

THE FAILURE TO PROTECT PREGNANT PRETRIAL
DETAINEES: THE POSSIBILITY OF CONSTITUTIONAL
RELIEF IN THE SECOND CIRCUIT UNDER A
FOURTEENTH AMENDMENT ANALYSIS

Joella Adia Jones*

Pregnant individuals face substantial risks of serious harm when detained while awaiting trial. Women and girls make up the fastest-growing population of incarcerated people in the United States. Disproportionately of color, many of these women and girls are confined pretrial simply because they cannot afford cash bail.

*In 2015, the Supreme Court held in *Kingsley v. Hendrickson* that a pretrial detainee's failure to protect claim should be governed by an objective deliberate indifference standard rather than the subjective standard applied to convicted prisoners asserting Eighth Amendment violations. In *Darnell v. Pineiro*, the Second Circuit extended the objective deliberate indifference standard for pretrial detainee failure to protect claims beyond *Kingsley's* context of excessive force.*

*This Note considers how the Second Circuit's holding in *Darnell v. Pineiro* may provide a relief framework for pregnant pretrial detainees suffering Fourteenth Amendment violations. It is impossible for pregnant detainees to be protected from substantial risks of serious harm while detained. Applying an objective deliberate indifference standard should result in successful failure to protect claims brought by pregnant pretrial detainees in the Second Circuit.*

* J.D. Candidate at Columbia Law School, expected May 2020. Thank you to the *Columbia Journal of Race and Law* staff, especially Geanette Foster and Gelsey Beaubrun, for providing such thoughtful guidance during this process. For comments, conversations, patient encouragement, and inspiration, I am grateful to Professor Mark Barenberg. Thank you to Professor Brett Dignam, for teaching me everything about absolutely everything and for the opportunity to challenge the consequences of mass incarceration. And to my husband Jason and our dog Chico, for their love.

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I. INTRODUCTION

All women deserve to have a safe and dignified pregnancy.¹ Unfortunately, being pregnant in the United States while detained irreparably limits a person's ability to have a healthy pregnancy free of the dehumanizing and medically hazardous barriers that confinement schemes systematically impose on women in prison and in jail.² Over the last forty years, the population of incarcerated women in the United States has grown by more than 830%,³ from 26,378 in 1980 to 225,060 in 2017.⁴

The American carceral system ensnares Black women disproportionately.⁵ Black women are also, indiscriminate of socio-

¹ This Note will use the terms “women,” “female,” and “mother” to refer to individuals who are or have at some point been pregnant. Not every person with a uterus in prison or jail identifies as female (many identify as transgender, intersex, or gender non-conforming individuals). However, data and documentation about gender identity is sparse and difficult to access. Because the cases, studies, and scholarship relied on in this Note primarily refer to people who identify with the pronouns she/her/hers, this Note will use those pronouns and the terms “women,” “female,” and “mother” when referring to individuals who are pregnant.

² See Barbara A. Hotelling, *Perinatal Needs of Pregnant, Incarcerated Women*, 17 J. PERINATAL EDUC., 37, 37–44 (2008) (examining how pregnant prisoners have health care needs that are minimally met by prison systems).

³ ROBIN STEINBERG, *How Cash Bail Hurts Poor Women – And What We Can Do About It*, MS. MAG. (Aug. 13, 2019), <https://msmagazine.com/2019/08/13/women-dont-belong-in-the-criminal-justice-system/>.

⁴ *Fact Sheet: Incarcerated Women and Girls, 1980 – 2017*, THE SENTENCING PROJECT (June 6, 2019), <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Womenpublications/incarcerated-women-and-Girls.pdf.girls/>.

⁵ Connor Maxwell & Danyelle Solomon, *Mass Incarceration, Stress, and Black Infant Mortality: A Case Study in Structural Racism*, CTR. FOR AM. PROGRESS (June 5, 2018), <https://www.americanprogress.org/issues/race/reports/2018/06/05/451647/mass-incarceration-stress-black-infant-mortality/> (“[T]he spike in female incarceration has disproportionately affected black women, especially young black women. While black women overall are twice as likely to be imprisoned as their white counterparts, black women ages 18 to 19 are three times more likely to be imprisoned than their white counterparts. If current incarceration trends continue, 1 in 18 black women will be

economic or detainment status, more than three times as likely to die from pregnancy related complications than non-Hispanic White women.⁶ In May of 2019, a Centers for Disease Control and Prevention report released data that confirmed what health care providers and activists across the country have long recognized: that “significant racial/ethnic disparities in pregnancy-related mortality exist.”⁷ Falling victim to a particularly pernicious mythology that degrades Black motherhood,⁸ Black women are more likely to die from preventable pregnancy-related complications than White women.⁹ For Black pregnant women in prisons and jails, these health inequities are irrefutably compounded.¹⁰

As outlined in the seminal scholarship of Dorothy Roberts, racist ideology in America paints Black reproduction as a “form

imprisoned at some point in their lifetime.”); Jamal Hagler, *6 Things You Should Know About Women of Color and the Criminal Justice System*, CTR. FOR AM. PROGRESS (Mar. 16, 2016), <https://www.americanprogress.org/issues/criminal-justice/news/2016/03/16/133438/6-things-you-should-know-about-women-of-color-and-the-criminal-justice-system/>.

⁶ Emily E. Peterson et al., *Vital Signs: Pregnancy-Related Deaths, United States, 2011–2015, and Strategies for Prevention, 13 States, 2013–2017*, U.S. DEP’T OF HEALTH AND HUMAN SERVS./ CTRS. FOR DISEASE CONTROL AND PREVENTION (May 10, 2019).

⁷ *Id.* at 423.

⁸ See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND MEANING OF LIBERTY* 8 (2d ed. 2017) (reflecting on the state of reproductive freedom in America and arguing that the legacy of punishing Black motherhood continues with the cruel and devaluing treatment of pregnant mothers in prisons and jails).

⁹ U.S. DEP’T OF HEALTH AND HUM. SERVS./ CTRS. FOR DISEASE CONTROL AND PREVENTION, *Racial and Ethnic Disparities Continue in Pregnancy-Related Deaths - Black, American Indian/Alaska Native women most affected* (Sept. 5, 2019), <https://www.cdc.gov/media/releases/2019/p0905-racial-ethnic-disparities-pregnancy-deaths.html>.

