

Spring 3-10-2021

Pregnancy During Incarceration: A “Serious” Medical Need

Rahgan Jensen

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Recommended Citation

Rahgan Jensen, *Pregnancy During Incarceration: A “Serious” Medical Need*, 46 BYU L. Rev. 529 (2021).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol46/iss2/8>

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Pregnancy During Incarceration: A “Serious” Medical Need

*Rahgan Jensen**

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*“[The] pain was indescribable and what hurts me more
though is that fact that nobody cared.”*

– Diana Sanchez¹

INTRODUCTION

In July of 2018, Diana Sanchez entered the Denver County Jail in Colorado on charges of identity theft. At nearly nine months pregnant, she was isolated from the general prison population and put under constant video supervision by the jail’s medical staff. Early on the morning of July 31, Diana began experiencing contractions. As directed by her doctor, Diana immediately notified a prison official that she was having contractions and needed to go to the hospital, yet no action was taken. Even after taking her concerns to seven other officials, Diana was forced to remain at the prison. At 9:45 a.m., a nurse “monitoring” the situation noted that

* J. Reuben Clark Law School, J.D. Candidate 2021; Brigham Young University, B.A. 2018. Many thanks to Professor Michalyn Steele for her invaluable insight and feedback during the drafting process.

1. Allyson Chiu, ‘Nobody Cared’: A Woman Was Forced to Give Birth Alone in a Jail Cell After Her Cries for Help Were Ignored, *Lawsuit Says*, WASH. POST (Aug. 29, 2019, 9:24 PM), <https://www.washingtonpost.com/nation/2019/08/29/pregnant-woman-diana-sanchez-birth-alone-jail-cell-denver/>.

Diana's water had broken and that she was bleeding. But instead of calling an ambulance, the nurse requested a prison van to take Diana to the hospital after all new detainees had been booked.²

At 10:00 a.m., after knocking on her cell door to get the medical staff's attention, Diana was given a white absorbent pad to lay on in her cell. For the next five hours, Diana repeatedly screamed for help as she endured a difficult labor. Eventually, without medical treatment or supervision, Diana gave birth to her son on her own. When another nurse finally did respond to Diana's cries for help, he did not provide the newborn with adequate medical care; the baby was not warmed after delivery, no mucus was cleared from his nose or mouth, and no clamps were available to sever the umbilical cord.³ Thirty minutes after giving birth on her own, and over five hours after notifying the prison staff that she was in labor, Diana and her son were finally transported from her dirty jail cell to a Denver hospital.⁴

Diana is not the first woman to give birth while incarcerated, and she will not be the last. Approximately 3% of women in federal prisons, 4% of women in state prisons, and 5% of women in local jails are pregnant when they are admitted to prison, and many give birth while incarcerated.⁵ Moreover, "economically disadvantaged women and women of color," or "those who face the greatest likelihood of being arrested," are also "most likely to experience [an] unintended pregnanc[y]," and are thus most likely to need prenatal care while imprisoned.⁶ However, there are currently no nationwide, mandatory health or medical standards for pregnant

2. *Id.* This process was known to take several hours.

3. Mariel Padilla, *Woman Gave Birth in Denver Jail Cell Alone, Lawsuit Says*, N.Y. TIMES (Sept. 1, 2019), <https://www.nytimes.com/2019/09/01/us/diana-sanchez-birth-denver-jail.html>.

4. Chiu, *supra* note 1.

5. LAURA M. MARUSCHAK, BUREAU OF JUST. STAT., NCJ 221740, MEDICAL PROBLEMS OF PRISONERS 22 (2008), <https://bjs.gov/content/pub/pdf/mpp.pdf>; see also CAROLYN SUFRIN, JAILCARE: FINDING THE SAFETY NET FOR WOMEN BEHIND BARS 125-26 (2017) (ebook).

6. Rachel Roth, *Obstructing Justice: Prisons as Barriers to Medical Care for Pregnant Women*, 18 UCLA WOMEN'S L.J. 79, 81 (2010). According to a recent study from the CDC, Black, American Indian, and Alaskan Native women are approximately two to three times more likely to die from pregnancy-related causes than white women. Emily E. Petersen, Nicole L. Davis, David Goodman, Shanna Cox, Carla Syverson, Kristi Seed, Carrie Shapiro-Mendoza, William M. Callaghan & Wanda Barfield, *Racial/Ethnic Disparities in Pregnancy-Related Deaths – United States, 2007–2016*, 68 MORBIDITY & MORTALITY WKLY. REP. 762, 762 (2019). These racial disparities are likely exacerbated in the prison context.

people in U.S. prisons or jails.⁷ In fact, state prisons are not required by law to track the number of pregnant inmates or their outcomes, even though the majority of incarcerated women are of reproductive age.⁸

This lack of nationwide standards and reporting for pregnancy is especially concerning considering that since 1980, the number of incarcerated women in the United States has increased by over 750% – twice the rate of increase of incarcerated men.⁹ To put this into a global perspective, although the United States is home to only 4% of the world's female population, it holds 30% of the world's incarcerated female population.¹⁰ The rise in incarceration stems not from a major increase in crime rates, but from changes in social and political policies including the "War on Drugs," mandatory minimums in sentencing guidelines, and the lack of adequate mental health services.¹¹ Currently, the vast majority of incarcerated women have been convicted of non-violent drug or property crimes.¹² As of 2017, a quarter of women in state prisons

7. SUFRIN, *supra* note 5.

8. *First of Its Kind Statistics on Pregnant Women in U.S. Prisons*, JOHNS HOPKINS MED.: NEWSROOM (Mar. 21, 2019), <https://www.hopkinsmedicine.org/news/newsroom/news-releases/first-of-its-kind-statistics-on-pregnant-women-in-us-prisons>. Because of this lack of reporting, there is currently very little data on pregnancy frequency or outcomes for incarcerated women. Researchers at Johns Hopkins Medical University label this study as a "first-of-its-kind systematic look at pregnancy frequency and outcomes among imprisoned U.S. women." *Id.* Until this new study, a 2004 Bureau of Justice Statistics (BJS) study, which only accounted for self-reported pregnancies, was the only available data on pregnancy prevalence in prisons. That study did not account for pregnancies that occurred after intake either from conjugal visits, work-release programs, or rape. Roth, *supra* note 6, at 82. The government has not released any data since the BJS study. See also Jennifer Bronson & Carolyn Sufrin, *Pregnant Women in Prison and Jail Don't Count: Data Gaps on Maternal Health and Incarceration*, 134 PUB. HEALTH REPORTS 575 (2019) (explaining what data is available regarding maternal health in jail or prison).

9. THE SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS 1 (2019).

10. Carolyn Sufrin, Lauren Beal, Jennifer Clarke, Rachel Jones & William D. Mosher, *Pregnancy Outcomes in US Prisons, 2016–2017*, 109 AM. J. PUB. HEALTH 799, 799 (2019).

11. THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS (2020); Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System*, in GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS 1, 5 (Barbara E. Bloom ed., 2003) (classifying the war on drugs as the "war on women"); Robin Levi, Nerissa Kunakemakorn, Azadeh Zohrabi, Elizaveta Afanasieff & Nicole Edwards-Masuda, *Creating the "Bad Mother": How the U.S. Approach to Pregnancy in Prisons Violates the Right to Be a Mother*, 18 UCLA WOMEN'S L.J. 1, 6 (2010); Barbara A. Hotelling, *Perinatal Needs of Pregnant, Incarcerated Women*, 17 J. PERINATAL EDUC. 37, 37 (2008).

12. JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUST. STAT., NCJ 252156, PRISONERS IN 2017, 23 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf>.

and nearly 60% of women in federal prisons were incarcerated for drug offenses.¹³ Significantly, in federal prisons, only 4.8% of women were serving time for violent crimes.¹⁴

It is important to note that this rise in female incarceration has impacted women of color at extremely disproportionate rates.¹⁵ For example, “[i]n 2017, the imprisonment rate for [Black] women (92 per 100,000) was twice the rate of imprisonment for [W]hite women (49 per 100,000).”¹⁶ Nearly 44% of incarcerated females are Black women, compared to 36% who are White women,¹⁷ despite that fact that White women make up 60.8% of the U.S. female population while Black women make up only 13.7%.¹⁸ Looking to the future, for female U.S. residents born in 2001, there is a 1 in 111 chance of incarceration if that individual is White, compared to a 1 in 45 chance of incarceration if that individual is Hispanic or a 1 in 18 chance of incarceration if that individual is Black.¹⁹ Because women of color continue to be incarcerated at disproportionately high rates, any policies (or lack thereof) relating to the treatment of incarcerated women will also affect women of color at disproportionately high rates.

As the number of incarcerated women continues to increase in the United States, concerns over the mistreatment and abuse of women in state and federal prisons have increased as well. Many of the laws and policies implemented in state and federal prisons were not actually designed with female inmates in mind and do not account for the particular needs of most incarcerated women, including economic hardship, employment instability, substance abuse, lack of vocational skills, biological makeup, and a history of

13. *Id.* at 15, 23. For federal prisons, 56.8% of women were incarcerated for drug crimes and 17.4% were incarcerated for property crimes, but only 4.8% were incarcerated for violent crimes. *Id.* at 23.

14. *Id.*

15. THE SENTENCING PROJECT, *supra* note 9, at 2.

16. *Id.*

17. ELIZABETH SWAVOLA, KRISTINE RILEY & RAM SUBRAMANIAN, VERA INST. OF JUST., OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 11 (2016).

18. See *Women of Color in the United States: Quick Take*, CATALYST (Mar. 19, 2020), <https://www.catalyst.org/research/women-of-color-in-the-united-states/>. However, the rate of incarceration for black women has been decreasing in the past few years while the rate for white women has been increasing. THE SENTENCING PROJECT, *supra* note 9, at 5.

19. THE SENTENCING PROJECT, *supra* note 11, at 5.

trauma and abuse.²⁰ These laws are often written in sex-neutral terms, yet many of the concerns faced by female inmates must be addressed in sex-specific ways.²¹

One of the most obvious and pressing sex-specific concerns faced by incarcerated women today is in their treatment during and after pregnancy. However, the U.S. incarceration system currently fails to adequately protect this vulnerable population. In the United States today, pregnant inmates consistently face gross violations of their human rights, which are dangerous to the health of the inmate and her fetus and which aggravate the levels of trauma and post-traumatic stress that many pregnant inmates already experience.²² To challenge these violations under the Constitution, a plaintiff must show that a prison official was “deliberate[ly] indifferen[t]” to a “serious medical need[.]”²³ However, only a handful of courts have held that pregnancy is a “serious medical need,” and only in the context of labor and delivery, making this standard difficult

20. SWAVOLA ET AL., *supra* note 17, at 17; *see also* Covington & Bloom, *supra* note 11, at 3. Covington and Bloom’s article summarizes the different arguments surrounding whether equal treatment under the law is actually good for women. *Id.* The first group argues “that the only way to eliminate the discriminatory treatment and oppression that women have experienced in the past is to push for continued equalization under the law—that is, to champion equal rights amendments and to oppose any legislation that treats men and women differently.” *Id.* The second group, by contrast, advocates that:

[B]ecause women are not the same as men, the use of a male standard to measure equality means that women will always lose. Recognition of the different or “special” needs of women is thus called for. This would mean that women and men would receive differential treatment, as long as such treatment did not put women in a more negative position than the absence of such a standard.

