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Reproductive Freedom: Abortion Rights of Incarcerated and Non-Incarcerated Women

BY SARAH TANKERSLEY*

INTRODUCTION

Since 1973, American women have had the legal right to terminate their pregnancies. This controversial right has been modified in many ways since then. Incarcerated women have the same right to terminate their pregnancies as other women. However, the incarcerated pregnant woman is not constrained by the practical obstacles faced by her counterparts outside of prison. The surprising result is that American women in prison have more reproductive freedom than unincarcerated American women.

This Note will address this disparity. Part I will address the general right to have an abortion. This section will discuss the right to privacy

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2 See Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding a requirement that doctors performing abortions inform the patient of all consequences to her fetus, even though such information has no effect on her own health and is far more inclusive than the normally applicable informed consent doctrine, and upholding a mandatory twenty-four hour waiting period); Rust v. Sullivan, 500 U.S. 173 (1991) (upholding law forbidding recipients of Title X funding from referring a pregnant client to an abortion provider, even upon specific request). See also the following cases upholding laws prohibiting any government funding of abortions for indigent women: Webster v. Reproductive Health Services, 492 U.S. 490 (1989); Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

3 See infra notes 49-106 and accompanying text.

4 See infra notes 107-62 and accompanying text.

5 See infra notes 18-48 and accompanying text. This Note will assume throughout that the pregnancy at issue is not the result of rape, either in prison or outside.
under cases from Griswold v. Connecticut \(^6\) to Roe v. Wade \(^7\) and limitations thereon under Roe and Planned Parenthood v. Casey. \(^8\) Part II will address the legal bases for providing abortions to inmates. \(^9\) These bases include a prisoner’s right to be free from deliberate indifference to her serious medical needs under Estelle v. Gamble, \(^10\) as well as the impropriety of denying prisoners their rights unless such denial is reasonably related to a legitimate penological objective under Turner v. Safley. \(^11\) These bases are synthesized by the Supreme Court in Monmouth County Correctional Institution Inmates v. Lanzaro. \(^12\) Part III will address the actual availability of an abortion to incarcerated and non-incarcerated women. \(^13\) This section considers dependency on the prison system, \(^14\) accessibility of services, \(^15\) and funding by the government. \(^16\) Part IV will address policy considerations in determining the extent to which the government will facilitate abortions both inside and outside of the prison system. \(^17\) Finally, Part V will conclude with an argument that women outside the prison system should have the same reproductive freedom as their incarcerated counterparts, including the accessibility and funding to make their right to choose a meaningful one.

I. GENERAL RIGHT TO AN ABORTION

A. Right to Privacy: From Griswold to Roe

A woman’s right to terminate her pregnancy was established in the landmark decision of Roe v. Wade. \(^18\) Roe came about as the logical next

\(^{9}\) See infra notes 49-106 and accompanying text.
\(^{13}\) See infra notes 107-62 and accompanying text.
\(^{14}\) See infra notes 107-20 and accompanying text.
\(^{15}\) See infra notes 121-49 and accompanying text.
\(^{16}\) See infra notes 150-62 and accompanying text.
\(^{17}\) See infra notes 163-75 and accompanying text.
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step in a series of cases propounding the right to privacy, or "'the right
to be let alone.'" These cases, as they affect reproductive freedom,
began in 1965 with Griswold v. Connecticut. Griswold invalidated a
law prohibiting the use of contraceptive devices by married couples on
the theory that government should not interfere with the "intimate
relation[s] of husband and wife," which are "intimate to the degree of
being sacred."

In 1972, Eisenstadt v. Baird extended the right to use contracep-
tives to unmarried persons. Writing for the Court, Justice Brennan
observed that the right to privacy is not a marital right, because a
marriage is not an "independent entity with a mind and heart of its own,
but an association of two individuals each with a separate intellectual and
emotional makeup." Therefore, the right to use contraceptives is the
right of an individual within a marriage, and Equal Protection prohibits
substantial difference between the rights of married persons and those of
single persons.

The Court in Roe v. Wade extended the right to privacy and furthered
the availability of contraception, concluding that "the right of person-
al privacy includes the abortion decision." The Court based its
ruling on a line of cases recognizing a right to personal privacy and
bodily integrity, and upon the "detriment that the State would impose

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(quotting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J.,
dissenting)).


21 Id. at 482.

22 Id. at 486.


24 Id.

25 Id. at 453.

26 Id. Equal Protection allows substantial differences in treatment of
persons in similar circumstances only if such differences are reasonably related
to compelling government interests. Id. at 446-47 ("'[T]his Court has consistent-
ly recognized that the Fourteenth Amendment does not deny to States the power
to treat different classes of persons in different ways. . . . The Equal Protec-
tion Clause of that amendment does, however, deny to states the power to
legislate that different treatment be accorded to persons placed by a statute into
different classes on the basis of criteria wholly unrelated to the objective of
that statute.'" (quoting Reed v. Reed, 404 U.S. 71, 75-76 (1971))).

27 Roe v. Wade, 410 U.S. 113, 154 (1973). This right is not unqualified,
however. Id. See infra notes 31-48 and accompanying text.

upon the pregnant woman by denying this choice altogether,\(^{29}\) including mental, physical, and psychological harm caused by forced maternity.\(^ {30}\)

**B. Limitations Thereon: From Roe to Casey**

*Roe*, while upholding a woman’s right to have an abortion, never held that the right was absolute. Indeed, the Court held that “this right is not unqualified and must be considered against important state interests in regulation.”\(^ {31}\) Presumably acceptable state interests mentioned by the Court included “safeguarding health [of the mother], ... maintaining medical standards, and ... protecting potential life.”\(^ {32}\) In order to balance these interests, the Court devised a trimester paradigm.

