶ See Bridges, *supra* note 24, at 117.

⁴⁷ See Priscilla Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 Cal. L. Rev. 1239, 1263–64 (2012).

posed to forced or coerced sterilizations.⁴⁸ In the modern era, many lawmakers have suggested requiring women who receive public assistance — a group that tends to be disproportionately black⁴⁹ — to use long-term birth control or give up their benefits.⁵⁰ In some cases, judges have given women a choice between using a hormonal birth control implant and going to prison.⁵¹ Thus, the lack of a full range of reproductive choice for incarcerated women is part of the systemic devaluation of black women, even when the incarcerated women themselves are not black.⁵²

Abortion-focused privacy rights victories have not proven to be helpful to women who cannot afford birth control or abortion, or to women punished for their behavior during pregnancy. Intersectional advocates would focus not simply on discrete rights to non-interference, but rather would take a reproductive justice approach that would incorporate the broad principles and address the real issues described above. Such advocates would need to prioritize the needs of poor women, women of color, and other marginalized populations. One example of such advocacy being successful is the creation of federal guidelines regarding sterilization in response to impact litigation on behalf of young African-American girls who were sterilized involuntarily.⁵³ Prison advocates can focus on the specific context of prison in order to determine fact-based litigation strategies for increasing access to reproductive healthcare. They should use the specific harms that women face in prison and will face when they leave — including environmental harms for

⁴⁸ See Thomas Volscho, *Sterilization and Women of Color*, RACISM REVIEW (2007) at <http://www.racismreview.com/blog/2007/09/22/sterilization-and-women-of-color/>, archived at <https://perma.cc/BH6L-8R7V>.

⁴⁹ 31.9% of people using Temporary Assistance for Needy Families were black in 2010, see OFFICE OF FAMILY ASSISTANCE, CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF TANF RECIPIENTS, FISCAL YEAR 2010 (Aug. 8, 2012), <http://www.acf.hhs.gov/ofa/resource/character/fy2010/fy2010-chap10-ys-final>, archived at <https://perma.cc/RN2H-UDPB>, although that number is declining, even though black people made up less than 13% of the population that year, see KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, 4 (Mar. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>, archived at <https://perma.cc/2Y53-JYGK>.

⁵⁰ See *Governor's Welfare Plan Pushes Free Birth Control*, N.Y. TIMES (Jan. 17, 1993), <http://www.nytimes.com/1993/01/17/us/governor-s-welfare-plan-pushes-free-birth-control.html>, archived at <https://perma.cc/ZU5E-PCJQ>.

⁵¹ See *Norplant: A New Contraceptive with the Potential for Abuse*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/other/norplant-new-contraceptive-potential-abuse>, archived at <https://perma.cc/8FSF-RJ7H>; see also Rachel Roth, "No New Babies?" *Gender Inequality and Reproductive Control in the Criminal Justice and Prison Systems*, 12 AM. U. J. GENDER SOC. POL'Y & L. 391, 404-07 (2004) (discussing the case of Darlene Johnson, who was offered a choice between a prison sentence and using Norplant).

⁵² See Ocen, *supra* note 47, at 1274 (noting that non-black women are "Blackened" by their incarceration).

⁵³ See SILLIMAN ET AL., *supra* note 2, at 10. Although limitations on sterilization extend to all women and girls, they are particularly beneficial to a marginalized population that was seen as easily exploitable by the state and medical professionals — African-American girls. The litigation granted relief not just to the plaintiffs in the suit, but to all girls and women who might otherwise have faced coercive sterilization in the future.

their young children and the risk of coerced sterilization—to formulate litigation strategies.

III. ACCESS TO REPRODUCTIVE HEALTHCARE IN MASSACHUSETTS PRISONS

In order to make a compelling Eighth Amendment argument for reproductive healthcare access, litigators must be familiar with the context of the prison setting. This Section will provide background information to assist advocates in formulating Eighth Amendment arguments based on interviews and data provided by correctional institutions in Massachusetts. Although the arguments outlined above could be applied to any state, Massachusetts provides a particularly interesting context because of its recent anti-shackling law. As of 2014, the law prohibits shackling (placing in restraints) of pregnant women beyond the first trimester and post-partum except in extreme circumstances, as well as requiring adequate prenatal care.⁵⁴ Because of this law and the publicity it has spawned,⁵⁵ local judges are likely to be aware of the cruelty of shackling and may be more attuned than judges of other jurisdictions to the reproductive healthcare problems facing prisoners. In addition, because of the law, significant data regarding pregnancy care, reproductive healthcare more broadly, and pregnancy outcomes have been collected in Massachusetts.⁵⁶ This data can provide litigators with a foundation for their Eighth Amendment claims.

Litigators can rely on the difficulties prisoners face in accessing reproductive healthcare to make more persuasive Eighth Amendment arguments. Incarcerated women in Massachusetts are disproportionately mentally ill and have lower levels of education.⁵⁷ Women of color are likely to be disproportionately incarcerated in Massachusetts, both because the entire Massachusetts prison population, counting both men and women, is disproportionately non-white⁵⁸ and because female prisoners in the United States are most often women of color⁵⁹ and many are poor.⁶⁰ Imprisoned women not only face lack of access to abortion and birth control, but also inadequate prenatal

⁵⁴ Pregnant and postpartum inmates; standards of care; use of restraints. MASS. GEN. LAWS ANN. ch. 127, § 118 (West).

⁵⁵ A Google search of “Massachusetts Anti-Shackling Law” turns up 49 news articles from a wide variety of sources and spanning a years-long timeframe.

⁵⁶ See generally *infra* Appendix.

⁵⁷ See *Prison Population Trends*, MASSACHUSETTS DEPT. OF CORRECTIONS 17 (Mar. 2016), <http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prisonpop-trends-2015-final.pdf>, archived at <https://perma.cc/D5YQ-DMSL>.

⁵⁸ See *Massachusetts Incarceration Rates by Race/Ethnicity, 2010*, PRISON POLICY INITIATIVE, [hereinafter *Massachusetts Incarceration*], <https://www.prisonpolicy.org/graphs/2010-rates/MA.html>, archived at <https://perma.cc/XRV2-W59D> (last visited Jan. 3, 2017).

⁵⁹ See LAWRENCE A. GREENFELD & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, *WOMEN OFFENDERS* 7 (DEC. 1999), <http://www.bjs.gov/content/pub/pdf/wo.pdf>, archived at <https://perma.cc/YH76-XYB7>. Notably, white women are the majority of those out on probation.

⁶⁰ See *id.* at 8.

care,⁶¹ coercive sterilization,⁶² termination of parental rights,⁶³ and sexual assault and rape.⁶⁴

Based on conversations with healthcare workers at the women's prison and jails around the state,⁶⁵ it appears that women in Massachusetts prisons cannot fully exercise the rights that they theoretically possess. In general, lack of training, sparse policies, and poor adherence to policies that do exist impede access to reproductive healthcare. In addition, because security officers serve as the first line responders to medical problems and medical care in general, inmates' and providers' relationships with guards can determine speed and quality of care. The unpredictability of access to reproductive healthcare is particularly important for litigators who may argue that there is a constitutional violation notwithstanding seemingly fair and adequate policies or laws.

A. *Massachusetts Committing Institution-Framingham ("Framingham")*

Framingham is the only women's prison in Massachusetts, and therefore the only correctional institution in the state subject to Department of Corrections ("DOC") policies. Because Framingham is larger and more regulated compared to the jails in Massachusetts,⁶⁶ the conditions and policies there are easier to find information about and can be used as the basis for Eighth Amendment claims. An interview with a healthcare worker and data provided by the prison itself give the basis for a comprehensive understanding of conditions for female prisoners in Massachusetts.

Nadia works at both Framingham and a county jail. She has found that jail policies are far more lax than prison policies and often not followed at all — without repercussions for the security officers who ignore them.⁶⁷ This point is supported and elaborated by Anne, another clinician.⁶⁸ She reports that prison policies are more routinely followed and violations are investigated and violators penalized.⁶⁹ However, she says that even in prisons, there can be a lack of training for healthcare services in general, including compliance with the anti-shackling law. Because prisoners must go through security officers in order to access healthcare, lack of training can

⁶¹ See Barbara A. Hotelling, *Perinatal Needs of Pregnant, Incarcerated Women*, 17 J. PERINATAL EDUCATION 38 (2008).

⁶² See Rachel Roth & Sara L. Ainsworth, "If They Hand You a Paper, You Sign It": A Call to End the Sterilization of Women in Prison, 26 *Hastings Women's L. J.* 20 (2015).

⁶³ See *id.* at 47.

⁶⁴ See Ocen, *supra* note 47, at 1253–54.

