ROE V. CRAWFORD: DO INMATES HAVE AN EIGHTH AMENDMENT RIGHT TO ELECTIVE ABORTIONS?

MARK EGERMAN*

TABLE OF CONTENTS

I. INTRODUCTION

Incarcerated women across the country face serious healthcare problems. As difficult as it is for female inmates to stay healthy,[1] incarcer-

* J.D. Candidate, Harvard Law School, Class of 2009. The author would like to thank Alisha Bhagat, Victoria Budson, Sharon Dolovich, Taki Flevaris, Mary Anne Franks, Catharine MacKinnon, Mercedes Montagnes, and Diane Rosenfeld for reviewing various drafts of the Comment, and for their feedback, friendship, and guidance.

[1] *See* Ellen M. Barry, *Bad Medicine: Health Care Inadequacies in Women's Prisons*, 16 CRIM. JUST. 38, 40 (2001) (describing the significant health problems prisoners face, including "diabetes, high blood pressure, sickle cell anemia, and a higher instance of

ated women face even greater problems when they are pregnant. It is estimated that at least six percent of female inmates enter confinement pregnant[2] and others become impregnated by guards, often through rape.[3] If these women wish to terminate their pregnancy, they may face a series of impediments: there is no national policy regarding prisoners' abortion rights, and a majority of state and federal prisons have policies that restrict inmates from receiving an abortion.[4] Incarcerated women who are unable to obtain an abortion are forced to endure confinement while pregnant, including women who may not have been convicted of any crime and are merely awaiting trial. An inmate whose imprisonment is longer than the length of her pregnancy may be shackled to a bed while she gives birth.[5]

The Missouri Department of Corrections instituted a policy on September 5, 2005 that prohibited all female inmates in state prisons from pursuing an elective non-therapeutic abortion.[6] On January 22, 2008, in *Roe v. Crawford*,[7] the Eighth Circuit upheld a district court ruling that struck down this policy.[8] By finding this policy unconstitutional, the Eighth Circuit has fur-

---

undetected breast cancer"); Kelly Parker, *Pregnant Women Inmates: Evaluating Their Rights And Identifying Opportunities For Improvements In Their Treatment*, 19 J.L. & HEALTH 259, 263–64 (2004) (describing some of the reasons why female inmates face difficulty in receiving treatment).

[2] *See* TRACY L. SNELL, U.S. DEP'T OF JUSTICE, SURVEY OF STATE PRISON INMATES, 1991: WOMEN IN PRISON (1999) (estimating six percent of women entered prison pregnant in 1991); *see also* Diana J. Mertens, *Pregnancy Outcomes of Inmates in a Large County Jail Setting,* 18 PUB. HEALTH NURSING 45, 45 (2001) (estimating ten percent of female inmates entered jail pregnant).

[3] *See generally* Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571 (2006) (describing the sexual abuse of female prisoners in historical context).

[4] *See* Elizabeth Budnitz, Note, *Not a Part of Her Sentence: Applying The Supreme Court's* Johnson v. California *to Prison Abortion Policies*, 71 BROOK. L. REV. 1291, 1296–99 (2006). It is worth noting that even in situations where a prison system may offer access to an abortion clinic, an individual woman might be subject to the whim of individual guards. This was the case for Leisa Gibson, who was unable to obtain an abortion after being convicted for robbery. Gibson v. Matthews, 926 F.2d 532, 533–34 (6th Cir. 1991). Gibson made repeated requests "of virtually everyone that she came in contact with for assistance in carrying out the abortion, but was thwarted at every turn." *Id*. at 533. The individuals Gibson alleged to have contacted included United States Marshals, a prison chaplain, and a psychiatrist. *Id*. at 534. Eventually, a doctor informed Gibson that it was too late to have the abortion. *Id*. at 534. These events occurred before the decision in Monmouth County Corr. Inst'l Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987), and the Sixth Circuit noted that there were no reported cases regarding the abortion rights of prisoners. *Gibson*, 926 F.2d at 536. Yet the Sixth Circuit held that even if there were an Eighth Amendment right to an abortion, the delays caused by administrative inaction did not meet the standard of "deliberate indifference." *Id*. Not only was Gibson unable to receive an abortion, she was unable to successfully sue the prison officials for violating her constitutional rights under 42 U.S.C. § 1983. *Id.* at 538.

[5] *See* Amnesty International, *Pregnant and Imprisoned in the United States*, 27 BIRTH 266, 267–68 (2000) (documenting the use of restraints on pregnant inmates as they give birth).

[6] *See* Roe v. Crawford, 514 F.3d 789, 792 (8th Cir. 2008), *reh'g en banc denied*, No. 06-3108 (8th Cir. Feb. 27, 2008).

[7] *Id*.

[8] *Id.*

thered a circuit split on the question of prisoner abortion rights, which has yet to be resolved by the Supreme Court.[9] This Comment will focus on a legal theory that was originally accepted by the district court but ultimately rejected by the Eighth Circuit: forcing inmates to give birth against their will constitutes cruel and unusual punishment in violation of the Eighth Amendment.[10] This Comment will first look at the *Turner*[11] standard as it was employed in *Roe v. Crawford*. Next, it will examine whether the Eighth Circuit was correct in rejecting an Eighth Amendment defense of prisoner abortion rights under the *Estelle v. Gamble*[12] standard. Finally, this Comment will explore the impact that a successful Eighth Amendment ruling would have on modern abortion jurisprudence.

An Eighth Amendment argument for abortion rights does not resemble traditional approaches to the abortion issue. This argument does not depend on the right to privacy defined in *Roe v. Wade,*[13] nor does it argue for a substantive sex equality right to an abortion. Indeed, this argument would not secure an abortion right for all women. There is no discussion of fetal status or the danger of back-alley abortions in the absence of legal abortions.[14] Instead, the Eighth Amendment argument focuses directly on state control over pregnant women and the real harms that unwanted pregnancies cause inmates. While the argument may be unconventional, it would appear that unwanted pregnancies meet the definition of "serious medical needs" under the *Estelle* standard and that inmates should have an Eighth Amendment right to an abortion.

II. *Roe v. Crawford* and the *Turner* Standard

Jane Roe was arrested in California in July 2005 pursuant to a Missouri warrant issued for a parole violation.[15] While in custody in California, she

---

[9] *See infra* Part II.B (surveying previous circuit rulings on prison abortion rights).

[10] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

[11] *See* Turner v. Safley, 482 U.S. 78 (1987).

[12] Estelle v. Gamble, 429 U.S. 97 (1976).

[13] 410 U.S. 113 (1973).

[14] A full exploration of the options available to pregnant inmates who are denied an abortion is beyond the scope of this Comment. Inmates may attempt self-abortions while in jail, which could partially explain the extremely high rate of prison miscarriages. *See* Rachel Roth, Making Women Pay: The Hidden Costs of Fetal Rights 154 (2000) (describing high rates of miscarriage in prison relative to rates among non-prisoners). Nonetheless, the options presented to pregnant inmates who are denied access to an abortion are substantially different from those presented to non-incarcerated women who try to obtain an illegal abortion. Inmates are denied freedom of mobility and are placed under constant state surveillance, constraints which make it nearly impossible for them to obtain extralegal relief.

