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“Nothing Less Than the Dignity of Man”: Women Prisoners, Reproductive Health, and Unequal Access to Justice Under the Eighth Amendment

Estalyn Marquis*

Much of the literature on women prisoners’ inadequate access to healthcare has focused on the relative rarity of women in prison before the age of mass incarceration. This may explain why prisons initially were poorly equipped to provide healthcare to women, but the gendered nature of Eighth Amendment jurisprudence has allowed prisons to remain so. This Note argues the Supreme Court’s standard for prisoners’ claims of inadequate medical care under the Eighth Amendment denies women equal access to justice in the wake of inadequate reproductive healthcare. By implicitly requiring that women prisoners compare their medical needs to those of men, the current standard for evaluating prisoners’ claims of inadequate medical care, though gender-neutral on its face, creates barriers for women that do not exist for men. In the context of reproductive healthcare, this requirement presents an often-insurmountable obstacle for women prisoners seeking justice under the Eighth Amendment.
On March 30, 2004, Michelle Lea Martinez was newly pregnant and in jail in Palm Beach, Florida, on cocaine charges. After experiencing vaginal bleeding, which can be a sign of miscarriage, she requested to visit the medical unit. The jail staff refused because Martinez had not put her name on a list to see the nurse who treated pregnant prisoners. “I was scared,” said Martinez in a later newspaper interview.1 “So I just grabbed the door and I slammed my thumb. I didn’t know what was wrong with me or my baby.” Within ten minutes Martinez received care for her thumb and vaginal bleeding. Martinez knew instinctively what was required to receive adequate healthcare as a female prisoner—an injury that looked like one a man could sustain.

INTRODUCTION
The United States has the highest incarceration rate of women in the world.2 Women and girls now comprise a greater proportion of the country’s prison population than ever before,3 yet until recently, society viewed mass incarceration of women as a relatively minor problem.

1. John Pacenti, P.B. County Jail’s Prenatal Care Faulted, PALM BEACH POST, May 9, 2004, at C1.
incarceration as a problem that primarily impacted men and boys.\(^4\) Popular culture,\(^5\) policy makers,\(^6\) and even presidential candidates\(^7\) are starting to recognize the devastating impact of mass incarceration on women. Society is beginning to ask how to make prisons—and the justice system as a whole—more just and attuned to the unique needs and attributes of women prisoners. We must now ask the same of our Constitution.

In this Note, I argue that current Eighth Amendment jurisprudence results in unequal access to justice for female prisoners following constitutionally inadequate reproductive healthcare. Although gender-neutral on its face, the current standard for evaluating prisoners’ claims of inadequate medical care implicitly requires that women prisoners compare their medical needs to those of men. In the context of reproductive healthcare, this standard presents an often-insurmountable obstacle for women prisoners seeking justice under the Eighth Amendment.

Much of the literature on women’s inadequate access to healthcare in prison has focused on the relative rarity of women in prison before the age of mass incarceration.\(^8\) Indeed, the historically low rates of female incarceration may explain why prisons initially were poorly equipped to provide healthcare to women. However, the gendered nature of Eighth Amendment jurisprudence allows prisons to continue to ignore women’s medical needs. The Supreme
Court has held: “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” 9 Yet, until we recognize and rectify the gendered barriers inherent in the Court’s current approach to medical claims, that promise will ring hollow for the thousands of women seeking adequate reproductive healthcare in our country’s prisons.

Part I of this Note provides background on mass incarceration, the astronomical rise in the number of women in prison over the past decades, and the poor state of women’s healthcare in America’s prisons. Part II examines the hidden barriers that the Supreme Court’s Eighth Amendment standard poses to women prisoners in the context of reproductive healthcare. Part III illustrates the impact of those barriers by reviewing the application of the current standard to women’s reproductive healthcare claims in federal circuit and district courts. Finally, Part IV discusses potential doctrinal changes and litigation and legislative strategies to ensure women prisoners have equal access to adequate healthcare under the Eighth Amendment.

I.

INVISIBLE RISE: WOMEN, MASS INCARCERATION, AND THE SEARCH FOR ADEQUATE HEALTHCARE IN AMERICA’S PRISONS

Despite the rapid increase in the incarceration of women, concerns about men prisoners have often overshadowed those of women prisoners. 10 This Part provides an overview of the rise of incarceration rates among women and the increased need for adequate healthcare in women’s prisons. Although President Barack Obama was the first sitting president to visit a federal prison, 11 he largely overlooked women in his widely broadcasted speech 12 to the NAACP on mass incarceration. President Obama remarked, “The bottom line is that in too many places, black boys and black men, Latino boys and Latino men experience being treated differently under the law.” 13 Understandably,

10. I have opted to use the term “woman prisoner” rather than “female prisoner.” Feminist scholars and linguists have debated the benefits of the use of “woman” as a modifier as opposed to “female.” See William Safire, Language: Woman vs. Female, N.Y. TIMES (Mar. 18, 2007), http://www.nytimes.com/2007/03/18/opinion/18safire.html [https://perma.cc/D7E7-UENG]. I have determined that the term “woman prisoner” is preferable in this context, and I intend the term to be inclusive of transgender prisoners to the extent that my discussion touches on their healthcare needs.
13. WHITE HOUSE, supra note 4.
scholars, media outlets, and advocates for prison and criminal justice reform have focused on this bottom line—mass incarceration is a system of racial and social control that targets (and is founded on stereotypes about) black men.

Yet, the same racialized “war on drugs” that led to the mass incarceration of black and Latino men in America has also ensnared thousands of women—especially low-income women of color. Although men prisoners greatly outnumber their women counterparts, the rate of women’s imprisonment has outpaced that of men by more than 50 percent over the past three decades. Between 1980–2014, the number of incarcerated women increased by 700 percent. There are now over 215,000 women incarcerated and 1.2 million under the supervision of the criminal justice system.

The same racial disparities that exist in men’s incarceration also exist for women: black women are imprisoned at more than twice the rate of white women. Since 2000, however, the rate of black women imprisonment has declined by 47 percent, while the rate of white women imprisonment has increased by 56 percent. The factors causing these dramatic shifts in the racial disparities are multifaceted and include economic, social, and political factors. The continued incarceration of women of color is a pressing issue that requires urgent attention and action to ensure justice and equity for all.

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19. Sent’g Project, supra note 3, at 1.
21. See Sent’g Project, supra note 3.
dynamics of women’s incarceration are unclear, but the data show that women prisoners now represent a substantial portion of the nation’s incarcerated.

The rise of women in America’s prisons coincides with a consistent decrease in crime rates nationwide. Indeed, over 60 percent of women prisoners are nonviolent offenders. The war on drugs is a “largely unannounced war on women,” as harsh policies like mandatory minimums and sentencing guidelines have operated in ways that uniquely disadvantage women. Mandatory sentences, for example, appear to be gender-blind, but result in disadvantages for women during plea negotiations. There are only a few ways to alter a mandatory minimum, such as providing the prosecution information about other drug offenders. However, since women tend to work at the lowest levels of the drug hierarchy, they often cannot provide any actionable information. Another driver in the rise of women prisoners might be the increasingly common prosecution of pregnant women for drug use under so-called “fetal protection” laws.

