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Unexpected Consequences: The Constitutional Implications of Federal Prison Policy for Offenders Considering Abortion

Claire Deason

Note

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Leisa Gibson robbed a bank.[1] Before she was sentenced, Leisa wrote to both her public defender and sentencing judge; she told them she was pregnant and wanted an abortion.[2] She was between 13 and 14 weeks pregnant at the time.[3] Leisa's pregnancy continued while she awaited sentencing despite her notice to her lawyer and the judge.[4] She continued her requests for an abortion. "She made repeated requests of virtually everyone that she came in contact with for assistance in carrying out the abortion, but was thwarted at every turn."[5] Four months passed; Leisa was sentenced and transferred to federal prison.[6] After being moved to various prisons over several weeks, Leisa arrived at a prison in Lexington, Kentucky, where she was told her abortion would be performed.[7] However, Leisa missed her clinic appointment because she was not told that it had been scheduled. After pleading with prison administrators,

∗ J.D. Candidate 2009, University of Minnesota Law School; B.A. 2006, Macalester College. The author wishes to thank Professor Judith T. Younger for her thoughtful advice, careful reading, and commitment to women's causes, and Professor Stephen Cribari for his encouragement. Special thanks to Elizabeth Borer and Jeffrey Justman for their edits and suggestions, which vastly improved this Note from earlier drafts. The author is grateful to her fiancé Mike Madigan for his patience and tireless listening. She is eminently proud to be the last family member to publish in a family of loving, supportive intellectuals. Finally, the author thanks the Breakfast Club for their wit, sarcasm, and cutting condescension, which fail to hide much-appreciated and respected friendship. This is for Alice.

1. Gibson v. Matthews, 926 F.2d 532, 533 (6th Cir. 1991).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 534.
7. *Id.*

including medical staff, a prison chaplain, a prison psychiatrist, and several United States Marshals, Leisa was turned away once and for all by the Lexington prison's medical staff.[8] By then she was 23–24 weeks pregnant.[9] She gave birth in prison.[10] Leisa is not alone.[11] Offenders[12] like her face bureaucratic obstacles to their access to abortion,[13] though they retain it as a constitutional right.[14]

The right to abortion in prison is diluted by Bureau of Prisons (BOP) policies which burden its exercise. These policies require potentially coercive counseling, empower prison administrators to control the process, without regard for the time constraints associated with pregnancy.[15] These policies govern all U.S. federal prisons like those in which Leisa was incarcerated.

When Leisa ultimately sued the prison administrators from whom she requested assistance, the Sixth Circuit Court of Appeals ruled against her.[16] They stated that, although it may appear that Leisa was a "victim of the bureaucracy as a whole,"[17] no individual prison staff members could be held lia-

8. *Id.* at 534–35.

9. *Id.* at 535.

10. *Id.*

11. The female prison population is increasing at astounding rates. *See* CORR. ASS'N OF N.Y., WOMEN IN PRISON FACT SHEET (2008), *available at* http://www.correctionalassociation.org/publications/download/wipp/factsheets/Women_in_Prison_Fact_Sheet_2008.pdf [hereinafter FACT SHEET] (noting a 64% increase in the state and federal female prison population from 1995 to 2006). The majority of the surveys and case studies cited herein derive from federal prisons alone. Where solely federal data is unavailable, I supplement demographics cited in this Note with statistics about state prisons or state and federal prisons combined.

12. I use the term "offenders" in reference to those individuals incarcerated in the prison system.

13. *See, e.g.*, Roe v. Crawford, 514 F.3d 789, 792–93 (8th Cir. 2008) (describing a female prisoner's attempt to obtain an abortion which was ultimately impeded by prison policies and bureaucracy).

14. Turner v. Safley, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.").

15. *See* FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, NO. P5360.09, PROGRAM STATEMENT, RELIGIOUS BELIEFS AND PRACTICES (2004), *available at* http://www.bop.gov/policy/progstat/5360_009.pdf [hereinafter RELIGION POLICY]; FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, NO. 6070.05, PROGRAM STATEMENT, BIRTH CONTROL, PREGNANCY, CHILD PLACEMENT AND ABORTION (1996), *available at* http://www.bop.gov/policy/progstat/6070_005.pdf [hereinafter ABORTION AND PREGNANCY POLICY].

16. Gibson v. Matthews, 926 F.2d 532, 538 (6th Cir. 1991).

17. *Id.* at 534–35.

ble because prison policy placed the responsibility of obtaining an abortion with the incarcerated woman[18] and no law existed at the time that obliged prison staff to help Leisa.[19] The law has developed since Leisa's case,[20] but prison procedures continue to jeopardize the rights of female prisoners.

This Note argues that, although the federal prison policies governing abortion are facially constitutional and will therefore survive substantive challenges like Leisa's,[21] these policies are unconstitutional as applied because they deny pregnant offenders the constitutionally protected procedures that should accompany the right to terminate a pregnancy. Part I of this Note explains the BOP abortion policies, outlines the state of prison abortion law, and describes the procedural due process protections courts require for offenders. Part II discusses the loopholes and roadblocks that, nevertheless, prevent incarcerated women from getting timely abortions. The discussion shows that, as applied, the BOP policies violate the Constitution's guarantee of procedural due process. Part III describes the procedural changes necessary to bring the application of BOP policy into conformity with the Constitution. A simple, albeit surprising, analogy to prison correspondence policies can provide a roadmap for establishing the basic protections of notice and a hearing. Part III concludes that, without a change in the application of BOP policy, procedural due process violations, and experiences like Leisa's, are likely to increase with the rise in the female offender population.

18. *Id.* at 537–38.

19. *Id.* at 535–36 (citing Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987) (indicating that *Monmouth County*, which, according to the *Gibson* court, "implicitly extended to prisoners a right not to be prevented from having an abortion because of their incarcerated status," had not been decided when prison staff prevented Leisa's abortion).

20. *See, e.g.*, *Monmouth County*, 834 F.2d at 326.

21. *See Gibson*, 926 F.2d at 535–38. (reviewing a challenge to federal prison policy under the Civil Rights Act, 42 U.S.C. § 1983, and the Fifth, Eighth, and Ninth Amendments). Although Leisa was subject to the same policies critiqued in this Note, she brought suit against individual prison staff members in their official capacity through 42 U.S.C. § 1983. *Id.* This Note focuses on a critique of the policy itself, as *Gibson* demonstrates that § 1983 suits against prison staff members neither compensate offenders nor correct policy failures. *See id.*

I. THE CURRENT STATE OF PRISONS AND PRISONERS' RIGHTS

Over 1,300,000 women were in federal or state prison, on parole or probation in the United States in 2006.[22] Women comprise over 7% of the total prison population.[23] Compared to the male prison population, this percentage represents a drastic increase.[24] From 1995 to 2005, the number of incarcerated women rose by 57% while the population of incarcerated men rose by only 34%.[25] This rapidly growing demographic of female offenders faces distinct health challenges.

A. PREGNANCIES IN PRISON

Pregnancy rates in prison are rarely calculated. The few reported results vary even when studies are conducted.[26] Some survey the combined female population of state and federal prisoners,[27] while others survey only particular race or age groups.[28] In addition, many studies fail to report data on pregnancy-related health care.[29] All of the available statistics derive

22. FACT SHEET, *supra* note 11.

23. *Id.*

24. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 198272, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES 1 (2000), *available at* http://www.ojp.gov/bjs/pub/pdf/csfcf00.pdf (stating that, between 1995 and 2000, the population of incarcerated women rose by 38% while that of incarcerated men rose by 27%).

25. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 215092, PRISONERS IN 2005, at 4 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p05/pdf.

26. *Compare* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: WOMEN IN PRISON 10 (1991), *available at* http://www.ojp.gov/bjs/pub/pdf/wopris.pdf [hereinafter WOMEN IN PRISON] (noting that 6.1% of state prisoners report being pregnant at the time of admission to prison), *with* THOMAS G. BLOMBERG & KAROL LUCKEN, AMERICAN PENOLOGY, A HISTORY OF CONTROL 192–93 (2000) (describing varying statistics, i.e. 6% of women at prison intake were reported pregnant in a 1993 study, 5% in a different study in 1997, while a 1992 study revealed that 9% of imprisoned women gave birth while incarcerated), *and* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 221740, MEDICAL PROBLEMS OF PRISONERS 4 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mpp.pdf [hereinafter MEDICAL PROBLEMS OF PRISONERS] ("[Four percent] of state and 3% of federal inmates said they were pregnant at the time of admission").

27. *E.g.*, MEDICAL PROBLEMS OF PRISONERS, *supra* note 26.

28. *E.g.*, WOMEN IN PRISON, *supra* note 26.

