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The Challenges in Health Care for Pregnant Women in U.S. Correctional Institutions

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The Challenges in Health Care for Pregnant Women in U.S. Correctional Institutions

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I. INTRODUCTION

In 2004, 94% of pregnant women who were admitted to state prisons reported that they received an obstetric exam but only 54% received prenatal care, according to a survey conducted by the Bureau of Justice Statistics.¹ Prison conditions such as overcrowding, lack of sanitation, solitary confinement, and inadequate medical care can create significant health risks for inmates, especially pregnant women and their babies.² As a result, pregnant inmates may be placed at a higher risk for negative pregnancy outcomes such as miscarriages, low fetal birth weights, pre-term births, and birth defects.³ This note argues that current prison policies severely impact the quality of medical care and treatment that incarcerated women receive during pregnancy and childbirth. The effects of incarceration can produce adverse maternal and infant health outcomes for pregnant inmates, raising important public health concerns. Therefore, I propose that the national health standards and recommended clinical guidelines should be adopted as policy and strongly enforced to address the health needs of pregnant women and ensure that they are receiving adequate prenatal care in correctional settings.

In Part I, I will introduce the topic I will discuss in this note and provide relevant background information. In Part II, I will lay out a general overview of the health care services women should receive during pregnancy, based on recommended clinical practice guidelines promulgated by health care providers. In Part III, I will discuss the systemic inequities that lead to disproportionate health care access and poorer outcomes for racial minorities and socioeconomically disadvantaged individuals. In Part IV, I will address the general prison conditions and practices that produce long-term adverse health outcomes for the mother and fetus. In Part V, I will discuss how prison conditions affecting pregnant inmates violate the Eighth Amendment. In Part VI, I will summarize the legislation and standards for prison health programs and services and analyze whether they are effective in meeting the health needs of pregnant inmates. Finally, in Part VII, I will discuss policy reform proposals for prenatal care in correctional settings.

1. Laura M. Maruschak, *Medical Problems of Prisoners*, BUREAU OF JUST. STAT. (Apr. 22, 2008), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=1097>.

2. *Overcrowding and Other Threats to Health and Safety*, ACLU, <https://www.aclu.org/issues/prisoners-rights/cruel-inhuman-and-degrading-conditions/overcrowding-and-other-threats-health> (last visited Dec. 9, 2020).

3. Roxanne Daniel, *Prisons neglect pregnant women in their healthcare policies*, PRISON POL'Y INITIATIVE (Dec. 5, 2019), <https://www.prisonpolicy.org/blog/2019/12/05/pregnancy/>.

II. HEALTH NEEDS OF PREGNANT WOMEN

In order to ensure a healthy pregnancy and birth, it is crucial for pregnant women to make regular prenatal visits to their health care provider.⁴ Prenatal visits give women the important opportunity to disclose health concerns and pre-existing conditions they may have to their doctor.⁵ Pregnant women are especially at risk for developing certain health conditions or complications before or during pregnancy that can affect the health of the mother and baby.⁶ For example, depression can make it difficult for a mother to properly care for herself and her unborn child, while high blood pressure and infections can put the mother at higher risk for poor birth outcomes.⁷ Regular and consistent prenatal care can help reduce the risk of pregnancy complications, while simultaneously allowing the doctor to identify possible risks or problems with the fetus early on through screening tests and diagnostic exams.⁸ Doctors can closely monitor the growth of the fetus, their patients' health, and the medications their patients take to ensure they do not have any potentially dangerous effects on the fetus.⁹ Health care providers can also recommend certain lifestyle changes to benefit the healthy development of the fetus, such as a nutritious diet, regular physical exercise, and abstaining from smoking and drinking.¹⁰ In short, prenatal health care providers can make sure that the woman is taking care of herself and her baby's health.¹¹

Clinical practice guidelines provide health care practitioners with standardized recommendations on how to diagnose and treat patients' medical conditions.¹² They are "informed by a systematic review of evidence, and an assessment of the benefits and harms of alternative care options," and are tailored to improve patient outcomes.¹³ In particular, clinical practice guidelines for prenatal care provide obstetrician-gynecologists (OB/GYNs) and primary care physicians with guidelines for

4. *Reproductive Health*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-complications.html#During%20Pregnancy> (last visited Aug. 13, 2020).

5. *Id.*

6. *Id.*

7. *Id.*

8. *What is prenatal care and why is it important?*, NAT'L INST. OF CHILD HEALTH AND HUMAN DEV. (Jan. 31, 2017), <https://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo/prenatal-care>.

9. *Medical Care During Pregnancy*, CLEVELAND CLINIC (July 22, 2019), <https://my.clevelandclinic.org/health/articles/12229-medical-care-during-pregnancy>.

10. *Id.*

11. *Id.*

12. *Clinical Practice Guideline Manual*, AM. ACAD. OF FAM. PHYSICIANS, <https://www.aafp.org/family-physician/patient-care/clinical-recommendations/cpg-manual.html#:~:text=Clinical%20practice%20guidelines%20are%20statements,harms%20of%20alternative%20care%20options> (last visited Oct. 25, 2020).

13. *Id.*

evaluating and treating women during pregnancy, so as to ensure the best possible health outcomes for both the mother and the baby.¹⁴ Health care practitioners are advised to evaluate pregnant women by conducting extensive screening and providing counseling, education, and immunizations as needed throughout the course of their pregnancy, and especially during the first trimester.¹⁵ The American College of Obstetricians and Gynecologists (ACOG) recommends that providers screen patients for perinatal depression and HIV, with follow-up and treatment or referral to a specialist as needed.¹⁶ Providers are also recommended to conduct preventive screenings and assessments to evaluate the patient's physical health and risk of complications.¹⁷ The guidelines recommend counseling patients about potential risk factors that can place them at high risk, such as pre-existing conditions, age, and lifestyle factors.¹⁸ Unfortunately, the level of care and treatment pregnant women in prisons receive often falls short of ACOG's national guidelines on pregnancy-related care.¹⁹

III. PREGNANT WOMEN SUFFER HARSH CONDITIONS AND PRACTICES IN U.S. CORRECTIONAL INSTITUTIONS

In this section, I will discuss the unhealthy conditions and prison health practices that negatively impact the health and well-being of incarcerated pregnant women and their fetuses, such as overcrowding, poor sanitation, and solitary confinement. These prison settings can be detrimental to pregnant inmates' physical and mental health and can contribute to life-threatening health complications. To make matters worse, incarcerated pregnant women experience great difficulty obtaining and securing access to adequate health care due to the lack of quality prenatal health services in prisons.

A. Overcrowding and Poor Sanitation

Millions of Americans are incarcerated in jails and prisons every year, where they are confined in overcrowded cells and “[suffer] from physical

14. *Guidelines for Perinatal Care*, THE AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS xi, <https://www.acog.org/clinical-information/physician-faqs/-/media/3a22e153b67446a6b31fb051e469187c.ashx> (last visited Nov. 7, 2021).

15. *Clinical Practice Guideline for Routine Prenatal and Postpartum Care*, MED. ASSOC. (May 2020), https://www.mahealthcare.com/pdf/practice_guidelines/Prenatal_Postpartum_Care.pdf.

16. THE AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, *supra* note 14, at 294.

17. *Id.* at 24.

