

Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict With Constitutional Standards?

Does a pregnant woman who is in prison or jail still have the constitutional right to decide whether to continue her pregnancy or to have an abortion? The simple legal answer is yes. Of course, this provides little, if any, insight into what actually happens when thousands of women each year must make this decision while living behind prison walls.* But gaining such insight in any systematic manner has long presented a challenge to health professionals, researchers and advocates. The ways in which prisons handle a woman's abortion request are often shielded from public scrutiny, and they can be enormously varied. Women are incarcerated at the federal, state and local levels. Accordingly, policies and practices of prison and jail officials, and the experience of pregnant women in their custody, may differ dramatically from state to state, county to county, and facility to facility. Despite these challenges, understanding incarcerated women's ability, or inability, to access reproductive health care, including abortion, is key to developing strategies to advance their reproductive health and rights.

In this issue of *Perspectives on Sexual and Reproductive Health* (page 6), Sufrin, Creinin and Chang present results from a nationwide survey of correctional health care providers that describe trends in abortion access and barriers. This is one of the very few published studies to provide a national snapshot of the availability of abortion for incarcerated women. The responses confirm that the degree to which incarcerated women are able to obtain abortions varies significantly among institutions. Notably, while a very small minority of participants—3%—reported that by law, their state specifically restricts incarcerated women from obtaining abortion,† only 68% responded affirmatively to the question “Are women at your facility allowed to obtain an elective abortion if they request one?” This discrepancy suggests that a significant proportion of facilities refuse to allow abortion access despite the absence of any actual, or perceived, legal barriers. Additionally, even among respondents who indicated that their facilities do allow access to abortion, many said that women receive little or no logistical assistance in arranging, paying for and getting to the appointment.

These findings are consistent with the experience of advocates representing incarcerated women. For instance, over the years, my colleagues at the American Civil Liberties Union and I have received calls and letters from, or

on behalf of, incarcerated women desperately seeking help after their requests for abortion care have been denied, delayed or ignored. But beyond our direct experience, it is hard to measure how often facilities thwart women's attempts to get abortion care. Only a fraction of incarcerated women succeed in obtaining legal help, and among those who do, often the problem is resolved informally and without a public record. Thus, relatively few cases make it to court. Yet, cases that have reached the courts have almost uniformly met with success.

Despite the legal consensus that incarcerated women must have adequate access to abortion care, the Sufrin study demonstrates that many correctional staff refuse to facilitate such access. Whether they do so because they do not understand their legal obligations or because they intentionally flout those obligations, the lack of abortion access for incarcerated women reveals the need to educate correctional policymakers, administrators, health providers and standard-setting organizations. With an enhanced understanding of the relevant legal framework—specifically, the constitutional right of incarcerated women to access abortion—health and correctional professionals can advance, rather than inhibit, reproductive health care for incarcerated women.

THE CONSTITUTIONAL RIGHT TO ABORTION IN THE PRISON CONTEXT

While imprisonment carries with it the restriction, even loss, of many freedoms, it does not completely strip individuals of their most basic constitutional and human

*A safe estimate is that at any given time, more than 10,000 pregnant women are in prison or jail: The population of adult women detained in prison or jail is more than 200,000, and 6–10% of women entering prison or jail are pregnant. (Sources: Sabol WJ and Minton TD, *Prison and Jail Inmates at Midyear 2006*, Washington, DC: U.S. Department of Justice, 2007, Table 13; and U.S. Centers for Disease Control and Prevention, *Women, Injection Drug Use, and the Criminal Justice System*, 2001, <<http://www.cdc.gov/odu/facts/cj-women.pdf>>, accessed Nov. 19, 2008.)

†No state laws specifically restrict abortion access for incarcerated women. To the contrary, a few explicitly protect incarcerated women's access to abortion. For example, the California Penal Code provides that “no condition or restriction upon the obtaining of an abortion by a prisoner...shall be imposed” (source: reference 13). To the extent that a state or local correctional facility implements a policy that restricts abortion access for women in its custody, that reflects internal agency decision making, not state law.

By *Diana Kasdan*

Diana Kasdan is staff attorney, American Civil Liberties Union Foundation, Reproductive Freedom Project, New York.

