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**“She Doesn’t Deserve to be Treated Like This”:
Prisons as Sites of Reproductive Injustice**

by

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“I knew when you went to jail you gave up some rights, but the rights over your own body?” – Pamela Forney, imprisoned in Pasco County, Florida.¹

During the past 30 years, prisons have become increasingly significant arenas of conflict over women’s bodies and women’s rights. As a strict system of physical confinement and punishment, imprisonment has unique institutional characteristics, and yet it also provides a microcosm of reproductive politics. Nowhere is race and class stratification more evident than in the criminal justice and prison systems, where poor women and men of color are dramatically overrepresented relative to their numbers in society. And prisons are one place where the metaphor of “choice” is sorely inadequate to describe what is at stake in political struggles over reproduction. A pregnant woman in prison cannot choose between a midwife and a doctor; she cannot even choose who will be in the room with her when she gives birth.

Every dimension of reproductive justice is negatively affected by imprisonment – from access to abortion and basic medical care to maintain one’s health and fertility to the ability to form and maintain relationships with one’s children. Medical neglect in prisons and the erosion of parental rights both fit into a long history of reproductive oppression suffered by poor women and women of color, including the sale of children under slavery, the forced removal of Native children to government boarding schools, restrictive immigration policies, sterilization abuse, bans on public funding for abortion, and punitive welfare policies.²

This paper explores prisons as sites of reproductive injustice by focusing on barriers to abortion and safe childbirth. After defining the concept of reproductive justice, the paper reviews the limits of the constitutional right to medical care in prison and the racial and class biases that

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characterize the criminal justice and prison systems. It then examines barriers to abortion care and pregnancy care to show that institutional resistance to abortion is not the result of a commitment to healthy pregnancy and childbirth. Rather, the failure to provide both forms of vital medical care is part of a widespread pattern of institutional neglect.

Research on reproductive abuses in prison presents a “tip of the iceberg” problem – we only know those instances that have come to light through the court system, the press, or primary research. Other instances have doubtless occurred because of the structural problems that limit access to health care in prison settings.³ Literally closed to the public, with no obligation to report on the outcomes of pregnant women in their custody, most jails and prisons operate without any meaningful oversight. This “fiefdom” scenario underscores both the constraints on documenting the full scope of abuse behind prison walls and also the need to do so.⁴

Reproductive Justice

“Reproductive justice exists when all people have the social, political and economic power and resources to make healthy decisions about our gender, bodies, sexuality and families for our selves and our communities. Reproductive Justice aims to transform power inequities and create long-term systemic change, and therefore relies on the leadership of communities most impacted by reproductive oppression.” – Asian Communities for Reproductive Justice⁵

The term “reproductive justice” encompasses the full scope of women’s reproductive lives, from decisions about whether and when to have children to the ability to raise children with dignity. These priorities reflect women’s need for reproductive self-determination in a country where poor women and women of color have been subjected to coercive sterilization or other practices designed to destroy their right to motherhood.⁶

Feminists of color and socialist feminists have worked for years to broaden our understanding of the political terrain of reproduction. A group of African American women originally coined the term reproductive justice in 1994 after meeting with activists from around the world at the International Conference on Population and Development in Cairo. As long-time activist Loretta Ross explains, “Not wanting to use the language of ‘choice’ because they represented communities with few real choices, they integrated the concepts of reproductive rights, social justice and human rights to launch the term ‘Reproductive Justice.’”⁷

By infusing reproductive rights with a social justice orientation, reproductive justice goes beyond abstract rights and individual privacy, emphasizing women’s ability to truly exercise their rights. This framework also emphasizes women’s agency to make decisions while at the same time recognizing that individual women live their lives as members of communities that have distinct histories of oppression, including population control.⁸ These insights help us to understand the meaning of reproductive rights in the prison context, where official declarations of rights by the courts in no way guarantee women’s ability to access health care or to carry out their own decisions.

The Constitutional Right to Medical Care

“These elementary principles establish the government’s obligation to provide medical care for those whom it is punishing by incarceration.” – United States Supreme Court.⁹

“You’re helpless. It’s not like you can get in your car and leave looking for competent medical care.” – Bernadette Fogell, imprisoned in Delaware.¹⁰

People in prison are the only group in the United States with a constitutional right to medical care. The right to medical care has its roots in the Eight Amendment’s prohibition of cruel and unusual punishment. In 1976, the Supreme Court recognized that when the government punishes someone by incarceration, it is obligated to meet that person’s basic needs. In *Estelle v. Gamble*, the Supreme Court explained that, “An inmate must rely on prison authorities to treat his [or her] medical needs; if the authorities fail to do so, those needs will not be met.”¹¹ The Supreme Court further explained that “deliberate indifference to serious medical needs” constitutes the “unnecessary and wanton infliction of pain,” whether by medical personnel or by guards who intentionally deny or delay access to care.

In practice, securing needed medical care can be daunting, as numerous lawsuits and investigations attest. Women encounter multiple barriers to care – from co-payments they cannot afford to having to convince a guard that they need to see a doctor. Since its landmark 1976 ruling in *Estelle*, the Supreme Court has retreated on prisoners’ rights, making it more difficult for people in prison to enforce their right to medical care or to seek redress for violations. Court decisions draw a sharp distinction between the everyday concept of medical malpractice and the higher standard of “deliberate indifference,” which is very difficult to prove because it turns on the subjective state of mind of the person being sued as opposed to the objective injuries suffered by the person deprived of medical care. In 1996, Congress further eroded the rights of people in prison by passing the Prison Litigation Reform Act, which limits people’s access to the courts and also limits judicial monitoring of prison conditions after winning a case.¹²

Despite the vulnerability and serious needs of incarcerated people, the United States has no national standards to implement the constitutional right to medical care in prison. Typically, each system – the federal Bureau of Prisons, the federal Bureau of Immigration and Customs Enforcement, state Departments of Corrections, and thousands of local jails – establishes its own policies and procedures, with little oversight. Although there are organizations that accredit institutions of confinement, a minority of institutions have gone through the process. The National Commission on Correctional Health Care, considered the leading organization on medical accreditation, reports in 2011 that it has accredited nearly 500 prisons and jails, which account for nearly 400,000 people – or, less than 20% of the total population of people in prison.¹³ Moreover, accreditation is no guarantee of consistent access to appropriate medical care. There are no surprise inspections to ensure that institutions adhere to policies. And policies, especially those pertaining to reproductive health care, may be inadequate in the first place.