29. MEDICAL PROBLEMS OF PRISONERS, *supra* note 26, tbl.10 (leaving blank statistical reporting of pregnancy care and obstetrics examinations for pregnant federal offenders due to "small sample size" of approximately three percent).

from data collected at admission.[30] The most recent federal study reported that 3% of women admitted to federal prison are pregnant at that time.[31] Other incarcerated women become pregnant while in prison.[32] Precise statistics cataloging pregnancy rates during incarceration are unavailable, however. While studies and statistics are limited, public health officials estimate that as many as 6,000 women are pregnant in prison at any time in the United States.[33]

Despite the lack of data on prison pregnancies, anecdotal stories regarding childbirth in prisons have drawn the attention of interest groups. News media and prisoner's rights groups exposed the practice of shackling women to their hospital beds while they give birth under the supervision of prison guards.[34] Interested parties, including non-profit organizations,[35] private medical care providers,[36] and policy makers,

30. *See, e.g.*, *id.* at 1.

31. *Id.* tbl.10; *see also* Mark Egerman, Comment, Roe v. Crawford*: Do Inmates Have an Eighth Amendment Right to Elective Abortions?*, 31 HARV. J. L. & GENDER 423, 424 & n.2 (2008) (describing several studies estimating that over 6% of incarcerated women are pregnant).

32. *See* Beers-Capitol v. Whetzel, 256 F.3d 120, 124–25 (3d Cir. 2001) (detailing sexual abuse of inmate by guard); AMNESTY INT'L, "NOT PART OF MY SENTENCE": VIOLATIONS OF HUMAN RIGHTS OF WOMEN IN CUSTODY 22 (1999), *available at* http://www.amnesty.org/en/library/asset/AMR51/001/1999/en/dom-AMR510011999en.html (reporting the sexual abuse of female offenders); Editorial, *Doing Something About Prison Rape*, HUM. RTS. WATCH, Sept. 26, 2003, http://www.hrw.org/editorials/2003/prison092603.htm (reporting that as many as one in four women report sexual assault by male guards in some prisons); Nicole Summer, *Powerless in Prison: Sexual Abuse Against Incarcerated Women*, RH REALITY CHECK, Dec. 11, 2007, http://www.rhrealitycheck.org/blog/2007/12/11/powerless-in-prison-sexual-abuse-against-incarcerated-women (sharing the story of an incarcerated woman who explains, "I am 7 months pregnant [and] I got pregnant here during a sexual assault. I have been sexually assaulted here numerous times! The jailers here are the ones doing it!"). *See generally* AMNESTY INT'L, FEDERAL BUREAU OF PRISONS: CUSTODIAL SEXUAL MISCONDUCT, (2005), *available at* http://www.amnestyusa.org/women/custody/states/federal.pdf.

33. Marian Knight & Emma Plugge, *Risk Factors for Adverse Perinatal Outcomes in Imprisoned Pregnant Women: A Systemic Review*, 5 BMC PUB. HEALTH 111 (2005).

34. Amnesty Int'l, *Pregnant and Imprisoned in the United States*, 27 BIRTH 266, 267–68 (2000); Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES, Mar. 2, 2006, at A16.

35. *See, e.g.*, Amie Newman, *Pregnant Behind Bars: The Prison Doula Project*, RH REALITY CHECK, Aug. 2, 2007, http://www.rhrealitycheck.org/blog/2007/08/02/pregnant-behind-bars-the-prison-doula-project.

36. *See* Correctional Medical Services, Our Mission, Vision & Values, http://www.cmsstl.com/about-us/mission-vision-values.asp (last visited Mar. 9,

have campaigned to ensure pre- and post-natal care for female offenders who choose to give birth.[37]

Yet, abortion, a valuable option for incarcerated women, is undefended. It is particularly suited for those who struggle with public assistance, drug addiction, or who are at risk of losing their child to the foster system.[38] Women's access to safe abortion in prison has not received the same attention as pre- and post-natal care. Without any support of the sort private organizations and prison administration provide for pregnancy and childbirth, incarcerated women seeking abortion services are forced to navigate prison bureaucracy alone.

Prison chaplains offer spiritual guidance during this time.[39] Faith is an important part of the lives of many incarcerated women. In fact, many women find faith while in prison.[40] For many, the exercise of new-found or reawakened faith provides a support network for facing prison life.[41] Faith also plays an important role for many women in their decision to abort a pregnancy.[42] However, an increasing number of religious pro-

2009) (describing a private medical provider to prison populations that "take[s] a caring and compassionate approach to serving the medical needs of inmates and [is] committed to offering our services in a dignified, respectful manner"). *But see* Leah Thayer, *Hidden Hell: Women in Prison*, AMNESTY INT'L MAG., Fall 2004 (describing negative results of privatized medical services in women's prisons, including cutting gynecological examinations as unnecessary budgetary expenses).

37. *See* Federal Bureau of Prisons, Female Offenders: Birth Control and Pregnancy, http://www.bop.gov/inmate_programs/female.jsp (last visited Mar. 9, 2009) (describing the "Mothers and Infants Nurturing Together" Program, a "community residential program" for "women who are pregnant at the time of commitment," offering "pre-natal and post-natal programs such as childbirth, parenting, and coping skills classes").

38. FACT SHEET, *supra* note 11; *see also* ABORTION AND PREGNANCY POLICY, *supra* note 15, at 4 (describing the responsibility of incarcerated women for placing their newborn children in the care of social agencies); KATHRYN WATTERSON, WOMEN IN PRISON: INSIDE THE CONCRETE WOMB 216–17 (Ne. Univ. Press 1996) (1973) (describing the experience of an incarcerated mother and her three-year-old son being separated after a prison visit).

39. *See* WATTERSON, *supra* note 38, at 161–62 (sharing the story of Father Charles Repole, a chaplain at the women's jail on Riker's Island who describes counseling women over the years, including persuading women towards adoption over keeping custody of children).

40. *See, e.g., id.* at 142–46 (sharing the story of Barbara Baker, a woman seeking religious community in prison who says, "[w]hen I talked to Reverend McCracken, I found a *people*").

41. *See* Samantha M. Shapiro, *Jails for Jesus*, MOTHER JONES, Nov.–Dec. 2003, at 55–56 (describing the community atmosphere of a faith-based prison program meeting).

42. *See* Roe v. Wade, 410 U.S. 113, 116 (1973) ("One's philosophy . . . [and]

gram administrators in prisons identify themselves as evangelical, or born-again, Christians.[43] This faith does not recognize a woman's right to choose abortion.[44] The BOP policies governing abortion include a religious counseling component which could expose pregnant women to potentially coercive counseling with these chaplains. The BOP policies create additional bureaucratic obstacles that overshadow the benefits of spiritual counseling.

B. ABORTION POLICY OF THE FEDERAL BUREAU OF PRISONS

Two BOP policies address incarcerated women considering abortion.[45] The "Birth Control, Pregnancy, Child Placement and Abortion" policy was implemented to "provide[] an inmate with medical and social services related to . . . pregnancy . . . and abortion."[46] According to this policy, an inmate is responsible for informing the prison medical staff when she suspects she is pregnant.[47] The medical staff then informs the inmate's case manager when the pregnancy is confirmed.[48] The offender is then exposed to medical, religious, and social counseling to assist her in making the decision whether to terminate her pregnancy.[49]

The BOP's religious counseling services are described in a separate policy on religious practices.[50] This policy states that "[p]regnant inmates will be offered religious counseling to aid in making an informed decision whether to carry the pregnancy to full term."[51] The abortion policy does not explicitly require

one's religious training . . . are all likely to influence and to color one's thinking and conclusions about abortion."); Dorie Giles Williams, *Religion, Beliefs About Human Life and the Abortion Decision*, 24 REV. OF RELIGIOUS RES. 40, 45–46 (1982) (describing studies showing a correlation between theological beliefs about fetus personhood and subjects' decisions whether to abort a pregnancy).

43. *See* ReligionLink, Evangelicals Expand State Prison Ministries (Jan. 5, 2004), http://www.religionlink.org/tip_040105c.php [hereinafter ReligionLink].

44. *See* Ben Witherington III, Why Do Evangelical Christians Believe Abortion Is Murder?, http://www.beliefnet.com/story/72/story_7223_1.html (last visited Mar. 9, 2009).

45. *See* ABORTION AND PREGNANCY POLICY, *supra* note 15; RELIGION POLICY, *supra* note 15.

46. *See* ABORTION AND PREGNANCY POLICY, *supra* note 15, at 1.

47. *Id.* at 2.

48. *Id.* at 3.

49. *Id.*

50. RELIGION POLICY, *supra* note 15, at 8.

51. *Id.*

this counseling.[52] However, the abortion policy could be read to provide no alternative method for obtaining an abortion without the submission of documents by a religious counselor, effectively requiring this counseling.[53] The abortion policy states that "[t]he Warden shall ensure that *each* pregnant inmate is provided . . . counseling services."[54] This mandate indicates that counseling is likely to be the norm in cases involving abortion requests. Indeed, the policy does not explicitly provide any way to obtain an abortion without undergoing religious counseling.[55]

The policy allows for counseling "for religious needs other than those of a specific faith tradition,"[56] because of the "particular needs of women."[57] In other words, an offender who is a devout Jew may find herself discussing her choice to abort with a Catholic priest. There is no explanation of the "particular needs" to which the policy alludes.