[15] Verified Complaint for Emergency Temporary Restraining Order and/or Preliminary Injunctive Relief at 4, Roe v. Crawford, 396 F. Supp. 2d 1041 (W.D. Mo. 2005) (No. 05-4333-CV-C-DW).

learned that she was pregnant and requested an abortion at that time.[16] Before she was able to obtain an abortion, she was transferred to a Missouri prison.[17] The Missouri Department of Corrections ("MDC") had instituted a policy prohibiting transportation for "elective, non-therapeutic abortions," and they denied Roe's request for an abortion.[18] Roe petitioned the United States District Court for an emergency injunction in order to challenge the policy and enable her to obtain an abortion.[19]

The district court granted the injunction, finding that, "it is well-accepted that a substantial delay in the decision to abort increases the risks associated with the procedure."[20] The MDC unsuccessfully appealed to the Eighth Circuit for a stay, and then to the United States Supreme Court.[21] Justice Thomas, exercising his administrative jurisdiction over the Eighth Circuit, granted an emergency stay on a Friday afternoon, thereby blocking the abortion procedure.[22] The following Monday, the full Court vacated Thomas's stay, which allowed Roe to receive an abortion.[23]

Roe then amended her complaint and filed a class action suit on behalf of all similarly situated women challenging the legality of the MDC policy.[24] The district court granted summary judgment to Roe, finding that the policy was an unreasonable restriction on her Fourteenth Amendment right to terminate a pregnancy under the four-part *Turner v. Safley* standard for evaluating prison regulations[25] as well as unconstitutional under the Eighth Amendment.[26]

A. The Turner *Standard*

The Supreme Court established the *Turner* standard for evaluating prison regulations in 1987.[27] Originally used to evaluate regulations prohibiting marriage and inter-inmate correspondence,[28] the *Turner* standard exam-

---

[16] Roe v. Crawford, 439 F. Supp. 2d 942, 945–46 (W.D. Mo. 2006). It appears that Roe was impregnated before she was arrested but only discovered that she was pregnant once in custody. *Id.* Many inmates, however, become pregnant in prison after having been raped by male prison guards and officials. *See* Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 46 (2007); Cheryl Bell et al., Note, *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195, 210 (1999).

[17] Roe v. Crawford, 439 F. Supp. 2d at 946.

[18] Roe v. Crawford, 514 F.3d 789, 792 (8th Cir. 2008) *reh'g en banc denied*, No. 06-3108 (8th Cir. Feb. 27, 2008).

[19] Roe v. Crawford, 396 F. Supp. 2d 1041 (W.D. Mo. 2005).

[20] *Id.* at 1043.

[21] Linda Greenhouse, *Supreme Court Roundup: Justices Reject Appeal in Tobacco Case*, N.Y. TIMES, Oct. 18, 2005, at 18.

[22] Crawford v. Roe, 546 U.S. 959 (2005).

[23] *Id.*

[24] Roe v. Crawford, 439 F. Supp. 2d 942, 946 (W.D. Mo. 2006).

[25] *Id.* at 949–53 (citing Turner v. Safley, 482 U.S. 78 (1987)).

[26] *Id.* at 953. *See* discussion *infra* Part III.

[27] *Turner*, 482 U.S. at 78.

[28] *Id.* at 81.

ines prison regulations from a deferential perspective. The standard upholds restrictions on inmates' constitutional rights so long as the restriction is "reasonably related to legitimate penological interests."[29]

The four-pronged *Turner* test has become the standard governing nearly all prison regulations.[30] The first prong asks whether there is a "valid, rational connection"[31] between the regulation and "the legitimate governmental interest put forward to justify it."[32] The next prong looks to "whether there are alternative means of exercising the right that remain open to prison inmates."[33] The third prong examines the impact of the regulation on guards, other inmates, and the general allocation of prison resources.[34] The last prong allows prisoners to demonstrate an alternative to the policy that accommodates the prisoners' rights, but only if it can do so "at *de minimis* cost to valid penological interests."[35]

Turner declared that "[i]t is settled that a prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.' "[36] Yet in a dissenting opinion, Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, expressed a concern that the standard "would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation."[37] This concern has been echoed by many commentators who believe that the *Turner* standard under-enforces prisoner rights and that more judicial oversight is needed.[38] One author has even

---

[29] *Id.* at 89.

[30] *See* James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoners' Rights*, 10 N.Y. CITY L. REV. 97, 104 (2006). *But see* Johnson v. California, 543 U.S. 499, 510 (2005) (applying strict scrutiny to a policy of racial segregation instead of the *Turner* test) and *infra* text accompanying notes 39, 183.

[31] *Turner*, 482 U.S. at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

[32] *Id.*

[33] *Id.* at 90.

[34] *Id.*

[35] *Id.* at 90–91.

[36] *Id.* at 95 (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).

[37] *Turner*, 482 U.S. at 100–01 (Stevens, J., dissenting).

[38] *See generally* Robertson, *supra* note 30, at 115–24 (arguing that *Turner* underenforces the Constitution and is a false balance that undermines prisoner rights); Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 452, 458 (1999) ("[F]irst, the authoritarian nature of [prisons] makes them places where serious abuses of power and violations of rights are likely to occur; and second, the political process is extremely unlikely to provide any protections [to prisoners]."); Krysten Sinema, Note, Overton v. Bazzetta*: How the Supreme Court Used* Turner *to Sound the Death Knell for Prisoner Rehabilitation*, 36 ARIZ. ST. L.J. 471, 485–86 (2004) (arguing that the court should abandon the *Turner* test); Jacqueline B. DeOliveira, Comment, *Marriage, Procreation and the Prisoner: Should Reproductive Alternatives Survive During Incarceration?*, 5 TOURO L. REV. 189, 194–96 (1988) (arguing that the Court would be better served by following a more "meaningful" analysis than the "superficial" *Turner* test).

argued that the *Turner* standard should not be used to determine the constitutionality of inmate abortion restrictions.[39]

B. Previous Applications of Turner *to Abortion Rights*

Two circuits have already applied the *Turner* standard to the question of abortion rights. In *Monmouth County Correctional Institutional Inmates v. Lanzaro*, the Third Circuit overturned, based on a *Turner* analysis, a New Jersey policy that prohibited inmates from receiving an abortion without a court order providing for their release.[40] The *Monmouth* court found that the policy was an "exaggerated response" and was not based on a valid penological interest.[41] Furthermore, the court approvingly cited a strongly supportive law review article that stated: "Security is no less protected, crime is no less deterred, retribution is not undermined, and rehabilitation is not hindered by the exercise of a prisoner's right to [elect] . . . an abortion."[42]

Seventeen years later, the Fifth Circuit took the opposite position in *Victoria W. v. Larpenter*.[43] Victoria learned she was pregnant while in prison and sought to get an abortion, but was forced to wait two weeks to meet with a prison official who informed her that the prison policy required her to get a court order to receive an elective operation.[44] Victoria did not have representation at the time and the attorney she attempted to contact originally refused to represent her, apparently because of moral reasons.[45] Finally, over a month after Victoria had requested an abortion, an attorney filed a motion on her behalf.[46] Victoria was transported to the courthouse for the hearing but remained in a holding cell and only later discovered that her attorney had not asked for the required court order to receive an abortion.[47] By the time Victoria left prison, she was in the twenty-fifth week of her pregnancy and was therefore unable to legally obtain an abortion in Louisi-

---

[39] *See* Budnitz, *supra* note 4. Budnitz argues that instead of using the *Turner* test, the court should follow Johnson v. California, 543 U.S. 499 (2005), and use the intermediate scrutiny test of Planned Parenthood v. Casey, 505 U.S. 833 (1992) when analyzing policies regarding prison abortions.

[40] 834 F.2d 326 (3d Cir. 1987).

[41] *Id.* at 344.

[42] *Id.* at 338 (quoting Anne Vitale, Note, *Inmate Abortions – The Right to Government Funding Behind Prison Gates*, 48 Fordham L. Rev. 550, 556 (1980)).

[43] 369 F.3d 475 (5th Cir. 2004).

[44] *Id.* at 478–79. For a more detailed analysis of the facts of the *Victoria W.* case, see Tecla Morasca, *Involuntary Childbirth and Prisoners' Rights: Court-Order Prison Policy Violates Fundamental Rights*, 32 New Eng. J. on Crim. & Civ. Confinement 43, 46–47 (2006).

