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The Absence of Penological Rationale in the Restrictions on the Rights of Incarcerated Women

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THE ABSENCE OF PENOLOGICAL RATIONALE IN THE RESTRICTIONS ON THE RIGHTS OF INCARCERATED WOMEN

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As the controversy surrounding the freedom of choice persists in American society, a small but important population of women has been marginalized in the debate: female prisoners seeking to exercise their right to choose while in custody. Nowhere is the freedom of choice more restricted than in an institution that is created to deprive an individual of basic freedoms, and yet nowhere is it more important to both the individual and to the societal goals which incarceration seeks to address. Women in prison are more likely to be in a situation where they conclude that abortion would be in their best interest, yet in many instances they are unable to exercise their right to choose while incarcerated. Prisons and jails may explicitly or through unduly burdensome policies deny access to a medical procedure that the Supreme Court has held to be a fundamental right. Judicial review of such policies may often prove to be fruitless, as they are not always provided in a timely manner and often apply inconsistent analyses to the claims. Many cases have been reviewed under the *Turner* rationality test, used for analyzing prison regulations in general, rather than the *Casey* undue burden test, used for analyzing anti-choice laws. Even applying the *Turner* test, the analysis applied is difficult to reconcile with actual fact. Further exasperating the problem, patriarchic bias enhances the difficulty in convincing the courts to classify a prison policy that denies or severely hinders access to abortion as cruel and unusual punishment.

The prison systems in the United States have developed around the needs of the traditionally male prison population. As more women enter the system, prison policies have generally not kept pace with the specific needs of female inmates. Many states have no official policy regarding abortion,

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leaving the woman's freedom of choice in the hands of prison administrators and officials who bow to the whims of the then current political administration. This runs the risk of allowing these politicos to impose their own views and biases onto policy decisions that have major implications for the women affected by them. Leaving such an important yet controversial right to the whims of a few individuals, often male, is an untenable solution. Even where states have implemented statewide policies regarding access to abortion, women prisoners sometimes have fared no better. The state may require the woman to seek a court order to receive abortion care, or it may require her to obtain a court-ordered release before being transported to a medical facility for the procedure. It may also impose waiting periods or require psychiatric consultation before allowing the abortion procedure to take place. The rationale behind such policies is that abortion is an "elective" procedure and therefore the inmate has no inherent right to it.

This approach is both medically and practically unsound. Abortion is an "elective" procedure only to those who have never had to face the always difficult choice of whether to have such a procedure. The choice is complicated by religious mores, health considerations, peer pressure, economic burdens, legal restrictions, and personal history. When added to the reality that an incarcerated woman is not likely to be able to keep her child if she carries to term, the decision of whether to terminate a pregnancy or carry to term is hardly in the elective category of whether to correct a deviated septum or operate on a troubled rotator cuff.

As of 2005, nearly sixty-five percent of women in state prisons were convicted of drug, property, or public order offenses.[1] One in three reported committing their offense to support a drug addiction.[2] Seventy-three percent of women in prison either have symptoms of or have been diagnosed with a mental illness.[3] Nearly thirty percent of women entering prison received public assistance prior to their arrest and thirty-seven percent have incomes of less than $600 per month.[4] Sixty-four percent of women in prison do not have a high school diploma.[5] More than half of all women in prison report having been physically or sexually abused at some point in their lives.[6] Shockingly, the patriarchic governments still blame the women for the circumstance of pregnancy.

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1. CORR. ASS'N. OF N.Y., WOMEN IN PRISON FACT SHEET (April 2009) *available at* http://www.correctionalassociation.org/publications/download/wipp/factsheets/Women_in_Prison_Fact_Sheet_2009_FINAL.pdf [hereinafter WOMEN IN PRISON FACT SHEET].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Women's Prison Association, http://www.wpaonline.org/index.html.

In 2005 in Missouri, the Department of Corrections went one step further and changed a long-standing policy to now prohibit the transportation of pregnant inmates to off-site facilities to receive elective abortion-related medical care,[7] thus forcing inmates to continue their pregnancies against their will, with no possibility of relief through prison or court procedures. Every abortion is considered "elective" unless the prison medical staff determines the pregnancy is a threat to the mother's life or health. This determination must be approved by both the Medical Director and Regional Medical Director of the Missouri Department of Corrections.[8] In *Roe v. Crawford*, a pregnant inmate who was denied access to an abortion challenged this procedure on behalf of a class of all women similarly situated as a violation of the Fourteenth Amendment Due Process Clause and the Eighth Amendment prohibition against cruel and unusual punishment.[9] In the midst of a circuit split on the issue and with no clear Supreme Court guidance, the Eighth Circuit found that Missouri's policy failed under the *Turner* rationality test, holding that despite the prison having a legitimate security interest, the policy was not rationally related to this interest.[10] The court, however, rejected the contention that denying access to abortion care amounts to cruel and unusual punishment.[11]

This article explores the results of the litigation in *Roe v. Crawford* and its implications for the continuing struggle to recognize the uncompromised right of women to choose in the prison environment. Part I will provide context for the case by analyzing the history of prisoners' rights, the history of the freedom to choose, and the history of the freedom of choice in prison. Part II will provide the background and the Eighth Circuit's analysis of *Roe v. Crawford*. Part III will argue that the Eighth Circuit should have used the *Casey* undue burden standard rather than the *Turner* rationality test when analyzing prison policies regarding abortion. Furthermore, it will dispute the court's determination that under the *Turner* rationality test the prison had a legitimate security interest in its abortion policy. Despite the Plaintiff Class prevailing on the overall *Turner* argument, such a negative finding on the legitimate security interest issue has serious implications for future challenges to prison policies and was simply not supported by any fact presented by the Defendant State's prison system. Finally, Part IV will assert that the prison's policy in *Roe v. Crawford* should have also failed under the Eighth Amendment prohibition against cruel and unusual punishment because unwanted pregnancies pose a serious medical threat, both physically and psychologically. Alternatively, it will suggest that viewing the freedom

7. Roe v. Crawford, 514 F.3d 789, 792 (8th Cir. 2008).
8. *Id.*
9. *Id.* at 793.
10. *Id.* at 792.
11. *Id.* at 798.

of choice as a medical issue is incorrect, and instead analysis should be framed in terms of basic human dignity, deprivation of which always requires a heightened standard of review when dealing with a fundamental right.

I. HISTORICAL DEVELOPMENTS

A. Evolution of Prisoners' Rights

Incarceration by definition requires the forfeiture of some rights and privileges that are normally bestowed upon American citizens. This then provokes the question of what rights, if any, prisoners maintain in spite of their incarceration. Until the 1970s, very little judicial attention was paid to the issue of the rights of those incarcerated. It was presumed that upon imprisonment, the prisoner lost many or all rights and privileges once enjoyed.[12] Early cases went as far as to classify the prisoner as "civiliter mortuus," or "civilly dead."[13] During the later twentieth century the Supreme Court began to relax its views towards prisoners, declaring, "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."[14] These constitutional rights, however, were balanced against a need to defer to the expertise and decisions of prison administrators.

Not until the early 1970s, partially as a result of the deplorable conditions existing at many prisons nationwide, did the Supreme Court make its first attempts to acknowledge limited rights of due process, equal protection, and other constitutional guarantees in the prison context. The Court looked at a variety of claims in the following decades, including issues pertaining to the right of access to the courts under the Due Process Clause; questions about speech and religion under the First Amendment; privacy rights under the Fourteenth Amendment; and issues involving medical care, punishment and discipline, and living conditions under the Eighth Amendment.[15] Although these cases made progress in expanding the rights of prisoners, they failed to establish a consistent standard to determine when a prison restriction amounted to a constitutional violation. Additionally, the

12. Price v. Johnston, 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights . . . ."), *overruled on other grounds by* McCleskey v. Zant, 499 U.S. 467 (1991).

13. Ruffin v. Commonwealth, 62 Va. 790, *4 (1871).

14. Wolff v. McDonnnell, 418 U.S. 539, 555–56 (1974).

15. *See* Hudson v. Palmer, 468 U.S. 517 (1984) (holding that prisoners have a right to be free from unreasonable searches and seizures of property); Wolff v. McDonnell, 418 U.S. 539 (1974) (requiring the application of certain due process protections to prison disciplinary procedures); Procunier v. Martinez, 416 U.S. 396 (1974) (restricting censorship of prisoner mail), *overruled by* Thornburgh v. Abbott, 490 U.S. 401 (1989); Cruz v. Beto, 405 U.S. 319 (1972) (upholding a prisoner's right to practice the religion of his choice).

Court continued to defer to prison administrators when balancing the constitutional interests of prisoners.[16]

In 1987, after years of ad hoc balancing tests and reliance on a fluctuating list of factors and circumstances, the Supreme Court formulated a general standard for measuring prisoners' claims of deprivation of constitutional rights. *Turner v. Safley*[17] held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[18] This test, which merely requires a rational basis to support a prison regulation, has effectively limited the circumstances under which courts will recognize constitutional violations in the prison setting.

Since *Turner*, this standard for reviewing prisoners' claims has been generally applied; however, the Court has recognized that it is not appropriate for every type of constitutional claim. In *O'Lone v. Estate of Shabazz*,[19] the Court attempted to apply *Turner* to decide a case involving religious freedom in prison but eventually rejected the test in favor of a "compelling government interest" standard under the Establishment Clause.[20] Some Eighth Amendment claims have also proved incompatible with *Turner* and are instead judged using the "standards of decency" test which considers whether the punishment is so disproportionate that it "shocks the conscience"[21] or is "repugnant to the conscience of mankind."[22] Similarly, when racial segregation is involved the Court has found that equal protection requires the usual strict scrutiny test rather than the more deferential *Turner* rationality test.[23]

One reason that these cases eschew the *Turner* analysis in these constitutional balancing analyses is that legitimate penological interests do not rationally support restrictions on most fundamental constitutional rights. Valid penological interests have been found to include "deterrence of crime, rehabilitation of prisoners, and institutional security."[24] Neither deterrence nor rehabilitation can be said to be furthered by forcing a woman to carry to term. Institutional security is rationally implicated in this analysis, but only marginally so. Denying an incarcerated woman access to terminating her

16. *See* Block v. Rutherford, 468 U.S. 576 (1984); Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974).

17. 482 U.S. 78 (1987).

18. *Id.* at 89.

19. 482 U.S. 342 (1987).

20. *Id.*

21. *See* Whitley v. Albers, 475 U.S. 312, 327 (1986) (quoting Rochin v. California, 342 U.S. 165, 172 (1952)).

22. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

23. *See* Johnson v. California, 543 U.S. 499 (2005).

24. *O'Lone*, 482 U.S. at 348.

pregnancy on grounds unique to incarceration will be shown to lack a rational legitimate interest of the state.

