

Reproductive Rights

Women Don't Check Their Reproductive Rights at the Jailhouse Door

by Lorraine Kenny, Ph.D.*

"Jane" discovered she was pregnant a day before she was sentenced for driving under the influence. She was 19-years-old, unmarried, and facing months of jail time and two years of probation. She felt unprepared to have a child, so she decided to have an abortion.

Jane asked the prosecutor to delay her sentencing hearing by two days or to agree to let her self-surrender 48 hours after sentencing so that she could have an abortion before serving time. The prosecutor refused, stating that Jane could have the procedure after she was incarcerated. The sentencing hearing went forward as scheduled, and she was immediately taken into custody.

During a medical exam performed at the end of Jane's first week in jail, a nurse confirmed Jane's pregnancy. Jane told the nurse she wanted an abortion. Over the following week, she repeatedly told medical and other correctional personnel that she wanted to terminate the pregnancy. No one offered to help her.

What Jane did not know was that the jail had an unwritten policy of refusing to transport an inmate for an abortion that was not necessary to save her health or life. Moreover, according to the policy, the only way an inmate can obtain an abortion that is not medically indicated is by seeking and obtaining a court order directing the jail to transport her to a provider. The jail does not assist inmates in finding a lawyer or an abortion clinic or in scheduling an appointment. In addition, there are no rules or procedures in place to ensure that the courts consider an inmate's request in a timely manner, nor are there any standards for judges to use when considering such a request.

A counselor eventually told Jane that she would have to get a lawyer and seek a court order. Fortunately, Jane's parents were available and willing to help. After

facing several roadblocks, including a court denial of Jane's first request, Jane's parents called the American Civil Liberties Union, which stepped in, filed a lawsuit on Jane's behalf, and obtained a court order requiring the jail to transport Jane to a nearby clinic. While Jane finally did get an abortion, it took seven weeks from the time she first asked the court to delay her sentencing hearing for two days so that she could obtain an abortion to the time she was able to get the procedure.

Matching Practice and Law

Unfortunately, Jane's experience is not atypical. The ACLU Reproductive Freedom Project gets calls throughout the

obstructs an inmate's access to the procedure, either through an outright refusal or by putting up unnecessary obstacles that delay a woman's ability to obtain an abortion, it violates a woman's right to privacy under the Fourteenth Amendment of the U.S. Constitution. In addition, some courts have held that such actions violate an inmate's right to be free from cruel and unusual punishment under the Eighth Amendment as well.

More than 30 years ago, in *Roe v. Wade*, the U.S. Supreme Court made clear that a woman has a fundamental right to decide whether or not to bear a child. Specifically, the Court said that the state could not interfere with a woman's

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year from women in jails or prisons looking for help in obtaining an abortion or from their advocates looking for guidance in handling these cases. Some callers have been denied access outright while others have been told they need a court order, must pay for the procedure themselves, and/or must cover the cost of transportation to an abortion provider.

Courts have made it clear that being incarcerated does not mean a woman gives up her right to have an abortion any more than it means that she gives up her right to bear a child. Below is a discussion of the key cases that should serve as a guide to ensuring that jails and prisons do not violate a woman inmate's reproductive right to end a pregnancy.

Court Decisions

Every court that has addressed the issue of whether a pregnant inmate has the constitutional right to abortion has decided—explicitly or implicitly—that the right survives incarceration. Court after court has held that if a prison or jail

abortion decision unless it had a compelling reason to do so. Consistent with this analysis, the state can ban abortion only when the fetus becomes viable (the point at which the fetus can survive outside of the womb, usually at the beginning of the third trimester of pregnancy). Even then, the Court held, a pregnant woman has to have access to an abortion if it is necessary to preserve her health or life. In 1992, in *Planned Parenthood v. Casey*, while preserving the right to abortion, the Court established the "undue burden" test for evaluating abortion restrictions. Under this principle, courts hold restrictions unconstitutional if they place a "substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus." This standard, we argue below, applies to abortion restrictions both in and out of prison.