18. MED. ASSOC., *supra* note 15, at 1.

19. *Care of Pregnant Women in Prisons Falls Short of Federal Guidelines: Report*, THE CRIME REP., <https://thecrimereport.org/2021/02/25/care-of-pregnant-women-in-prison-falls-short-of-federal-guidelines-report/> (last visited Aug. 21, 2021).

mistreatment, excessive disciplinary sanctions, barely tolerable physical conditions and inadequate medical and mental [health care],” according to Human Rights Watch reports on U.S. prison conditions in the late 1990s.²⁰ Prison overcrowding forces inmates to share cells with one another and leads to poor sanitary conditions, which can adversely affect the physical and mental health of inmates.²¹ In many cases, prisoners are exposed to extreme temperatures, contaminated food, limited access to water and personal hygiene products, and sometimes even a lack of basic sanitation in their environment.²² Prison overcrowding can facilitate the transmission of infectious diseases, such as HIV/AIDS, which poses a very serious public health risk.²³ The extreme lack of space and privacy can create serious dangers to the safety of other inmates by exacerbating mental health problems and contributing to higher rates of violence, self-harm, harm to others, and suicide.²⁴ In many cases, overcrowding can become “so severe that prisoners sleep in shifts, on top of each other, share beds or tie themselves to window bars so that they can sleep while standing.”²⁵

Pregnant women face insurmountable challenges in maintaining a healthy pregnancy while they are incarcerated because the conditions of confinement they are placed under can pose a serious risk of harm to their fetus.²⁶ There is no doubt that “incarceration may provide a beneficial change in living conditions, such as access to regular meals, consistent shelter and prenatal care” for women who come from a socioeconomically disadvantaged background.²⁷ However, prison overcrowding carries its own set of health risks for pregnant women, who are already more vulnerable to a host of problems.²⁸ Overcrowding can place pregnant inmates at a dangerously high risk for contracting infections.²⁹ Therefore, prisons serve

20. *Prisons in the United States of America*, HUM. RTS. WATCH PRISON PROJECT, <https://www.hrw.org/legacy/advocacy/prisons/u-s.htm> (last visited Oct. 25, 2020).

21. *Overcrowding and Overuse of Imprisonment in the United States*, ACLU (May 2015), <https://www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/ACLU.pdf>.

22. HUM. RTS. WATCH PRISON PROJECT, *supra* note 20.

23. *Key Facts*, PENAL REFORM INT’L., <https://www.penalreform.org/issues/prison-conditions/key-facts/> (last visited Oct. 25, 2020) [hereinafter *Key Facts*].

24. *Overcrowding*, PENAL REFORM INT’L., <https://www.penalreform.org/issues/prison-conditions/key-facts/overcrowding/> (last visited Oct. 25, 2020).

25. *Id.*

26. Rebecca Schlafer and Laurel Davis, *Pregnant, in prison, and facing health risks: prenatal care for incarcerated women*, THE CONVERSATION (Feb. 19, 2016), <https://theconversation.com/pregnant-in-prison-and-facing-health-risks-prenatal-care-for-incarcerated-women-45034>.

27. *Id.*

28. *Handbook on Women and Imprisonment*, U.N. OFF. ON DRUGS AND CRIME at 10, https://www.unodc.org/documents/justice-and-prison-reform/women_and_imprisonment_-_2nd_edition.pdf (last visited Dec. 10, 2020).

29. Lauren Kuhlik and Dr. Carolyn Sufrin, *During COVID-19 Crisis, We Must Prioritize the Release of Pregnant People*, ACLU (May 12, 2020), <https://www.aclu.org/news/prisoners-rights/during-covid-19-crisis-we-must-prioritize-the-release-of-pregnant-people>.

as an inadvertent breeding ground for the spread of infectious diseases, which can have an adverse impact on the health of the mother.³⁰

The Julia Tutwiler Prison for Women is a maximum-security prison in Alabama that places pregnant inmates in a single dorm for sick prisoners because it is one of the few areas with air-conditioning and is located closest to the infirmary.³¹ The prison houses almost double the capacity of prisoners it can hold, which makes it difficult for female inmates to secure the medical assistance they need.³² Another women's prison in Michigan, Women's Huron Valley Correctional Facility, is "notoriously overcrowded" and has faced various problems due to overcrowding, such as a scabies outbreak in 2018.³³ That same year, a female inmate suffered a miscarriage and "lay for two hours in a pool of her own blood before a doctor was summoned."³⁴ One may infer that the inadequacy of proper medical care can at least partially be explained by prison overcrowding because prison health care systems are not equipped to provide medical care on such a massive scale.

B. Solitary Confinement

Solitary confinement is a widely used practice in prisons and jails throughout the United States that adversely affects the physical and mental health of prisoners placed in isolation.³⁵ Solitary confinement is defined as "the practice of isolating people in closed cells for 22-24 hours a day, virtually free of human contact" for long periods of time ranging from days to years.³⁶ Solitary confinement is often used as a control strategy to punish prisoners for minor rule infractions, rather than as a last-resort disciplinary measure for prisoners who pose a threat to correctional officers or other inmates.³⁷ Since the 19th century, the conditions of solitary confinement have included "prolonged isolation with a lack of natural light, poor ventilation, and lack of meaningful human contact."³⁸ These conditions can have harmful and psychologically traumatizing consequences for the physical and mental health of prisoners.³⁹ Many prisoners held in Security Housing Units (SHUs) develop a psychiatric disorder known as "SHU Syndrome," which is

30. *Key Facts*, *supra* note 23.

31. Alysia Santo, *The Separation*, THE MARSHALL PROJECT (May 6, 2020), <https://www.themarshallproject.org/2020/05/06/the-separation>.

32. *Id.*

33. Zoe Schlanger, *Should a Pregnant Person Ever Go to Prison?*, QUARTZ (Apr. 6, 2019), <https://qz.com/1587102/what-its-like-to-give-birth-in-a-us-prison/>.

34. *Id.*

35. Valerie Kiebala and Sal Rodriguez, *Frequently Asked Questions*, SOLITARY WATCH (Dec. 2018), <https://solitarywatch.org/facts/faq/>.

36. *Id.*

37. *Id.*

38. David Cloud et al., *Public Health and Solitary Confinement in the United States*, 105 AM. J. OF PUB. HEALTH 18, 19 (2015).

39. *Id.*

“characterized by hypersensitivity to external stimuli, hallucinations, panic attacks, cognitive deficits, obsessive thinking, [and] paranoia.”⁴⁰ Prisoners may also develop chronic mental illnesses, such as depression and anxiety being around others.⁴¹ Solitary confinement is especially dangerous for prisoners who already struggle with mental illness because “[t]he stress, lack of meaningful social contact, and unstructured days can exacerbate symptoms of illness or provoke recurrence.”⁴² Therefore, solitary confinement places them at a higher risk of self-harm or suicide.⁴³ Prisoners placed in isolation are also vulnerable to physical violence and sexual abuse by correctional officers, often with few preventative measures in place.⁴⁴

Prisoners who require medical care, mental health services, addiction treatment, and suicide prevention measures are often denied care, and are instead punished and placed in solitary confinement.⁴⁵ Pregnant women are among the vulnerable groups in the prison population who are subject to solitary confinement.⁴⁶ Locking pregnant women up in solitary confinement “can jeopardize their access to prenatal care” and may impede their access to important health services, especially in the event that they require emergency medical care.⁴⁷ The psychological trauma, lack of physical exercise and nutrition, and use of shackles during labor are a few examples of how solitary confinement places pregnant women at serious risk.⁴⁸ In addition, the stresses of carrying a baby to term while in isolation can predispose women to a higher risk of pre-term labor, low birth weight, birth complications, or even miscarriage.⁴⁹ The lack of medical attention in solitary confinement facilities makes it difficult for pregnant women to request and obtain medical care, especially given the unique nature of their medical needs.⁵⁰

40. Kiebala and Rodriguez, *supra* note 35.

41. *Id.*

42. Jeffrey Metzner and Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104, 105 (2010).

43. *Id.*

44. HUM. RTS. WATCH PRISON PROJECT, *supra* note 20.

45. *Prison Conditions*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/prison-conditions/> (last visited Oct. 28, 2020).