All staff members, including medical and religious staff, not wishing to facilitate abortion for the offender are exempt from participation.[58] Since this applies to all staff, the prison chaplain is among those who may choose not to participate.[59] Prison chaplains may be evangelical Christians and act as the primary administrators of religious programming in federal prisons.[60] The evangelical influence in women's prisons may be attributed to the purported dominance of Christian organizations as recipients of money under the Bush Administration's

52. ABORTION AND PREGNANCY POLICY, *supra* note 15, at 3.
53. ABORTION AND PREGNANCY POLICY, *supra* note 15.
54. *Id.* at 2 (emphasis added).
55. *Id.*
56. RELIGION POLICY, *supra* note 15, at 8.
57. *Id.*
58. ABORTION AND PREGNANCY POLICY, *supra* note 15, at 1.
59. *See id.* at 1, 4.
60. *See* RELIGION POLICY, *supra* note 15, at 7. Other religiously affiliated representatives can have access to offender populations and may represent persuasive, and powerful political and religious perspectives on abortion. *See* Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES MAG., Jan. 21, 2007, at 42. This article describes Rhonda Arias, an ordained "evangelical preacher[,]" who leads the "Oil of Joy for Mourning" "abortion-recovery ministry" and counsels incarcerated women in Texas prisons, seeking to prevent future abortions, which she links to drug abuse. *Id.* Arias explains, "[i]n America, we have a big drug problem, and we don't realize it's because of abortion." *Id.* Arias conducts mock memorial services for offenders' aborted babies, allowing women to be in the chapel for hours, share their stories, hug, and dance with one another. *Id.*

push to federally fund faith-based service organizations.[61] In addition, non-profit evangelical organizations ease budgetary concerns in prison administration by adding to or, at times, replacing existing prison chaplain services altogether.[62] For example, Prison Fellowship Ministries, an evangelical religious programming organization, claimed to control programs for 1,843 prisons during the fiscal year of 2005 to 2006.[63] These religious leaders subscribe to a programming philosophy focused on conversion and evangelism.[64] Other chaplains subscribe to an all-inclusive philosophy that supports all denominations.[65] Unfortunately, evangelical prison ministries have a growing presence due to cuts in chaplain services.[66]

The institution's chaplain is responsible for contracting outside religious leaders to meet with offenders when the chaplain cannot personally deliver the needed religious services.[67] The Federal Bureau of Prisons religious counseling policy establishes procedures for arranging such meetings.[68] The policy provides four available options to facilitate a meeting.[69] The offender may request that a religious counselor come to the prison as, first, a volunteer, second, as a contractor, or third, for a pastoral visit.[70] Finally, the offender may also meet with the

61. *See* Megan A. Kemp, *Blessed Are the Born Again: An Analysis of Christian Fundamentalists, the Faith-Based Initiative and the Establishment Clause*, 43 HOUS. L. REV. 1523, 1540 (2007) (noting that most data demonstrates that the majority of federal funding to religious organizations goes to Christian groups); *see also* ESTHER KAPLAN, WITH GOD ON THEIR SIDE: HOW CHRISTIAN FUNDAMENTALISTS TRAMPLED SCIENCE, POLICY, AND DEMOCRACY IN GEORGE W. BUSH'S WHITE HOUSE 40–45, 63–67 (2004).

62. *See* ReligionLink, *supra* note 43.

63. PRISON FELLOWSHIP MINISTRIES, LETTERS OF THE HEART: ANNUAL REPORT (2005–2006) 7 http://www.prisonfellowship.org/media/prisonfellowship/Docs/pf/annual_reports/2005-06_Annual_Report.pdf (citing a monthly average attendance of 121,260 offenders at its programming).

64. *See, e.g.*, Prison Fellowship Ministries, Inside PFM, http://www.prisonfellowship.org/contentindex.asp?ID=25.

65. *See* American Correctional Chaplains Association, What Are Correctional Chaplains?, http://www.correctionalchaplains.org/what_is_the_acca.htm ("Chaplains are . . . responsible for ministry to prisoners regardless of religious beliefs or affiliation, using outside sources for assistance when needed.").

66. *See* ReligionLink, *supra* note 43.

67. *See* RELIGION POLICY, *supra* note 15, at 10. All contractual representatives will receive equal status and treatment, unless there are conflicts with institutional security and order. *Id.*

68. *Id.* at 6, 10, 16.

69. *Id.* at 10, 16.

70. *Id.* at 8, 10, 16.

chaplain of the prison for pastoral care or counseling.[71] Each option requires paperwork and possibly credential checks.[72] Notably, through the approval process, the chaplain, warden, and regional director control the amount of time that passes until the offender receives the requested religious services and may determine that the requested counselor cannot visit the prison.[73] If the chaplain refuses access to a requested religious counselor, the offender is left to meet with the chaplain, who may attempt to evangelize the prisoner, and, thus, encourage her to continue her pregnancy.[74]

Once the pregnant offender meets with medical, religious and social counselors, the involved staff members are required to submit written documentation of the counseling sessions to the offender's central file.[75] The offender, too, must submit a signed written statement of her election to abort her pregnancy and acknowledge that she had the opportunity for counseling and information.[76]

Should the offender choose to terminate her pregnancy, the abortion is scheduled by the Clinical Director and the offender is responsible for paying for the abortion, unless the life of the mother will be in danger if the fetus is carried to term or if the pregnancy is a result of rape.[77] BOP policy does not provide a scheduling timeline other than the order of steps taken.[78] Arranging for the abortion to take place is likely the most arduous step of the process, however, because the number of facilities that perform the service has been declining,[79] so many areas without abortion providers remain in the country.[80] In order to evaluate the constitutionality of these BOP policies, it is necessary to examine the development of abortion law in prisons.

71. *Id.* at 6.
72. *Id.* at 6, 10, 16.
73. *See id.* at 6, 8–10, 16.
74. *See* ReligionLink, *supra* note 43.
75. ABORTION AND PREGNANCY POLICY, *supra* note 15, at 3.
76. *Id.*
77. *Id.*
78. *Id.*
79. Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSP. ON SEXUAL & REPROD. HEALTH 6, 11 (2008) (showing that the number of abortion providers in the United States decreased from 2,380 in 1992 to 1,787 in 2005).
80. *Id.* (demonstrating that in 2005, 87% of counties in the United States did not have an abortion provider and there was a 2% decline in the total number of abortion providers in the United States from 2000 to 2005).

C. FEMALE OFFENDERS RETAIN A LEGAL RIGHT TO ABORTION

This Section describes abortion law as it relates to incarcerated women. The Section first addresses *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[81] the modern judicial standard for abortion rights. It next reviews conflicting circuit court precedent relating to abortion rights in the prison.

1. Undue Burdens on Women Seeking Abortion: *Planned Parenthood of Southeastern Pennsylvania v. Casey*

The Supreme Court decided *Casey* in 1992, nineteen years after *Roe v. Wade* established the right to an abortion.[82] Since *Roe,* state legislatures had established policies that effectively limited access to abortion.[83] Responding to patient frustration, Planned Parenthood of Pennsylvania challenged several of those policies in *Casey*.[84]

The Court's decision created the undue burden standard for abortion cases.[85] This standard rejected legislation that placed a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,"[86] regardless of the stage of pregnancy. The Court applied this standard to invalidate a spousal notification provision[87] which required that a woman seeking an abortion "sign a statement indicating that she ha[d] notified her husband of her intended abortion."[88] The undue burden standard presented a new way of looking at abortion: instead of focusing on a woman's right, as was the case in *Roe*, *Casey* shifted the debate to one about obstacles and roadblocks.[89] Obstacles and roadblocks in the prison context face the *Turner v. Safley* standard of review.[90]

81. 505 U.S. 833 (1992).

82. *Id.*; *see* Roe v. Wade, 410 U.S. 113, 153 (1973).

83. *See, e.g.*, *Casey*, 505 U.S. at 844–45, 879–901 (analyzing several "informed consent" requirements including a twenty-four-hour waiting period, required parental and spousal consent, as well as reporting and recordkeeping requirements).

84. *Id.*

85. *Id.* at 874–78.

86. *Id.* at 877.

87. *Id.* at 887–98 (invalidating a spousal-notification provision in part because of possible coercion and abuse by husband, which effectively threatened the wife's safety and liberty to choose abortion).

88. *Id.* at 844.

89. *Compare* Roe v. Wade, 410 U.S. 113, 153 (1973) (describing the application of the right of privacy to a woman's choice whether to have an abortion and the detriments that would be imposed on a woman forced to carry an unwanted pregnancy), *with Casey*, 505 U.S. at 875 (describing the failure of *Roe*

2. The Legal Standard for Prison Rights Litigation: *Turner v. Safley*

The *Turner v. Safley* "legitimate penological interest" standard applies to challenges to prison policy within the context of inmates" constitutional rights.[91] *Turner* was a class action lawsuit brought by Missouri offenders challenging prison regulations limiting the ability of offenders to marry while in prison and to correspond with offenders at different institutions.[92] The offenders challenged the regulations as unconstitutional, arguing that the correspondence policy and limitation on prison marriages unconstitutionally infringed their rights.[93] The Court held the correspondence regulation to be valid and the marriage limitations to be invalid, establishing the "legitimate penological interest" standard for determining what constitutes permissible infringement on the constitutional rights of the incarcerated.[94] The Court explained, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[95]

The *Turner* Court described four considerations for determining the legitimacy of the state's interests.[96] First, the Court explained that there must be a "'valid, rational connection'" between the "prison regulation and the legitimate governmental interest put forward to justify it."[97] Next, the Court considered "whether there are alternative means of exercising the right that remain open to prison inmates."[98] The Court then addressed the "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally."[99] Finally, the Court offered that the lack of alternatives demonstrated the reasonableness of the regulation and clarified that this test is not a

to acknowledge the strong state interest in fetal protection).