⁶⁵ All names have been altered in order to protect confidentiality and avoid potential backlash from the DOC or the individuals' employers.

⁶⁶ See *Prison Population Trends*, *supra* note 57, at 4 & 12. Framingham has an average daily population of 649, whereas one county facility housed only 51 women. *Id.*

⁶⁷ Telephone Interview with Nadia, Healthcare Provider, in Cambridge, Mass. (Dec. 4, 2016).

⁶⁸ *Infra* Section IV (B).

⁶⁹ Telephone Interview with Nadia, *supra* note 67.

impede access to needed care.⁷⁰ In addition, Nadia indicates that the security officers may be more or less strict in following procedures and policies based on their relationships with both the prisoners and the healthcare staff. Prisoners' care may be delivered more promptly and respectfully if there is a good relationship between the healthcare provider and the security staff member than if there is not.⁷¹

More importantly, Nadia reports that prison policies and their implementation are influenced by concerns other than prisoners' health. The prison is most concerned with security and develops policies to protect staff and inmates.⁷² It also reacts to potential legal liability and seeks to avoid being sued.⁷³ Thus, policies do not necessarily promote prisoner health or ensure that they will receive the care they need. For example, Nadia indicates that prescription drug availability depends partly on whether a recommended medication is addictive, and prisoners may end up being prescribed medication for reasons other than their health.⁷⁴ Fear of prisoners misusing or perhaps selling medication may also influence the birth control available at the prison. According to Nadia, few women are on daily birth control pills, but many take Depo-Provera, a birth control shot given by a medical provider once every three months,⁷⁵ even though the latter can cause side effects such as depression and prevent pregnancy for up to ten months after the woman stops using it.⁷⁶ Nadia also notes that security concerns may also influence post-birth treatment of recent mothers: women who give birth vaginally get only two days to bond with their infants, while those who undergo more invasive caesarean sections have three.⁷⁷ Therefore, women often choose to have unnecessary caesarean sections⁷⁸ in order to have more time with their new babies.

⁷⁰ *Id.*

⁷¹ The intricacies of this relationship are discussed by another author, who found that correctional officers' intervention in the medical staff-inmate relationship could be dangerous to prisoners because guards are primarily concerned with security, not health. See Kate Han-naher, *Caring for Invisible Patients: Challenges and Opportunities in Healthcare for Incarcerated Women*, 29 *HAMLIN J. PUB. L. & POL'Y* 161, 186 (2007). Because guards are not primarily concerned with health, to the extent that they do interfere with prisoners' healthcare, that interference may be more or less damaging depending on the relationship between the guard and the healthcare workers.

⁷² Telephone Interview with Nadia, *supra* note 67.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *Birth Control Shot, Depo-Provera*, PLANNED PARENTHOOD, (last visited Dec. 11, 2016), <https://www.plannedparenthood.org/learn/birth-control/birth-control-shot-depo-provera>, archived at <https://perma.cc/KYP3-JXZ3>.

⁷⁶ See *What Are the Disadvantages of the Birth Control Shot*, PLANNED PARENTHOOD, (last visited Apr. 16, 2017), <https://www.plannedparenthood.org/learn/birth-control/birth-control-shot-depo-provera/what-are-the-disadvantages-of-the-birth-control-shot>, archived at <https://perma.cc/S8PE-T88S>.

⁷⁷ Telephone Interview with Nadia, *supra* note 67.

⁷⁸ The American Congress of Obstetricians and Gynecologists notes a concern that caesarean sections are over-performed and have greater risk factors for both mother and baby than vaginal birth. See *Safe Prevention of the Primary Cesarean Delivery*, *THE AM. COLL. OF*

Nadia says that transgender prisoners can also face danger and lack of care in Framingham. They are often placed in an intensive treatment unit when they enter prison because there is nowhere they can be placed where they can be monitored for their own safety other than solitary confinement.⁷⁹ However, they can choose to enter the general prison population if they so desire. In addition, Nadia says that security officers often have no understanding or training in dealing with transgender prisoners, and they can often be insensitive and even create a hostile environment for them.⁸⁰ Because guards pose a barrier to care, their insensitivity and ignorance may lead to less or poorer healthcare for this population.

However, Nadia notes that there are positive aspects of the healthcare system for women in Framingham. Non-directive counseling and abortion are both accessible for prisoners.⁸¹ Nadia believes that women generally received needed screenings and were treated for any abnormal test results at a large hospital.⁸² Pregnant women have priority for methadone treatment if they suffer from addiction and access to a number of support groups and aftercare planning.⁸³ Nadia reports that Framingham is also working on improving policies with respect to transgender prisoners, including giving them access to hormones once their transgender status is verified.⁸⁴ Clinicians attend meetings monthly to discuss care for transgender prisoners.⁸⁵ The greater scrutiny under which the state prison is subjected, the longer time that prisoners spend there, and the larger staff and resources available likely explain the more beneficial healthcare policies available in the prison.

There are some red flags in the data about the number of pregnancies, miscarriages, abortions, and births at Framingham.⁸⁶ At Framingham, a total of 147 pregnant women were incarcerated in 2014, but only one gave birth while incarcerated.⁸⁷ Between May 2014 and March 2015, three women gave birth at Framingham, three had miscarriages, and four had abortions, for a total of ten pregnancy outcomes.⁸⁸ In the United States, 10% to 20% of known pregnancies end in miscarriage⁸⁹ and approximately 20% of

OBSTETRICIANS AND GYNECOLOGISTS (Mar. 2014), <http://www.acog.org/Resources-And-Publications/Obstetric-Care-Consensus-Series/Safe-Prevention-of-the-Primary-Cesarean-Delivery>, archived at <https://perma.cc/E358-S24V>.

⁷⁹ Telephone Interview with Nadia, *supra* note 67.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ This data is attached in the appendix.

⁸⁷ See *infra* Appendix at 1.

⁸⁸ See *id.* at 2.

⁸⁹ See *Miscarriage*, THE MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/home/ovc-20213664> (last visited Oct. 30, 2016), archived at <https://perma.cc/749W-9FKB>.

pregnancies that do not end in miscarriage end in abortion.⁹⁰ In Framingham, three out of ten pregnancies that reported a pregnancy outcome ended in miscarriage and four out of ten pregnancies ended in abortion — nearly 60% of those that did not miscarry.

There are several factors that may mitigate how alarming these numbers initially seem. Prisoners tend to come from populations that have higher-than-average rates of unplanned pregnancies,⁹¹ and the rate of unplanned pregnancies tend to predict the rate of abortions.⁹² Prisoners also tend to have other medical conditions that may increase the likelihood of miscarriage. For example, approximately 66 pregnant prisoners at Framingham in 2014 were on methadone during their pregnancies at the prison.⁹³ Withdrawal can increase the risk of miscarriage in the first trimester.⁹⁴ However, these numbers are still concerning — out of ten pregnancies, only three were carried to term. Given the context of the prison setting, it may be that women who would otherwise choose to keep their pregnancies instead opt for termination if they can afford it to avoid cruel and inhumane treatment such as being shackled during labor, being placed into solitary confinement without medical care, or having parental rights terminated. In addition, a lack of access to competent and complete prenatal medical treatment — regardless of DOC policy requiring such treatment — may increase the rate of miscarriages.

In addition, it is not clear what happened to the rest of the pregnant women at Framingham. A total of 147 incarcerated pregnant women entered the prison in 2014, but only one gave birth that year.⁹⁵ Based on the numbers cited earlier, the vast majority of these women had *no* pregnancy outcomes during their incarcerations. On average, women who have been sentenced spend over 800 days incarcerated at Framingham, with approximately half of women serving three years or longer.⁹⁶ Even pretrial detainees stay an average of 98 days at Framingham before their trials.⁹⁷

⁹⁰ See *Induced Abortion in the United States*, GUTTMACHER at <https://www.gutmacher.org/fact-sheet/induced-abortion-united-states> (last visited Oct. 30, 2016), archived at <https://www.gutmacher.org/fact-sheet/induced-abortion-united-states>.

⁹¹ See Clarke et al., *Pregnancy Attitudes and Contraceptive Plans Among Women Entering Jail*, 2 WOMEN HEALTH 111, 113 (2006).

⁹² See Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008–2011*, 374 NEW ENG. J. MED. 843, 847 (2016) (finding that 40% of unplanned pregnancies end in abortion).

⁹³ See *infra* Appendix at 1.

⁹⁴ See CENTER FOR SUBSTANCE ABUSE TREATMENT, MEDICATION-ASSISTED TREATMENT FOR OPIOID ADDICTION IN OPIOID TREATMENT PROGRAMS: A TREATMENT IMPROVEMENT PROTOCOL 218 (2005), https://www.ncbi.nlm.nih.gov/books/NBK64164/pdf/Bookshelf_NBK64164.pdf, archived at <https://perma.cc/VX8S-FNFD>.