Privatization is another powerful barrier to medical care. Private, for-profit companies run a growing number of prisons and win contracts to provide medical services in many more.

The profit motive inevitably creates disincentives to providing the best care, because every dollar spent on medical care lowers the company's earnings. Equally troubling is the way these companies shield themselves from public scrutiny and accountability by claiming that their policies and actions are private, despite the fact that they are providing public services. Sometimes, governments collude in this attempt to shield themselves from scrutiny. In Delaware, for instance, the Department of Corrections refused to answer a Freedom of Information request from the ACLU by insisting that the medical policies used in the state's prisons belonged to the private company Correctional Medical Services.¹⁴

Prisons and Social Injustice

“[Prisons] function as the default solution for a vast range of social problems that need to be addressed by other institutions.” – Angela Davis and Cassandra Shaylor.¹⁵

Prisons both reflect and reinforce social disadvantage: Prisons confine primarily poor women and men, and when those women and men get out of prison, they find that having a felony conviction makes it that much harder to get a job, housing, or education. Fully half the women awaiting trial in the Massachusetts Correctional Institution- Framingham, for example, are stuck behind bars because they cannot afford \$50 bail.¹⁶ In addition to economic insecurity, women who wind up in prison have usually suffered physical and sexual abuse and struggled with addiction or mental health problems. Many experience new traumas inside the system, and few get the individualized treatment they need.

More than 200,000 women are imprisoned in the United States, representing about 10 percent of all people imprisoned in this country and an astonishing 33 percent of women imprisoned worldwide.¹⁷ These statistics reflect the number of women locked up on a given day; many more spend time in jails, prisons, and immigration detention facilities over the course of a year. Although women have always been a minority of those imprisoned, they have been entering prison at a faster rate than men for some time. The more-than-eightfold increase since 1980 reflects largely the policy choice to impose mandatory sentences that severely punish drug use and small-time drug sales, instead of investing in drug treatment.¹⁸

When probation and parole are included, over one million women are under the authority of the criminal justice system.¹⁹ Women of all groups are not represented equally in these different arms of the system: White women are the majority of those on probation and women of color are the majority of those behind bars. As of January 2006, for example, more than 82 percent of women serving time in New York state prisons for drug offenses were women of color.²⁰ These statistics might create the impression that white women don't use drugs, but we know this isn't true.²¹ What the statistics really show is different rates of surveillance, arrest, prosecution, and conviction, as well as unequal access to drug treatment and other resources that might keep women with addiction problems out of the criminal justice system.²² The adoption of harsh mandatory sentences has created a system that locks up people who pose little threat to public safety, taking the greatest toll on those who have the fewest advantages to begin with.

Most women in jail and prison are mothers, and at least 65 percent have children under age eighteen. In addition, four to five percent of women are pregnant when booked into prison or jail.²³ Women in prison are often considered unworthy of motherhood, as prison policy, public discourse, and public policy demonstrate. Prison policies undermine parent-child relationships by limiting visiting hours, charging exorbitant rates for collect phone calls, and imprisoning people far from home. In many states, the one prison for women is in a rural area, even though most of the women come from cities. Some Departments of Correction send women to serve their time in other states. As one example, Hawaii sends women all the way to a prison in Kentucky.²⁴

Public discourse tends to be simplistic and punitive. In response to a news story about the shackling of pregnant women in labor, for example, one reader commented on the news web site: “It’s ‘dehumanizing’??? WHO CARES? These women are in prison for crimes that THEY DID. Why treat them like real people?”²⁵

After a 21-year-old woman died in a jail cell of internal bleeding caused by a ruptured ectopic pregnancy, several people essentially blamed her for her own death: “If this individual did not do anything wrong, she would have not been in jail;” “She put herself in that situation;” “She should’ve made better choices in her life.” One reader went so far as to speculate, “In and out of jail? What kind of mother is that? Maybe this was gods way of saying it wasn’t meant to be.”²⁶ These comments reflect widespread animosity towards women in prison, as well as a simplistic focus on individual “choices” that ignores any structural conditions that might contribute to a woman’s imprisonment.

Finally, public policies take their toll. Going to prison for even a short time can mean losing custody of children, forever. Federal and state laws mandate the termination of parental rights if a child has been in foster care for 15 months in a 22-month period, and only a few states make any exceptions for parents who are in prison.²⁷ Women who make it out of prison with their legal relationship to their children intact may still find that they cannot be reunited with them. If they have a felony drug conviction, as so many do, they will typically find that they are no longer eligible for public housing, food stamps or loans to go back to school – resources that would help them land on their feet and build a better future for themselves and their families. Finding a job with a criminal record is challenging even in a good economy.²⁸ Given the racial distribution of poverty and the racial biases of criminal justice administration, these policies fall especially heavily on women of color, permanently undermining their right to be mothers.