90. Turner v. Safley, 482 U.S. 78, 78 (1987) (requiring only a *legitimate* penological interest when infringing on a constitutional right of a prisoner).

91. *Id.* at 89.

92. *Id.* at 81–82.

93. *Id.*

94. *Id.* at 89, 91, 99–100.

95. *Id.*

96. *Id.* at 89–90.

97. *Id.* at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

98. *Id.* at 90.

99. *Id.*

"least restrictive alternative" test.[100] This means that prison administration need not consider all available options and choose that which most allows the offender to exercise her constitutional right.[101] The *Turner* Court validated the challenged correspondence policy,[102] but it struck down the prison marriage policy as having no reasonable relationship to a legitimate penological interest.[103] Courts have subsequently applied *Turner* in cases challenging the constitutionality of prison policies.[104]

3. The Standard Can Favor Offenders: *Monmouth County Correctional Institutional Inmates v. Lanzaro*

The *Turner* standard worked in favor of inmates who brought suit against a prison in *Monmouth County State Correctional Institutional Inmates v. Lanzaro* and successfully challenged a prison policy that severely restricted abortion access.[105] The Third Circuit applied the *Turner* standard in *Monmouth County* just months after the *Turner* decision, and ultimately invalidated the challenged policy.[106] The case was a class action brought by offenders challenging a prison medical policy requiring them to obtain a court-ordered release to leave prison to receive an elective, nontherapeutic abortion.[107] Despite the fact that the lower court applied a "compelling state interest" test instead of the *Turner* rationality standard, the Third Circuit affirmed in part and modified in part the district court's injunctive relief.[108] The Third Circuit additionally em-

100. *Id.*

101. *See id.*

102. *Id.* at 91.

103. *Id.* at 91, 97–100.

104. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 345, 349–53 (1987) (applying *Turner* to reverse an appellate court decision that vacated and remanded the district court holding of a prison regulation preventing Muslim offenders from participating in a service central to the Islamic faith as unconstitutional); Victoria W. v. Larpenter, 369 F.3d 475, 477, 479, 483–87 (5th Cir. 2004) (applying *Turner* to uphold a policy requiring a court order to obtain temporary release for offenders seeking elective medical procedures, including abortions); Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 331–34, 338–44, 351 (3d Cir. 1987) (applying *Turner* to invalidate a prison policy requiring a court-ordered release for offenders to receive nontherapeutic, elective abortions).

105. *See Monmouth County*, 834 F.2d at 338–44, 351.

106. *See id.*

107. *Id.* at 329, 351.

108. *Id.* at 330 (describing the district court's reasoning using the compelling-state-interest standard of review); *id.* at 351–52 (affirming or modifying

phasized that protection of the rights of offenders, due to the nature of their imprisonment, can require public funds and assistance beyond what is required in the free world.[109]

The court considered the first element of the *Turner* standard of whether there was a valid connection between the regulation and a legitimate government interest.[110] However, it concluded that the court-ordered-release policy failed to rationally connect to any legitimate governmental interests.[111]

The Third Circuit next considered *Turner*'s second element and recognized that in the unique case of abortion, "time is likely to be of the essence."[112] Acknowledging that women, upon the court release, "may encounter additional delays in scheduling the actual procedure,"[113] the court determined that delays due to policy roadblocks like the court-ordered release create a variety of risks for women.[114] The court noted that when time is a central consideration and "the only means available to effectuate [the decision to abort] are laden with probable delays, such means are inadequate and essentially deprive a woman of the ability to exercise her constitutional right" to abortion.[115]

Finally, the court considered that a lack of alternative to abortion, or, alternatively, their existence, serves to indicate whether the regulation is reasonable.[116] Considering that the prison provided for pre- and post-natal care,[117] the court concluded that funding abortions presented no significant burden to the prison, despite the state's asserted financial and admin-

all elements of the injunction, and requiring the County to arrange for transportation to and from the clinic).

109. *Id.* at 341 (citing Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975) (indicating that prison officials must accommodate prisoners with religious dietary restrictions)); *id.* ("It is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of liberty, care for himself [or herself.]" (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976))) (internal quotations omitted).

110. *Id.* at 338, 338 n.19 (explaining that, because the court-order requirement centered on the nature of the treatment and not the offender's security status, the policy cannot be rationally related to a legitimate security interest).

111. *Id.*

112. *Id.* at 339 (quoting H.L. v. Matheson, 450 U.S. 398, 412 (1981)).

113. *Id.* at 340.

114. *Id.* at 339.

115. *Id.* at 340 n.21.

116. *Id.* at 344.

117. *Id.* at 341 ("[Accommodating abortion costs] certainly imposes no greater burdens than already exist under the County's accepted responsibility to provide all pregnant inmates with proper pre- and post-natal care.").

istrative concerns.[118] The Third Circuit ultimately rejected the District Court's holding that the County does not need to fund elective abortions, but explicitly notes that this does not equate to an affirmative duty to do so.[119] This marked the first successful challenge to restrictive prison abortion policies after *Turner*.[120]

The court indicated that the *Turner* standard should, however, be applied with leniency toward the government. According to the Third Circuit, the *Turner* standard is applied "whether a challenged regulation 'effectively prohibit[s], rather than simply limit[s], a particular exercise of constitutional rights.'"[121] This principle is illustrated in *Victoria W. v. Larpenter*, where the *Turner* standard worked against incarcerated women facing roadblocks to abortion.[122]

4. The Standard Can Work Against Offenders: *Victoria W. v. Larpenter*

In *Victoria W. v. Larpenter*, a female offender brought a civil rights action challenging the constitutionality of a Louisiana prison policy requiring women to obtain a court-ordered release from prison to receive an abortion.[123] Meetings with administrators, filing reports, and other procedural roadblocks prevented Victoria from receiving an abortion,[124] even though she requested the procedure immediately after discovering her pregnancy. At the time of her release, Victoria's pregnancy had advanced past the point of legal abortion in Louisiana.[125]

The court applied the *Turner* standard and concluded that the policy was reasonably related to legitimate penological interests because it was established for all elective medical procedures, not only abortion.[126] The court distinguished *Mon-*

118. *Id.* at 341 & n.22.

119. *Id.* at 343.

120. *Id.* at 331 (describing how the *Turner* decision was rendered following oral argument in *Monmouth County*).

121. *Id.* (quoting O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)).

122. 369 F.3d 475 (5th Cir. 2004).

123. *Id.* at 477–78.

124. *Id.* at 478–80 (explaining that Victoria received prenatal care while she attempted to fulfill requirements to meet with the Head Nurse, schedule an abortion, meet with her lawyer, and obtain a court order).

125. *Id.* at 480 ("Victoria was released on October 13, 1999, too late to obtain a legal abortion in Louisiana.").

126. *Id.* at 486. Among the interests asserted by the prison were prison resources, inmate security, and potential liability. *Id.*

mouth County, explaining that the policy challenged there was specific to abortion.[127]

These cases demonstrate that courts have used *Turner* to require access to abortion and to deny it. A challenge to the BOP abortion policies would likely follow either the *Monmouth County* or *Victoria W.* precedent. The Third Circuit's approach in *Monmouth County* should control because the roadblocks established in the BOP policy are specific to the abortion decision alone, and do not apply to all elective medical procedures as in *Victoria W.*[128]

The standards set by *Turner* address the substantive rights retained in prison. The Due Process Clauses of the Fifth and Fourteenth Amendments protect both substantive rights and the procedure for protecting these rights,[129] as discussed below.

D. PROCEDURAL DUE PROCESS RIGHTS RETAINED BY THE INCARCERATED

The doctrine of procedural due process requires that procedural safeguards be applied where deprivation of a liberty or property right occurs.[130] These safeguards are guaranteed where codified law affirmatively protects or recognizes the existence of a right,[131] but also where the Constitution protects such rights.[132]

To determine whether procedural protection is due, one must look to the "context of the inmate's confinement."[133] Pro-

127. *Id.* at 487–88.

128. *See id.* at 486.

129. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 685–87 (2d ed. 1988).

130. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 570–71 (1972) (finding no right to procedural due process where the interest fails to satisfy a threshold definition of liberty or property); Philip W. Sbaratta, Note, Sandin v. Conner*: The Supreme Court's Narrowing of Prisoners' Due Process and the Missed Opportunity to Discover True Liberty*, 81 CORNELL L. REV. 744, 749 (1996) (describing the *Roth* holding as it relates to liberty and property interests).

