

PREGNANT IN CAPTIVITY: ANALYZING THE
TREATMENT OF PREGNANT WOMEN IN
AMERICAN PRISONS AND IMMIGRATION
DETENTION CENTERS

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PREGNANT IN CAPTIVITY: ANALYZING THE TREATMENT OF PREGNANT WOMEN IN AMERICAN PRISONS AND IMMIGRATION DETENTION CENTERS

INTRODUCTION

On September 10, 2010, eighteen-year-old Countess Clemons was incarcerated in Chattanooga, Tennessee’s Silverdale Detention Center due to an assault charge.¹ During her medical screening, jail staff verified that she was about fifteen weeks pregnant.² For two months and ten days while incarcerated, Clemons complained to jail staff about abdominal pain as well as a five-hour span of vaginal bleeding.³ Finally, on November 19, jail staff transported her to a hospital where she delivered a fetus that died shortly after birth.⁴ Clemons’s case settled for \$690,000 after the Corrections Corporation of America was issued a sanction for destroying video evidence of her delay in treatment.⁵

In April of 2017, Jacina Morales was pregnant while in Immigration and Customs Enforcement (ICE) custody in Tacoma, Washington.⁶ On the day she learned that ICE planned to put her on a flight back to Mexico, Morales began experiencing pregnancy complications: “I had pains and felt nausea.”⁷ Medical records from the detention center acknowledge Morales’s anxiety and worsening condition.⁸ When Morales woke up bleeding and in serious pain one morning, an ICE officer told Morales that she would “see if they can see you quickly,”

1. Todd South, *Chattanooga Woman Sues Prison for \$125 Million in Death of Baby*, CHATTANOOGA TIMES FREE PRESS (Feb. 24, 2012), <https://www.timesfreepress.com/news/news/story/2012/feb/24/chattanooga-woman-sues-prison-125-million-death-ba/71485/>.

2. *Id.*

3. *Id.*

4. *Id.*

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

6. Liz Jones, *Pregnant and Detained*, NPR (Apr. 6, 2018), <https://www.npr.org/2018/04/05/599802820/pregnant-and-detained>.

7. *Id.*

8. *Id.*

but Morales was not taken to the hospital until three hours after her initial complaint.⁹ When officers finally transported her to the hospital, they forced Morales to sit up in the back of a patrol car, making the bleeding worse.¹⁰ Morales's pregnancy ended in a miscarriage. Though ICE claims that Morales received appropriate care, Morales believes more could have been done and has filed a formal complaint with the Department of Homeland Security.¹¹

Unfortunately, the experiences of Countess Clemons and Jacina Morales as pregnant women in the custody of the United States government are not outliers. Pregnant women who are incarcerated¹² in both American prisons and immigration detention centers endure inadequate and delayed treatment for their reproductive-health needs. This Note will compare the experiences of women in both contexts of confinement, analyzing the constitutional rights and legal remedies available to both. For pregnant women in both settings, inadequate pregnancy care is in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. However, the legal remedies available to confined women with specialized needs are too burdensome and should be reviewed. Regardless of whether the detention is for the purpose of punishment or simply detainment pending other legal action, delayed or inadequate access to reproductive health care does not serve a valid interest of the United States government, as required by the Supreme Court.¹³

In Part I, this Note will detail the treatment of pregnant women in American prisons, examining the quality of health care through narrative accounts of women who have been pregnant while incarcerated. Part I will also examine the legal remedies applicable to these women, explaining the avenues available to assert their constitutional rights. In Part II, this Note will similarly detail the treatment of pregnant women in immigration detention centers through narrative accounts and examine applicable legal remedies and their accessibility. Finally, in Part III, this Note will compare the experiences and legal standards applicable to women detained in both American prisons and immigration detention centers, arguing that both groups are entitled to better reproductive health care. Prevailing legal standards, as currently applied to both groups, do not adequately address the specialized needs of pregnant women and should be reexamined.

9. *Id.*

10. *Id.*

11. *Id.*

12. While acknowledging the importance of person-first language, for ease of the reader, I will use terms such as "incarcerated women" and "pregnant women" throughout this Note.

13. See *Turner v. Safley*, 482 U.S. 78, 87 (1987).

I. THE TREATMENT OF PREGNANT WOMEN IN AMERICAN PRISONS

The number of women and girls in prison around the world has increased by about 53% since 2000, suggesting that the worldwide female prison population is increasing at a faster rate than the worldwide male prison population.¹⁴ Specifically, the United States has the highest rate of female incarceration in the world.¹⁵ Between 1980 and 2014, the number of women in American prisons and jails rose from 26,378 to approximately 215,000, an increase of over 800%.¹⁶ Specialized health concerns accompany the rise of the female prison population, since many female prisoners lack consistent access to health care prior to incarceration.¹⁷

Although most states do not collect data on incarcerated pregnant women and there is no national set of data on prenatal care or pregnancy outcomes for incarcerated women, an estimated one in four women is pregnant or has a child under one year old at the time of her incarceration.¹⁸ According to Tamar Kraft-Stolar, the director of the Correctional Association of New York's Women in Prison Project, "It's one of the many areas where the lack of data points to the invisibility of incarcerated people, and specifically incarcerated women."¹⁹

A. Quality of Reproductive Health Care

Because the majority of women who are incarcerated are younger than fifty years old, they have particular reproductive-health issues, including pregnancy.²⁰ Access to reproductive health care for women incarcerated in jails and prisons around the country is lacking. Specifically, gynecological exams are neither performed upon admission nor provided on an annual basis.²¹ Initial screening questions about a woman's gynecologic history often are not asked because jails

14. ROY WALMSLEY, WORLD FEMALE IMPRISONMENT LIST: WOMEN AND GIRLS IN PENAL INSTITUTIONS, INCLUDING PRE-TRIAL DETAINEES/REMAND PRISONERS 2 (4th ed. 2017), https://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_prison_4th_edn_v4_web.pdf.

15. *Id.*

16. Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2195 (2018).

17. Estalyn Marquis, *Nothing Less than the Dignity of Man: Women Prisoners, Reproductive Health and Unequal Access to Justice Under the Eighth Amendment*, 106 CAL. L. REV. 203, 209 (2018).

18. See Natalia D. Tapia & Michael S. Vaughn, *Legal Issues Regarding Medical Care for Pregnant Inmates*, 90 PRISON J. 417, 420 (2010), <https://journals.sagepub.com/doi/pdf/10.1177/0032885510382211>.

19. Coulls & Greenberg, *supra* note 5.

20. *Position Statement: Women's Health in Correctional Settings*, NAT'L COMMISSION ON CORRECTIONAL HEALTH CARE (Oct. 9, 2014) [hereinafter *Position Statement*], <https://www.ncchc.org/womens-health-care>.