In terms of maternal health and the maintenance of medical standards, the Court recognized that a first trimester abortion is statistically safer than continued pregnancy.\(^ {33}\) Consequently, a woman can have an “abortion free of interference by the State”\(^ {34}\) until the end of the third month of a pregnancy, and after that point it is permissible for the State to “regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.”\(^ {35}\)

In terms of the protection of potential life, the Court determined that the State can have a “compelling” State interest in regulating the pregnancy.\(^ {36}\) The Court decided to fix this superseding interest at the

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\(^{29}\) Id. at 153.


\(^{31}\) *Roe*, 410 U.S. at 154.

\(^{32}\) Id.

\(^{33}\) Id. at 163.

\(^{34}\) Id.

\(^{35}\) Id.

\(^{36}\) Id.
point of viability.\footnote{Id.} Viability, at least at the time of \textit{Roe}, was approximately seven months, possibly six months.\footnote{Id. at 160.} Since the "compelling" point for maternal health is earlier, at three months, this is the point that the Court fixed for unfettered termination of a pregnancy by choice.\footnote{Id. at 163.}

In light of modern advances in medical technology, the maternal health considerations are being pushed forward into later pregnancy, while the viability aspect is being pushed back into earlier pregnancy, a fact recognized by Justice O'Connor as early as 1983.\footnote{Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting), overruled by Planned Parenthood v. Casey, 505 U.S. 833 (1992).} Consequently, in 1992, the Court in \textit{Planned Parenthood v. Casey} "reject[ed] the trimester framework"\footnote{Planned Parenthood v. Casey, 505 U.S. 833, 873 (1992).} in favor of an undue burden standard, therefore invalidating "a state regulation [that had] the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."\footnote{Id. at 877.}

The \textit{Casey} Court applied its undue burden standard to several questions. The Court upheld an informed consent requirement that a doctor tell a patient seeking an abortion about "the consequences to the fetus, even when those consequences have no direct relation to her health";\footnote{Id. at 882 (overruling Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) as far as they are inconsistent).} upheld a mandatory twenty-four hour waiting period between the decision to abort the pregnancy and the actual performance of the procedure;\footnote{Id. at 885-86 (overruling Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) as far as it is inconsistent).} struck down a spousal notification requirement;\footnote{Id. at 892-98.} upheld a parental consent requirement for minors, with judicial bypass;\footnote{Id. at 899-900.} and upheld a record-keeping requirement,\footnote{Id. at 900-01.} except that the records cannot require a woman to explain her refusal to inform her spouse of her abortion.\footnote{Id. at 901.}
II. LEGAL BASIS FOR PROVIDING ABORTIONS TO INMATES

A. Deliberate Indifference to Serious Medical Needs: The Estelle Standard

The Eighth Amendment prohibits the use of cruel or unusual punishment on prisoners. This guarantee began as a prohibition on "‘torture[s]’ and other ‘barbar[ous]’ methods of punishment," and now includes "punishments which are incompatible with ‘the evolving standards of decency that mark the progress of a maturing society,’" or which "‘involve the unnecessary and wanton infliction of pain.’"

The Court in *Estelle v. Gamble* established that the Eighth Amendment gives incarcerated individuals the right to receive adequate medical care. J.W. Gamble, an inmate in a Texas state prison, sustained a back injury while in prison and claimed that he received inadequate medical treatment for his injuries. The Supreme Court, refusing to grant relief

49 The consideration of the standard developed in Estelle v. Gamble, 429 U.S. 97 (1976), in determining that the right to an abortion is a fundamental right in the form of a serious medical need is less important, now that *Casey* has established the right to an abortion as a fundamental right in the form of a right to privacy. However, *Monmouth Co. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir., 1987), *cert. denied*, 486 U.S. 1006 (1988) (ensuring prisoner abortions on demand) was decided before Planned Parenthood v. Casey, 505 U.S. 833 (1992), and that Court gives great weight to *Estelle.* *Estelle* is worth discussion for that reason.

50 The Eighth Amendment to the Constitution reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

*See generally* Anthony F. Grannucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839 (1969) (seminal work covering the historical background of the right to be free from cruel or unusual punishment).


52 *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

53 *Id.* at 103 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)).

54 *Id.* at 104 ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ *Gregg v. Georgia*, [428 U.S. 153] at 173, . . . proscribed by the Eighth Amendment.").

55 *Id.* at 98-101.
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to Gamble, set forth a twofold standard to define "inadequate medical care" in order to determine whether a violation of the Eighth Amendment occurred. To establish an Eighth Amendment violation, an inmate must demonstrate (1) that he had a "serious medical need" and (2) that prison officials acted with "deliberate indifference" thereto.

The Estelle Court did not define "serious medical need," but did give some examples, including a severed ear, an allergic reaction to penicillin, and leg surgery. Pregnancy, including elective abortion, was later defined as a serious medical need under this standard. Although pregnancy is a normal part of the life of any woman who chooses to bear children and is by no means an illness or injury, it is a serious medical need, and all aspects of medical treatment relating to pregnancy must be made available to prisoners.