Id. at 4. The third group states that:

[B]oth the equal treatment and special needs approaches accept the domination of male definitions. For example, equality for women is defined as rights equal to those of males, and differential needs are defined as needs different from those of males. In this position, women are the ‘other’ under the law; the bottom line is a male one.

Id.

21. Covington & Bloom, *supra* note 11, at 7; *see Female Offenders*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/female_offenders.jsp (last visited Sept. 7, 2020); SWAVOLA ET AL., *supra* note 17, at 13–14 (This source claims that the sex neutral or male centered assessment tools ignore research showing that women generally pose less risk than men. Because of this, their risk factor is often over-classified, and this bars women from many jail-based educational, vocational and rehabilitative programs. These tools also ignore women’s strengths, such as supportive family members, that can help mediate sex-responsive factors.).

22. Hotelling, *supra* note 11, at 38.

23. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

to meet. Thus, not only are the policies and legislation currently in place in most U.S. prisons woefully inadequate to protect pregnant and postpartum women, but the judicial remedies provided under the Constitution for violations are woefully inadequate as well.

Part I of this Note will address three prevailing issues that pregnant incarcerated women across the United States face today – lack of adequate prenatal and postpartum care, shackling, and prolonged solitary confinement – as well as the current state and federal laws or policies addressing these issues. Part II will discuss what Constitutional protections pregnant inmates are entitled to and the inadequacy of these protections. Finally, Part III will first propose a different and more equitable standard for analyzing Constitutional claims and second advocate for the implementation of national standards of care for pregnant and postpartum inmates that satisfy constitutional concerns.

I. OVERVIEW OF PREVAILING ISSUES AND CURRENT LEGISLATION/POLICIES

A. Lack of Adequate Prenatal and Postpartum Care

“There is no support from most prison staff: you’re just another face, another number, and they don’t think about your unborn baby. They don’t get that. You don’t get extra food or fresh fruit and veg for your growing child, even though you’re meant to be entitled to it. The staff either don’t know or they don’t care enough to make sure you get it. You just get a pint of full-fat milk.”

– Anonymous²⁴

“The lowest part for me was when the nurse stated that I had already passed the baby and she needed all of the linen that I had bled on prior to me getting to the hospital. [The officers] told her that they had thrown it in the trash. Just to hear that my baby was thrown in the trash, and the tone of the officers – like that was what they really felt about it, that

24. Anonymous, *I Had My Baby in Prison, So I Know How Jails Are Risking Mothers’ Lives*, OURCHEMIST (Nov. 16, 2018), <http://www.ourchemist.com/2018/11/i-had-my-baby-in-prison-so-i-know-how-jails-are-risking-mothers-lives/>.

it was trash – it’s really hard. . . . My crime was about some money, and I’m sitting up there thinking to myself, there’s no amount of money or nothing that I could have taken or did wrong to justify throwing my baby in the trash and treating me like I am trash.”

– Pamela Winn²⁵

While pregnant women have serious and unique health needs, they often go under- or unaddressed in incarceration facilities. To understand why this occurs, one must understand both the physical and mental state of many women upon entering a prison or jail facility. Currently, a large majority of incarcerated women arrive in poor health due to poverty, drug addiction, or physical and sexual abuse.²⁶ These women tend to have untreated chronic conditions, such as diabetes and high blood pressure, and most have endured some form of childhood or spousal abuse.²⁷ In a nationwide survey of prisoners and jail inmates, the Department of Justice reported that 65.8% of female prisoners and 67.9% of jailed female inmates had a history of mental health problems.²⁸ Further, a 1999 study reported that more than 57% of women in state prisons and 47% of women in local jails reported a history of physical or sexual abuse prior to incarceration.²⁹ Other studies place this abuse figure much higher, with rates as high as 68%,³⁰ 86%,³¹ and 94%.³²

25. C.J. Ciaramella, *This Woman Was Shackled While Pregnant in Federal Prison. A New Bill Would Make Sure That Never Happens Again*, REASON (Sept. 13, 2018, 2:15 PM) <https://reason.com/2018/09/13/female-lawmakers-introduce-bipartisan-bi/>.

26. Wendy Sawyer, *The Gender Divide: Tracking Women’s State Prison Growth*, PRISON POL’Y INITIATIVE (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html.

27. *Id.*

28. JENNIFER BRONSON & MARCUS BERZOFKY, BUREAU OF JUST. STAT., NCJ 250612, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011–12, at 4 (2017).

29. CAROLINE WOLF HARLOW, BUREAU OF JUST. STAT., NCJ 172879, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 2 (1999).

30. Ashley G. Blackburn, Janet L. Mullings & James W. Marquart, *Sexual Assault in Prison and Beyond: Toward an Understanding of Lifetime Sexual Assault Among Incarcerated Women*, 88 PRISON J. 351, 365 (2008).

31. SWAVOLA ET AL., *supra* note 17 at 11.

32. Angela Browne, Brenda Miller & Eugene Maguin, *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT’L J. L. & PSYCHIATRY 301, 315 (1999).

These pre-existing issues can cause serious complications when combined with pregnancy, and thus pregnancies for most incarcerated women are considered “high-risk.”³³ For women with drug abuse issues, serious problems such as “weight loss, dehydration, HIV/AIDs, other sexually transmitted diseases, hepatitis B, hypertension, cardiac and respiratory problems, and seizures” are amplified by pregnancy.³⁴ Moreover, detoxification from drug addictions while pregnant requires “specialized medical personnel and treatment protocols.”³⁵ All of these issues create additional risks for both the mother and the growing fetus.³⁶ Yet many of the needed resources for these women, including mental health treatment, medical examinations, therapy, prenatal education, and nutrition, are largely unavailable or limited.³⁷

Along with prenatal care, adequate recovery for postpartum inmates is also severely limited. Following the birth of her child, an inmate is typically given twenty-four to forty-eight hours with her child before turning him or her over to family members, caregivers, or the state and returning to an incarceration facility.³⁸ Many organizations, including the American College of Obstetricians and Gynecologists have strongly opposed this practice, stating this it is traumatizing for a recovering mother during her postpartum recovery period.³⁹ This recovery period—typically about six weeks—is also considered to be vital for an infant’s healthy development.⁴⁰ As a result of separation, these infants often do not develop secure attachments to their mothers within their first year of life, and research indicates that this can have negative social,

33. Kelly Parker, *Pregnant Women Inmates: Evaluating Their Rights and Identifying Opportunities for Improvements in Their Treatment*, 19 J.L. & HEALTH 259, 265 (2005). A large number of women, particularly those with children, report a period of homelessness in the year prior to incarceration. Hotelling, *supra* note 11, at 38. A “high risk” pregnancy means that the female giving birth has one or more conditions that raise her or her baby’s chance of developing health problems or preterm delivery.

34. Parker, *supra* note 33, at 265.

35. *Id.*

36. *Id.*

37. *Id.* Because of the lack of prenatal education, many incarcerated women receive their knowledge on pregnancy from other inmates, who themselves lack the necessary education on prenatal care.

38. SWAVOLA ET AL., *supra* note 17, at 17.

39. *Id.*

40. *Id.*

emotional, and intellectual consequences later in life.⁴¹ Thus, separation can also have serious consequences on the newborn child who is him- or herself innocent of any crime.

Aside from access to care, a lack of decision-making ability regarding one's pregnancy and health is itself a lack of adequate medical care. Unfortunately, this is another concern for pregnant inmates that happens with frequency.⁴² In most states, a woman will have no control over who is present during medical examinations or, more importantly, at the birth of her child.⁴³ While there is usually a male guard in the room, family members, friends, and doulas are often not allowed to be present.⁴⁴ Choices in health care provider and location of the birth are also naturally restricted to the correctional staff and nearest hospital.⁴⁵ Even decisions such as when and how to have the child are restricted and can result in retaliatory measures when a woman refuses to comply.⁴⁶ For example, evidence suggests that correctional facilities schedule Cesarian sections for women when they are neither requested nor desired, even if that woman might prefer to labor and deliver vaginally.⁴⁷

While the focus of this Note is on the lack of adequate medical care for pregnant and postpartum inmates, it is important to note that many of these pregnancies are not intended or chosen, and some even result from rape during incarceration.⁴⁸ Although the

41. Leda M. Pojman, *Cuffed Love: Do Prison Babies Ever Smile?*, 10 BUFF. WOMEN'S L.J. 46, 60 (2001).

42. See Roth, *supra* note 6, at 94-95.

43. Deborah Ahrens, *Incarcerated Child Birth and "Broader Birth Control": Autonomy, Regulation, and the State*, 80 MO. L. REV. 1, 28-29 (2015).

44. *Id.* at 29 ("Even when prison policy allows women to inform such people of a pending birth or even invite them into the delivery room, pregnant inmates are dependent on correctional officials or medical personnel to communicate their wishes, an obligation that is often ignored or mishandled.").

45. Melanie Kalmanson, *Innocent Until Born: Why Prisons Should Stop Shackling Pregnant Women to Protect the Child*, 44 FLA. STATE U. L. REV. 851, 855-57 (2017).

46. Ahrens, *supra* note 43, at 27.

47. *Id.* ("While prisons probably lack the authority to order a woman to undergo a medically unnecessary C-section if she refuses, pregnant inmates are unable to shop around for sympathetic facilities and providers, often lack the information necessary to make an informed choice, and face potential disciplinary consequences for challenging authority in ways that might be deemed confrontational.").

48. E.g., Veronica Penney, *An Inmate Was Raped, Impregnated by a Guard*, MIAMI HERALD (Sept. 27, 2019, 9:51 AM), <https://www.miamiherald.com/news/special->

Supreme Court has not addressed access to abortion for prisoners, the majority of federal courts have held that women have a constitutional right to obtain an abortion while incarcerated, but only at their own expense.⁴⁹ Other courts have held to the contrary, providing strong deference to prison regulations limiting abortion access.⁵⁰ For political or ideological reasons, those who run correctional facilities often make access to abortion difficult, if not impossible.⁵¹ However, while such abortion restrictions mean that these correctional facilities appear to prioritize continuing pregnancy, evidence repeatedly shows that they fail to prioritize the health and safety of the mother and her fetus. Because these women are often forced to carry to term in these dangerous conditions regardless of their personal decisions, at a minimum, providing adequate medical care to both the woman and her fetus is crucial.⁵²

Failing to provide adequate prenatal and postpartum medical care for incarcerated women exacerbates the already high risks that pregnant inmates face. Under the Eighth Amendment, all U.S. prisons and jails are required to provide medical care, including prenatal and postpartum recovery care.⁵³ Yet the most recent government study done by the Bureau of Justice Statistics reported that only 53.9% of pregnant women in prison actually received some form of care while incarcerated.⁵⁴ Pregnancy-related care is even less accessible for women in local jails.⁵⁵

reports/florida-prisons/article234961062.html; Ben Hall, *Female Inmate Claims Officer Impregnated Her*, NEWS CHANNEL 5 NASHVILLE (Jan. 29, 2018, 10:32 PM), <https://www.newschannel5.com/news/newschannel-5-investigates/female-inmate-claims-officer-impregnated-her>.

49. *E.g.*, Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 351 (3d Cir. 1987) (holding that an abortion constituted a serious medical need under the Eighth Amendment); Roe v. Crawford, 514 F.3d 789, 797 (8th Cir. 2008).