21. *Id.*

and prisons lack health providers who are trained in obstetrics and gynecology.²² These deficiencies result in an elevated risk of undetected disease for incarcerated women, such as breast and ovarian cancer.²³

According to the American College of Obstetricians and Gynecologists, approximately 6%–10% of incarcerated women are pregnant at any given time, and many women first learn they are pregnant when they enter a correctional facility.²⁴ Because of past medical histories, high rates of substance use disorders, and high levels of psychological distress, incarcerated women tend to have complicated and high-risk pregnancies.²⁵ Despite the prevalence of high-risk pregnancies in prisons, a 2009 Bureau of Justice Statistics report showed that only 54% of pregnant women received some type of pregnancy care while in prison.²⁶

After giving birth, women in prison are not routinely screened for postpartum physical and psychiatric complications, though 19% of women in the United States suffer from postpartum depression within three months of delivery and 7% have a major depressive episode.²⁷ Incarcerated women are at higher risk for depression and psychosis because of the prevalence of underlying mental-health disorders among women in prison and the emotional trauma of being separated from their newborns.²⁸

Beyond the institutional lack of access to reproductive health care, individual women who experience pregnancy *emergencies* are often denied timely treatment. In 2015, *Rewire News* published a report following an investigation that identified at least a dozen instances of women experiencing miscarriages, stillbirths, and ectopic pregnancies in jails and prisons across the United States.²⁹ These women reported similar stories, detailing delayed treatment and devastating outcomes.³⁰ For example, Tiffany Pollitt, while incarcerated and pregnant in Pennsylvania, was hit in the stomach by another prisoner.³¹ Though she “repeatedly reported the incident . . . no doctors or nurses took her seriously.”³² When she told corrections officers that she was in serious pain, the officers told

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, MEDICAL PROBLEMS OF PRISONERS 4 (2008), <https://www.bjs.gov/content/pub/pdf/mpp.pdf>.

27. *Position Statement*, *supra* note 20.

28. *Id.*

29. *Rewire News* is a “nonprofit daily online publication devoted to evidence-based reporting on reproductive and sexual health, rights, and justice.” *About Rewire News*, REWIRE NEWS, <https://rewire.news/about-us/> (last visited Jan. 20, 2020). *Rewire News* began as a United Nations Foundation blog before becoming its own nonprofit. Coulls & Greenberg, *supra* note 5.

30. Coulls & Greenberg, *supra* note 5.

31. *Id.*

32. *Id.*

her to “grow up” and “asked her what she expected them to do.”³³ Finally, when Pollitt “bled all over the floor of her cell,” she was “transferred to a nearby hospital, where she delivered a stillborn baby.”³⁴

The legal remedies available to women such as Pollitt who have experienced delayed treatment for their reproductive-health needs are complicated and often inaccessible due to the status of incarcerated women in American society. Although women in Pollitt’s position often file civil lawsuits against the jails or prisons where they were incarcerated and sometimes receive substantial settlements, the treatment of pregnant women in American prisons raises broader constitutional issues.

B. *Legal Standards*

In applying the Fourteenth Amendment’s Equal Protection doctrine, the Supreme Court of the United States has never recognized a constitutional right to health care.³⁵ However, the Court has established one important exception: prisoners.³⁶ In its 1976 decision *Estelle v. Gamble*, the Court applied the Eighth Amendment’s prohibition against “cruel and unusual punishments” to establish the constitutional right to adequate medical care for the incarcerated.³⁷ Through the Fourteenth Amendment, this protection applies to states as well as the federal government.³⁸ In applying this protection, the Court has concluded that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.”³⁹

While historically the Court had applied the Eighth Amendment’s prohibition of cruel and unusual punishment to inhumane techniques of punishment involving “tortur[ing] or a lingering death,” cases leading up to *Estelle v. Gamble* held that the Amendment proscribes “more than physically barbarous punishments.”⁴⁰ Rather, “[t]he Amendment embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .’ against which [the Court] must evaluate penal measures.”⁴¹ In the United States, punishment must be compatible with the “evolving standards of decency that mark the progress

33. *Id.*

34. *Id.*

35. Daniel Lublin Pollock & Natalie E. Rainer, *Healthcare Access: A Review of Major Barriers to Health Care Services for Women*, 6 GEO. J. GENDER & L. 825, 834 (2005).

36. *Id.*

37. See U.S. CONST. amend. VIII; *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976).

38. See *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

39. *Turner v. Safley*, 482 U.S. 78, 84 (1987).

40. *Estelle*, 429 U.S. at 102 (first quoting *In re Kemmler*, 136 U.S. 436, 447 (1890); then citing *Gregg v. Georgia*, 428 U.S. 153, 170 (1976); then citing *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958); and then citing *Weems v. United States*, 217 U.S. 349, 373 (1910)).

41. *Id.* at 102 (citation omitted) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) (omission in original)).

of a maturing society.”⁴² The Court concluded in *Estelle v. Gamble* that the preceding “elementary principles” establish the government’s obligation to provide medical care for those incarcerated because prisoners must *rely* on prison authorities to treat their medical needs.⁴³ If those authorities fail to do so, their needs will not be met, and such failure may produce “torture or a lingering death” in the worst cases or “pain and suffering which no one suggests would serve any penological purpose” in less serious cases.⁴⁴

Therefore, the Court concluded that:

[D]eliberate indifference to serious medical needs of prisoners constitutes the “unnecessary and wanton infliction of pain” proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.⁴⁵

This “deliberate indifference” is the prevailing standard to show a violation of the Eighth Amendment regarding inadequate medical treatment.⁴⁶ A prisoner seeking to file an Eighth Amendment complaint on these grounds must establish *both* that she had a “serious medical need[]” and that the person against whom she is filing suit was deliberately indifferent to it.⁴⁷ *Estelle’s* holding, however, does not reach every claim of inadequate medical treatment made by a prisoner.⁴⁸ Specifically, the Court notes that the “*inadvertent* failure to provide adequate medical care cannot be said to constitute ‘an unnecessary and wanton infliction of pain’ or to be ‘repugnant to the conscience of mankind.’”⁴⁹ For example, medical malpractice is not necessarily a constitutional violation: a prisoner must allege acts or omissions that are sufficiently harmful to show “deliberate indifference to serious medical needs.”⁵⁰

In 1994, the Court clarified that this deliberate indifference standard is *subjective* rather than objective.⁵¹ A prison official cannot be liable under the Eighth Amendment for denying a prisoner humane conditions unless the official “knows of and disregards an excessive risk to inmate health or safety.”⁵² The official must both be aware of facts implying a substantial risk of serious harm and actually draw that inference.⁵³ Further, the Court reviews constitutional

42. *Id.* (quoting *Trop*, 356 U.S. at 101).

43. *Id.* at 103.

44. *Id.* (first quoting *In re Kemmler*, 136 U.S. at 447; then citing *Gregg*, 428 U.S. at 170–74).

45. *Id.* at 104–05 (footnotes omitted) (citation omitted) (quoting *Gregg*, 428 U.S. at 173).

46. *Id.* at 106.

47. *See id.*

48. *Id.* at 105.

49. *Id.* at 105–06 (emphasis added).

50. *Id.* at 106.

51. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

52. *Id.*

53. *Id.*

complaints of prisoners under a lesser standard of review: the prison's actions must only be "reasonably related to legitimate penological interests."⁵⁴

Further, prisoners seeking to file lawsuits in federal court are limited by the 1996 Prison Litigation Reform Act (PLRA).⁵⁵ Among other limitations, the PLRA requires exhaustion of administrative remedies, payment of court filing fees in full, and demonstration of physical injury.⁵⁶ This "physical injury" requirement is especially prohibitive: a prisoner may not file a lawsuit for mental or emotional injury unless she can also show physical injury.⁵⁷ Because courts often differ in what constitutes physical injury, pregnant women who have suffered a miscarriage because of delay in treatment may be hindered from the outset by the PLRA.