46. *Still Worse than Second-Class: Solitary Confinement of Women in the United States*, ACLU at 4 (2019), https://www.aclu.org/sites/default/files/field_document/062419-sj-solitaryreportcover.pdf.

47. *Id.* at 9.

48. See generally Barbara A. Hotelling, *Perinatal Needs of Pregnant, Incarcerated Women*, 17 J. PERINATAL EDUC. (2008).

49. *Legislative Memo: Prohibiting the Use of Segregated Confinement for Incarcerated Women Who are Pregnant, Recently Gave Birth, and/or are Participating in the Nursery Programs*, N.Y. CIV. LIBERTIES UNION (last visited Oct. 28, 2020).

50. *Id.*

C. Poor Access to Quality Health Care

While prisons are required to provide healthcare services to incarcerated individuals, many inmates go without needed healthcare.⁵¹ For instance, one study found that “among inmates with a persistent medical problem, approximately 14% of federal inmates, 20% of state inmates, and 68% of local jail inmates did not receive a medical examination while incarcerated.”⁵² Medical care in prisons is often very limited, which makes it difficult for prison inmates to access necessary care and treatment for chronic illnesses and serious conditions.⁵³ Most prisons require their inmates to submit written requests and wait three to five days before they receive permission “to go to medical” and see a doctor.⁵⁴ This can lead to delays in access to medical care when it is needed most, such as in emergency situations.⁵⁵ Some states also charge prisoners for the medical care and prescriptions they receive, which creates financial strain and further deters prisoners from seeking medical attention.⁵⁶ Approximately 80% of prisoners are poor and cannot afford co-payments for medical services.⁵⁷ In addition, one study found that the majority of correctional facilities surveyed did not provide on-site prenatal care, educational or support services, or adequate nutrition for pregnant women in particular.⁵⁸

i. Prenatal Care

While the number of female prisoners continues to increase, pregnant women in prison continue to face challenges in securing access to quality prenatal care services.⁵⁹ In 2008, a report from the Department of Justice

51. Alexandra Gates et al., *Health Coverage and Care for the Adult Criminal Justice-Involved Population*, KAISER FAM. FOUND. (Sept. 5, 2014), <https://www.kff.org/uninsured/issue-brief/health-coverage-and-care-for-the-adult-criminal-justice-involved-population/>.

52. *Id.*

53. *Medical and Mental Health Care*, ACLU, <https://www.aclu.org/issues/prisoners-rights/medical-and-mental-health-care> (last visited Dec. 10, 2020).

54. *FAQ: Medical Care, PRISON FELLOWSHIP*, <https://www.prisonfellowship.org/resources/training-resources/in-prison/faq-medical-care/> (last visited Dec. 10, 2020).

55. *See Recognizing the Needs of Incarcerated Patients in the Emergency Department*, AM. COLL. OF EMERGENCY PHYSICIANS (Apr. 2006), <https://www.acep.org/administration/resources/recognizing-the-needs-of-incarcerated-patients-in-the-emergency-department/>.

56. PRISON FELLOWSHIP, *supra* note 54.

57. Michelle Andrews, *Even in Prison, Health Care Often Comes With a Copay*, NPR (Sept. 30, 2015), <https://www.npr.org/sections/health-shots/2015/09/30/444451967/even-in-prison-health-care-often-comes-with-a-copay>.

58. *Id.* at 560, 561, 567.

59. Somayeh Alirezaei and Robab Latifnejad Roudsari, *Promoting Health Care for Pregnant Women in Prison: A Review of International Guidelines*, 25 IRAN. J. NURS. MIDWIFERY RES. 91, 91 (2020).

showed that “46% of female prisoners were not receiving prenatal care.”⁶⁰ In 2011, findings from the Committee on Health Care for Underserved Women also showed that thirty-eight states “failed to institute policies requiring that incarcerated pregnant women receive basic prenatal care”, and that forty-one states “[did] not require prenatal nutrition counseling or... ensure that these women receive proper nutrition.”⁶¹ Even though there are established standards for prenatal care, many states’ prisons fail to ensure that pregnant women are receiving the care and support they need while they are imprisoned.⁶² ACOG and the National Commission on Correctional Health Care recommend that pregnant inmates receive nutrition counseling and “periodic health monitoring and evaluation throughout pregnancy”.⁶³ Correctional facilities should provide incarcerated pregnant women information about the importance of nutrition and exercise to help promote the fetus’s healthy development.⁶⁴ Childbirth education and support during pregnancy should also be included as part of pregnancy counseling to help alleviate the stress pregnant inmates may experience while serving time in prison.⁶⁵

ii. Shackling During Labor

Pregnant women are among the most vulnerable populations in prisons, yet they are commonly subject to physical restraints such as shackling.⁶⁶ Shackling poses serious health risks to both the mother and fetus because it puts the mother at “a higher risk for falls, problems related to those falls, and barriers to providers’ ability to detect and treat pregnancy-related complications such as pre-term labor and hemorrhaging during delivery and after birth.”⁶⁷ The use of physical restraints during and after childbirth can exacerbate women’s mental health problems, including depression, post-

60. *Id.*

61. Desiree Robles, *Prison and Birth*, MIDWIVES ALL. OF N. AM., <https://mana.org/blog/prison-birth> (last visited Dec. 10, 2020).

62. Taylor Walker, *Across the Nation, States Fail to Meet Pregnant Women’s Health Needs in Prisons*, WITNESS LA (Dec. 10, 2019), <https://witnessla.com/widespread-failure-to-meet-pregnant-womens-health-needs-in-prisons/>.

63. Danielle H. Dallaire et al., *Chapter 3: Policy, Programs, and Interventions Regarding Pregnant Incarcerated Women*, in AND JUST. FOR ALL: FAM. AND THE CRIM. JUST. SYS. 1, 1-2 (2015).

64. *Id.*

65. Robles, *supra* note 61.

66. Nakea Barksdale, *Does Shackling Incarcerated Women During Childbirth Violate the Eighth Amendment?*, AM. BAR ASS’N (Apr. 27, 2020), <https://www.americanbar.org/groups/litigation/committees/civil-rights/articles/2020/does-shackling-incarcerated-women-during-childbirth-violate-the-eighth-amendment/>.

67. Tori DeAngelis, *The restraint of pregnant inmates*, AM. PSYCH. ASS’N (June 2016), <https://www.apa.org/monitor/2016/06/restraint-inmates>.

traumatic stress disorder (PTSD), severe mental distress, and anguish.⁶⁸ ACOG, the American Psychological Association, and the American Public Health Association (APHA) have formally condemned shackling, as it can cause severe pain and trauma and endanger women's well-being.⁶⁹ In 2003, Shawanna Nelson, who was an inmate at the McPherson Unit in Arkansas, went into labor while she was incarcerated—her legs were shackled during labor and immediately after giving birth to her baby.⁷⁰ She suffered physical injury to her back and mental distress because she was unable to move. She later had to undergo surgery to treat symptoms she developed while giving birth to her son.⁷¹

IV. WOMEN AND MINORITIES ARE DISPROPORTIONATELY IMPACTED BY INCARCERATION

A. Racial and Socioeconomic Inequality in U.S. Female Incarceration Rates

In recent decades, the mass incarceration system in the United States has grown rapidly, and the consequent increase in the inmate population has disproportionately impacted socioeconomically disadvantaged communities of color.⁷² The racial and ethnic breakdown of the U.S. prisoner population shows that people of color, especially African Americans and Latinos, are incarcerated at much higher rates than whites.⁷³ According to data statistics collected by the U.S. Bureau of Justice in 2016, “African Americans and Latinos comprise 29% of the U.S. population, [yet] they make up 57% of the U.S. prison population.”⁷⁴ As a result, African Americans are 5.9 times as likely—and Hispanics are 3.1 times as likely—to be incarcerated than

68. *End the Use of Restraints on Incarcerated Women and Adolescents during Pregnancy, Labor, Childbirth, and Recovery*, AM. PSYCH. ASS'N, <https://www.apa.org/advocacy/criminal-justice/shackling-incarcerated-women.pdf> (last visited Dec. 4, 2020).