50. *See* Victoria W. v. Larpenter, 369 F.3d 475 (5th Cir. 2004) (upholding a correctional policy requiring an inmate to receive a court order before an abortion); Gibson v. Matthews, 926 F.2d 532 (6th Cir. 1991).

51. *See* Roth, *supra* note 6, at 83.

52. *Id.*

53. Estelle v. Gamble, 429 U.S. 97, 103 (1976); *see also* SWAVOLA ET AL., *supra* note 17, at 17.

54. BUREAU OF JUST. STAT., MEDICAL PROBLEMS OF PRISONERS (2020), <https://www.bjs.gov/content/pub/html/mpp/tables/mppt10.cfm>.

55. SWAVOLA ET AL., *supra* note 17, at 17. This is particularly concerning because half of all incarcerated women are detained in local jails. Incarcerated women, who tend to have

Moreover, no detailed nationwide standards have been set regarding exactly what care is required for pregnant women under the Constitution.⁵⁶ Because of the lack of mandatory standards, the quality of care that an inmate receives varies greatly, depending largely on which prison or jail she is housed in.

While there are no nationally recognized standards for prenatal and postpartum care, three organizations—the National Commission on Correctional Health Care (NCCCHC), the American College of Obstetricians and Gynecologists (ACOG), and the American Public Health Association (APHA)—have advocated for minimum standards that should be met during incarceration. These standards include prenatal medical examinations, identification of high risk pregnancies, HIV and other STI testing, nutritional guidance and counseling, prenatal education and advisement of safety precautions during pregnancy, appropriate postnatal care, mental health screening, abortion access, breastfeeding options, substance abuse treatment specifically for pregnancy, education of staff members, documentation of pregnancy outcomes, and access to newborns after delivery.⁵⁷

Though the majority of states now provide some form of prenatal care to inmates, very few have standards similar to those proposed by NCCCHC, ACOG, or APHA.⁵⁸ And as of 2019, twelve states still have no formal policies in place regarding prenatal care for pregnant women.⁵⁹ Though it has been shown that prisons and jails are far less sanitary and equipped to deal with complications, twenty-four states lack formal policies regarding pre-existing arrangements for delivery.⁶⁰ Moreover, though a large portion of these pregnancies are high risk, the Bureau of Prisons and

lower incomes than men, are disproportionately held in jails because they have difficulty affording the steep price of bail. And even after conviction, about one quarter of convicted incarcerated women are held in jails. Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html>.

56. Roxanne Daniel, *Prisons Neglect Pregnant Women in Their Healthcare Policies*, PRISON POL'Y INITIATIVE (Dec. 5, 2019), <https://www.prisonpolicy.org/blog/2019/12/05/pregnancy>.

57. DIANA KASDAN, ACLU REPRODUCTIVE FREEDOM PROJECT, STATE STANDARDS FOR PREGNANCY-RELATED HEALTH CARE IN PRISON (2008), <https://www.aclu.org/state-standards-pregnancy-related-health-care-and-abortion-women-prison-0>.

58. *Id.*

59. Daniel, *supra* note 56.

60. *Id.*

twenty-two states have no guidelines regarding specialized care of high risk pregnancies.⁶¹ Thirty-one states have no nutritional policies or guidelines in place for pregnant women, and in twelve states with policies in place, the only guidelines were vague phrases requiring “adequate” or “appropriate” nutrition for pregnant inmates.⁶² As of 2019, California was the only state with guidelines that explicitly listed the nutritional policies for pregnant inmates: “two extra eight ounce cartons of milk or a calcium supplement if lactose intolerant, two extra servings of fresh fruit, and two extra servings of fresh vegetables daily” with extra allowance for “additional nutrients” if ordered by a physician.⁶³ Finally, only twelve states had policies explicitly stating that medical examinations were a requirement for prenatal care.⁶⁴

Even with states that have prenatal and postpartum policies in place, evidence suggests that these policies are not adequately enforced. For example, though Arizona enacted nutritional guidelines for pregnant women in 2018, a tour of one women’s facility in Tucson revealed that the diet for pregnant inmates was severely lacking in fruits and vegetables, and that the “additional nutrients” received were a peanut butter sandwich and an extra carton of milk.⁶⁵ Moreover, as Diana Sanchez’s case illustrates, pregnant inmates’ medical concerns are often ignored or downplayed by the predominately male prison staff to their and their child’s detriment.

Within the last few years alone, there have been dozens of examples of women who reported that they were having serious problems only to be ignored by staff until it was too late to be transported to a hospital.⁶⁶ One Illinois woman, Krystal Moore, was delayed transportation to the hospital for eight hours after going

61. *Id.*

62. *Id.*

63. CAL. CODE REGS. tit. 15, § 3050(a)(3) (2008).

64. KASDAN, *supra* note 57.

65. Lauren Castle, *Arizona Prisons Have a History of Women Giving Birth in Their Cells*, AZCENTRAL (June 5, 2019, 11:45 AM), <https://www.azcentral.com/story/news/local/arizona/2019/06/04/arizona-prisons-history-women-giving-birth-cells-health-care-department-corrections/1306184001/>.

66. *E.g., Doe v. Gustavus*, 294 F. Supp. 2d 1003, 1007 (E.D. Wis. 2003).

into pre-term labor.⁶⁷ When her guard informed off-site medical staff of her abdominal pain, the staff stated that Moore was “full of shit” and that she could go to the doctor tomorrow.⁶⁸ Moore ended up delivering twin babies three months early, the first surviving only one day, and the other surviving for sixteen days.⁶⁹ Had she been taken to the doctor earlier, at least one expert believes that the children might have survived.⁷⁰ As another example, one Florida woman near her due date repeatedly sought medical attention for two weeks because she believed she was leaking amniotic fluid.⁷¹ After finally receiving an ultrasound showing that her fetus had died, she was delayed transportation to the hospital for hours and nearly died of septic shock.⁷²

As the population of incarcerated females continues to grow, the number of pregnant inmates will grow as well. Yet for decades, federal and state law has failed to account for the sex-specific prenatal and postpartum needs of this vulnerable population. As awareness of the needs of these inmates continues to grow, there is no longer any justification for failure to meet the minimum standards of care these inmates deserve.

67. Sharona Coutts & Zoe Greenberg, *Deprived of Care, Incarcerated Women Suffer Miscarriages, Stillbirths, Ectopic Pregnancies*, REWIRE NEWS GRP. (Mar. 31, 2015, 9:18 AM), <https://rewirenewsgroup.com/article/2015/03/31/deprived-care-incarcerated-women-suffer-miscarriages-stillbirths-ectopic-pregnancies/>.

68. *Id.*

69. *Id.*

70. *Id.* Even if the children would not have survived, Moore’s case illustrates how callous treatment and neglect may jeopardize an inmate’s life.

71. Associated Press, *Former Inmate Sues over Baby’s Death in Florida*, SARASOTA HERALD-TRIBUNE (Nov 15, 2010, 9:22 AM), <https://www.heraldtribune.com/news/20101115/former-inmate-sues-over-babys-death-in-florida>.

72. *Id.*

B. Shackling

“Because I was shackled to the bed, they couldn’t remove the lower part of the bed for the delivery, and they couldn’t put my feet in the stirrups. My feet were still shackled together, and I couldn’t get my legs apart. The doctor called for the officer, but the officer had gone down the hall. No one else could unlock the shackles, and my baby was coming but I couldn’t open my legs.”

– Warnice Robinson⁷³

“My wrists being secured to the belly chain on me, it was like a tree falling. . . . There was no way for me to break my fall. I couldn’t move or do anything but fall. From that point is when I started bleeding.”

– Pamela Winn⁷⁴

Shackling – the placing of handcuffs, chains, or shackles around a woman’s ankles, wrists, and sometimes stomach⁷⁵ – is a form of restraint that poses unnecessary risks to both the inmate and the fetus, especially for high-risk pregnancies.⁷⁶ Yet in many states, pregnant inmates are shackled during transportation to a hospital,⁷⁷ labor and delivery, and post-delivery recovery.⁷⁸

Many organizations, including the American College of Obstetricians and Gynecologists and the United Nations Human Rights Committee have explicitly opposed the practice as harmful to both the mother and the child for multiple reasons.⁷⁹

73. Vania Leveille, *Bureau of Prisons Revises Policy on Shackling of Pregnant Inmates*, ACLU (Oct. 20, 2008, 12:54 PM), <https://www.aclu.org/blog/bureau-prisons-revises-policy-shackling-pregnant-inmates>.

74. Ms. Winn miscarried at twenty weeks. Ciaramella, *supra* note 25.

75. EVAN FEINAUER, AARON LEE, JULIA PARK & TESSA WALKER, *THE SHACKLING OF INCARCERATED PREGNANT WOMEN: A HUMAN RIGHTS VIOLATION COMMITTED REGULARLY IN THE UNITED STATES* 3 (Brian Citro, Jamil Dakwar, Amy Fettig, Sital Kalantry & Gail Smith eds., 2014), <https://chicagounbound.uchicago.edu/ihr/3/>.

76. *Id.* at 4–6.

77. *Id.* at 5 (quoting LaDonna Hopkins, Testimony Before Illinois House of Representatives (Mar. 2011)).

78. *Id.* at 3.

79. *See, e.g.,* FEINAUER ET AL., *supra* note 75.

First, restraint makes it more difficult for medical personnel to assess the condition of their patient.⁸⁰ Serious complications, such as hypertensive disease, are more difficult to diagnose or treat when a woman is shackled.⁸¹ Additionally, restraint makes it nearly impossible to conduct diagnostic tests to determine a source of abdominal pain resulting from pregnancy.⁸²

Second, in emergency situations, shackling also makes it difficult or impossible to perform necessary procedures, such as a caesarean-section, or address serious complications during delivery such as preeclampsia.⁸³ Even a short delay during delivery caused by shackling can be life threatening for the mother or child.⁸⁴

Third, restraint during labor also makes it more difficult for a woman to move and change positions as needed.⁸⁵ Research shows that movement during labor can decrease both duration and pain.⁸⁶ Shackles, in contrast, can make the delivery longer, more painful, and more dangerous.⁸⁷ For example, one woman who was shackled to the bed during labor suffered a hip dislocation and an umbilical hernia from not being able to move her legs during delivery.⁸⁸

Fourth, during the second and third trimester of pregnancy, shackling one's hands behind their back increases the risk of falling and makes it nearly impossible for the falling woman to catch herself due to her handcuffs.⁸⁹ For any pregnancy, and especially for one designated high-risk, a fall can cause serious health complications or miscarriage.⁹⁰

Fifth, shackling limits a mother's ability to contact and bond with her newborn, an action that is critical for optimal child development.⁹¹ In addition to general contact, shackling also restricts a mother's ability to breastfeed her newborn.⁹²

80. *Id.* at 5.

81. *Id.*

82. *Id.*

83. *Id.* at 5-6.

84. *Id.*

85. *Id.* at 5.

86. *Id.*

87. *Id.*

88. *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 526 (8th Cir. 2009).

89. FEINAUER ET AL., *supra* note 75, at 6.

90. *See id.*

91. *Id.*

92. *Id.*

Finally, aside from the physical health risks, shackling causes serious emotional trauma for an expectant mother and deprives her of her basic human dignity.⁹³ One twenty-one-week pregnant woman from Kentucky, after waiting for an ambulance for over nine hours, gave birth to her child in her underwear while being shackled in an ambulance on her way to the hospital.⁹⁴ The baby died within hours.⁹⁵ Labor and delivery is one of the most difficult and intimate moments of a woman's life. Shackling her to the bed or to an ambulance during this process designates her as something closer to an animal than a human being.