In sum, to successfully bring a claim asserting a violation of Eighth Amendment rights, a prisoner must first meet the standards of the PLRA in order to bring the claim at all. Next, she must establish both that she had a "serious medical need" and that the prison official was "deliberately indifferent" to it. For the indifference to be sufficiently deliberate, she must show that the official was *subjectively* aware of her need and knowingly disregarded a serious risk to her health.

In applying these facially neutral standards along with a low standard of review, the Court affords considerable deference to prison officials. This creates uniquely gendered barriers for women attempting to bring claims for inadequate medical treatment involving reproductive health.⁵⁸ In successful claims brought by female prisoners for inadequate pregnancy care, "defendants . . . have usually exhibited extreme indifference to the pregnant plaintiff, bordering on inaction, for the very *purpose* of causing pain for the pregnant plaintiff."⁵⁹ Courts have "struggled to define when pregnancy constitutes a serious medical need. . . . [and] evaluate whether a defendant could have known that this need existed."⁶⁰

Circuit courts applying the standards derived from *Estelle* and its progeny rarely find that plaintiffs have met their burden. However, two courts have reviewed cases where deliberate indifference was undeniable.⁶¹ In *Goebert v. Lee County*, plaintiff Michelle Goebert informed jail medical staff immediately upon incarceration that she was pregnant, with a high risk of miscarriage.⁶² She was

54. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

55. *See* 42 U.S.C. § 1997e (2018).

56. *Id.*

57. *See id.*

58. *See* Marquis, *supra* note 17, at 206.

59. *Id.* at 221 (emphasis added).

60. *Id.*

61. *See* *Goebert v. Lee County*, 510 F.3d 1312, 1329 (11th Cir. 2007); *Pool v. Sebastian County*, 418 F.3d 934, 945 (8th Cir. 2005).

62. *Goebert*, 510 F.3d at 1316 (informing medical staff of her risk factors, including her age, blood type, and history of miscarriages).

five months pregnant when she realized she was leaking amniotic fluid and informed the jail doctor, but the doctor told her that she was “fine” and that it was not an amniotic leak.⁶³ For the next eight days, Goebert continued to leak significant fluid.⁶⁴ Though her medical records show that the jail doctor recommended bed rest, Goebert was not given a “lie-in pass,” which would have allowed an exception to the jail’s rule prohibiting “lying down during daylight hours.”⁶⁵ When a sudden “rush of fluid came out of her,” officers left Goebert sitting at the officer station for twenty-five minutes before finally driving her to the hospital.⁶⁶ Hospital doctors “discovered that there was essentially no amniotic fluid left in Goebert’s womb” and informed her that she should have been placed on bed rest immediately when she began leaking amniotic fluid.⁶⁷ When the fetus’s heart stopped, doctors induced labor, and Goebert gave birth to a stillborn.⁶⁸

Goebert filed a lawsuit in federal court against prison officials and doctors, in part under the Eighth Amendment’s prohibition of cruel and unusual punishment. Applying the *Estelle* standard, the Eleventh Circuit found that leaking amniotic fluid was a “serious medical need” sufficient to satisfy the objective component of the deliberate indifference test.⁶⁹ Further, the prison official had sufficient information to provide a factual basis for a finding of subjective deliberate indifference because it was “self-evident” that leaking amniotic fluid could cause serious medical problems.⁷⁰ For these reasons and more, the Eleventh Circuit overturned the district court’s grant of summary judgment for the prison officials.⁷¹ Ultimately, Goebert reached a confidential settlement with the prison.⁷²

Similarly, in *Pool v. Sebastian County*, the Eighth Circuit refused to reverse denial of summary judgment because the plaintiff repeatedly informed prison officials of her serious medical needs.⁷³ Plaintiff Talisa Pool suffered a miscarriage in a detention center while awaiting her transfer to the Arkansas Department of Corrections.⁷⁴ On Pool’s intake form, she indicated that she was

63. *Id.* at 1317.

64. *Id.* at 1318.

65. *Id.* at 1317–18 (detailing that on “[s]ome days the nurses would simply refuse to take her medical request forms” and one nurse “wadded up [her] written request to see the doctor and threw it back at her”).

66. *Id.* at 1319.

67. *Id.*

68. *Id.*

69. *Id.* at 1326.

70. *Id.* at 1327.

71. *See id.* at 1329.

72. Aisling Swift, *Inmate Who Lost Baby in Collier Jail: ‘I Want Them to Make Changes,’* NAPLES DAILY NEWS (Feb. 14, 2009), <http://archive.naplesnews.com/news/local/inmate-who-lost-baby-in-collier-jail-i-want-them-to-make-changes-ep-399742886-344169992.html>.

73. *See Pool v. Sebastian County*, 418 F.3d 934, 934 (8th Cir. 2005).

74. *Id.* at 945.

currently pregnant and “passing blood clots.”⁷⁵ When she was finally seen by a nurse, the nurse did not believe that she was pregnant.⁷⁶ Pool continued to bleed and eventually was placed in an observation cell alone and encouraged to rest.⁷⁷ After screaming and beating on the walls for help, Pool miscarried into the toilet, catching the fetus with her shirt.⁷⁸ The Eighth Circuit found that these facts indicated a serious medical need that would have been obvious even to a layperson.⁷⁹ Information on the ultimate outcome of Pool’s case could not be found.

C. *Incarcerated Women Report Conditions*

Although the women in the Eleventh and Eighth Circuit cases described above were able to assert their constitutional rights and obtain relief, successful litigation under current legal standards is rare. The 2015 *Rewire News* report details several stories from women whose constitutional claims would not be successful under the current legal framework but nonetheless have endured “cruel and unusual punishment” while in government custody.⁸⁰

Autumn Miller was unknowingly pregnant while incarcerated, serving a one-year sentence in a Texas jail.⁸¹ For two months, she complained of cramps and fatigue and requested a pregnancy test and Pap smear, but she never received either from the jail.⁸² When Miller began bleeding and experiencing pain so severe she could not walk one night, she told guards she felt like she was having a baby.⁸³ The guards took her to a medical unit where she was barely able to explain what was happening to a nurse on telescreen before a guard turned off the screen and handed her a menstrual pad.⁸⁴ Locked in a segregated cell, Miller gave birth into a toilet.⁸⁵

To succeed in a constitutional claim, Miller must be able to show first that she suffered physical injury before proving the other requirements of the PLRA. Because courts have not consistently defined physical injury, the court may not find that Miller’s miscarriage qualifies if it separates the loss of the fetus

75. *Id.* at 938.

76. *Id.*

77. *Id.* at 939.

78. *Id.*

79. *Id.* at 945.

80. *See* Coulls & Greenberg, *supra* note 5.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

from the harm to the woman. Next, she must establish *both* that she had a serious medical need and that the guards were deliberately indifferent to it.⁸⁶ Obviously, Miller had a serious medical need, but to show deliberate indifference, she must first prove that the guards *subjectively* were aware of facts inferring a substantial risk of serious harm and then prove that they actually drew that inference.⁸⁷ Although Miller's need for medical attention should have been clear when she requested a pregnancy test, the guards likely would succeed under the subjective test because they did not *know* Miller was pregnant and therefore could not have been aware of her serious medical need. Further, the guards will claim that they were not *deliberate* in their indifference because they took action by allowing her to see a nurse and giving her a menstrual pad.