[45] *Victoria W.*, 369 F.3d at 479. *See also* Budnitz, *supra* note 4, at 1318 (describing attorney's initial refusal to represent Victoria).

[46] *Victoria W.*, 369 F.3d at 479–80.

[47] *Id.* at 480. It is unclear why the attorney filed the incorrect motion.

ana.[48] Her pregnancy was classified as "high risk," and following an emergency cesarean section, she gave her newborn up for adoption.[49]

The facts of *Victoria W.* demonstrate the serious difficulties pregnant inmates face in obtaining an abortion, and the Fifth Circuit's ruling supports the argument that the *Turner* standard can underenforce rights. Unlike *Monmouth*, the *Victoria W.* court found that the *Turner* balancing test justified the policy that required a court order in order to receive an elective abortion.[50] The court found there was a legitimate penological interest in prohibiting inmates from leaving the prison for elective treatments.[51] The court also found that the second, third, and fourth prongs of the test favored the prison.[52] In an attempt to harmonize the ruling with *Monmouth*, the court distinguished the facts of the two cases by noting that the New Jersey policy only applied to abortions, while the Louisiana policy applied to all elective medical procedures.[53] In addition, in response to Victoria's claim that the procedure was not elective, the court explicitly stated that "a non-therapeutic abortion is not a medical emergency."[54]

C. The Eighth Circuit's analysis of the Turner *standard in* Roe v. Crawford

Writing for the majority of the Eighth Circuit in *Roe*, Judge Riley sided with the *Monmouth* court in finding that the *Turner* test favored the inmates, effectively rekindling a circuit split.[55] Although the Eighth Circuit overturned the district court, it found that the first prong of the *Turner* test, regarding the connection between the regulation and government interest, favored the prison officials.[56] The MDC argued that any removal of an inmate from prison posed a security risk, but the court noted that the policy did not reduce the number of these removals, as the MDC would still need to

---

[48] *Id.*

[49] Budnitz, *supra* note 4, at 1319 (citing Brief of Plaintiff-Appellant at 15-16, Victoria W. v. Larpenter, 369 F.3d 475 (5th Cir. 2004) (No. 02-30598)).

[50] *Victoria W.*, 369 F.3d at 485.

[51] *Id.* at 486.

[52] *Id.* at 487.

[53] *Id.* at 488–89.

[54] *Id.* at 487 n.52. The court's footnote exhibits particularly problematic reasoning. The court attempts to distinguish the time sensitivity of abortions from the prison's other "emergency" procedures such as heart attacks but gives no basis for this classification other than an assertion by the prison. There is no attempt to apply any standard that would judge whether or not an abortion would classify as an emergency. Furthermore, the court lacks the awareness shown in cases such as *Derrickson v. Keve*, 390 F. Supp 905 (D. Del. 1975), discussed *infra* note 115.

[55] Roe v. Crawford, 514 F.3d 789, 794–98 (8th Cir. 2008) *reh'g en banc denied*, No. 06-3108 (8th Cir. Feb. 27, 2008). *Victoria W.* attempted to distinguish itself from *Monmouth* and Roe v. Crawford attempts to distinguish itself from *Victoria W.*, although it is unclear whether the cases are truly distinguishable. *See infra* discussion accompanying notes 70–76.

[56] Roe v. Crawford, 514 F.3d at 795.

transport pregnant inmates for medical examinations associated with their pregnancy.[57] The court noted that inmates tend to require increased levels of prenatal care, which could even further increase the number of departures.[58] Next, the MDC argued that the existence of protesters at abortion facilities could result in high risks to guards and inmates, as well as increased opportunities for escape.[59] The district court had found, based on testimony given at trial, that it was undisputable that picketers had never interfered with inmates or guards in the past eight years.[60] The Eighth Circuit stated that this information did not automatically make the policy irrational, as "prison officials should not be required to wait until a problem occurs before addressing the risk."[61] Furthermore, the court rejected Roe's claim that deferring to this potential security problem would create an impermissible "heckler's veto" by allowing protesters to block the exercise of a legally protected right.[62] Admitting that Missouri would be unable to ban all abortions out of concern of social disruption due to protests, the court stated that prison rights depend "on a balancing test which grants far more leniency to prison administrators than the government would be granted as to the general public."[63]

Next, the court found that the second prong, concerning alternative means, weighed against the policy.[64] By prohibiting transfers out of the prison, the MDC eliminated Roe's access to an elective abortion.[65] The court noted that elective abortions have been recognized as a protected liberty interest under the Fourteenth Amendment.[66] The MDC argued that this right was not completely lost, as inmates could obtain an abortion before incarceration.[67] This argument was rejected on the grounds that many inmates would not know of their pregnancies before becoming imprisoned.[68] Furthermore,

---

[57] *Id.* Furthermore, there would need to be at least one removal in order for the inmate to give birth, so even if there were no accompanying hospital visits, there would be no decrease in security risks under the policy.

[58] *Id.* The Court dismissed other claims, such as the idea that inmates transported for abortion visits are more likely to escape than inmates transported for other medical visits. *Id*. at 796 n.4.

[59] *Id.* at 795.

[60] Roe v. Crawford, 439 F. Supp. 2d 942, 950 (W.D. Mo. 2006).

[61] Roe v. Crawford, 514 F.3d at 795.

[62] *Id.* at 796.

[63] *Id.* It is unclear that this addresses the problem posed by the heckler's veto and, despite a citation to *Turner*, the position is without precedent. While restrictions on the rights of prisoners are indeed judged with more leniency than the rights of the general public, it remains unclear why deference must be given to disruptive protesters who seek to deny individuals their rights in either context. The court makes the mistake of being deferential not to the policy decisions of prison officials, but to the will of protesters, which is not a part of the *Turner* standard. Allowing prison officials to use these protesters as a justification for their policy effectively raises the protesters to the level of public officials. While this finding on the first prong did not affect the outcome of the decision, it is an aberrant finding.

[64] *Id.* at 796–97.

[65] *Id.* at 796.

[66] *Id.*

[67] *Id.* at 797.

[68] *Id.* This was Roe's own experience.

the court noted that under the MDC's reasoning, the *Turner* court itself would have been able to uphold the marriage prohibition because inmates could have married before they went to jail.[69]

The court then attempted to distinguish this finding from the opposite finding in *Victoria W.* on the basis that the Louisiana policy did not completely bar elective abortions, but allowed an abortion with a court order.[70] The court also noted how the Fifth Circuit tried to distinguish *Victoria W.* from *Monmouth* by noting that the latter case required a court order that released the inmate on her own recognizance, as opposed to Louisiana's requirement that only a court order allowing the procedure was needed.[71]

Turning to the third *Turner* prong, the court found that it also favored Roe, as the policy could not be justified on the basis of conserving prison resources.[72] It was important that this policy would likely be more costly than the alternative, as it would increase the number of departures from prison required to care for pregnant inmates.[73] Furthermore, the court noted that the impact of allowing elective abortions would be so minimal on the overall allocation of resources that the extremeness of the policy appeared to be the type of "exaggerated response" prohibited by *Turner*.[74]

Finally, the court found that the fourth prong of the test also favored the inmates as there existed other alternatives that could be advanced at a *de minimus* cost. The court suggested two possible alternatives that would satisfy the test: returning to the MDC's old policy of allowing transportation for elective abortions, or adopting the Louisiana policy upheld in *Victoria W.*[75] The court's embrace of the *Victoria W.* policy is surprising, given how radically different the *Turner* analysis was in the two cases, a difference that cannot be explained by the marginal addition of a court order. As discussed above, *Victoria W.* held that all four prongs of the test favored the prison regulation.[76]

---

[69] *Id.*

[70] *Id.*

[71] *Id.* As this Comment focuses on the Eighth Amendment claim and not the *Turner* standard, it is beyond the scope of the piece to question fully these distinctions. This issue was most recently litigated in Arizona, where an unwritten policy that required a court order before obtaining an abortion was held to be unconstitutional under the *Turner* standard. *See* Doe v. Arpaio, 150 P.3d 1258 (Ariz. Ct. App. 2007), *review denied*, Doe v. Arpaio, CV-07-0104-PR, 2007 Ariz. LEXIS 85 (Ariz. Sept. 25, 2007), *cert. denied*, Arpaio v. Doe, No. 07-839, 2008 U.S. LEXIS 2716 (U.S., Mar. 24, 2008).