⁹⁵ See *infra* Appendix at 1.

⁹⁶ See RESEARCH AND PLANNING DIVISION, MASSACHUSETTS DEPARTMENT OF CORRECTION: PRISON POPULATION TRENDS 2013, 44 (2014), <http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prisonpop trends-2013-final-5-21-2014.pdf>, archived at <https://perma.cc/3CKE-Y6NQ> [hereinafter PRISON POPULATION TRENDS].

⁹⁷ See *id.*

Therefore, it seems highly likely that far more than ten pregnancies would have had outcomes during the relevant time period. Possibly, some of these women were released early or received other accommodations (for example, being transferred to halfway houses) because of their pregnancies. Nadia has suggested that both the prison and the state are interested in keeping pregnant women out of prison, and therefore this is likely to be the case.⁹⁸ It is also possible — although, according to Nadia, unlikely — that some of these women were furloughed, which would have relieved the prison of its obligation to pay for labor- or abortion-related costs. It is certainly also possible that not all of the outcomes are being properly recorded. For example, many women who miscarry do not seek further medical treatment, especially if the miscarriage occurs early in the pregnancy. The prison may also not report all early-pregnancy miscarriages. Regardless of the reason, the oddity of the data should be enough to give prisoner advocates pause. Advocates should be concerned that prisons are not reporting their pregnancy data accurately and that they are engaging in practices that tend to increase negative pregnancy outcomes.

B. County Jails

In contrast, county jails are smaller and less regulated than Framingham. They are subject mostly to the control of a local elected sheriff, and therefore the policies and practices can change without notice.⁹⁹ Anne works for an organization that provides reproductive healthcare to women at a number of jails in Massachusetts. Anne's organization has been able to provide regular reproductive healthcare to inmates, including non-directive options counseling for pregnant prisoners, contraception prescribed and provided by outside services, and transportation to an abortion provider.¹⁰⁰ She knew of two cases in which an inmate requested an abortion. In both cases, Anne reported that the inmates were able to receive the abortion, but in one case, the institution paid for the procedure and in the other, it refused to do so.¹⁰¹ In the second case, the inmate was able to have her abortion funded through an outside abortion fund. Anne said that all women at these institutions are able to access regular gynecological exams, although women in solitary confinement at the time of the exams may be shackled during the exams.¹⁰²

Anne did not know, however, the quality of reproductive healthcare prior to her organization's involvement. Although the inmates had access to reproductive healthcare under Anne's direction, it is not clear that they had

⁹⁸ Telephone Interview with Nadia, *supra* note 67.

⁹⁹ See MASS. GEN. LAWS ANN. ch. 126, § 16 (West 2017).

¹⁰⁰ Telephone Interview with Anne, Healthcare Provider (Oct. 1, 2015).

¹⁰¹ *Id.*

¹⁰² *Id.*

such access before.¹⁰³ In addition, she was not sure whether inmates confined at other institutions have similar kind of access. It appears that Anne was able to negotiate with the sheriffs and others in charge of the institutions to ensure that reproductive healthcare was truly available and accessible to all women.¹⁰⁴ It is not clear to Anne that other organizations, sheriffs, and relevant individuals would have been able to come to the same agreements, potentially leaving many female inmates without the full panoply of healthcare that Anne's organization is able to provide.

In addition, it appears that the institutions decide whether to pay for elective abortions without clear principles — Anne could discern no reason that the institution had paid for one abortion but not the other, except that perhaps some individual felt the first procedure was too expensive and did not want to pay for another. Without any clear policies or guiding principles in place, women cannot be sure what kind of treatment they can access or whether they will have to pay for their own abortions. Given the lack of clear policies, it may be that women in Massachusetts jails are entitled to rights and services that they cannot access. This type of situation has been considered inhuman and degrading treatment — which is analogous to a serious deprivation or cruel and unusual punishment — by the European Court of Human Rights.¹⁰⁵

There are also gaps in the data for the jails. For example, in Barnstable County Jail, an average of two women a month entered pregnant during 2015, but there were no pregnancy outcomes at all recorded — no abortions, no miscarriages, no stillbirths, and no live births.¹⁰⁶ This lack of data may indicate that record-keeping is sloppy, and therefore that women cannot rely on getting accurate information about their own pregnancies. This uncertainty, and the anxiety that it is likely to induce, can bolster an Eighth Amendment claim.

C. *Anti-Shackling Law*

Massachusetts law requires that pregnant women have access to prenatal care, including mental healthcare.¹⁰⁷ During the second and third trimesters, pregnant inmates are entitled to be transported in vans with seatbelts and restrained using only handcuffs in front.¹⁰⁸ They are not to be restrained in any matter during *any* stage of labor and delivery, or while they recover after giving birth.¹⁰⁹ Though it has been two years since the anti-shackling

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See Alyson Zureick, (*En*)gendering Suffering: Denial of Abortion As A Form of Cruel, Inhuman, or Degrading Treatment, 38 *FORDHAM INT'L L.J.* 99, 123 (2015).

¹⁰⁶ See *infra* Appendix at 3.

¹⁰⁷ See MASS. GEN. LAWS ANN. ch. 127, § 118(a)(2) (West 2017).

¹⁰⁸ See *id.* § 118(b)(1).

¹⁰⁹ See *id.* § 118(b)(2)–(3).

law passed, the law has not generally been followed, with violations occurring at all correctional institutions that house female inmates in Massachusetts.¹¹⁰ Pregnant prisoners in Massachusetts not only have been shackled up to labor and immediately post-partum,¹¹¹ but also have received inadequate prenatal care, testing, and nutrition.¹¹²

In jails, many employees mistakenly believe that handcuffing is permissible up until the point at which a patient is in “active labor,” even though this is in clear violation of the law.¹¹³ Women who are handcuffed or shackled during labor in violation of the law, even those who know their legal rights, either are not able to prevent the illegal shackling or to sue for an injunction or damages in court afterward; in fact, there are no consequences to the prison or jail at all for breaking the anti-shackling law.¹¹⁴ Some inmates have been able to argue with the corrections officers to prevent them from restraining them to the hospital bed immediately after giving birth while others have not been successful.¹¹⁵ Either way, women should not have to endure the stress and anxiety of having to argue for their own legal rights immediately after going through labor. Pregnant women are also given inadequate prenatal care, including delayed obstetric exams, food with too few calories and too little nutrition, and clothes that are not sized appropriately, which could cause them to fall and injure themselves.¹¹⁶ Again, women have no power to vindicate their rights under the law, and therefore may have to suffer through pregnancies while knowing that they and their fetuses are not getting adequate care and that they may have to endure unlawful handcuffing or shackling during pregnancy, labor, and post-partum. The fear of being shackled at the discretion of guards — who may be prejudiced, including against those whom they see as gender non-conforming, as Nadia indicates¹¹⁷ — may serve as the basis for an Eighth Amendment claim, notwithstanding that there is a law in place intended to prevent shackling of pregnant women.

¹¹⁰ See THE PRISON BIRTH PROJECT AND PRISONER’S LEGAL SERVICES OF MASSACHUSETTS, BREAKING PROMISES: VIOLATIONS OF THE MASSACHUSETTS PREGNANCY STANDARDS & ANTI-SHACKLING LAW 2 (2016), http://www.plsma.org/wp-content/uploads/2016/05/Breaking-Promises_May2016.pdf, archived at <https://perma.cc/GM3H-WW2C> [hereinafter BREAKING PROMISES].

¹¹¹ See *id.* at 6–7.

¹¹² See *id.* at 12–13.

¹¹³ See *id.* at 6.

¹¹⁴ See Joe Watson & Matt Clarke, *Massachusetts’ Anti-shackling Law Limits Restraints on Pregnant Prisoners but Problems Persist*, PRISON LEGAL NEWS, Sept. 30, 2016, <https://www.prisonlegalnews.org/news/2016/sep/30/massachusetts-anti-shackling-law-limits-restraints-pregnant-prisoners-problems-persist/>, archived at <https://perma.cc/9Y22-A3VG>.

¹¹⁵ See BREAKING PROMISES, *supra* note 110, at 7.

¹¹⁶ See *id.* at 12–13.

¹¹⁷ See *supra* Section III.A.