According to Miller's attorney, when guards found her after giving birth, they could not find the key to open the door and began taking pictures with their cell phones of her lying on the cot with "blood everywhere."⁸⁸ Miller then was handcuffed and shackled for transport to a hospital, separate from her newborn.⁸⁹ The newborn died four days later.⁹⁰ Subsequently, although this situation likely would not have risen to the level of cruel and unusual punishment under the current constitutional framework as applied, Miller's personal injury lawsuit against the jail settled, and the jail facility has been shut down due to budget cuts and increased scrutiny about the jail's conditions.⁹¹

Krystal Moore, another woman who reported her story in 2015, was six months pregnant while incarcerated in an Illinois prison "for smoking marijuana while on probation."⁹² When she woke up with sharp pain one morning and "asked to go to the hospital," the "guard telephoned the jail nurse."⁹³ The jail nurse was not on duty that morning and sounded irritated on the phone, telling the guard that Moore was "probably full of shit" and "she can see the doctor tomorrow if she'd like."⁹⁴ By 2:30 that afternoon, Moore was bleeding and "[s]creaming out of pain and fear."⁹⁵ After guards forced her "to walk down the stairs from her cell to an ambulance," Moore was taken to a hospital, where "she was shackled to the hospital bed."⁹⁶ "[A]round 5:20 p.m., she gave birth to twins": one survived for only one day, while the other survived for only sixteen days.⁹⁷

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

87. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

88. Coulls & Greenberg, *supra* note 5.

89. *Id.*

90. *Id.*

91. *See id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

Whether Moore could meet the physical injury and other requirements of the PLRA is once again a threshold matter. Because the guard immediately responded to her complaints by telephoning the jail nurse, Moore likely would not succeed under the deliberate indifference standard. The jail nurse's reaction to her complaint over the phone also may not meet the standard because the nurse may not have been *subjectively* aware that Moore had a serious medical need, and even if the nurse was aware, the court may find that allowing Moore to see the doctor the next day was an adequate response. According to her attorney, Moore's lawsuit against the prison settled for \$620,000.⁹⁸

II. THE TREATMENT OF PREGNANT WOMEN IN IMMIGRATION DETENTION CENTERS

As the result of a recent shift in American immigration policy, pregnant women detained by United States immigration agencies endure indignities similar to those endured by pregnant women incarcerated in American prisons. Although the legal remedies available to detained women technically differ from those available to incarcerated women, both their individual experiences and inability to access effective legal remedies are strikingly similar.

In 2017, “[t]he Trump [A]dministration . . . rescinded an Obama-era policy⁹⁹ that ordered immigration officials generally to release pregnant women from federal custody”¹⁰⁰ While the Obama Administration sought mainly to “detain and deport criminals and those who had recently crossed the border,” the Trump Administration targets “anyone in the United States illegally.”¹⁰¹ Philip Miller, deputy executive associate director of ICE, stated, “We’re ending the presumption of release for all pregnant detainees We’re no longer exempting any individual from being subject to the law.”¹⁰² ICE “ended the presumption of release” for pregnant women to “better comply” with President Trump’s Executive Order 13768, *Enhancing Public Safety in the*

98. *Id.*

99. An August 2016 ICE policy addressed the issue directly, requiring that ICE release pregnant women unless the mandatory detention statute applies or “extraordinary circumstances” exist. The policy also required ICE to evaluate pregnant women on a weekly basis to determine whether continued detention was appropriate. Letter from Am. Civil Liberties Union, et al., to Cameron Quinn, Officer for Civil Rights and Civil Liberties, Dep’t. of Homeland Sec. and John Roth, Inspector General, Dep’t. of Homeland Sec. (Sept. 26, 2017) [hereinafter Complaint], https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_increasing_numbers_of_pregnant_women_facing_harm_in_detention.pdf.

100. Maria Sacchetti, *Trump Administration Ends Automatic Release from Immigration Detention for Pregnant Women*, WASH. POST (Mar. 29, 2018, 2:52 PM), https://www.washingtonpost.com/local/immigration/trump-administration-ends-automatic-release-from-detention-for-pregnant-women/2018/03/29/8b6b1bc0-3365-11e8-8abc-22a366b72f2d_story.html?utm_term=.a6c650437228.

101. *Id.*

102. *Id.*

Interior of the United States, which “no longer exempts a category of aliens from enforcement of the Nation’s immigration laws.”¹⁰³

This change in policy has drastically increased the number of pregnant women in ICE custody and has led to disturbing reports of pregnant women’s treatment in U.S. Customs and Border Protection (CBP) and ICE custody. From January to May of 2017, ICE held 292 pregnant women in detention centers, while detaining 506 pregnant women from December 2017 to April 2018.¹⁰⁴

On September 26, 2017, several organizations, including the American Civil Liberties Union (ACLU), the American Immigration Council, and the American Immigration Lawyers Association, submitted an official complaint to the Department of Homeland Security on behalf of pregnant women detained by ICE.¹⁰⁵ The organizations are “gravely concerned” with the agency’s newly increased detention of pregnant women, the “conditions that have been reported by pregnant women[,] . . . and the lack of quality medical care provided to [pregnant women in custody].”¹⁰⁶ The complaint documents individual reports from pregnant women who have been “detained for much longer periods of time than should be permitted given their medical needs, and in conditions that are completely inadequate under existing policies.”¹⁰⁷

Although “ICE and its contractors are legally required to provide appropriate medical care,” which includes “proper screening and counseling for pregnant women, referral for high-risk pregnancies, appropriate prenatal care, and proper documentation of all pregnancies and care given,” the complaint details blatant deviations from these ICE policies and procedures.¹⁰⁸ The individual reports represent “a few of the many” that the organizations received, and “detailed sworn declarations from the women may be available upon request.”¹⁰⁹ The organizations have asked the Department of Homeland Security to review the women’s reports and the general issue of increased immigration detention of pregnant women “in an expedited manner.”¹¹⁰

103. *FAQs: Identification and Monitoring of Pregnant Detainees*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/faqs-identification-and-monitoring-pregnant-detainees> (last updated Mar. 29, 2018) (“ICE has ended the presumption of release for all pregnant detainees.”).

104. Liz Jones, *Pregnant and Detained*, NPR (Apr. 6, 2018, 9:29 AM), <https://www.npr.org/2018/04/05/599802820/pregnant-and-detained> (sharing information given to an NPR affiliate from ICE).