In 2008, the Federal Bureau of Prisons (FBP) promulgated a policy restricting the use of restraints on pregnant inmates:

[A]n inmate who is pregnant, in labor, delivering her baby, or is in post-delivery recuperation, or who is being transported or housed in an outside medical facility for treating labor symptoms, delivering her baby, or post-delivery recuperation, should not be placed in restraints unless there are reasonable grounds to believe the inmate presents an immediate, serious threat of hurting herself, staff or others, or there are reasonable grounds to believe the inmate presents an immediate and credible risk of escape that cannot be reasonably contained through other methods.⁹⁶

In 2018, this policy was codified into law on a bipartisan basis as part of a larger criminal justice reform effort through the First Step Act.⁹⁷

However, the First Step Act is binding only on federal prisons and does not reach state or local facilities. Thus, shackling legislation differs by state, and the actual practical effects of the federal policy on incarcerated women, most of whom are incarcerated in state prisons and jails, is minimal. However, both the 2008 policy and the First Step Act demonstrate a growing movement towards anti-shackling policies within the

93. *Id.* at 8. This is especially true considering that most female inmates are likely to be victims of some form of abuse.

94. Blake Ellis & Melanie Hicken, *Dangerous Jail Births, Miscarriages, and Stillborn Babies Blamed on the Same Billion Dollar Company*, CNN INVESTIGATES (May 7, 2019), <https://www.cnn.com/2019/05/07/health/jail-births-wellpath-ccs-invs/?ref=todayheadlines.live>.

95. *Id.*

96. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., NO. 5538.05, PROGRAM STATEMENT: ESCORTED TRIPS 12 (2008), <https://perma.cc/BGJ9-MNEV>.

97. First Step Act of 2018, Pub. L. No. 115- 391, 132 Stat. 5194.

United States. In 2008 when the FBP policy was issued, 47 states had no legislation to restrict or prohibit the shackling of pregnant women.⁹⁸ Furthermore, U.S. Immigration and Customs Enforcement (ICE) refused to specifically end the practice in immigration detention.⁹⁹ However, as of December 2019, 37 states have formal policies or legislation restricting the use of restraints during labor and delivery.¹⁰⁰ Along with state reform, in 2011, ICE issued directives prohibiting the use of restraint against pregnant detainees “absent truly extraordinary circumstances that render restraints absolutely necessary.”¹⁰¹

While this is a significant increase since 2008, a large majority of these policies provide insufficient protection against shackling for pregnant women, and thus further legislative reform is essential. According to ACOG, shackling laws or policies that do not cover the entire pregnancy, including transportation and postpartum recovery, are inhumane and unsafe.¹⁰² However, only thirteen states restrict the practice of shackling broadly to extend beyond labor and delivery.¹⁰³ Additionally, only twenty-one states allow medical personnel to remove the restraints immediately during delivery, and just twenty-seven states require written documentation by corrections personnel before using restraints.¹⁰⁴

98. Leveille, *supra* note 73. Illinois was the first state to enforce anti-shackling legislation. 1999 Ill. Laws 91-0253 (effective Jan. 1, 2000).

99. Leveille, *supra* note 73.

100. Daniel, *supra* note 56; Crime and Justice News, *23 States Still Allow Shackling Pregnant Prisoners*, CRIME REPORT (Jan. 27, 2020), <https://thecrimereport.org/2020/01/27/23-states-still-allow-shackling-pregnant-prisoners/>.

101. U.S. IMMIGR. & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., OPERATIONS MANUAL, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS, 213 (2011), https://www.ice.gov/doclib/detention-standards/2011/use_of_force_and_restraints.pdf.

102. Committee Opinion, *Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, 511 OBSTETRICS & GYNECOLOGY 1198, 1202 (Nov. 2011) [hereinafter ACOG Comm. Op.], <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2011/11/health-care-for-pregnant-and-postpartum-incarcerated-women-and-adolescent-females.pdf>.

103. Daniel, *supra* note 56. These states are: CA, CT, NE, IL, KY, LA, ME, MD, MN, NC, OK, TX, and UT. Am. Coll. of Obstetricians & Gynecologists, *2018 Shackling Tally*, <https://www.acog.org/-/media/Departments/State-Legislative-Activities/2018ShacklingTally.pdf?dmc=1&ts=20200220T1833131586> (last visited Apr. 10, 2020).

104. Am. Coll. of Obstetricians & Gynecologists, *supra* note 103. The states requiring immediate removal during delivery are: AR, CA, CT, DE, DC, FL, HI, ID, IL, LA, ME, MD, MA, MN, MO, NE, RI, TX, UT, WA, WV. The states requiring written authorization are: AR, AZ, CT, CO, DE, DC, FL, GA, HI, ID, IL, LA, ME, MD, MA, MN, MO, NE, NY, NC, OK, PA, RI, TX, UT, VT, and WA. *Id.*

Thirteen states have no formal policies or legislation in place, leaving the determination of appropriateness up to prison personnel who are themselves subject to bias and lack of education on the subject.¹⁰⁵

Even in facilities with formal policies in place, there is significant evidence that violations happen frequently.¹⁰⁶ For example, even though Illinois was the first state to pass anti-shackling laws in 1999, in a class-action lawsuit in 2012, 80 women brought claims against a Chicago prison, claiming that they were shackled during labor.¹⁰⁷ The prison eventually settled the suit for \$4.1 million.¹⁰⁸ In New York, 23 out of 27 women who gave birth in prison after passage of the state's 2009 anti-shackling law reported being shackled before, during, or after the delivery.¹⁰⁹ Violations are not unique to state facilities; though ICE has a fairly restrictive policy against shackling, there are frequent reports of shackling within detention centers as well.¹¹⁰

Although shackling continues to occur frequently despite legislation and pushback from national and international organizations, its apparent justifications – risk of flight and danger to others – are not merited. To the first point, common sense tells us that the chances of a pregnant woman, in labor or not, outrunning a guard are close to zero. But beyond common sense, research shows that, in general, female inmates pose less of a flight risk than males.¹¹¹ For pregnant inmates specifically, the flight risk is minimal to non-existent; in states that have implemented anti-shackling laws, none have reported any attempts of escape by

105. *Id.*

106. *E.g.*, Audrey Quinn, *In Labor, In Chains*, N.Y. TIMES (July 26, 2014), <https://www.nytimes.com/2014/07/27/opinion/sunday/the-outrageous-shackling-of-pregnant-inmates.html>; *Nelson v. Corr. Med. Servs.*, 583 F.3d 522 (8th Cir. 2009); *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239 (9th Cir. 2016).

107. Colleen Mastony, *\$4.1 Million Settlement for Pregnant Inmates Who Say They Were Shackled*, CHI. TRIB. (May 23, 2012, 6:52 AM), <https://www.chicagotribune.com/news/breaking/chi-lawsuit-by-pregnant-jail-inmates-who-say-they-were-shackled-settled-for-41-million-20120522-story.html>.

108. *Id.*

109. Quinn, *supra* note 106.

110. Ema O'Connor & Nidhi Prakash, *Pregnant Women Say They Miscarried in Immigration Detention and Didn't Get the Care They Needed*, BUZZFEED NEWS (July 9, 2018, 2:44 PM), <https://www.buzzfeednews.com/article/emaconnor/pregnant-migrant-women-miscarriage-cpb-ice-detention-trump>.

111. FEINAUER ET AL., *supra* note 75, at 7.

pregnant prisoners.¹¹² Additionally, the risk of self-harm or harm to others is minimal. In general, women are statistically unlikely to be violent offenders.¹¹³ For pregnant inmates specifically, in anti-shackling states, there are no reports of any pregnant prisoners causing harm to themselves or others.¹¹⁴ Moreover, pregnant inmates are unlikely to share a delivery room with others, again reducing the risk of danger to others.¹¹⁵ Thus, while the justifications of shackling are sex-neutral, they lack merit in the context of pregnant inmates.

C. Isolation/Solitary Confinement

“Basically, you were on lockdown. . . . They opened the doors long enough for you to get your medicine, and you had about an hour to use the phone if it worked for you and to take a shower. Then you had to be back in your room. . . . I’d sit there and stare at the wall all day long. . . . I didn’t even have a Bible at that time.”

– Angela Grimm¹¹⁶

“I bawled my eyes out when they took my daughter from me. . . . And that was it. Back in the van. Back to the prison. Back to that room all by myself.”

– Natalie Lynch¹¹⁷

Solitary confinement is defined as “the housing of an adult or juvenile with minimal to rare meaningful contact with other

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Theresa Vargas, *Maryland Just Banned Placing Pregnant Women in Solitary Confinement. Yes, That Was Apparently Happening*, WASH. POST (May 1, 2019, 1:04 PM), https://www.washingtonpost.com/local/maryland-just-banned-placing-pregnant-women-in-solitary-confinement-yes-that-was-apparently-happening/2019/05/01/e74e58ea-6c2a-11e9-8f44-e8d8bb1df986_story.html.

117. Sarah McCammon, *Pregnant, Locked Up, and Alone*, NPR (June 16, 2019, 5:00 AM), <https://www.npr.org/2019/06/16/732109546/pregnant-locked-up-and-alone>.

individuals.”¹¹⁸ Individuals faced with solitary confinement “often experience sensory deprivation and are offered few or no educational, vocational, or rehabilitative programs.”¹¹⁹ Justification for this practice is cited as deterrence, protection from self-harm, incapacitation from serious threats, rehabilitation, or clinical and therapeutic reasons.¹²⁰ However, many national and international organizations, including the World Health Organization and the United Nations (UN), condemn the practice, categorizing it as “cruel, inhumane, and degrading treatment, and harmful to an individual’s health.”¹²¹

Research indicates that solitary confinement causes serious physical health problems, including “gastrointestinal and genitourinary problems, diaphoresis, insomnia, deterioration of eyesight, profound fatigue, heart palpitations, migraines, back and joint pains, weight loss, diarrhea, and aggravation of preexisting medical problems.”¹²² Moreover, even for those without pre-existing mental health conditions, confinement often causes “anxiety, depression, anger, diminished impulse control, paranoia, visual and auditory hallucinations, cognitive disturbances, obsessive thoughts, paranoia, hypersensitivity to stimuli, posttraumatic stress disorder, self-harm, suicide, and/or psychosis.”¹²³ Additionally, for women with a history of post-traumatic stress disorder, prolonged isolation often acts as a trigger for retraumatization.¹²⁴

Pregnant and postpartum inmates are especially susceptible to the dangers of solitary confinement and yet are frequently

118. *Solitary Confinement (Isolation)*, NAT’L COMM’N ON CORR. HEALTHCARE (Apr. 10, 2016), <https://www.ncchc.org/solitary-confinement>.

119. *Id.* “Different jurisdictions refer to solitary confinement by a variety of terms, such as isolation; administrative, protective, or disciplinary segregation; permanent lockdown; maximum security; supermax; security housing; special housing; intensive management; and restrictive housing units,” but “restrictive housing” is most often used when discussing the isolation of pregnant women. *Id.*

120. *Id.*; see also Fatos Kaba, Andrea Lewis, Sarah Glowa-Kollisch, James Hadler, David Lee, Howard Alper, Daniel Selling, Ross MacDonald, Angela Solimo, Amanda Parsons & Homer Venters, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442, 442 (2014).