¹⁰ Maxwell & Solomon, *supra* note 5, at 4 (“According to the U.S. Bureau of Justice Statistics, 4 percent of women in federal prison and 3 percent of women in state prison are pregnant at the time of incarceration. For these women, negligent correctional procedures can produce high levels of stress and exacerbate pregnancy-related mental health disorders, which are already disproportionately experienced by black women.”).

of degeneracy,” perpetuating the myth that Black mothers transmit inferior physical traits and damage their babies *in utero* because of reckless habits during pregnancy.¹¹ While the modern movement for reproductive justice has gained mainstream visibility,¹² the goals of reproductive freedom, health equity, and racial justice have yet to be realized.¹³

The practice of shackling pregnant women is one of the most glaringly dehumanizing abuses women in American prisons and jails endure.¹⁴ The use of restraints on women during pregnancy, labor, childbirth, and the recovery period “poses serious health risks to both mother and baby that increase with each advancing stage of pregnancy.”¹⁵ Enacted in December of 2018, The “First Step Act” specifically prohibits the shackling of pregnant prisoners; however, the bill only applies to individuals in federal custody.¹⁶ Although states across the country have also begun to reform their policies regarding the shackling of pregnant prisoners and detainees,¹⁷ twenty states still permit shackling and the use of

¹¹ *Id.* at 9.

¹² The history of women of color organizing for reproductive freedom in the United States has a long and distinct history. Organizations including SisterSong Women of Color Reproductive Justice Collective, SPARK Reproductive Justice NOW, the Black Women’s Health Imperative, and the Trust Black Women Partnership have worked to advance what is now commonly known as “reproductive justice.” ROBERTS, *supra* note 8, at xv-xix. The reproductive justice platform is grounded in the human right to have a child, the right to not have a child, and the right to raise children in safe and sustainable communities. *What is Reproductive Justice?*, SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE, <https://www.sistersong.net/reproductive-justice> (last visited Apr. 15, 2020).

¹³ ROBERTS, *supra* note 8, at xix. *See also* Jael Silliman et al., *Undivided Rights: Women of Color Organize for Reproductive Justice* (2004).

¹⁴ Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239 (2012).

¹⁵ *End the Use of Restraints on Incarcerated Women and Adolescents during Pregnancy, Labor, Childbirth, and Recovery*, AM. PSYCHOLOGICAL ASSOC. (2017), [hereinafter APA].

¹⁶ First Step Act of 2018, § 2 Pub. L. No. 115-391, 132 Stat. 5194 (2018).

¹⁷ ARIZ. REV. STAT. ANN. § 31-601 (2012); CAL. PENAL CODE § 3407 (West 2013); COLO. REV. STAT. § 17-1-113.7 (2011); DEL. CODE ANN. tit. 11, § 6603

restraints on incarcerated women during pregnancy, childbirth, and the postpartum period.¹⁸

The perinatal shackling of incarcerated women is a particularly abhorrent practice that increases stress and jeopardizes birth outcomes for women inside.¹⁹ This Note, however, is focused on the substantial risk of serious harm that all forms of government detention pose to pregnant people, no matter the stage of pregnancy or if the pregnant person has been shackled. Recent shifts in the deliberate indifference standard for 42 U.S.C. § 1983 failure to protect claims in the Second Circuit,²⁰ developing procedural arguments for habeas class actions, and current advances

(2012); D.C. CODE § 24-276.02 (2015); FLA. STAT. § 944.241 (2012); HAW. REV. STAT. § 353-122 (2011); IDAHO CODE § 20-901 (2011); 55 ILL. COMP. STAT. 5/3-15003.6 (2018); LA. STAT. ANN. § 15:744.3 (2012); ME. STAT. tit. 34-A, § 3102 (2015); Md. Code Ann., Corr. Servs. § 9-601 (West 2014); MASS. GEN. LAWS ch. 127, § 118 (2014); MINN. STAT. § 241.88 (2015); N.M. STAT. ANN. § 33-1-4.2 (2009); N.Y. CORRECT. LAW § 611 (2016); 61 PA. CONS. STAT. § 5905 (2010); 42 R.I. GEN. LAWS § 42-56.3-3 (2011); TEX. GOV'T CODE ANN. § 501.066 (WEST 2009); VT. STAT. ANN. tit. 28, § 801a (2005); WASH. REV. CODE § 72.09.651 (2010); W. VA. Code § 31-20-30a (2010).

¹⁸ APA, *supra* note 15. See also Ginette G. Ferszt et al., *Where Does Your State Stand on Shackling of Pregnant Incarcerated Women*, 22 NURSING FOR WOMEN'S HEALTH 17, 18 (2018) (explaining that states vary in their anti-shackling legislation. Some states ban the use of shackles during transportation to and from medical facilities, during labor and delivery, and during the immediate postpartum period. Other states only ban shackling during labor and delivery. Moreover, it is incredibly difficult to monitor how laws and regulations are being implemented in each state due to a lack of uniformity in reporting requirements and data collection).

¹⁹ APA, *supra* note 15.

²⁰ See discussion *infra*, Sections I.A., B. See also Kyla Magun, *A Changing Landscape for Pretrial Detainees? The Potential Impact of Kingsley v. Hendrickson on Jail-Suicide Litigation*, 116 COLUM. L. REV. 2059, 2060 (2016) (“In 2015, the Supreme Court held in *Kingsley v. Hendrickson* that an objective, rather than subjective, standard applies to determine whether an official’s use of force against a pretrial detainee was excessive—a lesser standard than the subjective standard used for convicted prisoners.” Magun also examines “how the *Kingsley* decision and the Court’s emphasis that intent is not required for an act to be considered punishment might impact a pretrial detainee’s failure to protect and serious-medical-needs claims.”).

in bail reform underscore how meaningful relief in this realm might take shape.

The Second Circuit has developed a strong tradition of social justice litigation,²¹ and New York City is home to a large number of notable public interest organizations focused on civil rights.²² According to average daily jail census (ADC) figures, 9,148 people were housed in New York City jails in 2017, 7,048 of whom had not yet been sentenced.²³ New York also has one of the largest prison systems in the country: the New York State Department of Corrections and Supervision.²⁴ This massive system, combined with an active social justice lawyering community and an array of nationally recognized nonprofit and public interest organizations, creates a ripe environment for prisoners' rights claims to be brought in the Second Circuit.

Conditions of confinement claims have now been recognized in a broad range of contexts. Initially, lawsuits were based on the Eighth Amendment's prohibition of "cruel and unusual punishment."²⁵ Because pretrial detainees have yet to be convicted, the

²¹ Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2089 (2014) ("[S]ocial-justice litigation seeks change on the ground, usually through ending a harmful practice or enjoining enforcement of a discriminatory law... [S]ome [social justice-litigation arguments] ask decisionmakers to revisit and unsettle deeply rooted or widespread social norms or practices. That is, they not only seek a desired practical outcome but also aim to shift a court's conceptualization of the problem at issue.").

²² Matthew Diller & Alexander A. Reinert, *The Second Circuit and Social Justice*, 85 FORDHAM L. REV. 73, 73–74 (2016) (discussing the Second Circuit's reputation for breaking ground on social justice issues, the richness of the legal community, and various national public interest organizations based in New York City (including the American Civil Liberties Union (ACLU) and the NAACP Legal Defense Fund)).

²³ *New York State Jail Population 10 Year Trends: 2008-2017*, N.Y. STATE DIV. OF CRIM. JUST. SERVS. (Sept. 10, 2018), http://www.criminaljustice.ny.gov/crimnet/ojsa/jail_pop_y.pdf.