105. Complaint, *supra* note 99.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

A. Quality of Reproductive Health Care

In February 2018, the Human Rights Watch examined “[U.S.] authorities’ compliance with specific protections” for immigrant women and children who were detained, finding that the “conditions in holding cells at the southern border are often poor and in several critical respects identical to those previously found by [U.S.] courts to be in violation of CBP’s obligations and prior commitments.”¹¹¹ Along the U.S.–Mexico border, families who are taken into custody by U.S. immigration agents are generally placed in holding cells—sometimes for a week or more.¹¹² Often, these holding cells are uncomfortably cold, and detainees, even pregnant women, must “sleep on concrete benches or directly on the floor” because they are not provided with “mats for sleeping.”¹¹³ Frequently, “[w]omen and children must . . . go without showering,” and many “holding cells often do not provide soap.”¹¹⁴ “None of the people [interviewed by the Human Rights Watch] were provided with toothbrushes or toothpaste while in [immigration] holding cells.”¹¹⁵ Further, some women reported that CBP did “not provide sanitary pads or tampons for women . . . who [were] menstruating.”¹¹⁶

One pregnant woman reported that “she was given clothes that were so small for her pregnant belly they gave her welts and ‘pain in [her] uterus.”¹¹⁷ Another said that “she underwent repeated X-rays” while in ICE custody, even though X-rays are “against the Food and Drug Administration’s [(FDA)] recommendations . . . for pregnant women.”¹¹⁸ Though CBP’s policies adopt the FDA’s recommendation, ICE’s policies do not.¹¹⁹ Pregnant women in ICE and CBP custody endure not only inadequate facilities to meet their health-care needs but also delayed and inefficient responses to medical emergencies. Because of the new influx of pregnant women in detainment, data reported on these issues is limited, and litigation is only beginning.

In July 2018, several women who had been detained by ICE and CBP while pregnant spoke to *BuzzFeed News* about their treatment while in the custody of

111. Michael García Bochenek, *In the Freezer: Abusive Conditions for Women and Children in U.S. Immigration Holding Cells*, HUM. RTS. WATCH (Feb. 28, 2018), <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells>.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. 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) (alteration in original), <https://www.buzzfeednews.com/article/emaconnor/pregnant-migrant-women-miscarriage-cpb-ice-detention-trump>.

118. *Id.*

119. *Id.*

“different detention centers in California, Texas, New Mexico, and Arizona.”¹²⁰ “Two weeks after arriving in the [U.S.]” to seek asylum, “E,” who declined to use her name for the report, was four months pregnant when she began bleeding profusely and begging for help from staff at the detention facility.¹²¹ “E” reported:

An official arrived and they said it was not a hospital and they weren’t doctors. They wouldn’t look after me . . . I realized I was losing my son. It was his life that I was bleeding out. I was staining everything. I spent about eight days just lying down. I couldn’t eat, I couldn’t do anything. I started crying and crying and crying.¹²²

After experiencing a miscarriage while in detention and one week after speaking with *BuzzFeed News*, “E” gave up her fight for asylum, accepted voluntary departure, and was deported back to El Salvador.¹²³ She lamented:

For me, this is going to be a pain that I carry for a long time, that because of me, I lost my son. I had a dream to come to this place with my son and to be safe and make a life here. What’s going to happen now? What was the point of this dream? It hurts.¹²⁴

For women in immigration detention like “E,” the legal remedies available to seek redress for their harms are often unknown, inaccessible, or simply too late.

B. *Legal Standards*

In its 1886 decision *Yick Wo v. Hopkins*, the Supreme Court extended the protections of the U.S. Constitution to citizens and noncitizens alike.¹²⁵ The Court has since elaborated: “Whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”¹²⁶ Due Process protections extend to all persons within the United States, “whether their presence here is lawful, unlawful, temporary, or permanent.”¹²⁷

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

126. *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

127. *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

Immigration detainees are “civil detainees” under the law, rather than convicted prisoners.¹²⁸ Therefore, the legal standards protecting immigration detainees differ from legal standards protecting those incarcerated in American prisons pursuant to a conviction.¹²⁹ Immigration detainees are protected, under the Fifth Amendment, from conditions that amount to *punishment*.¹³⁰ The Supreme Court has not directly addressed the issue with regard to immigration, and federal circuit courts have applied this protection differently. The Fifth Circuit has held that immigration detainees should receive the *same* level of protection as pretrial detainees, who are also protected from conditions that constitute punishment.¹³¹ The Second Circuit has held that the level of protection depends upon a person’s immigration status¹³² but has declined to decide whether “unadmitted aliens” are entitled to be free from “gross physical abuse,” a standard asserted by the Fifth Circuit.¹³³

Going a step further, the Ninth Circuit has held that conditions of confinement for civil detainees must be *superior* to both convicted prisoners and pretrial criminal detainees, and civilly confined persons need not prove deliberate indifference to demonstrate a violation of their constitutional rights.¹³⁴ A civil detainee retains “greater liberty protections than his criminal counterpart” and is “entitled to conditions of confinement that are not punitive.”¹³⁵ The Ninth Circuit has also held that detention on noncriminal charges is a “cruel necessity of our immigration policy” but “the greatest care must be observed in not treating the innocent like a dangerous criminal.”¹³⁶

Although the Supreme Court has not specifically addressed the rights of immigrant detainees in conjunction with the *Estelle* standard, the Court has addressed the rights of a civilly committed individual.¹³⁷ The Court found that “[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”¹³⁸ The trial court in this case erroneously used *Estelle*’s deliberate indifference standard when instructing the jury on

128. Tom Jawetz, *Litigating Immigration Detention Conditions*, UC DAVIS SCH. L., 2 (July 18, 2008), https://law.ucdavis.edu/alumni/alumni-events/files/mcle-files/jawetz_detention_conditions.pdf.

129. A prisoner must demonstrate “deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

130. *Wong Wing v. United States*, 163 U.S. 228, 237–38 (1896).

131. *Medina v. O’Neill*, 838 F.2d 800, 803 (5th Cir. 1988).

132. *Arar v. Ashcroft*, 532 F.3d 157, 189–90 (2d Cir. 2008), *vacated and superseded on reh’g en banc*, 585 F.3d 559 (2d Cir. 2009).

133. *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987).

134. *Jones v. Blanas*, 393 F.3d 918, 933–34 (9th Cir. 2004).

135. *Id.* at 933 (citing *Youngberg v. Romeo*, 457 U.S. 307, 321–24 (1982)).

136. *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1104 (9th Cir. 2004).

137. *See Youngberg*, 457 U.S. at 321–22.

138. *Id.* (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

the plaintiff's burden to prove his claim.¹³⁹ The Court recognized a critical difference between individuals who are confined as the result of a criminal conviction for the purpose of punishment and those who are civilly committed.¹⁴⁰

Similar to civilly committed individuals, immigrant detainees are not detained as the result of a crime. They are not in the custody of the government for the express purpose of punishment. The Court's rejection of the *Estelle* standard for civilly committed individuals logically extends to civil detainees, but the Court has not made this direct connection. While lower courts inconsistently apply the *Estelle* standard to immigrant detainees, sometimes requiring deliberate indifference to show a violation of rights, detainees are protected from "punishment" under the Fifth Amendment at the very least.¹⁴¹

For an immigrant in detention, the first step in the process of seeking redress for their harm is to file an official complaint with the Department of Homeland Security's Office of Civil Rights and Civil Liberties, which several nonprofits recently have filed on behalf of pregnant women in detention.¹⁴² The Office then will review the complaint and decide whether to launch an investigation to determine if violations occurred.¹⁴³ In addition, or alternatively, the detainee may contact an attorney to begin the process of filing a lawsuit. The information derived from the Department of Homeland Security's investigation may be of the utmost importance in building a case against the government for constitutional right violations. If the lawsuit were to reach a court of law, the legal standards applicable to a case involving inadequate care for a pregnant detainee are unpredictable because of past inconsistent application of legal standards for immigrant detainees generally.