Additionally, many women convicted of violent offenses were in abusive relationships at the time of the offense. Three quarters of women prisoners have histories of physical abuse by an intimate partner during adulthood, and

23. See MAUER, supra note 22, at 8 (suggesting increased methamphetamine enforcement combined with harsh sentencing policies may be contributing to escalating number of white women in prison).

24. Carson, supra note 18, at 4. Women account for approximately 7 percent of state and federal prisoners, but in some states, women account for up to 10 percent of the state prison population. Id. Only sixteen states saw a decrease in their women prison populations between 2013–2014, compared with twenty-three states for men. Id.

25. SENT’G PROJECT, supra note 3, at 4. Their offenses included property, drug, and public order crimes. Id.


27. Id.


30. Chesney-Lind, supra note 8, at 84; see also Alex Campbell, Battered, Bereaved, and Behind Bars, BUZZFEED NEWS (Oct. 2, 2014), https://www.buzzfeed.com/alexcampbell/how-the-law-turns-battered-women-into-criminals [https://perma.cc/M54P-X32N] (discussing the prosecution and imprisonment of battered women who fail to protect their children from their abuser); Sadhbh Walshe, The Double Imprisonment of Battered Women, GUARDIAN (Mar. 21, 2012) http://www.theguardian.com/commentisfree/cifamerica/2012/mar/21/double-imprisonment-battered-women [https://perma.cc/527F-VNUV] (discussing the imprisonment of women who kill their abusive partners and arguing that the law wrongfully presumes a woman in an abusive relationship has the ability to simply walk away).
82 percent suffered serious physical or sexual abuse as children. Women, particularly black women, have historically been unprotected from violence inflicted by men yet punished for committing acts of violence when defending themselves against their abusers.

With the rise of women prisoners come specialized healthcare concerns. Along with mental health and substance abuse issues often linked to trauma, women prisoners frequently present more severe medical needs than women who have never been incarcerated because many women prisoners lack consistent access to healthcare prior to incarceration. Though scholars, advocates, and medical professionals have severely criticized the inadequate provision of healthcare in America’s prisons generally, women prisoners face unique dangers and risks in the modern prison system. Despite the growing population of women prisoners and the associated increase in need for women’s healthcare, prisons remain ill-equipped to provide adequate mental and physical healthcare to women inmates.

Pregnant prisoners or prisoners presenting reproductive health needs experience the harshest consequences of inadequate healthcare. More than 65 percent of women incarcerated in state prison report having a minor child.


37. Parker, supra note 34 at 264; see also Lilya Dishchyan, * Shackled During Labor: The Cruel and Unusual Truth*, 14 WHITTIER J. CHILD & FAM. ADVOC. 140, 143 (2015) (describing women prisoners’ lack of access to mental and physical healthcare services, as well as essential products for maintaining good health and hygiene, such as sanitary napkins).

and an estimated 4–10 percent of women entering prisons are pregnant.\textsuperscript{39} Women prisoners attempting to access reproductive healthcare face challenges at every stage of a pregnancy: confirming a pregnancy, obtaining prenatal care or an abortion, dealing with complications or emergency deliveries, maintaining autonomy and safety during labor, and attempting to breastfeed or connect with a newborn after giving birth.\textsuperscript{40} In addition to their unique barriers to adequate healthcare in prison, women face barriers to justice within a courtroom.

II. GENDER-BLIND JUSTICE? THE \textsc{Estelle/Brennan} STANDARD’S HIDDEN BARRIERS

This Part examines the Supreme Court’s prevailing standard for the evaluation of medical treatment claims of prisoners. It then goes on to examine the gendered barriers that arise for women prisoners bringing claims for inadequate medical treatment under the Eighth Amendment.

A. The \textsc{Estelle/Brennan} Standard for Medical Treatment Claims of Prisoners

The meaning of the Eighth Amendment in the prison context has evolved beyond notions of “physically barbarous punishment”\textsuperscript{41} to “the evolving standards of decency that mark the progress of a maturing society.”\textsuperscript{42} The Amendment has come to “embod[y] ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .’ against which we must evaluate penal measures.”\textsuperscript{43} It is now “undisputed that the treatment a prisoner receives in prison and conditions under which he is confined are subject to

\begin{itemize}
\item \textsuperscript{39} Laura M. Maruschak, Bureau of Just. Stat., Medical Problems of Jail Inmates 1, 7 (2006) (reporting that 5 percent of women said they were pregnant when they entered jail). But see Deborah Allen & Brenda Baker, Supporting Mothering Through Breastfeeding for Incarcerated Women, 42 J. Obstetric, Gynecologic, & Neonatal Nursing 103 (2013) (estimating that 8–10 percent of women entering prisons are pregnant and that those women spend an average of six to twelve months incarcerated after the birth of their children); see also REBECCA PROJECT FOR HUMAN RIGHTS & NAT’L WOMEN’S LAW CTR., MOTHERS BEHIND BARS 10 (2010), http://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf [https://perma.cc/BBX5-WXYX] (noting that 56 percent of women in federal prison have children).
\item \textsuperscript{40} See Ahrens, supra note 35, 17–30 (drawing from anecdotal reports, press coverage, and litigation papers to detail the risks and complications faced by women prisoners seeking reproductive healthcare).
\item \textsuperscript{41} Estelle v. Gamble, 429 U.S. 97, 102 (1976). The Court originally considered the Eighth Amendment to prohibit certain methods of punishment. For a detailed examination of the historical evolution of the Eighth Amendment, see generally John D. Bessler, Cruel and Unusual: The American Death Penalty and the Founders’ Eighth Amendment (2012).
\item \textsuperscript{42} Trop v. Dulles, 356 U.S. 86, 101 (1958).
\item \textsuperscript{43} Estelle, 429 U.S. at 102 (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).
\end{itemize}
scrutiny under the Eighth Amendment.” Yet despite the evolution of the doctrine, inadequate healthcare is still one of the most common prisoner complaints.

In *Estelle v. Gamble*, the leading case on allegations of inadequate medical care, the Court established the “deliberate indifference” standard that has since governed all prisoner challenges to inadequate medical care. *Estelle* considered the claim of J.W. Gamble, a Texas prisoner who sustained a back injury during his work assignment. Although Gamble had received some treatment, he alleged that the prison should have done more in response to his injury. The Court noted that the Eighth Amendment’s prohibition on punishments that “involve the unnecessary and wanton infliction of pain” establishes the government’s obligation to provide medical care for those incarcerated. The Court concluded that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ . . . proscribed by the Eighth Amendment.”

Although *Estelle* failed to provide much guidance in defining “deliberate indifference” or “serious medical needs,” it gave some examples of behavior that would (and would not) violate the standard. First, courts can find a violation where “indifference is manifested by prison doctors in their response to the prisoner’s needs.” Second, an intentional denial or delay in access to medical care can result in a violation. Finally, prison guards violate the standard when they intentionally interfere with a treatment once prescribed.

The Court also helped define the outer boundaries of the standard. For instance, an accident, “although it may produce added anguish,” is not by itself a wanton infliction of unnecessary pain. Nor does inadvertent failure to provide adequate medical care or negligence constitute a violation of the standard. Discussing negligence, the Court remarked, “Medical malpractice...