69. *Id.*; *Shackling of pregnant women and girls in correctional systems*, NCCD CTR. FOR GIRLS AND YOUNG WOMEN, https://www.evidentchange.org/sites/default/files/publication_pdf/shackling.pdf (last visited Dec. 4, 2020).

70. Anna Clark, *Giving Birth in Chains: The Shackling of Incarcerated Women During Labor and Delivery*, REWIRE NEWS GROUP (July 6, 2009), <https://rewirenewsgroup.com/article/2009/07/06/giving-birth-chains-the-shackling-incarcerated-women-during-labor-and-delivery/>.

71. *Id.*

72. *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENTENCING PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

73. *Id.*

74. *Id.*

whites.⁷⁵ The racial disparities in incarceration rates among female prisoners are not as high, but are still prevalent, as discussed below.⁷⁶ In addition, “[c]lass inequalities within the incarcerated population are reflected in the lower education levels of those in prison or jail.”⁷⁷ For example, “[t]he cumulative risk of imprisonment is [three] to [four] times higher for high school dropouts than for high school graduates,” and this risk is about five times higher for black men.⁷⁸ There is an overwhelming record of evidence affirming that the correctional system continues to perpetuate these patterns of racial and economic inequality by creating a “vicious cycle of punishment” for poor and racially marginalized communities.⁷⁹

This trend in racial disparities extends across gender lines.⁸⁰ Women of color are significantly overrepresented in the criminal justice system.⁸¹ According to the American Civil Liberties Union, Black women represent 30% of all incarcerated women, and Hispanic women represent 16% of all incarcerated women, even though both Black and Hispanic women each represent less than 15% of all women in the U.S.⁸² In 2016, it was reported that “64 percent of women in jails across the country are women of color.”⁸³ Moreover, most of these women are imprisoned for committing low-level, non-violent offenses like drug possession.⁸⁴ These women often suffer from poverty and/or mental illness as well.⁸⁵ Because women of color are more likely to be incarcerated in the first place, they are less likely to receive adequate medical care compared to white women. Evidently, incarcerated Black and Hispanic women are more likely than incarcerated white women to have their health concerns dismissed or ignored.⁸⁶ The confluence of

75. *Id.*

76. *Id.*

77. Bruce Western and Becky Petit, *Incarceration & social inequality*, DAEDALUS (2010), <https://www.amacad.org/publication/incarceration-social-inequality>.

78. Becky Petit and Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 160-161 (2004), <https://journals.sagepub.com/doi/10.1177/000312240406900201>.

79. Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998), <https://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex>.

80. *Facts About the Over-Incarceration of Women in the United States*, ACLU, <https://www.aclu.org/other/facts-about-over-incarceration-women-united-states> (last visited Oct. 25, 2020); Jamila Taylor, et al., *Eliminating Racial Disparities in Maternal and Infant Mortality*, Ctr. for Am. Progress (May 2, 2019), <http://www.americanprogress.org/issues/women/reports/2019/05/02/469186/eliminating-racial-disparities-maternal-infant-mortality/>.

81. *Id.*

82. *Id.*

83. *Study: The Growing, Disproportionate Number of Women of Color in U.S. Jails*, NPR (Aug. 17, 2016), <https://www.npr.org/sections/codeswitch/2016/08/17/490364132/study-the-growing-disproportionate-number-of-women-of-color-in-u-s-jails>.

84. *Id.*

85. *Id.*

86. Taylor et al., *supra* note 80.

economic, social, and environmental factors often bring women into the incarceration system with pre-existing health problems or generally poor health.⁸⁷ For instance, “incarcerated Black women are disproportionately impacted by health issues, including sexually transmitted infections, HIV/AIDS, substance use, and posttraumatic stress disorder.”⁸⁸

B. Incarceration Predisposes Racial Minorities to Poorer Health Outcomes

Given that racial and ethnic minorities are more likely to become involved with the criminal justice system, this inevitably places them at higher risk for poor health outcomes when it comes to pregnancy.⁸⁹ This issue is further complicated by the fact that “minority women receiving prenatal care still experience a disproportionate rate of poor birth outcomes, including preterm birth, operative birth, and low birthweight.”⁹⁰ There can be various reasons for these types of discrepancies in health outcomes among women of color, such as differences in the quality of care provided, increased exposure to environmental hazards, and stress they may experience due to the prejudice and discrimination they face as a minority.⁹¹ Women of color who are pregnant are also at increased risk of experiencing stress, anxiety, and depression, all of which can contribute to poor pregnancy outcomes.⁹² Research indicates that, generally in the United States, “African American women are three to four times more likely to die from childbirth than non-Hispanic white women” due to a pregnancy-related complication.⁹³ This staggering statistic does not even take into account how the prison environment might produce disproportionately adverse outcomes for them.⁹⁴ Within the context of prisons, however, “[t]he incarcerated population generally has worse health than the noninstitutionalized population, especially for hypertension, heart problems, asthma, kidney problems, stroke,

87. Janette Taylor et al., *Invisible, Underserved, and Diverse: The Health of Women in Prison*, 2 INT’L J. OF GLOB. HEALTH 28, 33 (2002), <https://scholarworks.uni.edu/ijgh/vol2/iss1/5/>.

88. Keren Gueta, *Exploring the promise of intersectionality for promoting justice-involved women’s health research and policy*, 8 HEALTH & JUST. J. 1, 2 (2020), <https://healthandjusticejournal.biomedcentral.com/articles/10.1186/s40352-020-00120-8>.

89. Susan Gennaro et al., *Improving Prenatal Care for Minority Women*, MCN THE AM. J. MATERNAL CHILD NURSING (May 1, 2017) at 1, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4851587/>.

90. *Id.*

91. David R. Williams and Selina A. Mohammed, *Discrimination and racial disparities in health: evidence and needed research*, 32 J. BEHAV. MED. 1, 13, 15-16 (Feb. 2009), <https://pubmed.ncbi.nlm.nih.gov/19030981/>.

92. *Id.*; Gennaro et al., *supra* note 89, at 1.

93. Theresa Chalhoub and Kelly Rimar, *The Health Care System and Racial Disparities in Maternal Mortality*, CTR. FOR AM. PROGRESS (May 10, 2018), <https://www.americanprogress.org/article/health-care-system-racial-disparities-maternal-mortality/>.

94. *Id.*

arthritis, and cancer.”⁹⁵ Therefore, incarceration in itself predisposes women of color to poor health outcomes because of the poor conditions in prisons.

V. USING THE EIGHTH AMENDMENT AS A VEHICLE FOR CHANGE

In recent decades, federal courts have increasingly been confronted with Eighth Amendment concerns due to the poor living conditions in prisons and mounting pressures for prison reform.⁹⁶ The Eighth Amendment to the United States Constitution prohibits the federal government from inflicting cruel and unusual punishment upon prisoners.⁹⁷ “Cruel and unusual punishment” is defined as “punishment that is torturous, degrading, inhuman, grossly disproportionate to the crime in question, or otherwise shocking to the moral sense of the community.”⁹⁸ The U.S. Supreme Court has interpreted and applied this term broadly to various contexts, including prisoners’ rights to receive medical care and treatment.⁹⁹ Historically, the courts assumed a “hands-off” policy, where they refrained from intervening in cases challenging prison conditions as unconstitutional.¹⁰⁰ Instead, they chose to defer to the expertise of corrections officials to avoid “[subverting] internal prison discipline” and to preserve separation of powers.¹⁰¹

A. “Deliberate Indifference” Standard

In the 1960s, national news coverage about prison conditions and confinement began to raise public awareness about prisoners’ rights issues.¹⁰² This contributed to a major shift in judicial attitudes, and eventually prisoners’ constitutional rights to medical care became codified in both federal and state law.¹⁰³ In 1976, the U.S. Supreme Court held in *Estelle v. Gamble* that prisoners have the right to adequate medical care while they are

95. Nowotny et al., *Racial Disparities in Health Condition Among Prisoners Compared With the General Population*, 3 SSM POPULATION HEALTH 487, 494-95 (2017).