Certainly the plaintiff-detainee would argue that the conditions amounted to punishment, which is an express violation of the Fifth Amendment. Based on precedent, it is unclear whether a court would require the plaintiff to show deliberate indifference under the *Estelle* standard to demonstrate cruel and unusual punishment under the Eighth Amendment. While an analogous Supreme Court case shows that *Estelle's* deliberate indifference standard may be inappropriate for the context of immigration detention, an emerging circuit split reveals that some federal courts will apply to immigrant detainees the *same* rights as criminal pretrial detainees, while other courts view immigrant rights as *superior*.¹⁴⁴

139. *Id.* at 312 n.11.

140. *See id.* at 321.

141. *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896).

142. *See* Complaint, *supra* note 99.

143. *Make a Civil Rights Complaint*, DEP'T HOMELAND SEC., <https://www.dhs.gov/file-civil-rights-complaint> (last updated Apr. 23, 2019).

144. *See* Jones v. Blanas, 393 F.3d 918, 933–34 (9th Cir. 2004). *But see* Medina v. O'Neill, 838 F.2d 800, 803 (5th Cir. 1988).

C. Detained Women Report Conditions

Although people detained by ICE and CBP are constitutionally protected from “punishment” because of their status as civil detainees, conditions within immigration detention centers do not afford this protection in practice. The pregnant women in immigration detention who spoke to *BuzzFeed News* described conditions that constitute cruel and unusual punishment and perhaps even meet the most burdensome deliberate indifference standard.¹⁴⁵ Two detainees said that, upon being taken into custody, they showed the results of their pregnancy tests and ultrasounds to CBP officials, but they were told they could not receive any medical attention until they were moved to more long-term facilities.¹⁴⁶ One of those women, Rubia Mabel Morales Alfaro, stated that CBP officers pushed her to the ground and “threw [her] around.”¹⁴⁷ When she told them again that she was pregnant, “[t]hey didn’t believe [her], they said it wasn’t important, that it wasn’t their problem.”¹⁴⁸ When Alfaro told them that she was seeking asylum because she was in danger in her home country, the officers accused her of lying and said that “El Salvador was fine to live in.”¹⁴⁹ After this encounter, Alfaro began vomiting all day and “asked to see a doctor but was denied.”¹⁵⁰

Alfaro was held in CBP custody for four days before being transferred to an ICE detention facility, where she began bleeding as soon as she arrived.¹⁵¹ She was able to see an on-site doctor, but the doctor told her the bleeding was normal.¹⁵² When she fainted in the cafeteria the next day, officers finally took her to see an ob-gyn who informed her that she had miscarried.¹⁵³ Alfaro told *BuzzFeed News*, “When the doctor examined me, he said there were many reasons for the miscarriage but it was likely because of the conditions they had me in.”¹⁵⁴ Upon returning to the detention center, she was treated as if nothing had happened.¹⁵⁵ Though she exhibited symptoms of depression and lost a significant amount of weight, she was not allowed to return to the doctor.¹⁵⁶ When Alfaro told an officer that she was not well because she “just lost a baby,” the officer said, “[t]hat’s not my fault, that’s your fault.”¹⁵⁷

145. O’Connor & Prakash, *supra* note 117.

146. *Id.*

147. *Id.* (alteration in original).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

The conditions and treatment described by Alfaro certainly qualify as punishment, which is legally prohibited due to her status as a civil detainee. Further, Alfaro's account likely meets each of the various legal standards of cruel and unusual punishment that have been applied inconsistently by federal circuit courts. Even applying the highest and most prohibitive standard, the subjective *Estelle* standard of deliberate indifference, the officers were subjectively aware of Alfaro's serious medical need and acted intentionally to disregard it. Alfaro provided the authorities with documentation of her pregnancy when she entered the facility, making the staff aware of her serious medical need. The officers' treatment of Alfaro was not only deliberately indifferent but also violent. Though Alfaro likely could successfully show that her constitutional rights were violated, logistically, her ability to assert these claims is limited. Not only are immigrant detainees often held temporarily pending deportation, but also their knowledge of and access to legal remedies while in custody or after deportation are insufficient to effectively mount a claim. Further, courts inconsistently apply due process standards to immigrant detainees seeking to raise constitutional claims about conditions of their confinement.¹⁵⁸

Though women suffering the indignities of inadequate reproductive health care in immigration detention centers likely could successfully show, even under the strictest standards, that their constitutional rights were violated, the inconsistent application of these standards for civil detainees makes litigation difficult and often impossible. Because pregnant women in immigration custody were presumptively released until a recent and drastic change in policy, complaints are in preliminary stages, and their success is unknown.¹⁵⁹ Further, women who have endured this type of trauma understandably may view a legal remedy as inadequate and simply too late to address the harm they have experienced.

III. COMPARISON AND RECOMMENDATIONS

Pregnant women in the custody of the United States government, whether incarcerated through the penal system or detained through the immigration system, endure inadequate reproductive health care that can and often does rise to the level of cruel and unusual punishment. Theoretically, the Eighth Amendment protects both groups of women from these conditions. However, when delays in treatment have led to devastating results such as miscarriage, the legal remedies to assert violations of their constitutional rights are often ineffective or unavailable.

158. *Preval v. Reno*, No. 99-6950, 2000 WL 20591, at *1 (4th Cir. Jan. 13, 2000).

159. *See* Complaint, *supra* note 99.

A. Inadequacy of Legal Remedies

In the prison context, pregnant women must show deliberate indifference, according to the *Estelle* standard, in order to convince a court that the prison subjected them to cruel and unusual punishment in violation of the Eighth Amendment. This standard is prohibitive because in order to prove that the treatment was deliberate, the woman must show that the prison official acted for the very purpose of causing the pregnant woman pain. This subjective test creates barriers for women who are pregnant in prison that do not exist for incarcerated men.

Though pregnant women in immigration detention are entitled to that *same* constitutional protection from cruel and unusual punishment, their legal remedies, in theory, extend further than the protections afforded to women in prison. At the very least, immigration detainees are not to be subjected to conditions that are considered punitive because of their status as civil detainees rather than convicted prisoners. However, courts have inconsistently applied this protection. While some courts have considered detainees' claims through the prohibitive *Estelle* standard, other courts have held that detainees need not prove deliberate indifference in order to show that their treatment qualified as impermissible punishment.

Neither women incarcerated in American prisons nor detained in immigration detention centers should be subjected to inadequate reproductive health care. Inadequate and delayed treatment does not serve any valid "penological purpose."¹⁶⁰ Women in both contexts endure strikingly similar indignities: in effect, they are punished for their reproductive capabilities. The existing legal remedies available for both groups of women are ineffective, and neither group should be required to prove deliberate indifference according to a subjective standard. Rather, courts should consider the uniquely specific needs of pregnant women and the effect that delayed treatment has on their reproductive health.