Reproductive Injustice: Barriers to Abortion Care

“I was completely helpless and felt that I had no control. I was truly afraid that I was going to be forced to have the baby.” – Jane Doe, who had to sue a sheriff in order to obtain an abortion.²⁹

“It’s been a hard personal journey. I’m really hoping that nobody else has to go through what I’ve gone through.” – Yuriko Kawaguchi, who was prevented by a municipal judge from having an abortion when she was in jail.³⁰

Time and time again, in at least 20 states and the District of Columbia, women have had to fight for the right to abortion – and in some cases, have lost and been forced to continue pregnancies against their will. Many prisons and jails have no official written policy to tell women how to go about requesting an abortion, and staff members how to go about meeting a woman’s request, since obtaining an abortion will always entail a trip to an outside medical provider. Agencies within the U.S. government provide examples from both ends of the transparency spectrum. The federal Bureau of Prisons policy is readily accessible on the Bureau’s web site and in the *Federal Register*, and explains the Bureau’s responsibility to arrange for abortion appointments and transportation, as well as the requirement that the woman pay for the procedure. In contrast, the Bureau of Immigration and Customs Enforcement has no publicly available information about abortion access for detained women.³¹

At the state level, only California has a statute affirming the rights of women in jail and prison to access abortion care. Legislatures almost always delegate the issue to Departments of Correction, which often delegate it further to individual prisons that use decision-making processes that are closed to the public. About one-quarter of state prison systems have no official written policy on abortion. Others do not release their policies to the public or have ambiguous policies that require interpretation and therefore invite discretion on the part of prison personnel.³² Little information exists about the nation’s 3,000-plus jails. In New York, a systematic review of county jail policies found that almost half of the 52 counties with female prisoners had an abortion policy, but only 13 of these unambiguously guaranteed women’s rights – even though public policy in New York supports women’s access to abortion.³³

Federal courts and state courts of appeal have been very clear that women in prison do not lose the basic right to make decisions about pregnancy and abortion. The constitutional right to an abortion has been recognized since the 1973 decision *Roe v. Wade*. It is grounded in the Fourteenth Amendment’s guarantee of privacy and personal liberty, and applies to women inside prison as much as to women outside of prison. Some judges and legal scholars believe that the Eighth Amendment right to medical care also protects women’s right to an abortion. The one case to address the question of public funding found that women who cannot afford an abortion must be provided one at the jail’s expense.³⁴ And yet the well-established nature of women’s rights has not stopped prison and jail personnel from trying to deny women abortion care, or at least obstruct women’s access to abortion.

A case from Phoenix (Maricopa County), Arizona conveys the difficulties that women endure when they try to assert their right to an abortion.³⁵ A woman identified as “Jane Doe” learned the day before her sentencing hearing that she was pregnant. Nineteen years old, with four months in jail and two years of probation ahead of her, Doe decided she did not want to have a baby. Her attorney asked the prosecutor if she could stay out of jail just long enough to get an abortion, but the prosecutor said no, assuring her that she would be able to do so when she was in jail’s work furlough program.

The prosecutor’s assurances took on a hollow ring once Doe was in jail. She was cleared for furlough, but never given an assignment. For the first week, she tried to no avail to find out how to obtain an abortion, and then she was moved to a part of the jail where her access to the telephone was restricted. A jail physician suggested that adoption was the better course.

Eventually, she learned that she could have an abortion if she could meet, without regular use of a telephone, the following requirements: She needed to have someone outside the jail schedule an abortion and pay for it, hire an attorney to obtain a court order authorizing transport outside the jail, and pay for jail personnel to take her to a clinic – all to conform with an unwritten policy decreed by Sheriff Joe Arpaio, who ran the jail.

This obstacle course was in marked contrast to the sheriff's other policies, which included taking prisoners outside the jail for medical care and also for non-medical purposes, such as visiting sick relatives or attending a funeral, all without the involvement of the courts. Doe's parents were willing and able to pay for her to have an abortion, and yet the obstacles were almost insurmountable. Doe's criminal defense attorney declined to assist with this matter, so her parents found a public defender to seek the required court order. When the public defender was pulled off the case, he suggested they call the ACLU, and only then did things finally start to go right. The ACLU attorneys, who had worked on similar cases in other states, were able to get a court to order the sheriff to take Doe to a clinic. By this time, eight weeks had passed since she was taken into custody.³⁶

Sheriff Arpaio likes to brag that he is the "toughest sheriff in America," and has garnered national attention for his punitive practices, such as making people work on chain gangs in the hot desert sun. But his resistance to providing access to abortion care is not unusual. Indeed, Jane Doe's case illustrates several common problems experienced by women seeking abortions from within the confines of prisons and jails: long delays, unwritten policies, difficulty gaining information, and restricted communication with the outside world. Across the country, women have been told they must get a judge's permission and must come up with the money for an abortion and for the cost of transportation and staff time as well. Given the tendency to site prisons in rural areas, and the concentration of abortion services in urban areas, these requirements can put abortion out of reach without ever explicitly denying women's rights. In other instances, women *are* denied; someone simply says, "No, you cannot have an abortion." In one such case, a Missouri prison reversed a longstanding policy to take women who could afford abortions to a clinic, via an internal memo, with no notice to the public.³⁷

Restrictions on abortion fall especially heavily on poor women and women of color, for two reasons: These groups of women are 1) overrepresented in jail and prison and 2) more likely to experience unintended pregnancies, reflecting racial disparities in access to healthcare. Women of color – African American, Asian American, and Latina – are also more likely than white women to terminate a pregnancy.³⁸ These factors mean that women of color are disproportionately burdened by barriers to abortion.