²⁴ Diller & Reinert, *supra* note 22, at 85.

²⁵ U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

Second Circuit has joined other circuits in taking the position that pretrial detainees have constitutional rights equal to those asserted by convicted prisoners under the Cruel and Unusual Punishment Clause of the Eighth Amendment.²⁶ Pretrial detainees' allegations of unconstitutional conditions of confinement alleging Fourteenth Amendment violations may be brought as failure to protect claims based on a standard of deliberate indifference.²⁷

This Note focuses specifically on pregnant pretrial detainees and the serious harms pregnant women are subject to when detained while awaiting trial.²⁸ This Note argues that the Second Circuit's objective reading of the subjective prong (or mens rea prong) of the deliberate indifference test for pretrial detainees softens the standard,

²⁶ See, e.g., *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017) ("A pretrial detainee's claims of unconstitutional conditions of confinement are governed by the Due Process Clause of the Fourteenth Amendment, rather than the Cruel and Unusual Punishments Clause of the Eighth Amendment" (citing *Benjamin v. Fraser*, 343 F.3d 35, 49 (2d Cir. 2003); see also *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)). A pretrial detainee's claims are evaluated under the Due Process Clause because, "[p]retrial detainees have not been convicted of a crime and thus 'may not be punished in any manner—neither cruelly and unusually nor otherwise.'" *Iqbal v. Hasty*, 490 F.3d 143, 168 (2d Cir. 2007) (quoting *Fraser*, 343 F.3d 35). A detainee's rights are "at least as great as the Eighth Amendment protections available to a convicted prisoner." *City of Revere*, 463 U.S. at 244.

²⁷ *Darnell*, 849 F.3d at 35 ("[T]o establish a claim for deliberate indifference to conditions of confinement under the Due Process Clause of the Fourteenth Amendment, the pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety. In other words, the 'subjective prong' (or *mens rea* prong) of a deliberate indifference claim is defined objectively."). See *Caiozzo v. Koreman*, 581 F.3d 63, 70 (2d Cir. 2009).

²⁸ The number of individuals detained before trial in the United States has grown significantly over time – 433 percent between 1970 and 2015 – from 82,922 to 441,790. Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful Effects of Pretrial Detention*, VERA INST. OF JUST. (2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

thus opening the door for pregnant pretrial detainee claims of deliberate indifference to the substantial risk of serious harm to their health and safety, in violation of the Fourteenth Amendment.

In Part I, this Note will provide an overview of the deliberate indifference standard for pretrial detainees, as recently modified in the Second Circuit for 42 U.S.C. § 1983 failure to protect claims. Part II argues that being pregnant while detained is an objectively serious medical need that triggers a significant risk of serious harm that cannot be mitigated by improving conditions of confinement. Being confined while pregnant, even without the use of shackles or restraints, subjects the pregnant individual to a substantial risk of serious harm. Deliberate indifference to that objectively serious and substantial risk is a violation of a pretrial detainee's rights under the Fourteenth Amendment. Finally, Part III explains why the moment is ripe for increased advocacy on behalf of pregnant pretrial detainees such as habeas class action lawsuits, cash bail reform, and other forms of advocacy.

II. THEORIES OF LIABILITY FOR UNCONSTITUTIONAL CONDITIONS OF CONFINEMENT

The notion that incarcerated individuals have, as a consequence of their crimes, forfeited all facets of their liberty is no longer the prevailing view in American jurisprudence.²⁹

²⁹ The uncodified view that prisoners were to be “slave[s] of the state,” was upheld by courts well into the twentieth century. *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871) (“A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is subject while undergoing that punishment, to all the laws which the Legislature in its wisdom may enact for the government of that institution and the control of its inmates. For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State. He is *civiliter mortuus*; and his estate, if he has any, is administered like that of a dead man”); *But cf.* *In re Bonner*, 151 U.S. 242 (1894).

However, this change is relatively recent, with much of the historical legacy of prisons and prisoners rooted in the institution of American chattel slavery.³⁰ In 1948, the Supreme Court declared that incarceration involves the limitation of “many” rights and privileges of those incarcerated but not *all* rights and privileges.³¹ In 1972, the Court overtly acknowledged the constitutional rights of prisoners, stating:

Federal courts sit not to supervise prisons but to enforce the constitutional rights of all ‘persons,’ including prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances[.]³²

The Court also concluded that detainees should be protected while in government custody and that the Fourteenth Amendment protects pretrial detainees from any form of punishment, cruel and unusual or otherwise.³³

³⁰ *Prison Labor and the Thirteenth Amendment*, EQUAL JUST. INITIATIVE (Jan. 20, 2019), <https://eji.org/history-racial-injustice-prison-labor>.

³¹ *Price v. Johnston*, 334 U.S. 266, 285 (1948) (“Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system”).

³² *Cruz v. Beto*, 405 U.S. 319, 321 (1972); *See also Procnier v. Martinez*, 416 U.S. 396, 404–05 (1974) (invalidating state prison mail censorship regulations).

³³ *See Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) (“It is clear [...] that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment”); *see also, DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989) (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an

Although convicted prisoners and pretrial detainees are both protected from conditions of confinement that violate the Constitution, the protections are distinct for each group.³⁴ Convicted prisoners may assert, against a municipality or correctional official, a failure to protect claim of deliberate indifference³⁵ to a serious medical need or substantial risk of serious harm under the Eighth Amendment's prohibition of "cruel and unusual punishment."³⁶ For pretrial detainees, failure to protect claims relying on the deliberate indifference standard are governed by the Due Process Clause of the Fourteenth Amendment.³⁷ Pretrial detainees are protected by the Due Process

individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for basic human needs -- e.g., food, clothing, shelter, medical care, and reasonable safety - it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause").

³⁴ U.S. CONST. amend. VIII; U.S. CONST. amend. XIV, § 1. *See also* David C. Gorlin, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417 (2009).

³⁵ *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976) (recognizing deliberate indifference as a "cognizable" claim for an Eighth Amendment violation: "We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,'" proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983") (internal citations omitted); *see also* *Wilson v. Seiter*, 501 U.S. 294 (1991) (noting that deliberate indifference on the part of a prison official can constitute an Eighth Amendment violation).

³⁶ U.S. CONST. amend. VIII.

³⁷ *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017) (a pretrial detainee's claims are evaluated under the Fourteenth Amendment Due Process Clause because "[P]retrial detainees have not been convicted of a crime and thus 'may not be punished in any manner—neither cruelly and unusually nor otherwise.'" (quoting *Iqbal v. Hasty*, 490 F.3d 143, 168 (2d Cir. 2007)). The court went on to explain that "[a] detainee's rights are at least as great as the Eighth Amendment protections available to a convicted prisoner." *Id.* at 29 (internal quotation marks omitted) (quoting *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. at 244 (1983)).