B. Evolution of the Freedom to Choose

Similar to the history of prisoners' rights, the right of a woman to choose to terminate her pregnancy made great strides in the second half of the twentieth century, only to be incrementally eroded in the following decades by subsequent Supreme Court decisions. In 1965, the Court set the stage for future decisions by striking down a law that prohibited the distribution of contraceptives to married couples,[25] followed by the 1972 decision on the same issue as applied to unmarried couples, and holding that the "decision whether to bear or beget a child" was a fundamental right protected by the Due Process Clause.[26] A year later, the Court applied this reasoning to the right to choose in the seminal case of *Roe v. Wade*, [27] recognizing that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[28] By classifying the right to choose as a fundamental right, the Court required that laws interfering with this right must be necessary to support a compelling state interest.[29] The Court determined that the state has two compelling interests in a woman's pregnancy: protecting the health of the mother and protecting the potential life of the fetus.[30] In determining at what point these interests become compelling, the Court broke down the pregnancy into trimesters and held that the state's interest in the mother's health only becomes compelling at the end of the first trimester.[31] Before this time, her right to choose cannot be restricted at all; the state has no compelling interest because the risks of carrying the child to term are greater than the risks of terminating the pregnancy.[32] Once the end of the first trimester is reached, the state may regulate the right to choose only in ways that legitimately protect the health of the mother by ensuring that procedures are safe.[33] Not until the end of the second trimester does the state obtain an interest in the potential life of the fetus.[34] After this point, the state may regulate or even prohibit abortions that are not medically necessary.

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25. Griswold v. Connecticut, 381 U.S. 479 (1965).
26. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
27. 410 U.S. 113 (1973).
28. *Id.* at 153.
29. *Id.* at 153–55.
30. *Id.* at 162–63.
31. *Id.* at 163.
32. *Id.*
33. *Roe*, 410 U.S. at 163.
34. *Id.*

While the trimester approach was a compromise cobbled from medical science rather than constitutional precepts, it held some logic which appealed to all points of view while pleasing none of them. At the same time, it provided the chink in the armor of *Roe*'s foundation that allowed later courts to slowly reduce the right from its fundamental underpinnings. Had the Court simply acknowledged the fundamental nature of the right as embedded in the privacy jurisprudence it had established and left the decision as a personal medical issue between a woman and her doctor, the constant attacks on the right to choose would have been harder for the conservative judicial activists on the Court to make. Indeed, in no other area of medicine does the Court attempt to practice medicine with such exactitude and allow the legislature to tell doctors how to do their job.

Consequently, in the aftermath of *Roe*, states enacted various laws that restricted women's access to abortion by playing on *Roe*'s trimester framework. The Court has upheld some administrative restrictions, including requirements for written consent, waiting periods, and record-keeping.[35] Restrictions that interfered more substantially with the first and second trimesters of pregnancy were often struck down.[36] Statutes that restricted access to abortion clinics or that endangered the health of the mother to protect the fetus did not survive *Roe*'s strict scrutiny test.[37] These decisions did not, however, come easily to the Court. In many cases the Court was sharply split on how to apply *Roe*'s test to statutory restrictions on abortions. The majority of the Court finally settled on a broader "undue burden" test, introduced for the first time by Justice O'Connor in *City of Akron v. Akron Center for Reproductive Health, Inc.*,[38] which only looked at whether a restriction encroached on the fundamental liberty interest at stake.[39] The majority found that if the statute imposed an undue burden, such as delaying, limiting, or increasing the cost of abortion, strict scrutiny would apply and in most instances defeat the statute.[40] The minority preferred to employ a higher threshold of encroachment and argued that any regulation that was not an

35. *See* H.L. v. Matheson, 450 U.S. 398 (1981) (upholding a state statute requiring parental consent for minors); *see also* Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (upholding a state statute that imposed restrictions on the use of state funds for performing or assisting abortion procedures).

36. *See, e.g.*, City of Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

37. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (striking down a state statute requiring spousal consent); *see also City of Akron*, 462 U.S. 416 (invalidating waiting periods and requirements that the procedure be performed in a hospital).

38. 462 U.S. 416 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

39. *Id.* at 430–31.

40. *Id.*

absolute barrier to an abortion should be analyzed under a rational basis standard.[41]

This disagreement within the Court came to a head in 1992, in *Planned Parenthood v. Casey*.[42] *Casey* involved a challenge to a Pennsylvania law that required married women to notify their husbands before having an abortion, required doctors to give specific information about the fetus to a woman seeking an abortion, prescribed a twenty-four-hour waiting period before receiving an abortion, enacted a parental consent requirement for minors, and included various other record-keeping requirements.[43] Previously, the Court had struck down similar provisions as unconstitutional under the *Roe* strict scrutiny test.[44] In *Casey*, however, the Court effectively abandoned *Roe*'s trimester framework in favor of a more generalized "undue burden" test.[45] Under the undue burden test, the legislature may not place a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[46] Under this test the Court no longer adjusted the balancing test between the state's interests and individual rights according to the stage of pregnancy. Because the Court now believed that the state had a substantial interest in the potential life of the fetus throughout the pregnancy, the new test simply focused on "substantial obstacle[s]" at any point during the pregnancy.[47] As such, the Court upheld all the provisions of the challenged statute except for the requirement that a married woman notify her husband before having an abortion, reasoning that in cases of domestic violence a requirement to inform an abusive husband may effectively prevent the woman from receiving the procedure.[48]

The new test made it easier for states to regulate abortion. The Court now only considers burdens to be unconstitutional when the burdens are absolute obstacles that are intended to prohibit the freedom of choice; laws enacted to persuade or cajole a woman to choose childbirth over abortion are no longer prohibited. Under *Casey*, the Court went on to overrule previous decisions that had found laws making an abortion more expensive or time-consuming unconstitutional.[49]

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41. *Id.* at 464 (O'Connor, J., dissenting); *see also* Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).

42. 505 U.S. 833 (1992).

43. *Id.* at 844.

44. *See, e.g.*, City of Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

45. *Id.* at 873.

46. *Id.* at 877.

47. *Id.*

48. *Id.* at 894.

49. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003).

Once again, this was a position of compromise, much like the trimester approach. Unwilling to grant the right to choose the highest scrutiny of other fundamental rights, and needing to pacify jurists who were wavering toward overruling *Roe* but who were unable to justify violating *stare decisis*, the Court's application of the undue burden approach gave everyone something that they desired without forcing anyone to form a definitive position one way or the other. While less demonized than the trimester approach, the undue burden test is not any more satisfactory, nor is it defensible from a constitutional point of view. It is, nevertheless, the current state of the law.

C. Freedom to Choose in the Prison Environment

Today there are over 200,000 female inmates being held at state and federal prisons and local jails around the country.[50] The number of women entering prison has increased every year at a rate almost twice as fast as the rate of men entering prison.[51] The majority of women inmates are single mothers, minorities, come from economically disadvantaged populations, and are often incarcerated for nonviolent drug offenses.[52] In any given year, between six and ten percent of the women who enter prison are pregnant,[53] and still others become pregnant while incarcerated through consensual or non-consensual relationships with male guards.[54] Despite a growing problem with pregnancy in prisons and jails, no universal policy exists that allows these women to terminate their pregnancies if they choose to do so.[55] Instead, policy details and procedures are generally delegated to officials running the prisons and jails.[56]

Some states have official policies that allow for unrestricted access to abortion, at least during the first trimester.[57] Others qualify abortion as

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50. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PUB. NO. NCJ 225619, JAIL INMATES AT MIDYEAR 2008—STATISTICAL TABLES (March 2009), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=839 (listing the number of women in jail in 2008 at 99,175 and the number of women in prison in 2008 at 115,779).

51. *Id.*

52. WOMEN IN PRISON FACT SHEET, *supra* note 1.

53. Carolyn B. Sufrin, Mitchell D. Creinin & Judy C. Chang, *Incarcerated Women and Abortion Provision: A Survey of Correctional Health Providers*, 41 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 6, 6 (March 2009), *available at* http://www.guttmacher.org/pubs/psrh/full/4100609.pdf.

54. Nicole Summer, *Powerless in Prison: Sexual Abuse Against Incarcerated Women*, RH REALITY CHECK (Dec. 11, 2007), *available at* http://www.rhrealitycheck.org/blog/2007/12/11/powerless-in-prison-sexual-abuse-against-incarcerated-women.

55. Sufrin, *supra* note 53, at 7–9.

56. *Id.*

57. Rachel Roth, *Do Prisoners Have Abortion Rights?*, 30 FEMINIST STUD. 353, 364 (2004).

"elective" medical care and require the inmate to obtain permission for the procedure from prison officials or, in some cases, receive a court order allowing the procedure.[58] Some policies require counseling, a waiting period, or similar hurdles before the procedure can be obtained.[59] Fourteen states have no official written abortion policy.[60] In these circumstances, abortion policy is subject to the discretion of the prison administrators, and so policies may vary from prison to prison across the state. In addition to the policies within prison, inmates are also subjected to state abortion laws, which may include additional mandatory waiting periods and reporting requirements. Furthermore, in *Harris v. McRae*, [61] the Supreme Court upheld the Hyde Amendment, which restricted the use of federal funds for abortion procedures.[62] This opened the door to allow states to restrict or deny funding for abortions. Even when medically necessary, only seventeen states use state funds to provide for prisoners' abortions, and thirteen of these states do so only because they have been ordered to by their courts.[63]

Despite the growing number of female inmates, constitutional challenges to prison abortion policies have been limited. In *Monmouth County State Correctional Institutional Inmates v. Lanzaro*, [64] a class of prisoners challenged a prison policy requiring a prisoner to have a court-ordered release in order to leave prison to obtain a non-therapeutic abortion.[65] The Third Circuit applied the *Turner* rationality test and held that the policy was not rationally related to legitimate penological interests.[66] It found that requiring a woman to obtain a court order would create "additional delays in scheduling the actual procedure" and such obstacles could create unnecessary risk.[67] The court emphasized that in the case of many abortion procedures time is of the essence, and unnecessary delays could essentially deprive the woman of her ability to exercise her constitutional right to choose.[68] Further, the court pointed out that no other medical procedure that was considered "elective" by prison officials required a court order, which undercut the prison's assertion that the policy was enacted out of administrative and financial concerns arising from providing funding and transpor-

58. *Id.* at 366–67.
59. *Id.* at 367.
60. *Id.* at 367–69.
61. 448 U.S. 297 (1980).
62. *Id.* at 326–27.
63. GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: STATE FUNDING OF ABORTION UNDER MEDICAID (Mar. 1, 2010), *available at* http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf.
64. 834 F.2d 326 (3d Cir. 1987).
65. *Id.* at 329.
66. *Id.* at 344.
67. *Id.* at 339–40.
68. *Id.* at 338–40.

tation for unnecessary medical procedures.[69] The court went on to assert that "'[s]ecurity is no less protected, crime is no less deterred, retribution is not undermined, and rehabilitation is not hindered by . . . a prisoner's right to . . . an abortion.'"[70]

The Fifth Circuit addressed a similar case but reached a different result in *Victoria W. v. Larpenter*.[71] In *Victoria W.*, an inmate challenged the constitutionality of a Louisiana prison policy that required women to get a court order granting permission to receive an abortion.[72] This procedure proved to be difficult and time consuming, and by the time Victoria received her release she was past the point in her pregnancy where she could legally obtain an abortion in Louisiana.[73] Despite Victoria's difficulties, the policy at issue was in theory less burdensome than the policy in *Lanzaro*, and it applied to all "elective" medical procedures, not just "elective" abortions.[74] The court seized on these facts to distinguish *Lanzaro* and upheld the policy under the *Turner* rationality test.[75]