121. NAT’L COMM’N ON CORR. HEALTHCARE, *supra* note 118.

122. *Id.*

123. *Id.*

124. Covington & Bloom, *supra* note 11, at 8.

subjected to it in some form.¹²⁵ This confinement is often justified as a way to protect pregnant inmates from being injured by the general population or as a way to provide better medical care or monitoring. However, solitary confinement has also been used as a retaliatory measure against pregnant inmates for both pregnancy-related and non-pregnancy related actions.¹²⁶ Additionally, research indicates that confinement occurs more frequently among pregnant inmates of color.¹²⁷

Confinement can be for more than 22–23 hours per day, and most often takes place in the weeks leading up to delivery and the days or weeks after birth.¹²⁸ For pregnant inmates, solitary confinement serves to aggravate feelings of stress, anxiety, and depression that can arise in the late stages of pregnancy.¹²⁹ This change in mental health can lower an inmate's ability to fight infection and may increase the risk of preterm labor, miscarriage, and low birth rate.¹³⁰ Along with the physical and mental health risks, solitary confinement of pregnant women also obstructs or delays access to critical medical care in the days leading up to delivery and prevents women from the requisite exercise and movement needed for a healthy pregnancy.¹³¹ For inmates during postpartum recovery, who are usually removed from their newborn child within 48 hours, confinement severely increases the risks of developing postpartum depression.¹³²

As illustrated in the case of Diana Sanchez in the introduction, this lack of outside contact can be life threatening for both the mother and the child. However, Diana's situation is not an

125. *Id.*; Sufrin et al., *supra* note 10, at 803.

126. McCammon, *supra* note 117; e.g., Doe v. Gustavus, 294 F. Supp. 2d 1003, 1006 (E.D. Wis. 2003) (placing a woman who declined induction to be placed in solitary confinement).

127. Margo Schlanger, *Prison Segregation: Symposium Introduction and Preliminary Data on Racial Disparities*, 18 MICH. J. RACE & L. 241, 242 (2013).

128. Cameron Dodd, *General Assembly Bills Tackle Solitary Confinement in State Prisons*, FREDERICK NEWS-POST (Feb. 6, 2019), https://www.fredericknewspost.com/news/crime_and_justice/prison/general-assembly-bills-tackle-solitary-confinement-in-state-prisons/article_a8cd1007-9ea8-5004-b9b6-2983cf933ccf.html.

129. TAMAR KRAFT-STOLAR, WOMEN IN PRISON PROJECT OF THE CORR. ASS'N. OF N. Y., REPRODUCTIVE INJUSTICE: THE STATE OF REPRODUCTIVE HEALTHCARE FOR WOMEN IN NEW YORK STATE PRISONS 149 (2015), <https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf>.

130. *Id.*

131. *Id.*

132. *Id.*

exception.¹³³ In May of 2019, a pregnant and mentally ill pre-trial detainee in Florida was placed in an “isolation cell” and forced to give birth on her own after notifying staffers of contractions seven hours earlier.¹³⁴ In 2015, a pregnant inmate in the U.S. Virgin Islands who was not eating regularly, speaking, or taking prenatal vitamins was placed in solitary confinement for weeks, eventually giving birth alone on her cell floor.¹³⁵

In recent years, solitary confinement for pregnant women has been strongly opposed by many health and human rights organizations, politicians, and governments.¹³⁶ In 2010, as one of the first major responses to this opposition, the UN adopted rules explicitly outlawing “close confinement or disciplinary segregation” for pregnant women as a form of punishment.¹³⁷ Five years later, the UN amended the *Standard Minimum Rules for the Treatment of Prisoners* to further limit the use of solitary confinement and reaffirmed that confinement of pregnant women is prohibited.¹³⁸ Following suit, in late 2015, President Barack Obama directed the Department of Justice (DOJ) to issue recommendations limiting the use of solitary confinement in the criminal justice system, citing its “devastating, lasting psychological consequences.”¹³⁹

133. Blake Ellis & Melanie Hicken, *Dangerous Jail Births, Miscarriages, and Stillborn Babies Blamed on the Same Billion Dollar Company*, CNN HEALTH (May 7, 2019), <https://www.cnn.com/2019/05/07/health/jail-births-wellpath-ccs-invs/?ref=todayheadlines.live>. One Michigan woman, who begged prison medical staff to “please don’t let me have my baby in this jail,” went into labor alone in her cell. *Id.* EMTs arrived only five minutes before birth. *Id.*

134. *Id.*; see also Charles Rabin & David Smiley, *Mentally Ill Woman Gave Birth Alone in Isolated Jail Cell, Broward Public Defender Says*, MIAMI HERALD (May 3, 2019, 5:05 PM), <https://www.miamiherald.com/article230002894.html>. Weeks reports having to catch the baby on her own. She had previously had a c-section and was terrified the baby would not survive.

135. Eric Balaban & Lauren Kuhlik, *No One Should be Forced to Give Birth Alone in a Jail Cell*, ACLU (May 19, 2019, 2:45 PM), <https://www.aclu.org/blog/prisoners-rights/women-prison/no-one-should-be-forced-give-birth-alone-jail-cell>.

136. *Id.*

137. G.A. Res. 65/229, *The Bangkok Rules* (Dec. 21, 2010).

138. *Id.*

139. Barack Obama, *Why We Should Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), <https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265cestory.html>; Press Release, Off. of the Press Sec’y, FACT SHEET: Department of Justice Review of Solitary Confinement (Jan. 25, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement>.

Like the aforementioned UN rules, the DOJ recommendations contain provisions prohibiting the confinement of pregnant women in federal incarceration facilities.¹⁴⁰ However, these recommendations extend beyond only pregnant women to include both postpartum inmates and women who have recently suffered a miscarriage.¹⁴¹ Unlike the UN rules, the recommendations also state that exceptions “in very rare situations” are available if the inmate shows “behavior that poses a serious and immediate risk of physical harm.”¹⁴² However, any confinement “must be approved by the agency’s senior official overseeing women’s programs and services, in consultation with senior officials in health services, and must be reviewed every 24 hours.”¹⁴³

Unfortunately, like the FBP policy outlawing shackling, the DOJ’s recommendations on solitary confinement are binding only upon federal prisons. However, at the time the FBP policy was passed, many states were beginning to enact their own legislation to limit the practice.¹⁴⁴ In the last five years, proposals to restrict or eliminate solitary confinement have increased significantly in popularity at the state level. Most significantly, in 2019 alone, twenty-eight states introduced and twelve states passed legislation majorly restricting the practice.¹⁴⁵ The majority of these new and proposed laws contain strict limitations on solitary confinement of pregnant and postpartum women.¹⁴⁶ Many also restrict women who have recently miscarried or terminated a pregnancy from confinement.¹⁴⁷ In total, six of the newly enacted laws expressly prohibit pregnant women from confinement without exception.¹⁴⁸

140. U.S. DEP’T OF JUST., REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 102 (Jan. 2016), <https://www.justice.gov/archives/dag/file/815551/download>.

141. *Id.*

142. *Id.*

143. *Id.* As of October 2020, there has not been significant movement among the states to restrict the practice further.

144. Teresa Wiltz, *Is Solitary Confinement on the Way Out?*, PEW CHARITABLE TRS. (Nov. 21, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/11/21/is-solitary-confinement-on-the-way-out>.

145. Amy Fetting, *2019 Was a Watershed Year in the Movement to Stop Solitary Confinement*, ACLU (Dec. 16, 2019), <https://www.aclu.org/news/prisoners-rights/2019-was-a-watershed-year-in-the-movement-to-stop-solitary-confinement/>.

146. *Id.*

147. *Id.*

148. *Id.*

But while solitary confinement *per se* has come under scrutiny in recent years,¹⁴⁹ “medical” or “protective” isolation and “restrictive housing” of pregnant and postpartum inmates continues to occur as solitary confinement in practice.¹⁵⁰ Thus, while many state and local prisons claim to prohibit or limit the practice, many prisoner’s rights advocates claim this is merely “clever wordsmithing” to implement what is essentially the same practice.¹⁵¹ As an example, although North Carolina has a policy in place that restricts solitary confinement of pregnant women, public records from a North Carolina correctional facility reveal that, for safety and medical concerns, pregnant pretrial detainees are routinely transferred to the state prison as “safekeepers.”¹⁵² Though not classified as solitary confinement, safekeepers are only allowed out of their cell for one hour a day to exercise, have only non-contact visitation rights, and are generally not permitted to eat meals outside their cell.¹⁵³ Thus, while these women are not in solitary confinement in name, in practice it is essentially the same. To complicate the situation, no data exists as to when and how often pregnant women are isolated in prisons and jails. Thus, it is difficult to state definitively how frequently the practice occurs within the United States.

Though evidence suggests solitary confinement continues to be used frequently against pregnant inmates, like the practice of shackling, its justifications have no merit.¹⁵⁴ It is often used as a

149. *Id.*

150. McCammon, *supra* note 117; Ciaramella, *supra* note 25 (describing a woman placed on “medical observation,” both prior to and after her miscarriage, by herself for twenty-three hours a day with no counseling or contact with her family).

151. McCammon, *supra* note 117; Vargas, *supra* note 116; Crystal Hayes, Lauren Kuhlik & Kristie Puckett-Williams, *Pregnant Women in North Carolina Prisons Are Being Kept in Solitary Confinement*, MS. MAG. (Oct. 23, 2019), <https://msmagazine.com/2019/10/23/pregnant-women-in-north-carolina-prisons-are-being-kept-in-solitary-confinement/> (showing that pregnant women are often classified as “safekeepers” under NC policy, which is in practice, solitary confinement).

152. Hayes et al., *supra* note 151.

153. *Id.*

154. ACLU, *STILL WORSE THAN SECOND-CLASS: SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES* (2014, updated 2019), https://www.aclu.org/sites/default/files/field_document/062419-sj-solitaryreportcover.pdf; *Seitz v. Allegheny County*, ACLU PA. (Dec. 19, 2016), <https://www.aclupa.org/en/cases/seitz-v-allegheny-county> (describing a case in which three pregnant inmates were confined in isolation for minor offenses, including having two pairs of shoes in a cell and possessing a library book); Hayes et. al, *supra* note 151; McCammon, *supra* note 117.

disciplinary measure against inmates, yet research indicates that confinement is not effective deterrence and may even increase recidivism.¹⁵⁵ Moreover, the extreme mental and physical health risks that confinement poses to pregnant and postpartum women substantially outweigh any potential benefits (i.e. protection from self-harm or rehabilitation) that could possibly be incurred. While solitary confinement arguably should not be enforced against anyone, it is particularly harmful to pregnant and postpartum women in ways that the law has failed to take account of for decades. Thus, it and any practice remotely similar to it should be prohibited.

II. CONSTITUTIONAL PROTECTIONS

While there is a growing movement in the United States toward policies and legislation that protect pregnant inmates, evidence suggests that a discouraging number of prisons and jails continually fail to provide vital prenatal and postpartum care. Additionally, many prisons and jails are still implementing the practices of shackling and solitary confinement on pregnant inmates, regardless of the health risks they pose to both the mother and the fetus. Even in states with formal legislation or policies to protect pregnant inmates, evidence suggests that violations by prison officials continue to occur with alarming frequency. Thus, while statutory protections may help to decrease the number of violations, it is clear that judicial intervention is often necessary when legislative protections fall short.