Clause because they have not yet been found guilty and therefore cannot yet be punished.³⁸ Both convicted prisoners and pretrial detainees can seek relief against state prison officials or a municipality under 42 U.S.C. § 1983.³⁹ Those in federal custody may bring an action against one or more federal agents by filing a *Bivens* suit.⁴⁰

A pretrial detainee can establish a failure to protect claim based on conditions of confinement in two ways: (1) by proving a prison official or municipality's deliberate indifference to the inhumane condition, or (2) by proving the condition amounts to punishment.⁴¹ The Supreme Court has cautioned, "[n]othing about our interpretation of the proper standard for deliberate indifference for due process purposes should be construed as affecting the standards for establishing liability based on a claim that challenged conditions are punitive."⁴² While it may rightly be argued that being detained while pregnant amounts to punishment, this Note focuses on the deliberate indifference theory of liability recently affirmed in the Second Circuit, as it presents an opportunity for prison reform and activism.

A. The Deliberate Indifference Standard for Failure to Protect Claims Alleging Eighth Amendment Violations⁴³

³⁸ *Id.*

³⁹ 42 U.S.C. § 1983 (1871).

⁴⁰ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

⁴¹ *Darnell*, 849 F.3d at 34 n.12.

⁴² *Id.*

⁴³ The Eighth Amendment does not govern failure to protect claims brought by pretrial detainees. In order to distinguish pretrial detainee claims under the Fourteenth Amendment, it is necessary to examine how failure to protect litigation was first developed for convicted individuals alleging Eighth Amendment violations.

The Eighth Amendment ban on cruel and unusual punishment has gradually been read to encompass more than direct physical punishments.⁴⁴

The Eighth Amendment's ban on inflicting cruel and unusual punishments, made applicable to the States by the Fourteenth Amendment, proscribe[s] more than physically barbarous punishments. It prohibits penalties that are grossly disproportionate to the offense, as well as those that transgress today's broad and idealistic concepts of dignity, civilized standards, humanity, and decency. Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.⁴⁵

By the 1970's, the Eighth Amendment was invoked to protect not only against direct physical abuse by prison officials, but also against other unconstitutionally punitive conditions of confinement such as excessive heat or cold.⁴⁶ Around the same time, courts also began

⁴⁴ See Andrew B. Mamo, *The Dignity and Justice That is Due to Us by Right of Our Birth: Violence and Rights in the 1971 Attica Riot*, 49 HARV. C.R.-C.L. L. REV. 531, 542 (2014) (discussing the uncertain ground on which the Eighth Amendment was interpreted in the late nineteen sixties and the concept of "evolving standards of decency" as articulated in *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

⁴⁵ *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (internal quotation marks omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Weems v. United States*, 217 U.S. 349, 367 (1910)).

⁴⁶ See, e.g., *Wright v. McMann*, 387 F.2d 519, 526 (2d Cir.1967) (where the Second Circuit vacated a dismissal on the pleadings concerning allegations that inmates were deliberately exposed to bitter cold), see also *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (the Court has not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner), see generally *Furman v. Georgia*, 408 U.S. 238 (1976) (Powell, J., dissenting); *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion)).

to recognize that acts by prison officials could be deemed unconstitutionally punitive based on their mental consequences.⁴⁷

Estelle v. Gamble concretized the deliberate indifference threshold concerning prisoners' rights to adequate medical care.⁴⁸ In *Estelle*, the court held that deliberate indifference on the part of prison officials or a municipality was enough to establish an Eighth Amendment violation stemming from inadequate medical care.⁴⁹ Deliberate indifference claims under the Eighth Amendment cannot be based solely on negligence, though no permanent injury requirement exists. For convicted prisoners, the viability of a deliberate indifference claim turns on the state actor's state of mind.⁵⁰ A prison official must have the requisite *mens rea* – not “mere negligence” but something closer to or equaling recklessness.⁵¹

Courts further recognized claims of deliberate indifference to psychiatric healthcare needs (not just the mental consequences associated with being confined) as Eighth Amendment violations. The Second Circuit “has explicitly recognized that medical care encompasses mental health care and that the denial of medical care with respect to ‘deliberate indifference’ encompasses psychological problems.”⁵² Applying the deliberate indifference standard in *Estelle* to psychiatric healthcare, the Second Circuit concluded that psychiatric

⁴⁷ See, e.g., *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967) (although the mental suffering associated with solitary confinement was not in itself grounds for a finding of a constitutional violation, mental suffering was found to be a legitimate consequence of “subhuman conditions” in the same way that freezing or extremely hot temperatures may be), see also *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) (whippings were found to be unconstitutional in part because of psychological consequences).

⁴⁸ *Estelle*, 429 U.S. at 104 (stating “deliberate indifference to serious medical needs of prisoners” amounts to an Eighth Amendment violation).

⁴⁹ *Id.*

⁵⁰ See, e.g., *Wilson v. Seiter*, 501 U.S. 294, 297 (1991); *Farmer v. Brennan*, 511 U.S. 825, 826 (1994).

⁵¹ *Farmer*, 511 U.S. 825 (1994) (holding that subjective recklessness applies to Eighth Amendment violations. In *Farmer*, a prison physician was found to have been deliberately indifferent to the plaintiff's serious medical needs).

⁵² *Young v. Choinski*, 15 F. Supp. 3d 194, 208 (D. Conn. 2014) (internal citations omitted).

care is “an integral part of medical care,” requiring that such care be provided to prisoners.⁵³

In *Farmer v. Brennan*, the Supreme Court applied the subjective deliberate indifference standard discussed in *Estelle* to a failure to protect context, holding that consciousness was required in order to assert a failure to protect claim of deliberate indifference under the Eighth Amendment.⁵⁴ This subjective knowledge requirement was consistent with the explanation the court provided in *Wilson* as to why the deliberate indifference claim was rejected in *Estelle*.⁵⁵ The *Estelle* Court rejected the deliberate indifference claim because it “failed to establish that [the prison doctor] possessed a sufficiently culpable state of mind.”⁵⁶

⁵³ Langley v. Coughlin, 888 F.2d 252, 254 (2d Cir.1989); see also Guglielmoni v. Alexander, 583 F.Supp. 821, 826–27 (D.Conn. 1984) (“[The] deliberate indifference standard of *Estelle* is equally applicable to the constitutional adequacy of psychological or psychiatric care provided at a prison,” and “the eighth amendment reaches psychiatric care as a component or aspect of medical care”) (citations and internal quotation marks omitted); Young, 15 F. Supp. 3d 194 at 208 (“after all, mental health care is a subset, or specialty, of medical care. It thus follows that deliberate indifference by a prison official to an inmate's attempt to harm himself falls squarely within the *Estelle* standard).

⁵⁴ *Farmer*, 511 U.S. 825 (1994) (holding that Eighth Amendment liability requires subjective knowledge of risk, establishing a “subjective recklessness standard.” The Court held that “a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety. [T]he 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”) *Id.* at 837.