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45. 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 4:1 (4th ed.).
46. 429 U.S. at 97.
47. Id. at 98, 106–07.
48. Id.
49. Id. at 103.
50. Id. at 104.
51. Id. As examples, the Court cited cases in which prison doctors provided treatment that was less effective than appropriate; a nurse gave a prisoner inappropriate treatment and then the doctor refused to treat the consequences; and a prison doctor failed to follow the postoperative directions of the surgeon who had operated on the prisoner. Id.
52. Id. at 104–05.
53. Id. at 105.
54. Id. In discussing this conclusion, the Court cited the case of a Louisiana prisoner who was electrocuted a second time after the electric chair malfunctioned during the first attempt. Because the failed attempt resulted from an accident, it did not constitute cruel and unusual punishment. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947).
55. *Estelle*, 429 U.S. at 105–06.
does not become a constitutional violation merely because the victim is a prisoner.\textsuperscript{56} The Court found that the question of whether additional forms of treatment were needed is a classic example of a matter for medical judgment in which it would not interfere—thus it denied relief to Gamble.\textsuperscript{57}

Almost twenty years later, the Court clarified that the standard established in \textit{Estelle} was indeed subjective.\textsuperscript{58} In \textit{Farmer v. Brennan}, Dee Farmer, a transwoman prisoner, was beaten and raped after prison officials placed her in the general population of a federal prison for men.\textsuperscript{59} Farmer alleged that by placing her in the general population, despite knowledge that she was vulnerable to attack, prison officials were deliberately indifferent to her safety in violation of the Eighth Amendment.\textsuperscript{60} The Court held that prison officials must provide prisoners with adequate food, clothing, shelter, and medical care and must take “reasonable measures” to guarantee the safety of inmates.\textsuperscript{61} However, to establish an Eighth Amendment violation for a failure to meet these obligations, the plaintiff must satisfy two elements.

First, “the deprivation alleged must be, objectively, ‘sufficiently serious.’”\textsuperscript{62} Specifically, “a prison official’s act or omission must result in the denial of ‘the minimal civilized measure of life’s necessities,’”\textsuperscript{63} and the prisoner must demonstrate “that he is incarcerated under conditions posing a substantial risk of serious harm.”\textsuperscript{64}

Second, considering the prison official’s subjective state of mind, the prison official must have a “sufficiently culpable state of mind”—deliberate indifference.\textsuperscript{65} The Court held that liability under the Eighth Amendment will not attach unless the prison official “knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”\textsuperscript{66} The Court noted that the subjective deliberate indifference standard “incorporates due regard for prison officials’ unenviable task of keeping dangerous men in safe custody under humane conditions.”\textsuperscript{67}

The Court flatly rejected Farmer’s proffered objective test for establishing liability (known or should have known): “An official’s failure to alleviate a significant risk that he should have perceived but did not, while no cause for

\textsuperscript{56} Id. at 106.
\textsuperscript{57} Id. at 107.
\textsuperscript{59} Id. at 829–30.
\textsuperscript{60} Id. at 831.
\textsuperscript{61} Id. at 832.
\textsuperscript{62} Id. at 834.
\textsuperscript{63} Id. (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).
\textsuperscript{64} Id.
\textsuperscript{65} Id. (quoting Wilson v. Seiter, 501 U.S. 294, 302–03 (1991)).
\textsuperscript{66} Id. at 837.
\textsuperscript{67} Id. at 845 (internal quotation marks and citations omitted).
commendation, cannot under our cases be condemned as the infliction of punishment.” 68 In response to Farmer’s arguments that a subjective standard would enable prison officials to ignore obvious dangers to inmates, the Court remarked, “[w]e doubt that a subjective approach will present prison officials with any serious motivation to take refuge in the zone between ignorance of obvious risks and actual knowledge of risks.” 69 A fact finder could conclude that a prison knew of a substantial risk from the “very fact that the risk was obvious” if a plaintiff demonstrated that a risk was “longstanding, pervasive, well-documented, or expressly noted by prison officials in the past.” 70

Finally, the Court rejected Farmer’s argument that a subjective standard requires a prisoner to suffer physical injury before obtaining a court’s order to rectify an inhumane prison condition. 71 A prisoner does not have to await injury, the Court reasoned, and may instead present evidence that officials are “knowingly and unreasonably disregarding an objectively intolerable risk of harm” and that they will continue to do so. 72 The Brennan court remanded the case to the district court where Farmer lost in a jury trial. 73 Thus, under the Estelle/Brennan framework, a prisoner claiming an Eighth Amendment violation due to inadequate medical treatment must demonstrate that a deprivation was objectively “sufficiently serious” and that the subjective state of mind of the prison official was sufficiently culpable. 74 As the next section argues, this facially neutral standard creates unique gendered barriers for women attempting to bring claims for inadequate medical treatment.

B. No Comparison: Gendered Barriers Within a Facialy Neutral Standard

Because Brennan recognized a state obligation to keep prisoners safe, some have hailed the case as a victory for transgender prisoners and victims of

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68. Id. at 837–38.
69. Id. at 842 (internal quotation marks omitted).
70. Id.
71. Id. at 845.
72. Id. at 845–46.
74. Brennan, 511 U.S. at 584.
rape in prison. Yet many have also criticized Brennan’s subjective, intent-based standard for its failure to adequately protect prisoners.

In the context of women prisoners and access to adequate healthcare, academic articles and interest-group reports have focused on the practice of shackling pregnant inmates during transportation, court appearances, and labor. As one scholar noted, in addition to calling attention to a disturbing practice in women’s prisons, this focus on shackling has helped highlight how a facially gender-neutral administrative regulation can impose “gender-specific indignities” on women prisoners. This discussion, however, has not yet translated into a “broader appreciation for the challenges and constraints encountered by incarcerated pregnant women and birthing mothers.” Nor has it led to an analysis of the gendered barriers all women prisoners encounter when they seek reproductive healthcare.

Given Chief Justice Earl Warren’s assertion that the Eighth Amendment must draw its meaning from “evolving standards of decency,” it would seem to follow that women prisoners should be entitled to today’s standard for women’s reproductive healthcare. Yet, as scholars and prison reform advocates agree, reproductive healthcare for women prisoners is far from meeting this

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77. See Ahrens, supra note 35, at 4 n.7, for an extensive review of the numerous articles and reports about shackling.

78. Id. at 5; see also Dana Sassman, Bound by Injustice: Challenging the Use of Shackles on Incarcerated Pregnant Women, 15 CARDozo J.L. & GENDER 477–78 (2009).

79. Ahrens, supra note 35, at 5.

80. Ocen argues that Eighth Amendment jurisprudence obscures the fact that race and gender are at the heart of prison practices like shackling and that a narrow, intent-based inquiry continues the myth of a “penology of racial innocence.” See Ocen, supra note 17, at 1275. She suggests that the Eighth Amendment should be read in light of the Thirteenth Amendment in order to uproot the racial subjugation at the center of penal practices in the United States. See id. My approach is similar to Ocen’s in that I argue for a gender and race-conscious critique of the Eighth Amendment jurisprudence itself rather than falling back on common explanations for women prisoners’ lack of access to adequate reproductive healthcare.

standard. Dominant explanations for this inadequate care suggest that the prison system was originally designed for men prisoners and has not adjusted to women prisoners. Other explanations posit that since prison officials believe that the incarceration experience should be as harsh as possible, “penal harm” has permeated the provision of healthcare within prisons.