[72] Roe v. Crawford, 514 F.3d at 797.

[73] *Id.* at 798.

[74] *Id.* (citing Turner v. Safley, 482 U.S. 78, 97–98 (1987)).

[75] *Id.*

[76] To be more accurate, the *Victoria W.* court did not actually separate the prongs, but did not find any points in favor of the inmates. *See* Victoria W. v. Larpenter, 369 F.3d 475, 486–89 (5th Cir. 2004). It is unclear how the existence of a court order alters either the first or third prong, nor is any reason given.

III. The Eighth Amendment Claim in *Roe v. Crawford*

Roe v. Crawford focused on more than just the *Turner* standard; the suit also claimed that the policy violated Roe's right to be free from cruel and inhumane punishments.[77] As discussed above, the *Turner* standard is considered by many to underenforce prisoner rights and has been used to uphold restrictions on inmates' rights to obtain an abortion. The Eighth Amendment argument offers a different approach to the problem and may better protect inmates' abortion rights.[78]

A. Outlining an Eighth Amendment Argument For Inmate Abortion Rights

In a 1980 law review note, Anne Vitale presented a compelling argument that the Eighth Amendment ought to guarantee women state-funded abortions while in prison.[79] This remarkably prescient article, written before *Harris v. McRae*[80] and *Planned Parenthood v. Casey*,[81] foresees a number of the significant issues regarding prisoner abortion rights and argues that these rights can be secured both by means of a balancing test as well as through an Eighth Amendment claim.[82]

The article focuses on the standard set out in *Estelle v. Gamble*.[83] In *Estelle*, the Supreme Court found that "deliberate indifference to serious medical needs of prisoners" violated the Eighth Amendment.[84] Vitale cites cases where this standard had been applied to require prisons to provide prisoners with psychological care and to "treat sinus conditions, varicose veins, ulcers, broken bones, fevers, and high blood pressure."[85] Next, the article uses medical sources to demonstrate how unwanted pregnancies pose health risks such that abortion should be considered a serious medical need.[86]

---

[77] Roe v. Crawford, 514 F.3d at 798–801.

[78] *But see* Kendra Weatherhead, Note, *Cruel but not Unusual Punishment: The Failure to Provide Adequate Medical Treatment to Female Prisoners in the United States*, 13 Health Matrix 429, 438–40 (2003) (noting that the *Estelle* test is shortsighted insofar as it fails to understand the importance of women's experiences within the prison context and that courts are more likely to find deliberate indifference to the needs of male inmates). Weatherhead's critique is a valuable one as it applies to the *Estelle* test's ability to regulate all inmate treatment. The author believes it is possible to show that unwanted pregnancies present a serious medical need under *Estelle* and that this criticism does not apply in this context. *See infra* text accompanying notes 83, 84 (discussing the *Estelle* standard).

[79] Vitale, *supra* note 42.

[80] Harris v. McRae, 448 U.S. 297 (1980).

[81] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[82] *See* Vitale, *supra* note 42, at 553.

[83] 429 U.S. 97 (1976).

[84] *Id.* at 104.

[85] Vitale, *supra* note 42, at 560 (footnotes omitted). In a Note written twenty-six years later, Elizabeth Budnitz composes a similar list, including "a broken nose, severe muscle cramps, and a broken arm." Budnitz, *supra* note 4, at 1322.

[86] *Id.* at 561–63.

Furthermore, the article discusses the serious psychological injuries women suffer by bearing an unwanted child.[87] Finally, the article notes that there are no alternative therapeutic solutions to relieve a prisoner's pain and suffering, clearly stating that in the case of unwanted pregnancy, "only one medical procedure—abortion—will alleviate the potential for serious physical and psychological pain and suffering of the inmate."[88]

Missing from Vitale's argument is an analysis of the first prong of the *Estelle* standard, the presence of "deliberate indifference."[89] The Supreme Court elaborated on this standard in *Farmer v. Brennan*, which stated that the Eighth Amendment outlaws cruel and unusual punishments, not cruel and unusual conditions.[90] It is, therefore, also necessary to show that prison officials acted with knowledge of the substantial risks and harms involved with forcing a woman to carry a pregnancy to term against her will in order to win on an Eighth Amendment claim. In this case, the existence of an official policy satisfies this requirement. More importantly, the question as to what constitutes a serious medical need has developed an uneven and complicated jurisprudence since the article was written. In order to make a more complete Eighth Amendment claim, it is necessary to analyze the various tests used by lower courts.[91]

B. Unwanted Prison Pregnancies Pose a Serious Medical Need that Triggers Eighth Amendment Protection

The Supreme Court has not defined what constitutes a serious medical need under the *Estelle* test, and lower courts have applied a number of varying standards.[92] The risks and harms represented by forcing an inmate to keep an unwanted prison pregnancy should be seen as a serious medical need because of the physical and psychological pain experienced by the prisoner, the inability of the prisoner to terminate the pregnancy at a later time, and the outright violation of basic human dignity that occurs when inmates are forced to give birth against their will.

---

[87] *Id.* at 561–62.
[88] *Id.* at 562.
[89] Estelle v. Gamble, 429 U.S. 97, 104 (1976).
[90] Farmer v. Brennan, 511 U.S. 825, 837 (1994).
[91] It is important to note that such an analysis must proceed by assuming that pregnancy is conceptualized as a legitimate health concern by federal judges. There is a significant jurisprudence stemming from *Geduldig v. Aiello* that indicates that the Supreme Court does not understand pregnancy as a medical condition deserving of equal protection of the laws. 417 U.S. 484 (1974) (holding that discrimination on the basis of pregnancy does not violate the equal protection clause).
[92] *See* LYNN S. BRANHAM & MICHAEL S. HAMDEN, THE LAW AND POLICY OF SENTENCING AND CORRECTIONS 775 (7th ed. 2005).

1. *Pregnancy exposes inmates to substantial physical and psychological pain*

Women who enter prisons have a higher incidence of serious health concerns than the general public.[93] Female inmates have significantly higher rates of HIV, hepatitis, cervical cancer, diabetes, and asthma.[94] These preexisting conditions amplify the physical pain and health risks that occur during pregnancy. Even under the most desirable conditions, pregnancy causes nausea, back pain, hyperventilation, bladder injuries, as well as the extraordinary pains involved with the act of child birth itself.[95] There are also considerable physical risks involved with pregnancies, including preeclampsia and placental abruption.[96] When the pregnancy is unwanted, pregnancy-related risks increase, including an increased chance of postpartum infection and hemorrhaging.[97] These physical pains and harms are exacerbated by prisons' generally poor quality of prenatal care, including the reduced availability of gynecology and obstetrics visits, the harsh treatment of pregnant inmates by other inmates and prison guards, and the lack of a specific prenatal nutrition and dietary regime.[98] Studies show that miscarriage rates among prisoners are as high as fifty times the statewide average.[99] Finally, pregnancy poses a risk of death or permanent physical damage through miscarriages or other complications that are significantly higher than the health risks posed by first trimester abortions.[100]

In addition to these physical harms, unwanted pregnancies pose serious psychological harms to inmates.[101] These psychological harms are intensified by the fact that female inmates suffer from incredibly high rates of de-

---

[93] *See* Cynthia Chandler, *Death and Dying in America: The Prison Industrial Complex's Impact on Women's Health*, 18 BERKELEY WOMEN'S L.J. 40, 42 (2003).