Although news stories and court documents about conflicts over abortion access rarely identify a woman's racial or ethnic background, sometimes this information is available. In one case, a sentencing judge in Somerville, New Jersey appointed a guardian for the fetus of Sonya Jackson, a 31-year-old African American mother of two, who had asked to leave the county jail for an abortion appointment. The move was widely reported by the press, and a minister who runs a pregnancy center visited Jackson in jail with promises of child support and bail money. She had the baby.³⁹ In another case, a sentencing judge in Cleveland, Ohio gave jail time instead of probation to Yuriko Kawaguchi, a 21-year-old student from Japan, specifically to prevent her

from obtaining an abortion. A state court of appeals ordered her released on bail but by that time it was too late to terminate the pregnancy in the state of Ohio. Kawaguchi had the baby.⁴⁰

Decisions about pregnancy and abortion are deeply personal and yet they are also shaped by the larger political, economic, and social context of women's lives. Some women have already decided to have an abortion before they get arrested or sentenced; others learn afterwards that they are pregnant, or become pregnant while imprisoned. Among the top reasons that women generally give for deciding to have an abortion are their caregiving responsibilities and their inability to afford a baby.⁴¹ While some women say they are not ready to be mothers, a majority already have at least one child. Landing behind bars intensifies these concerns, and may prompt even women who intended to have a baby to reassess their plans. Women in jail or prison have to figure out who can take care of any children they already have, as well as make plans for a new baby. Their families tend to have few resources, and taking "kin care" foster care payments sets the clock ticking to terminate the mother's parental rights.⁴² Fears about medical neglect in prison and the prospect of being immediately separated from their newborn may be too much to bear.

Reproductive Injustice: Barriers to Safe Childbirth

"I feel if she did wrong, she should be punished for it. If you did wrong, you should have to pay for it, but she doesn't deserve to be treated like this."
– Loannza Staten, whose granddaughter was left to give birth all alone in a prison cell.⁴³

"In virtually every case that I have handled involving health care claims of women, I have found women who lost pregnancies or newborns due to the prison's atrocious neglect." – Elizabeth Alexander, Director of the ACLU National Prison Project.⁴⁴

Women in prison and jail have long reported problems with pregnancy care. In a nationally representative government study, 20 percent of pregnant women in prison reported getting no prenatal care, and 50 percent of pregnant women in jails reported getting no prenatal care.⁴⁵ A study in the King County Jail in Seattle, Washington found that the pregnant women "all complained of being uncomfortable, lacking pillows and chairs, having to sit on cold cement, being exposed to toxic cleaning materials, and feeling constantly hungry."⁴⁶ While virtually every state prison system has an official policy to provide prenatal care to pregnant women, jail are less likely to have such policies. In New York, for example, 43% of county jails have no policy on prenatal care.⁴⁷

Pregnant women in custody encounter too many problems to enumerate here. Among the most serious are the prison staff's refusal to take bleeding seriously, a problem associated with miscarriage and stillbirth, and their failure to recognize when women are in labor, a problem associated with women giving birth inside their cells, as well as the routine practice of shackling pregnant women and the failure to provide post-partum care.

A woman serving time in a California state prison describes her experience several months into her pregnancy: “I went for my monthly checkup. They couldn’t find my baby’s heartbeat.... [Five days later] I was in a lot of pain and was spotting a lot. I told my housing staff and he called the [Medical Technical Assistant]. She told him I didn’t have proof, that she wouldn’t see me. At that time the bleeding slow down so I put a pad on. It was blood on it but not good enough for her. She told me that All Pregnant Women Bleed. I told her that I was a high risk and when I seen the doctor last week he couldn’t find a heartbeat. So she called the doctor and he told her to send me back to my unit.... [Three days later at 3:00 A.M.] I lost my baby in my bathroom.”⁴⁸

This story is not uncommon. Court records and other documents show that corrections officers and medical personnel ignore, disregard, and discount women’s own knowledge that something is happening and that they need medical attention.⁴⁹ One woman, six and a half months pregnant, was locked bleeding overnight in the cell of a small Minnesota jail because she could not make bail and the jail did not want to pay to take her to the hospital; another, four or five months pregnant, was locked in an “observation cell” in an Arkansas jail for three days, after three days of bleeding in a group cell. Both women lost their pregnancies. In some cases, to be sure, nothing can be done to prevent a miscarriage or stillbirth. However, in these cases, no one even tried to intervene or to provide a safe and humane setting for what is a physically and emotionally traumatic event. Women who experience pregnancy loss need medical attention to ensure that the miscarriage is complete and to monitor the possibility of infection or hemorrhage.

In the summer of 2007, a young African American woman named Shakira Staten gave birth alone in the Lackawanna County Prison in Pennsylvania. Staten was brought from her cell to the medical ward around midnight, and when a nurse decided that her contractions weren’t “consistent enough,” she was placed in an individual locked cell instead of in a bed in the medical ward. The cell had a closed-circuit camera, but the only way to get anyone’s attention was to yell, pound on the door, or lob wet toilet paper at the camera. Guards, not nurses, monitored the cell. Whenever she could get anyone to listen to her, Staten said that she needed to go to the hospital. At one point, she got down on her hands and knees to try to keep the baby from coming out, but the guards just told her to stay in her cell, which is where she wound up giving birth, all alone.

Staten’s family broke the story to the local media, where it received extensive coverage. In the controversy that ensued, prison officials first denied any wrongdoing, and then suggested that Staten had planned to give birth in the prison so that she could sue the government and get the charges against her dropped. According to internal prison records, prison personnel said that Staten was dancing and singing, “I got it! I got it! I’m in the money,” after seeing her story in the paper.⁵⁰ This far-fetched accusation relied on insidious stereotypes of African American women as welfare cheats, out to fleece the system: Since the time of Ronald Reagan, conservatives have used the idea of welfare fraud and the image of the “welfare queen” “to portray an image of widespread depravity and criminality among low-income women of color.”⁵¹ Here was a young woman of color, a young mother, locked up for criminal charges, a perfect screen for such projections, especially if they could deflect attention from the prison’s own failures. After weeks of negative publicity, the county prison board apologized to Ms. Staten.