II. *ROE V. CRAWFORD*

A. Background

The conflicting circuit decisions of *Victoria W.* and *Lanzaro* reflected the current state of prison abortion jurisprudence when Jane Roe entered a Missouri prison on August 22, 2005.[76] She had previously been admitted to the Missouri Women's Eastern Reception Diagnostic and Correctional Center (WERDCC) in January of 2005 on a drug charge.[77] She was paroled four months later but re-arrested later that year in California for a probation violation.[78] Roe first learned of her pregnancy while awaiting extradition from California to Missouri, but she was unable to obtain the procedure before being sent to Missouri.[79] After her arrival at WERDCC, she repeatedly informed the staff of her desire to have an abortion, but her requests were

69. *Id.* at 335.
70. *Lanzaro*, 834 F.2d at 338 (quoting Anne Vitale, *Inmate Abortions—The Right to Government Funding Behind Prison Gates*, 48 FORDHAM L. REV. 550, 556 (1980)).
71. 369 F.3d 475 (5th Cir. 2004).
72. *Id.* at 477–78.
73. *Id.* at 480.
74. *Id.* at 488.
75. *Id.* at 485.
76. Roe v. Crawford, 439 F. Supp. 2d 942, 945 (W.D. Mo. 2006).
77. *Id.*
78. *Id.*
79. *Id.* at 945–46.

ultimately denied despite the fact that she was willing to pay for both the procedure and the transportation to the medical facility.[80]

Roe's unsuccessful attempt to secure permission to receive an abortion was the result of a new Missouri Department of Corrections (MDC) policy that was amended to authorize transportation for abortions only "[i]f '[the] abortion is indicated due to threat to the mother's life or health, and if approved by the Medical Director in consultation with the Regional Medical Director.'"[81] Unlike other "elective" procedures, which may be allowed if a physician determines that the treatment should be administered, the MDC policy prohibited any such determination by a physician in the case of an "elective" abortion, effectively making the procedure unattainable.[82] The MDC claimed this policy addressed security concerns and provided cost savings by reducing the number of opportunities for prisoners to be transported to and from prison grounds.[83]

By October, Roe was in the second trimester of her pregnancy. With time running out for a legal abortion, she sought emergency relief from the federal district court.[84] The district court entered a preliminary injunction ordering the prison to transport Roe for an abortion as soon as possible, finding that it is well accepted that a substantial delay in the decision to abort increases the risks associated with the procedure.[85] Prison officials tried several times to stay the order, which ultimately proved unsuccessful but further delayed Roe's access to the procedure.[86] In a last ditch effort to stop the procedure, the MDC appealed to the Supreme Court of the United States for an emergency stay. The appeal came in on a Friday evening to Justice Clarence Thomas, who at the time was the acting Circuit Justice of the Eighth Circuit. Justice Thomas, exercising his administrative jurisdiction, granted an emergency stay blocking the procedure, which remained in place over the weekend. When the full Court returned on Monday morning, it immediately vacated the stay, giving Roe permission to carry out the procedure.[87]

After the procedure had been obtained, the district court certified the class of which Roe was the lead plaintiff, challenging the legality of the MDC policy on behalf of all similarly situated inmates throughout the

80. *Id.* at 946.
81. *Id.* at 946 (quoting Mo. Dep't of Corr. Policy IS 11-58).
82. Brief of Appellants at 6, Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008) (No. 06-3108).
83. Roe v. Crawford, 439 F. Supp. 2d 942, 949 (W.D. Mo. 2006).
84. *Id.* at 946.
85. Roe v. Crawford, 396 F. Supp. 2d 1041, 1043–45 (W.D. Mo. 2005).
86. *Crawford*, 439 F. Supp. 2d at 946.
87. Crawford v. Roe, 546 U.S. 959 (2005).

state.[88] The district court then, after briefing, granted Roe summary judgment, finding that the MDC policy failed under *Turner*'s four-part test used to determine the reasonableness of restrictions on inmates' freedom of choice as guaranteed by the Fourteenth Amendment.[89] The district court also held that Roe's Eighth Amendment rights were violated, reasoning that non-therapeutic abortion was a "serious medical need" regardless of whether the MDC chose to label it as "elective" and that the MDC policy intentionally denied Roe access to treatment for this need.[90]

B. Eighth Circuit Analysis

After losing on summary judgment in the district court, the MDC appealed the decision to the Eighth Circuit.[91] The court first addressed the issue of the applicable test for determining the constitutionality of abortion policy in the prison context.[92] The district court had rejected Roe's argument that the proper standard of review was *Casey*'s undue burden test in favor of the *Turner* rationality test.[93] The Eighth Circuit agreed, finding that "*Turner* applies to prison restrictions relating to rights *not* typically subject to strict scrutiny."[94] *Casey*'s undue burden test, the court reasoned, is not a test of strict scrutiny but rather applies a lesser standard of review, thereby making it ineligible for the special deference granted to rights subject to strict scrutiny that the Supreme Court established in *Johnson v. California*.[95]

The court reasoned that abortion was more similar to the marriage restrictions that the *Turner* Court analyzed than the racial segregation policy analyzed in *Johnson*.[96] Providing access to marriage involves a burden on the prison system to allocate resources to facilitate the ceremony, whereas denying the prisons the ability to classify prisoners based on race creates no similar burden on the system.[97] Abortion, the court reasoned, falls into the former category of rights, because it places additional financial and security burdens on the prison system, and therefore the right to an abortion is "inconsistent with proper incarceration."[98]

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88. *Crawford*, 439 F. Supp. 2d at 946.
89. *Id.* at 953.
90. *Id.*
91. Roe v. Crawford, 514 F.3d 789, 792 (8th Cir. 2008).
92. *Id.* at 793.
93. *Id.*
94. *Id.* at 794. This is a perfect example of the pernicious result of the "undue burden" compromise, although the "undue burden" test is still more appropriate to the fundamental right than the *Turner* "reasonableness of restriction" test.
95. *Id.*
96. *Id.*
97. *Crawford*, 514 F.3d at 794.
98. *Id.* at 793. Prison officials in *Johnson* argued that they needed the ability to segre-

The district court found that the MDC policy failed under all four parts of the *Turner* rationality test.[99] The Eighth Circuit disagreed, finding that the policy did not fail every prong of the test, but nevertheless found that when balancing the overall interests under the test the MDC policy failed as a whole.[100]

To determine whether a prison regulation is reasonably related to a legitimate penological interest under the four prongs of the *Turner* rationality test, a court must consider (1) whether there exits a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it[;]" (2) "whether there are alternative means of exercising the right that remain open to prison inmates[;]" (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally[;]" and (4) the existence of obvious, easy alternatives that can fully accommodate the inmate's rights at a "*de minimis* cost to valid penological interests."[101]

The Eighth Circuit first considered whether there was a reasonable relationship between the policy and MDC's stated interests. The MDC asserted that removing an inmate from prison always presents a security risk, and denying access to transportation for an abortion reduces the number of inmates needing to be removed, thereby lowering the overall security risk.[102] The problem with this argument, as the court pointed out, was that the policy did not actually reduce the number of instances of inmates being removed from the prison grounds.[103] An inmate without access to an abortion would be forced to continue the pregnancy and as such would require prenatal care throughout her term.[104] This care would require that the inmate be transported from the prison to the appropriate medical facility on multiple occasions to monitor the pregnancy.[105] Those inmates that remained in prison throughout the entire length of their pregnancy would also need transportation off-site for delivery.[106] The court concluded that the MDC policy could not rationally be explained as reducing the number of off-site transports for inmates.[107]

The MDC further argued that the presence of protesters that often congregated at the sole abortion clinic in the area presented a high risk to both

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gate to control gang fighting and obviously disagreed with this Eighth Circuit analysis. Johnson v. California, 543 U.S. 499, 502 (2005).

99. *Crawford*, 514 F.3d at 795.
100. *Id.* at 798.
101. Turner v. Safley, 482 U.S. 78, 89–91 (1987).
102. *Crawford*, 514 F.3d at 795.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*

the guards and the inmates.[108] Because of these problems, the MDC considered it of special importance to reduce the number of inmate transports to the abortion facility.[109] Roe countered that in eight years under the current system protesters had never once interfered with the transport of prison inmates to the facility.[110] The district court found that it was "undisputed that in the past eight years [prior to the judgment], picketers had never interfered with the safety or security of [MDC] inmates or staff.[111] The appellate court did not find this convincing, reasoning that prison officials should be able to anticipate problems and adopt solutions before such problems actually occur.[112] Roe further argued that this created an impermissible "heckler's veto" by allowing the protesters to block the exercise of a legally protected activity.[113] Without elaborating, the court found that the "heckler's veto" argument was inapplicable in the prison context where the government is granted far more deference than the government would be granted when dealing with the general public.[114]

In sum, the court found that simply because no problems had occurred in the past did not make the MDC policy irrational as applied to the special circumstances of abortion. The inquiry did not end there. The court went on to analyze the policy under the remaining three prongs of the *Turner* rationality test. The Eighth Circuit agreed with the district court that under the second prong of the test, which considered the possibility of alternative ways to exercise the right, the MDC policy "entirely eliminated Plaintiff's access to elective abortions."[115] The MDC argued that an alternative option would be to obtain the abortion before incarceration, but the court appropriately dismissed this option as unrealistic.[116] The court went on to state that there is "no authority . . . indicating the Supreme Court has determined a right may be entirely eliminated during incarceration . . . ."[117] The court also distinguished the MDC's policy from the policy upheld by the Fifth Circuit in *Victoria W.*, which the Eighth Circuit claimed merely "created an administrative hurdle" by requiring court authorization rather than authorizing a complete ban.[118] The MDC policy was more comparable to the policy struck down in *Lanzaro*, which, by requiring an inmate to receive a court

108. *Crawford*, 514 F.3d at 795.
109. *Id.*
110. *Id.* at 796.
111. Roe v. Crawford, 439 F. Supp. 2d 942, 950 (W.D. Mo. 2006).
112. *Id.*
113. *Crawford*, 514 F.3d at 796.
114. *Id.*
115. *Id.* Note that this is the equivalent of finding an "undue burden."
116. *Id.* at 797.
117. *Id.*
118. *Id.*

ordered release from prison, all but eliminated the possibility of accessing the procedure.[119]

In regard to the impact on prison staff and the allocation of prison resources that requiring transportation of inmates for abortions would have, the court referred to its earlier finding that the policy did not logically diminish prison security concerns and the MDC itself admitted that costs savings from the policy would be "minimal . . . as compared to [its] general budget."[120] Finally, the court addressed whether there existed "ready alternatives" to accommodate pregnant inmates at minimal cost to the prison system and found that the previous MDC policy that allowed transportation for elective abortion procedures represented such an alternative.[121] The court went on to state (in dicta) that even a more intrusive policy such as the one upheld in *Victoria W.* could be a viable alternative.[122] After disposing of the case under the *Turner* rationality test, the court went on to reject the district court's finding that the MDC policy violated the Eighth Amendment prohibition against cruel and unusual punishment, finding that an "elective" abortion was not a "serious medical need" within the context of the Eighth Amendment that would require prison officials to take affirmative action.[123]

The holding of the Eighth Circuit in *Roe v. Crawford* revived the perceived circuit split created by *Victoria W.* and *Lanzaro*. Although the court came down on the side of upholding the fundamental right of a woman to choose in the prison context, the decision left open major loopholes that in the future could be exploited by prison officials when crafting abortion policy. Nevertheless, the United States Supreme Court did not believe any perceived split worthy of granting certiorari review, and denied the State's petition.[124] The remainder of this article will consider how these loopholes can be closed to prevent future abuse by prison systems and assure that a woman's right to choose does not disappear when the cell door closes.