96. Ronald H. Rosenberg, *Constitutional Law – The Eighth Amendment and Prison Reform*, COLL. OF WM. & MARY L. SCH. SCHOLARSHIP REPOSITORY 1539, 1542 (1973), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1692&context=facpubs>.

97. NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendment/amendment-viii> (last visited at Nov. 30, 2020).

98. *Punishment*, BLACK’S L. DICTIONARY (11th ed. 2019).

99. Damon Martin, Comment, *State Prisoners’ Rights to Medical Treatment: Merely Elusive or Wholly Illusory*, 8 UCLA NAT’L BLACK L. J. 427 (1983), <https://escholarship.org/content/qt1jh7t4bp/qt1jh7t4bp.pdf?t=nrwqsr>.

100. *Id.*

101. Stuart Klein, *Prisoners’ Rights to Physical and Mental Health Care: A Modern Expansion of the Eighth Amendment’s Cruel and Unusual Punishment Clause*, 7 FORDHAM URB. L.J. 1, 7-8 (1979), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1117&context=ulj>.

102. *Id.* at 9.

103. *Id.* at 9-13.

incarcerated.¹⁰⁴ This foundational case established the “deliberate indifference” standard in determining whether prison officials’ conduct violated the Eighth Amendment.¹⁰⁵ Under *Estelle*, “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the Eighth Amendment.”¹⁰⁶ There are two important components that must be met to establish an Eighth Amendment violation: (1) the prisoner must have had a serious medical need, and (2) the prison guard must “[know] of and disregard an excessive risk to inmates’ health or safety.”¹⁰⁷ By recognizing incarcerated individuals’ basic constitutional right to health care, this opened the door to greater judicial scrutiny of prisons under Eighth Amendment standards.¹⁰⁸

B. Challenges to Living Conditions in Overcrowded Prisons

Prison overpopulation in correctional facilities across the United States has directly contributed to the deterioration of inmates’ living conditions.¹⁰⁹ As previously alluded to, many prison inmates are forced to live without basic sanitation, proper medical care, and/or adequate environmental conditions.¹¹⁰ As the Eighth Amendment’s prohibition against cruel and unusual punishment “became the main route to relief for prison conditions cases,” the U.S. Supreme Court devised specific standards to determine when prison conditions would amount to cruel and unusual punishment.¹¹¹

In 2011, the two federal class action suits of *Coleman v. Wilson*¹¹² and *Plata v. Schwarzenegger*¹¹³ were jointly decided in *Brown v. Plata*.¹¹⁴ The

104. *Estelle v. Gamble*, 97 S.Ct. 285, 290 (1976).

105. *Id.*

106. *Id.* at 291.

107. Dan Manville, *Federal Legal Standards for Prison Medical Care*, PRISON LEGAL NEWS (May 15, 2003), <https://www.prisonlegalnews.org/news/2003/may/15/federal-legal-standards-for-prison-medical-care/>.

108. Klein, *supra* note 101, at 9.

109. Susanna Y. Chung, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351 (2000), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3653&context=flr>.

110. *Id.* at 2352.

111. Pamela M. Rosenblatt, *The Dilemma of Overcrowding in the Nation’s Prisons: What are Constitutional Conditions and What Can Be Done?*, 8 NYLS J. HUM. RTS. 489, 497-498 (1991), https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1190&context=journal_of_human_rights.

112. *Coleman v. Wilson*, 912 F.Supp. 1282, 1293 (1995), [https://1.next.westlaw.com/Document/I5b761ab9564111d997e0acd5cbb90d3f/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Document/I5b761ab9564111d997e0acd5cbb90d3f/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)).

113. *Plata v. Schwarzenegger*, 603 F.3d 1088, 1090 (2010), [https://1.next.westlaw.com/Document/I5d525eb5546a11dfae65b23e804c3c12/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Document/I5d525eb5546a11dfae65b23e804c3c12/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)).

114. William J. Newman and Charles L. Scott, *Brown v. Plata: Prison Overcrowding in California*, 40 J. AM. ACAD. PSYCHIATRY L. 547, 548 (2012), <http://jaapl.org/content/40/4/547>.

U.S. Supreme Court held that prison overcrowding was unconstitutional because prison inmates were suffering serious medical and mental health issues and were not receiving adequate care.¹¹⁵ The U.S. Supreme Court affirmed the three-judge panel's ruling mandating a reduction in California's prison population to curb overcrowding and remedy the constitutional violations pursuant to the Prison Litigation Reform Act (PLRA).¹¹⁶ In the long term, reducing overcrowding is an important step toward providing "timely and adequate access to medical care, including reducing the incidence of prison violence and ameliorating unsafe living conditions."¹¹⁷ Nonetheless, prison institutions' failure to meet basic human needs because of overcrowding continues to severely constrain prison resources, burden the prison health care system, and threaten the health and safety of prison inmates.¹¹⁸

C. "Excessive Force"

The Eighth Amendment protects prisoners against excessive punishment, which has traditionally been based on physical force.¹¹⁹ However, this protection does not extend to all punishment: prison officials still have the authority to use physical force toward prisoners as necessary to maintain or restore discipline and order.¹²⁰ For this reason, it may be difficult for prison inmates to challenge the use of physical force because it is used so commonly in the prison setting as to be considered "a natural and ordinary aspect of prison life."¹²¹ In order for force to be considered "excessive," and thus qualify as "cruel and unusual punishment" under the Eighth Amendment, the force must be "excessive and applied maliciously and sadistically for the very purpose of causing harm and not in a good faith effort to achieve a legitimate purpose."¹²² In 1986, the U.S. Supreme Court in *Whitley v. Albers* granted wide deference to prison officials in exercising

115. *Brown v. Plata*, 131 S.Ct. 1910, 1941 (2011).

116. *Id.* at 1944.

117. *Id.* at 1939.

118. Gaby Galvin, *Underfunded, Overcrowded State Prisons Struggle with Reform*, U.S. NEWS & WORLD REP. (July 26, 2017), <https://www.usnews.com/news/best-states/articles/2017-07-26/understaffed-and-overcrowded-state-prisons-crippled-by-budget-constraints-bad-leadership>.

119. Ellen K. Lawson, *Extending Deference to Prison Officials Under the Eighth Amendment: Whitley v. Albers*, 32 WASH. U. J. URB. & CONTEMP. L. 231 (1987), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1334&context=law_urbanlaw.

120. *Id.* at 232.

121. Jeffrey M. Lipman, *Eighth Amendment and Deliberate Indifference Standard for Prisoners: Eighth Circuit Outlook*, 31 CREIGHTON L. REV. 435, 448 (1998), https://dspace2.creighton.edu/xmlui/bitstream/handle/10504/40228/22_31CreightonLRev435%281997-1998%29.pdf?sequence=1&isAllowed=y.