131. *See* Wolff v. McDonnell, 418 U.S. 539, 557 (1974) (describing that, while a good-time credit is not constitutionally guaranteed, due process protection of the right to good-time credits was afforded because the state had recognized the right in legislation).

132. *See* Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482, 491–92 (1984) (describing that interference with "life, liberty, or property" triggers due process).

133. Washington v. Harper, 494 U.S. 210, 222 (1990).

cedural protections exist where deprivation of a right is unrelated to regularly imposed penal confinement.[134] By contrast, prisons are not required to ensure procedural protections where deprivations are "well within the terms of confinement ordinarily contemplated by a prison sentence."[135] In most cases, courts defer to prison administrators in determining what falls within the "context of confinement."[136]

Minimum due process protection includes notice and a hearing.[137] However, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[138] Courts have required various combinations of an administrative hearing, timely meetings with a warden,[139] access to counsel,[140] the opportunity to present witnesses to the prison administrators,[141] and the assurance of a "neutral and detached" procedural determination[142] when a property or liberty interest is at stake.[143]

An offender is entitled to the minimum protections of notice and a judicial hearing if she can show that the right she has been deprived of is affirmatively, statutorily, or constitutionally protected by law and that the deprivation is not within the terms of her confinement.[144] Courts may require procedure more specific than simple notice and a hearing, however, depending on the right of which the offender has been deprived.[145]

134. *See* Hewitt v. Helms, 459 U.S. 460, 468 (1983).

135. *Id.*

136. *Harper*, 494 U.S. at 223–24 ("[P]rison authorities are best equipped to make difficult decisions regarding prison administration.").

137. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 559 (1974) (quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972)).

138. Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

139. *Wolff,* 418 U.S. at 558.

140. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

141. Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

142. *Id.*

143. *See Wolff*, 418 U.S. at 557 ("[The due process] analysis as to liberty parallels the accepted due process analysis as to property.").

144. *See id.* ("[A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the State."); *see also* Michael Irvine, *Chapter 17: Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law*, 31 COLUM. HUM. RTS. L. REV. 305, 321 (2000) (noting that protected liberty interests are those "that are unusually burdensome in relation to 'the ordinary incidents of prison life'").

145. *See, e.g.*, Gwinn v. Awmiller, 354 F.3d 1211, 1218–19 (2004) (holding that an offender was entitled to notice of charges, opportunity to present witnesses and evidence in defense of those charges, and a written statement by a

Indeed, some liberty interests require extensive procedural protections to make them meaningful.[146] Abortion rights are recognized as time sensitive[147] and related to potentially injurious procedures,[148] and therefore should be eligible for heightened procedural protection. Prison policies already provide heightened due process protections for other individual rights, such as the First Amendment right to uncensored correspondence.

Prison correspondence procedure provides a model for prison due process protections. BOP abortion policies implicate a liberty interest like the interest in uncensored communication between offenders and their correspondents.[149] The Constitution ensures certain protections and procedural remedies for offenders whose correspondence is kept from them[150] because of the liberty interest at stake[151] and limits on the "context of . . . confinement."[152] These protections apply to all prison policies implicating protected constitutional rights. The BOP abortion policies are no exception.

decision maker of evidence relied upon and reasons for classification before being classified as a sex offender).

146. *See* Krug v. Lutz, 329 F.3d 692, 699 (9th Cir. 2003) (granting injunctive relief where prison correspondence was being kept from offenders); Bullock v. Barham, 23 F. Supp. 2d 883, 885 (N.D. Ill. 1998) (concluding that injunctive relief was cognizable where an offender was threatened with bodily harm).

147. *See, e.g.*, Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 339 (3d Cir. 1987) (noting the increased medical risk associated with delaying abortion).

148. There is evidence that even early abortion procedures are major medical undertakings, strongly weighing in favor of sound procedural protections surrounding access to the procedure. *See RU-486: Demonstrating a Low Standard for Women's Health?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the H. Comm. on Gov't Reform*, 109th Cong. (2006).

149. *See* Procunier v. Martinez, 416 U.S. 396, 418 (1974) ("The interest of prisoners and their correspondents in uncensored communication by letter . . . is plainly a 'liberty' interest within the meaning of the [Due Process Clause of the] Fourteenth Amendment . . . .").

150. *Krug*, 329 F.3d at 696–97 (describing that an offender must retain the right to notice and two-level review when a prison withholds correspondence).

151. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972).

152. *See* Washington v. Harper, 494 U.S. 210, 222 (1990).

II. THE BUREAU OF PRISONS POLICY IS UNCONSITUTIONAL AS APPLIED TO PREGNANT OFFENDERS CONSIDERING ABORTION

The first section of Part II shows that the BOP policy is facially constitutional. The second section applies the policy to pregnant offenders considering abortion, revealing several flaws. The final section presents an argument that the BOP policies, as applied to pregnant offenders, violate the constitutional right to procedural due process.

A. THE BUREAU OF PRISONS ABORTION POLICIES ARE FACIALLY CONSTITUTIONAL

The *Turner* standard works in favor of the Bureau of Prisons in a facial challenge to the substantive policy. First, there is likely a "valid, rational connection"[153] between imposing security protections and effective counseling requirements and a state interest in ensuring that offenders exercise their abortion rights in an informed and secure manner. Second, the BOP could argue that there is no need for "alternative means of exercising the right"[154] to abortion simply because the policy, on its face, does not prevent abortions. Third, the BOP can make a strong case that "accommodation of the asserted constitutional right" will have a negative impact on "guards and other inmates"[155] due to personal objections to abortion, a concern expressed in the staff-exemption to the abortion policy.[156] Fourth, *Turner* emphasizes that prison policy addressing constitutional issues need not be the "least restrictive alternative" available.[157]

Thus, under *Turner*, the legitimate penological interest in security justifies regulating, but not eliminating, offenders' access to abortion services. On its face, the policy is constitutional. How, then, is one to help women like Leisa Gibson? The rights conferred on her were not unconstitutionally restricted in *substance*, yet their exercise was prevented. This problem is one of *procedure*, requiring a procedural due process analysis.

153. *See* Turner v. Safley, 482 U.S. 78, 89 (1987).
154. *See id.* at 90.
155. *See id.*
156. ABORTION AND PREGNANCY POLICY, *supra* note 15, at 1.
157. *Turner*, 482 U.S. at 90.

B. APPLICATION OF THE BUREAU OF PRISON POLICIES

Applying the BOP policies to the circumstances experienced by incarcerated women like Leisa Gibson reveals six significant problems. The policies provide no notice of options for pregnant offenders, rely on intimidating communication with guards, fail to incorporate time sensitivity, allow staff nonparticipation without limitation, place responsibility in the hands of the offender without giving her the tools to exercise that responsibility, and allow for unnecessary and potentially strategic time manipulation by prison officials.

First, the BOP abortion policy does not include a procedure for alerting female offenders to the possibility they may be pregnant, nor to the options available to them if they are.[158] In fact, Leisa Gibson was not informed of a medical appointment scheduled for her, which was her last opportunity for an abortion.[159] Without this kind of information, pregnant offenders are left not knowing to whom to turn once they become aware of their pregnancy.[160] Weeks may pass before an offender approaches prison administrators.[161]

This raises the second failure of the policy's procedures. Moments alone with guards are likely the only means by which to communicate a health concern.[162] Indeed, Leisa Gibson was housed in a jail guarded by U.S. Marshals, in whom she con-

158. *See* ABORTION AND PREGNANCY POLICY, *supra* note 15.

159. Gibson v. Matthews, 926 F.2d 532, 534 (6th Cir. 1991).

160. The average offender would likely be unaware of an early stage pregnancy at prison admission. The majority of female federal offenders are incarcerated for drug offenses, FACT SHEET, *supra* note 11, and nearly 40% of prisoners reporting a medical condition enter federal prison with a drug addiction. MEDICAL PROBLEMS OF PRISONERS, *supra* note 26, tbl.7. The same number report using drugs in a month before their arrest. *Id.* Drug addiction interferes with a woman's ability to care for her health, including monitoring her reproductive status. Women admitted to prison addicted to drugs often experience withdrawal, which can be confused with the symptoms of early pregnancy. In the last study performed, only 18% of female offenders receive drug treatment in federal prisons. FACT SHEET, *supra* note 11. Pregnancies are only occasionally detected during physical examinations at prison admission. MEDICAL PROBLEMS OF PRISONERS, *supra* note 26, tbl.8. While 78.1% of female offenders report having an obstetrics exam "since admission," statistical reports do not clarify the amount of time that passes from admission before an offender receives medical care. *Id.* tbl.10.

161. *See* WATTERSON, *supra* note 38.

162. See http://www.bop.gov/locations/institutions/index.jsp, for a BOP description of the low staff-to-inmate ratio for a low security prison facility, indicating less contact between offenders and staff.

fided but who failed to help her.[163] Without clear guidelines of how to obtain an abortion,[164] the BOP policy relies entirely on communication between guard and offender and the opportunity for confidential conversation as the means by which pregnant offenders are able to gain access to the abortion procedure. This reliance on confidential communication is misplaced because offenders may fear and distrust prison guards, who wield power over them.