119. *Crawford*, 514 F.3d at 797.
120. *Id.* at 798.
121. *Id.*
122. *Id.*
123. *Id.* at 798–801.
124. Crawford v. Roe, 129 S.Ct. 109 (2008).

III. PRISON ABORTION POLICIES SHOULD BE ANALYZED UNDER *CASEY*'S UNDUE BURDEN TEST RATHER THAN THE *TURNER* RATIONALITY TEST

A. Application of *Johnson v. California* in the Context of Freedom of Choice

When Roe presented her case to the district court, she argued that under the Supreme Court's decision in *Johnson v. California*,[125] policies that restrict freedom of choice in prison should be subject to the same standard of review that applies to the right to choose outside of prison.[126] The fundamental nature of the right should place it above the governmental interest in prison administration. Both the district court and the Eighth Circuit rejected this argument, reasoning that *Johnson* protects only restrictions that would be subject to strict scrutiny outside the prison context, such as racial classifications, not restrictions that would merely be subject to an "undue burden" test. A closer reading of *Johnson*, however, seems to indicate that the decision applies to all rights that are not "inconsistent with proper incarceration," regardless of what standard of review they are accorded outside of prisons.

Johnson v. California, decided just two years before *Roe v. Crawford*, was the first case since the development of the *Turner* rationality test to find that the test was not appropriate to evaluate prison policy in certain circumstances.[127] In *Johnson*, an African-American state prison inmate challenged, under the Equal Protection Clause, an unwritten policy of segregating new inmates by race during the first sixty days of incarceration.[128] The prison officials argued that the policy prevented racially motivated gang violence, and the Ninth Circuit upheld the practice, finding it to be rational under the *Turner* test.[129] On appeal the Supreme Court of the United States reversed, holding that strict scrutiny, not the *Turner* test, was the proper standard of review.[130]

The Court reasoned that racial classifications are always "immediately suspect," and therefore all racial classifications imposed by the government must be analyzed under strict scrutiny.[131] The Court refused to find an exception for prisoners under the *Turner* rationality test, which allowed for such a policy to be reviewed under a rational basis test.[132] In *Turner*, the

125. 543 U.S. 499 (2005).
126. Roe v. Crawford, 439 F. Supp. 2d 942, 943–48 (W.D. Mo. 2006).
127. *See Johnson*, 543 U.S. 499.
128. *Id.* at 503.
129. *Id.* at 504.
130. *Id.* at 515.
131. *Id.* at 509.
132. *Id.*

right to marry was at issue, and the Court held that because marriage was not consistent with incarceration policies, restricting marriage need only be reasonably related to a legitimate penological interest.[133] Unlike the right to marry, which necessarily involves access to the prisoner by another person, equal protection is not "inconsistent with proper incarceration" because "[t]he right not to be discriminated against based on one's race . . . is not a right that need necessarily be compromised for the sake of proper prison administration."[134]

Part of the Court's concern over racial classifications was that such classifications "raise special fears that they are motivated by an invidious purpose."[135] To avoid such application, the Court determined that a mere rationality test was not appropriate because it could not "'smoke out' illegitimate uses of race," which was particularly important in the prison context where "the government's power is at its apex."[136] In his dissent, Justice Thomas predictably argued that determining the appropriateness of race-based policies is "better left in the first instance to the officials who run our Nation's prisons" and the deferential *Turner* rationality test should therefore remain the correct standard.[137] The Court found that this standard was "too lenient" and would allow the use of race-based policies that in practice do not advance the prison's stated interests.[138]

Notably, in the *Johnson* opinion, the Court mentioned a list of rights it considered inconsistent with proper incarceration and therefore still susceptible to the *Turner* test.[139] Along with marriage restrictions, this list included the freedom of association, limits on correspondence, restrictions on access to the courts, restrictions on receiving certain publications, limitations on attending religious services during work hours, and regulations regarding mentally ill prisoners.[140] Conspicuously missing from this list is any right that involves the access to healthcare. Instead, the common thread that runs through these inconsistent rights is that they require the prison to give the inmate a greater amount of autonomy than would normally be expected in prison. This differs from medical care and treatment, which under the Eighth Amendment is not one of the rights forfeited upon entering prison. This inconsistency of analysis is further evidenced by the fact that Eighth

133. Turner v. Safley, 482 U.S. 78, 98–90 (1987).
134. *Johnson*, 543 U.S. at 510.
135. *Id.* at 505.
136. *Id.* at 506–10.
137. *Id.* at 542 (Thomas, J., dissenting).
138. *Id.* at 513.
139. *See id.* at 510.
140. *Johnson*, 543 U.S. at 510.

Amendment claims, like Equal Protection claims, are not analyzed under the *Turner* rationality test.[141]

Putting aside the Eighth Amendment argument for now, if abortion is considered a medical procedure, which it is, and medical procedures are not inconsistent with proper incarceration, then abortion is not inconsistent with proper incarceration and should therefore fall under *Johnson v. California*'s exception to the *Turner* rationality test.[142] Clearly a prison will take care of a pregnant inmate's medical needs by providing her with obstetrical care throughout the pregnancy and transporting her off-site when necessary for treatment and delivery. It is unreasonable to think that providing access to abortion should be viewed any differently, particularly because it often involves less off-site travel and less expense than would be required if the pregnancy was carried to term. In the majority of prison abortions the inmate is required to travel off-site only once to obtain the procedure, and in many cases is required to pay for the procedure herself. Pregnancy requires several off-site trips and the state is required to pay for the care.

Allowing inmates access to abortion procedures is even less disruptive of proper incarceration than the equal protection requirements protected in *Johnson*. If a prison with severe race-related problems is required to remain integrated, it will be arguably more difficult to quell violence between different populations. In *Johnson*, the department of corrections was able to cite to five major prison gangs based along racial lines within its prisons and numerous instances of violence between the groups.[143] It further stated that it expected such violence to continue and to be inflamed if the prisons were required to integrate.[144] Despite the overwhelming evidence that racial integration could generate more violence, create a more dangerous environment for the prison guards, and generally disrupt prison administration, the Court insisted that equal protection and the right not to be segregated was not inconsistent with proper incarceration. The impact of abortion procedures on effective prison administration seems minute by comparison.

Allowing a woman to receive an abortion does not defeat the penological objectives of prison administrators anymore than allowing her to receive an appendectomy or other type of routine medical care would.[145] One stated objective of imprisonment is to rehabilitate the offender. Forcing an inmate to give birth to a child she does not want is not consistent with this goal. Such an action can only serve to add to the anguish she is already expe-

141. *See* Helling v. McKinney, 509 U.S. 25 (1993); Estelle v. Gamble, 429 U.S. 97 (1976).

142. *See* Elizabeth Budnitz, Note, *Not a Part of Her Sentence: Applying the Supreme Court's* Johnson v. California *to Prison Abortion Policies*, 71 BROOK. L. REV. 1291 (2006).

143. *Johnson*, 543 U.S. at 502.

144. *Id.* at 503.

145. Budnitz, *supra* note 142, at 1322.

riencing and possibly increase her hostility towards the prison system and society in general. In the worst-case scenario, she may take it upon herself to obtain an illegal abortion while in prison. None of these outcomes can possibly be considered rehabilitative.[146]

A second objective of imprisonment, punishment, cannot logically be achieved by denying access to abortions either.[147] Even if it could be argued that imprisonment requires that a woman should be forced to lose her freedom to choose what happens to her body, this argument would fail under an equal protection argument because it is a punishment that solely affects female inmates.[148] The result would be particularly egregious in the numerous instances where the state, through deliberate indifference, allows a woman to be inseminated while incarcerated.

In *Johnson*, the Supreme Court expressed special concern over racially discriminatory policies that reflect underlying improper motives of prison officials.[149] The Court reasoned that race was a particularly sensitive and controversial issue, so much so that *Turner*'s standard was "too lenient" to protect from "invidious uses of race" within the prison.[150] The Court was generally concerned that if prison administrators or officials held racist views, these views would be able to slip unnoticed into prison policy without a strict standard of review to safeguard equal protection.[151]

This reasoning applies with equal force to abortion policy. Abortion is a polarizing topic, and many people feel strongly one way or the other about the issue. Arguably, the ability to effectively use prison policy to block a procedure that some find objectionable creates a strong incentive for those who oppose the practice to find reasons to deny or hinder the procedure, even when such reasons are exaggerated or speculative. Under the *Turner* rationality test, such improper motives could easily be justified through deference to prison officials' expertise on efficient operation of the prison system. This is particularly dangerous given the fact that these policies are often implemented by men who may not fully understand the implications of denying the freedom of choice to female inmates. The right to choose is a constitutional right whether one agrees with it or not and should not be subject to the deference of prison officials.

Finding that the *Turner* rationality test, rather than *Casey*'s undue burden standard, should govern freedom of choice analysis diminishes the right to choose in the prison setting. Such a result misstates the holding in *Johnson* as applying only to rights that are normally protected by strict scrutiny.

146. *Id.* at 1325.
147. *Id.*
148. *Id.*
149. Johnson v. California, 543 U.S. 499, 513 (2005).
150. *Id.*
151. *Id.* at 513–14.

The *Johnson* exception applies to rights not inconsistent with proper incarceration, regardless of the type of scrutiny the right may receive outside the prison walls. Strict scrutiny is implicated in the *Johnson* opinion only because racial equality is *not* inconsistent with imprisonment, and any prison policy that interferes with racial equality must be analyzed under the same strict scrutiny standard that would apply outside of the prison context. Similarly, because access to abortion is *not* inconsistent with proper incarceration, it must be analyzed under the same "undue burden" test that would normally apply to abortion regulations outside of prison.

Supporters of restrictions also point to the fact that "access to abortion involves burdens on the prison system concerning allocation of resources that necessitate either allowing inmates out of the prison setting, or bringing persons into the facilities."[152] The premise of this statement is that, unlike simply refraining from classifying prisoners on the basis of race, which creates no burden, these additional burdens make abortion inconsistent with proper prison administration. The premise is false. First, the premise ignores that, in most cases, providing an abortion will be less burdensome on prison administration than maintaining the pregnancy because it requires fewer trips off-site and less expenditure of state funds, as the Eighth Circuit found.[153] Second, the premise erroneously determines that any right that requires more than refraining from a certain action by prison officials creates a burden that renders it inconsistent with incarceration. This is simply not the case, as is evidenced by the medical care that generally is provided to inmates. Clearly, providing such care is a burden on the staff, but that does not make it inconsistent with incarceration. Whatever burden is created by allowing access to abortion is no different than the incidental burdens that are created whenever the state must pay for and transport an inmate to receive other medical care off-site; accordingly, those burdens are not sufficient to make the availability of abortion inconsistent with proper incarceration.