IV. REPRODUCTIVE HEALTHCARE ACCESS IN PRISON JURISPRUDENCE

Jurisprudence addressing reproductive healthcare access for prisoners is limited, but provides some means for determining what litigation strategies can best expand that access. This Section outlines the relevant jurisprudence that can provide a basis for expanding reproductive healthcare access. First, it outlines Supreme Court cases that form the basis for challenging inadequate access to healthcare in prison settings. Second, it outlines circuit court cases dealing with non-abortion reproductive healthcare access, finding that fact-driven Eighth Amendment claims have been more successful than Fourteenth Amendment claims based on abstract privacy or parenting rights. Third, it outlines circuit court cases dealing with abortion access in prison settings, finding that the right to abortion does survive incarceration, but has been narrowly defined under the Fourteenth Amendment and that Eighth Amendment arguments have not been successful.

A. *Supreme Court Cases Defining Constitutional Right to Healthcare in Prison*

The two most important Supreme Court cases on reproductive health in the prison context are *Estelle v. Gamble*¹¹⁸ and *Turner v. Safley*.¹¹⁹ *Estelle*, decided in 1976, interpreted the Eighth Amendment right to be free from cruel and unusual punishment¹²⁰ to apply to access to healthcare in prison settings. The Court found that, because prisoners have no choice in whom to turn to for medical care, prisons have an obligation to provide such care.¹²¹ Failure to provide that care can result in suffering that serves no “penological purpose.”¹²² However, negligence and medical malpractice alone do not constitute an Eighth Amendment violation; only “deliberate indifference to serious medical needs” does.¹²³ Thus, a prisoner seeking to file an Eighth Amendment complaint against any medical professional or prison official must establish *both* that she had a serious medical need and that the person against whom she is filing suit was deliberately indifferent to it.

*Farmer v. Brennan*¹²⁴ clarified that the deliberate indifference standard set out in *Estelle* is subjective, not objective. Specifically, a prison official “must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”¹²⁵ In order for an Eighth Amendment violation to be established, the

¹¹⁸ *Estelle v. Gamble*, 429 U.S. 97 (1976).

¹¹⁹ *Turner v. Safley*, 482 U.S. 78 (1987).

¹²⁰ U.S. CONST. amend. VIII.

¹²¹ *See Estelle*, 429 U.S. at 103.

¹²² *Id.*

¹²³ *Id.* at 106.

¹²⁴ *Farmer v. Brennan*, 511 U.S. 825 (1994).

¹²⁵ *Id.* at 837.

prison official must subjectively have realized that there was a serious medical need, which she purposely chose to ignore or exacerbate. By focusing on the individual wrongdoer, this standard “fails to consider the historical implications of race and gender . . . [and] is unable to consider the broader institutional context out of which individual acts of brutality emerge.”¹²⁶ Prisoners have no way to attack the institutional structures that create cruel and unusual conditions unless they are filtered through a single, identifiable bad actor.¹²⁷

Notwithstanding this high standard, *Farmer* held that prison officials could potentially be liable for placing a transgender prisoner among a male general population when such an action could have been known to cause her harm.¹²⁸ The Court found that the district court had incorrectly dismissed the case based on the assumption that the plaintiff must provide explicit advance notice to the prison before a failure-to-protect claim could be pursued.¹²⁹ Because the Court found that deliberate indifference could be established even without such notice, it remanded to the district court to apply the correct standard.¹³⁰

Prisoners can argue that their constitutional rights are violated under the Fourteenth Amendment, but the Fourteenth Amendment right has been interpreted very narrowly in the prison context, and therefore lends itself less straightforwardly to the actual experiences of incarcerated women. Fourteenth Amendment case law focuses less on the context of women’s experience and more on the abstract availability of constitutional rights. Under Fourteenth Amendment jurisprudence, courts examine prison regulations, even those that burden fundamental constitutional rights, using rational basis review. *Turner* announced the four factors used to determine whether a prison regulation that burdens fundamental constitutional rights could be upheld. First, there must be a valid, non-remote connection between the prison

¹²⁶ Ocen, *supra* note 47, at 1274.

¹²⁷ This distinction between institution and actor maps onto the distinction between disparate impact and discriminatory intent. The Court analyzes statutory housing discrimination claims, for instance, using disparate impact: if a plaintiff can point to a statistical disparity in housing caused by the defendant’s policies, then she has made a prima facie case for liability even if she cannot show that the policies were motivated by overt prejudice. See *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2514–15 (2015). The Court acknowledges that disparate impact liability can address both systemic causes of racial differences, *see id.* at 2515, and motivations that are implicitly or covertly biased without being overtly so, *see id.* at 2522. The Court analyzes Fourteenth Amendment racial discrimination cases, on the other hand, by looking to discriminatory intent, only striking down state action if it was motivated by a desire to discriminate on the basis of race. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). In the criminal justice realm, the heightened proof requirement of discriminatory intent is an insurmountable barrier to 14th Amendment claims about institutional racism, as plaintiffs must not only show discriminatory intent, but must also show that the discrimination played a part in their own treatment. See *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987).

¹²⁸ See *Farmer*, 511 U.S. at 848–49.

¹²⁹ See *id.* at 849.

¹³⁰ See *id.* at 849.

regulation set forth and the neutral, legitimate government interest it is meant to protect.¹³¹ Second, a regulation is more likely to be upheld if other methods of practicing the constitutional right remain open to the prisoner than if the regulation completely forecloses the practice of those constitutional rights.¹³² Third, courts must consider the impact of allowing prisoners to practice their constitutional rights on other prisoners and the resources of the prison as a whole.¹³³ Finally, a regulation is more likely to be upheld if the plaintiff is not able to provide an alternative that would accomplish the prison's goal without burdening the prisoner's constitutional rights.¹³⁴ Overall, the *Turner* court emphasized the importance of showing significant deference to prison administrators.¹³⁵ Whenever a prisoner brings a claim challenging a regulation under the theory that it burdens a fundamental constitutional right, the court must apply these four factors to the specific regulation at issue to determine its constitutional validity. For example, a prisoner claiming that an abortion restriction violates her Fourteenth Amendment abortion right under *Roe v. Wade* will have to show that the restriction would fail even rational basis review, rather than the more demanding standard of undue burden.¹³⁶ The latter standard may have required the court to balance the actual (not merely hypothesized) burdens and benefits that a law restricting abortion access results in, at least if the law is defended on the grounds that it protects women's health.¹³⁷ Such deference to prison administrators opens the door to allowing significant restriction of even fundamental constitutional rights. For example, prisoners in minority religions may be restricted from religious practice because of cost and other logistical concerns.¹³⁸ Because the *Turner* test only allows attacks on general policies that severely restrict constitutional rights, a system that allows individual guards — who may be racist or otherwise prejudiced — significant discretion or a policy that provides access to rights only if prisoners can pay may escape scrutiny if the policy facially appears to provide some access to the burdened right.

¹³¹ See *Turner*, 482 U.S. at 89–90.

¹³² See *id.* at 90.

¹³³ See *id.*

¹³⁴ See *id.* at 90–91.

¹³⁵ See *id.* at 84–85 (noting that prison administration is a difficult task left properly to the political branches).

¹³⁶ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

¹³⁷ See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

¹³⁸ See *Marchant v. Murphy*, No. CIV.A. 05-12446-RGS, 2010 WL 447781, at *3 (D. Mass. Feb. 9, 2010) (finding that “any burden on Marchant’s [Native American] freedom of worship is justified by a proper concern for the disruption that would likely arise from the attempt to accommodate dissident religious factions and by staffing issues”).

B. Circuit Court Cases Addressing Non-Abortion Claims

The circuit courts have applied the standards outlined above to a number of cases involving non-abortion-related reproductive healthcare access of incarcerated individuals. These cases show both the limitations of the Fourteenth Amendment's narrow rights-based framework and the potential of the Eighth Amendment's context-based test. In order to determine the best way to expand reproductive healthcare access for prisoners, including but not limited to abortion, litigants must be familiar with which kinds of arguments have been put forward and which courts respond to.

In two cases, incarcerated male plaintiffs sought to use assisted impregnation with their non-incarcerated wives. Because the plaintiffs in these cases challenged prison regulations prohibiting assisted impregnation under the theory that there is a fundamental constitutional right to procreate, the courts had to analyze the regulations under the *Turner* standard.