⁵⁵ *Wilson*, 501 U.S. at 297.

⁵⁶ *Id.* (the Court expands on their reasoning for denying the deliberate indifference claim against the prison doctor) (“In *Estelle v. Gamble*...[w]e rejected ... the inmate's claim in that case that prison doctors had inflicted cruel and unusual punishment by inadequately attending to his medical needs—because he had failed to establish that they possessed a sufficiently culpable state of mind. Since, we said, only the unnecessary and wanton infliction of pain implicates the Eighth Amendment, a prisoner advancing such a claim must, at a minimum, allege deliberate indifference” to his serious” medical needs. It is *only* such indifference that can violate the Eighth Amendment;

Although the subjective indifference standard originated in *Estelle*, the Supreme Court took almost two decades to articulate the two-prong test in *Farmer* that distinctly defined the standard.⁵⁷ With *Farmer*, a clear two-prong test emerged for Eighth Amendment failure to protect claims. Noting their previous discussion in *Wilson*,⁵⁸ the *Farmer* Court held that in order to find an Eighth Amendment violation in a failure to protect claim based on the deliberate indifference standard there must be: (1) an objective “sufficiently serious” deprivation, and (2) the prison official must have had a “sufficiently culpable state of mind.”⁵⁹ While circuit courts generally accepted the first, “objective,” prong of the *Farmer* test, the second, “subjective,” prong caused considerable divergence among the lower courts when it came to the test’s application to pretrial detainees.

B. The Deliberate Indifference Standard as Applied to Pretrial Detainees’ Fourteenth Amendment Failure to Protect Claims

As previously mentioned, pretrial detainees are not protected by the Eighth Amendment because they have not yet been adjudged guilty of any crime, and thus cannot yet be punished by the state.⁶⁰ Pretrial detainees’ failure to protect

allegations of inadvertent failure to provide adequate medical care or of a negligent diagnos[is] simply fail to establish the requisite culpable state of mind”) (internal citations omitted).

⁵⁷ See Magun, *supra* note 20, at 2060 (discussing how the *Kingsley v. Hendrickson* decision might affect pretrial detainee failure to protect claims).

⁵⁸ In *Wilson*, the Court recognized “objective” and “subjective” components in an Eighth Amendment context. *Wilson v. Seiter*, 501 U.S. 294 (1991).

⁵⁹ *Farmer*, 511 U.S. at 826, 834-34.

⁶⁰ *Darnell v. Pineiro*, 849 F.3d 17, 34 (2d Cir. 2017) (“The language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less “maliciously and sadistically. Thus, there is no need here, as there might be in an Eighth Amendment case, to determine when punishment is unconstitutional”) (internal citations omitted); see also *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) (“Eighth Amendment

claims using the deliberate indifference standard fall under the substantive Due Process clause of the Fourteenth Amendment.⁶¹ Similar to those of convicted prisoners, pretrial detainee failure to protect claims are often based on deplorable conditions of confinement (excessive force, health and sanitary needs, mental health abuses, etc.).

In June of 2015, the Supreme Court used an objective standard to evaluate whether intentional force used against a pretrial detainee was excessive (violating the detainee's Fourteenth Amendment rights).⁶² In *Kingsley*, plaintiff brought a § 1983 action against two county jail officers, alleging that the officers used excessive force when removing him from his cell, in violation of his rights under the Fourteenth Amendment's Due Process Clause.⁶³ The *Kingsley* Court considered whether the force used by the officers should be evaluated using a subjective standard—did the officers know the force was unreasonable—or an objective standard—the force used was objectively unreasonable despite the officers' state of mind.⁶⁴

The Court ruled in favor of the objective test for the second prong of the deliberate indifference test, which significantly altered the legal landscape for pretrial detainees and future claims of excessive force.⁶⁵ Not only did *Kingsley* lower the burden of

scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions); *see also* *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979) (“A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest”) (internal quotation marks omitted) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 115 (1975)).

⁶¹ *Darnell*, 849 F.3d at 29.

⁶² *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015).

⁶³ *Id.* at 2471.

⁶⁴ *Id.* at 2472 – 73.

⁶⁵ Rosalie Berger Levinson, *Kingsley Breathes New Life into Substantive Due Process as a Check on Abuse of Government Power*, 93 NOTRE DAME L. REV. 357 (2017) (discussing the objectively reasonable deliberate indifference test in difference between pretrial detainees and convicted inmates and the effects of *Kingsley v. Hendrickson* and the standard's effect on future § 1983 claims

proof for pretrial detainees—who are four times as likely to be sentenced to prison than defendants who were not detained prior to trial—⁶⁶ the ruling was also in line with the standard for excessive force claims brought under the Fourth Amendment under *Graham v. Connor*.⁶⁷ An officer's subjective knowledge of whether her conduct was unreasonable was no longer a requirement for the second prong of the deliberate indifference test.⁶⁸

After *Kingsley*, it was unclear whether the Supreme Court would extend the objective reading of the second prong of the deliberate indifference test to claims outside of the excessive force context. Pretrial detainees with claims involving unsanitary conditions, overcrowding, insufficient medical care, and harmful psychological conditions could all benefit from an objective reasonableness standard for the second prong of the deliberate indifference test.⁶⁹ Circuits clashed in their post-*Kingsley* treatment of failure to protect claims alleging unconstitutional conditions of confinement not involving excessive use of force.⁷⁰

brought by pretrial detainees that extend beyond claims of excessive force (broader conditions of confinement claims).

⁶⁶ Lauren-Brooke Eisen & Inimai Chettiar, *Criminal Justice: An Election Agenda for Candidates, Activists, and Legislators*, BRENNAN CTR. FOR JUST. 14 (2018), https://www.brennancenter.org/sites/default/files/publications/Criminal_Justice_An_Election_Agenda_for_Candidates_Activists_and_Legislators%20.pdf.

⁶⁷ *Graham v. Connor*, 490 U.S. 386, 388 (1989) (holding that excessive force claims brought by free citizens are “properly analyzed under the Fourth Amendment's objective reasonableness standard, rather than under a substantive due process standard”) (internal citation and quotation marks omitted).

⁶⁸ For convicted prisoners, the second prong still has a subjective knowledge requirement.

⁶⁹ See, e.g., *Spencer v. Bouchard*, 449 F.3d 721 (6th Cir. 2006); *Benjamin v. Fraser*, 343 F.3d 35 (2^d Cir. 2003); *Owens v. Scott County Jail*, 328 F.3d 1026 (8th Cir. 2003); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Hubbard v. Taylor*, 399 F.3d 150 (3^d Cir. 2005).