Modification of the legal standard is necessary because the *Estelle* standard does not fit in the context of reproductive health care. This deliberate indifference standard hinders female prisoners from accessing justice for inadequate care during pregnancy and birth.¹⁶¹ Courts are hesitant to find deliberate indifference in the absence of maliciousness or the *intention* to prolong suffering.¹⁶² Because deliberate indifference is evaluated through the subjective intent of the prison or immigration officials, women asserting their rights in the context of inadequate pregnancy care must prove that the officials both knew they were

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

161. Marquis, *supra* note 17, at 225.

162. *Id.*

pregnant *and* acted with the specific purpose of causing them harm.¹⁶³ In *Estelle*, the plaintiff prisoner's complaint was based on a lack of diagnosis and inadequate treatment of his back injury.¹⁶⁴ The standard of deliberate indifference derived from this case does not adequately apply in the specialized cases of pregnant women receiving insufficient prenatal care. Though this standard is facially gender-neutral, it creates barriers for women that do not exist for men.¹⁶⁵ "Without a ready comparison to a man's condition, courts have struggled to define when pregnancy" reaches the level of a "serious medical need."¹⁶⁶

In practice, the determination of whether officials should have recognized the symptoms of childbirth or pregnancy distress requires inquiry into the training practices of the institutions, and this is a difficult undertaking.¹⁶⁷ Although professional guidelines do exist, courts have been unwilling to elaborate on the quality of prenatal care that *should* be provided.¹⁶⁸ Since the Eighth Amendment must draw its meaning from "evolving standards of decency that mark the progress of a maturing society," women in the custody of the government should be entitled to the current medical standard of reproductive care.¹⁶⁹

In *Farmer v. Brennan*, the Court acknowledged that a prison official's duty under the Eighth Amendment is to ensure "reasonable safety," a standard that incorporates due regard for prison officials' "unenviable task of keeping dangerous men in safe custody under humane conditions."¹⁷⁰ This statement reflects the Court's gendered assumption about prisoners (and by comparison, immigrant detainees), reinforcing the notion that prison, and the legal remedies associated with inadequate care, are contemplated with regard to "dangerous men." In applying the *Estelle* standard, the Court in *Farmer* famously rejected an objective test for a subjective test, requiring the plaintiff to show that the subjective state of mind of the official was sufficiently culpable.¹⁷¹ In the reproductive health-care context, this required knowledge of a "serious risk of harm" depends on whether the official knows of a condition that *only* affects women.¹⁷² This knowledge clearly is neither "required nor expected in the context of a man prisoner's claim of inadequate healthcare."¹⁷³

163. See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

164. See *Estelle*, 429 U.S. at 97.

165. See Marquis, *supra* note 17, at 203.

166. *Id.* at 221.

167. See *id.* at 223.

168. *Id.*

169. See *Estelle*, 429 U.S. at 102 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); Marquis, *supra* note 17, at 214.

170. *Farmer v. Brennan*, 511 U.S. 825, 844–45 (1994) (quoting *Spain v. Procunier*, 600 F.2d 189, 193 (9th Cir. 1979)).

171. *Id.* at 834.

172. Marquis, *supra* note 17, at 217 (emphasis added).

173. *Id.*

B. *Recommendations for Better Treatment*

Operating under our current legal framework, the most important step toward providing adequate care to pregnant women in both prisons and immigration detention facilities is improving the quality of training for prison officials to be able to recognize the symptoms of childbirth and pregnancy distress.¹⁷⁴ If officials are trained to recognize these symptoms and respond appropriately, plaintiffs will more easily satisfy the subjective test for deliberate indifference. Further, better data collection on this subject is necessary because forty-nine states do not report all incarcerated women's pregnancies and their outcomes.¹⁷⁵ Regardless of a woman's imprisonment or detention, consistent treatment is necessary to ensure a safe pregnancy.¹⁷⁶ These facilities must provide comprehensive reproductive care either by employing adequately trained medical staff or implementing emergency protocols that will transport women experiencing pregnancy distress to hospitals in a timely manner.

The indignities imposed upon women in the custody of the government extend beyond pregnancy. Specifically in the prison context, most women who successfully give birth while incarcerated are forced to separate from their infants within one to two days of giving birth.¹⁷⁷ Recently, however, several correctional facilities have created nursery programs that allow the infant to live with the mother in a supervised setting with parental support for the mother.¹⁷⁸ Research shows that programs such as these improve the mothers' feelings of attachment to their children and reduce recidivism.¹⁷⁹ The continued implementation of these programs will increase comprehensive care for women who have recently given birth.

1. *Case Study: Alabama Prison Birth Project*

In Alabama, female prisoners, including those who are pregnant, are incarcerated at Julia Tutwiler Prison for Women (Tutwiler), the state's only prison for women.¹⁸⁰ As a part of a 2014 settlement with the Department of Justice following an investigation that uncovered decades of prisoner abuse and poor conditions, Alabama's Department of Corrections has implemented a program

174. *Id.* at 222.

175. *Id.* at 223.

176. *Id.*

177. *Position Statement*, *supra* note 20.

178. *Id.*

179. *Id.*

180. *Tutwiler Prison for Women*, ALA. DEPT CORRECTIONS, <http://www.doc.state.al.us/facility?loc=5> (last visited Jan. 20, 2020).

for pregnant prisoners known as the Alabama Prison Birth Project (the Project).¹⁸¹ The Project provides one-on-one peer support to pregnant women incarcerated at Tutwiler.¹⁸² A doula, or birth companion, “continuously nurtures” incarcerated women through their pregnancy and birthing time, eventually accompanying them to the hospital for the birth.¹⁸³ The Project cites data showing lower cesarean rates, lower risks of infants going to special-care nursery, lower preterm birth rates, and higher birth weights when incarcerated mothers are accompanied by a companion during pregnancy and in the birth room.¹⁸⁴

The Project also allows pregnant women at Tutwiler to attend weekly support-group meetings with a doula and a registered nurse to discuss topics including breastfeeding, labor pains, nutrition, and child care.¹⁸⁵ Each woman receives a composition notebook for journaling, teaching handouts, coloring sheets, and a pregnancy resource book for incarcerated mothers.¹⁸⁶ Volunteers with the Project provide prisoners with a healthy meal during the meetings, which includes fruits, vegetables, and proteins.¹⁸⁷

In 2018, the Project worked with the Department of Corrections to create the “Serene Expressions” lactation room at Tutwiler.¹⁸⁸ This room is the first lactation room of its kind in the United States, allowing women who are incarcerated to pump breast milk and ship it to their infants while they remain in prison.¹⁸⁹ Before incarcerated women at Tutwiler give birth, the Project trains them to use a breast pump and to label and store their breast milk once expressed.¹⁹⁰ The hospital where they give birth provides the women with individual pumping equipment, which they are allowed to take back to the prison after giving birth.¹⁹¹

Despite the Project’s support within the prison and its obvious role in improving conditions for pregnant woman, the Project receives no state funding and solely relies upon donations for support.¹⁹² The Department of Corrections has agreed to provide *access* to the prison for the Project’s programs, but the

181. *See Services*, ALA. PRISON BIRTH PROJECT, <https://www.prisonbirth.org/services> (last visited Jan. 27, 2020).

182. *Id.*

183. *Id.*

184. *Id.*

185. Beth Shelburne, *Alabama Prison Birth Project Launches Outreach for Pregnant Inmates at Tutwiler Prison for Women*, WBRC (May 22, 2017, 7:44 PM), <http://www.wbrc.com/story/35489400/alabama-prison-birth-project-launches-outreach-for-pregnant-inmates-at-tutwiler-prison-for-women/>.