To challenge inadequate medical care in a prison setting, there are multiple legal approaches that an inmate can potentially take. Medical malpractice is a tort that can be brought in state court for negligence in either medical treatment or diagnosis.¹⁵⁶ However, sovereign immunity and budgetary limitations often make state challenges difficult to win.¹⁵⁷ And even if a plaintiff can win, some medical malpractice insurance policies between prisons and healthcare providers do not cover “willful, wanton, or

155. See Kaba, *supra* note 120, at 446 (noting that inmates placed in solitary often commit additional infractions).

156. Meaghan A. Sweeney, *Reasonable Response: The Achilles’ Heel of the Seventh Circuit’s “Deliberate Indifference” Analysis*, 12 SEVENTH CIR. REV. 62, 65 (2017).

157. *Id.* at 66.

intentional acts,” and thus will not cover a judgment against a violating physician.¹⁵⁸ Moreover, most states place a cap on compensatory damages and prohibit punitive damages for medical malpractice claims.¹⁵⁹ Finally, medical malpractice challenges require a costly expert witness to testify to the standard of care required, how that standard was not met, and how the violation damaged the plaintiff.¹⁶⁰ Because of these difficulties, the most common route for challenging a medical care violation is a federal constitutional challenge under 42 U.S.C. § 1983, which does not have a cap on compensatory damages, allows punitive damages, pays attorney fees, and does not require expert testimony.¹⁶¹

Before more fully addressing the availability of redress under the Constitution, it is important to note the significant barriers that many inmates face to even bringing a challenge in court. Under the Prison Litigation Reform Act of 1996 (PLRA), a prisoner cannot bring a challenge to court unless they have first exhausted all administrative remedies and have suffered physical injury.¹⁶² Completing the exhaustion requirement can be an extremely difficult and complicated process for an inmate and often deters her from pursuing her claim.¹⁶³ In addition to the PLRA, correctional institutions are exempted from the HIPAA requirement to provide an individual with her medical records while that individual is incarcerated.¹⁶⁴ And even after release, institutions can withhold medical records as “[i]nformation compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding.”¹⁶⁵ Moreover, while all state prisons have a formal policy in place regarding the release of medical records, many jails do not have any formal guidance in place, making it

158. *Id.* at 67.

159. *Id.* at 66.

160. *Id.*

161. *Id.* at 66–67.

162. *Levi, supra* note 11, at 18; 42 U.S.C. § 1997e(a), (e). On the physical injury requirement, some courts hold that physical injury is not applicable in the context of constitutional violations while others hold that some form of physical injury must be shown. Daniel E. Manville, *Federal Legal Standards for Prison Medical Care*, 14 PRISON LEGAL NEWS 1, 4 (2003). Where physical injury is required, prisons may be immune to § 1983 claims for deliberate indifference to mental health claims. *Id.* This has serious implications for pregnant women because pregnancy-related medical neglect is often an emotional injury.

163. *See Levi, supra* note 11, at 18.

164. 45 C.F.R. § 164.524(a)(2)(ii) (2018).

165. *Id.*; § 164.524(a)(1)(ii).

difficult for many inmates to receive their records. Thus, even if an inmate believes her medical care rights may have been violated while in prison, current law regarding access to medical records can be a significant deterrence factor in choosing to pursue a claim.

For constitutional challenges, one of the most foundational and important cases regarding prisoner's rights is the 1976 case *Estelle v. Gamble*.¹⁶⁶ Here, a *pro se* prisoner in Texas alleged that after injuring his back, prison officials subjected him to "cruel and unusual punishment" by providing him with inadequate medical diagnosis and treatment, forcing him to continue to work despite his injuries, disregarding doctor's orders to move him to a lower bunk, placing him in solitary confinement for his complaints, and refusing to take him to the doctor despite chest and back pains.¹⁶⁷ Basing their decision on the Eighth Amendment's "evolving standards of decency," the Supreme Court first established that both state and federal governments have an "obligation to provide medical care for those whom it is punishing by incarceration."¹⁶⁸ Second, and more importantly, the Court set forth that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment," and it is actionable under Section 1983.¹⁶⁹

Two later cases, *Wilson v. Seiter* and *Farmer v. Brennan*, further clarified that this "deliberate indifference" standard has both an objective and subjective component.¹⁷⁰ First, "the deprivation alleged must be, objectively, 'sufficiently serious.'"¹⁷¹ While the Supreme Court has not provided definitive guidance on what is "serious," lower courts have found that a "serious medical need" is "one that has been diagnosed by a physician as mandating treatment" or "one that is so obvious that even a lay person would

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

167. *Id.* at 99-101.

168. *Id.* at 102-03 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

169. *Id.* at 104-05 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). Later Supreme Court cases have held that pretrial detainees have at least Eighth Amendment protections. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983). This is important since a large majority of female inmates are pretrial detainees rather than prisoners.

170. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991)).

171. *Id.* at 834 (quoting *Wilson*, 501 U.S. at 298).

easily recognize the necessity for a doctor's attention."¹⁷² Moreover, if "a delay in treating the need worsens the condition" or the need "poses a substantial risk of serious harm" if left unattended, the need is sufficiently serious to meet the deliberate indifference standard.¹⁷³

Second, from a subjective standpoint, the prison official allegedly responsible for the violation must have had a "sufficiently culpable state of mind."¹⁷⁴ Under the subjective requirement, an official is sufficiently culpable if he or she "knows of and disregards an excessive risk to inmate health or safety."¹⁷⁵ Thus, mere negligence or medical malpractice is insufficient to bring a constitutional claim.¹⁷⁶ Indeed, in *Estelle* itself, the Court held that the plaintiff's case presented a "classic example of a matter for medical judgment" which was "[a]t most . . . medical malpractice," not a constitutionally cognizable injury.¹⁷⁷ However, a prison official "need not . . . believ[e] that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm."¹⁷⁸ Moreover, if the risk is sufficiently "obvious," a factfinder may conclude that the official knew subjectively of the risk based on circumstantial evidence.¹⁷⁹ But this inference cannot be conclusive; if prison officials can prove that they were unaware of even an obvious risk of health or safety, deliberate indifference will not be met.¹⁸⁰

While not dealing specifically with a pregnancy-related issue, *Estelle* and its subsequent cases were foundational in shaping the treatment of pregnant inmates and have provided an avenue for

172. *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1187 (11th Cir. 1994) (quoting *Laaman v. Helgemoe*, 437 F. Supp. 269, 311 (D.N.H. 1977)).

173. *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1307 (11th Cir. 2009) (citing *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003)); see *Hill*, 40 F.3d at 1187; *Doe v. Gustavus*, 294 F. Supp. 2d 1003, 1008 (E.D. Wis. 2003).

174. *Farmer*, 511 U.S. at 834 (quoting *Wilson*, 501 U.S. at 297); Michael Cameron Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921, 930 (1992).

175. *Farmer*, 511 U.S. at 837.

176. For an interesting argument that a violation of medical care could be a violation of an infant's constitutional rights under the Eighth Amendment, see Kalmanson, *supra* note 45, at 880.

177. *Estelle v. Gamble*, 429 U.S. 97, 107 (1976).

178. *Farmer*, 511 U.S. at 842.

179. *Id.* at 842-43.

180. *Id.* at 844.

success in multiple cases. For example, in *Nelson v. Correctional Medical Services*, when an inmate went into labor, her transportation officer was ordered to “RUSH” her to the hospital and “to NOT to [sic] take time for cuffs.”¹⁸¹ However, after walking her down the sally port, the plaintiff was cuffed by the officer and placed in the van.¹⁸² Once in the maternity ward, the officer shackled plaintiff’s legs to opposite sides of her hospital bed, although no one in the hospital asked the officer to do so.¹⁸³

Because she was unable to move during the delivery, the plaintiff suffered “permanent hip injury, torn stomach muscles, and an umbilical hernia requiring surgical repair.”¹⁸⁴ On appeal from a denied motion for summary judgment, the Eighth Circuit Court of Appeals held *en banc* that a factfinder could determine that the shackling of a pregnant inmate during labor and delivery constituted a substantial risk of serious harm.¹⁸⁵ Furthermore, the court held that a factfinder could infer from the prison official’s actions that she had knowledge of this risk to Nelson’s health or safety but nevertheless disregarded it.¹⁸⁶

Building upon *Nelson*, many jurisdictions have held that shackling during labor and delivery constitutes a substantial risk or serious deprivation.¹⁸⁷ However, the practice of shackling alone does not guarantee success on a deliberate indifference claim. For example, in a 2013 case where an officer tied an inmate’s wrists to the hospital bed and shackled her leg even after being told explicitly by medical staff that the plaintiff should not be shackled

181. *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 530 (8th Cir. 2009).

182. *Id.*

183. *Id.*

184. *Id.* at 526.

185. *Id.* at 529.

186. *Id.* Following this decision from the Court of Appeals, the parties settled out of court.

187. *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1256 (9th Cir. 2016) (“A jury could also infer the County Defendants’ awareness of the risk of restraining Mendiola-Martinez while she was in labor because the risk is obvious.”); *Villegas v. Metro. Gov’t of Nashville*, 709 F.3d 563, 574 (6th Cir. 2013) (“[T]he shackling of pregnant detainees while in labor offends contemporary standards of human decency such that the practice violates the Eighth Amendment’s prohibition against the ‘unnecessary and wanton infliction of pain’ – i.e., it poses a substantial risk of serious harm.”); see *Zaborowski v. Dart*, No. 08 C 6946, 2011 WL 6660999 (N.D. Ill. Dec. 20, 2011); *Brawley v. Washington*, 712 F. Supp. 2d 1208 (W.D. Wash. 2010); *Women Prisoners of D.C. Dep’t of Correct. v. District of Columbia*, 93 F.3d 910, 927, 936 (D.C. Cir. 1996).

during delivery, the court held that the officers were not deliberately indifferent because the legality of shackling during labor was “open to reasonable dispute” and the plaintiff did not have a “clearly established” constitutional right to be free of shackling.¹⁸⁸ Thus, while shackling has increasingly been advocated against publicly, depending on the jurisdiction, a plaintiff still might not succeed under *Estelle* unless she can prove that the prison official had actual knowledge of shackling’s substantial risk and disregarded it.

In addition to shackling cases, many pregnant plaintiffs have used *Estelle* to challenge conditions of solitary confinement and lack of adequate medical treatment. For example, in *Doe v. Gustavus*, a plaintiff was placed in solitary confinement prior to her delivery and forced to give birth alone in her cell after being ignored for hours.¹⁸⁹ Applying the deliberate indifference standard, the court held pregnancy “was, in fact, serious,” and that a jury could find that the actions of prison officials were deliberately indifferent.¹⁹⁰ In *Cooper v. Rogers*, a pregnant plaintiff who repeatedly informed officials of vaginal bleeding was denied medical care for thirteen days and only taken to the hospital after she miscarried.¹⁹¹ In a motion to dismiss, the defense counsel attempted to argue, “and apparently [did] so with a straight face,” that the vaginal bleeding was not a serious medical need because “little . . . c[ould] be done to prevent” it.¹⁹² In response, the court denied the motion, holding that it is “unwaveringly clear” that vaginal bleeding is a “serious medical need, . . . ‘one that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.’”¹⁹³ Furthermore, by refusing to provide her with care for nearly two weeks, the court stated that plaintiff’s needs were “cruelly disregarded.”¹⁹⁴

188. *Fain v. Rappahannock Reg’l Jail*, No. 3:12cv293-JAG, 2013 WL 3148145, at *5–6 (E.D. Va. June 19, 2013) (quoting *Wilson v. Kittoe*, 337 F.3d 392, 402–03 (4th Cir. 2003)).