⁷⁰ See Michael S. DiBattista, *A Force to Be Reckoned with: Confronting the (Still) Unresolved Questions of Excessive Force Jurisprudence After Kingsley*, 48 COLUM. HUM. RTS. L. REV. 203, 213 (2017) (“Although the Court in *Graham* put to rest the dispute over which amendment protects pretrial detainee

Although the *Kingsley* Court premised its decision on *Bell v. Wolfish*, a conditions of confinement case and not an excessive force case, there was still confusion among the lower courts surrounding the standard beyond excessive force claims.⁷¹ Some post-*Kingsley* courts continued to discuss pretrial detainees within a subjective framework, while some courts have declined to address the issue at all, arguing that the resolution of the claims did not require an analysis of the subjective versus objective debate.⁷²

In February 2017, the Second Circuit applied the objective deliberate indifference ruling from *Kingsley*, agreeing with the Ninth Circuit's eventual resolution in *Castro*⁷³ that pretrial detainees asserting claims against prison officials and municipalities should not be constrained by the intent requirement in the second prong of the *Farmer* test.⁷⁴ *Darnell v. Pineiro* involved a conditions of confinement claim brought by pretrial detainees asserting that facility officials were deliberately indifferent to

excessive force claims, it failed to articulate the standard for determining whether a violation of the Fourteenth Amendment has occurred. As a result, a large circuit split endured for years, with some circuits applying an objective reasonableness test similar to the Fourth Amendment standard, and others applying a subjective intent test similar to the Eighth Amendment standard” (internal citations omitted).

⁷¹ Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 388, 409-15 (2018) (discussing pre and post-*Kingsley* doctrine regarding pretrial conditions of confinement cases and whether an objective reasonableness standard is applied).

⁷² *Id.* at 411-12.

⁷³ Just weeks after the Supreme Court decided *Kingsley*, the Ninth Circuit was met with the case of *Castro v. County of Los Angeles*. 833 F.3d 654 (9th Cir. 2015). *Castro*, a pretrial detainee, brought a failure to protect claim against corrections officials after he was injured in an attack by another inmate. The Ninth Circuit panel held that *Kingsley* had “no bearing on the failure to protect claims” currently before them because the standard for an excessive force claim was “completely different” from the standard for a failure to protect claim (deliberate indifference to a substantial risk of serious harm). *Id.* at 655. On rehearing en banc, the Ninth circuit reversed, embracing the use of an objective standard in pretrial detention failure to protect cases. *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1069 (9th Cir. 2016) (en banc).

⁷⁴ *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017).

unconstitutional conditions of confinement in violation of their rights under the Due Process Clause of the Fourteenth Amendment.⁷⁵

The Second Circuit held that after the first prong of the deliberate indifference test is met (objectively unreasonable conditions), a pretrial detainee's claim can prevail against a defendant-official if the risk to the detainee was objectively obvious.⁷⁶ The claim is successful if the pretrial detainee can show that the officer either acted intentionally to impose the condition or "recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety."⁷⁷ It is the "should have known" piece of the language that propels the standard into objective territory.

III. PRETRIAL CONFINEMENT AND PREGNANCY

Unconstitutional conditions of confinement have undeniably adverse consequences for pregnant pretrial detainees. Despite the fact that women make up the fastest-growing segment of incarcerated people in the United States,⁷⁸ the carceral system has failed to adequately adapt to the critical and unique needs of women and girls inside.⁷⁹ Although legislative victories limiting the use of

⁷⁵ *Id.*

⁷⁶ *Id.* at 35 ([T]he 'subjective prong' (or mens rea prong) of a deliberate indifference claim is defined objectively.').

⁷⁷ *Id.*

⁷⁸ Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE (Jan. 9, 2018), <https://www.prisonpolicy.org/reports/womenvertime.html>.

⁷⁹ Jennifer G. Clarke & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, 15 [J]AMA OF ETHICS, 779, 780 (Sept. 2013). ("The practice of shackling pregnant women and women in labor is principally a remnant of protocols designated for male institutions and is not based on genuine security concerns. Because the number of male prisoners

restraints on pregnant women are on the rise,⁸⁰ many of these laws are not properly implemented.⁸¹ Jails and prisons across the country continue to subject female inmates and detainees to extremely harmful conditions.⁸² The use of even the most limited restraints still

overwhelmingly exceeds the number of female prisoners—prisons and jails are over 90 percent male—these institutions have not prioritized the appropriate health and safety protocols for women during transport to a medical facility”) (internal citations omitted).

⁸⁰ *National Task Force on the Use of Restraints with Pregnant Women under Correctional Custody, Best Practices in the Use of Restraints with Pregnant Women Under Correctional Custody*, U.S. DEP’T OF JUST. (2014), http://www.nasmhpd.org/sites/default/files/Best_Practices_Use_of_Restraints_Pregnant%282%29.pdf. (In 2014, the U.S. Department of Justice published *Best Practices in the Use of Restraints with Pregnant Women and Girls Under Correctional Custody* after convening a task force on the use of restraints on pregnant women in correctional custody. The recommendations were a step in the right direction, but the standards are not mandatory and there is no current system for tracking which institutions have followed or maintained the standards in the report). See also Ferszt, *supra* note 18.

⁸¹ *ACLU Briefing Paper: The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails & Youth Detention Centers*, AM. CIV. LIBERTIES UNION REPRODUCTIVE FREEDOM PROJECT, <https://www.aclu.org/other/aclu-briefing-paper-shackling-pregnant-women-girls-us-prisons-jails-youth-detention-centers> (last visited Apr. 15, 2020) [hereinafter *ACLU Briefing Paper*].

⁸² See Hotelling, *supra* note 2, at 37-44 (“With the growing number of incarcerated women who are pregnant, it is important to recognize that failing to provide preventive and curative health care for these women may cost more to society than funding programs that might improve attachment and parenting behaviors, facilitate drug rehabilitation, and reduce recidivism among this population. The current prison system increases victimization, learned helplessness, passivity, shame, and violation of human rights. Posttraumatic stress is elevated by strip-and-cavity searches, handcuffs and shackles, confinement to small cells, isolation, and control by predominantly male staff. Incarcerated women endure further damage and re-traumatization with the lack of privacy in a patriarchal system that constantly observes them in their sleep and personal care and with separation from their children [...] the vast majority of incarcerated women have abused alcohol and/or drugs; yet, prison systems are deficient in providing therapy for any addictions. Additionally, [...] pregnant inmates lack adequate prenatal care offering medical, nutritional, educational, environmental, and family-support services. When birth takes place in prison, separation of mother and child occurs almost immediately,

results in substantial harm to pregnant detainees.⁸³ The profound and unrelenting racism that has both constructed and perpetuated the conditions of confinement experienced by Black women in America only serves to exacerbate this harm.⁸⁴

Proponents of the practice of shackling pregnant prisoners and detainees rely on flimsy arguments, citing safety concerns for correctional officers, health care professionals, and the general public.⁸⁵ A significant body of scholarship refutes these claims and has contributed crucial analyses on the negative effects of perinatal shackling.⁸⁶ Organizations such as Amnesty International and the American Civil Liberties Union (ACLU) have published data and detailed reports on the health risks experienced by incarcerated individuals.⁸⁷ The American College of Obstetricians and

which further compromises critical bonding period”) (internal quotation marks omitted). See also Janice F. Bell et al., *Jail Incarceration and Birth Outcomes*, 81 J. URB. HEALTH 630 (2004) (examining the relationships between jail incarceration during pregnancy and infant birth weight, preterm birth, and fetal growth restriction).