**The right to
decide
whether...
to have an
abortion is not
lost as a result
of criminal
punishment
and
incarceration.**

rights. Consistent with this principle, the right to decide whether to continue a pregnancy or to have an abortion is not lost as a result of criminal punishment and incarceration. Indeed, this has been the consensus among courts that have considered the issue.¹⁻⁶

Therefore, correctional authorities and staff should be aware that policies or practices that restrict or otherwise regulate women's access to abortion during incarceration must do so within constitutional bounds. At the same time, health professionals who work to ensure adequate abortion access for incarcerated women should understand the unique constitutional limits that exist in the prison setting.

A woman's right to decide whether to bear a child falls within the scope of bodily autonomy and privacy protected under the Fourteenth Amendment of the Constitution. More than 35 years ago, in *Roe v. Wade*, the U.S. Supreme Court made clear that this right protects a woman's decision to choose an abortion.⁷ Since then, the Court has repeatedly held that laws that restrict abortion access cannot create an "undue burden"; in other words, they cannot place a "substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus."⁸ In addition, a state cannot obstruct a woman's access to abortion care, even postviability, if the abortion is medically indicated to preserve her health or life.⁸ While these legal principles define the general constitutional right to abortion, another set of cases regarding limits on prisoners' rights demonstrate how this right applies to incarcerated women.

The Supreme Court has laid out two basic principles that are especially relevant for assessing whether policies that restrict abortion access in prison or jail are constitutionally permissible. First, in *Turner v. Safley*, the Court considered whether certain prison policies that restricted inmate marriages and inmate-to-inmate correspondence violated prisoners' constitutional rights. The Court decided that a regulation that curtails fundamental constitutional rights can be upheld only if the restriction is "reasonably related to penological interests."⁹ Legitimate "penological interests" typically include deterring crime, rehabilitating prisoners and ensuring institutional security.¹⁰ In addition, the Court ruled that prison administrators' professional judgment as to how best to advance penological interests are entitled to particular deference. This special consideration for correctional administration necessarily permits greater restrictions on the constitutional rights of prisoners than on those of the general population.

Second, in *Estelle v. Gamble*, a case in which an inmate claimed that prison officials did not provide adequate treatment for his medical conditions, the Court held that the Eighth Amendment prohibition on cruel and unusual punishment requires correctional authorities to treat the "serious medical needs" of inmates by ensuring timely access to proper care.¹¹ Thus, even though the Supreme Court has never recognized a generalized constitutional right to state-provided health care, in *Estelle*, it firmly established the government's constitutional obligation to meet the important medical needs of those in its custody.

Courts across the country have used both of these standards to review the claims of incarcerated women whose access to abortion care has been denied or delayed. Applying the *Turner* standard, courts have consistently invalidated restrictive abortion policies as failing to reasonably advance legitimate penological goals.^{1,4,6,12} Applying *Estelle*, however, only one appellate court has clearly held that abortion care is a "serious medical need" that triggers Eighth Amendment protections.⁴ Collectively, these cases provide important guidance on how correctional policies or practices regarding abortion should fare when subject to constitutional scrutiny.

Two types of prison and jail abortion policies have been challenged in the courts. The Missouri Department of Corrections had a written policy that explicitly prohibited the transportation of inmates off prison grounds to obtain elective abortions. The policy further directed that even if the treating physician recommended an abortion for health or life-preserving reasons, it would not be allowed unless "approved by the Medical Director in consultation with the Regional Medical Director."^{1(p. 792)} More common are jail policies that do not permit an inmate to obtain an abortion until she has obtained a court order authorizing either a temporary release (often called a "furlough") or a transport by jail security.^{2,4,6}