B. Evaluating Abortion Policy Under *Casey* Produces Fairer Results

Because abortion is not inconsistent with proper incarceration, *Casey*'s "undue burden" standard should be applied to any prison policy regulating abortion rather than the *Turner* rationality test. This standard still allows for deference to prison officials, but at the same time serves to better protect the constitutional rights of an incarcerated woman. Furthermore, a higher standard of review helps to eliminate the possibility that prison policy be used as a pretext for mandating a certain set of values on the prison population.

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152. Roe v. Crawford, 514 F.3d 791, 794 (8th Cir. 2008).
153. *See id.*

Finally, under *Casey* it is of no consequence that the abortion be considered "elective" or medically necessary. *Casey*'s protections were geared specifically towards "elective" abortions; medically necessary abortions enjoy much broader protection. Therefore, by applying *Casey*, prisons will no longer be allowed to distinguish between the two types of procedures by allowing one type and denying the other.

The policy in *Roe v. Crawford* would have easily been defeated under *Casey*'s undue burden test:

> A finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.[154]

Clearly a policy such as the one instituted by the MDC, which completely prohibited any elective abortion, would constitute not just a substantial obstacle but an absolute obstacle. Whatever interests the MDC had to support this policy, whether legitimate or not, prohibiting abortion is never "a permissible means" of serving those interests.

Another important question is how far prisons can go before their actions become a substantial obstacle. *Casey* has proven not to be an impenetrable barrier to abortion regulation. Under *Casey*, laws requiring informed consent, waiting periods, and parental consent have all been upheld.[155] Therefore, it is likely that prisons would still be able to place some restrictions on access to abortion as long as such restrictions do not interfere too greatly with the woman's right to choose. Waiting periods, mandatory counseling, and informed consent could be considered constitutional within the prison setting, just as they are on the outside.

A more troublesome question arises when prisons require certain judicial procedures before allowing an inmate to receive an abortion. This was the case in both *Victoria W.* and *Lanzaro*, which required a court order for the abortion[156] and a court-ordered release to travel to the abortion clinic,[157]

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154. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 883, 877 (1992) (O'Connor, J., plurality opinion).

155. *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983).

156. Victoria W. v. Larpenter, 205 F. Supp. 2d 580, 598 (E.D. La. 2002).

157. Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 351 (3d Cir. 1987).

respectively. If prison officials can show that these types of requirements help prison security or administration, deference may be given to these officials as long as such restrictions do not in practical effect delay receiving the procedure until it is no longer legally attainable. Under *Casey*, however, any similar kind of obstacle that did not purport to eliminate access to abortion but in effect prevented it from taking place would be impermissible. This is of particular importance since the Eighth Circuit suggested in *Crawford* that requiring an inmate to obtain a court order authorizing an abortion would constitute a "ready alternative" to a complete ban on the procedure.[158] This presumes that an inmate can gain ready access to a court without being deterred by prison officials. This was not the actual case in *Crawford*. Prisons can still regulate abortions to achieve effective prison administration under *Casey*; they simply must do so in a way that does not result in a complete denial of access or an unreasonable delay.

C. Even if the Courts Continue to Apply the *Turner* Rationality Test, No Rational Relationship Exists Between Preventing Access to Inmate Abortions and a Legitimate State Interest

The Eighth Circuit struck down the MDC policy in *Roe v. Crawford* under the more deferential *Turner* standard because the MDC failed to show that the regulations were reasonably related to legitimate penological interests. Such interests include deterrence of crime, rehabilitation of prisoners, and institutional security. The court concluded that the MDC policy failed three of the four prongs of the *Turner* test, which, the court concluded, was enough to find the regulation invalid, but the court did find that the MDC policy had a rational relationship to the legitimate concern about the heightened risks for guards and inmates while visiting an abortion clinic.[159] Although this finding was ultimately non-determinative in *Crawford*, it has potential implications for future prisoner freedom-of-choice cases and should be addressed.

The MDC cited concerns about protesters that were often outside of the local abortion clinic picketing, taking license plate numbers, and videotaping vehicles as they entered.[160] The MDC reasoned that these activities made it more difficult to transport inmates to an abortion facility than to a regular medical facility. Although in her brief Roe acknowledged the presence of the protesters on many occasions at the facility, she offered evidence that in eight years of transporting prisoners "picketers have never

158. Roe v. Crawford, 514 F.3d, 789, 798 (8th Cir. 2008).
159. *Id.* at 795–98.
160. *Id.* at 795.

interfered with the safety or security of . . . inmates or staff."[161] There had never once been any instance of threats, vandalism, disruptions, or altercations. Furthermore, Roe pointed out that the presence of protesters "was not one of the considerations at the time the Policy was formulated and implemented" but only during litigation became the MDC's primary justification for its enforcement.[162] When presented with this evidence the district court rightly concluded that the MDC "fail[ed] to present any material fact showing that the presence of picketers [has] in fact increas[ed] security concerns."[163]

The Eighth Circuit disagreed with this assessment, finding that the district court "erred in finding the MDC policy is irrational simply because no problems occurred in the past."[164] Citing deference to prison administrators, the court took them at their word that traveling to the abortion clinic was dangerous, despite no evidence of actual past or threatened future danger.[165] The court reasoned that "[p]rison officials should not be required to wait until a problem occurs before addressing the risk."[166] The difficulty with this analysis is that it allows the curtailment of any constitutional right based purely on conjecture, speculation, and post hoc rationalization. It also ignores the obvious fabrication of the prison official's concern. As the district court pointed out, every time a prisoner is transported, for whatever reason, a variety of security concerns are raised, and "the undisputed evidence shows that inmates who choose to terminate a pregnancy and must be transported outside of prison for that purpose pose no greater security risk than any other inmate that requires outside medical attention."[167] In all of the cases not involving abortion, prison officials have been able to handle the risks and have managed to take literally thousands of prisoners off-site over the years without incident.[168] By allowing such complete deference towards prison officials without requiring any evidence to support their claims, the Eighth Circuit leaves the door wide open for future policy challenges to be dismissed under the *Turner* rationality test merely because prison officials were able to invent some rationale for the policy after the fact.

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161. *Id.*

162. Brief of Respondent-Appellees at 31, Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008) (No. 06-3108).

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

164. *Crawford*, 514 F.3d at 796.

165. *Id.*

166. *Id.* at 795.

167. *Crawford*, 439 F. Supp. 2d at 950.

168. Brief of Respondent-Appellees at 31–33, Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008) (No. 06-3108).

The Eighth Circuit found that the occasional presence of protesters at abortion clinics was enough to make a transport for an abortion more perilous than transport for other types of medical procedures.[169] Regardless of whether this is the reality, allowing protesters to influence a decision about constitutional rights creates an impermissible "heckler's veto" by allowing them to effectively block access to a legally-protected activity. A heckler's veto traditionally arises when a party's freedom of speech is curtailed or restricted to prevent another party from reacting negatively to such speech and thereby creating a threat of interruption, protest, or violence.[170] Normally a heckler's veto is not allowed to suppress speech unless the speech itself incites violence or lawless action. Ironically, the actions of the abortion protesters are protected from a heckler's veto; they may continue to exercise their freedom of assembly and expression even if it creates the potential for hostility from opposing groups. The Eighth Circuit, however, concluded that protection from a heckler's veto is only applicable as it relates to the general public.[171]

Unlike when dealing with the general public, in the prison context the validity of infringement on constitutional rights depends only on the *Turner* rationality test that grants far more deference to prison administrators than would be given to the government when dealing with the general populace. As such, prison administrators may defer to a heckler's veto when the government otherwise could not. This does not pass constitutional muster on any level. If prison officials were truly concerned, their concern would warrant a legitimate time and place restriction on the protesters so that the prison officials could get the inmate in and out of the facility.[172] Prison officials could easily solve the problem, if it truly existed, by removing protesters for the few hours a prisoner is brought to a site, certainly a reasonable time and place restriction under the First and Fourteenth Amendments.[173] This would alleviate the excuse used to deny the pregnant woman her constitutional rights and place a minimum restriction on the protesters' constitutional rights, rather than an outright prohibition on the pregnant woman's constitutional rights.

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169. *Crawford*, 514 F.3d at 795.

170. Lewis v. Wilson, 253 F.3d 1077, 1081–82 (8th Cir. 2001).

171. *Crawford*, 514 F.3d at 796.

172. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("[A] state may . . . enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.").

173. *Cf.* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994) (finding that tailored injunctions are appropriate measures to protect patients from the possible physical harm that targeting picketing could spawn).

IV. PRISON POLICES THAT DENY ACCESS TO ABORTION VIOLATE THE EIGHTH AMENDMENT BAR AGAINST CRUEL AND UNUSUAL PUNISHMENT

A. *Estelle v. Gamble*: Establishing the Medical Test for Cruel and Unusual Punishment

The Eighth Amendment of the United States Constitution simply states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[174] Historically, this provision was read to prohibit "'torture(s)' and other 'barbar(ous)' methods of punishment."[175] As constitutional understanding evolved, courts began to read this amendment as embodying "broad and idealistic concepts of dignity, civilized standards, humanity, and decency" and prohibiting "punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'"[176] With this understanding, the courts required prisons to provide medical care and treatment for incarcerated prisoners, reasoning that denial of medical treatment may result in "torture or lingering death" or "result in pain and suffering which no one suggests would serve any penological purpose."[177] Such suffering is "inconsistent with contemporary standards of decency" under the view that the "public be required to care for the prisoner, who cannot by reason of the deprivation of [her] liberty, care for [herself]."[178]

The current analysis of what constitutes cruel and unusual punishment in the context of medical care was defined in the Supreme Court case *Estelle v. Gamble*.[179] In *Estelle*, a prisoner filed a complaint against prison officials claiming that the officials' failure to provide him adequate medical care for a back injury was cruel and unusual punishment.[180] The Court held that "deliberate indifference" by prison doctors or prison staff to the "serious medical needs" of prisoners violates the Eighth Amendment.[181] This includes both "denying or delaying access to medical care or intentionally interfering with the treatment once prescribed."[182] Since *Estelle*, inmates' claims of cruel and unusual punishment in the medical arena have been analyzed under a two prong test: (1) the inmate must show an objectively serious medical need, and (2) the inmate must show that the prison was deli-

174. U.S. CONST. amend. VIII.
175. Estelle v. Gamble, 429 U.S. 97, 102 (1976).
176. *Id.*
177. *Id.* at 103.
178. *Id.* at 103–04.
179. *Id.*
180. *Id.* at 100.
181. *Estelle*, 429 U.S. at 104.
182. *Id.* at 104–05.

berately indifferent to that need.[183] Deliberate indifference requires that officials act knowingly to prevent, deny, or delay treatment; mere negligence will not suffice.[184] What is considered a serious medical need is less clear. Courts have defined it in several different ways: treatment that "cannot be postponed [without] far-reaching consequences," a medical need that, if not treated, will create "irreparable consequences," or a need "that has been diagnosed by a physician as requesting treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention."[185] Under any of these definitions, termination of a pregnancy easily qualifies.