[94] *Id.* (citing Nina Siegal, *Women in Prison: The Number of Women Serving Time Behind Bars Has Increased Dramatically. Is this Equality?*, Ms., Sept.-Oct. 1998, at 64, 69).

[95] *See* Vitale, *supra* note 42, at 560.

[96] *See* Mary McGurrin, Note, *Pregnant Inmates' Right to Health Care*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 163, 178 (1993).

[97] Willard Cates, Jr., *Legal Abortion: The Public Health Record*, 215 SCI. 1586, 1587 (1982).

[98] *See* Rachel Roth, *Justice Denied: Violations of Women's Reproductive Rights in the United States Prison System* (Sept. 2004), http://www.prochoiceforum.org.uk/psy_ocr10.asp (last visited Apr. 22, 2008).

[99] *See* ROTH, *supra* note 14, at 154.

[100] *See* Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1017 (1984).

[101] This fact was explicitly mentioned in Roe v. Wade, 410 U.S. 113, 153 (1973) ("Psychological harm may be imminent."). Justice Marshall addressed this point to some extent in his dissent in Harris v. McRae, 448 U.S. 297, 340 (1980) (Marshall, J., dissenting) ("[S]evere mental disturbances will be created by unwanted pregnancies. The result of such psychological disturbances may be suicide, attempts at self-abortion, or child abuse.").

pression, perhaps twice as high as their male counterparts.[102] Prepartum depression not only represents a serious psychological harm, but also can present serious physical risks to both the inmate and her newborn.[103]

These physical and psychological harms would satisfy all of the various tests used by lower courts to determine serious medical need. One federal district court has found that a serious medical need occurred when a prisoner was denied painkillers for six days, even though no permanent damage resulted from the denial of care.[104] Unwanted prison pregnancies last for upwards of nine months and permanent physical harm can occur. The Second Circuit has explicitly held that serious medical needs do not describe only the most extreme medical conditions.[105] This standard has led the Second Circuit to hold that a prisoner denied a proper eyeglass prescription has a serious medical need.[106] Similarly, the Ninth Circuit has held that delay in providing dentures constitutes a serious medical need.[107] Certainly the risks posed by an unwanted pregnancy are at least as serious as the risks posed by an improper eyeglass prescription or delayed dentures.

Finally, a number of courts have found psychological risks and harms to be as serious as physical harms for this analysis.[108] While acknowledging the real harms posed by psychological risks, courts have noted that the psychological harms in question must go beyond mere depression.[109] The medical evidence regarding the psychological impacts of both unwanted pregnancies and prison pregnancies demonstrate that these psychological harms meet this standard.

The State of Missouri raised counterarguments to this position in its brief to the Eighth Circuit. Missouri relied on a previous Eighth Circuit ruling that defined a serious medical need as one that has been diagnosed by a physician as requiring treatment, or one that "is so obvious that even a

---

[102] Candace Kruttschnitt & Rosemary Gartner, *Women's Imprisonment*, 30 CRIME & JUST. 1, 34 (2003).

[103] *See generally* Miguel A. Diego et al., *Prepartum, Postpartum, and Chronic Depression Effects on Newborns*, 67 PSYCHIATRY 63 (2004) (reviewing literature on prepartum depression and its effects on mother and child, in addition to providing a new study on these effects).

[104] Isaac v. Jones, 529 F. Supp. 175, 180 (N.D. Ill. 1981).

[105] *See* Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977) (providing the following description of *Estelle*: "the Court was careful to observe that the Eighth Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which cause or perpetuate pain. To assert otherwise would be inconsistent with contemporary standards of human decency."). *But see* Hathaway v. Coughlin, 37 F.3d 63 (2d Cir. 1994) (applying a more restrictive standard). For a discussion about this internal tension within the Second Circuit, see Laura Smolowe, Note, *Rejecting the Cosmetic Label to Revive the Eighth Amendment*, 23 YALE L. & POL'Y REV. 357, 361–63 (2005).

[106] Koehl v. Dalsheim, 85 F.3d 86, 88. (2d Cir. 1996).

[107] *See* Hunt v. Dental Dep't, 865 F.2d 198, 200 (9th Cir. 1988).

[108] *See* Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1187 (5th Cir. 1986) ("A psychological or psychiatric condition can be as serious as any physical pathology or injury . . . .").

[109] *See, e.g.*, Partee v. Lane, 528 F. Supp. 1254, 1261 (N.D. Ill. 1981).

layperson would easily recognize the necessity for a doctor's attention."[110] The state argued that there was no serious medical need absent a decision from a physician stating that the specific abortion requested was medically necessary.[111] However, an amicus brief filed by the American College of Obstetricians and Gynecologists ("ACOG") undermines this argument.[112] Analyzing the relevant medical research, the ACOG argues that "denying access to abortion care prevents a woman from obtaining pregnancy-related care that can reduce risks to her health and life" and "denying pregnant women the ability to decide whether or not to terminate a pregnancy is inconsistent with good medical judgment and with standard medical care."[113] Perhaps most importantly, the ACOG directly argues that "abortion care is a serious medical need."[114] It would, therefore, seem that even given this higher standard proposed by the State of Missouri, the standards of care established by physicians recognize that unwanted prison pregnancies represent a serious medical need necessitating a doctor's attention. While each inmate will need the individualized attention of a doctor, an unwanted prison pregnancy itself is a *per se* serious medical need under this standard.

2. *Preventing inmates from terminating unwanted pregnancies may prohibit them from ever receiving the operation*

Elective procedures can be considered to represent a "serious medical need" when the prisoner would never be able to have the operation if it was not available while in prison. In *Derrickson v. Keve*, a federal district court found that the denial of an elective tonsillectomy violated the Eighth Amendment.[115] The court reasoned that the prisoner was serving a life sentence, and therefore his condition would be made irreparable if the surgery was denied.[116] A similar position was taken in *Delker v. Maass*,[117] where the court plainly stated that, "[t]he classification of surgery as elective does not abrogate the prison's duty, or power, to promptly provide necessary medical treatment for prisoners."[118]

When inmates are denied access to an elective abortion, they can lose the ability to ever elect this remedy, as was clearly demonstrated in the case

---

[110] Reply Brief of Appellants at 20, Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008) (No. 06-3108) (citing Camberos v. Branstad, 73 F.3d 174, 176 (8th Cir. 1995)).

[111] *Id.* at 20–21.

[112] Brief for American College of Obstetricians & Gynecologists et al. as Amici Curiae Supporting Plaintiffs-Appellees, Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008) (No. 06-3108).

[113] *Id.* at 5–9, 10–17.

[114] *Id.* at 18–22.

[115] 390 F. Supp. 905, 906–07 (D. Del. 1975).

[116] *Id.* at 907.

[117] 843 F. Supp. 1390 (D. Or. 1994).

[118] *Id.* at 1399.

of *Victoria W.*[119] Even women who spend a short time in prison may face this risk if medical complications that could render abortion infeasible arise during their incarceration. As such, the fact that these abortions are elective does not mean that they do not represent a "serious medical need."