In *Gerber v. Hickman*, the Ninth Circuit found that because isolation and curtailment of certain rights are fundamental to the goals of incarceration,¹³⁹ "the right to procreate while in prison is fundamentally inconsistent with incarceration."¹⁴⁰ Therefore, the court declined to evaluate the *Turner* factors,¹⁴¹ which implies that there is no constitutional restriction on prison regulations that burden rights that are inconsistent with incarceration. Litigants must be attuned to the fact that if a non-abortion right is not recognized as fundamental, a court may decline to scrutinize a prison's restriction or denial of it at all, even if the end result is a great deprivation for a prisoner. The plaintiff also made a claim under the Eighth Amendment, but the court summarily dismissed this claim, stating only that the prohibition on assisted insemination was not a severe enough deprivation to implicate the Eighth Amendment.¹⁴² Advocates should recognize that the framing of the deprivation may influence the court's response to it. For example, deprivation of "assisted insemination" may be too narrow to be seen as cruel and unusual punishment, whereas deprivation of the ability to parent may have been seen as a greater deprivation. Similarly, deprivation of a specific type of care may have less traction than a context-based understanding of deprivation of care that may influence the long-term health of a pregnancy or child.

In *Goodwin v. Turner*, the Eighth Circuit assumed without deciding that the right to procreate was a fundamental right even in the prison setting.¹⁴³ The court nonetheless found that a prison regulation denying the plaintiff the right to used assisted insemination with his wife was valid under the *Turner* test. The court accepted the prison's reasoning that the regulation was in-

¹³⁹ See *Gerber v. Hickman*, 291 F.3d 617, 621 (9th Cir. 2002).

¹⁴⁰ *Id.* at 623.

¹⁴¹ See *id.*

¹⁴² *Id.* at 624.

¹⁴³ See *Goodwin v. Turner*, 908 F.2d 1395, 1398 (8th Cir. 1990).

tended to further the legitimate goal of treating all prisoners equally because the prison could not afford to allow female prisoners to become impregnated with assistance and therefore it was valid for it not to offer assisted insemination to *any* prisoners.¹⁴⁴ The implication of the court's reasoning "is that men cannot exercise their rights because women's rights are so expensive and cumbersome."¹⁴⁵ Therefore, the interests of women who might wish to procreate are implicated even when the focus is on a male plaintiff. The cost and effect on other prisoners or the prison system of increasing access to healthcare are more salient under the *Turner* test than the Eighth Amendment test of serious deprivation. The Fourteenth Amendment, then, is less attuned to individual circumstances such as race, health status, and wealth than the Eighth Amendment has the potential to be.

Based on these decisions, it appears that the Fourteenth Amendment right to procreate is limited in the prison context. Prisoners have the right not to be involuntarily sterilized,¹⁴⁶ but they do not have the right to any kind of assistance to help them procreate. The state has no obligation to help effectuate procreation by prisoners. Because many prison sentences are very long,¹⁴⁷ the actual impact of *Gerber* and *Turner* is that prisoners have no way to exercise their right to procreation, even though courts find a theoretical distinction between sterilization and refusal to aid in assisted insemination. Although these decisions do not appear to discriminate on the basis of race or poverty, the fact that people of color tend to be disproportionately incarcerated, including in Massachusetts¹⁴⁸ means that these decisions will disproportionately burden the ability of people of color to have the families that they want. In addition, because it can be very expensive to get pregnant later in life, when in vitro fertilization may be required,¹⁴⁹ such decisions have a disproportionate impact on poor people who cannot afford to get medical assistance in becoming pregnant once they leave. For example, public medical assistance in Massachusetts covers sterilization¹⁵⁰ but not infertility treatment.¹⁵¹ Thus, long prison sentences, disproportionate incarceration of people of color, and inadequate welfare systems combine to reduce

¹⁴⁴ See *id.* at 1399–1400.

¹⁴⁵ Roth, *supra* note 51, at 400.

¹⁴⁶ See *Skinner v. Okl. ex rel. Williamson*, 316 U.S. 535 (1942) (prohibiting the involuntary sterilization of an incarcerated man).

¹⁴⁷ In 2007–2008, the average prison sentence for men was about 62 months and the average sentence for women was about 37 months. FEDERAL JUSTICE STATISTICS, AVERAGE INCARCERATION SENTENCE LENGTHS IMPOSED, BY OFFENSE AND OFFENDER CHARACTERISTICS (2010), <http://www.bjs.gov/content/pub/html/fjst/2008/tables/fjs08st504.pdf>, archived at <https://perma.cc/7SR4-6A4Q>.

¹⁴⁸ See MASSACHUSETTS INCARCERATION, *supra* note 58.

¹⁴⁹ *IVF Cost Breakdown by State and Procedure*, GROWING FAMILY BENEFITS, (last visited Mar. 5, 2017), <https://www.growingfamilybenefits.com/ivf-cost-breakdown/>, archived at <https://perma.cc/EZR6-J3RJ>.

¹⁵⁰ See 130 C.M.R. § 485.401–413 (2015).

¹⁵¹ See *id.*

choice for poor people and people of color, a consequence that is not explored in the decisions.

Prisoners have had more success challenging individual misconduct under the Eighth Amendment when such misconduct is both egregious and obviously harmful. In two cases, circuit courts affirmed denial of summary judgment for defendants after women who were clearly having miscarriages were denied adequate medical treatment. The plaintiff in *Goebert v. Lee County*, a pretrial detainee, was five months pregnant when she noticed that she was leaking amniotic fluid.¹⁵² Although she informed the doctor that she had previously had a miscarriage, the doctor provided only cursory medical care, noting his belief that the fluid was actually urine.¹⁵³ She continued to leak significant fluid for eight days but was not taken to see a doctor, despite her frequent requests for help.¹⁵⁴ When she was finally taken to the hospital, she had already lost so much of the amniotic fluid that the fetus died.¹⁵⁵ A licensed midwife at the hospital determined that if she had received appropriate medical treatment, the baby would have had a significantly higher chance of survival.¹⁵⁶

Applying the *Estelle* Eighth Amendment standard, the Eleventh Circuit found, first, that leaking amniotic fluid was a serious medical need “sufficient to satisfy the objective component of the deliberate indifference test.”¹⁵⁷ Second, the information that the prison official had was sufficient to provide a factual basis for a finding of subjective deliberate indifference because it was “self-evident” that leaking amniotic fluid could cause serious medical problems.¹⁵⁸ The court found that the prison official who denied the plaintiff access to proper medical care “acted with more than gross negligence[,]”¹⁵⁹ thus establishing the requisite subjective deliberate indifference. The court also found that the official was not entitled to qualified immunity¹⁶⁰ because his “alleged inaction is of the type that we have held violates the well established right of prisoners to timely treatment for serious medical conditions.”¹⁶¹ It therefore overturned the grant of summary judgment for the prison.¹⁶²

¹⁵² See *Goebert v. Lee Cty.*, 510 F.3d 1312, 1317 (11th Cir. 2007).

¹⁵³ See *id.*

¹⁵⁴ See *id.* at 1318.

¹⁵⁵ *Id.* at 1319.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1326.

¹⁵⁸ *Id.* at 1327.

¹⁵⁹ *Id.* at 1328.

¹⁶⁰ A court bases its determination on whether a public official is immune from having to pay damages for unconstitutional conduct on “(1) whether the law was clearly established at the time the action was taken; and (2) if so, whether the official knew or reasonably should have known that the action or inaction would violate petitioner’s constitutional rights.” *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 141 (1st Cir. 2001) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1982)).

¹⁶¹ *Id.* at 1331.

¹⁶² *Id.*

The plaintiff in *Pool v. Sebastian County* miscarried in a county jail while awaiting transfer to prison.¹⁶³ When she entered the jail, she indicated on the intake questionnaire that she was pregnant and hemorrhaging.¹⁶⁴ The nurse, however, did not believe she was pregnant and only prescribed “bed rest.”¹⁶⁵ Three days later, she was transferred into an observation cell, but had no contact with a doctor and could not get anyone’s attention even by screaming and beating on the wall.¹⁶⁶ Five days after she entered the jail, she miscarried, alone in the observation room.¹⁶⁷ One deputy wrote in an affidavit that her supervisors had refused to respond to Pool’s medical needs, despite the fact that it was obvious that she was bleeding heavily.¹⁶⁸ The Eighth Circuit refused to reverse denial summary judgment on the grounds of qualified immunity because the prison officials knew that she was in pain, pregnant, and bleeding.¹⁶⁹ These facts indicated a serious medical need that would have been obvious even to a layperson, thus making it unreasonable to grant the defendants qualified immunity.¹⁷⁰

In both miscarriage cases, the specific facts and context were decisive in the outcome of refusing to grant summary judgment to the defendants. First, in both cases, the plaintiffs had obvious symptoms of serious problems with the pregnancies.¹⁷¹ Second, both plaintiffs had disclosed their pregnancies¹⁷² and were actively lobbying for appropriate medical care.¹⁷³ The fact that the prisoners had nowhere else to turn for medical care makes the situation all the worse. The courts may have been less responsive to cases in which the consequences of not taking action were not so clearly laid out. Notably, these cases were about individual wrongdoing — but many individuals were implicated in neglecting these women, to the point that the distinction between individual and systemic injustice appears less clear than in other cases. When entire systems are set up in such a way that women are unable to exercise their rights, or individual guards are able to block access to care because of the wide discretion granted them, then the Eighth Amendment may, based on these cases, be able to provide relief.