189. *Doe v. Gustavus*, 294 F. Supp. 2d 1003, 1005–07 (E.D. Wis. 2003).

190. *Id.* at 1008–09.

191. *Cooper v. Rogers*, No. 2:11-cv-964-MEF, 2012 WL 2050577, at *2 (M.D. Ala. June 6, 2012).

192. *Id.* at *4.

193. *Id.* (quoting *Goebert v. Lee Cnty.*, 510 F.3d 1312, 1326 (11th Cir. 2007)).

194. *Id.* at *5. While the court in this case provides strong and somewhat hopeful language regarding the seriousness of miscarriage, *Cooper* provides one of the best examples of the variability among lower courts in applying the *Estelle* standard. While the court stated

Other circuits have also found that vaginal bleeding and/or miscarriage can be a “serious” medical need.¹⁹⁵ But unfortunately, outside of immediate labor and delivery or miscarriage, courts are hesitant to classify pregnancy in and of itself as “serious” for constitutional purposes. In 1987, the Third Circuit did take this broader approach, stating that while “pregnancy itself is not an ‘abnormal medical condition’ requiring remedial, medical attention[, that] does not place it beyond the reach of *Estelle*.”¹⁹⁶ However, this reasoning has not been followed by a majority of courts. A federal district court in Kentucky, for example, held that although “an inmate in labor has a serious medical need,” “it is well established that simply being pregnant – without more – does not constitute a serious medical condition.”¹⁹⁷ In a similar case from the Ninth Circuit, the court stated that “even if [Plaintiff] could show that the *condition of being two or three months pregnant* were ‘sufficiently serious’ in itself to form the basis of an Eighth Amendment claim,” plaintiff had not presented enough facts to

that miscarriage is a serious medical need and that the prison officials were deliberately indifferent to the plaintiff’s need, the court granted the defendant’s subsequent motion to dismiss on the grounds that there was no “causal connection” between plaintiff’s alleged miscarriage and the defendant’s actions, an additional requirement for deliberate indifference in the Eleventh Circuit but not set forth by *Estelle*. *Cooper v. Rogers*, 968 F. Supp. 2d 1121, 1133 (M.D. Ala. 2013).

195. *Archer v. Dutcher*, 733 F.2d 14, 17 (2d Cir. 1984) (reversing a grant of summary judgment against a female prisoner who miscarried allegedly as a result of a five hour delay in responding to her vaginal bleeding); *Boswell v. County of Sherburne*, 849 F.2d 1117, 1123 (8th Cir. 1988) (affirming district court’s denial of summary judgment on deliberate indifference claim where pregnant plaintiff began suffering vaginal bleeding, was denied medical care, and gave birth to a stillborn child); *Pool v. Sebastian County*, 418 F.3d 934, 944–45 (8th Cir. 2005) (finding that pregnant plaintiff’s bleeding and passing blood clots constituted a need for medical attention that would have been obvious to a layperson); *Townsend v. Jefferson County*, 601 F.3d 1152, 1158 (11th Cir. 2010) (holding that plaintiff who was three months pregnant and suffering vaginal bleeding had a serious medical need).

196. *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 348 (3d Cir. 1987); see also *Roth*, *supra* note 6, at 99 (expanding on the Third Circuit’s approach).

197. *Webb v. Jessamine Cnty. Fiscal Ct.*, 802 F. Supp. 2d 870, 878 (E.D. Ky. 2011). Here, plaintiff was forced to give birth in her cell alone after being ignored and mistreated for hours. *Id.* at 875–76. The court held that pregnancy is not a serious medical need alone but that certain circumstances may exist in any particular case which would provide the basis for determining that a woman’s pregnancy was a serious medical need. *Id.* at 878; see also *Coleman v. Rahija*, No. 4-91-CV-50260, 1996 WL 939219, at *6 (S.D. Iowa Jan. 2, 1996), *aff’d in part, vacated in part*, 114 F.3d 778 (8th Cir. 1997) (“[B]oth parties appear to agree that pregnancy is *not* a serious medical need alone but that certain circumstances may exist in any particular case which would provide the basis for determining that a woman’s pregnancy was a serious medical need.”).

show the officials had violated her rights.¹⁹⁸ Finally, in a federal district court in Indiana, the court held that “[t]he knowledge of [a plaintiff’s] advanced stage of pregnancy is insufficient by itself to put a reasonable jail commander on notice that an inmate has a serious medical condition,” and thus officers could not be held liable under the subjective requirement of *Estelle*.¹⁹⁹

These cases, along with others expressing similar sentiments, reveal one of the major shortcomings of *Estelle* in the context of pregnancy-related medical care: while pregnancy is not an illness or disease, it is a medical condition with risks that extend beyond mere labor and delivery or miscarriage. Moreover, these risks are often exacerbated by confinement, and yet they are routinely disregarded or downplayed by prison officials who often escape any liability through *Estelle*’s subjective standard. Although a woman is not in an imminently dangerous medical condition every second of her nine months of pregnancy, prison officials’ repeated unpreparedness for pregnancy-related emergencies, failure to provide necessary medical treatment and nutrition, and dismissive attitudes toward an inmate’s medical concerns throughout the duration of her pregnancy increase the likelihood of serious harm to the inmate and/or her fetus when an imminent concern does arise. And yet, courts addressing these claims do not seem to take the broader context of pregnancy into account when determining what counts as “serious.” Thus, while the *Estelle* standard might be helpful in challenging the particularly egregious conduct of prison officials under certain conditions, by failing to classify pregnancy as a serious medical condition outside the context of labor and delivery or miscarriage, the standard has proven too lenient to adequately protect pregnant inmates during all points of pregnancy, even when violations are objectively unreasonable.

Along with its failure to classify pregnancy as objectively “serious” under the objective component of *Estelle*, the deliberate indifference standard has proven even more problematic in its requirement of a subjective intent on the part of violating prison officials. In reaffirming the subjective component of deliberate indifference in *Farmer* and *Wilson*, the Supreme Court stressed that

198. *Jamison v. Nielsen*, 32 F. App’x 874, 876 (9th Cir. 2002) (emphasis added); see also Roth, *supra* note 6, at 99 (expanding on the Ninth Circuit’s approach).

199. *Hartbarger v. Blackford Cnty. Dep’t of Pub. Welfare*, 733 F. Supp. 300, 303 (N.D. Ind. 1990).

only intent or “wantonness” by an official could qualify as punishment under the Eighth Amendment.²⁰⁰ However, lower courts vary greatly in their interpretations of this intent requirement.²⁰¹ While some have held strictly to the requirement of actual subjective intent to cause harm, others require only a subjective knowledge of a substantial risk of harm. Others have gone even further, holding that gross negligence or callous inattention might satisfy the subjective requirement.²⁰² In practice, an actual subjective intent requirement places a high burden of proof on the plaintiff because often—due to HIPAA regulations restricting medical record access and/or financial constraints—the only evidence available to establish this intent are the words of the official him- or herself.²⁰³ In requiring subjective intent, the standard shifts the focus away from the nature of treatment faced by the plaintiff at the hands of the prison official and instead “hinge[s] a finding of cruel and unusual punishment” on the motivation behind the defendant’s actions.²⁰⁴ Especially in the context of pregnancy, where many courts do not recognize “seriousness” outside of labor and delivery or miscarriage, courts should focus on the objective harm that a plaintiff suffers, not the subjective reasoning behind a defendant’s actions.²⁰⁵

Perhaps one of the best cases to illustrate the shortcomings of the *Estelle* standard—both in its failure to classify pregnancy as serious and its focus on subjective intent—is *Patterson v. Carroll County Detention Center*.²⁰⁶ In this case, the plaintiff was four months pregnant upon intake at the corrections facility and was incarcerated for approximately one month before she lost the pregnancy.²⁰⁷

200. See Friedman, *supra* note 174, at 930.

201. *Id.* at 931.

202. *Id.* at 936–37.

203. See Joel H. Thompson, *Today’s Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs*, 45 HARV. C.R.–C.L. L. REV. 635, 638 (2010).

204. Friedman, *supra* note 174, at 946.

205. *Id.*

206. *Patterson v. Carroll Cnty. Det. Ctr.*, No. 05-101-DLB, 2006 WL 3780552, at *4 (E.D. Ky. Dec. 20, 2006); see also Roth, *supra* note 6, at 100 (discussing the shortcomings of *Patterson*).

207. *Patterson*, 2006 WL 3780552, at *1.

During that time period, the court notes that “the record does not reflect any pregnancy-related medical problems” or complications until the date of the miscarriage.²⁰⁸ However, the plaintiff alleged that she was denied “requests for milk, snacks, and/or additional vitamins in order to increase her intake of calcium and protein” and that “she was forced to sleep on the concrete floor of the jail.”²⁰⁹ On the night of the miscarriage, plaintiff informed one of her guards that she was in an “unusually great amount of pain” due to severe cramping, but the guard “laughed off” her concern, believing she was just experiencing pregnancy symptoms.²¹⁰ Several hours later, plaintiff’s water broke while in her cell.²¹¹ However, the staff did not call an ambulance or doctor and denied plaintiff’s request to call her emergency contact.²¹² Eventually, she was transported by prison staff to a hospital half an hour away – despite another facility being much closer – where she “proceeded into labor and miscarried her child.”²¹³

In analyzing the seriousness of her claims under the objective component of the deliberate indifference standard, the court very clearly stated that “the general condition of being pregnant does not necessarily constitute a serious medical need at any given moment in time during incarceration absent a development that ‘must require immediate attention.’”²¹⁴ Thus, “once Patterson’s water broke” the situation was serious.²¹⁵ But prior to that moment, the court stated that recognizing any general seriousness of pregnancy was an “untenable application of the legal standard,” because it was only after her water broke that “a lay person would easily recognize the necessity for a doctor’s treatment.”²¹⁶ With that understanding of seriousness in mind, the court held that “a guard who brushes off an inmate – no matter how callously – that is four to five months pregnant and begins to exhibit cramping, *but had not*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at *2.

212. *Id.*

213. *Id.*

214. *Id.* at *3 n.5.

215. *Id.* at *3.

216. *Id.* at *3 n.5.

experienced any prior complications with her pregnancy” did not possess the state of mind required for deliberate indifference.²¹⁷ As demonstrated by this case, complications from pregnancy can arise at any given moment regardless of how “healthy” an inmate might appear beforehand. Yet by holding that a prison guard could not have known a pregnancy was “serious” until the moment a major complication arose, the court improperly focused its attention on the guard’s mindset instead of on the objective harm that plaintiff suffered at the hands of the guard by having her concerns ignored. In doing so, the court reflects that dangerous sentiment allowed under *Estelle* that until the pregnant plaintiff is actually in the midst of a dangerous situation such as labor or miscarriage, initial signs of serious pregnancy complications – such as bleeding or cramping – can be ignored, dismissed, or inadequately addressed without legal consequence.