3. *Forcing inmates to continue unwanted pregnancies and give birth in prison represents a serious violation of basic human dignity in direct violation of the Eighth Amendment*

The Supreme Court has stated that *Estelle* applies "contemporary standards of decency"[120] in an attempt to eradicate "serious deprivation of basic human needs" and conditions that "may deprive inmates of the minimal civilized measure of life's necessities."[121] This reflects the Court's belief that the Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[122] Denying inmates the ability to terminate an unwanted pregnancy does not meet this civilized standard. While female inmates who wish to continue their pregnancies face all of the risks and harms described above, there is something specifically problematic about subjecting women prisoners to this much pain against their will.[123] This is even more incredible when a simple, safe, and effective medical procedure is available to avoid all of these problems.

To illustrate the reality of prison birth, it is useful to examine the case of one woman who gave birth in a California prison. This inmate went into labor during "count," a surveillance procedure performed several times each day where prisoners are locked in their cells and counted.[124] The guards refused to allow her to leave her cell and seek medical attention until the "count" was finished.[125] Because of the delay, the inmate ended up giving birth in prison instead of at a hospital.[126]

Amnesty International documented the direct testimony of an inmate with minimum security status:

---

[119] Abortion may be unique among elective surgeries in its time sensitivity. For a similar critique of the *Victoria W.* position, see Femi S. Austin, Note, *Limits on State Inmates' Access to Abortion: A Discussion of the Fifth Circuit's Decision in* Victoria W. v. Larpenter, 27 WOMEN'S RTS. L. REP. 87, 98 (2006).

[120] Estelle v. Gamble, 429 U.S. 97, 103 (1976).

[121] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

[122] *Estelle*, 429 U.S. at 102 (quoting Jackson v. Bishop, 404 F. 2d 571, 579 (8th Cir. 1968)) (citations omitted).

[123] It is worth noting that forcing inmates to receive abortions against their will would also be a fundamental violation of the inmates' rights. This Comment has consistently tried to differentiate between the interests of inmates and non-inmates as well as the issues concerning wanted and unwanted pregnancies. There are unique health concerns that affect unwanted prison pregnancies and it is only in this context that this analysis applies.

[124] Rachel Roth, *Searching for the State: Who Governs Prisoners' Reproductive Rights?*, *in* THE REPRODUCTIVE RIGHTS READER 243, 249 (Nancy Ehrenreich ed., 2008).

[125] *Id.*

[126] *Id.*

> Giving birth while incarcerated was one of the most horrifying experiences of my life. While enduring intense labor pains, I was handcuffed while being taken to the hospital, even though I was in a secured vehicle with a metal grating between the driver's and passenger's compartments and with no interior door handles on the passenger doors. With the handcuffs on, I could not even hold my stomach to get some comfort from the pain . . . . At the hospital I was shackled to a metal bed post [sic] by my right ankle throughout 7 hours of labor, although a correctional officer was in the room with me at all times . . . . Imagine being shackled to a metal bedpost, excruciating pains going through my body, and not being able to adjust myself to even try to feel any type of comfort, trying to move and with each turn having hard, cold metal restraining my movements . . . . Even animals would not be shackled during labor . . . . The birth of a child is supposed to be a joyous experience, and I was robbed of the joy of my daughter's birth.[127]

Given this testimony, it is easy to see how forcing any inmate to go through this pain, with its concomitant risks and psychological harms, would be cruel and unusual.[128] A strong argument can be made that there is no place in a civilized society for a pregnant woman in an orange jumpsuit, forced to bear a child against her will, suffering morning sickness in lockdown, shackled as she gives birth, only to send her back to prison as soon as possible.

C. Eighth Amendment Claims in Previous Prison Abortion Cases

In 1987, the Third Circuit in *Monmouth* largely adopted the argument described above, finding that the policy in question "constitutes a deliberate indifference to the serious medical needs of . . . inmates who opt for abortion."[129] The court first found that the prison officials had demonstrated deliberate indifference "toward the medical needs of inmates exercising their constitutionally protected right to choose abortion."[130] The proof of the deliberate indifference was the burdensome release procedure, especially with

---

[127] Amnesty International, *supra* note 5, at 268. While not directly relevant, the simple fact that Amnesty International and other human rights groups are investigating American prisons to see if we live up to international standards is a sign of how serious the problem is. For more on this point, see Martin Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 79–84 (2000).

[128] Being shackled while giving birth would most likely be found to be cruel and unusual even when the inmate wanted to carry the pregnancy to term and it is an analytically separate claim to argue that nobody should be shackled during birth. Yet the fact that inmates are sometimes shackled during birth emphasizes the dehumanizing experience of being forced to bring a pregnancy to term in prison.

[129] Monmouth County Corr. Inst'l Inmates v. Lanzaro, 834 F.2d 326, 351 (3d Cir. 1987).

[130] *Id.* at 347.

reference to the time-sensitive nature of the inmate's gestational period.[131] Next, the court established that an elective, non-therapeutic abortion can constitute a serious medical need.[132] The court described the uniqueness of pregnancy, noting that unlike any other medical condition, the election of an option (whether or not to keep the child) determines the subsequent medical need.[133] After discussing *Roe v. Wade*, the court cited an amicus brief that noted "the increase in risk of death, physical discomforts and psychological consequences of adoption on a woman who gives birth" but the opinion does not go into detail, or describe any of these discomforts or consequences.[134] In a concurring opinion, Judge Mansmann contested the Eighth Amendment findings, explicitly stating that the *Estelle* standard does not apply, as the court was only considering "medically unnecessary abortions."[135] The concurrence recognizes that "physical and psychological ills" may accompany pregnancy, but it does not believe that the denial of an abortion equates to "painful disease or injury per se."[136]

While the Fifth Circuit did not directly address the Eighth Amendment issue in *Victoria W.*, the district court there had already rejected the argument, saying that a "non-therapeutic abortion sought due to financial and emotional reasons" is not a serious medical need under *Estelle*.[137] The district court found that an elective abortion "is simply lacking in similarity and intensity to the other medical conditions that have been found to be serious medical needs under the Eighth Amendment."[138] While the district court acknowledged that an abortion necessary to save a woman's life constitutes a serious medical need, all other abortions were described as being performed merely to avoid "inconvenience and financial drain."[139]

D. The Eighth Amendment Claim in Roe v. Crawford

The district court in *Roe v. Crawford* found that the MDC policy violated the Eighth Amendment.[140] The court described the *Estelle* standard and then directly cited *Monmouth* for the proposition that an outright denial to medical treatment constitutes deliberate indifference.[141] The court cited to *Monmouth* again to show that a non-therapeutic abortion constitutes a seri-

---

[131] *Id.* at 347 n.32.
[132] *Id.* at 344–49.
[133] *Id.* at 349.
[134] *Id.* (noting Brief for American Civil Liberties Union and the American Public Health Association).
[135] *Id.* at 354 (Mansmann, J., concurring).
[136] *Id.*
[137] Victoria W. v. Larpenter, 205 F. Supp. 2d 580, 601 (E.D. La. 2002).
[138] *Id.*
[139] *Id.* While the district court does not explain what it means by this phrase, it is hard to imagine the extreme deprivations caused by unwanted prison pregnancies as mere inconveniences.
[140] Roe v. Crawford, 439 F. Supp. 2d 942, 953 (W.D. Mo. 2006).
[141] *Id.*

ous medical need.[142] No authorities other than *Monmouth* were included, nor was there a discussion of the concurring opinion in *Monmouth* or the opposite position taken in *Victoria W*.[143]

Judge Riley's opinion for the Eighth Circuit reversed this holding. The court agreed that the policy demonstrated deliberate indifference under *Estelle*, but disagreed on the second part of the test, declaring that non-therapeutic abortions do not represent a serious medical need.[144] The court cited to the district court's opinion in *Victoria W.* to support the MDC's contention that no elective procedure could constitute a serious medical need.[145] This position was then contrasted with the *Monmouth* decision.[146] Next, the court described Judge Mansmann's concurrence.[147]