Unfortunately for Staten, her lawsuit against the prison for violating her right to medical care was dismissed in 2010 because her lawyer missed filing deadlines. After the dismissal, she said, “I just can’t believe I had to bring a child into the world like I did.”⁵²

While most women who have babies in a prison cell are not subject to the kind of pillorying that Staten was, their stories do share certain elements in common: No one believes women when they say they are in labor, and no one conducts a thorough exam to check for signs of labor. Sometimes, it becomes clear after the fact that the prison staff had no way to monitor contractions or no skill in this area. All too often, corrections officers who have no medical training make judgment calls about complicated medical issues.

Pregnancy care policies are notably silent on when to take a woman in labor to the hospital. In New York, for example, not a single county jail has a written policy explaining when to take a woman in labor to the hospital.⁵³ And yet the details of such policies, where they do exist, can be problematic. When writing a policy in the aftermath of Staten’s prison cell birth, for example, the co-owner of the private medical company proposed taking women to the hospital if they are at least 24 weeks pregnant and have been having contractions for at least an hour, or if the contractions are five minutes or less apart. His reasons for setting the threshold at 24 weeks are deeply troubling. First, he said that a fetus of less than 24 weeks gestation probably wouldn’t survive anyway, implying that a woman experiencing pregnancy loss at 23 weeks would not require medical attention outside the prison; and second, he said that pregnant women might “abuse” the system by insisting on going to the hospital each time they had a contraction.⁵⁴

Women who do make it to a hospital are typically transported in shackles, labor in shackles, and may even give birth chained to the hospital bed. Casandra Brawley had a baby while she was serving time at the Washington Corrections Center for Women. When the prison nurse decided to send Brawley to the hospital, corrections officers first strip-searched her and then placed her in full restraints, including a metal chain around her full-term belly and handcuffs that bound her hands to the waist chain. The officers kept one of her ankles shackled to the bed at the hospital, even after an epidural, removing the leg iron only during her cesarean surgery. After the ordeal, Brawley, who was sent to prison for shoplifting, said, “I am still a person and I didn’t feel like I should be treated like a caged animal.”⁵⁵

International human rights organizations and national medical and public health associations oppose the shackling of laboring women as demeaning, dangerous, and unnecessary.⁵⁶ An emerging consensus in the federal courts agrees with this view, holding that such shackling amounts to cruel and unusual punishment.⁵⁷ Until 2008, only three states had statutes limiting the use of restraints on women in labor. In the past four years, thanks in large part to coalitions spearheaded by reproductive justice, civil rights, and medical advocates, 13 additional states have passed laws to restrict this practice.⁵⁸ The laws vary in scope, from those that limit the use of restraints beginning in the second trimester to those that set limits only when women are in “active” labor and giving birth, and most lack meaningful enforcement provisions, but they represent important progress in recognizing the problem.⁵⁹

Finally, prisons and jails neglect the needs of women separated from their newborn babies. They fail to provide appropriate postpartum care, counseling, or any physical comfort.

Some prisons give women less than 24 hours in the hospital before bringing them back to prison, and women report that they go without six-week checkups or the care needed to heal properly from a cesarean delivery. After giving birth in the secure ward of the Denver Health Medical Center, 22 year-old Maria Casillas was returned to jail, where she was subjected to the typical strip-search routine, ordered to bend over, expose herself, and cough repeatedly: “I had six stitches and it hurt. I told them, ‘I just had a baby. It hurts.’ They said they didn’t care and told me to cough harder.”⁶⁰

Mass Imprisonment as a Barrier to Reproductive Justice

“I think these kinds of stories get people to realize that the people we put in prison are still human beings and they are our neighbors and friends and, if not, they will be when they get out.” – Catherine Wise, Pennsylvania Prison Society.⁶¹

As the stories above show, problems with pregnancy-related medical care behind prison walls are widespread. In some ways, helping women to obtain abortion care is more clear-cut. Abortion is an either-or situation – either a woman will be able to terminate her pregnancy or not – while prenatal care can be a more ambiguous matter of whether the quality of care is so bad as to be unconstitutional. Because women have a well-established right to terminate a pregnancy, petitioning federal judges to order a jail or prison to take a woman for an abortion has worked very well. Local judges have been less receptive, and have even been the ones to block access, as the case from Cleveland, Ohio demonstrates. The key is for women to be able to connect with organizations such as the ACLU Reproductive Freedom Project and the National Network of Abortion Funds that can get their case before a federal judge and provide the financial assistance they need to carry out their decisions. Lawyers have also engaged in administrative advocacy short of going to court, and this has improved women’s access to abortion, but is also subject to backsliding when administrators change.

There is no reason to believe that the U.S. system of imprisonment will ever be able to consistently deliver constitutional standards of confinement or medical care. The sheer size of the U.S. prison system, the decentralized and increasingly privatized nature of the system, and the general disregard for the humanity of people in prison are formidable barriers to positive change. A class action lawsuit against the state of California lays bare the problem: The federal judge presiding over the lawsuit was moved to place the entire system into receivership by the “uncontested” finding of a court-appointed expert “that a prisoner needlessly dies an average of roughly once a week” from neglect or incompetence.⁶²

While it is crucial to stand up for better treatment of people inside prison, it is not enough. It is also essential to work on several other fronts. First, we must reduce the number of people who wind up in prison to begin with. This means working to change mandatory sentencing laws and to change the parole and probation practices that send so many people back to prison for technical violations such as missing an appointment with their parole officer. Second, we must improve the prospects for people who are released, so that they can have a realistic chance of staying out of prison. This means dismantling barriers to public assistance, employment, and other resources that people need to build a secure life. And, third, we must limit the harms inflicted on children whose parents go to prison. This means adopting policy

changes that respect parent-child bonds and support other vital family relationships to ensure children's emotional and physical security during periods of separation.⁶³