Another line of reasoning suggests that the low quality of women prisoners’ reproductive healthcare reflects poor healthcare in prisons generally and a shortage of resources available to respond to the medical needs of women prisoners. This approach suggests that the practical realities of prisons contribute to inadequate women’s reproductive healthcare, including:

- limited resources, financial and otherwise, devoted to the medical care of all women prisoners; the dependence of these women on personnel for all their medical needs, no matter how minor; and the staggering demands women inmates place on correctional health care systems, seeking care at higher rates than men, and the failure of officials to plan accordingly.

This perspective suggests that reproductive healthcare inadequacies resulting from structural barriers to care within the prison system fall short of constitutional standards and thus “betray the ideals in the Constitution.”

Missing from these perspectives, however, is a closer examination of the constitutional standards at play. While resource limitations doubtlessly contribute to inadequate reproductive healthcare for women prisoners, limited resources within prisons cannot account for the barriers to justice women prisoners face in their attempts to bring claims under the Eighth Amendment for inadequate medical care. Scholars have recognized obstacles to bringing successful medical claims for women prisoners: the doctrine of qualified immunity, the requirement of a policy or practice of constitutional violations

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82. For a slightly different take on this consensus, see Ahrens, supra note 35, at 51, arguing that the kinds of experiences pregnant women have in prison are similar to the kinds of experiences pregnant women have outside of prison.

83. See, e.g., Chesney-Lind, supra note 8, at 79, 83 (noting that historically “little or no thought was given to the possibility of a female prisoner until she appeared at the door of the institution”).

84. See, e.g., Parker, supra note 34, at 264 (citing Michael S. Vaughn & Linda G. Smith, Practicing Penal Harm Medicine in the United States: Prisoners’ Voices from Jail, JUST. Q. 175, 176 (1999)).

85. See, e.g., Rachel Roth, Obstructing Justice: Prisons as Barriers to Medical Care for Pregnant Women, 18 UCLA WOMEN’S L.J. 79, 105 (2010).

86. See Parker, supra note 34, at 271.

87. Roth, supra note 85, at 105.

88. See Ahrens, supra note 35, at 31–32 (reviewing obstacles to lawsuits); Parker, supra note 34, at 282–84 (summarizing challenges raised by PLRA for women prisoners).

89. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (establishing and shielding public officials from liability for constitutional violations when the right in question is not clearly established).
before a municipality can be held liable,\textsuperscript{90} the intent-based standard of “deliberate indifference,”\textsuperscript{91} and the strict requirements of the Prison Litigation Reform Act (PLRA).\textsuperscript{92}

Here, I argue that at the root of these obstacles lies a fundamental flaw in Eighth Amendment jurisprudence: the requirement that women prisoners be similarly situated to men prisoners for the purposes of bringing inadequate medical care claims. As discussed above, the Estelle/Brennan standard requires a prisoner to demonstrate that her injury or deprivation was objectively sufficiently serious and that the subjective state of mind of the prison official was sufficiently culpable.\textsuperscript{93} In evaluating the objective prong, I argue, based on a review of federal case law, that courts cannot successfully compare a reproductive healthcare violation affecting women to a healthcare violation affecting men. When a comparison is unavailable, I argue that courts deny relief under the Eighth Amendment. Moreover, when evaluating the subjective prong, I argue, courts have been hesitant to find prison officials involved in reproductive healthcare to be deliberately indifferent. In other words, before a court will guarantee equal protection under the Eighth Amendment, it appears that women must be similarly situated to men.

As Catherine MacKinnon has noted, the Constitution’s requirement that “similarly situated” individuals be treated equally requires that women be like men in order to receive equal treatment under the law.\textsuperscript{94} This “assimilationist” approach to challenging sex inequality—rooted in challenges to racial discrimination—has been somewhat successful in situations where a woman seems more like a man, for instance, in elite employment situations.\textsuperscript{95} However, where the sexes are different and sexism does not look like racism, as is the case with sexual abuse or reproductive control, sex discrimination as a legal theory does not arise.\textsuperscript{96} The “similarly situated” assumption functions as a “white male standard in neutral disguise,” thus ensuring the continuation of dominance disguised as difference.\textsuperscript{97}

Explanations for the inadequate provision of healthcare in women’s prisons stem from women’s difference—the fact that they represent a unique minority in a penal system created for the prototypical man criminal and thus

\textsuperscript{90} See Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 694 (1978). Even when constitutional harm can be shown, suits against facilities and municipalities may be dismissed for failure to show a pattern or practice. \textit{Id.}
\textsuperscript{91} See Ocen, supra note 17, at 1284.
\textsuperscript{93} 511 U.S. 825, 834 (1994).
\textsuperscript{94} CATHERINE MACKINNON, WOMEN’S LIVES, MEN’S LAWS 127 (2005).
\textsuperscript{95} \textit{Id.} at 120.
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} \textit{Id.} at 127.
ill-equipped to take on the different needs of women prisoners. 98 I argue, however, that this view obscures the implicit sex discrimination and racism in the man-centric Eighth Amendment jurisprudence that allows inadequate reproductive healthcare—and the subordination of women, particularly women of color—to persist. The barriers to adequate reproductive healthcare are a reflection of the broader failure of the “similarly situated” standard to recognize women’s health needs and to guarantee women equal protection under the law. As I argue in the next Part, the systemic barriers inherent in such a requirement have important consequences for women prisoners seeking relief for inadequate medical treatment under the Eighth Amendment.

III.
LACKING IN SIMILARITY AND INTENSITY: REPRODUCTIVE HEALTHCARE AND BARRIERS TO RELIEF UNDER THE ESTELLE/BRENNAN STANDARD

Although most critiques of Eighth Amendment jurisprudence in the medical context have focused on the subjective element of the Court’s standard, 99 this Section argues that the implicit comparability or “similarly situated” requirement is evident in both prongs of the deliberate indifference standard: the objective requirement of a sufficiently serious medical need and the subjective requirement of deliberate indifference. Under the first prong, I argue that courts have been unwilling to recognize an objectively serious medical need or risk in the context of reproductive healthcare. Even when courts have recognized a sufficiently serious medical need, such as labor or childbirth, I argue, based on a review of the case law, that they have struggled to define and limit these serious medical needs, which ultimately results in an unprincipled analysis.

This struggle also impacts application of the second prong of the standard, as knowledge of a serious medical need depends on the existence of one. Moreover, knowledge of a serious risk of harm in the context of reproductive healthcare depends on whether the prison official knows of a condition that only affects women—knowledge which is clearly never required or expected in the context of a man prisoner’s claim of inadequate healthcare.

98. See, e.g., Chesney-Lind, supra note 8, at 79 (noting that historically “little or no thought was given to the possibility of a female prisoner until she appeared at the door of the institution”); Roslyn Muraskin, Disparate Treatment in Correctional Facilities, in WOMEN AND JUSTICE: IT’S A CRIME 329, 335 (Roslyn Muraskin, ed., 5th ed. 2012) (noting that medical services have been reduced for women prisoners due to the “presence of small numbers of women in men’s correctional facilities”); see also Roth, supra note 85, at 105 (noting that women prisoners seek medical care at higher rates than men prisoners).