The second prong of the Estelle test is "deliberate indifference." Even when a serious medical need has been identified and not treated, the Court will not find that an Eighth Amendment violation has occurred unless prison officials acted with "deliberate indifference." Officials will not be held liable for a constitutional violation if they acted without malice and the denial of medical treatment was due to a good faith mistake. In explaining that "[a]n accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain," the Court used, as an example, the case of a condemned prisoner who was sent to the electric chair a second time, after a mechanical malfunction thwarted the first attempt to execute him. Since the pain inflicted the first time was "accidental," it was not deemed cruel and unusual to try again.

56 Id. at 107-08.
57 Id. at 106; see Mary Catherine McGurrin, Pregnant Inmates' Right to Health Care, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 163 nn.15 & 16 (1993) (discussing the requisites for showing an Eighth Amendment violation).
58 Estelle, 429 U.S. at 106.
59 Id. at 104 n.10.
61 Id.
62 Estelle, 429 U.S. at 104.
63 Id.
64 Id. at 105.
65 Id.
The *Estelle* standard has become no less stringent in recent years. In *Wilson v. Seiter*, the Supreme Court addressed the issue of whether generally unsatisfactory prison conditions could rise to the level of an Eighth Amendment violation. In holding that they could not, Justice Scalia, writing for the Court, noted that "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists."

Further, in *Farmer v. Brennan*, the Court held that there can be no Eighth Amendment violation "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer was a transsexual, a biological man persistently uncomfortable with his gender who "wore women's clothing, . . . underwent estrogen therapy, received silicone breast implants, and submitted to unsuccessful 'black market' testicle-removal surgery." While incarcerated within the general male prison population for credit card fraud, s/he was beaten and raped by another inmate. The Court held that a prison official could show that he "knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent."

These two cases (*Wilson* and *Farmer*) are illustrative of the Supreme Court's reluctance to consider the discomfort of prisoners to be an Eighth Amendment violation unless there is a clear showing of malice on the part of prison officials. In his dissent to *Hudson v. McMillian*, Justice Thomas went so far as to say that the beating of a handcuffed and shackled inmate by two prison guards is not an Eighth Amendment violation if the harm caused is not "significant." While only Thomas

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67 *Wilson v. Seiter*, 501 U.S. 294 (1991). The conditions complained of were "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates." *Id.* at 296.

68 *Id.* at 305.


70 *Id.* at 1979.

71 *Id.* at 1975.

72 *Id.* at 1982.

d Scalia dissented from the majority holding in *Hudson* that the inmate's rights had been violated, the fact that two Justices on the Supreme Court feel that a chained inmate beaten by prison officials has not been subjected to cruel and unusual punishment shows how stringent the Eighth Amendment standard can be.

Far less extreme is that "an inadvertent failure to provide adequate medical care" is also an accident, not giving rise to an Eighth Amendment claim. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Failure to assist a prisoner in obtaining an abortion due to administrative confusion and inadvertent delay has been held to fall within that realm of medical mistakes which do not constitute deliberate indifference, although pregnancy is a serious medical need under *Estelle*.

B. *Reasonable Relation to Legitimate Penological Objectives: The Turner Standard*

Having determined that deliberate indifference to a serious medical need relating to pregnancy, including the need to have an elective abortion within the legal and medical time frame of early pregnancy, violates a constitutionally guaranteed right, it is necessary to examine when it is permissible to limit this constitutional right. Prisoners, by definition, lack many of the freedoms that other people take for granted, and because of this, many of the rights associated with freedom are "significantly curtailed."

A balancing test to determine the extent to which a prisoner's rights may be "significantly curtailed" is set forth in *Turner v. Safley*. *Turner* involved a prison regulation denying prisoners the right to get married. The regulation was struck down and the following rule of law was established: "when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate

74 Id. at 17.
75 *Estelle*, 429 U.S. at 105.
76 Id. at 106.
79 Id.
80 Gibson, 926 F.2d at 535-36.
penological interests. The Court developed a multifaceted scheme determining whether a regulation is reasonably related to a penological interest: (1) whether there is a "valid, rational conception" between the regulation and the legitimate government interests served; (2) whether there are alternative means for the prisoner to exercise the right in question; (3) whether accommodating the right will have serious detrimental effect on guards, other inmates, and allocation of prison resources in general; and (4) whether there are alternative means for the prison to accommodate the prisoner rights.

Using these criteria, the Turner Court upheld a ban on inter-prison correspondence, which served the valid penological interest of lessening the possibility of organized criminal or prison gang activities, and struck down a ban on prison marriages as serving no valid penological interest. It has since been held that, under the Turner guidelines, denial or delay of an elective abortion is not reasonably related to any legitimate penological interest.

C. A Synthesis of the Two: The Monmouth Decision

In 1987, the Court of Appeals for the Third Circuit, in Monmouth County Correctional Institution Inmates v. Lanzaro, held that inmates cannot be impeded from obtaining abortions. The extent of the holding includes the requirement that the county ensure the availability of funding. At issue in Monmouth was a regulation requiring inmates to obtain a court-ordered release on their own recognizance for the purpose

82 Id. at 89.
83 Id. (citations omitted).
84 Id. at 90.
85 Id.
86 Id. at 90-91.
87 Id. at 91-92.
88 Id. at 97-98.
90 Id.
of obtaining an abortion, and to provide their own funding.\textsuperscript{92} The Monmouth court drew its decision from Estelle and Turner.