⁸³ See Ferszt, *supra* note 18, at 18.

⁸⁴ ROBERTS, *supra* note 8, at 311 (arguing that every policy concerning reproduction should be scrutinized to “determine its impact on Blacks...[R]ace has profoundly influenced every aspect of childbearing in America...There is good cause to suspect a racial agenda behind programs that affect reproduction and to be concerned about these programs; effect on the status of Black people.”).

⁸⁵ ACLU Briefing Paper, *supra* note 81.

⁸⁶ Dorothy E. Roberts, Priscilla A. Ocen, Rachel Roth, and Carolyn Sufrin are among the many prominent scholars writing on the shackling of pregnant women and larger systems of oppression concerning women of color and the criminal justice system. There has also been a significant amount of coverage in the media in recent years. See generally, Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES, Mar. 2, 2006, at A16. For more leading scholarship, see Brett Dignam and Eli Y. Adashi, *Health Rights in the Balance: The Case Against Perinatal Shackling of Women Behind Bars*, 16 HEALTH & HUM. RTS. J. 14–23 (2014); Geraldine Doetzer, *Hard labor: The legal implications of shackling female inmates during pregnancy and childbirth*, 14 WM. & MARY J. WOMEN & L. 363, 363–392 (2008).

⁸⁷ See USA: Rights for all: “Not Part of my Sentence”: *Violations of the Human Rights of Women in Custody*, AMNESTY INT’L (1999), <https://www.amnestyusa.org/reports/usa-not-part-of-my-sentence-violations-of-the->

Gynecologists, the American Psychological Association, the National Commission on Correctional Health Care, the Rebecca Project for Human Rights, and the National Women's Law Center are also among a growing list of prominent organizations that oppose the use of restraints during labor.⁸⁸

This section of the Note will discuss the particular case of pregnant pretrial detainees, women in jail who have not been convicted of a crime and who simply await the adjudication of their case. A much larger proportion of the total population of incarcerated women are held in jail (versus prison) than their male counterparts.⁸⁹

Not only do conditions of confinement, even in their most optimistic incantations, amount to punishment, they are also grounds for viable failure to protect claims using the objective deliberate indifference standard now followed in the Second Circuit. No amount of reform inside could alter what is, at its core, a system that is deliberately indifferent to the serious harms imposed on pregnant

human-rights-of-women-in-custody/; *State Standards for Pregnancy-Related Healthcare and Abortion for Women in Prison*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/state-standards-pregnancy-related-health-care-and-abortion-women-prison-0#hd1> (“Women in labor need to be mobile so that they can assume various positions as needed and so they can quickly be moved to an operating room. Having the woman in shackles compromises the ability to manipulate her legs into the proper position for necessary treatment. The mother and baby's health could be compromised if there were complications during delivery, such as hemorrhage or decrease in fetal heart tones.”); .

⁸⁸ Committee Opinion, *Heath Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, 511 OBSTETRICS & GYNECOLOGY 1198–1202 (Nov. 2011) [hereinafter ACOG Comm. Op.]; *The Restraint of Pregnant Inmates*, AM. PSYCHOLOGICAL ASSOC., 47 MONITOR ON PSYCHOL. 26 (2016); *Mothers Behind Bars: A State-by-State Report Card and Analysis of Federal Policies on Conditions of Confinement for Pregnant and Parenting Women and the Effect on Their Children*, REBECCA PROJECT FOR HUM. RTS. & NAT'L WOMEN'S LAW CTR. (2010), <https://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf>.

⁸⁹ Twice the number of women are held in state prisons and jail than the proportional equivalent for men. Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html.

people in confinement. This section examines the totality of harms inherent in confinement schemes beyond the practice of shackling.

A. Pretrial Detainees are Subject to Unique Harms

No other country in the world detains individuals before trial at a higher rate than the United States.⁹⁰ The disproportionately high rate of pretrial detainment in the United States is in part due to the widespread use of cash bail and the fact that many defendants are at a severe socioeconomic disadvantage.⁹¹ Cash bail discriminates against people of color;⁹² these disparities are compounded by economic inequalities.⁹³ Without the economic resources to pay bail or bond fees, individuals coming from marginalized communities bear a disparate burden, even though the Constitution supposedly prohibits the punishment of people simply because they are low-income.⁹⁴ In *Bearden v. Georgia*, the Supreme Court articulated this point:

⁹⁰ Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201 (2018) (noting that even in 2013, among the eleven million individuals detained prior to conviction around the world, the United States leads all other countries with approximately half a million detained individuals, which is double the next country, China).

⁹¹ *Id.*

⁹² Various studies have found that people of color are treated more severely than White people during pretrial detainment decision-making processes and also that Black and Latino people are more likely than White people to be detained without bail. Digard & Swavola, *supra* note 28, at 7 (citing the 2003 and 2005 studies by Schlessinger & Deluth, “Racial and Ethnic Differences” and “Racial and Ethnic Disparity,” which both incorporated variables including race, ethnicity, age, offense seriousness, offense type, and criminal justice history into their regression models).

⁹³ Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUST. (Dec. 10, 2019), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.

⁹⁴ Digard & Swavola, *supra* note 28; *see also* *Bearden v. Georgia*, 461 U.S. 660, 671 (1983).

[T]he State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty.⁹⁵

The Court then concluded that although the state has clear interests in deterring future criminal behavior, those interests in deterrence can often be achieved in other ways.⁹⁶

Data show that pretrial detention can negatively impact the outcome of a defendant's case.⁹⁷ Pretrial detainee defendants have been found to be over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who are released at some point before trial.⁹⁸ Because pretrial detainees have already been experiencing horrific conditions awaiting trial, they are often more likely to take a plea deal for a lower charge with a shorter sentence rather than risk a higher charge and longer sentence at trial.⁹⁹ Defendants often plead guilty even if they could successfully defend against the charges in court.¹⁰⁰ The collateral consequences of pleading guilty are substantial,

⁹⁵ *Bearden*, 461 U.S. at 671.

⁹⁶ *Id.* at 671-672.

⁹⁷ Eisen & Chettiar, *supra* note 66; *see also* Dobbie et al., *supra* note 90, Lowenkamp et al., *infra* note 98.

⁹⁸ Christopher T. Lowenkamp et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, LAURA AND JOHN ARNOLD FOUND. 10 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf.

⁹⁹ Eisen & Chettiar, *supra* note 66, at 14.