Analyzing imprisonment through the lens of reproductive justice has the potential to alter the way people think about prisons and enlarge the circle of those who care about what goes on inside prisons. First, including imprisonment on the reproductive justice agenda brings it to the attention of reproductive health and rights organizations. Second, the reproductive justice framework recognizes both the individual harms suffered by people inside prison and the impact of imprisonment on communities. While this paper has focused on direct harms to women, the imprisonment of men certainly affects women, families, and neighborhoods. Racial patterns of incarceration are similar for women and men, but the incarceration rates of men are much higher; in 2005, for instance, more than half a million African American men ages 20-39 served time behind bars. Across the country, in the poorest neighborhoods, political geographers have identified "million dollar blocks" – city blocks where so many residents have been sent to prison that the cost of their incarceration will exceed one million dollars.⁶⁴

Today, the United States leads the world in incarceration, but not in public education, health status, or life expectancy. This dubious distinction costs taxpayers about \$68 billion a year.⁶⁵ The decision to invest so heavily in prisons drains money away from such critical needs as good schools, health care, and environmental protection. Without a shift in political priorities, we will not achieve a society that embodies principles of reproductive justice. At the same time, the very idea of reproductive justice may provide a new way to understand the problems of people in prison and the ways that the overarching problem of mass imprisonment affects us all.

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¹ Quoted in Laura Griffin, "Judge Refuses Delay for Abortion," *St. Petersburg Times*, October 26, 1989.

² On reproductive oppression in the United States, see Rickie Solinger, *Pregnancy and Power: A Short History of Reproductive Politics in America* (New York: NYU Press, 2005).

³ See Rachel Roth, "Obstructing Justice: Prisons as Barriers to Medical Care for Pregnant Women," *UCLA Women's Law Journal* vol. 18, no. 1 (2010), and Nancy Stoller, "Space, Place, and Movement as Aspects of Health Care in Three Women's Prisons," *Social Science & Medicine* vol. 56, no. 11 (2003).

⁴ A note on terminology: While prisons, jails, and immigration "detention centers" are distinct types of institutions administered by different government agencies, I sometimes use the term "prison" generically to encompass all forms of involuntary confinement by the state. Generally speaking, federal and state prisons confine people who have been convicted of a felony and sentenced to at least one year. City or county jails tend to confine people who are waiting to go on trial or have been convicted of a misdemeanor and sentenced to less than one year; however, in some states, "county prisons" confine people sentenced to up to two and a half years. Outside of urban areas, jails tend to be much smaller and less bureaucratized than prisons, that is, less likely to have official written policies on a range of medical issues. Immigration detention facilities may be administered by the federal government or by private contractors and confine

people charged with violating immigration laws, such as overstaying a visa or being in the country without proper documentation. In addition, federal immigration officials contract with local jails to detain people facing immigration charges or deportation orders.

⁵ Asian Communities for Reproductive Justice, “What is Reproductive Justice?” available at the organization’s website. See also Asian Communities for Reproductive Justice, *A New Vision* (2005), available at the organization’s website.

⁶ See Solinger, *Pregnancy and Power*, n. 2 above, and Elaine Tyler May, *Barren in the Promised Land: Childless Americans and the Pursuit of Happiness* (Cambridge: Harvard University Press, 1995), ch. 3.

⁷ Quoted in Asian Communities for Reproductive Justice, “What is Reproductive Justice?,” n. 5 above.

⁸ See *The Reproductive Justice Briefing Book* prepared for the United States Social Forum (2007), available at the website of the Funders Network on Population, Reproductive Health, and Rights, and Jael Silliman, Marlene Gerber Fried, Loretta Ross, and Elena R. Gutierrez, *Undivided Rights: Women of Color Organize for Reproductive Justice* (Cambridge, MA: South End Press, 2005).

⁹ *Estelle v. Gamble* 429 U.S. 97 (1976), p. 103.

¹⁰ Quoted in Esteban Parra and Lee Williams, “Baby Died While Mom Pleaded for Nurses’ Help, Lawsuit Claims,” *The News Journal*, September 27, 2005 (part of the series “Delaware’s Deadly Prisons: A Special Report”).

¹¹ *Estelle v. Gamble*, p. 103, n. 9 above.

¹² See *No Equal Justice: The Prison Litigation Reform Act in the United States* (New York: Human Rights Watch, 2009). Congress enacted a wide range of regressive laws in 1996, on welfare, immigration, and the death penalty, as well as prisoners’ rights.

¹³ *National Commission on Correctional Health Care Annual Report* (Chicago: National Commission on Correctional Health Care, 2011).

¹⁴ *ACLU v. Danberg* C.A. No. 06C-08-067-JRS (Delaware Super. Ct. 2006). Journalists have written many exposes of private medical companies, in, for instance, Delaware, Michigan, Missouri, New York, and Tennessee. Private companies also insist that they cannot be sued for violating people’s rights in the prisons that they operate under government contract; see *New York Times*, “Under ‘Color of Federal Law’” (editorial), November 2, 2011.

¹⁵ Angela Y. Davis and Cassandra Shaylor, “Race, Gender, and the Prison Industrial Complex: California and Beyond,” *Meridians* vol. 2, no. 1 (2001), p. 21.

¹⁶ “Making Women Count: Women Offenders in Massachusetts” (fact sheet) (Wellesley, MA: Wellesley Centers for Women, no date).

¹⁷ Heather C. West, *Prison Inmates at Midyear 2009 – Statistical Tables* (Washington, D.C.: United States Bureau of Justice Statistics, 2010), Table 17; Roy Walmsley, “World Female Imprisonment List” (as of 2006), International Centre for Prison Studies, King’s College, London, available online at http://www.unodc.org/pdf/india/womens_corner/women_prison_list_2006.pdf.