99. See, e.g., Gutterman, supra note 76, at 395–99, 402–05 (critiquing the deliberate indifference standard and arguing that the Court has yielded too much to federalism and deference to prison officials); Park, supra note 76, at 409 (critiquing the knowledge requirement in Eighth Amendment jurisprudence); Ristroph, supra note 76, at 1357–60 (arguing that an intent-based theory of state action is inappropriate in the Eighth Amendment context).
To paint a broader picture of how these barriers to relief under the Eighth Amendment function in the context of litigation to create additional barriers for women prisoners, I will explore the application of the deliberate indifference standard in three reproductive health arenas: contraception and abortion, pregnancy, and breastfeeding.\textsuperscript{100}

\textbf{A. Contraception and Abortion}

Women prisoners, like all prisoners, retain their constitutional rights while incarcerated.\textsuperscript{101} The right to an abortion is rooted “in concepts of personal liberty guaranteed by the Fourteenth Amendment.”\textsuperscript{102} Although women prisoners have had moderate success in accessing contraception and abortion care under the Fourteenth Amendment, as discussed \textit{infra}, they have met substantial obstacles when attempting to frame contraception and abortion care as a “serious medical need” under the Eighth Amendment. This represents a critical blow to women prisoners’ practical access to abortion care because without Eighth Amendment protection, prisons cannot be required to pay for abortion services even if a circuit recognizes prisoners’ due process right to abortion care under the Fourteenth Amendment.\textsuperscript{103} Only a handful of circuit courts have considered a prisoner’s right to an abortion.\textsuperscript{104}

The first appellate case to consider a woman prisoner’s right to an abortion under the Eighth Amendment did find a serious medical need.\textsuperscript{105} In that case, the Third Circuit found that all pregnancy-related care constitutes a serious medical need under the Eighth Amendment, regardless of whether it is necessary to save a woman’s life.\textsuperscript{106} The panel reasoned that the need for a nontherapeutic abortion is a serious medical need where “denial or undue delay
in provision of the procedure will render the [woman’s] condition ‘irreparable.’”107

No other circuits have followed the Third Circuit’s holding that pregnancy on its own presents a serious medical need. In 2004, the Fifth Circuit upheld a restrictive, unwritten jail policy requiring women prisoners to obtain a judicial order before receiving an abortion.108 A woman prisoner in a Louisiana jail was unable to obtain a court order and was released too late to legally access an abortion in the state.109 The panel did not consider whether access to abortion care constituted a serious medical need.110 Instead, the panel upheld the district court’s finding that the jail’s policy was reasonably related to security and liability concerns, and therefore placed a legitimate constraint on women’s abortion rights.111

Although the Fifth Circuit did not consider whether an abortion constitutes a serious medical need, the district court did address this issue.112 The district court considered and rejected the plaintiff’s Eighth Amendment claim by removing a non-emergency abortion from the realm of medical conditions: “An elective abortion sought for non-medical reasons such as the one at issue in this case is simply lacking in similarity and intensity to the other medical conditions that have been found to be serious medical needs under the Eighth Amendment.”113 An abortion could possibly become a medical need, the district court reasoned, if it was necessary to save the prisoner’s life.114

Most recently, the Eighth Circuit considered a Missouri Department of Corrections policy that prohibited all women inmates in state prisons from pursuing elective, non-therapeutic abortions.115 A pregnant prisoner unable to obtain an abortion challenged the policy on behalf of herself and other prisoners under the Fourteenth Amendment and the Eighth Amendment.116 The Eighth Circuit upheld a district court opinion finding the policy violated the prisoners’ Fourteenth Amendment right to an abortion by “completely eliminating” access to care.117 Under this analysis, however, it held that the Department of Corrections was not required to cover the cost of prisoners’ abortion care.118 The panel flatly rejected the district court’s holding that an

107. *Id.*
109. She ended up having a cesarean surgery and placing the baby for adoption. Roth, *supra* note 85, at 91.
110. *Id.* at 486–89 (finding all of the *Turner* factors to favor the prison).
111. *Id.* (emphasis added).
112. *Id.*
113. *Id.* at 486.
114. *Victoria W.*, 369 F.3d at 486.
115. *Roe v. Crawford*, 514 F.3d 789, 792 (8th Cir. 2008)), *reh’g en banc denied*, no. 06-3108 (8th Cir. Feb. 27, 2008).
117. *Roe*, 514 F.3d at 797 (applying the *Turner* factors and ruling in the prisoners’ favor).
118. *Id.* at 800.
“elective” abortion is a serious medical need protected by the Eighth Amendment. The Eighth Circuit reasoned: “Logically, if a procedure is not medically necessary, then there is no necessity for a doctor’s attention.”

A woman recently argued that delay in the administration of emergency contraception amounted to deliberate indifference to a serious medical need under the Eighth Amendment. The plaintiff reported to police that she was raped. After realizing that the plaintiff had an outstanding warrant, the responding officer arrested her. During the plaintiff’s incarceration, the medical provider at the county jail, on the basis of religious beliefs, refused to administer the second anti-contraception pill as the plaintiff’s doctor directed. The Florida district court reasoned that the plaintiff was delayed medical care, rather than denied it, and that she had not suffered any physical injury as a result of the delay. The court did not specify whether a pregnancy resulting from the delay would have constituted a “physical injury.” The need for emergency contraception on its own, however, did not count as a serious medical need. The court also rejected the plaintiff’s Equal Protection claim, finding that no action was taken against her because of her sex.

Taken together, these cases illustrate how the similarly situated requirement presents a substantial barrier to justice in the context of abortion and contraception. The gender-neutral language of the Estelle/Brennan standard is indeed susceptible to the Eighth Circuit’s reading of what constitutes a serious medical need, especially when considered in light of the Supreme Court’s holding that discrimination on the basis of pregnancy does not constitute discrimination on the basis of sex. Finding abortion or contraception incomparable to any other serious medical needs—thus removing abortion and contraception from the realm of medical needs altogether—serves to “other” women’s reproductive healthcare needs and to remove them from Eighth Amendment scrutiny.

119. Id. at 799.
120. Id. (emphasis in original).
122. Id. at 1300.
123. Id.
124. Id.
125. Id. at 1302.
126. Id.
127. Id.
B. Pregnancy

Pregnant prisoners face an array of health care challenges. Litigation has been brought in the wake of grossly inadequate, sometimes “sickening” treatment. This Section highlights cases to show how the similarly situated standard hinders women prisoners’ access to justice in the wake of inadequate care during pregnancy and delivery. In successful claims brought by women prisoners for inadequate pregnancy care, the defendants in question have usually exhibited extreme indifference to the pregnant plaintiff, bordering on inaction, for the very purpose of causing pain for the pregnant plaintiff. This heightened standard more closely resembles the standard for claims of excessive force than the deliberate indifference standard for inadequate medical treatment claims. In cases where the defendants do not appear to meet this heightened standard, courts have been reluctant to find liability under the Eighth Amendment.