The cases analyzing the right to an abortion in prison under the Eighth Amendment, however, have been relatively few and have produced mixed results. In *Bryant v. Maffucci*,[186] the Second Circuit held that prison officials' failure to arrange for an abortion before the time limit for legally obtaining the procedure had passed did not violate the inmate's rights.[187] After the inmate was admitted she was given a sonogram that indicated she was in her twenty-first week of pregnancy.[188] State law prohibited abortions after twenty-four weeks, so prison officials arranged an appointment for the procedure two weeks later, the earliest time the hospital had available.[189] At that appointment, a new sonogram revealed that the inmate was actually twenty-four weeks into her pregnancy, and the hospital refused to carry out the procedure.[190] The Second Circuit found that this was mere negligence on the part of prison officials and did not rise to the level of deliberate indifference required to show a violation of the Eighth Amendment.[191]

A similar case arose in the Sixth Circuit that same year. In *Gibson v. Matthews*,[192] the court held that the prison did not violate the inmate's rights by refusing to provide her with an abortion when she arrived in prison twenty-three weeks pregnant.[193] Prior to her arrival at the prison that denied her the procedure, she had been moved to several different federal prison facilities and at each of them she had asked to obtain an abortion.[194] Because none of the prisons were located near abortion providers, she had to be

183. *Id.* at 106.
184. *Id.*
185. Bellotti v. Baird, 443 U.S. 622, 643 (1979); Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987).
186. 923 F.2d 979 (2d Cir. 1991).
187. *Id.* at 980.
188. *Id.*
189. *Id.* at 980–81.
190. *Id.* at 981.
191. *Id.* at 983–84.
192. 926 F.2d 536 (6th Cir. 1991).
193. *Id.* at 534–35.
194. *Id.* at 534.

transferred to a prison that had access to an abortion facility, and by this point it was too late in her pregnancy.[195] The court noted that the inmate was a "victim of the bureaucracy as a whole" and therefore none of the individual defendants could be held liable.[196] The Second Circuit did find, however, that abortion was a serious medical need under the Eighth Amendment and the inmate's claim failed only because bureaucratic negligence could not be considered deliberate indifference.[197]

The Third Circuit was the first to find a prison's abortion policy violated the Eighth Amendment. In *Lanzaro*, inmates claimed that the prison had an affirmative duty to attend to serious medical needs, including abortion, and that denial of elective abortions was a breach of this duty.[198] The prison countered that "elective" procedures were beyond the scope of its duty and likened such procedures to "an inmate who desires a facelift or the removal of varicose veins purely for cosmetic reasons."[199] The Third Circuit rejected the idea that classifying a procedure as "elective" disqualifies it as a serious medical need because denial of abortion care will result in "tangible harm."[200] The court then found that the burdensome procedure of requiring a court-ordered release as a precondition to exercising the right to choose constituted deliberate indifference towards the serious medical need that accompanies a request to exercise this right.[201]

B. The Eighth Amendment Holdings in *Roe v. Crawford*

The district court in *Roe v. Crawford* found the reasoning in *Lanzaro* persuasive and held that the MDC policy prohibiting all elective abortions violated the Eighth Amendment.[202] As the correctional facility argued in *Lanzaro*, the MDC argued that an "elective" abortion can never constitute a "serious medical need," but the district court rejected the idea that merely labeling a procedure "elective" takes away all Eighth Amendment scrutiny, just as the *Lanzaro* court did.[203] Once the court determined that abortion should be considered a "serious medical need," it clearly followed that a policy designed to restrict all access to that procedure qualified as deliberate

195. *Id.*
196. *Id.* at 534–35.
197. *Id.* at 536.
198. Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 344 (3d Cir. 1987).
199. *Id.* at 345.
200. *Id.* at 347.
201. *Id.*
202. Roe v. Crawford, 439 F. Supp. 942, 953 (W.D. Mo. 2006).
203. *Id.*

indifference on the part of prison administrators because they had to have been aware of the consequences of their actions.[204]

The Eighth Circuit did not agree with the district court and overturned this part of the ruling, citing "recent developments in the law."[205] The court referenced the 2002 district court case that preceded the Fifth Circuit decision in *Victoria W.*, which held that "[a]n elective abortion sought for non-medical reasons . . . is simply lacking in similarity and intensity to the other medical conditions that have been found to be serious medical needs under the Eighth Amendment."[206] The district court in *Victoria W.* likened the harm caused by denial of an abortion procedure to be merely that of "inconvenience and financial drain."[207] The Eighth Circuit acknowledged this holding to be in conflict with the Third Circuit in *Lanzaro*, but reasoned that the court in that case did not come to a conclusive interpretation of what constituted a "serious medical need."[208] The concurring opinion required to create a majority in *Lanzaro* stopped short of finding that a request for an "elective" procedure could place an affirmative duty on prisons to provide such procedures or risk violating the Eighth Amendment.[209] As such, the Eighth Circuit reasoned that the Third Circuit had not conclusively established the definition of "serious medical need."[210]

Victoria W. also had similar precedential problems. Although the district court in *Victoria W.* took a firm stance in finding no violation of the Eighth Amendment, on appeal the Fifth Circuit failed to adopt the reasoning of the district court and instead found that the policy did not violate the Eighth Amendment under the *Turner* rationality test.[211] Therefore, the Fifth Circuit discounted the district court's rigid Eighth Amendment analysis and failed to analyze the Eighth Amendment claim under the correct standard of review as declared in *Estelle v. Gamble*.

Finding neither *Victoria W.* nor *Lanzaro* to conclusively settle the issue, the Eighth Circuit looked to Supreme Court precedent. Citing *Rust v. Sullivan*,[212] the court found that "[t]he Supreme Court has made it clear the state has no affirmative duty to provide, fund, or help procure an abortion for any member of the general population."[213] Finding that the views articu-

204. *Id.*
205. Roe v. Crawford, 514 F.3d 789, 798 (8th Cir. 2008).
206. *Id.* at 799 (quoting Victoria W. v. Larpenter, 205 F. Supp. 2d 580, 600–01 (E.D. La. 2002)).
207. *Id.* (quoting *Victoria W.*, 205 F. Supp. 2d at 601).
208. *Id.* at 800.
209. *See* Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 352–55 (3d Cir. 1987) (Mansmann, J., concurring).
210. *Crawford*, 514 F.3d at 800.
211. *Id.* at 799 n.8.
212. 500 U.S. 173 (1991).
213. *Crawford*, 514 F.3d at 800.

lated by the district court in *Victoria W.* were more consistent with Supreme Court precedent, the court concluded that "elective" abortion does not constitute a serious medical need and, therefore, denial of access to the procedure does not constitute an Eighth Amendment violation.

C. The Eighth Amendment Should Apply to Prison Abortion Policies

Just as the MDC policy in *Crawford* did not reasonably relate to a legitimate penological interest, the policy also should have failed under *Estelle*'s Eighth Amendment test. According to the *Estelle* Court, the State is obligated "to provide medical care for those whom it . . . incarcerat[es]," and "[i]ntentionally denying or delaying access to medical care" constitutes an "unnecessary and wanton infliction of pain."[214] Pregnancy termination is a vital option of medical care for pregnant women and as such falls within the category of serious medical need safeguarded by the Eighth Amendment.

1. *The Desire to Obtain Abortion Care Is a "Serious Medical Need"*

Access to abortion care is a "serious medical need" because denial of the procedure will ultimately result in irreversible consequences, the treatment cannot be postponed without creating those consequences, and the need for the assistance of a physician is obvious to even the most naïve of lay persons.[215] Without such treatment, the inmate will be forced against her will to continue the pregnancy until she either miscarries or gives birth, or may even be tempted to abort without medical care at all. There is substantially less risk of death and serious medical complications associated with a timely medical abortion procedure than there is carrying a pregnancy to term.[216] Women are "at least ten times more likely to die from continuing a pregnancy through childbirth than from induced abortion."[217] The risk of carrying the pregnancy to term is even greater where the pregnancy is deemed "high-risk."[218] Women in prison are especially susceptible to high-risk pregnancies resulting from inadequate access to prenatal care, substance abuse problems, and nutritional deficiencies.[219] Woman inmates also

214. Estelle v. Gamble, 429 U.S. 97, 103–04 (1976).

215. Bellotti v. Baird, 443 U.S. 622, 643 (1973).

216. Brief of Respondent-Appellees at 53–54, Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008) (No. 06-3108).

217. *Id.*

218. *Id.*

219. *See* National Commission on Correctional Health Care Guideline P-G-07 [hereinafter NCCHC Guideline], cited by the State of Missouri prison guidelines in their regulations, and conceded in their testimony.

have much higher rates of HIV and other sexually transmitted diseases that can endanger pregnancies.[220]

Further, the pain and discomfort of childbirth is amplified in the prison environment. Numerous stories exist of women prisoners shackled or handcuffed during labor and while giving birth.[221] This type of treatment is not only humiliating; it is dangerous for both the mother and child during delivery, which requires mobility and adaptability.[222] Denying abortion care forces women to undergo this type of treatment during labor. The psychological implications of forced motherhood can also be debilitating. Infants are often separated from their mothers soon after birth and given to a family member or put in foster care. For inmates with longer sentences, this means that they do not have the chance to develop a meaningful relationship with their child during its formative years, or at all. Inmates with shorter sentences, the majority of whom are already single parents, upon release must return to life outside the prison with another child who requires care. In *Estelle*, the Supreme Court noted that the Eighth Amendment should reflect "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[223] Forcing women to carry out unwanted pregnancies is not compatible with these concepts, particularly when there exists a safe way to alleviate the situation. The Supreme Court has acknowledged the choice to terminate pregnancy as a constitutional right; therefore it is not up to administrative agencies to impose their moral opposition to the right upon the inmates who are left in their charge. The right to choose is the law of the land.

Levels of physical and psychological pain far less severe than those caused by denial of termination of pregnancy have been deemed worthy of Eighth Amendment protection. In *Brooks v. Berg*,[224] a New York court found a treatment for gender identity disorder was a "serious medical need."[225] A Fourth Circuit case, *Oldham v. Beck*, [226] held that avoiding exposure to second-hand smoke could be a "serious medical need."[227] A Penn-

220. *See* Effectiveness of Interventions to Address HIV in Prisons 16, 19, World Health Organization, 2007.

221. *See generally* AMNESTY INT'L USA, WOMEN IN PRISON (2008), *available at* http://www.amnestyusa.org/violence-against-women/abuse-of-women-in-custody/women-in-prison/page.do?id=1108246.

222. *See* Angela Thomas, *Inmate Access to Elective Abortion: Social Policy, Medicine and the Law*, 19 HEALTH MATRIX 539, 559 (Spring 2009).

223. Estelle v. Gamble, 429 U.S. 97, 102 (1976).

224. 270 F. Supp. 2d 302 (N.D.N.Y. 2003), *vacated on other grounds*, 289 F. Supp. 2d 286 (N.D.N.Y. 2003).

225. *Id.* at 309–12.

226. 75 F. App'x 122 (4th Cir. 2003).