¹⁶³ See *Pool v. Sebastian Cty., Ark.*, 418 F.3d 934, 939 (8th Cir. 2005).

¹⁶⁴ *Id.* at 938.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 939.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 940.

¹⁶⁹ *Id.* at 944–45.

¹⁷⁰ *Id.* at 945.

¹⁷¹ See *Goebert*, 510 F.3d at 1317 (leaking amniotic fluid); *Pool*, 418 F.3d at 938–39 (heavy bleeding).

¹⁷² See *Goebert*, 510 F.3d at 1316–17; *Pool*, 418 F.3d at 938.

¹⁷³ See *id.*

C. Circuit Court Cases Addressing Abortion Access

Although prisoners face numerous reproductive healthcare crises, as outlined above, much of the reproductive rights case law focuses on abortion access. Because access to abortion had been so important to typically class- and race-privileged groups of women who wanted to advance reproductive rights, there are many existing litigation strategies with respect to abortion access and some favorable case law. These strategies can be used to further other types of reproductive healthcare access if litigators focus on the context, which gave rise to the assessment that the denial of abortion constitutes a denial of a constitutional right or a serious medical need. Abortions must also be performed on a very short time-frame; if a woman needs an abortion and her prison will not provide her that access, then judicial intervention is necessary in short order.¹⁷⁴

Because the Supreme Court has never directly addressed prisoners' right to access abortion, this section examines the current circuit courts cases. In general, the circuit courts have rarely overturned prison regulations that prohibit or impede access to abortion. To the extent that such regulations have been overturned, the courts have generally relied on the Fourteenth Amendment's protection of abortion access based on privacy rather than the Eighth Amendment's prohibition of cruel and unusual punishment. Notably, if prison regulations allow abortion but the negligence of prison officials prevents individuals from accessing it, then courts have found no constitutional violation.

None of the courts that have examined restrictions on elective (i.e., not medically necessary) abortion¹⁷⁵ access have determined that the right to abortion under the Fourteenth Amendment's guarantee of privacy does *not* survive incarceration. However, prisons can place so-called reasonable restrictions¹⁷⁶ on a woman's ability to exercise this right. In general, regulations that are or resemble absolute bans are more likely to be overturned than restrictions — even those that in practice prevent access to abortion. In *Roe v. Crawford*,¹⁷⁷ one of only two circuit court cases to overturn prison regulations restricting abortion access, the Eighth Circuit struck down a Missouri prison policy that absolutely forbade transportation of inmates for the pur-

¹⁷⁴ In Massachusetts, if a pregnancy is more than 24 weeks along, abortions can only be performed to save the life or health of the mother. See Mass. Gen. Laws Ann. ch. 112, § 12M (West 2017).

¹⁷⁵ Although abortions are classified as elective when they are not medically required, the mortality and morbidity risks associated with childbirth belie this neat distinction. See generally Raymond & Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *OBSTETRIC GYNECOLOGY* 215 (2012). Women put themselves at risk when they continue with even a healthy pregnancy rather than terminate; therefore, calling an abortion purely “elective” appears somewhat of a misnomer. *Id.* Regardless, in keeping with current terminology, this Note distinguishes between elective and non-elective abortion.

¹⁷⁶ Based on the *Turner* test. See *supra* note 119.

¹⁷⁷ *Roe v. Crawford*, 514 F.3d 789, 792 (8th Cir. 2008) [hereinafter *Crawford*].

pose of obtaining elective abortions.¹⁷⁸ The court began with the assumption that because abortion is a fundamental constitutional right not subject to strict scrutiny based on *Roe*, any prison regulation restricting abortion had to be scrutinized under the *Turner* test described above, which is essentially a form of rational basis review.¹⁷⁹ This right to abortion was narrowly defined, rather than a broad right to make decisions about reproduction and parenting. Because the right is so narrow, litigants could not use a Fourteenth Amendment argument to expand access to other reproduction or parenting rights based on this case.

The prison contended that the policy was motivated by security concerns, which the court accepted as legitimate.¹⁸⁰ The court found that the policy was not rationally related to the security concern that is posed any time an inmate is transported outside of the prison.¹⁸¹ Since refusing to transport an individual for an elective abortion necessarily means that that individual will later be transported for prenatal appointments, the total number of off-site transports would not necessarily be decreased as a result of the policy.¹⁸² However, the court did find that the policy was rationally related to the security interest of avoiding the risk that anti-abortion protestors posed to both inmates and security guards, despite the fact that protestors had never threatened security at any point in the past.¹⁸³ Because there were less restrictive alternatives available — including requiring inmates to get a court order authorizing elective abortion — the court found that the policy could not withstand *Turner* scrutiny and struck it down.¹⁸⁴ The court also analyzed the Eighth Amendment claim, finding perfunctorily that elective abortion is not a serious medical need, and therefore that the prison was not obligated to provide access under the Eighth Amendment.¹⁸⁵ This need was not analyzed in the specific context of prison, given the conditions that incarcerated women find themselves. The court did not address, for example, the harms that incarcerated women may face in continuing a pregnancy, such as fearing being shackled, having their children taken away, and not being provided adequate prenatal care.

In *Monmouth County v. Lanzaro*,¹⁸⁶ the Third Circuit found that the prison's requirement that any prisoner seeking an abortion had to get a court order (a time-consuming process) allowing them to be released on her own recognizance was unconstitutional because it was not rational under the *Turner* test. This case relied on the actual plights of prisoners seeking abortion, not simply what the policy required. The policy mandated that all prisoners

¹⁷⁸ See *id.* at 792.

¹⁷⁹ See *id.* at 794.

¹⁸⁰ *Id.* at 795.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 795–96.

¹⁸⁴ *Id.* at 798.

¹⁸⁵ *Id.* at 801.

¹⁸⁶ *Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987).

needed to get a court order releasing them on their own recognizance prior to obtaining an elective abortion.¹⁸⁷ The court found that, in reality, high-security prisoners were barred from accessing elective abortion because they would simply not be able to obtain court-ordered release for the procedure.¹⁸⁸ Even prisoners who could access such release because of their low security status would not likely receive such release in time to access abortion.¹⁸⁹ In addition, in order to effectuate the right to access abortion, the court found that the prison would have to pay for the abortions of indigent prisoners — notwithstanding cases in which the Supreme Court found no constitutional right to have abortion paid for outside of prison.¹⁹⁰ This requirement recognized the poverty of incarcerated women and forced the prison to mold their policies based on the actual circumstances of these women, rather than relying on an abstract right to abortion that could not be realized in the absence of government funding.

The *Monmouth* court also found that the policy was unconstitutional under the Eighth Amendment.¹⁹¹ It is the only court to have done so; all other courts that addressed Eighth Amendment arguments have rejected them.¹⁹² In determining that elective abortion is a serious medical need, the *Monmouth* court noted that “denial of the required [abortion] will likely result in tangible harm to the inmate who wishes to terminate her pregnancy.”¹⁹³ The court held that the refusal of officials to minimize the obstacles in the path of an inmate seeking an abortion at the prison is evidence of deliberate indifference.¹⁹⁴ The prison context can provide a basis for the “tangible harm” requirement that is even stronger than what exists for free women, given the likelihood of denial of medical care and restrictions on parenting. The court then addressed the question of whether the Eighth Amendment required the prison to fund abortions.¹⁹⁵ It found that the Eighth Amendment conferred an obligation on the prison to effectuate the prisoners’ right to access an abortion, including actual funding if necessary.¹⁹⁶ This focus on tangible harm, rather than only an abstract right, supports the idea that litigators can marshal facts — including the tangible harms that pregnant prisoners may face — to support a strong Eighth Amendment argu-

¹⁸⁷ *Id.* at 335.

¹⁸⁸ *Id.* at 337.

¹⁸⁹ *Id.* at 339.

¹⁹⁰ *Id.* at 341 (recognizing that the prison’s obligation to provide for inmates is greater than the state’s obligation to provide for the poor, and therefore that the prison might have an affirmative obligation to provide funds to effectuate the right to an abortion, even if no such right exists outside the prison walls).

¹⁹¹ *Id.* at 345–49.

¹⁹² See *Victoria W. v. Larpenter*, 369 F.3d 475, 490 (5th Cir. 2004); see also *Bryant v. Maffucci*, 923 F.2d 979, 984–85 (2d Cir. 1991); *Gibson v. Matthews*, 926 F.2d 532, 536–37 (6th Cir. 1991).