Once a staff member is alerted to a suspected pregnancy, the offender's case manager must be notified.[165] This process may consume a significant amount of time[166] because at no point does the BOP policy dictate a time limit for involving the case manager, arranging a medical appointment or requiring that the abortion option be made known to the offender.[167] This is a policy failure because offenders may be unaware of their right to terminate their pregnancy, or the amount of time it would take to arrange the procedure from prison.

The third problem presented by the BOP policy is thus that the offender has neither the knowledge nor tools to pressure the prison administration to arrange for appointments and schedule meetings with the case manager. Fourth, even when the schedule is finally arranged, aspects of the policy allow staff members to further delay access to abortion services. The policy states that any staff members, including medical staff, may refuse to participate in the care and treatment of an offender considering abortion.[168] Delays are therefore possible at both the administrative and staff levels of the prison power structure.

163. *Gibson*, 926 F.2d at 534.

164. ABORTION AND PREGNANCY POLICY, *supra* note 15, at 2 (noting each offender is responsible for alerting medical staff when she suspects she is pregnant, but not specifying how to access or communicate with the appropriate administrator).

165. *See id.* at 3.

166. *See* Victoria W. v. Larpenter, 369 F.3d 475, 478–79 (5th Cir. 2004) (noting that two weeks passed between Victoria's request for a meeting with the Head Nurse and the meeting).

167. *See* ABORTION AND PREGNANCY POLICY, *supra* note 15.

168. *See id.* at 1 ("A staff member who wishes not to be involved in arranging an elective abortion will not be required to do so."); *cf.* Amy Bergquist, Note, *Pharmacist Refusals: Dispensing (With) Religious Accommodation Under Title VII*, 90 MINN. L. REV. 1073, 1078 (2006) ("Title VII of the Civil Rights Act restricts both private and public employers' right to terminate, discipline, or refuse to hire employees on religious grounds.").

The fifth problem presented by the BOP policy initially appears positive for offenders. The BOP abortion policy requires that the offender be entirely responsible for the decision to abort her pregnancy.[169] However, Leisa Gibson's case illustrates the damaging results of a policy which places responsibility in the hands of the offender when she is not in a position to exercise it. The Sixth Circuit presumed that placing this responsibility in the offender's hands removed any responsibility from the prison administration.[170] In reality, of course, with no objective information about abortion rights, no willing participation from prison administration or staff, and no understanding of where to begin the process for obtaining an abortion, this responsibility cannot be meaningfully exercised.

Finally, the BOP policy allows for unnecessary and potentially strategic delay. This is especially the case when the warden and chaplain become involved because the BOP policy governing religious counseling encourages delay. If, and when, an offender is made aware of her option to abort, she would likely turn to a guard, who would notify a case manager. The case manager would speak with the Warden.[171] The BOP abortion policy places no time restrictions on the Warden for meeting with offenders considering abortion.[172] The Warden must offer medical, religious, and social counseling.[173] The Warden will consult with the chaplain, the coordinator of religious programming, to arrange religious counseling if requested. In addition, an offender may be transferred from facility to facility, as Leisa Gibson was three times, "passing the buck" on to other prisons entirely.[174] Prison administrators may justify these procedures with security and financial concerns, but the process could, intentionally or not, delay an abortion beyond legal limits.

Access to abortion is time-sensitive. *Victoria W.* demonstrates that an abortion can be prevented by simply stalling the

169. *See* ABORTION AND PREGNANCY POLICY, *supra* note 15, at 3 ("[An] inmate has the responsibility to decide either to have an abortion or to bear the child.").

170. Gibson v. Matthews, 926 F.2d 532, 537–38 (6th Cir. 1991).

171. ABORTION AND PREGNANCY POLICY, *supra* note 15, at 3 (explaining that the Warden is the primary administrator for assisting an inmate with counseling involving abortion).

172. *See id.*

173. *Id.*

174. *Gibson*, 926 F.2d at 534–35.

procedure.[175] Even when prison administrators act in good faith, as they arguably did in *Victoria W.*,[176] it is likely that mere bureaucracy can prevent abortion. The risk that prison administrators will act in bad faith increases, however, where the prison chaplain is anti-abortion and religious programming in federal prisons is dominated by private, evangelical Christian missionary organizations. Tales of these groups' influence on pregnant offenders abound in Christian religious programming materials. One describes the Cinderella story of a woman who found Christ, had a baby, and recovered from a crack addiction.[177] With prison programming centered on this kind of religiosity, and ample power placed in the hands of the persuasive chaplain, it is likely that at least some of the time consumed in implementing the policy stems from strategic manipulation of an offender's decision.

Some pregnancies are not detected before the second or third month (and even later for drug-addicted and unhealthy women) and abortion is only available until the sixth month in most clinics.[178] There is a narrow opportunity for women in late first or second trimester pregnancies to avail themselves of abortion services. The current BOP procedure simply takes too long, especially considering the opportunity for manipulation. In addition, prison administrators are not required to communicate with the offender about the details of the process and her rights, there are no procedural time constraints, and there is no way for an offender to challenge administrative roadblocks to abortion in time to get access to the procedure safely and legally. Although the BOP policy is substantively constitutional on its face, its application to pregnant offenders considering abortion violates procedural due process.

C. AS APPLIED, THE BOP POLICIES FAIL TO MEET PROCEDURAL DUE PROCESS REQUIREMENTS

Under the procedural due process doctrine, where there is a right in place through statute or the Constitution, removal of

175. *See* Victoria W. v. Larpenter, 369 F.3d 475, 478 (5th Cir. 2004).

176. *See id.* at 490 ("[P]rison officials and medical staff reasonably applied the policy.").

177. Hope Today Prison Fellowship, *Redeemed Drug Addict Returns to Jail to Spread the Word,* HOPE TODAY: STORIES OF TRANSFORMATION, http://www.pfm.org/article.asp?ID=491 (last visited Mar. 9, 2009).

178. *See* Patricia Miller, *The Last Resort: Abortion Providers in Kansas and Mississippi Hold Ground Despite States' Attacks*, MS., Fall 2005, at 16, (noting that only two clinics in the country perform late-term abortions).

that right must be accompanied by procedural accommodations.[179] The Due Process Clauses of the Fifth and Fourteenth Amendments protect the right to choose abortion, and the BOP policy also explicitly codifies it.[180] While this recognition of the right renders the policy facially constitutional, this recognition of the offender's constitutional liberty interest places it squarely within the realm of procedural due process. Regardless of the BOP's ability to limit rights in the prison context based on legitimate interests,[181] the prison must provide offenders with procedural protections.[182]

Furthermore, the "context of confinement" analysis shows that removal of the right to choose abortion must be accompanied by procedural due process protection.[183] Removal of a right is in the "context of the inmate's confinement" where deprivation of the right is related to regularly imposed penal confinement.[184] Challenges to prison policies under this standard usually address punishments added to a prison sentence, like solitary confinement or removal of prison privileges.[185] These punishments are within the context of confinement because they can be expected in an ordinary prison sentence. However, mandatory childbirth is not within an expected prison sentence.[186] Even with deference to prison administrators,[187] forced childbirth cannot be construed as lawful punishment.[188]

179. *See* Herman, *supra* note 132, at 491–92.

180. Roe v. Wade, 410 U.S. 113, 164 (1973); ABORTION AND PREGNANCY POLICY, *supra* note 15, at 1, 3; RELIGION POLICY, *supra* note 15, at 8.

181. *See* Turner v. Safley, 482 U.S. 78, 89 (1987) (concluding that a regulation is valid even if it impinges on inmates' constitutional rights, if it is "reasonably related to legitimate penological interests").

182. *See* Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 341 (3d Cir. 1987) (explaining that the state must provide certain resources for offenders in order to ensure the safe exercise of their constitutional rights, such as particular foods for religious purposes); Stanford H. Kadish, *Methodology and Criteria in Due Process Adjudications—A Survey and Criticism*, 66 YALE L.J. 319, 340 (1957) (explaining that procedural safeguards are important "even in an area of legitimate governmental concern").

183. Washington v. Harper, 494 U.S. 210, 222 (1990).

184. *Id.* at 220.

185. *See* Whitlock v. Johnson, 982 F. Supp. 615, 617–18 (N.D. Ill 1997) (upholding a procedural due process challenge against a disciplinary hearing); Irvine, *supra* note 144, at 321.

186. Elizabeth Budnitz, *Not a Part of Her Sentence: Applying the Supreme Court's* Johnson v. California *to Prison Abortion Policies*, 71 BROOK. L. REV. 1291, 1302 (2006) (describing the physical burden of carrying an unwanted pregnancy in prison).

187. *See Harper*, 494 U.S. at 224.

188. *See* John F. Hagan, *Jail OKs Altered Abortion Policy; Settlement In-*

In fact, scholars argue that forced childbearing in prison amounts to cruel and unusual punishment, violating the Eighth Amendment.[189] Procedural protections are warranted because abortion rights are statutorily and constitutionally recognized and removing them is not traditionally acceptable criminal punishment.