¹⁸ See *Caught in the Net: The Impact of Drug Policies on Women and Families* (New York: American Civil Liberties Union, Break the Chains, and the Brennan Center for Justice, 2005).

¹⁹ Lauren E. Glaze and Thomas P. Bonczar, *Probation and Parole in the United States, 2006* (Washington, D.C.: United States Bureau of Justice Statistics, 2007).

²⁰ “Women in Prison Fact Sheet” (New York: Correctional Association of New York, 2006).

²¹ White women, African American women, and Latina women are equally likely to report having used illegal drugs in the past month; however, white women are more likely to report ever using illegal drugs than either African American women or Latinas. *Caught in the Net*, p. 7, n. 18 above.

²² *Caught in the Net*, n. 18 above; *Policing the National Body: Race, Gender, and Criminalization*, eds. Jael Silliman and Anannya Bhattacharjee (Cambridge, MA: South End Press, 2002).

²³ Laura M. Maruschak, *Medical Problems of Jail Inmates* (Washington, D.C.: United States Bureau of Justice Statistics, 2006), and Laura M. Maruschak, *Medical Problems of Prisoners* (Washington, D.C.: United States Bureau of Justice Statistics, 2008).

²⁴ Silja J.A. Talvi, “No Room in Prison? Ship ‘Em Off,” *In These Times*, May 10, 2006.

²⁵ See comments posted to: Emily Walker, “AMA: House of Delegates Backs Ban on Shackling Inmates in Labor,” *MedPage Today*, June 19, 2010, available online at abcnews.go.com/Health/MindMoodNews/shackling-female-inmates-labor-banned-ama/story?id=10934689.

²⁶ See comments posted to: John O’Brien, “Pregnant Inmate Died after Hours of Agony in Syracuse Jail,” *Post-Standard*, May 16, 2010, available online at www.syracuse.com/news/index.ssf/2010/05/pregnant_inmate_died_after_hou.html. On the question of who deserves to be a mother, see Solinger, *Pregnancy and Power*, n. 2 above.

²⁷ These states are California, Colorado, Nebraska, New Mexico, and New York. The federal law is the Adoption and Safe Families Act of 1997. For a critique of this law’s impact on families with parents in prison, see Julie Kowitz Margolies and Tamar Kraft-Stolar, *When “Free” Means Losing Your Mother: The Collision of Child Welfare and the Incarceration of Women in New York State* (New York: Correctional Association of New York, 2006).

²⁸ See *Caught in the Net*, n. 18 above, and *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, eds. Marc Mauer and Meda Chesney-Lind (New York: New Press, 2002).

²⁹ “Declaration of Jane Doe,” par. 15, p. 4, *Doe v. Arpaio*, No. CV2004-009286, June 7, 2005.

³⁰ Quoted in M.R. Kropko, “Settlement of Lawsuit Fine Tunes Inmates’ Abortion Policy,” *The Beacon Journal*, June 4, 2002.

³¹ Roth, “Obstructing Justice,” pp. 88-89, n. 3 above.

³² Roth, “Obstructing Justice,” p. 89, n. 3 above; for more information, see Rachel Roth, “Do Prisoners Have Abortion Rights?” *Feminist Studies* vol. 30, no. 2 (2004).

³³ *Access to Reproductive Health Care in New York State Jails* (New York: New York Civil Liberties Union, 2008), p. 10.

³⁴ *Monmouth County Correctional Institute Inmates v. Lanzaro* 34 F.2d 326 (3rd Cir. 1987). Despite this precedent, when women in other jurisdictions need an abortion, those women or their lawyers usually raise the money themselves, to prevent the proceedings from getting derailed by the question of government funding.

³⁵ Details about the case are drawn from court documents and also a presentation by one of Doe’s attorneys, Brigitte Amiri of the ACLU Reproductive Freedom Project, at the National Summit to Ensure the Health and Humanity of Pregnant and Birthing Women, Atlanta, January 20, 2007. See *Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007).

³⁶ Doe pursued her case after she obtained an abortion, and the courts agreed that the sheriff’s policy violated women’s rights. The Arizona and U.S. Supreme Courts let the lower decisions stand. Sheriff Arpaio continues to interfere with women’s access to abortion, despite these

repeated losses in court, a situation that speaks to the difficulty of enforcing rights for imprisoned women. See Roth, “Obstructing Justice,” p. 103, n. 3 above.

³⁷ *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008), rehearing en banc denied.

³⁸ Rachel K. Jones, Jacqueline E. Darroch, and Stanley K. Henshaw, “Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001,” *Perspectives on Sexual and Reproductive Health* vol. 34, no. 5 (2002).

³⁹ Jackson was recruited into the local anti-abortion movement and trained to speak publicly against abortion, including the idea that abortion is a form of racial genocide. Ruth Padawer, “Turnabout: How A Pregnant Inmate Became A Political Football,” *The Record*, September 28, 1997.

⁴⁰ Although Kawaguchi was not a U.S. citizen, the news coverage never suggests that she was at risk of deportation, as so many immigrants in the criminal justice system are. Kawaguchi sued Judge Patricia Cleary for violating her civil rights, but lost, largely because of judicial immunity from liability. The judge lost her bid for re-election, however, and the Ohio Supreme Court suspended her license to practice law for six months because of her conduct in the case. Kawaguchi also sued the jail, which settled with her almost four years later, and agreed to improve its reproductive health care policies. See Andrew Welsh-Huggins, “Supreme Court Disciplines Ex-Judge Who Jailed Pregnant Woman,” Associated Press, September 19, 2001; and Kropko, n. 30 above.

⁴¹ Lawrence B. Finer, Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh, and Ann M. Moore, “Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives,” *Perspectives on Sexual and Reproductive Health* vol. 37, no. 3 (2005).

⁴² See n. 27 above.