Having outlined these three positions, the court attempted to determine which approach the Eighth Circuit should follow.[148] First, the court looked to *Johnson v. Bowers*,[149] an earlier Eighth Circuit case that had approvingly cited *Monmouth*. *Johnson* concerned an inmate who was stabbed while incarcerated and sought surgery to repair the resulting nerve damage.[150] The prison physician referred Johnson to the University of Missouri Hospital, which recommended surgery, but coded it as "elective."[151] The court declared that the "gratuitous classification of Johnson's surgery as 'elective,' however, does not abrogate the prison's duty, or power, to promptly provide necessary medical treatment for prisoners," citing *Monmouth* to support this position.[152]

The court in *Roe v. Crawford* narrowly interpreted this decision, rejecting Roe's proposition that this incorporated the *Monmouth* majority position.[153] Instead, the court argued that *Johnson* prevents prison officials from designating necessary procedures as "elective" in order to avoid providing treatment.[154] While the court weighed this in a manner that was detrimental to Roe's argument, this is a rather progressive position: courts should not

---

[142] *Id.*
[143] *Id.*
[144] Roe v. Crawford, 514 F.3d 789, 798–99 (8th Cir. 2008) *reh'g en banc denied*, No. 06-3108 (8th Cir. Feb. 27, 2008).
[145] *Id.* at 799.
[146] *Id.* at 799–800.
[147] *Id.* at 800.
[148] *Id.* at 800–01.
[149] Johnson v. Bowers, 884 F.2d 1053 (8th Cir. 1989). As noted *supra* note 110, this is the case that the MDC advanced in its brief.
[150] *Id.* at 1054.
[151] *Id.* at 1055.
[152] *Id.* at 1056 (citing Monmouth County Corr. Inst'l Inmates v. Lanzaro, 834 F.2d 326, 348 n.32).
[153] Roe v. Crawford, 514 F.3d 789, 800 (8th Cir. 2008) *reh'g en banc denied*, No. 06-3108 (8th Cir. Feb. 27, 2008).
[154] *Id.*

defer to prison guards' judgment in these circumstances and instead should look to objective criteria in determining what is a serious medical need.[155]

Next, the court turned to the Supreme Court's abortion jurisprudence.[156] The court found guidance in rulings that denied any affirmative duty by the state to "provide, fund, or help procure an abortion for any member of the general population."[157] While the court is correct, none of these cases involve Eighth Amendment claims.[158] None, in fact, even mention the Eighth Amendment, and it is unclear how they inform the question at hand. Whether the pain and suffering caused to an inmate by an unwanted pregnancy is a serious medical concern is unrelated to the government's obligation to fund abortions in a non-prison setting.

Finally, the court concluded that *Victoria W.* and the *Monmouth* concurrence represented a better interpretation of the Eighth Amendment and were more consistent with Supreme Court precedent, and the court declared elective, non-therapeutic abortions not to constitute a medical need.[159] No satisfactory justification can be found for this conclusion. In its discussion of *Johnson*, the court argued that an objective test should be used to make this determination.[160] The *Roe v. Crawford* court does not perform this analysis, nor can anything resembling this test be found in the Supreme Court cases cited as supporting this conclusion.[161] Neither the district court nor the Fifth Circuit in *Victoria W.* performs this analysis.[162] *Monmouth* is the closest any case has come to attempting an objective analysis, but the *Roe v. Crawford* court does not adopt its conclusions.

Elective abortions ought to be considered a serious medical need because of the extraordinary pain and suffering, both physical and mental, that unwanted prison pregnancies cause inmates. The risks and harms done to women were described by Vitale[163] and noted by the *Monmouth* court.[164] Even more importantly, these harms were described by Roe in her original brief as well as in an amicus brief.[165] As there is no alternative to abortion

---

[155] For a similar argument, see Laura Smolowe, *supra* note 105, at 358. Smolowe argues that the Second Circuit ought to reject the practice of labeling procedures as "cosmetic" to automatically deny care under the second prong of the *Estelle* standard. *Id.*

[156] Roe v. Crawford, 514 F.3d at 800–01.

[157] *Id.* (citing Rust v. Sullivan, 500 U.S. 173 (1991); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989); Harris v. McRae, 448 U.S. 297 (1980)).

[158] *See Rust*, 500 U.S. at 178 (analyzing regulations with respect to First and Fifth Amendments); *Webster*, 492 U.S. at 501 (analyzing statute with respect to First, Fourth, Ninth, and Fourteenth Amendments); *Harris*, 448 U.S. at 301 (analyzing statute under First and Fifth Amendment).

[159] Roe v. Crawford, 514 F.3d at 801.

[160] *Id.* at 799–800.

[161] *See supra* note 158 and accompanying text.

[162] *See Victoria W. v. Larpenter*, 205 F. Supp. 2d 580, 600–01 (E.D. La. 2002); *Victoria W. v. Larpenter*, 369 F.3d 475, 483–89 (5th Cir. 2004).

[163] *See* Vitale, *supra* note 42, at 559–63.

[164] Monmouth County Corr. Inst'l Inmates v. Lanzaro, 834 F.2d 326, 349 (3d Cir. 1987).

[165] *See supra* notes 110, 112.

that addresses the significant health risks and mental anguish that inmates suffer because of an unwanted pregnancy, an elective abortion constitutes a serious medical need.

IV. The Impact of an Eighth Amendment Argument

The Eighth Circuit was aware that *Monmouth* does not particularly conform to Supreme Court precedent, although this discontinuity was not completely explored.[166] As the court noticed, *Monmouth* actually required the state to pay for abortions, because they represented a serious medical need under the Eighth Amendment, in direct contradiction to the reasoning represented by *Webster v. Reproductive Health Services*[167] and *Harris v. McRae*.[168] Furthermore, the court stated that the most basic medical provisions classified as serious under *Estelle* have been the kinds of procedures that society has provided to the indigent under Medicaid.[169] The court thought that the ruling in *Harris* should be read as a strike against the seriousness of forced prison pregnancies.[170] In fact, the serious medical need posed by forced prison pregnancy and compelled prison birth may serve as a strike against *Webster* and *Harris*.

Harris and *Webster* both uphold statutory limitations on the use of state funds for abortions.[171] *Harris* famously states that while "government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation," which is based on the due process liberty recognized in *Roe v. Wade*.[172] The negative privacy right described in *Harris*, however, is not the same as the affirmative right prisoners have under the Eighth Amendment. If denying pregnant inmates an abortion is a cruel and unusual punishment, then Congress would not have the constitutional authority to pass a statute that prevents women in prison from getting access to an abortion. Prisons would be required to pay for abortion services to indigent women, the Hyde Amendments[173] would be unconstitutional to the extent they forbid this, and *Harris* would have to be overturned in part.

There is an additional and important element of an Eighth Amendment argument. At no point in time does a prisoner's Eighth Amendment right to an abortion depend on *Roe v. Wade*. As noted above, every court that has analyzed the issue, as well as the Vitale article, contextualizes the Eighth

---

[166] *See* Crawford, 514 F.3d at 801.
[167] Webster v. Reprod. Health Serv., 492 U.S. 490, 522 (1989).
[168] Crawford, 514 F.3d at 801 n.9 (citing *Monmouth*, 834 F.2d at 344–45).
[169] *Id.*
[170] *Id.*
[171] *See* Harris v. McRae, 448 U.S. 297, 326–27 (1980); Webster, 492 U.S. at 522.
[172] *Harris*, 448 U.S. at 316.
[173] 42 U.S.C. 1397ee(c)(1) (2006) (providing that "Funds provided to a state . . . may include coverage of abortion only if necessary to save the life of the mother or if the pregnancy is the result of an act of rape or incest").