¹⁹³ *Monmouth*, 834 F.2d at 349.

¹⁹⁴ *Id.* at 347.

¹⁹⁵ *Id.* at 349.

¹⁹⁶ *Id.* at 350.

ment. However, it is worth noting that this case was decided 30 years ago and has not had significant progeny; litigators may have an uphill battle if they rely solely on this case to establish an Eighth Amendment right to reproductive healthcare.

In a number of other cases, courts found that regulations did not unconstitutionally restrict abortion access, even when women were practically unable to access abortion. In *Victoria W. v. Larpenter*,¹⁹⁷ the Fifth Circuit upheld a restriction requiring a court order before a woman could be released to obtain an abortion. Even though in practice the requirement had the effect of preventing the plaintiff from accessing abortion, the court found it was rationally related to the prison's objective of avoiding liability and decreasing total number of off-site transports.¹⁹⁸ Even though the plaintiff would have had to go off-site more frequently for prenatal care (and presumably labor), the fact that the abortion clinic was farther away meant that the policy of refusing to transport prisoners for elective abortion without a court order was rationally related to the security interest of decreasing off-site transfers.¹⁹⁹ The court also found that because an inmate could get a court order, there was no unconstitutional restriction on abortion access.²⁰⁰ Analyzing the plaintiff's Eighth Amendment claim, the court found that her lawyer, whom she had to hire in order to get a court order, was at fault for not making a stronger legal argument to get her a court order.²⁰¹ Because the lawyer's actions most directly prevented the petitioner from accessing abortion, the court found that the prison's "policy, being a condition of Victoria's incarceration, burdened her access to an abortion, but the policy functioned properly and the balance was reasonable."²⁰² Therefore, the court upheld the policy as constitutional.²⁰³ The focus on *individual* wrongdoing — namely, that of the lawyer — obscured the systemic barriers that blocked the plaintiff from accessing abortion and that were inherent in the bureaucracy itself.

In *Gibson v. Matthews*,²⁰⁴ prison regulations technically allowed women to get elective abortions, but bureaucracy and delays in the plaintiff's case prevented her from actually obtaining an abortion during the legal

¹⁹⁷ *Victoria W.*, 369 F.3d at 486–91.

¹⁹⁸ *Id.* at 490.

¹⁹⁹ *Id.* at 486–87. Given that a pregnant woman will need many more off-site transports during the course of her pregnancy than one who simply needs one transport to obtain an abortion, and that a pregnant woman might need an emergency transport that could cause more security concerns than a planned transport for an elective abortion, the court was willing to overlook the facts as long as the Fourteenth Amendment right is at least theoretically preserved.

²⁰⁰ See *Victoria W.*, 369 F.3d at 489.

²⁰¹ *Id.* at 490.

²⁰² *Id.* Notably, the reliance on the facts does indicate that other facts might have led the court to uphold the Eighth Amendment claim. It was relevant to the court's decision that the lawyer was at fault — it did not merely dismiss the Eighth Amendment claim on the grounds that an elective abortion is not a serious medical need.

²⁰³ *Id.* at 491.

²⁰⁴ *Gibson v. Matthews*, 926 F.2d. 532, 533–34.

timeframe.²⁰⁵ Because she was a “victim of the bureaucracy” and not of any individual prison official, the officials she sued were all held to have qualified immunity.²⁰⁶ The case did not focus on the systemic failure of the prison system to provide access to abortion to be actionable. It further held that there was no “clearly established” right to access abortion in the prison context.²⁰⁷ The Sixth Circuit denied the Eighth Amendment claim as well, determining that even if elective abortion were a serious medical need, the officials’ actions did not amount to more than negligence.²⁰⁸

Similarly, the plaintiff in *Bryant v. Maffucci*²⁰⁹ was unable to get an abortion despite repeatedly requesting one.²¹⁰ The Second Circuit determined that the prison officials’ actions, such as not delivering a letter that had been written to the warden requesting an abortion in a timely fashion, could only constitute negligence and not a higher standard of misconduct.²¹¹ Based on that finding, the court determined that the actions of the officials could not establish either an Eighth Amendment violation (which would have required deliberate indifference)²¹² or a Fourteenth Amendment violation.²¹³ There was no recognition that both individual negligence and the prison system came together to prevent her access to abortion. Similarly, there was no judicial support for a broad conception of the right to make choices about reproduction with dignity — a right that was violated when the plaintiff was not only denied abortion access but also forced to beg a number of people to give her access to this right, ultimately unsuccessfully.

V. THE ARGUMENT FOR EIGHTH AMENDMENT CLAIMS TO REPRODUCTIVE HEALTHCARE

Prison advocates should argue for greater reproductive healthcare access under the Eighth Amendment rather than the Fourteenth Amendment. The Eighth Amendment provides greater potential because it allows litigators to take into context the concrete harms that incarcerated women face, including the history of coercion and violence that women of color — who are disproportionately incarcerated — face and the harms that arise from incarcerated women’s lack of ability to pay, especially because poor women are also disproportionately incarcerated. The Fourteenth Amendment, with its focus on narrow, abstract rights, does not provide a strong foundation for developing a reproductive healthcare jurisprudence that truly expands access to healthcare for all prisoners. This section will first examine the Fourteenth

²⁰⁵ *Id.* at 534–35.

²⁰⁶ *See id.* at 536.

²⁰⁷ *See id.* at 536.

²⁰⁸ *Id.* at 536–37.

²⁰⁹ *Bryant v. Maffucci*, 923 F.2d 979 (2d Cir. 1991).

²¹⁰ *See id.* at 981–82.

²¹¹ *Id.* at 984–85.

²¹² *See id.* at 983.

²¹³ *See id.* at 983–84.

Amendment argument, exploring why it is not likely to provide access to greater reproductive healthcare access, before detailing the benefits of using an Eighth Amendment litigation strategy.

A. *The Fourteenth Amendment*

Since *Roe v. Wade*, the Supreme Court has recognized a privacy right to be free from state interference implicit under the Fourteenth Amendment that includes the choice of whether to carry a pregnancy to term. Outside of prison, state regulations limiting access to abortion are assessed under the “undue” burden standard announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*²¹⁴ and explicated more fully in *Whole Woman’s Health v. Hellerstedt*²¹⁵ last year. Notably, the right limiting state interference with abortion access does not require any affirmative act by the state. The state is not required to pay for elective abortions²¹⁶ and indeed, the state is not required to provide actual access at all.²¹⁷ Because the right limits state interference, rather than providing an actual “right to abortion,” it does not translate cleanly to the prison context since incarceration necessarily requires prisoners to surrender many of their privacy rights. In addition, as explored above, limitations on state interference can mean that the prison is not obligated to help effectuate the right financially or otherwise, thus putting the right out of reach for indigent prisoners. Given that the prison system prevents prisoners from earning much money,²¹⁸ reproductive justice advocates should recognize that the disproportionate incarceration of the poor leads to a lack of access to abortion for those individuals if the prison does not pay, even if regulations would otherwise not prohibit prisoners from accessing abortion. Because the Fourteenth Amendment right to an abortion in the prison context has been interpreted narrowly,²¹⁹ litigators may struggle to argue successfully for other reproductive healthcare needs as privacy rights.

Another danger of relying on the Fourteenth Amendment argument is that the right to privacy can change over time. Currently, *Whole Woman’s Health* has seemingly reinvigorated the abortion right, making it stronger than it has been since before *Planned Parenthood v. Casey* was decided in

²¹⁴ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (finding that a regulation restricting elective abortion of a nonviable fetus is unconstitutional if it places a “substantial obstacle” in the path of the abortion-seeker).

²¹⁵ See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (finding that the court must consider evidence presented in the lower courts in determining whether the undue burden has been met).

²¹⁶ See *Maher v. Roe*, 432 U.S. 464, 479 (1977).

²¹⁷ *Id.* at 474.

²¹⁸ See Whitney Benns, *American Slavery, Reinvented*, THE ATLANTIC, Sept. 21, 2015, <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/>, archived at <https://perma.cc/5576-YDPL> (noting that prisoners often earn only pennies per hour).

²¹⁹ See *supra* Section IV.

1992.²²⁰ However, President Donald Trump has promised to nominate anti-abortion Supreme Court Justices to fill any vacancies.²²¹ Given the current age of two of the Justices who have been supportive of abortion rights,²²² it is likely that abortion right under the Fourteenth Amendment will be narrowed in the coming years. If the right to abortion narrows or even disappears altogether because *Roe* is overturned, then all privacy-related jurisprudence will be affected. Prisoners will have even less of a leg to stand on as far as advocating for abortion or other reproductive healthcare. Therefore, litigators should be cautious about bringing privacy claims that may end up in front of the Trump-configured Supreme Court. Even if those cases do not end up in front of the Supreme Court, they will be influenced by any changes in the Supreme Court's privacy and abortion jurisprudence, making all Fourteenth Amendment arguments dangerous for litigators seeking to advance prisoners' access to reproductive healthcare.