186. *Services*, ALA. PRISON BIRTH PROJECT, *supra* note 181.

187. *Id.*

188. Beth Shelburne, *Alabama Women’s Prison Opens First-of-Its-Kind Lactation Room*, WAFB (Nov. 16, 2018, 12:10 PM), <http://www.wafb.com/2018/11/16/alabama-womens-prison-opens-first-of-its-kind-lactation-room/>.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

Project operates through philanthropy alone.¹⁹³ For the lactation room, two major breast pump companies donated hospital-grade breast pumps and supplies to keep at the prison.¹⁹⁴ Local mothers donated furniture, while prison nurses made the curtains by hand and prisoners at Tutwiler renovated an old isolation cell to transform it into the lactation room.¹⁹⁵ Dr. Wendy Williams, deputy commissioner for women's services at the Alabama Department of Corrections, actively supports the Project's programs.¹⁹⁶ She stated:

What we did as an agency is just start recognizing that these are women, they're not men Their needs are different. They commit crimes for different reasons. If we don't address those needs while they're incarcerated, the chances of them returning to society and recidivating are going to be higher.¹⁹⁷

2. *The Necessity of Reform*

Programs such as the Alabama Prison Birth Project should be fully funded by state governments, and similar programs should be provided by immigration detention facilities and funded by the federal government. Women who give birth while in the custody of the government should be allowed the dignity of providing breast milk for their infants and afforded the opportunity to learn about their specific health needs in preparation for motherhood. If the government must detain pregnant women, it must also provide care and treatment to meet their needs, both in the prison and immigration-detention contexts.

On a larger level, criminal justice and immigration reform are necessary to reduce the "number of women who are locked down and locked out of the opportunity to procreate [and] parent."¹⁹⁸ Experts and practitioners recommend various reforms to confront mass incarceration, including sentencing reform to reduce mandatory-minimum sentences and implementation of alternatives to prison time through specialized courts such as drug, mental health, and veteran courts.¹⁹⁹ Reevaluation of immigration-detention policies toward pregnant women is necessary to address this problem. The ACLU and other organizations' official complaint to the Department of Homeland Security²⁰⁰ should be thoroughly reviewed and requires immediate response. Further, ICE should return to its previous policy of presumptively releasing pregnant women in its custody. If ICE is unable to provide adequate medical care for pregnant women, it should not detain them.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *See* Ocen, *supra* note 16, at 2243.

199. *See* Solutions, ACLU, <https://www.aclu.org/other/solutions> (last visited Mar. 8, 2020).

200. *See* Complaint, *supra* note 99.

C. Incapacitation as Punishment for Deviation from Gender Norms

Women in both American prisons and immigration detention centers experience conditions that amount to punishment for their reproductive capabilities. The increased number of women in the custody of the United States government can be attributed to America's shift in both penological goals and immigration policies over time. Once aiming for rehabilitation, America's criminal justice system now seeks to *incapacitate* criminals rather than facilitate their return to society.²⁰¹ This crisis of mass incarceration is often theorized as a system of racialized control that primarily targets black men.²⁰² Further, some scholars suppose that the rapidly increasing incarceration of women is actually "an unintended consequence of the punitiveness directed toward black men."²⁰³

The increased number of pregnant women in ICE custody is the obvious result of the Trump Administration's reversal of ICE's previous policy of presumptive release for pregnant women. This decision has put pregnant detainees in ultimately the same position as pregnant women in America's criminal justice system: incarceration in ill-equipped facilities with improperly trained staff that are unable, and sometimes unwilling, to meet the health-care needs associated with pregnancy.

Specifically, the American prison system was built for men, and imposing facially gender-neutral administrative regulations can impose "gender-specific indignities" on female prisoners and women in immigration detention, by comparison.²⁰⁴ Incapacitation as a system of punishment has gendered causes and effects:

Women are viewed as dangerous or harmful to society when they fail to adhere to gender norms such as domesticity, submissiveness, piety, and sexual purity. Deviation from these gender norms is perceived as a signal that women are unregulated by patriarchal values, sexually immoral, and will produce children who will become burdens on society due to their poor mothering skills. Thus, women's incapacitation has functioned to reinforce and police the normative boundaries of gender, motherhood, and reproduction.²⁰⁵

For women in prison and immigration detention, pregnancy serves as the basis for specific forms of punishment that target their reproductive capacities and identities as mothers.²⁰⁶ Failure to provide appropriate medical care or to render

201. See Ocen, *supra* note 16, at 2203 (describing mass incarceration "as the product of mandatory minimums, three strikes [laws], the reinstatement of the death penalty, and the abolition of rehabilitative programs in jails and prisons across the country").

202. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 13 (2012) (positing that the criminal justice system targets black men and functions as a contemporary system of racial control).

203. Ocen, *supra* note 16, at 2191.

204. Marquis, *supra* note 17, at 209.

205. Ocen, *supra* note 16, at 2204.

206. *Id.* at 2217.

aid during labor demonstrates the ways that a woman's status as pregnant subjects her to "unique punishments and dignitary harms."²⁰⁷ These forms of humiliation reinforce the notion that incarcerated women are "undeserving of reproduction or procreation" and discourage them from becoming parents.²⁰⁸

The Court's narrow reading of the Eighth Amendment's protection from cruel and unusual punishment facilitates the incapacitation of motherhood: "Instead of serving as a bulwark against state abuse of women's bodies, courts have undermined reproductive rights and legitimized the expanded use of the criminal law to incapacitate populations that are perceived to be deviant."²⁰⁹ For women in the custody of the United States government, "the Constitution is often an abstract notion without real grounding in their everyday existence."²¹⁰

CONCLUSION

Pregnant women have specialized needs that require timely and efficient care, particularly in emergency situations. For women in the custody of the government, both through incarceration in American prisons and detention in immigration centers, the obstacles in asserting constitutional claims are often insurmountable. In the United States, the law should offer both vulnerable groups the accessible opportunity to demonstrate that their traumatic experiences constituted cruel and unusual punishment. In order to adequately protect the constitutional rights of pregnant women in the custody of the United States government, courts must take a gender-specific approach when addressing these claims. By at least removing the requirement of subjective knowledge from the deliberate indifference standard and implementing higher standards of care for pregnant women in captivity, courts can help ensure that women are treated with the respect and dignity they have earned simply by virtue of their humanity.

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207. *Id.* at 2219.

208. *Id.*

209. *Id.* at 2229.

210. *Id.* at 2231.

* Juris Doctor Candidate (May 2020), The University of Alabama School of Law. First, I would like to thank Burt and Elizabeth Smithart and Justin Nolen for their endless support throughout law school and for their helpful feedback in reading early drafts of this Note. I would also like to thank my friend and fellow *Alabama Law Review* editor Atticus DeProspero for his insight in developing the idea for this Note. This Note originated in Professor Meghan Boone's Reproductive Rights seminar, and I am grateful for her patient teaching and encouraging feedback. Finally, I would like to thank Professor Courtney Cross, director of the Domestic Violence Law Clinic of which I am a part, for her investment in me and her fearless and determined work on behalf of women who are incarcerated.