227. *Id.* at 125.

sylvania court in *Petrichko v. Kurtz*[228] held that a dislocated shoulder was a "serious medical need."[229] Many courts, including the Fourth Circuit in *Webb v. Driver*, [230] have found that a hernia qualifies as a "serious medical need."[231] The list of cases goes on and includes all types of maladies from fractured ankles, to broken ribs, to inadequate dental care. Given that all of these conditions qualify as "serious medical needs" for Eighth Amendment purposes, it is unreasonable to deny that relief from pregnancy is just as worthy given pregnancy's potential for severe pain, discomfort, or even death, and its irreparable consequences.

Supreme Court abortion jurisprudence also indicates that the desire to obtain an abortion is a serious medical need. In *Roe v. Wade*, the Supreme Court discussed the implications of denying a woman the right to choose:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[232]

The stress caused by forced motherhood, concern for the mental and physical health of the mother, and the future implications of having an unwanted child were severe enough to convince the Court to qualify abortion as a fundamental right.[233]

Finally, the treatment of pregnant inmates shows a general agreement that, abortion aside, prison officials consider pregnancy itself a "serious medical need." A pregnant inmate has a right to comprehensive treatment and preventative care during the duration of the pregnancy. This treatment is normally guided by the health standards enacted by the National Commission on Correctional Health Care (NCCHC), which directs that medical care for pregnant inmates should be "in accordance with their expressed desires regarding their pregnancy, whether they elect to keep the child, use adoption services, or have an abortion."[234] In *Crawford*, prison officials who

228. 52 F. Supp. 2d 503 (E.D. Pa. 1999).
229. *Id.* at 507–08.
230. 313 F. App'x 591 (4th Cir. 2008).
231. *Id.* at 593.
232. Roe v. Wade, 410 U.S. 113, 153 (1973).
233. *Id.* at 153–54.
234. NCCHC Guideline P-G-10.

admitted to adhering to the NCCHC standards recognized that pregnancy was a "serious medical need" but disputed that an abortion procedure could ever fit that definition when medically unnecessary. Officials confused the condition with treatment. Pregnancy is a "serious medical need" that under the Eighth Amendment must be treated while in prison. Under the NCCHC standards, abortion is one of the treatment options available. Because the condition of pregnancy clearly constitutes a "serious medical need" and because abortion is the safest way of relieving this need, a denial of this constitutionally protected option violates the Eighth Amendment. To argue otherwise would be analogous to allowing a prison that provided medical care for all medical conditions but permitted only the most painful, dangerous, or disfiguring treatments to be employed.

2. *Labeling Abortion as "Elective" Does Not Permit Restrictive Prison Policy to Escape Eighth Amendment Review*

The few cases that have addressed the issue, including *Crawford*, and found that denial of access to abortion care did not violate the Eighth Amendment often hinged their decisions on a finding that no "elective" procedure can ever constitute a "serious medical need." The fact that nontherapeutic abortions are labeled as "elective" does not mean that they do not fall within the Eighth Amendment protections. The label itself is unwarranted. The majority of treatments considered "elective," such as cosmetic surgery, laser eye surgery, or hip or knee replacement are given that label because "the procedure is beneficial to the patient but does not need to be done at a particular time."[235] The decision to terminate a pregnancy however "cannot be postponed, or it will be made by default with far-reaching consequences."[236] Both the decision to terminate a pregnancy and the decision to carry to term require timely care to avoid serious and permanent health conditions. The Third Circuit agreed in *Lanzaro*:

> [A] woman exercising her fundamental right to choose to terminate her pregnancy requires medical care to effectuate that choice. Denial of the required care will likely result in tangible harm to the inmate who wishes to terminate her pregnancy. Characterization of the treatment as necessary for the safe termination of an inmate's pregnancy as "elective" is of little or no consequence in the context of the *Estelle* "serious medical needs" formulation. An elective, nontherapeutic abortion may nonetheless constitute a "serious medical need" where denial or undue delay in

235. MedicineNet.com, Medical Dictionary Definitions of Popular Medical Terms, http://www.medterms.com/script/main/art.asp?articlekey=14367 (last visited March 1, 2010).

236. Bellotti v. Baird, 443 U.S. 622, 643 (1979).

provision of the procedure will render the inmate's condition "irreparable."[237]

Prior to its holding in *Crawford*, the Eighth Circuit had relied on *Lanzaro* to reject the notion that "serious medical need" can be reduced to distinguishing between "elective" and "medically necessary" care. In *Johnson v. Bowers*,[238] the court cited *Lanzaro* to support the proposition that the mere classification of a surgery as elective does not "abrogate the prison's duty . . . to promptly provide necessary medical treatment for prisoners."[239] The court held that indefinitely delaying "elective" surgery to correct a left-hand nerve injury was a denial of care for a "serious medical need" because without the surgery the injury would constitute a "permanent handicap" restricting day-to-day activities.[240] Thus, the Eighth Circuit has recognized that when denial of treatment for a particular condition causes irreparable harm, it is a "serious medical condition," regardless of whether prison officials characterize it as "elective." It would seem to follow that the life of an inmate denied an abortion will be permanently altered—medically, physically, emotionally, and sociologically—by continued pregnancy and childbirth, thus she has a "serious medical need" regardless of how the prison chooses to label the procedure.

Yet this was not the result in *Crawford*. The Eighth Circuit claimed that the *Bowers* decision was based on the prison gratuitously labeling a clearly necessary medical procedure as "elective."[241] Therefore, the court concluded that *Bowers* only stands for the proposition that gratuitous classification of "elective" treatment "will not automatically remove the prison's responsibility to provide treatment, when that treatment is actually '*necessary*' for the health of the prisoner."[242] The decision, the court reasoned, is aimed at preventing prison officials from surreptitiously withholding medical treatment by labeling it as "elective,"[243] but this seems exactly what is going on in cases of "elective" abortion. As discussed above, "elective" abortion does not fit the typical classification of an "elective" procedure. Unlike other "elective" procedures, a pregnant woman has no choice but to make a decision between one of two treatment options. The other option, carrying the child to term, is not called "elective pregnancy," so why should the alternative treatment for the same condition be given such a label? The

237. Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 349 (3d Cir. 1987).

238. 884 F.2d 1053 (8th Cir. 1989).

239. *Id.* at 1056.

240. *Id.*

241. Roe v. Crawford, 514 F.3d 789, 800 (8th Cir. 2008).

242. *Id.*

243. *Id.*

fact that a woman, rather than her doctor, determines that an abortion is necessary does not change the importance of that determination. Labeling her choice as "elective" only works to trivialize the seriousness of her decision. Consequently, the conflict between *Crawford* and *Bowers* cannot be resolved in spite of the court's attempt to do so.

3. *A Prison Policy that Purposely Delays or Denies Access to Abortion Shows "Deliberate Indifference" on the Part of Prison Officials*

Once the district court in *Crawford* determined that abortion care is a "serious medical need" it became undisputable that the prison policy explicitly denying all access to the procedure constituted "deliberate indifference" on the part of prison officials. The Eighth Circuit did not address this prong. After finding abortion care was not a "serious medical need," it was of no consequence whether officials were deliberately indifferent to it or not. Clearly, in the case of *Crawford*, where prison policy created an intentional denial of care, relief under the Eighth Amendment turned on the classification of the procedure rather than on the conduct of prison officials. The issue of "deliberate indifference" becomes more significant when prison policy serves only to create obstacles to receiving abortion care, or when abortion policy is not openly acknowledged or expressed by officials.

The Supreme Court has defined "deliberate indifference" as "intentionally denying or delaying access to medical care."[244] This definition reaches beyond *Crawford*-type polices that completely deny abortion care to include policies that create obstacles to obtaining the procedure. This was the case in *Lanzaro*, where the Third Circuit found that "deliberate indifference" could be established "where prison officials erect arbitrary and burdensome procedures that 'result[] in interminable delays and outright denials of medical care to suffering inmates.'"[245] Under this analysis, the court concluded that prison policy requiring inmates to receive a court-ordered release to obtain an abortion was so burdensome as to cause serious delays in obtaining the procedure.[246] Officials made no attempt to minimize these delays despite knowing that obtaining an abortion requires timely action in order to obtain a safe and legal procedure.[247]

The Fifth Circuit disagreed with this assessment in *Victoria W.*, finding that a prison policy requiring a pregnant inmate to obtain a court order be-

244. Estelle v. Gamble, 429 U.S. 97, 104–05 (1976).

245. Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987).

246. *Id.*

247. *Id.*

fore receiving an abortion did not constitute "deliberate indifference."[248] Arguably, a policy that requires a court order for an abortion, rather than for a court ordered release which is much more difficult to obtain, is less burdensome and thereby may produce fewer delays. This less burdensome policy, however, still proved to be so burdensome to plaintiff Victoria that access to an abortion was delayed to the point where she could no longer legally receive one. Nevertheless, the court found that this policy did not amount to "deliberate indifference" because she was given access to prenatal care after arriving in prison and attempts were made, although without success, to arrange the procedure.[249] The court found that the problem was not the policy, but with Victoria's lawyer, who did not effectively pursue the court order on her behalf.[250]

These distinctions are important for future prison abortion policy. All courts seem to agree that if abortion was to be deemed a "serious medical condition" then a policy that purposely delayed obtaining the procedure until the point where it is no longer safe or legal would be considered "deliberate indifference." However, "a showing of simple or even heightened negligence will not suffice" to prove culpability.[251] This leaves open the possibility that politically motivated guards, officials, or medical practitioners could find ways to "accidentally" lose required documents, to "forget" about requests, or to "mistakenly" give advice. The courts must guard against this type of manipulative behavior; however, doing so will likely be difficult, as it goes against the traditional deference that courts have granted prison officials in determining how to run prisons. Furthermore, policies that involve any type of judicial intervention allow prison officials to defer the decision of the judge, rather than be the "but for" cause of the denial. In jurisdictions that are predominantly anti-freedom of choice, the prisons can craft policy to take advantage of this and delay or deter access to the courts. Although the current obstacle to freedom of choice in prison is refusal to classify the procedure as a "serious medical need," once abortion finally achieves this classification these types of issues dealing with "deliberate indifference" will need to be addressed. A more appropriate answer might be to revisit the Eighth Amendment analysis and find that interference with the right to choice is an Eighth Amendment violation without regard to serious medical need.

248. Victoria W. v. Larpenter, 369 F.3d 475, 485 (5th Cir. 2004).

249. *Id.* at 489–90.

250. *Id.* at 490. The court apparently had no practical experience in trying to litigate the rights of an inmate through the bureaucracy of a prison system.

251. *Id.* at 489.

4. *Constitutional Analysis Should Be Based on General Eighth Amendment Principles and Not on "Serious Medical Need"*

Perhaps the true problem here is that this issue should not be analyzed in the medical context at all. Under Eighth Amendment jurisprudence, the state is not allowed to punish someone merely because of a condition which exists and cannot punish someone in a way which is degrading to human dignity. Because pregnancy is a condition which is irrelevant to any crime the incarcerated woman has committed, it is degrading to her human dignity to use that condition as a way of further penalizing her. Granted, this was not a position raised in any of the cases discussed, including *Roe v. Crawford*, but it is a position worth examining.