In cases involving blanket prohibitions¹ or court-order requirements,^{2,4,6} courts have consistently relied on the *Turner* "reasonableness" standard to assess whether the challenged policies violated a woman's right to abortion under the Fourteenth Amendment. In all but one case, courts have concluded that they did. Specifically, they held that such policies were not reasonable, even after taking into consideration concerns such as the potential safety risk of transporting inmates off prison grounds and the need to allocate scarce administrative resources and staff time. As evidence that a facility is unreasonable in its refusal to transport women for abortion care, these courts have cited the facility's ability and willingness to provide transport for other pregnancy care,^{1,6} for a wide range of other health care¹³ or, in some cases, for purposes such as visiting sick relatives⁶ or receiving job training.¹³ For example, as the Eighth Circuit explained in the Missouri case, if inmates were not transported for abortion, the state corrections department would still need to transport them for medical care associated with pregnancy, including delivery care. Thus, the department's policy "does not necessarily reduce the number of [transports] and the related security risk."^{1(p. 795)}

Additionally, courts have viewed the claimed security and cost justifications more skeptically when a policy appears to target abortion specifically. For instance, the Eighth Circuit found that in the Missouri Department of Corrections, "abortion is treated differently," from other medical care, and the policy prohibiting abortion transports was not simply a "specific application of a general policy regarding elective procedures."^{1(p. 797)} In contrast, in the one case that upheld a restriction, the court accepted the jail's insistence

that because the court-order requirement applied equally to transports for other types of nonemergency or elective medical care, it did not target abortion.²

The focus on whether a facility's policy regarding access to abortion is similar to, or part of, a general policy regarding access to "elective" medical care reflects two problems. First, even if a prison or jail does not normally provide access to "elective" medical care, this should not determine how it handles access to abortion care, which is afforded unique constitutional protection. Unfortunately, correctional authorities frequently assume that they have discretion to permit, or not permit, abortion care on the same terms as other elective medical care.^{1,2,6} And, indeed, courts have looked to a facility's general procedures and practices related to elective medical care to assess whether a restriction on abortion access is reasonably related to neutral and legitimate institutional interests. Nonetheless, even where restrictions have been found to relate to legitimate concerns, such as security, courts have held that prison and jail facilities can, and must, reasonably accommodate a woman's decision to have an abortion.^{1,4,6}

Second, the comparison of abortion to other elective procedures has made it difficult for incarcerated women to successfully challenge abortion restrictions as violations of their Eighth Amendment right to medical care. An "elective" medical procedure is often one that, even if medically indicated, can be postponed—sometimes indefinitely—without risking irreversible or serious harm. But postponing abortion, and many other types of pregnancy care, can lead to serious and irreversible medical, physical and emotional consequences, including risks to health and life. In one of the earliest cases, the Third Circuit Court of Appeals recognized this difference, and the reality that the categorical denial of elective abortions will have "irreparable" physical and emotional consequences for pregnant inmates who do not want to carry to term.^{4(p. 349)} It thus held that abortion is a "serious medical need" for those women. Unfortunately, later courts have not followed the Third Circuit's lead. One appellate court has gone so far as to explicitly determine that an elective abortion is not a serious medical need.*¹ At a minimum, however, courts have recognized that abortions needed to preserve women's health or life qualify as serious medical needs.[†] Thus, prison policies that prohibit or delay access to abortion care in such circumstances risk violating pregnant women's rights under the Eighth Amendment. Further, the obligation of prisons to affirmatively provide for inmates' serious medical needs means that if a woman is unable to afford an abortion that she seeks because of specific health concerns, correctional authorities need to assume costs that they may not need to assume for elective abortions.

MOVING FORWARD: EXPANDING REPRODUCTIVE HEALTH ACCESS IN PRISONS AND JAILS

As Sufrin et al. conclude, and the cases discussed here confirm, incarcerated women are not receiving the full range of needed pregnancy-related services. Sufrin identifies the

need for further research documenting women's experience and the development of policy guidelines from relevant standard-setting organizations, such as the National Commission on Correctional Health Care. Such efforts could help advocates and health professionals address gaps in abortion and other reproductive health services for incarcerated women. This will be especially effective where those gaps result primarily from lack of information, lack of foresight and planning, or other oversights by correctional facilities. Additionally—particularly in states and facilities where policy is set by people who are politically, ideologically or otherwise opposed to abortion—increasing correctional authorities' awareness of their legal obligations is an important approach to increasing their responsiveness to the reproductive health needs of incarcerated women. Indeed, in some correctional settings, the desire to avoid legal liability may be the only sufficient motivator.