Under the Estelle standard,\textsuperscript{93} the Monmouth court found that the requirement of a court order for elective abortion constituted deliberate indifference to a serious medical need.\textsuperscript{94} That an elective abortion is a serious medical need is predicated on three factors. First, pregnancy is a medical condition, although it is not an abnormal medical condition requiring remedial care.\textsuperscript{95} Second, the denial of an elective abortion has necessarily significant effects on a woman’s mental, physical, and emotional health based on the rigors of a full-term pregnancy, childbirth, and care of an unwanted child.\textsuperscript{96} Third, an elective abortion is time-bound, so that denial or delay renders the inmate’s condition “irreparable.”\textsuperscript{97} The court order requirement constitutes deliberate indifference because it is time-consuming for a minimum-security inmate to obtain a court-ordered release on her own recognizance, leading to a later and thereby less safe abortion, or possibly delaying the abortion until it is legally or medically impossible.\textsuperscript{98} A maximum security inmate will be unable to get a court-ordered release at all, and so would be forced to carry the pregnancy to term.\textsuperscript{99}

The Monmouth court also struck down the regulation based on the Turner standard of reasonable relation to a legitimate penological interest. First, there is no logical connection between the court order requirement and any penological interest, as any security or other risk involved in obtaining an abortion is the same as the risks involved in obtaining any other medical procedure.\textsuperscript{100} Second, there are no alternative means available to the inmate to obtain an abortion, especially for a maximum security inmate who will be unable to obtain a court-ordered release.\textsuperscript{101}

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\textsuperscript{92} Monmouth, 834 F.2d at 328.
\textsuperscript{93} See supra notes 49-78 and accompanying text.
\textsuperscript{94} Monmouth, 834 F.2d at 348.
\textsuperscript{95} Id.
\textsuperscript{96} Id. These are the same concerns originally mentioned in Roe v. Wade. See supra note 30 and accompanying text.
\textsuperscript{97} Monmouth, 834 F.2d at 348.
\textsuperscript{98} Id. at 337.
\textsuperscript{99} Id. This could create a sort of “baby farm,” where inmate mothers, carrying unwanted children and denied abortions, provide a supply of newborns for couples looking to adopt. The issues surrounding this scenario are beyond the scope of this Note.
\textsuperscript{100} Id. at 338.
\textsuperscript{101} Id. at 339.
\end{flushleft}
Even for minimum security inmates, the delay necessitated by obtaining a court order may effectively deny an inmate's abortion by pushing her over the threshold of legal or medical feasibility. Third, accommodating inmates' rights to abortion services will not have any serious detrimental impact on prison resources, as providing an abortion "impose[s] no more, and indeed probably less, administrative and financial burdens on [prison] officials" than providing requisite prenatal care if the inmate chooses not to terminate her pregnancy. Finally, there are viable alternatives to accommodate the prisoners' rights; namely treating elective abortions like any other medical process and providing that service on the same terms as other medical services. Such treatment would be a de minimis cost because the system for handling medical care is already in place.

Thus, the Monmouth court combined Estelle and Turner to hold that the right to an elective abortion is a constitutional right that may not be impinged upon by prison regulations.

III. ACTUAL AVAILABILITY OF ABORTION TO INCARCERATED AND NON-INCARCERATED WOMEN

A. Dependency on the Prison System: The Gibson Decision

The biggest problem encountered by inmates seeking an abortion is that they are necessarily dependent upon prison authorities to provide this service, as well as all other services, for them. A pregnant woman in prison must ask her jailers to arrange for her to get an abortion. If they refuse to accommodate her, she cannot just go to the next clinic on her list. While it may be possible for her to get an abortion without the cooperation of her jailers, it becomes very difficult. Refused assis-

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102 Id.
103 Id. at 342. A few prisons, most notably the Bedford Hills Correctional Facility in New York, allow children of inmates to live in the prison for a certain length of time. In these cases, the prison must absorb postnatal and child care costs as well as prenatal costs. A discussion of such facilities and their implications is beyond the scope of this Note.
104 Id. at 344.
105 Id.
106 McGurrin, supra note 57, at 163.
107 Monmouth, 834 F.2d at 345.
108 For example, she can contact a private attorney, assuming that she can afford one or can get one to take her case pro bono, and get a writ of prohibition
tance, she may very well have to bear the child and all the responsibilities of parenthood. This includes the unique responsibility of a parent in prison: that of placing her child in the care of another until she is released from prison. "The Warden may not permit the inmate's new born child to return to the institution. . . . Child placement is the inmate's responsibility."

Gibson v. Matthews illustrates an inmate's total dependency on the prison system to provide abortion services as requested. The Sixth Circuit held that prison officials' refusal to assist Leisa Gibson, who was then pregnant and serving time for bank robbery, to terminate her pregnancy did not constitute the "deliberate indifference to a serious medical need" required to state an Eighth Amendment claim.

The court predicated the Gibson decision on two considerations. First, the failure to perform the abortion could not be blamed on any one defendant, based on that defendant's actions in the situation he faced, and no liability could therefore attach to any defendant. Second, the officials were protected under qualified immunity, which provides that an

or a temporary restraining order to force the prison to accommodate her need for an abortion. See Farmer v. Brennan, 114 S. Ct. 1970, 1983 (1994) (inmate may seek injunction based on claim that officials are knowingly and unreasonably disregarding objectively intolerable risk of harm and will continue to do so).