Without a ready comparison to a man’s condition, courts have struggled to define when pregnancy constitutes a serious medical need. Even when courts recognize a serious medical need, they struggle to evaluate whether a defendant could have known that this need existed. In Webb v. Jessamine

129. See Parker, supra note 34, at 265 (reviewing the specific needs of pregnant inmates).
130. See White v. McMillin, No. 3:09CV120-DPJ-FKB, 2010 WL 2683033, at *3 (S.D. Miss. July 2, 2010) (calling the facts of the case “sickening” if true, where guards told a woman prisoner who had miscarried twins to flush the fetuses down the toilet, but granting summary judgment to defendant county sheriff who was not deliberately indifferent to a serious medical need by not providing training to guards on appropriately responding to pregnant inmates).

131. Because other papers have discussed shackling in depth, I will not evaluate those cases here. Notwithstanding this omission, a comparability standard may have impacted shackling cases. In Brawley v. Washington, 712 F. Supp. 2d 1208, 1221 (W.D. Wash. 2010), the court concluded that the right to not be shackled during labor was clearly established at the time of the plaintiff’s suit in large part because the Supreme Court had held that shackling a male inmate to a post, despite the absence of an emergency situation, violated the Eighth Amendment as interpreted in Hope v. Pelzer, 536 U.S. 730 (2002). The court was unwilling to conclude that the defendant officer had to have known that the plaintiff was in labor when she shackled her to the bed, despite the fact that the plaintiff had received an epidural. Brawley, 712 F. Supp. 2d at 1220. It was, therefore, left to a fact finder to determine whether the defendant was deliberately indifferent to the plaintiff’s need. Id.

132. See, e.g., Doe v. Gustavus, 294 F. Supp. 2d 1003, 1006, 1010 (E.D. Wis. 2003) (refusing to grant summary judgment for nurse and security guard defendants, where plaintiff who was left to deliver her baby alone alleged that the defendants placed her in segregation, called her a “dumb bitch,” and ignored her cries for help for the purpose of causing her suffering). Ironically, the extreme nature of the situation led the court to conclude that the plaintiff’s ordeal was an anomaly and did not demonstrate a need for better training for guards and staff. See also Archer v. Dutcher, 733 F.2d 14 (2d Cir. 1984) (holding that if the prison delayed emergency medical care to a pregnant plaintiff for the purpose of making her suffer, plaintiff had stated a claim for deliberate indifference).

133. See Hudson v. McMillan, 503 U.S. 1, 4–5, 7 (1992) (holding that prison guards must balance the need to restore discipline with the risk of harm resulting from the use of force and that the core inquiry in excessive force cases is whether force was applied in a good-faith effort to maintain order or “maliciously and sadistically to cause harm”).

134. See, e.g., White, 2010 WL 2683033, at *4.

County Fiscal Court. A nine-months pregnant prisoner gave birth to her
daughter in a holding cell after deputies ignored her statements that she was in
labor. Although all parties agreed that childbirth presented a serious medical
need, the defendants argued that a layperson could not discern a woman was in
labor until her water had broken (the rupture of a woman’s amniotic sac).

The court determined that evaluating whether labor presents a serious
medical need requires a fact-specific inquiry into an array of factors: the
amount of time left before a pregnant inmate reaches full term, commonly
known symptoms of labor (contractions and severe cramping, for example),
any previous complications with the prisoner’s pregnancy, and the reaction of
jail officials. The court distinguished the case from another Kentucky case in
which a prisoner was “only four to five months pregnant” and had experienced
no complications other than cramping. Despite finding that a serious medical
need existed, the court determined that the guard who approached the
plaintiff’s cell did not have the requisite knowledge to constitute deliberate
indifference because he was unaware that the plaintiff’s water had broken.

Another Georgia district court applied the Webb factors to determine that
a pregnant inmate in her second trimester—who was left to deliver her baby
alone in the bathroom and was not given medical care after the birth—did not
present a serious medical need prior to delivery. Because the medical staff
called emergency services after the baby was born, the defendants did not
demonstrate deliberate indifference when a serious medical need was
obvious.

If women are unable to obtain medical care due to prison officials’ failure
to recognize the symptoms of childbirth or pregnancy distress, then more
training should be mandated. Yet comparison also makes it extremely difficult
for women prisoners to succeed in challenging inadequate training of prison
staff. To succeed on a lack-of-training claim, courts require evidence of a
pattern of similar violations, and the inadequacy of training must be likely to
result in a constitutional violation. Without relevant history suggesting that
the training created a substantial risk of serious harm, defendants are not liable
for the inadequate response of their staff. As noted earlier, an estimated 4–10

136. Id.
137. Id. at 875–76.
138. Id. at 879.
139. Id.
140. Id.; see also Patterson v. Carroll Cty. Det. Ctr., No. 05-101-DLB, 2006 WL 3780552, at
143. Id.
144. See, e.g., Thompson v. Upshur Cty., 245 F.3d 447, 457 (5th Cir. 2001).
145. See id. at 463.
percent of women entering prison are pregnant.146 Because pregnancy is not comparable to a medical risks suffered by men prisoners, women who suffer inadequate healthcare during pregnancy are only able to look to a smaller group of prisoners to establish a pattern of similar violations, even where potential pregnancy complications may be relatively common.147 This pattern requirement can be avoided if the risks of not training officers are “highly predictable.”148 However, it appears that courts have been unwilling to use this reasoning, instead concluding that the risks of pregnancy complications after inadequate training are not obvious.149

Although professional guidelines do exist, courts have been unwilling to elaborate on the quality of prenatal care prisons are required to provide.150 It is thus unsurprising that forty-three states do not require medical examinations as a component of prenatal care, forty-one states do not require the provision of appropriate nutrition to pregnant incarcerated women, and forty-nine states fail to report all incarcerated women’s pregnancies and their outcomes.151 This absence of guidelines for women in prison is problematic in the pregnancy context, because, unlike an injury that may only require one or two doctor’s visits to treat, consistent treatment is necessary to ensure a safe pregnancy.

In California, for example, after a prison failed to administer group B streptococcus (GBS) testing to a pregnant prisoner, her baby died shortly after

146. Maruschak, supra note 39 (reporting that 5 percent of women said they were pregnant when they entered jail). But see Allen & Baker, supra note 39, at 103 (estimating that 8 to 10 percent of women entering prisons are pregnant and that those women spend an average of six to twelve months incarcerated after the birth of their children); see also Rebecca Project for Human Rights & Nat’l Women’s Law Ctr., supra note 39 (noting that most states do not even keep track of the number of births and pregnancies in prison).


A California district court found no Eighth Amendment violation because the prison had provided prenatal care “on the acute, as needed basis for complaints which arose during her pregnancy.” Although the prison doctor had not obtained the plaintiff’s records—which would have demonstrated that she had not been tested for GBS—the court found no deliberate indifference. The court compared the plaintiff’s condition to a Ninth Circuit case where prison guards confiscated a man inmate’s sling because they had not consulted his medical records from his previous placement. The Ninth Circuit found no deliberate indifference because although the prisoner’s treatment was “not as prompt or efficient as a free citizen might hope to receive,” he eventually received medical care that addressed his needs. Similarly, since the plaintiff had been given some care during her pregnancy, the court reasoned, there was no deliberate indifference to a serious medical need.

For women who have suffered miscarriages while incarcerated, at least one court appears to have required an additional showing of causation even when both elements of the Eighth Amendment medical standard are met. In Alabama, for example, a plaintiff who was pregnant when she was booked into a county jail started experiencing spotting and then heavy bleeding. The guard ignored her continuous requests for emergency attention and told her that if she did not stop complaining, he would send her to a state women’s prison because the county did not have the money to care for her pregnancy. By the time the plaintiff was finally released to an emergency room to obtain care, a pregnancy test indicated that she was no longer pregnant.