Right to Abortion in Prison

In the prison context, the U. S. Supreme Court has laid out three basic principles for determining whether a restric-

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tion on a constitutional right is permissible, namely:

1. Prison regulations that curtail constitutional rights are valid only if they are “reasonably related to penological interests.” (*Turner v. Safely* (1987).)
2. If a fundamental right is not inconsistent with incarceration, any violation of that right should be judged by the same legal standard applied outside of the prison context. (*Johnson v. California* (2005).)
3. Correctional facilities must meet the serious medical needs of inmates by ensuring access to proper care. (*Estelle v. Gamble* (1976).)

ical care—serves a legitimate security function.

In reviewing Jane’s case under *Turner*, for example, the Superior Court of Arizona noted:

[W]hat is significant to the court... is that there is no policy requiring a court order for the transport of inmates for special events such as visiting sick relatives, attending viewings of deceased relatives, or hearing a will read. How then can there be a reasonable legitimate penological interest in the security of inmates if one category of inmates must obtain a court order and inmates in the other categories are not similarly restricted?

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“to provide medical care for those whom it is
punishing by incarceration.”*

Prison Regulations Curtailing Constitutional Rights Are Valid Only if “Reasonably Related to Penological Interests.” In *Turner*, the Court defines these interests to include deterring crime, rehabilitating prisoners, and ensuring institutional security. Courts reviewing restrictions on abortion in prison have consistently held that allowing a woman prisoner to obtain an abortion does not interfere with a facility’s ability to fulfill its penological mission and, therefore, under *Turner*, prison policies prohibiting or severely restricting access to abortion are unconstitutional.

In Jane’s case, as is typical in correctional facilities throughout the country, the jail in question routinely provides pregnant inmates with obstetrical care throughout pregnancy and delivery, transporting pregnant prisoners off-site for such care without a court order when necessary. Moreover, the facility regularly transports inmates off-site without a court order for other medical and dental treatments that they do not provide on-site. This common practice undermines a facility’s argument that forcing women inmates to get court orders before they can obtain an abortion or refusing to transport women for abortion care—while imposing no such requirements or refusals for other med-

The court answers its own question:

[W]hile Defendants mouth concerns for security, what is actually at stake is an interest to deflect what may be politically unpopular decisions and put those decision at the feet of the court. (*Doe v. Arpaio* (2005).)

Accordingly, the court struck down the prison’s policy because it failed to serve a “legitimate penological purpose.”

In an earlier case, *Monmouth County Correctional Institutional Inmates v. Lanzaro* (1987), the U.S. Court of Appeals for the Third Circuit not only held that inmates retain the right to have an abortion under *Turner*, but also “in the absence of alternative methods of funding [prisons] must assume the cost of providing its inmates with needed medical care.” Without financial assistance, incarceration would be an absolute barrier to obtaining abortion care for many inmates. The court therefore concluded, “If alternative means of funding are nonexistent, the County must assume the full cost of all inmate abortions.”

If a Fundamental Right Is Not Inconsistent With Incarceration, any Violation of That Right Should Be Judged by the Same Legal Standard Applied Outside

of the Prison Context. In *Johnson*, the Court held that because the right to be free from racial discrimination is not inconsistent with incarceration, a prison’s policy of temporarily segregating prisoners on the basis of race is subject to the “strict scrutiny” standard—the highest level of judicial review and the same standard that applies to cases of racial discrimination outside of prison. On the other hand, curtailing rights—such as the right to free association and movement—that are inherently inconsistent with legitimate penological objectives—are subject to review under *Turner*, because such rights are not protected to the degree that they are in free society.