⁴³ Quoted in Borys Krawczeniuk, “Inmate’s Care Disputed,” *Times-Tribune*, July 18, 2007.

⁴⁴ Elizabeth Alexander, “The Caged Canary,” *William and Mary Journal of Women and the Law* vol. 14, no. 2 (2008), p. 263. Alexander has more than 25 years experience litigating cases about prison conditions. See also Ellen Barry, “Women Prisoners and Health Care: Locked Up and Locked Out,” *Man-Made Medicine: Women’s Health, Public Policy, and Reform*, ed. Kary Moss (Durham: Duke University Press, 1996), ch. 11.

⁴⁵ Lawrence A. Greenfeld and Tracy L. Snell, *Bureau of Justice Statistics Special Report: Women Offenders* (Washington, D.C.: United States Bureau of Justice Statistics, 1999).

⁴⁶ Carole Schroeder and Janice Bell, “Doula Birth Support for Incarcerated Pregnant Women,” *Public Health Nursing* vol. 22, no. 1 (2005), p. 55.

⁴⁷ *Access to Reproductive Health Care in New York State Jails*, p. 10, n. 33 above.

⁴⁸ Letter to Legal Services for Prisoners with Children, quoted with permission.

⁴⁹ Roth, “Obstructing Justice,” pp. 94-102, esp. n. 101, n. 3 above.

⁵⁰ Borys Krawczeniuk, “Inmate Accused of Planning Birth,” *Times-Tribune*, August 22, 2007.

⁵¹ Kaaryn Gustafson, “To Punish the Poor: Criminalizing Trends in the Welfare State,” Women of Color Resource Center Working Paper (Oakland: Women of Color Resource Center, 2003), p. 5, and *Cheating Welfare: Public Assistance and the Criminalization of Poverty* (New York: NYU Press, 2011). See generally Solinger, *Pregnancy and Power*, n. 2 above; Gwendolyn Mink, *Welfare’s End*, 2nd ed. (Ithaca: Cornell University Press, 2002); and Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York: Pantheon, 1997).

⁵² Charles Schillinger, “Woman Who Gave Birth at Prison: No Justice Yet,” *Times-Tribune*, August 15, 2010.

⁵³ *Access to Reproductive Health Care in New York State Jails*, p. 10, n. 33 above.

⁵⁴ Borys Krawczeniuk, “New Prison Rules Proposed,” *Times-Tribune*, September 11, 2007.

⁵⁵ See *Brawley v. Washington* 712 F.Supp. 2d 1208 (W.D. WA 2010) and Rachel La Corte, “WA Corrections Sued for Shackling Pregnant Woman,” *Seattle Times*, June 25, 2009.

⁵⁶ Amnesty International, Human Rights Watch, the American Public Health Association, American College of Obstetricians and Gynecologists, American Medical Association, American Women’s Medical Association, and American Association of Nurse Midwives have all taken stands against shackling, as has the American Bar Association.

⁵⁷ See *Nelson v. Correctional Medical Services* 583 F.3d 522 (8th Cir. 2009); *Brawley v. Washington*, n. 55 above; and *Villegas v. Metropolitan Government of Davidson County/Nashville Davidson County Sheriff’s Office* (United States District Court for the Middle District of Tennessee, Opinion No. 3:09-00219, April 27, 2011).

⁵⁸ See, e.g., *A Case-Study of SB 10-193, Ending Shackling of Pregnant Prisoners in Colorado* (2011) by Sunnive Brydum for the Elephant Circle, available at the organization’s website. The 16 states with laws against shackling are: Arizona, California, Colorado, Florida, Hawaii, Idaho, Illinois, Nevada, New Mexico, New York, Pennsylvania, Rhode Island, Texas, Vermont, Washington, and West Virginia. There is no federal law against shackling.

⁵⁹ In Illinois in May 2012, a federal judge gave preliminary approval to a multi-million dollar settlement in a class action lawsuit brought by 80 women who were shackled by the Cook County Sheriff’s Office in defiance of state law. See Colleen Mastony, “\$4.1 Million Settlement for Pregnant Inmates Who Say They Were Shackled,” *Chicago Tribune*, May 23, 2012.

Advocacy organizations monitoring laws against shackling in other states find serious problems, including the failure of government agencies to write policies to implement the laws. See *Stop Shackling: A Report on the Written Policies of California’s Counties on the Use of Restraints on Pregnant Prisoners in Labor* (San Francisco: Legal Services for Prisoners with Children, 2010); and *Implementation of Laws Regarding Pregnant Women in Texas County Jails: A Review of the Shackling Ban and Pregnant Inmate Standards of Care* (ACLU of Texas and Texas Jail Project, 2011).

⁶⁰ Quoted in Tina Griego, “In the Name of National Security: DIA Anti-Terror Raid, Mom’s Deportation Shatter Family,” *Rocky Mountain News*, December 7, 2002.

⁶¹ Quoted in Mallory Simon, “Pa. Inmate Sues County Prison, Saying She was Forced to have Baby Alone in her Cell,” Court TV, July 27, 2007.

⁶² Jennifer Warren, “U.S. to Seize State Prison Health System; A Federal Judge, Citing Experts’ Reports of Fatal Incompetence and Neglect, Will Name A Receiver for the \$1.1-Billion Program,” *Los Angeles Times*, July 1, 2005.

⁶³ Nell Bernstein, *All Alone in the World: Children of the Incarcerated* (New York: New Press, 2005); “Bill of Rights for Children of Incarcerated Parents,” available online at San Francisco Children of Incarcerated Parents.

⁶⁴ Jennifer Gonnerman, “Million-Dollar Blocks: The Neighborhood Costs of America’s Prison Boom,” *The Village Voice*, November 9, 2004.

⁶⁵ Senator Jim Webb, “Why We Must Fix Our Prisons,” *Parade*, March 29, 2009.