The court found that the plaintiff had met both elements of the deliberate indifference claim but nevertheless granted summary judgment to the defendants because of her failure to establish that the constitutional violation was the cause of her injury. As support for this requirement, the court cited another Eleventh Circuit case involving a pregnant prisoner who gave birth to a stillborn baby after the prison staff ignored amniotic fluid leakage for eleven days. In that case, the court found that the plaintiff showed that one of the

152. Horn, 2010 WL 1267363, at *1; GBS is a bacterium that occurs in 25 percent of pregnant women. It can have serious consequences for a newborn but is easily manageable. Testing for pregnant women is now routine. See AM. PREGNANCY ASS’N, supra note 147.
154. Id.
155. Id. (citing Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990)).
156. Wood, 900 F.2d at 1334.
159. Id.
160. Id. at 1128.
161. Id. at 1127.
162. Id. at 1133. The court also granted summary judgment to the defendant on her Equal Protection claim because there was no evidence that the actions taken against her were because of sex. Id.
163. Goebert v. Lee Cty., 510 F.3d 1312, 1316 (11th Cir. 2007).
prison officials acted with deliberate indifference in delaying access to treatment but held that a question remained for the jury as to whether the delay caused the death of the plaintiff’s child.\textsuperscript{164} Requiring an additional showing of causation in the case of miscarriage does not appear to be appropriate under the Eighth Amendment standard for medical indifference claims. Instead, it seems more similar to the causation requirement for challenges to unconstitutional prison conditions, which requires proof of a causal link between the conditions of confinement and a plaintiff’s injuries.\textsuperscript{165}

Although the comparability requirement may not be as obvious in the pregnancy context as it is in the abortion context, it nevertheless hinders women inmates from accessing justice for inadequate care during pregnancy and birth. As these cases demonstrate, the comparability requirement affects the objective component of the standard by complicating the establishment of a serious medical need. Courts are unlikely to find deliberate indifference to a specific pregnancy need—like testing for GBS—where any care was provided, no matter how inadequate. They are hesitant to find deliberate indifference in the absence of something close to maliciousness or the intention to prolong suffering. This unwillingness seems to be rooted in the notion that pregnancy is a special circumstance, one less obvious than other medical afflictions. As in the abortion context, pregnancy is removed from the realm of “normal” medical conditions—with potentially devastating results for pregnant prisoners and their babies.

\textbf{C. Breastfeeding}

Pediatricians,\textsuperscript{166} public health advocates,\textsuperscript{167} and the federal government\textsuperscript{168} encourage new mothers to breastfeed their infants.\textsuperscript{169} Yet, very few prisons

\begin{itemize}
\item \textsuperscript{164} Id.
\item \textsuperscript{165} See, e.g., LaMarca v. Turner, 995 F.2d 1526, 1534–35 (11th Cir. 1993) (finding a causal link between the unsafe conditions at a prison and the sexual assaults suffered by a male prisoner); see also Monell v. Dep’t of Soc. Servs. of City of N.Y., 436 U.S. 658, 694 (1978) (holding that a local government cannot be sued under Section 1983 simply for the actions of its employees but may only be sued for an injury inflicted by its policy or custom).
\item \textsuperscript{168} Making the Decision to Breastfeed, OFF. ON WOMEN’S HEALTH, http://www.womenshealth.gov/breastfeeding/breastfeeding-benefits.html [https://perma.cc/7PBC-KD85].
\item \textsuperscript{169} Though less has been done to accommodate women’s decisions to breastfeed. See Cynthia Colen, \textit{Most Women Can’t Afford to Breastfeed}, N.Y. TIMES (May 22, 2014), https://www.nytimes.com/roomfordebate/2014/05/22/the-politics-of-breastfeeding/most-women-cant-afford-to-breastfeed [https://perma.cc/AV73-ZK34].
\end{itemize}
allow women inmates to breastfeed or provide them with breast pumps to supply milk to their babies.\textsuperscript{170} Scholars have rarely discussed access to breastfeeding in the Eighth Amendment context. As in the context of abortion, the courts that have addressed this issue have largely removed breastfeeding from the realm of serious medical needs.\textsuperscript{171} For example, in an early case addressing a prisoner’s claim that the state preventing her from breastfeeding her son interfered with her fundamental right to privacy, the Fifth Circuit did not consider breastfeeding to constitute a medical need for either the prisoner or her newborn son.\textsuperscript{172} Rather, the court characterized the denial of a prisoner’s request to breastfeed as a necessary curtailment of a parental right.\textsuperscript{173} The court found breastfeeding to be “fundamentally inconsistent with . . . the objectives of incarceration” and ruled that penological interests justified denying a fundamental right to breastfeed.\textsuperscript{174}

The Sixth Circuit most recently considered an Eighth Amendment challenge to a denial of a breast pump in Villegas v. Metropolitan Government of Nashville.\textsuperscript{175} The Sixth Circuit rejected the plaintiff’s claim, finding no serious medical need, reasoning that because the breast pump was only provided by the hospital and not prescribed, the breast pump did not qualify as a serious medical need.\textsuperscript{176} The panel held that the need for a breast pump had to be “so obvious that even a lay person [sic] would easily recognize the necessity for a doctor’s attention” in order to qualify as a serious medical need.\textsuperscript{177}

The Sixth Circuit distinguished the plaintiff’s need for a breast pump from the successful medical indifference claims of two men prisoners that the district court below had relied upon to grant summary judgment to the plaintiff.\textsuperscript{178} In one case, a prison denied an inmate medicine and a high-protein diet after a Hepatitis-C diagnosis; in the other case, a prison denied bandage changes and

\begin{footnotes}
\item[\textsuperscript{171}] See, e.g., Villegas v. Metro. Gov’t of Nashville, 709 F.3d 563, 579 (6th Cir. 2013); Southerland v. Thigpen, 784 F.2d 713, 716 (5th Cir. 1986) (citing Hudson v. Palmer, 468 U.S. 517 (1984)); see also Doug Schneider, Wisconsin Woman Complains She Wasn’t Allowed to Breastfeed in Jail, GREEN BAY WIS. GAZETTE (Mar. 3, 2014, 8:54 AM) (sheriff at jail that denied breast pump to woman who was incarcerated on contempt of court charges related to traffic case characterized breast pumping as a “privilege[“]).
\item[\textsuperscript{172}] \textit{Southerland}, 784 F.2d at 716.
\item[\textsuperscript{173}] \textit{Id}.
\item[\textsuperscript{174}] \textit{Id}. (quoting \textit{Hudson}, 468 U.S. at 522); see also Berrios-Berrios v. Thornburg, 716 F. Supp. 987, 990 (E.D. Ky. 1989) (practicalities legitimately prevent storage of expressed breast milk, because at any given time, fifty of 1,300 female inmates are pregnant).
\item[\textsuperscript{175}] 709 F.3d at 579.
\item[\textsuperscript{176}] \textit{Id}.
\item[\textsuperscript{177}] \textit{Id}. (internal quotations and citations omitted).
\item[\textsuperscript{178}] \textit{Id}.
\end{footnotes}
medicine to an inmate recovering from a gunshot wound. For these men prisoners, the Sixth Circuit reasoned, it was clear that a “medical professional formally mandated a treatment plan,” while in the case of the postpartum plaintiff, her need for a breast pump was not so obvious. At least one other district court used similar reasoning to deny a breast pump to a lactating prisoner. As in the abortion context, the incomparable nature of women prisoner’s medical needs serves to “other” those needs and place them outside the purview of the Eighth Amendment.