122. *Id.*

physical force against the prison inmate.¹²³ The majority held that the prison officials acted in good faith because their use of physical force was not an “unnecessary and wanton infliction of pain,” therefore it did not constitute cruel and unusual punishment.¹²⁴

According to the California Department of Corrections and Rehabilitation, “excessive force” can also be defined as “the use of more force than is objectively reasonable to accomplish a lawful purpose.”¹²⁵ Unlike police violence toward communities of color, the pervasive use of excessive force and violence against prisoners at the hands of correctional officers is widely underreported and continues to go unpunished.¹²⁶ In December 2020, three former female inmates with psychiatric disabilities brought suit against prison officials at Allegheny County Jail in Pennsylvania, alleging the jail sergeant used excessive force against them.¹²⁷ One of the inmates, who was pregnant, alleged that the jail sergeant “repeatedly pepper-sprayed her and slammed her face on the ground requiring her to be hospitalized.”¹²⁸ The other inmates alleged that they were pepper-sprayed after they were stripped naked before they were placed in restraints, and they suffered chemical burns and physical injuries as a result.¹²⁹ Even where the force used is “reasonably necessary,” excessive force can “amount to torture or ill treatment” of vulnerable groups such as the disabled and pregnant women.¹³⁰

D. Inadequate Medical Care

Even where prison officials have not acted with “deliberate indifference” in violating pregnant inmates’ rights, prisoners can also bring claims against correctional facilities for failure to provide adequate medical care. In 1977, the U.S. Court of Appeals for the Second Circuit held in *Todaro v. Ward* that the prison’s medical practices were “constitutionally

123. *Whitley v. Albers*, 106 S.Ct. 1078, 1085 (2011), [https://1.next.westlaw.com/Document/I178d84909c1f11d993e6d35cc61aab4a/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Document/I178d84909c1f11d993e6d35cc61aab4a/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)).

124. *Id.*

125. CAL. DEP’T OF CORR. AND REHAB., Operations Manual, Chapter 5: Adult Custody and Security Operations 325 (2019), https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2019/08/Ch_5_2019_DOM.pdf.

126. Lauren-Brooke Eisen, *The Violence Against People Behind Bars That We Don’t See*, TIME (Sept. 1, 2020), <https://time.com/5884104/prison-violence-dont-see/>.

127. Claudia Lauer, *Female ex-inmates allege excessive force at Allegheny jail*, ASSOCIATED PRESS (Dec. 2, 2020), <https://apnews.com/article/health-lawsuits-mental-health-1d9f007bf7efa537191a33960940ed9b>.

128. *Id.*

129. *Id.*

130. *Guidance on Less-Lethal Weapons in Law Enforcement*, U.N. HUM. RTS., https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf (last visited Dec. 11, 2020).

infirm” because the screening and record-keeping procedures in place were causing serious delays in access to care and inadequate follow-up care.¹³¹ While this case did not specifically address the problems experienced by pregnant women, it set the stage for later suits to be brought by pregnant inmates.¹³² One of those later suits is the 1986 case of *Harris v. McCarthy*, which was a class action filed on behalf of all pregnant and post-partum prisoners in the State of California.¹³³ *Harris* was the “first suit to challenge solely the quality of prenatal and post-partum care.”¹³⁴ The case eventually reached a settlement by which California state prisons were required to permit pregnant inmates to receive treatment and medical care from a qualified OB-GYN, create a health care team that would address the needs of pregnant inmates, and implement emergency treatment and high-risk protocols.¹³⁵

Even though pregnant inmates may encounter significant challenges to receiving adequate medical care in prison, it can be difficult to prove an Eighth Amendment violation because the claim must go beyond mere negligence.¹³⁶ In addition, “[c]ourts are generally unwilling to presume intentional cruelty by prison officials, so bad faith elements of willful, wanton or reckless conduct are required” to raise a complaint to the level of an Eighth Amendment violation.¹³⁷ One reason for this is the fact that courts have failed to clearly define whether pregnancy reaches the level of a “serious medical need” and what the quality of prenatal care in prisons should be.¹³⁸ A lack of adequate and timely medical care can lead to devastating consequences for pregnant women, such as pregnancy-related complications and miscarriages, which the Eighth Amendment should protect women from.¹³⁹ The prison system’s failure to provide adequate medical care to pregnant inmates subjects them to unnecessary dangers and reinforces the

131. *Todaro v. Ward*, 565 F.2d 48, 52-53 (1977).

132. Kelly Parker, *Pregnant Women Inmates: Evaluating Their Rights and Identifying Opportunities for Improvements in Their Treatment*, 19 J. L. AND HEALTH 259, 274 (2004), <https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1106&context=jlh>.

133. Ellen Barry, *Imprisoned Mothers Face Extra Hardships*, 14 J. NAT’L PRISON PROJECT 2 (1987).

134. Terri L. Schupak, *Women and Children First: An Examination of the Unique Needs of Women in Prison*, 16 GOLDEN GATE U. L. REV. 455, 462 (1986), <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1397&context=ggulrev>.

135. Barry, *supra* note 133.

136. Martin, *supra* note 99, at 445.

137. *Id.* at 446.

138. Wesley Smithart, Note, *Pregnant in Captivity: Analyzing the Treatment of Pregnant Women in American Prisons and Immigration Detention Centers*, 71 ALA. L. REV. 867, 885 (2020), <https://www.law.ua.edu/lawreview/files/2020/05/11-Smithart-867-892.pdf>.

139. *Id.* at 885.

idea that incarcerated pregnant women do not deserve the same reproductive rights.¹⁴⁰

E. Neglect, Shackling, and Physical Restraints

Applying *Estelle*, neglecting pregnant women, using physical restraints, and shackling pregnant women during childbirth could constitute “deliberate indifference” because it increases the risk of significant medical harm to the health of the mother and baby.¹⁴¹ In 2019, Diana Sanchez, an inmate at Denver County Jail, was forced to give birth alone in a locked cell without any medical supervision or treatment.¹⁴² Despite notifying the prison staff and nurses several times, she was not taken to the hospital and no one arrived to her cell until after she had delivered her baby.¹⁴³ Another unnamed female inmate experienced a similar situation at Broward County Jail in Florida, where she was ignored by jail staff standing outside her cell as she screamed for help and was forced to give birth alone without any medical assistance.¹⁴⁴

Shackling pregnant inmates endangers the health and safety of the mother and fetus, which violates the Eighth Amendment’s prohibition on cruel and unusual punishment. There have been significant reform efforts to restrict and prohibit the use of shackles to restrain pregnant inmates. In 2014, the Federal Bureau of Prisons amended its policy on the use of force and application of restraints to prohibit shackling pregnant inmates “unless there are reasonable grounds to believe the inmate presents an immediate, serious threat of hurting herself, staff, or others, or that she presents an immediate credible risk of escape that cannot be reasonably contained through other method.”¹⁴⁵ Similarly, the American Bar Association’s criminal justice standards limit the use of physical restraints to the least restrictive means appropriate, to use them only as long as the need exists, and in a manner that does not cause any unnecessary pain or discomfort to the prisoner.¹⁴⁶ Shackling subjects pregnant women who are already in an inherently

140. *Id.* at 892.

141. Dana L. Sichel, *Giving Birth in Shackles: A Constitutional and Human Rights Violation*, 16 AM. U. J. GENDER SOC. POL’Y & L. 223, 232 (2008), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1035&context=jgspl>.

142. Mariel Padilla, *Woman Gave Birth in Denver Jail Cell Alone, Lawsuit Says*, N.Y. TIMES (Sept. 1, 2019), <https://www.nytimes.com/2019/09/01/us/diana-sanchez-birth-denver-jail.html>.

143. *Id.*

144. Rafael Olmeda, *Report: Woman’s pleas for help ignored while giving birth in Fla. jail*, ATLANTA JOURNAL-CONSTITUTION (Oct. 15, 2020), <https://www.ajc.com/news/report-womans-pleas-for-help-ignored-while-giving-birth-in-florida-jail/D5LBNZBKQRALZFKJPSRF2N6W34/>.