28 C.F.R. § 551.24 (1996). A few prisons in New York allow inmates' babies to live in the prison nursery for a period of time, but these are by far the minority. See supra note 103.

Gibson v. Matthews, 926 F.2d 532 (6th Cir. 1991).

Id. While awaiting sentencing, Gibson wrote to the federal public defender and to the district court judge who would sentence her in April, 1986, indicating that she was then about 13-14 weeks pregnant and specifically stating that she desired to terminate her pregnancy. She was sentenced in May and travelled through various facilities, arriving at the Federal Correctional Institution in Lexington, Kentucky, in June. At that point, she was informed by the prison doctor that her pregnancy was too far advanced to have an abortion. There is no specific indication that any one person refused outright to procure an abortion for her (which is why the court held that there was no violation of her Constitutional rights), but the fact remains that she wanted an abortion and could not get one due to the failure of any prison official to act on her behalf. An abortion should have been arranged at her first request, especially considering that she was already into the second trimester of pregnancy at that point. Id. at 533.

Id. at 534-35. Gibson did not attempt to sue the medical director of any individual prison, or of the Bureau of Prisons as a whole. The Court does not address whether the buck would have stopped there in its "passing the buck" analysis. Id.
official will not be held liable for an act or omission "unless any reasonable government official would know or reasonably should have known that the action would violate a clearly established constitutional right." Qualified immunity was held to exist in *Gibson* because at the time of the events in question there was no clearly established constitutional right that prison employees facilitate abortions.

However, the situation has changed since *Gibson*. The events in *Gibson* took place in 1986; *Monmouth* was not decided until 1987. Although *Gibson* was decided in 1991, the ruling was based on the state of the law in 1986. The *Gibson* court gave due consideration to the *Monmouth* decision as regards the issue of qualified immunity, pointing out that the *Gibson* case had to be decided based on the facts and circumstances as they were in 1986, not as they were in 1987, after *Monmouth*. Judge Boggs, writing for the Court, asserted, "[w]e do not believe that it was a clearly established constitutional right at the time of the alleged actions regarding Gibson that federal prison employees were required to facilitate prisoners in their requests for an abortion," and, "[a]t the time these events took place, there were no reported cases regarding the abortion rights of prisoners." It seems clear that, had *Monmouth* been decided before the *Gibson* events took place, the actions of the prison officials, taken as a whole, would have violated a clearly established constitutional right.

Although the court specifically said that it would have ruled against *Gibson* even after *Monmouth* removed the qualified immunity question, on the grounds that no single defendant acted with "deliberate indifference" to Gibson's medical needs, and that each acted in accordance with his honest medical judgment, *Monmouth*'s removal of the qualified immunity defense goes far toward insuring that an inmate who desires an abortion will get one. *Gibson* was transferred through several prisons during her pregnancy and never stayed in one place long enough to make any single individual responsible for failure to assist her in obtaining an abortion. From *Monmouth* and the qualified immunity

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113 *Id.* at 535 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Dominque v. Telb, 831 F.2d 673, 676 (6th Cir. 1987)).

114 *Id.*

115 *Id.* at 535-36.

116 *Id.* at 535.

117 *Id.* (emphasis added).

118 *Id.* (emphasis added).

119 *Id.* at 536.

120 *Id.*
holding in *Gibson*, it appears that an inmate who, in interactions with the same prison and the same set of prison officials, requests an abortion and does not get one will have a cause of action against those prison officials.

It is true that a prison could still shuffle a pregnant inmate around long enough to deliberately prevent her from obtaining an abortion, but there is no reasonable explanation as to why a prison would do that. From an administrative perspective, it is surely easier to schedule an abortion than to be prepared for imminent childbirth, which cannot be planned for a convenient time. Also, from a liability perspective, *Gibson* does not alter liability predicated on deliberate indifference. It would be a huge risk to try to conceal such deliberate indifference, and it would serve no purpose. It, therefore, appears that an inmate who wants an abortion will get one, barring a good faith mistake on the part of prison officials.

B. Accessibility

The ability of incarcerated women to obtain abortion services should be contrasted with that of pregnant women who are not imprisoned. They too have the basic right from *Roe v. Wade*¹²¹ to terminate their pregnancies. However, *Roe* guarantees only that they will be free from intervention,¹²² and the Court has since consistently upheld laws that can be seen only as practical obstacles to actually exercising the right to have an abortion.¹²³

To begin with, there is the question of abortion counseling. A woman who cannot afford to go to a private doctor and must seek medical care under Title X might not be informed that an abortion is one option for

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¹²² *Id.* at 163-64.
¹²³ In upholding these laws, the Court has consistently held that constitutional protection of a right does not entail a constitutional guarantee of the ability or resources to fully exercise that right. Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992) (upholding a requirement that doctors performing abortions inform the patient of all consequences to her fetus, even though such information has no effect on her own health and is far more inclusive than the normally applicable informed consent doctrine, and upholding a mandatory twenty-four hour waiting period). *See supra* note 2 and accompanying text. Intervention as prohibited by *Roe* appears to involve an affirmative act on the part of the government to hinder a woman seeking an abortion, but does not apply to the regulation of abortion services which may more passively hinder her.
If she does not realize on her own that this is a viable medical alternative and that she has a legal right to pursue it, her rights under *Roe* might just as well not exist. Even if she does know that she can have an abortion and asks how to obtain one, no facility subsidized by the federal government can give her any advice, counseling, or referrals on the subject. \[125\]