It is well established that a State may not punish a person for being mentally ill, for being afflicted with a venereal disease, or for being addicted to narcotics.[252] Perhaps it is by this standard that a woman's right to choose in prison should be enforced. Pregnancy is a condition for which the woman's rights should not be altered merely because she is incarcerated, and to do so would be cruel and unusual.

If *Casey* is currently the seminal case defining the right to choose, it makes sense to look to *Casey* to determine how that right should be analyzed. Doing so leads to the conclusion that the basis of the right is not premised on serious medical need. *Casey* clearly holds: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[253] The Court further reasoned:

> Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[254]

Similarly, in his partial concurrence in *Casey*, Justice Stevens described the right to choose: "Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled. A woman who decides to

252. Robinson v. California, 370 U.S. 660, 666 (1962).

253. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (O'Connor, J., plurality opinion).

254. *Id.* at 852.

terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term."[255]

Thus it is the condition of pregnancy, and not the conduct of abortion, with which this analysis must be made. If the right to choose is so basic that it implicates the fundamental right to liberty and human dignity, and if a woman who chooses to terminate a pregnancy is entitled to the same deference as one who chooses to carry to term, then the question of whether there is serious medical need or elective choice is not at issue. Cases that analyze the issue as such hit wide of the mark. The test should be the same as any other fundamental right analyzed in the Eighth Amendment context: Does the limit placed by incarceration create an affront to human dignity?

In *Robinson v. California*,[256] the Supreme Court struck down a statute making it a criminal offense for a person to be addicted to drugs.257 The Court reasoned, "in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[258] Like the statute at issue in *Robinson*, a policy that punishes a woman for the condition of pregnancy is similarly cruel and unusual. In both instances the state would be punishing a condition, not conduct. In *Robinson*, the punishment came in the form of a ninety-day jail sentence for being the victim of a condition. In *Crawford* and other prison abortion cases, punishment comes in the form of forcing a choice, due to a condition, upon a woman who has a fundamental right to make the choice on her own without interference from the state.

It is undisputed that in certain instances basic constitutional rights may be curtailed or denied in prison without rising to the level of cruel and unusual punishment. As the Court pointed out in *Robinson*, though, "[e]ven one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."[259] In other words, punishment that may not be considered harsh when matched with the appropriate offense becomes unduly harsh when imposed for non-criminal behavior.

Punishment is also a violation of the Eighth Amendment when it inflicts unnecessary and wanton pain totally without penological justification.[260] In *Hope v. Pelzer*, handcuffing a prisoner to a hitching post as a punishment when he was already subdued was found to be degrading and an affront to the prisoner's dignity in obvious violation of the Eighth Amend-

255. *Id.* at 920 (Stevens, J., concurring in part and dissenting in part).
256. 370 U.S. 660.
257. *Id.* at 667.
258. *Id.* at 666.
259. *Id.* at 667.
260. Hope v. Pelzer, 536 U.S. 730, 737 (2002).

ment.[261] Likewise, there is no legitimate penological reason to deny a pregnant inmate access to procedures to terminate a pregnancy; consequently such denial must also be considered degrading and an affront to the prisoner's dignity. As in *Hope*, safety concerns are at issue. In *Hope*, safety was claimed as the reason for shackling the prisoner to a post, but the Court found that any concern for safety had passed when the shackling occurred. In the abortion context, safety concerns are no different for obtaining a termination of pregnancy than for treating a pregnancy carried to term, and in many instances abortion may prove to be the safer option. Efforts to characterize transportation to a provider facility as more dangerous are belied by facts and history. Penological justifications simply do not exist. Therefore, as in *Hope*, safety concerns cannot justify an affront to a prisoner's dignity when such concerns are shown not to be legitimate.

In *Farmer v. Brennan*, [262] the Supreme Court defined a transsexual as "one who has '[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,' and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change."[263] It went on to hold that the prison had responsibility to house a transsexual who had not undergone a sex change procedure in such a manner as to protect that person from violent assault from other inmates. The Court found that allowing such assault serves no penological interest, and held that "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.' "[264]

While this case addresses liability of prison officials for injury sustained at the hands of other prisoners, it is not wholly inapposite. The Court held that denial of "the minimal civilized measure of life's necessities" could result in an Eighth Amendment violation.[265] The ability to choose to terminate a pregnancy has been held to be a constitutional right of a pregnant woman. Denial of access to such a right must therefore be the unnecessary and wanton infliction of pain implicating the Eighth Amendment as a denial of the minimal civilized measure of life's necessities. In this view, the issue ceases to be one of serious medical need, and, like *Farmer*, is analyzed as a case of deliberate indifference to the general health and safety of the inmate. In this case, a pregnant woman who wishes to terminate a pregnancy for her own health reasons, whether physical or mental, not because of a proven medical need to do so—as required by *Estelle*.

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261. *Id.* at 738.
262. 511 U.S. 825 (1994).
263. *Id.* at 829.
264. *Id.* at 834 (citations omitted).
265. *Id.*

The *Farmer* court reviews *Estelle* as a basis for defining "deliberate indifference," not from the point of view of whether the medical care is necessary or elective, but from the point of view of the conduct of the prison official vis-à-vis the prisoner.[266] The Court finally settled on the test for defining "deliberate indifference":

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.[267]

In the abortion context, the prison official knows well the excessive risks of pregnancy to inmate health and safety, and is aware from the fact of pregnancy that substantial risk of serious harm exists. The NCCHC standards codify both knowledge and risk. Once a prison official also knows that an inmate wishes to terminate her pregnancy, the additional psychological and possible physical harm of denying that right is a fact of which the official is actually aware. Again, the NCCHC standards are proof of this. Absolute denial of access is therefore deliberate indifference to the health and safety of the pregnant inmate. It is essentially allowing an assault on the woman's body which she does not wish to experience. While the *Farmer* test is one for determining prison official liability, it is useful in analyzing what sort of Eighth Amendment analysis should apply and argues for an analysis not confined to the serious medical need analysis, but one that more fully examines the affront to human dignity caused by denial of access to the ability to terminate a pregnancy, the minimal civilized measure of life's necessities.

As stated above, applying a *Casey* analysis, which would seek to determine whether the prison policy constituted an undue burden on the woman prisoner imposed by the state, would be even more appropriate. By examining *Crawford* and other prison abortion cases under *Casey*, courts would avoid having to cram these types of cases into analysis established for other unrelated issues, and instead allow them to be determined under the framework set up by the Supreme Court specifically for the issue in dispute. If *Crawford* had been so analyzed, the inescapable conclusion would have been that the prison policy denying all transfers for "elective" abortions was a complete bar, not just an undue burden, and the policy could not have stood scrutiny.

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266. *Id.* at 835.
267. *Id.* at 837.

Whether using *Robinson*, *Hope*, *Farmer*, or *Casey*, any of these analyses seem to give the issue the deference it is properly due as a fundamental right of liberty in the line of cases of *Griswold* and *Eisenstadt*, as that line was acknowledged in *Casey*.[268] To subject the issue to a *Turner* analysis, or even an *Estelle* analysis as a medical treatment, seems to relegate the pregnant woman's choice to a level of broken bones rather than the intimate and personal choice of a lifetime central to human dignity and personal autonomy. The alternatives proposed here seem much more appropriate to the right at issue.

V. CONCLUSION

As the number of women entering United States prisons continues to grow, so will the problem of what to do when a pregnant inmate requests abortion care. The current variations in both prison policies and court opinions fail to adequately safeguard the right of women in prison to exercise their constitutionally protected right to choose. Decisions to strike down policy that interferes with this right, such as the decision made by the Eighth Circuit in *Roe v. Crawford*, represent only small victories. As long as courts continue to scrutinize prison abortion policy under a rational basis test, and as long as courts continue to deny that abortion is a serious medical need, politically motivated prison officials will continue to interfere with the right to choose for non-penological reasons.

Treating the right to choose differently depending on whether the woman wishing to exercise it is currently incarcerated cannot be defended from a penological perspective. Whether behind bars or out in society, the woman is pregnant and in both instances a choice needs to be made to address the condition of pregnancy, whether the choice is termination of the pregnancy or carrying the fetus to term. Both alternatives are available to women outside of prison; one cannot justify denying the option to incarcerated women. Doing so allows the state to interfere with a woman's pregnancy at a point when even the father of the child would not be able to do so. When looked at realistically, brushing aside all of the rationalization and pretext, policies such as the ones at issue in *Crawford*, *Lanzaro*, and *Victoria W.* cannot rationally be explained as anything other than a reflection of the anti-choice views of the prison officials involved. The continued deference of the courts to prison officials allows this imposed political morality to persist, yet it is the antithesis of the role the courts are designed to play in our society under our system of government.

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268. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (O'Connor, J., plurality opinion).

The freedom to choose is a fundamental right that is protected by our Constitution. Whether or not everyone agrees with this, it is the law as it currently stands. Prisons should not be allowed to make an end run around the protections afforded to this right at the expense of one of the country's most vulnerable populations simply because members of that population are prisoners. Perhaps one day nationwide standards will be developed that can guarantee access to abortion care, both in prison and outside of prison, but until then courts can do much to alleviate the problems. By rejecting the *Turner* rationality test, and applying the *Casey* undue burden standard, courts will better be able to balance the rights of inmates against the legitimate concerns of prison officials. The reality is that most prison regulations that seek to rationalize some restriction on obtaining an abortion in reality erect an absolute barrier to obtaining an abortion. Regardless of how officials justify this barrier, it creates an undue burden on the right to choose and violates the current constitutional jurisprudence concerning that right. These regulations should be seen for the political interference that they are and should be analyzed in such a way that recognizes the fundamental nature of the right to choose. Call it "undue burden" rather than "strict scrutiny" if you must, but apply the standard and do so consistently. This standard will eliminate the deference that allows prisons to create pretextual rules, while at the same time be flexible enough to permit rules that legitimately ensure the safety and security of prison officials and inmates. A separate, or *Turner*, analysis is not required.

Courts must also acknowledge that abortion, as a treatment option for pregnancy, constitutes a "serious medical need" within the context of the Eighth Amendment, or rather courts should impose an analysis that does not address the right from a medical perspective, but purely from one of basic human dignity. If our society is going to indulge in the incarceration hysteria, which makes more and more victimless conduct illegal, prison populations will only continue to spiral out of control. If Eighth Amendment restraints placed upon the now often private agencies with which governments contract to run these penal institutions are relaxed, we will be not only creating a system which routinely ignores and violates constitutional principles, but we will be abandoning any pretext of the rehabilitative goal of incarceration. Denying women a constitutional right to terminate a pregnancy when such a choice does not seriously impact the institutional security in any way, does not increase institutional costs, and does not further any government acknowledged goal of incarceration. Denial of that right should be considered cruel and unusual, regardless of how the medical procedure is labeled.

Even if considered only in a medical context, considering a termination of a pregnancy as a serious medical need will not only prevent the gratuitous label of "elective" from impeding access to the procedure, but will also acknowledge the significance that the availability of such a decision has to

women as individuals, help restore an individual inmate's dignity, and prevent giving her yet another reason to withdraw from society as a result of the way she is treated by society. If we are true to the articulated societal goals of incarceration and to the ideals stated in the Eighth and Fourteenth Amendments, this will produce a better and more positive result in the long run, and remain consistent with constitutional law.