145. FED. BUREAU OF PRISONS, Change Notice to Program Statement 5566.06, *Use of Force and Application of Restraints* (2005), https://www.bop.gov/policy/progstat/5566_006.pdf.

146. A.B.A., Criminal Justice Standards for Treatment of Prisoners, § 23-5.9(a)-(b) (2010), https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archi ve/crimjust_standards_treatmentprisoners/.

vulnerable position, to “arbitrary and complete physical control... at the will of correctional officers.”¹⁴⁷ Long-established Supreme Court precedent has found that shackling women during labor demonstrates “deliberate indifference” to their medical needs in violation of the Eighth Amendment.¹⁴⁸ Despite the potential life-threatening risks caused by shackling, only eighteen states have laws prohibiting or restricting the use of shackling on pregnant inmates.¹⁴⁹

VI. CURRENT POLICY AND PROPOSED REFORMS FOR IMPROVING TREATMENT OF INCARCERATED PREGNANT WOMEN

A. National Standards of Care for Incarcerated Pregnant Women

Major national organizations such as ACOG, APHA, and the National Commission on Correctional Health Care (NCCHC) have established federal standards that specifically provide guidance on what type of health care and treatment pregnant inmates should receive.¹⁵⁰ The NCCHC’s *Standards for Health Services* provide that pregnant inmates must receive “timely and appropriate prenatal care [and] specialized obstetrical services when indicated.”¹⁵¹ Correctional facilities must provide specific services for prenatal care such as medical exams, diagnostic tests, nutritional counseling, documented postnatal care, written policies and procedures, and tracked pregnancy outcomes.¹⁵² ACOG’s *Health Care for Pregnant and Postpartum Incarcerated Women* focuses on the unique needs of incarcerated pregnant women.¹⁵³ ACOG’s standards require OB-GYNs to provide pregnancy risk assessments, pregnancy counseling, appropriate prenatal care, testing and treatment for HIV, mental health screenings, hospital services, and written policies.¹⁵⁴ Finally, APHA’s *Standards for Health Services in Correctional Institutions* address standards mentioned in both NCCHC and ACOG, yet also provide for prenatal health education, identification and referral of high-

147. Alexa Richardson, *Shackling of Pregnant Prisoners is Ongoing*, BILL OF HEALTH (Mar. 4, 2020), <https://blog.petrieflom.law.harvard.edu/2020/03/04/shackling-of-pregnant-prisoners-is-ongoing/>.

148. *ACLU Briefing Paper: The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails & Youth Detention Centers*, ACLU, https://www.aclu.org/sites/default/files/field_document/anti-shackling_briefing_paper_stand_alone.pdf (last visited Dec. 11, 2020).

149. *Id.*

150. *State Standards for Pregnancy-Related Health Care in Prison*, ACLU, <https://www.aclu.org/state-standards-pregnancy-related-health-care-and-abortion-women-prison-0#hd4> (last visited Dec. 12, 2020).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

risk pregnancies, training of health care staff for labor and emergencies, and access to newborns after delivery.¹⁵⁵

The standards of care established by these guidelines address the importance of screening examinations, prenatal nutrition, and prohibition on shackling during labor and childbirth to support a healthy pregnancy.¹⁵⁶ While these guidelines appear to provide extensive protections, they do not seem to go far enough. There is no data to determine whether these standards are effective in improving health care for incarcerated pregnant women.¹⁵⁷ There is also evidence that suggests that the existence of these standards alone may not be enough to ensure inmates will receive better correctional health care.¹⁵⁸ This is because “standards designed for the community setting may not translate seamlessly to correctional health systems.”¹⁵⁹ Correctional healthcare systems are already overburdened, fiscally constrained, and have limited health services, which can make it challenging for prisons to provide quality care to inmates in accordance with national standards.¹⁶⁰

B. Pregnant Women in Custody Act

The Pregnant Women in Custody Act (PWCA), enacted by the House of Representatives on October 1, 2020, prohibits the use of shackles and solitary confinement while establishing minimum standards of health care for pregnant women.¹⁶¹ The bipartisan bill requires prisons to provide programs and services relating to pregnancy and childbirth, including: prenatal education, counseling, and childbirth support services; screening tests; and treatment for substance use or mental health disorders.¹⁶² The federal government is required to collect data on pregnant incarcerated women and submit its findings each year to the Committee on the Judiciary of the Senate and the House of Representatives.¹⁶³ Democratic Congresswoman Karen Bass, representative of California’s 37th congressional district, introduced the PWCA to provide incarcerated pregnant women with access to prenatal health care and services with the hope of ensuring better health outcomes for

155. *Id.*

156. C.M. Kelsey et al., *An Examination of Care Practices of Pregnant Women Incarcerated in Jail Facilities in the United States*, 21 *MATERNAL CHILD HEALTH J.* 1260 (2017).

157. Marc F. Stern et al., *Patient Safety: Moving the Bar in Prison Health Care Standards*, 100 *AM. J. PUB. HEALTH* 2103 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2951964/>.

158. *Id.*

159. *Id.*

160. *Id.*

161. Amy Fetting, *New Bill Would Ensure No Woman Is Forced to Give Birth in Chains*, *ACLU* (Sept. 19, 2018), <https://www.aclu.org/blog/prisoners-rights/women-prison/new-bill-would-ensure-no-woman-forced-give-birth-chains>.

162. H.R. Res. 7718, 116th Cong. (2020) (enacted).

163. *Id.*

both mothers and babies.¹⁶⁴ While the legislation is fairly new, it nevertheless marks a big step forward by establishing health care and nutritional standards for pregnant women, and protecting them against dangerous disciplinary measures.¹⁶⁵ By developing data collection guidelines and training programs for correctional staff, prisons can be held to greater accountability when it comes to providing safe living and birthing conditions for pregnant inmates.¹⁶⁶

C. First Step Act

In 2019, the Trump administration passed the First Step Act, which prohibits placing federal inmates in physical restraints during pregnancy “unless the inmate is considered a flight risk or an immediate threat to themselves or others.”¹⁶⁷ Where restraints are necessary to prevent harm or risk of escape, only the “least restrictive restraints” are permissible and only for as long as is necessary.¹⁶⁸ However, the bill only applies to women incarcerated in federal prisons and not women housed in state or local correctional facilities, where the majority of incarcerated women are kept.¹⁶⁹ While the First Step Act improves the care of pregnant inmates by outlawing shackling, some critics argue that the legislation does not do enough to meet the needs of pregnant inmates.¹⁷⁰ According to Carolyn Sufrin, an OB-GYN and assistant professor at Johns Hopkins University, “[t]he First Step Act only addresses shackling and that’s the tip of the iceberg when it comes to treating women behind bars.”¹⁷¹

Despite the overwhelming bipartisan support the legislation received, the First Step Act’s “controversial use of a risk assessment tool to assess eligibility for programming and early release... received significant public scrutiny,” especially from criminal justice reform advocates.¹⁷² The law’s risk and needs assessment system was created to evaluate prisoners’

164. Press Release, Congresswoman Karen Bass, Reps. Bass, Clark, Reschenthaler and Lesko Introduce Bipartisan Criminal Justice Reform Focused on Women in Prison (July 22, 2020), <https://bass.house.gov/media-center/press-releases/reps-bass-clark-reschenthaler-and-lesko-introduce-bipartisan-criminal>.

165. *Id.*

166. *Id.*

167. Chloe Atkins, *New law ends use of restraints on pregnant inmates as advocates push for more to be done*, NBC (May 25, 2019), <https://www.nbcnews.com/politics/donald-trump/new-law-ends-use-restraints-pregnant-inmates-advocates-push-more-n1007526>.