Although the absolute “gag rule” prohibition on providing any reference to abortion providers was suspended in 1993, \[126\] it is still true that “[a] title X project may not provide counseling concerning the use of abortion as a method of family planning.” \[127\] When Title X projects do refer a pregnant woman to another health care provider, \[128\] they are required to tell the patient that they do not refer for abortions and to provide her with “a list of available providers that promote the welfare of mother and unborn child.” \[129\] This list may include health care providers who perform no abortions \[130\] and providers who perform some abortions and some prenatal care, but no providers “whose principal business is the provision of abortions.” \[131\]

The prohibition on referring a woman specifically to abortion providers hinders her in two ways. First, by telling her that it does not refer for abortions, a Title X project may convey the idea that abortion is not only less socially desirable than pregnancy (a message Title X admittedly intends to convey) but also less legally or medically appropriate than pregnancy. Since women who seek help through Title X are

\[124\] “A title X project may not provide counseling concerning the use of abortion as a method of family planning or provide a referral for abortion as a method of family planning.” 42 C.F.R. § 59.8(a)(1) (1995).

Title X is a federal program which provides contraceptive and general reproductive health services to low-income women. Title X care extends only to preconception services. Title X providers, upon finding that a woman is pregnant, cannot treat her throughout pregnancy, but may refer her to a provider that promotes “the welfare of mother and unborn child.” *Id.* § 59.8(a)(2).

\[125\] *Id.*

\[126\] *Id.* § 59.8 (the enforcement of this prohibition on counseling and referral for abortion services was suspended effective Feb. 5, 1993).

\[127\] *Id.* § 59.8(a)(1).

\[128\] Title X performs only family planning, i.e. pre-conception services. These include “preconceptional counseling, education, and general reproductive health care,” but not pregnancy care or abortion services. *Id.* § 59.2.

\[129\] *Id.* § 59.8(a)(2).

\[130\] *Id.* § 59.8(b).

\[131\] *Id.* § 59.8(a)(3).
likely to be among the younger and poorer women in America, it is likely that they may be unsure of their legal rights and/or their medical alternatives. The statement by a Title X employee that abortion is legally or medically undesirable may be enough to convince her to carry the pregnancy to term, even though she does not want a child, based solely on the misinformed conclusions she draws from the Title X facility's unwillingness to refer.

Chief Justice Rehnquist, speaking for the Court in Rust v. Sullivan, addressed this concern by saying that, as Title X projects address only preconception issues, "a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client..." However, when a Title X provider informs a woman that she is pregnant and tells her that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion... [but] that the project can help her to obtain prenatal care and necessary social services," it is very misleading. A reasonable woman, upon hearing this explanation, could easily believe that abortion is less legally or medically desirable than pregnancy. This is especially true of the young and poor women who are the most likely to seek governmental assistance in meeting their medical needs. While it is true that most American women today, regardless of their socio-economic status, understand that they have the right to terminate an unwanted pregnancy, the fact that an unfair rule will affect only a few makes it no less unfair.

Secondly, refusal to refer a woman to abortion providers denies her the knowledge of those best equipped to help her in procuring an abortion. Logically, doctors and clinics who "specialize" in abortions will have the most experience in abortion services and will, therefore, be the best providers available. A woman seeking assistance through Title X will not be referred, even indirectly, to these facilities. Thus, a woman who requests a referral to get an abortion will receive only a list of providers

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134 Id. at 200.


136 Most of the over four million women who seek Title X care are young and poor. Fact Sheet, supra note 132, at 2.

of both abortion and prenatal services, rather than the more helpful list of experts in abortion services.

Prison inmates, however, are counseled as to the availability of abortions. Not only are prison staff allowed to counsel a pregnant inmate about the abortion option, they are required to do so. \(^{138}\) "The Warden shall offer to provide each pregnant inmate with medical, religious, and social counseling to aid her in making the decision whether to carry the pregnancy to full term or to have an elective abortion." \(^{139}\) Thus, an inmate receives a full range of counseling about her alternatives, while an unincarcerated woman receives counseling geared toward only one of her two alternatives: that of carrying her pregnancy to term.

Further, there is the question of availability and arrangements for an abortion. States do not have to provide facilities to perform abortions \(^{140}\) and a woman desiring to terminate her pregnancy may have to travel to a distant city in order to find a clinic that does perform abortions. Once she has arrived and spoken with a doctor, the state can require her to wait twenty-four hours before actually obtaining the abortion. \(^{141}\) She is completely without assistance in terms of finding a doctor, arranging transportation and finding a place to stay for the twenty-four hours she must wait.

An inmate, however, need only inform her unit manager in writing that she desires an abortion and all the arrangements will be made for her. \(^{142}\) The court in Gibson explained that regulations in 1986, at the time of Gibson's pregnancy, placed the burden of arranging for an abortion on the inmate. \(^{143}\) As the court stated, "[t]he inmate is required to give the staff direction 'to arrange for the abortion to take place at a hospital or clinic outside the institution.'" \(^{144}\) The regulation in question, 28 C.F.R. § 551.23(c), has since been changed to place all the burdens

\(^{138}\) 28 C.F.R. § 551.23(b) (1996).

\(^{139}\) Id.