In *Monmouth County*,[190] the Third Circuit reviewed the affirmative obligation of the state to provide resources for offenders to adequately exercise the rights they retained in prison.[191] The court emphasized that the protection provided in the free world must be heightened in the prison context because offenders are totally dependent on the state.[192] *Monmouth County* urges a comparison of free world standards to the needs of offenders in order to determine the constitutional adequacy of prison policies.[193] This principle is particularly applicable to determine the adequacy of current BOP procedure vis-à-vis abortion.

Outside the prison context, *Casey* would determine that unidentified time constraints and religious coercion with no access to other resources amount to an undue burden on a woman's right to choose abortion.[194] The obstacles established in the BOP abortion policies are comparable to the spousal noti-

cludes Payment to Woman Jailed by Former Judge, PLAIN DEALER (Cleveland), June 4, 2002, at B1 (describing the six-month suspension of a judge for allegedly jailing a female defendant after learning about her desire to seek abortion). *But see* People v. Pointer, 199 Cal. Rptr. 357, 364 (Cal. Ct. App. 1984) (affirming the parole condition that a woman convicted of child endangerment not conceive any more children because the condition was "related to child endangerment, the crime for which [the] appellant was convicted").

189. Budnitz, *supra* note 186, at 1321–22; Egerman, *supra* note 31, at 437 (arguing that forced childbirth "represents a serious violation of basic human dignity in direct violation of the Eighth Amendment"); Tecla Morasca, *Involuntary Childbirth and Prisoners' Rights: Court-Order Prison Policy Violates Fundamental Rights,* 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 69–73.

190. Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 341 (3d Cir. 1987).

191. *Id.*

192. *Id.* at 341–42 (describing a prison's obligation to accommodate religious diet, feed, clothe, and house offenders).

193. *Id.* at 341 ("Automatically applying in the prison context the tenets that define the government's obligation to its free world citizens denies . . . inmates' right to have their constitutional claims balanced against the state's legitimate interests in operating its prisons.").

194. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 898 (1992) (striking down spousal-notification provision because of the "troubling degree of authority" it gave to a husband over his wife).

fication provision invalidated in *Casey*.[195] The Court invalidated this provision because it placed a "troubling degree of authority"[196] in the hands of someone other than the woman making the choice,[197] a person whose intentions might not be in her best interest.[198] The BOP policy mimics this problem by placing ultimate control over the abortion decision in the hands of prison administrators, not the offender herself.[199] Like the concerns with spousal consent, the interests of prison administrators may not align with those of pregnant offenders.[200] The BOP policies, like the free-world spousal consent provision,[201] place an undue burden on the woman's decision to choose abortion in prison.

One could argue that the *Casey* standard should not be considered when analyzing rights in the prison context.[202] After all, *Turner* specifically indicates that a less rigid standard applies when substantive rights are at issue in prison.[203] However, *Monmouth County* indicates that if a policy would be overly burdensome in the free world, it certainly cannot work in the prison context where the right is retained.[204] Under *Monmouth County,* the prison must provide the means to ensure that access to retained rights is protected and meaningful. The *Gibson* court recognized this fact when it stated that *Monmouth County* "implicitly extended to prisoners a right not to be prevented from having an abortion because of their incarcerated status."[205] *Casey* re-framed the issue of abortion as a debate about the manageability of hurdles and roadblocks. In light of

195. *Id.* at 887–99.

196. *Id.* at 898.

197. *See id.* at 896 ("The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.").

198. *See id.* at 893 (listing the myriad reasons a woman would be afraid to tell her husband her desire to seek abortion).

199. *But see* ABORTION AND PREGNANCY POLICY*, supra* note 15, at 3 ("[T]he inmate has the responsibility to decide either to abort or bear the child.").

200. *See* Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 336–38 (3d Cir. 1987) (describing the state's interests and weighing them against the offenders' interests).

201. *See Casey*, 505 U.S. at 898.

202. *But see* Budnitz, *supra* note 186, at 1294–95 (arguing that *Johnson v. California*, 543 U.S. 499 (2005), supports the proposition that courts reviewing prison abortion policies should apply intermediate scrutiny in accordance with *Casey* instead of *Turner*).

203. Turner v. Safley, 482 U.S. 78, 89 (1987).

204. *Monmouth County*, 834 F.2d at 341.

205. Gibson v. Matthews, 926 F.2d 532, 535 (6th Cir. 1991).

this modern construction of abortion rights in *Casey*, the *Monmouth County* approach to prison abortion should be applied, and the *Victoria W.* approach should be rejected. Under the *Monmouth County* standard, the BOP policy has failed to provide adequate procedures by which offenders may exercise their retained rights to choose abortion and challenge potential restrictions thereto.

Perhaps indicative of the social marginalization of female prisoners, there is little awareness of this problem. Outside the sparse litigation that has taken place challenging state prison policies, no person or organization has taken direct action against prisons that limit female offenders' access to abortion. None of the major pro-choice advocacy groups include discussions of the issue on their websites or in printed promotional material. Still, potentially thousands of women continue to suffer in silence.[206] As the population of women in prison increases, the risk of constitutional violations also increases.

In order to avoid the detrimental impact of these policies on individual prisoners, this Note offers a workable solution to amend the BOP policies. While the abortion issue is controversial, access to the procedure continues to be protected by the Constitution.[207] As long as this is the case, solutions are required to clear bureaucratic barriers to access. The traditional procedural protections of timely notice and a hearing are required to prevent abuses of policy and procedural roadblocks.

III. AMENDING THE BUREAU OF PRISONS POLICIES TO CONFORM TO THE CONSTITUTION

Changes in policy are required for the BOP abortion policies to provide adequate procedural due process. Policy must provide timely notice and the opportunity for a hearing to offenders who are deprived of access to abortion services. These procedural protections are included in BOP policy governing offender correspondence.[208] That policy provides a model for change to the abortion policy. The addition of a time limit, no-

206. *See* MEDICAL PROBLEMS OF PRISONERS, *supra* note 26, tbl.10; Quick Facts About the Federal Bureau of Prisons, http://www.bop.gov/news/quick.jsp (last visited Mar. 9, 2009) (indicating that 13,273 women are incarcerated in federal prisons).

207. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992).

208. FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT, CORRESPONDENCE, *available at* http://www.bop.gov/policy/progstat/5265_011.pdf [hereinafter CORRESPONDENCE POLICY].

tice requirements, and opportunities for appeal and review will bring the BOP abortion policy into conformity with the Constitution. These changes would be easy and inexpensive to implement because structural protections of similar rights already exist in the federal prison system.[209]

A. THE REQUIREMENT OF TIMELY NOTICE PROTECTS TIME-SENSITIVE ABORTION RIGHTS

In order to meet the timely notice requirement, the BOP abortion policy must recognize the time-sensitive nature of abortion procedures.[210] Failure to respond to requests for abortion during the early stages of an offender's pregnancy jeopardizes the affirmatively granted right to choose abortion, either by inadvertent failure to accelerate the process or manipulation by prison staff.[211] The BOP must notify the offender of her right to choose abortion, the procedure for obtaining an abortion, and any delays potentially arising in the process.

The BOP policy relating to offender correspondence provides an element of time sensitivity. First, the correspondence policy requires that offenders receive notification of rules relating to their right to private correspondence immediately upon entering a federal facility.[212] Second, the correspondence policy requires frequent internal review of decisions by prison administrators to limit an offender's right to correspondence.[213]

The BOP abortion policy does not recognize the time sensitivity of threatened rights, although access to an abortion is arguably more time-sensitive than access to one's letters and magazines. Correspondence access is reviewed every 180 days.[214] An identical review, described in the following section, of an offender's requests related to pregnancy should be re-

209. *Id.* at 6–8 (explaining the procedures for limiting correspondences and providing standard notice and consent forms for offenders).

210. *See* Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 339 (3d Cir. 1987).

211. *See, e.g.*, Reproductive Rights in Prison, Posting to Reproductive Rights Prof Blog, http://lawprofessors.typepad.com/reproductive_rights/2007/02/reproductive_ri.html (Feb. 1, 2007) ("[A] worker at the jail refused to give the woman her second dose of emergency contraception to help prevent a possible pregnancy from [her rape by a prison guard], because he objected to the medication on religious grounds.").

212. CORRESPONDENCE POLICY, *supra* note 208, at 6.

213. *Id.* at 18 ("The Warden shall review an inmate's restricted special mail status at least once every 180 days.").

214. *Id.*

quired every fourteen days to ensure that the review operates within the time constraints of abortion access. These frequent procedural reviews would not violate the *Turner* standard because they are already incorporated in prison procedure, daily operations, and costs as they relate to correspondence.

The policy must also limit prison administrators to a reasonable time for arranging an abortion for offenders. Injecting time sensitivity into the policy allows an offender to have an abortion quickly and provides effective monitoring to prevent strategic delay of the process. Recognition of the time-sensitive nature of the right to abortion, paired with notice of that right, and the chance it may be obstructed, would allow an offender to understand the options available to her. This change could be implemented by requiring that the procedure be performed within one month after the offender requests an abortion.