Amendment right with respect to the abortion right created by *Roe v. Wade*.[174] While it might seem counterintuitive, the due process right to an abortion created by *Roe v. Wade* has no impact on whether an Eighth Amendment right to an abortion exists.[175] The Eighth Amendment's prohibition on cruel and unusual punishment does not depend on preexisting rights to various medical treatments. *Estelle* stands for the principle that prisoners have an affirmative right to the health care necessary to avoid cruel and unusual punishment.[176] Whenever a prisoner needs medical treatment, he or she does not need to cite a Supreme Court case that creates the right for that specific procedure. As the *Monmouth* court stated, there is no substitute for an abortion that can equally avoid the serious risks unwanted pregnancies pose to inmates.[177] Therefore, if there exists an Eighth Amendment right to avoid the pain and suffering caused by unwanted prison pregnancies, the existence of a due process right to an abortion would be unnecessary for prisoners.[178]

This independence from *Roe v. Wade* reflects one of the important aspects of the Eighth Amendment argument: that there is a qualitative difference between unwanted pregnancies inside and outside of jail. Inmates are isolated from support networks that would ease difficult times. Instead, they find themselves at the mercy of guards, other prisoners, and a penal system that is hardly designed for comfort. Nutritional and safety concerns are greater in prison, where women do not control their diet, exercise habits, or workloads. While the suffering faced by women outside of prison forced to become mothers against their will is incredible, prisoners suffer additionally. This suffering can be exacerbated when they are denied the ability to be with their children after birth.

An Eighth Amendment defense, therefore, only protects abortion rights in a very limited sense.[179] But this small, protected area of abortion rights could possibly be extended by non-legal arguments to other areas. Already, one commenter has noted that prisoners may have better abortion access

---

[174] *See* Vitale, *supra* note 42, at 560; *Monmouth*, 834 F.2d at 329; Victoria W. v. Larpenter, 205 F. Supp 2d 580, 592 (2002).

[175] This is another difference between the Eighth Amendment analysis and the *Turner* standard. Were *Roe v. Wade* overturned, there would be no infringement of a constitutionally protected right that would trigger the *Turner* test.

[176] Estelle v. Gamble, 429 U.S. 97 (1976).

[177] *Monmouth*, 834 F.2d at 349.

[178] This argument can only be taken so far. Certainly there is not an Eighth Amendment right to forcibly take the organs from a stranger to assist an inmate, even if such a procedure were medically necessary. Without the rights created by *Roe v. Wade*, it may be possible for Congress to declare abortion to be a crime in a manner similar to killing a stranger for his/her organs.

[179] It is worth noting that the women whose rights are being protected, inmates, are disproportionately poor and ethnic minorities. *See* Parker, *supra* note 1, at 262. The Eighth Amendment argument would, therefore, disproportionately protect women in subordinated social groups.

than women serving in the military.[180] Simply making this argument does not have legal force, but there exists a certain moral force to the idea that our servicewomen deserve at least as many rights as prisoners do. Furthermore, an argument could be made that abortion rights ought to be extended to all women, to remove the moral hazard that would be created where pregnant women who wanted to terminate their pregnancy would be incentivized into committing crime.[181]

V. Conclusion

An Eighth Amendment right to an abortion has largely been overlooked, perhaps because it does not offer as much protection as do sex equality arguments.[182] The few commentators who have argued for an Eighth Amendment right have overlooked the strategic advantages. Budnitz puts forward a limited version of an Eighth Amendment argument, but the focus of her article is an argument that courts should follow *Johnson v. California* and apply the *Casey* undue burden standard instead of the *Turner* standard.[183] While Vitale asserts that the Eighth Amendment obligates states to provide prisoners with medical treatment, including abortions, this article was written before *Harris*.[184] It is worth noting that Nancy Stearns made an Eighth Amendment claim in an amicus brief filed in *Roe v. Wade*, which was not limited to the prison context.[185]

This Eighth Amendment claim is conceptualized as a way to independently secure abortion rights for a very limited group of people. This is a different approach from the attempts by other feminists to independently secure abortion rights through sex equality arguments.[186] It is beyond the scope of this Comment to fairly and adequately discuss the many different

---

[180] *See* Leah Ginsberg, Note, *Do Prisoners Get a Better Deal? Comparing the Abortion Rights and Access of Military Women Stationed Abroad to Those of Women in Prison*, 11 Cardozo Women's L.J. 385, 411 (2005).

[181] Currently, the opposite problem exists, where judges can sentence women to jail in order to prevent them from getting an abortion. Budnitz recalls a story where a judge declared in open court that she was sending a woman to jail because the woman had stated an intention to get an abortion if paroled. Budnitz, *supra* note 4, at 1301. While in jail, this woman repeatedly asked officials to allow her to get an abortion, but the officers refused and the woman was released too late to get a legal abortion. *Id.*

[182] For example, not a single author in the excellent collection What *Roe v. Wade* Should Have Said addresses the Eighth Amendment argument, although one author references Nancy Stearns's amicus brief. What *Roe v. Wade* Should Have Said 246 (Jack Balkin ed., 2005) (referencing Motion for Permission to File Brief and Brief Amicus Curiae on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Coalition at 24, 32, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18)).

[183] *See* Budnitz, *supra* note 4, at 1321–23. The district court rejected this argument, declining to read the *Johnson v. California* broadly enough to replace *Turner* with *Casey*. Roe v. Crawford, 439 F. Supp. 2d 942, 947–49 (W.D. Mo. 2006).

[184] *See* Vitale, *supra* note 42, at 552–53.

[185] *See* Stearns, *supra* note 182, at 37–43.

[186] *See, e.g.*, Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281, 1299 (1991).

approaches taken by those who make sex equality arguments for abortion. Reva Siegel provides the following succinct definition:

> A sex equality analysis of reproductive rights views the social organization of reproduction as playing a key role in determining women's status and welfare and insists - custom notwithstanding - that government regulate relationships at the core of the gender system in ways that respect the equal freedom of men and women.[187]

These arguments often see *Roe v. Wade* as an incomplete defense of abortion rights and seek to expand abortion rights by grounding them in a sex equality analysis.[188]

While the Eighth Amendment claim presented here is not a sex equality argument for abortion, the two approaches are not mutually exclusive.[189] The Eighth Amendment argument makes no claim about the role reproductive freedom plays in creating an equal society; it merely looks at medical literature and cultural notions of dignity. Judges who see themselves as outright opponents of abortion rights would likely ignore modern medical knowledge in order to find that forced inmate pregnancy does not represent a serious medical need, thereby preventing the limited expansion of abortion rights discussed above. However, more moderate judges who are comfortable with restrictions on abortion rights may agree with the Eighth Amendment argument. Focusing on the horrific pain and suffering and the extreme indignities faced by inmates who are forced to give birth against their will may prove to be persuasive and perhaps will succeed where sex equality arguments have not. There is no place in a humane society for the state to force a female prisoner to remain pregnant against her will, to chain her legs to a hospital bed while she gives birth, and to deny her constitutional protection against cruel and unusual punishment.

---

[187] Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 815 (2007). For additional sex equality arguments, see CATHARINE MACKINNON, SEX EQUALITY 1127–62 (2d ed. 2007) (summarizing and exploring a number of sex equality arguments for reproductive rights).

[188] *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 382–83 (1985).

[189] Furthermore, other approaches are possible. A recent article that analyzes a strategy of abortion litigation under state constitutional law describes a theory of autonomy rights in addition to the sex equality approach. *See* Scott A. Moss & Douglas M. Raines, *The Intriguing Federal Future of Reproductive Rights*, 88 BOSTON U. L. REV. 175, 186 (2008).