\(^{142}\) "Upon receipt of the inmate's written statements required by paragraph (b) of this section, ordinarily submitted through the unit manager, the Clinical Director shall arrange for an abortion to take place." 28 C.F.R. § 551.23(c) (1996).

\(^{143}\) Gibson v. Matthews, 926 F.2d 532, 538 (6th Cir. 1991).

\(^{144}\) Id. (quoting 28 C.F.R § 551.23(d) (1986)).
of arrangements on the facility, without requiring direction thereof by the inmate. Subsection (d) has disappeared entirely, and subsection (c) now reads as follows: "Upon receipt of the inmate’s written statements required by paragraph (b) of this section, ordinarily submitted through the unit manager, the Clinical Director shall arrange for an abortion to take place." It is clear that the regulation as it stands now is "couched in such mandatory terms" as to create a "legitimate claim of entitlement" for an inmate to have an abortion arranged. Compare this to the Title X requirement "prohibiting actions to assist women to obtain abortions." Again, it is easier for an inmate to have an abortion than for her counterpart who has committed no crime.

C. Funding

Finally, there is the question of funding for abortions. The government is not obligated to fund abortions for women who cannot afford them. It is clear that federal funds may not be used “to pay for abortions except when continuation of the pregnancy would endanger the mother’s life.” Furthermore, it has been established by case law that state governments may not be required to fund abortions.

In *Maher v. Roe,* Justice Powell, writing for the Court, stated that a state could make “a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds.”

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145 28 C.F.R. § 551.23(c) (1996).
146 *Gibson,* 926 F.2d at 538.
147 *Id.* (quoting Washington v. Starke, 855 F.2d 346, 349 (6th Cir. 1988) and Bills v. Henderson, 631 F.2d 1287, 1292 (6th Cir. 1980)).
149 In no other situation does the government assist in abortion arrangements. In fact, women serving in the military, another situation where their lives are dictated by the needs of the system, cannot get an abortion in a military hospital. This applies even overseas, where other abortion services may not be available, and without consideration of funding. For 1997, the Senate has voted to repeal the ban and the House has voted to retain it. Helen Dewar, *Senate Votes to Lift Military Abortion Ban,* WASH. POST, June 20, 1996, at A23.
152 See *infra* notes 153-59.
154 *Id.* at 474.
Later, in *Harris v. McRae*, Justice Stewart for the Court wrote that "it simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." In *Webster v. Reproductive Health Services*, the Court asserted that "the State need not commit any resources to facilitating abortions, even if it can turn a profit by doing so." Thus, it is clear from case law that a woman who cannot fund her own elective abortion is effectively denied the right to have one.

In fact, the refusal to fund abortions for indigent women is one of the bases for the *Gibson* court’s decision that there was no clearly established constitutional right in 1986 to the procurement of an abortion for an inmate. The *Monmouth* decision changed that presumption and declared that an inmate does have a right to a funded abortion if she is unable to afford one. "[The prison] may not condition the provision of services for an elective, nontherapeutic abortion upon . . . the inmates’ ability or willingness to pay. Moreover, in the absence of alternative methods of funding, the County must assume the cost of providing inmates with elective, nontherapeutic abortions." Thus, a poor woman who desires an elective abortion is better off in prison than she is on her own.

IV. POLICY CONSIDERATIONS

From the foregoing discussion, it is apparent that the government has decided to assist inmates in procuring non-therapeutic abortions, while refusing to assist their non-incarcerated counterparts. The policy reasons for assisting inmates are clear. Administratively, it is easier to deal with a prison population that is uncomplicated by pregnancies. A woman who is pregnant has more needs than a woman who is not pregnant, including...

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157 *Harris*, 448 U.S. at 316.
159 *Id.* at 492.
162 *Id.* at 351.
better nutrition to support her growing fetus, clothing to fit her changing body, and prenatal care to monitor her pregnancy. Additionally, the time and manner of childbirth cannot be predicted, so toward the end of her pregnancy she will need to be observed closely to ensure that she can receive the requisite medical assistance in the delivery of her baby.\textsuperscript{163} Prison officials would probably prefer to have no pregnant women in their charge.

Further, policies supporting intact families and encouraging women to bear and to raise children are less applicable in prison than in the general population. With the exception of a few prisons in New York that have nursery programs and encourage incarcerated women to be active in the care of their very young children\textsuperscript{164}, the United States criminal justice system is not designed to allow mothers and babies to remain together. When a newborn has to be shuffled immediately to relatives or to foster care, the illusion of an intact family is shattered.

Finally, there may be an unspoken policy to encourage inmates to have abortions. Such a policy would be based on the perception of prisoners as socially undesirable. Law-abiding society would be reluctant to see such undesirables reproduce.

The policy reasons for not assisting pregnant women outside of prison in procuring abortions are harder to understand. Fiscally, it does not make much sense to deny abortion counselling or funding. A woman who seeks governmental assistance in early pregnancy is not likely, eight or nine months later, to be able to support a child financially. Further, it is clearly more difficult for a woman with a child to improve her financial situation than for a woman without a child, as she will have the added expenses of caring for the child, including the costs of food, clothing, and child care. She also may be limited in the kind of employment she can accept due to her parental responsibilities. For example, she cannot take a job that requires extensive travel, nor one that requires her to work during hours that child care is not available. This means that the

\textsuperscript{163} Additionally, any prison which allows babies to remain with the inmate mother must arrange for the needs of these babies to be met as well. Currently, only three prisons in the country allow women inmates to live with their babies. These are Bedford Hills, Taconic Prison, and Riker's Island, all in New York. Donna K. Metzler, \textit{Neglected by the System: Children of Incarcerated Mothers,} 82 ILL. B.J. 428, 430 (Aug. 1994). A discussion of prison nurseries is beyond the scope of this Note.