Finally, in addition to discussing the difficulties with *Estelle*, it is also important to remember that the protections it does provide are grounded in the “evolving standards of decency” contemplated by the Eighth Amendment.²¹⁸ However, the only care prisons are required to provide is something above the “minimal civilized measure of life’s necessities.”²¹⁹ By requiring more than an “ordinary lack of due care” to establish a violation, the *Estelle* standard in practice allows general mistreatment and negligence by prison officials without real consequence. For example, in *Moore v. Kankakee County*, a plaintiff pregnant with twins repeatedly begged prison officials to go to the hospital because she was in terrible pain and believed she was in labor.²²⁰ However, a prison medical official, without examining her, told her guards she was “full of shit” and that she could go to the hospital the next day.²²¹ Even after her mother called the prison facility requesting that her daughter be taken to the hospital, she was still denied care.²²² Additionally, when another inmate informed plaintiff’s guards that plaintiff’s

217. *Id.* at *3 (emphasis added).

218. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); Friedman, *supra* note 174, at 948.

219. Amy Vanheuverzwyn, Comment, *The Law and Economics of Prison Health Care: Legal Standards and Financial Burdens*, 13 U. PA. J.L. & SOC. CHANGE 119, 124 (2009).

220. *Moore v. Kankakee County*, No. 12-CV-2002, 2013 WL 6283718, at *1 (C.D. Ill. Dec. 4, 2013).

221. *Id.* at *3.

222. *Id.*

“butt was hurting,” the guards replied that plaintiff was “not going to have the baby out of her ass” and seemed preoccupied by their computers.²²³ Finally, after plaintiff began screaming and passing a lot of blood, her doctor cleared her to go to the hospital.²²⁴ But instead of bringing her a wheelchair, defendants forced her to walk down the stairs and out of her cell.²²⁵ When she finally made it to the hospital, the plaintiff delivered her twins, who later died.²²⁶

In analyzing her claims, the court stated that many of the comments made to the plaintiff were “deeply inappropriate” and that the acts by some of the officials were arguably negligent.²²⁷ Yet because the officials “did not observe or believe [the] Plaintiff to be in any distress,” their actions were not deliberately indifferent under the subjective test.²²⁸ In our ever-evolving society, determining what “standards of decency” pregnant inmates should be afforded under the Constitution is a difficult and complicated question. However, at a minimum, society should not tolerate a standard that continually protects callous, negligent treatment by prison officials under the guise of “intent.”²²⁹

III. PROPOSED CHANGES

As Part I demonstrates, legislation and formal policies by both federal and state governments for pregnancy-related medical care have proven insufficient protection for pregnant and postpartum inmates. Yet under *Estelle's* deliberate indifference standard, these inmates have no real avenue to adequately redress this serious and pervasive mistreatment. Thus, it is clear that to truly address this issue, serious change must occur from both a judicial and legislative standpoint.

On the judicial side, a standard must be implemented that recognizes the entire duration of pregnancy—not just labor, delivery, or miscarriage—for the serious condition that it is. This standard must recognize that, while not an illness or disease, life-threatening medical emergencies from pregnancy can arise at

223. *Id.* at *4.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at *9.

228. *Id.* at *8-10.

229. *See id.* at *9.

any given moment in ways that the traditional definition of seriousness fails to adequately recognize. And because courts continually fail to recognize this broader understanding of seriousness, the subjective intent requirement of *Estelle* must also be replaced by one that focuses on the objective harm endured by a plaintiff at the hands of prison officials and not the subjective mental state of those who cause the harm. This can be done by amending the deliberate indifference standard to a gross negligence standard for an official's conduct in cases of pregnancy-related mistreatment.²³⁰ Under this standard, an official will be liable if they are "deliberately or intentionally indifferent" to a medical need *or* if they acted with such utter disregard toward a medical need that an objectively reasonable person would conclude that they did not show the appropriate level of care.²³¹ Some scholars and judges have argued that eliminating the subjective intent requirement would turn constitutional doctrine into nothing more than a "constitutional tort" by allowing the standard to include simple negligence and malpractice claims.²³² However, recognizing that the *Estelle* standard applies broadly to all medical care claims during incarceration, this Note addresses the elimination of subjective intent only in the maternal healthcare context. This narrow change recognizes the unique medical circumstances of pregnancy-related care that require a different approach, while avoiding an upheaval of all caselaw relating to prison healthcare. Additionally, replacing this requirement with a gross negligence standard would direct the court's focus objectively towards the harm caused by an official's actions but would not permit simple malpractice or ordinary negligence. Thus, these scholars' concerns are unfounded.

From a legislative standpoint, much can be done to provide greater protections to pregnant and postpartum inmates. As a crucial first step, we need to know exactly what is going on in prisons and jails so that we have an accurate understanding of the issues at hand and can hold incarceration facilities accountable when they do not measure up. Countless violations are reported

230. For greater discussion on replacing the standard with gross negligence, see Friedman, *supra* note 174, at 937–38.

231. *Id.*

232. Eric Neisser, *Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care*, 63 VA. L. REV. 921, 922 (1977).

every year. However, significantly more violations go unreported due to the difficulties of challenging care. Because reporting on pregnancy outcomes and conditions is not required, it is almost impossible to document precisely what is going on around the country. Most national, comprehensive data on incarcerated pregnant women is outdated, “often limited to prevalence estimates and births[,]” and focused solely on federal and state prisons – not jails.²³³ To solve this issue, data on pregnancy among incarcerated women must be collected and standardized across states and among prisons and jails. The Pregnancy in Prison Statistics (PIPS) project is one major effort to do just this. Currently, twenty-two state departments of corrections, the nation’s five largest jails, and the Bureau of Prisons are working with PIPS to report the numbers of pregnant women, miscarriages, stillbirths, abortions, maternal and neonatal deaths, and other pregnancy-related statistics.²³⁴ However, projects such as PIPS require additional funding to be successful on a national level.²³⁵ Additionally, each state should pass legislation requiring correctional facilities to collect data on pregnant women.²³⁶

Along with tracking pregnancy outcomes, many serious violations occur because prisons, jails, and detention facilities fail to update their current policies and inform their employees.²³⁷ Thus, before we even address ways to combat specific violations, legislation must be enacted that requires the federal government and incentivizes state governments via federal grants to track pregnancy outcomes and implement staff trainings on a significantly greater scale. In order to receive the proposed incentives, state prisons and jails should be required to notify prisoners, staff, and contracting medical professionals of updated policies and procedures for pregnant inmates. This will better ensure that inmates are aware of their rights and will eliminate the implementation gap. Moreover, as a condition of receiving the grants, all corrections officers should be required to undergo specific training for responding to and dealing with pregnancy-related medical issues. By providing notice and training to all

233. Bronson & Sufrin, *supra* note 8, at 57.

234. *Id.* at 60.

235. *Id.*

236. *Id.*

237. Tori DeAngelis, *The Restraint of Pregnant Inmates*, 47 AM. PSYCH. ASS’N. 26, 26 (2016).

within the prison system, not only will the health and well-being among prisoners improve, but because of increased transparency, it will also be easier to bring a cause of action in court when an inmate's medical care has been inadequate.

In addition to better tracking and training, the federal government must adopt national standards that clearly define what level of care pregnant and postpartum inmates are entitled to. This was attempted in 2018 by the Pregnant Women in Custody Act, a bill introduced in the House and Senate with bipartisan support.²³⁸ Specifically, the bill established national standards of care in federal prisons; required the DOJ to collect data on pregnant and postpartum women's mental and physical health in federal, state, tribal, and local correctional facilities; and incentivized states to provide services and programs for incarcerated pregnant and postpartum women, prohibit shackling, and end solitary confinement.²³⁹ However, the proposed legislation was not successful in either branch of Congress and the bill died.²⁴⁰ While not quite as broad in its protections for pregnant inmates as the Pregnant Women in Custody Act, in 2018 the First Step Act was signed into law with major criminal justice reform provisions.²⁴¹ Included in those provisions is a prohibition on restraining pregnant prisoners in federal prisons.²⁴² More significantly, the Act also requires the Bureau of Justice Statistics to collect data on "[t]he number of female prisoners known by the Bureau of Prisons to be pregnant, as well as the outcomes of such pregnancies, including information on pregnancies that result in live birth, stillbirth, miscarriage, abortion, ectopic pregnancy, maternal death, neonatal death, and preterm birth."²⁴³

Although this legislation is a good "First Step," its application to shackling and reporting does not extend beyond federal prisons. Yet the majority of incarcerated women are housed in state prisons

238. Pregnant Women in Custody Act, H.R. 6805, 115th Cong. (2018); Pregnant Women in Custody Act, S. 3616, 115th Cong. (2018).

239. *Id.*

240. Similar legislation to ban shackling and solitary confinement federally was introduced in 2017 and again in 2019 in the Senate through the Dignity for Incarcerated Women Act; however, that legislation does not address tracking pregnancy outcomes or state incentives.

241. First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, 5217 (2018).

242. *Id.*

243. *Id.*

and local jails.²⁴⁴ While the federal government cannot enact legislation that is binding upon state incarceration systems, legislation that incentivizes states via federal grants to implement national standards and provide reporting, such as that proposed by the Pregnant Women in Custody Act, can and must be implemented to protect pregnant inmates as soon as possible. Following the recommendations of the American Academy of Pediatrics, the National Commission on Correctional Health Care, and the American College of Obstetricians and Gynecologists, these national standards should require, at a minimum, prenatal medical examinations, prenatal nutritional guidance and counseling, “high-risk” pregnancy assessments, treatment for substance abuse, HIV and other STI testing, and appropriate postnatal care. Additionally, these standards should prohibit the use of restraints on pregnant and postpartum women, with no exceptions during labor and delivery. Finally, solitary confinement or “restrictive housing” must be prohibited for pregnant and postpartum women.

CONCLUSION

“Having a child is hard enough – being in prison makes it even harder. It doesn’t need to be this dangerous. Life-saving changes need to be made now.”

– Anonymous²⁴⁵

If you are wondering what Diana Sanchez, Natalie Lynch, Angela Grimm, or any of these women did to end up in prison, you are missing the point. Regardless of one’s past, every person deserves basic human dignity and protection under the Constitution. Despite one’s crime, no one’s prison sentence should include medical neglect, mistreatment, or an unnecessary risk to life. The goal of incarceration should be rehabilitative; these women should leave prison better and more productive than when they entered it. However, if we ever want to see that goal become reality, we must begin by addressing the unique needs of pregnant inmates and treating them with the respect, dignity, and humanity they deserve.

244. Kajstura, *supra* note 55.

245. Anonymous, *supra* note 24.

Lack of health education and resources, shackling, and solitary confinement aggravate the levels of trauma and post-traumatic stress that pregnant inmates experience, which in turn directly affects both the inmate's health and the health of her fetus.²⁴⁶ Countless articles have been written over the years addressing these very same issues, and yet they continue to persist within our incarceration system and affect the lives of thousands of women. So far, a gentle, state-by-state approach has not worked to stop these violations, and it has made it so the level of care an inmate receives depends largely on where she happens to be incarcerated. Additionally, constitutional protections haven't proven insufficient. Thus, from a legislative standpoint, outcome tracking, staff training, and national medical care standards must be implemented so that a woman's pregnancy is not a matter of life and death simply because of the correctional facility she happens to be placed in. At the same time, from a judicial standpoint, the current "deliberate indifference standard" must be redefined so that the entire duration of a pregnancy can be classified as "serious" and so that a violation does not hinge on a defendant's subjective intent.

246. Hotelling, *supra* note 11, at 38.