IV.
BEYOND GENDER-BLIND (IN)JUSTICE: RESEARCH, POLICY, AND DOCTRINE

Women prisoners do not enjoy a right to adequate reproductive healthcare. When seeking relief under the Eighth Amendment, women often encounter gendered barriers in the guise of a gender-neutral legal standard. What needs to be done to address women prisoners’ unequal access to justice? To start, further research will bring this problem into full focus. At this time, state prisons and jails are not required to keep records of the number or outcomes of incarcerated births. Indeed, there is currently no uniform system for keeping track of women prisoners’ health outcomes. Further research will reveal the number of incarcerated women who experience pregnancy or a birth, are able to breastfeed their newborns, and are able to access adequate preventive care and birth control. Without a uniform mandatory system for tracking women prisoners’ health outcomes, a comprehensive understanding of healthcare barriers in prison is impossible.

Scholars and activists have called for federal and state policies to ban certain practices, such as shackling, for women prisoners. Even more important for women prisoners, however, would be the enactment of federal

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179. Id.; see Boretti v. Wiscomb, 930 F.2d 1150, 1151 (6th Cir. 1991); Byrd v. Wilson, 701 F.2d 592, 594–95 (6th Cir. 1983).
180. Villegas, 709 F.3d at 579.
182. See REBECCA PROJECT FOR HUMAN RIGHTS & NAT’L WOMEN’S LAW CTR., supra note 39, at 16 (presenting data that indicates most states do not keep track of the number of births and pregnancies in prison); see also Victoria Law, ‘What We Do to Women Behind Bars’: A Q & A with ‘Jailcare’ Author Dr. Carolyn Sufrin, REWIRE (June 2, 2017), https://rewire.news/article/2017/06/02/women-behind-bars-qa-jailcare-author-dr-carolyn-sufrin [https://perma.cc/6PBR-N2ME] (noting that there is a lack of data on health outcomes for women in prison and detailing Sufrin’s project to collect data from prisons and jails on pregnant prisoners and their outcomes).
184. See, e.g., Dishchyan, supra note 37, at 161.
and state laws requiring the proactive provision of adequate healthcare. Professional standards exist to guide lawmakers, yet courts do not appear to have found these guidelines on their own to be persuasive. State and federal laws requiring adequate reproductive healthcare for women prisoners would make it clear to reviewing courts that women’s reproductive health needs constitute serious medical needs. These laws would also put prison officials on notice, thus limiting the chance of escaping liability under qualified immunity. Affirmative requirements would likely present increased costs for prisons, which could in turn motivate states and localities to consider alternatives to incarceration. Alternatives to incarceration, such as family-based treatment, could be effective for women, especially those who are parenting and have committed non-violent offenses. State and federal policy makers could play an important role in creating incentives for localities to develop alternative programs.

A first step to challenge and eventually change Eighth Amendment doctrine itself is to reject the gender-blind approach and bring to the fore the doctrinal barriers women prisoners face. By reviewing the cases above, I’ve attempted to illustrate the barriers women prisoners face under the current Eighth Amendment standard for inadequate medical care claims. To my knowledge, however, no comprehensive study has been conducted to compare the outcomes of inadequate medical care claims brought by women and men prisoners. A holistic understanding of how men and women prisoners fare under the Eighth Amendment would be valuable in illustrating the impact of gendered barriers for reviewing courts.

Women and men prisoners are similarly situated because they are incarcerated by the state. Women should not have to convince a court that their injuries are similar to one a man could sustain in order to obtain relief. Moreover, another doctrinal improvement would be the removal of a causation requirement in the Eighth Amendment context. Once it is determined that a prison official has acted with deliberate indifference to a woman prisoner’s serious medical need, this finding should be sufficient to establish an Eighth Amendment violation. As in the First Amendment context, the loss of the right to be free from inadequate medical treatment, even for a minimal amount of time, should be sufficient to establish an injury under the Eighth Amendment.

185. Texas recently enacted a law requiring sheriffs to report policies regarding treatment of pregnant women. See H.B. 1140, 84(R) Leg. Sess. (Tex. 2015) (codified at TEX. GOV’T CODE § 511.0103 (West 2017)).

186. See, e.g., Horn v. Hornbeak, No. CV F 08-1622 LJO DLB, 2010 WL 1267363, at *15 (E.D. Cal. Mar. 31, 2010) (finding no Eighth Amendment violation in failure to administer GBS test to pregnant prisoner despite the fact that such testing is now routine). See AM. PREGNANCY ASS’N, supra note 147.

187. See REBECCA PROJECT FOR HUMAN RIGHTS & NAT’L WOMEN’S LAW CTR., supra note 39, at 12.

188. More research is necessary on the outcomes of men and women prisoners’ Eighth Amendment claims.
A prisoner who has suffered inadequate healthcare should not be forced to establish that a prison official’s deliberate indifference was the ultimate cause of a poor health outcome, such as a miscarriage.

Another strategy to ensure access to adequate reproductive healthcare for women could be an Equal Protection challenge. To be sure, there is a concern that a “vengeful equity” attitude toward women prisoners could result in lower standards for women prisoners to make them equal to standards for men. Yet, advocates should not disregard an Equal Protection challenge in the context of women prisoners’ access to reproductive healthcare. The implicit comparability and formal equality requirement of the current Eighth Amendment standard makes it more difficult for women prisoners to access justice when they cannot effectively compare their injuries or medical needs to ones that a man prisoner may sustain. An Equal Protection challenge to unequal healthcare provision to women and men prisoners presents an opportunity to explicitly characterize women and men prisoners as similarly situated because of their shared status, regardless of the type of medical care that they require. Without challenging the result of the current Eighth Amendment standard, holding women’s prisons accountable for constitutionally inadequate healthcare will continue to be difficult.

CONCLUSION

In a country that cannot seem to slow the mass incarceration of its residents, women prisoners are an increasingly common part of the carceral landscape. Women prisoners are overwhelmingly nonviolent and poor, and they are often desperately in need of adequate medical care. For too long, courts have used the differences between women and men prisoners as an excuse for the continuing inadequacy of healthcare in women’s prisons. This Note challenges the commonly held assumption that women prisoners continue to receive inadequate healthcare because they are women in a prison system designed for men. Rather, the doctrine that should provide them access to justice and provide an incentive for prisons to provide constitutionally adequate healthcare has failed. The Eighth Amendment’s “deliberate indifference standard,” while gender neutral on its face, implicitly requires comparability with men’s injuries and medical conditions before guaranteeing equal treatment.

I do not suggest that women should be given “special treatment”; however, the broader constitutional framework—which creates differences and enforces social control on the basis of those differences—is hard at work within


the Eighth Amendment jurisprudence. It is time for society to recognize and break down the barriers to justice for women prisoners seeking constitutionally adequate reproductive healthcare.