\textsuperscript{164} The best known of these facilities is Bedford Hills, which allows babies to stay with their mothers until their first birthday. \textit{Id.}
government will end up paying for prenatal care through Medicaid\textsuperscript{165} and possibly for support of the child throughout its minority through programs such as Aid to Families with Dependent Children,\textsuperscript{166} instead of for the significantly cheaper elective abortion.

Another policy consideration cited in cases such as \textit{Monmouth County Correctional Institution Inmates v. Lanzaro}\textsuperscript{167} is that prisons must provide abortions because the inmates have no other way to obtain the service, due to their lack of freedom to move about in the rest of the world and make the arrangements themselves.\textsuperscript{168} This is certainly true. Prison inmates are severely hampered in their ability to arrange and fund their own health care. However, women seeking governmental assistance are also likely to be severely limited in their ability to arrange and fund their own health care. If they had the funds or connections to obtain an abortion or other health services from a private doctor,\textsuperscript{169} they would not be visiting a Title X clinic in the first place.\textsuperscript{170} So, while prisoners are dependent upon the government in that they cannot leave prison, poor women are no less dependent upon the government in that they have nowhere else to turn for medical treatment and advice.

The \textit{Monmouth} case\textsuperscript{171} makes another argument for providing abortions and funding, therefore, in the prison context but not in the free world. This argument hinges upon the court’s observation that, “[w]hat-

\begin{itemize}
\item \textsuperscript{165} Needy pregnant women are provided with “services that are necessary for the health of the pregnant women and fetus, or that have become necessary as a result of the woman having been pregnant. These include, but are not limited to, prenatal care, delivery, postpartum care, and family planning services.” 42 C.F.R. § 440.210(2)(i) (1995).
\item \textsuperscript{166} 42 U.S.C. §§ 601-617 (1995) provides for financial assistance to parents of needy dependent children to further goals of continuing parental care and protection.
\item \textsuperscript{168} \textit{Monmouth}, 834 F.2d at 345. The issue raised of forced incubation is beyond the scope of this Note. \textit{See supra} note 99.
\item \textsuperscript{169} A first trimester abortion with a local anesthetic costs $325.00, according to phone interviews with \textit{Women for Women} and \textit{Women’s Medical Center}, two Cincinnati women’s clinics. Three hundred twenty-five dollars is more than one half of a month’s rent. It represents a huge burden for a poor woman.
\item \textsuperscript{170} It is estimated that Title X clinics are the only source of family planning services for 83% of the women they serve. \textit{Fact Sheet, supra} note 132, at 2.
\item \textsuperscript{171} \textit{Monmouth}, 834 F.2d at 326.
\end{itemize}
ever the government's constitutional obligations to the free world, those obligations often differ radically in the prison context. For example, the court notes that many amenities, such as religious materials, food, and housing, not normally supplied outside of prison are routinely furnished to inmates and are expected of the prison system. While this is true, it does not necessarily follow that abortions are among the amenities that should be provided to inmates, but to no one else. Outside of prison, there are other avenues to obtain the necessities of life that are supplied in prison. Religious materials may be provided by the relevant church or synagogue, and indeed, provision of those materials to the devout may be seen as one of the primary functions of the institution, to assist members of the flock in their search for sanctity. Similarly, food, shelter, and clothing have traditionally been available for the needy through a variety of church and civic groups such as the Salvation Army and Goodwill, as well as through various government programs such as Aid to Families with Dependent Children.

However, abortions are in an entirely different class than these other necessities. Abortions are within the realm of medical care, and medical care for the indigent citizens of this country has traditionally been provided by the government. Religious and civic groups have neither the expertise nor the equipment, generally, to provide abortion or any other pregnancy-related services, and doctors have not traditionally opened their regular offices to the poor in the way that lawyers do pro bono work for indigent clients.

Furthermore, the government has already stepped in and agreed to provide other medical services relating to pregnancy, to the sole exclusion of abortion services. In no other instance has the government agreed to provide, for example, religious materials for Jewish persons but not for Muslims, or to provide dairy products to hungry people, but no meat or vegetables. Once the government has begun providing a certain type of service, it should provide all subdivisions of that service on an equal level. In this instance, once it has decided to provide services relating to pregnancy, it should provide abortive as well as prenatal services.

172 Id. at 341.
173 Id.
175 Medicaid covers pregnancy-related services including prenatal care, delivery, postpartum care, family planning services, and services for other illnesses or medical conditions that might complicate the pregnancy or threaten the safe delivery of a full-term fetus. 42 C.F.R. § 440.210(a)(2) (1995).
CONCLUSION

Our society has elected to punish criminals by curtailing their freedom. However, when female criminals are being punished with the loss of their physical freedom, they actually have increased reproductive freedom in terms of the guarantee that they will be able to exercise their right to terminate an unwanted pregnancy. This disparity is unfair to impoverished women who have committed no crime and who will be denied an elective abortion. The logical conclusion is that the government should make abortions available to all women, not just those in prison.