168. H.R. Res. 5682, 115th Cong. (2018) (enacted).

169. Rachel D. Cohen and Ailsa Chang, *Federal Legislation Seeks Ban on Shackling of Pregnant Inmates*, NPR (Dec. 5, 2018), <https://www.npr.org/sections/health-shots/2018/12/05/673757680/federal-legislation-seeks-ban-on-shackling-of-pregnant-inmates>.

170. *Id.*

171. *Id.*

172. *FIRST STEP’s Rough First Year*, VERA INST. OF JUST. (2019), <https://www.vera.org/state-of-justice-reform/2019/first-step>.

eligibility for early release based on their recidivism risk and risk of committing violence or serious misconduct.¹⁷³ The provisions of the First Step Act reduced mandatory minimum sentences and allowed inmates to earn time credits for good conduct.¹⁷⁴ However, there were pervasive concerns that the criteria of the algorithms would “exclude certain inmates from earning credits,” which if true, would ultimately perpetuate existing racial and class disparities.¹⁷⁵

D. Evaluation of Whether Current Prison Programs and Services Meet National Standards

Incarcerated pregnant women have a constitutional right to obtain pregnancy-related medical care and services, yet “most states lack important policies on prenatal care and nutrition for pregnant women.”¹⁷⁶ Even though there are clear standards and policies on prenatal health care in place, “correctional facilities are not obligated or mandated to adopt or implement them.”¹⁷⁷ In fact, the implementation of prenatal health care standards varies significantly by state, and some states fail to meet the minimum level altogether.¹⁷⁸ For example, twelve states do not have any laws that require prisons to conduct medical examinations for pregnant women as part of their prenatal care.¹⁷⁹ Thirty-one states do not have any policies addressing nutrition for pregnant inmates, and the twelve states that do have nutrition guidance do not define what “adequate” nutrition means.¹⁸⁰ Twenty-four states do not have any laws requiring “predetermined arrangements for deliveries,” which can leave pregnant women to fend for themselves and give birth in their cells without any medical assistance.¹⁸¹ Thus, very few states’ policies actually measure up to the national standards and recommendations promulgated by ACOG, APHA, and NCCCHC.¹⁸² Because states are not required to adhere to these standards, “many state women’s prisons fail to provide adequate prenatal care, nutritionally adequate diets[,] or appropriate

173. H.R. Res. 5682, *supra* note 168.

174. German Lopez, *The First Step Act, explained*, VOX (Feb. 5, 2019), <https://www.vox.com/future-perfect/2018/12/18/18140973/state-of-the-union-trump-first-step-act-criminal-justice-reform>.

175. *Id.*

176. Daniel, *supra* note 3.

177. Jennifer Bronson and Carolyn Sufrin, *Pregnant Women in Prison and Jail Don’t Count: Data Gaps on Maternal Health and Incarceration*, 134 PUB. REP. 57, 59 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6505318/>.

178. Dallaire, *supra* note 63, at 2.

179. Walker, *supra* note 62.

180. *Id.*

181. *Id.*

182. ACLU, *supra* note 150.

work assignments for pregnant inmates.”¹⁸³ These guidelines are essential to protecting pregnant inmates and their babies from major health risks; therefore, there must be better enforcement of these policies and standards.¹⁸⁴

E. Proposals for Policy Reform

While criminal justice reform has risen to the forefront of public discourse, incarcerated pregnant women and their health needs continue to be overlooked.¹⁸⁵ The lack of consistent statistical data on prison pregnancy rates and outcomes leaves pregnant inmates out of important conversations surrounding prison reform.¹⁸⁶ In 2016, Carolyn Sufrin launched Pregnancy in Prison Statistics (PIPS), the first nationwide study to collect data on the frequency and outcomes of pregnancies in prison.¹⁸⁷ Sufrin and her team later shared PIPS’s findings with lawmakers to further policy reform for incarcerated pregnant women and advocate change.¹⁸⁸

Along these lines, I propose that there is an important need for data collection in prisons with respect to demographics, pregnancy outcomes, and prenatal care services provided to pregnant inmates. Improving data collection across the correctional health care system will better help us understand how prisons can meet incarcerated pregnant women’s health needs. This would also help guide reform efforts by helping prison reform organizations tackle specific problems and track progress over time. Where corrections facilities fail to report incidents of misconduct or mistreatment of pregnant inmates, this data would fill information gaps and hold prisons to a higher standard of accountability. However, I would go one step further and modify this proposal by recommending the creation of an external review committee composed of members with diverse expertise: for example, health care professionals, prison officials, and policymakers, among others. The external review committee would evaluate the data received by prisons, propose changes to existing policies or new reforms, and intervene in cases where pregnant inmates allege misconduct or excessive force by a prison official.

Policymakers have also advocated expanding incarcerated pregnant women’s access to doula services, in an effort to improve perinatal care and

183. Ginette G. Ferszt and Jennifer G. Clarke, *Health Care of Pregnant Women in U.S. State Prisons*, 23 J. HEALTH CARE FOR THE POOR AND UNDERSERVED 557, 558 (2012).

184. Kelsey et al., *supra* note 156.

185. Carolyn Sufrin, *Criminal Justice reform must include pregnant women*, THE HILL (Mar. 21, 2019), <https://thehill.com/blogs/congress-blog/healthcare/435118-criminal-justice-reform-must-include-pregnant-women>.

186. *Id.*

187. Katie Pearce, *Landmark study compiles data on pregnant women in prisons*, THE HUB (Apr. 11, 2019), <https://hub.jhu.edu/2019/04/11/carolyn-sufrin-pips-study/>.

188. *Id.*

support healthy pregnancies.¹⁸⁹ Doulas are “trained [professionals who] provide continuous physical, emotional, and informational support during and shortly after childbirth.”¹⁹⁰ There is mounting evidence that supports the use of doulas to improve birth outcomes, advocate for the mother’s needs, and provide women who are at risk with a positive pregnancy and birthing experience.¹⁹¹ Minnesota Professor Rebecca Shlafer and her colleagues conducted a study on the Minnesota Prison Doula Project where they found that doulas were crucial in establishing trust with inmates and supporting them throughout the pregnancy and delivery process.¹⁹² They concluded that “doula support was a feasible intervention for women in prison.”¹⁹³ Because doulas improve birth outcomes and provide incarcerated pregnant women with continuous support, I fully support this proposal.

VII. CONCLUSION

Current prison policies and practices fail to meet national health standards and recommended clinical guidelines, placing pregnant inmates at a higher risk of adverse maternal and fetal health outcomes. Prison measures such as overcrowding, poor sanitation, and solitary confinement can create life-threatening complications for both the mother and the fetus. Moreover, incarcerated pregnant women experience great difficulty obtaining timely access to adequate prenatal care and health services. As a result, the standards of care established by national guidelines need to be supplemented and enforced more strongly to ensure that incarcerated pregnant women receive the prenatal care and nutrition they need. Addressing the health care disparities that pregnant inmates face in the prison setting is crucial because this population is already vulnerable to negative health outcomes. Further, women of color are disproportionately incarcerated in the United States, so a lack of adequate care in prisons disproportionately impacts U.S. minority communities. Without criminal justice reform targeted specifically toward incarcerated pregnant women, prisons will continue to overlook and ignore their health needs.

189. *State Policy Approaches to Incorporating Doula Services into Maternal Care*, ASTHO EXPERTS BLOG (Aug. 9, 2018), <https://www.astho.org/StatePublicHealth/State-Policy-Approaches-to-Incorporating-Doula-Services-into-Maternal-Care/08-09-18/>.

190. *Id.*

191. *Id.*

192. Heather Stringer, *Improving life for pregnant inmates*, AM. PSYCH. ASS’N (Mar. 2019), <https://www.apa.org/monitor/2019/03/pregnant-inmates>.

193. *Id.*