Public health and correctional professionals need to be aware that at a minimum, prison and jail officials must allow timely access to abortion care for women in their custody. In cases where pregnancy termination is indicated because of risks to a woman's health or life, the institutional obligations are even greater. Correctional facilities across the country should be held to these basic standards for respecting pregnant women's federal constitutional rights, regardless of the state in which they are incarcerated. At the same time, advocates or health professionals who are working to improve reproductive health care for inmates should consider the impact of state-specific laws that may mandate additional or different obligations with respect to abortion access. For example, in a state that has laws specifically protecting the right of inmates to obtain abortion care—California is one example¹⁴—correctional facilities must operate within the requirements of those laws. On the other hand, state laws that tend to restrict access to abortion for all women—for example, by imposing mandatory counseling and waiting periods prior to the provision of abortion care—will apply to women who are incarcerated. Thus, health and correctional professionals should seek guidance on relevant state laws to appropriately tailor any state-specific research or interventions.

Ultimately, as Sufrin's study confirms, there remains a crucial need for further research and work to identify how

*Also, in *Victoria W. v. Larpen*, the court of appeals affirmed the lower court decision, which rejected both the plaintiff's Fourteenth Amendment claim and her Eighth Amendment claim that abortion care constitutes a serious medical need. But the court of appeals focused on the Fourteenth Amendment claim. The appellate court did not clearly address the serious medical need claim or expressly adopt the lower court's analysis of that issue.

†For example, in *Roe v. Crawford*, the Eighth Circuit stated that "a medically necessary abortion certainly could qualify as a 'serious medical need'" (source: reference 1, p. 799). The decision itself does not define a "medically necessary" abortion in the prison context. However, under long-standing Supreme Court precedent, medically necessary abortions include those that, in a physician's professional medical judgment, are necessary to prevent harm to either physical or mental health (source: *Doe v. Bolton*, 410 U.S. 179, 192 [1973]).

correctional facilities can meet the reproductive health needs of female inmates. Moreover, the gap in abortion services is only part of the larger challenge to identify and improve the range of reproductive health services incarcerated women need. Fortunately, although research in this area has been limited, the results are encouraging. Two studies conducted in a Rhode Island adult correctional institute demonstrated that incarcerated women, while at extremely high risk for STDs and unplanned pregnancies, are substantially more likely to initiate use of birth control if they are provided with contraception during their incarceration than if they are referred to free contraceptive services in the community upon release.^{15,16} Moreover, they showed that when public health researchers and providers work cooperatively with correctional authorities, the collaboration can meaningfully expand the range of reproductive health services available to, and used by, incarcerated women. The gap in services identified in the Sufrin study demonstrates a need to expand such efforts, particularly with respect to abortion access. In so doing, health professionals can help correctional authorities implement standards of care that recognize and meet the complete range of reproductive health needs that women may experience while incarcerated and as they prepare to return to their families and reenter the community.

REFERENCES

1. *Roe v. Crawford*, 514 F.3d 789 (2008).
2. *Victoria W. v. Larpenter*, 369 F.3d 475 (2004).
3. *Bryant v. Maffucci*, 923 F.2d 979 (1991).
4. *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326 (1987).
5. *Doe v. Barron*, 92 F. Supp.2d 694 (S.D. Ohio 1999).
6. *Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007).
7. *Roe v. Wade*, 410 U.S. 113 (1973).
8. *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992).
9. *Turner v. Safley*, 482 U.S. 78, 89 (1987).
10. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987).
11. *Estelle v. Gamble*, 429 U.S. 97 (1976).
12. *Roe v. Leis*, No. C-1-00-651, 2001 WL 1842459 (S.D. Ohio Jan. 10, 2001).
13. *Roe v. Crawford*, 439 F. Supp.2d 942 (W.D. Mo. 2006).
14. Cal. Penal Code §§ 3405, 4028 (West 2008).
15. Clarke JG et al., Reproductive health care and family planning needs among incarcerated women, *American Journal of Public Health*, 2006, 96(5):834–839.
16. Clarke JG et al., Improving birth control service utilization by offering services prerelease vs. postincarceration, *American Journal of Public Health*, 2006, 96(5):840–845.

Author contact: DKasdan@aclu.org