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Hani Fish-Bieler · 3 days ago · 4 min read

The Roe Repeal Behind Bars: Prison Pregnancies in a Post-Dobbs World

165,000 women are estimated to be incarcerated in the United States.[1] These are disproportionately women of color, as Black women are incarcerated at a rate two times higher than that of white women.[2] Around 58,000 pregnant individuals are processed into jails, prisons, and other detention facilities in the United States every year.[3] Approximately 6 to 10 percent of women are pregnant when they enter prison or jail, and about 1400 newborns are born to women in custody.[4] This population has been and will continue to face the challenging effects of the Supreme Court's 2022 repeal of *Roe v. Wade* in *Dobbs v. Women's Health Organization*, which further exacerbates the punishment of incarceration for pregnant people.

Before *Dobbs*, courts repeatedly held that the right to an abortion survived a person's incarceration.[5] Pregnant people seeking abortions while incarcerated could theoretically turn to the legal system to access abortions.[6] In *Estelle v. Gamble*, the Court held that "deliberate indifference to the serious medical needs of prisoners" violates the 8th Amendment's "cruel and unusual punishment" clause.[7] In *Turner v. Safley*, the Court held that a carceral regulation could only be upheld if it was "reasonably related to penological interests." [8] Courts have used both of these standards to assess claims by incarcerated people of delayed or denied requests for abortions and have not infrequently held for the plaintiffs in those cases.[9]

However, even in the pre-*Dobbs* legal landscape, incarcerated people seeking abortions faced tremendous barriers, including not knowing "they had the right or ability to seek an abortion," [10] having to travel enormous distances and pay for both abortions themselves and this travel, and, in some states, dealing with a waiting period requiring multiple trips to providers, and having to pay for all these trips as well.[11] In fact, one study found that 1.3% of pregnancies which ended while the pregnant person was in prison ended in abortion, compared to 21% of pregnancies in the general population.[12]

Since the Court's decision in *Dobbs* to repeal *Roe*, the landscape has changed dramatically for incarcerated pregnant people. There are only 22 federal prisons for women, meaning that many incarcerated women are held outside of their home state.[13] Of those 22 facilities, 9 are in states which, since the *Dobbs* decision, have adopted complete bans on abortion.[14] Many of these women, then, will be charged with crimes in states which allow for abortions, and incarcerated in ones which do not. As such, they will lose not only the "usual" rights a person loses when incarcerated, but also one more—the right to bodily autonomy. Thus, the *Dobbs* decision, for many women, will expand what it means to be punished by the state with incarceration.

There is an added layer of trauma for parents who are forced to carry pregnancies to term while incarcerated. After an incarcerated person gives birth, the newborn baby is usually taken from the new parent within 24 hours, and sent to live with family or in foster care.[15] The practice of removing children from parents in infancy is understood to create trauma for the child.[16] Accordingly, by requiring pregnancies to be carried to term, *Dobbs* has expanded incarcerated parents' punishment and conveyed the punishment to their newborns, too, by subjecting parents and children alike to the trauma of separation at birth.

Women are “the fastest growing segment” of the U.S. prison population.[17] Scholarship predicts that almost half the country will eventually ban abortion outright.[18] Incarceration always impacts more than just the person in prison, and this is a particularly damning example of that fact. Under *Dobbs*, the punishment of incarceration stands to grow horrifically: incarcerated people will be forced to carry unwanted pregnancies to term, pregnancies which will end in the forced separation of newborns from the person who carried them into life.

[1] Suzanne O. Bell, Jessica L. Dozier, Imaima Casubhoy & Carolyn Sufrin, *Impact of new abortion restrictions on people in prison: Estimated number of incarcerated people without abortion access and distance to abortion providers*, *CONTRACEPTION* at 1 (Sept. 4, 2023), available at <https://www.sciencedirect.com/science/article/pii/S0010782423003761?via%3Dihub>.

[2] *Id.*

[3] Kimberly Haven, *Remarks on: "One Year Later: The Changed Landscape of Reproductive Rights on the Anniversary of Dobbs,"* 24 *GEO. J. GENDER & L.* 969, 969 (2023).

[4] Samantha Laufer, Note, *Reproductive Healthcare for Incarcerated Women: From "Rights" to "Dignity,"* 56 *AM. CRIM. L. REV.* 1785, 1786 (2019).

[5] *Id.* at 1791.

[6] See Joshua Sharfstein, *Jailed and Pregnant: What the Roe Repeal Means for Incarcerated People*, *JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH* (Sept. 21, 2022), <https://publichealth.jhu.edu/2022/abortion-care-for-incarcerated-people-after-dobbs>.

[7] *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)

[8] *Turner v. Safley*, 482 U.S. 78, 89 (1987).

[9] Diana Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict With Constitutional Standards*, 41 *PERSP. ON SEXUAL & REPRODUCTIVE HEALTH* 59, 59 (2009).

[10] Haven, *supra* note 3, at 969.

[11] Laufer, *supra* note 4, at 1792.

[12] Bell, Dozier, Casubhoy & Sufrin, *supra* note 1, at 1.

[13] Haven, *supra* note 3, at 970.

[14] *Id.*

[15] Jennifer G. Clarke & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, *AM. MED. J. OF ETHICS*, 779, 781 (2013).

[16] See Robert Winston & Rebecca Chicot, *The importance of early bonding on the long-term mental health and resilience of children*, 8 *LONDON J. PRIMARY CARE* 12, n.2 (2016).

[17] Haven, *supra* note 3, at 969.

[18] Elizabeth Nash & Isabel Guarnieri, *Six Months Post-Roe, 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, *GUTTMACHER INST.* (Jan. 10, 2023), <https://www.guttmacher.org/2023/01/six-months-post-ro-24-us-states-have-banned-abortion-or-are-likely-do-so-roundup>.