B. *The Eighth Amendment*

Litigators are more likely to be successful with carefully crafted Eighth Amendment arguments that address a broad range of reproductive healthcare concerns. Although no circuit court has struck down a prison policy prohibiting abortion access solely on Eighth Amendment grounds,²²³ Eighth Amendment cases with shocking fact patterns are especially likely to gain traction; moreover, given modern prison conditions, it is likely that many potential reproductive justice impact litigation cases exist with sufficiently egregious facts. The miscarriage cases filed under the Eighth Amendment²²⁴ had factual backgrounds that clearly moved the judges. Likewise, the judges in *Monmouth County* noted that the plaintiff prisoners were either completely denied access to abortion or significantly delayed in that access,²²⁵ notwithstanding prison policy that formally allowed inmates to access abortion as long as they first obtain a court order releasing them on their own recognizance.²²⁶ Analyzing the Eighth Amendment claim, the *Monmouth*

²²⁰ The *Whole Woman's Health* doctrine requires courts to determine the benefits of a law restricting abortion access, see 136 S. Ct. at 2318, whereas in *Casey*, the Court upheld a law because it was based on a "reasonable assumption" by the state, see *Casey*, 505 U.S. at 895.

²²¹ See Women in the World Staff, *At final debate, Trump Vows to Appoint Pro-Life Justices to Supreme Court*, N.Y. TIMES (Oct. 19, 2016), <http://nytlive.nytimes.com/womenintheworld/2016/10/19/at-final-debate-trump-vows-to-appoint-pro-life-justices-to-supreme-court/>, archived at <https://perma.cc/J4L8-6ZCQ>.

²²² Justice Ruth Bader Ginsburg is 84 and Justice Stephen Breyer is 78. See *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/biographies.aspx> (last visited Jan. 4, 2017), archived at <https://perma.cc/6U8E-S328>.

²²³ See *supra* Section IV.

²²⁴ See *supra* Section III(b).

²²⁵ *Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 339 (3rd Cir. 1987).

²²⁶ *Id.* at 335.

court recognized that it needed to look at the *effect* of denying access to abortion,²²⁷ which can include “tangible harm,” thus making elective abortion a serious medical need requiring the prison to provide access.²²⁸ The focus on the effect of policies rather than the intent is especially helpful for individuals who may suffer disproportionately under facially neutral policies, such as women of color, transgender prisoners, and indigent prisoners. Notably, under the Eighth Amendment argument, the *Monmouth* court found the prison had an affirmative obligation to provide medical care, such as abortions, for prisoners within its walls, including paying for the abortions of women who were too poor to pay for them.²²⁹

Litigators should therefore argue that pregnancy itself is a serious medical need that requires the prison to provide access to elective abortion under the Eighth Amendment. The “tangible harm” that causes elective abortion to be a serious medical need can be expanded to all pregnancy care. A pregnant poor or black prisoner who expects to be released before giving birth, for example, may face “tangible harm” based on a lack of prenatal care. Although all women who have not had prenatal care may face the danger of invasive drug tests or even having a child taken away from them, based on the way that prison and healthcare systems treat poor and black women, a poor or black prisoner is likelier to face this harm than her white counterpart who can afford private insurance.²³⁰ An Eighth Amendment argument could cogently lay out the facts of what might happen to this individual. The threat of being rearrested or having a child taken away could be a shocking enough fact pattern to allow a court to determine that a prison policy providing inadequate prenatal healthcare violates the Eighth Amendment.

There are two reasons that an Eighth Amendment argument will be more likely to create the right to elective abortion and expand rights to other forms of reproductive healthcare. First, as the *Monmouth* court determined, serious medical needs can be deduced based on the actual effect of the denial of care on the prisoners.²³¹ Instead of referencing an abstract privacy right under the Fourteenth Amendment that fits uncomfortably within the prison setting, litigators can point to the concrete need for urgent reproductive medical services for prisoners to make their arguments. Second, the Eighth Amendment confers an affirmative obligation to provide care,²³² which means that a litigator can argue that a policy would have to provide *actual* access to abortion, including funding if necessary, to comport with the Eighth Amendment. An Eighth Amendment argument can also provide actual access to other forms of reproductive healthcare.

²²⁷ *Id.* at 347.

²²⁸ *Id.* at 349.

²²⁹ *Id.* at 350–51.

²³⁰ See *supra* Section II.

²³¹ See *Monmouth*, 834 F.2d at 347.

²³² *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

VI. CONCLUSION

Women incarcerated in Massachusetts prison, even though they have access to a number of good programs and healthcare workers who care about them, still have to worry about their treatment while pregnant. They are thereby prevented from making choices about whether, when, and how to have and parent children free from coercion and violence. Recognizing these principles, Massachusetts litigators should argue that the court should look at the effect of denying care and determine that pregnancy is a serious medical need, using the data provided and interviews with healthcare workers to show that prisoners are denied the right to make these choices. Massachusetts prisoners are shackled during pregnancy, labor and postpartum, and denied adequate prenatal care and nutrition. Even if a pregnancy goes well, a woman only has two to three days to be with her infant. In general, all prisoners would be right to be concerned about pregnancy care because they have to go through guards who may be untrained or unsympathetic. These conditions can establish cruel and unusual punishment for all pregnant women, and can show tangible harm for women who are forced to endure unwanted pregnancies.

Thus, women who are denied abortion are forced to endure these conditions, which litigators can argue amounts to deliberate indifference to a serious medical need. If a woman wants to remain pregnant, litigators can make the same arguments about prenatal care and time to bond with the infant, as the results of the denial evince deliberate indifference when they refuse proper prenatal care. Litigators can also attempt to establish the right to other forms of reproductive healthcare, including transition-related care,²³³ based on the Eighth Amendment and the facts on the ground in Massachusetts correctional institutions. Eighth Amendment fact- and context-based constitutional arguments have the potential to increase actual access to reproductive healthcare for Massachusetts inmates.

²³³ The First Circuit has denied access to sex reassignment surgery for one prisoner, but has left open the possibility that other prisoners may be able to make fact-based arguments for sex reassignment surgery in the future. *See Kosilek v. Spencer*, 774 F.3d 63, 91 (1st Cir. 2014).

APPENDIX

FRAMINGHAM PREGNANCY DATA

Medical Stats	Jan. 2015	Feb. 2015	Mar. 2015	Jan.-Mar. 2015	2014
Pregnancy and Post-Partum					
# of new admissions	10	4	4	18	147
Detainees	10	2	2	14	127
Sentenced	0	1	1	2	16
Civil Commitments	0	1	1	2	4
# of women transferred to Spectrum ²³⁴	n/a	n/a	n/a	0	1
# of women maintained on methodone	5	3	3	11	35
# of women added to methodone	1	0	1	2	31
Births					
Total # births	1	0	1	2	1
Detainees	0	0	0	0	1
Sentenced	1	0	1	2	0
Civil Commitment	0	0	0	0	0
# to DCF	1	0	n/a	1	0
# to family/friend	0	0	1	1	0
# adoption	0	0	n/a	0	0
# fetal demise (stillborn)	0	0	n/a	0	0

* Substance abuse treatment center.

FRAMINGHAM PREGNANCY DATA

MCI-FraminghamCatch the Hope

- The number of women whose pregnancies resulted in an abortion while incarcerated at MCIF† or SMCC‡ since May 2014—4
- The number of women whose pregnancies resulted in a miscarriage while incarcerated at MCIF or SMCC since May 2014—3

BARNSTABLE COUNTY PREGNANCY DATA

Pregnancies at Barnstable County Sheriff's Office Facility

Month	Number of Pregnant Inmates	Number of Abortions	Number of Miscarriages	Number of Births	Number of Stillborn births
May, 2014	0	0	0	0	0
June, 2014	1	0	0	0	0
July, 2014	2	0	0	0	0
August, 2014	2	0	0	0	0
September, 2014	1	0	0	0	0
October, 2014	2	0	0	0	0
November, 2014	2	0	0	0	0
December, 2014	2	0	0	0	0
January, 2015	2	0	0	0	0
February, 2015	2	0	0	0	0
March, 2015	1	0	0	0	0
April, 2015	1	0	0	0	0

†MCI-Framingham

‡South Middlesex Correctional Center, a pre-release program for Framingham prisoners.