Applying *Johnson*, we argue that since the right to decide whether or not to continue a pregnancy, like the right to be free from racial discrimination, does not conflict with the institutional need to deter crime, ensure institutional security, or rehabilitate prisoners, restrictions on that right should be subject to the same judicial standard of review that applies outside of prison, namely the “undue burden” test established in *Casey*. Under the “undue burden” test, requiring women prisoners to obtain a court order, for example, before obtaining an abortion places a substantial obstacle in the path of a woman prisoner seeking an abortion and is therefore unconstitutional. Requiring a court order in this context serves either to delay a woman prisoner’s access to abortion care or to give a court veto power over a woman prisoner’s legitimate right to end a pregnancy if she so chooses. Neither outcome passes the “undue burden” test.

Correctional Facilities Must Meet the Serious Medical Needs of Inmates by Ensuring Access to Proper Care. In *Estelle*, the Supreme Court held that under the Eighth Amendment, the state is required “to provide medical care for those whom it is punishing by incarceration.” Furthermore, the Court concluded that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment.” In *Monmouth County v. Lanzaro*, the Third Circuit Court of Appeals recognized abortion, specifically elective abortions, as a “serious medical need.” The court held that:

[D]enial of [abortion care] will likely result in tangible harm to the

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inmate who wishes to terminate her pregnancy. Characterization of the treatment necessary for the safe termination of an inmate's pregnancy as "elective" is of little or no consequence.

Accordingly, correctional facilities must provide abortion care—whether elective or medically indicated—as they do all other serious medical services, including pre- and postnatal care and

- Insists that she pay for an abortion with her own money regardless of her ability to pay; or
- Requires her to pay for the costs of transporting her to a clinic or hospital to obtain an abortion if she cannot afford to do so.

The right to abortion, moreover, does not turn on whether the woman needs the procedure to protect her health or life. Institutions should treat requests for medically indicated abortions and elective abortions equally.

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childbirth services. More recently, adopting the Third Circuit's argument, the U.S. District Court for the Western District of Missouri Central Division likewise held that as with all other serious medical needs, including abortion, prison officials must transport prisoners off-site for treatment if necessary. (Roe v. Crawford (2006).)

Following the above principles, a prison or jail violates a woman's rights if it:

- Prevents her from having an abortion;
- Pushes her to have an abortion she does not want;
- Forces her to get a court order before she can obtain an abortion or otherwise delays access to abortion care;

Reproductive Healthcare, Incarceration, and the Need for Education

Despite consistency in the courts and the clear holding that the right to abortion survives incarceration, policies and women's experiences differ across correctional institutions. Federal prisons, for example, do not require a pregnant woman to obtain a court order before accessing abortion care, while many state and county facilities may impose such an unconstitutional burden. In some instances, spearheaded by anti-abortion sheriffs or other officers, the denial of abortion care is done in flagrant violation of the law. In other instances, facilities or correctional employees do not

understand that the law requires them to provide a woman inmate with timely access to abortion care upon request. With a growing population of women in state and federal facilities, the need to educate both correctional employees and women about an inmate's right to abortion and other reproductive healthcare has taken on a new urgency.

Without a clear understanding of their rights and without the support of advocates working to change bad policies or assist women who are being denied reproductive healthcare, women in prison may find themselves forced to carry unwanted pregnancies to term or in some instances forced to have abortions they do not want. Whether a woman decides to continue a pregnancy or have an abortion, it is important that she act quickly. Early prenatal care can help ensure a healthy pregnancy and a healthy baby, and while abortions are extremely safe, the costs and risks increase with time. If correctional employees fail to accommodate requests for reproductive healthcare in a timely manner, women should document everything that happens, putting requests for an abortion or other medical care in writing and keeping detailed records of any correspondences or responses. In addition, if denied a request, women should file official complaints and any appeals that are allowed in a facility's grievance system. If a prison or jail fails to respond in a timely manner or outright refuses to accommodate a woman's request for reproductive healthcare, she should contact her lawyer or other advocates, including the ACLU's Reproductive Freedom Project. No woman should be denied her reproductive rights because she is incarcerated. ■