Notice of one's rights and the procedures for exercising them are also lacking in the BOP abortion policy. Once again, the BOP correspondence policy provides a model.[215] The first paragraph of the policy requires that the guidelines themselves "be widely available to staff and inmates through posting on bulletin boards, placement in the institution library, or other appropriate means."[216] The BOP ensures that offenders have access to information about their right to correspond by posting the policy itself throughout the prison. A similar requirement of posting notices in prison locker rooms or restrooms would inform offenders of their right to abortion and of the process for obtaining the procedure. These changes could be easily implemented using the same infrastructure that implements the correspondence policy.

The correspondence policy also includes specific language for notifying offenders before restricting their right to correspond. The policy requires prison staff to inform offenders of the possibility that their right will be limited,[217] and when the right is limited, notice must be given describing the reasons for the limitation and the options for redress.[218] The right to abortion, and the limitations on it, would be clearer and better communicated if the BOP abortion policy included identical requirements for communication to offenders. After an offender requests an abortion, prison administrators should have to

215. *See id.* at 6.
216. *Id.* at 1.
217. *Id.* at 6.
218. *Id.* at 8, 13.

provide her with a comprehensive description of the process from beginning to end, either during a hearing or in writing. This clear communication would enable offenders to prepare and plan for abortion. It would also diminish the likelihood that abuse of the policy would go unchecked.

For example, the requirement of religious counseling severely restricts an offender's access to abortion. Adding the elements of time and notice to the abortion policy would allow an offender to schedule counseling with the chaplain in advance of her decision, or to request an outside counselor of her choice without running out of time for an abortion. Because the offender would be notified of the requirement earlier and the administration would be required to arrange counseling within a time that does not restrict the right to access abortion, offenders would be better able to get meaningful counseling.

The time and notice requirements may result, however, in some pregnant offenders not receiving religious counseling due to constraints on administrator's time for planning the procedure. In anticipation of these circumstances, the BOP should develop an expedited background check policy for outside counselors with less stringent security restrictions for pregnant offenders considering abortion in order to enable these women to get access to meaningful counseling with a counselor of their denomination.[219] The offender could receive counseling pertinent to her faith at the most useful time, when she is still capable of having an abortion. An offender should be notified of this expedited process only when she reveals her pregnancy. This would minimize any security threat posed by offenders' meeting using expedited background checks for visits when they are not actually in need of pregnancy counseling.[220]

B. THE REQUIREMENT OF AN ADMINISTRATIVE HEARING PREVENTS POTENTIAL COERCION

After notifying an offender of her right to abortion, the process involved, and her access to religious counseling, the BOP policy must afford basic hearings for offenders requesting

219. *See* RELIGION POLICY, *supra* note 15, at 16.

220. Security restrictions for female offenders are already limited. *See* Federal Bureau of Prisons, Institutions Housing Female Offenders, http://www.bop.gov/locations/female_facilities.jsp (last visited Mar. 9, 2009); Federal Bureau of Prisons, Prison Types & General Information, http://www.bop.gov/locations/institutions/index.jsp (last visited Mar. 9, 2009) (describing the characteristics of minimum- and low-security facilities, including the absence of perimeter fences in some minimum security prisons).

changes in policy or assistance in exercising the right to choose abortion. Administrative review is a procedural safeguard required by the Due Process Clause that would accommodate such requests. Administrative review calls for, at a minimum, two-person review of restrictions placed on protected rights.[221]

In the case of prison correspondence, courts require that prison policy involve an unbiased two-person review of a decision to censure correspondence.[222] The BOP correspondence policy includes specific language required for notifying offenders of their right to written and oral appeal of a restriction of their right.[223] Similarly, administrative review must be established to review a complaint in the event an offender challenges abortion policy after receiving notice. A review by two disinterested persons would be beneficial to offenders because it would likely reveal any staff attempts to undermine the process. The review is also an opportunity to evaluate the pregnant offender's situation and allow advocacy on the part of one or both reviewers to hasten the process. A hearing would also provide offenders with a forum to request a meeting with a specific counselor, or one other than the chaplain, in order to access personalized religious counseling. Like notice of the rights involved, access to administrative review must be timely in order to conform to the requirements of due process. Implementation of this change to the BOP abortion policy would also be fairly simple; the two-person review panels meet to review complaints on a regular basis and the complaint procedure is already available for other aspects of prison policy.

These hearings must consider injunctive relief as a remedy to give female offenders access to abortion services. Although it is not a foundational procedural due process guarantee, injunctive relief is necessary because the BOP policy implicates a protected right, abortion access, that is time-sensitive. In addition, removing the right to abortion causes bodily harm because the alternative is childbirth, which is a physical ordeal for all wom-

221. Krug v. Lutz, 329 F.3d 692, 697–98 (9th Cir. 2003) (explaining that state must provide review by two people, one of whom is not involved in denying the right, before it can deny a constitutional right to an offender).

222. *Id.*; *see also* CORRESPONDENCE POLICY, *supra* note 208, at 8 ("The Warden shall refer an appeal to an official other than the one who originally disapproved the correspondence.").

223. CORRESPONDENCE POLICY, *supra* note 208, at 8, 13.

en,[224] regardless of their interest in abortion. In addition, this kind of relief has been granted in other prison cases,[225] including abortion.[226] For example, one of the rare stories of prison abortion that has been made public describes the story of "Jane Doe," a minor who was forced to continue her pregnancy because her sentencing judge would not to allow her to leave her residential treatment facility for an abortion.[227] "Jane" was ultimately granted injunctive relief by a different judge.[228] The relief required the facility to inform women of their right to choose abortion and the procedures required to obtain the service.[229]

To avoid the physical burden of an advancing pregnancy, an offender is entitled to an expedited administrative hearing that considers injunctive relief.[230] Injunctive relief should be the primary administrative remedy available to a pregnant offender challenging BOP policies preventing her from accessing abortion, including the BOP religious counseling policy. These challenges would allow an offender to circumvent religious counseling if time constrains her access to a counselor of her denomination.

Timely notice to offenders of the right to choose abortion while in prison and the procedure for doing so, as well as administrative hearings to review cases, would improve the BOP abortion policy. In addition, the BOP policies must provide offenders with access to two person hearings which rule on injunctive relief and access to expedited screening of religious counselors arranged for or requested by pregnant offenders. These solutions would alleviate the insurmountable burdens that the current BOP abortion policy imposes on pregnant women.

224. The physical risks associated with pregnancy increase substantially when a pregnant woman is incarcerated. *See* Egerman, *supra* note 31, at 434–36.

225. *See Krug*, 329 F.3d at 699; Bullock v. Barham, 23 F. Supp. 2d 883, 885 (1998).

226. *See* Rachel Roth, *Searching for the State: Who Governs Prisoners' Reproductive Rights?*, 11 SOC. POL. 411, 412 (2004).

227. *Id.*

228. *Id.* at 412 n.1.

229. *Id.*

230. *Id.* at 412 (describing a judge's decision to hold an emergency hearing to determine the value of Jane's claim for injunctive relief because no remedy at law could prevent the health risks a delay to abortion presented).

CONCLUSION

Leisa Gibson spent the duration of her pregnancy in federal prison, being systematically ignored and misled by prison administrators.[231] She was forced to carry her unwanted pregnancy to term and ultimately to give birth in prison.[232] The BOP policy enabled prison officials to "pass[ ] the buck,"[233] leaving Leisa a "victim of the bureaucracy as a whole."[234] Furthermore, there were no remedies available for Leisa to recover her losses from the prison officials who caused them by preventing her from having an abortion.[235] This Note presents a different way of looking at this problem: as one of procedural, not substantive, rights.

Indeed, the BOP policies surrounding prison abortion are facially constitutional but unconstitutional as applied to women like Leisa because they fail to provide adequate procedural due process. The number of women in federal and state institutions has increased at almost twice the rate of incarcerated men for over ten years.[236] Given the growing number of female offenders, the impact of these damaging policies is significant. There are more women like Leisa Gibson.

About three percent of female federal inmates report being pregnant at the time of their incarceration.[237] This number will grow as the incarcerated female population grows. It is a population comprised of women with financial, social, and behavioral problems that make abortion a valued option. Indeed, "[f]ar from being criminal predators, female inmates tend to be impoverished, drug addicts, victims of sexual assault or domestic violence, and mothers."[238] The unique experiences of female offenders require adequate procedural protections to preserve the rights of this growing population.

231. Gibson v. Matthews, 926 F.2d 532, 534–35 (6th Cir. 1991).
232. *Id.* at 535.
233. *Id.* at 535.
234. *Id.* at 534–35.
235. *Id.* at 536, 538.
236. BUREAU OF JUSTICE STATISTICS, *supra* note 25, at 4.
237. MEDICAL PROBLEMS OF PRISONERS, *supra* note 26, tbl.10.
238. BLOMBERG & LUCKEN, *supra note* 26, at 191.