¹⁰⁰ Juleyka Lantigua-Williams, *Why Poor, Low-Level Offenders Often Plead to Worse Crimes*, THE ATLANTIC (Jul. 24, 2016), <https://www.theatlantic.com/politics/archive/2016/07/why-pretrial-jail-can-mean-pleading-to-worse-crimes/491975/>.

however, including a loss of ability to vote, find a job, apply for school, and qualify for public benefits.¹⁰¹

B. Black Women are Disproportionately Justice-Impacted

The challenges that pregnant pretrial detainees face reflect broader systems of racial and social hierarchy that operate to incarcerate women—in particular women of color. The criminal justice system perpetuates American racial and socioeconomic disparities unapologetically and without pretense. In 2017, Black women were incarcerated at nearly twice the rate of White women (92 per 100,000 for Black women versus forty-nine per 100,000 for White women).¹⁰² The disparity also exists for girls. At a rate of 110 per 100,000, Black girls are three-and-a-half times more likely to be imprisoned than White girls (at a rate of thirty-two per 100,000).¹⁰³ Girls comprised a growing proportion of all teen arrests between 1980 and 2017, and with Black girls becoming incarcerated at such a disproportionately high rate, the result is a devastating increase in the number of Black girls inside.¹⁰⁴

Detained Black women are subjected to a unique form of punitive humiliation,¹⁰⁵ one that is consistent with the reproductive

¹⁰¹ *Id.* See also Dobbie et al., *supra* note 90 (analyzing data from over 420,000 criminal defendants from two large, urban counties in connection to administrative court and tax records, criminal case outcomes, pretrial flight, recidivism, foregone earnings and the loss of social benefits).

¹⁰² THE SENTENCING PROJECT, *supra* note 4, at 2.

¹⁰³ *Id.* at 5.

¹⁰⁴ *Id.*

¹⁰⁵ ROBERTS, *supra* note 8, at xviii (“Thousands of Black women in prison today – mostly for nonviolent offenses- need treatment for substance abuse, support for their children, or safety from violent relationships, not criminal punishment. Locking up astronomical numbers of Black [] women is a powerful way of restricting reproductive liberty and transferring political inequality to the next generation”); see also Jallicia Jolly, *Reproductive Control: The Enduring State Violence Against Incarcerated Black Women*, REWIRE.NEWS (Jun. 14, 2018), <https://rewire.news/article/2018/06/14/reproductive-control-enduring-state-violence-incarcerated-black-women/> (discussing experiences

violence and racial, gender, and sexual oppression that Black women experience in a range of institutional contexts.¹⁰⁶ Slavery initiated a centuries-long tradition of institutionalized racial violence and the regulation of Black women's bodies.¹⁰⁷ As Dorothy Roberts writes:

The brutal domination of slave women's procreation laid the foundation for centuries of reproductive regulation that continues today[.] The social order established by powerful white men was founded on two inseparable ingredients: the dehumanization of Africans on the basis of race, and the control of women's sexuality and reproduction [...] Every indignity that comes from the denial of reproductive autonomy can be found in slave women's lives – the harms of treating women's wombs as procreative vessels, of policies that pit a mother's welfare against that of her unborn child, and of government attempts to manipulate women's childbearing decisions through threats and bribes.¹⁰⁸

This denial of Black reproductive autonomy has been sanctioned by laws that have evolved to maintain a “monstrous combination of racial and gender domination.”¹⁰⁹

Detained Black women must also fight a wide array of stereotypes born from degrading mythology about Black mothers. This body of mythology is based on the notion that Black people are

of incarcerated Black women, including, the 1970s' “war on drugs” impact on Black women and instances of forced sterilization and contraception).

¹⁰⁶ Jolly, *supra* note 105.

¹⁰⁷ See generally, ROBERTS, *supra* note 8, (discussing the history of Black reproductive freedom in the United States, the experience of childbearing Black women during slavery, the economic and social incentives to govern Black women's reproductive lives, and the subsequent denial of Black reproductive autonomy).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

scientifically inferior because of biological distinctions that determine their inferiority.¹¹⁰ Prominent myths of Black motherhood and archetypal Black mothers include: Jezebel (the immoral and lascivious Black mother), Mammy (the perfect caregiver to White children who neglects her own), the unwed mother (as perpetuated by Daniel Patrick Moynihan's thesis in his 1965 report, *The Negro Family: The Case for National Action*),¹¹¹ and the Welfare Queen (the lazy mother who relies on public assistance and deliberately gets pregnant at the expense of taxpayers).¹¹² These stereotypes continue to play a role in the experiences of Black women throughout their contact with American carceral institutions.

C. The Lack of National Standards Compounds the Already-Insufficient Medical Care Inside

Although incarcerated people have a constitutional right to medical care,¹¹³ the reality of securing medical care while detained is incredibly fraught, and there are no national standards for the

¹¹⁰ ROBERTS, *supra* note 8, at 9 (citing Nancy Stepan, *The Idea of Race in Science: Great Britain, 1800-1960* (Hamden, Conn.: 1981)); *see also* Barbara Jeanne Fields, *Slavery Race, and Ideology in the United States of America*, 181 NEW LEFT REV. 95 (1990).

¹¹¹ *The Negro Family: The Case for National Action*, DEPT. OF LABOR, OFF. OF PLAN. & POL'Y RES. (1965), <https://www.dol.gov/general/aboutdol/history/webid-moynihan>.

¹¹² ROBERTS, *supra* note 8, at 10-19.

¹¹³ *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) ("These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical 'torture or a lingering death,' the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that '(i)t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself'" (internal citations omitted)).

oversight of healthcare in prisons and jails. For example, in New York State, the State Commission of Correction (SCOC) oversees county jail facilities and is tasked with establishing minimum standards for health care in New York correctional institutions.¹¹⁴ The minimum standards, however, do not distinguish the health-care needs of male and female inmates, and nothing within the minimum standards addresses the significant and incredibly specific needs of pregnant prisoners and detainees.¹¹⁵ In New York, no county jail has a written policy mandating when to take a female who is in labor to the hospital.¹¹⁶

Similarly, while some institutions have received accreditation from organizations such as the National Commission on Correctional Health Care (NCCH), the majority of the nation's correctional institutions have not been accredited, and accreditation does not guarantee consistency when it comes to reproductive healthcare.¹¹⁷ The NCCH standard on "Pregnancy Counseling" states that "[p]regnant inmates are given comprehensive counseling and assistance in accordance with their expressed desires regarding their pregnancy, whether they elect to keep the child, use adoption services, or have an abortion."¹¹⁸ The NCCH leaves many of the details to the discretion of local facilities, suggesting facilities

¹¹⁴ N.Y. Correct. Law § 45(6) (McKinney 2008); 9 N.Y.C.R.R. § 7500.1(b)(1) (McKinney 2008).

¹¹⁵ *Id.* See also *Access to Reproductive Health Care in New York State Jails*, NYCLU (2008), <https://www.nyclu.org/en/publications/report-access-reproductive-health-care-new-york-state-jails> (last visited Apr. 15, 2020).

¹¹⁶ Rachel Roth, "She Doesn't Deserve to be Treated like This:" *Prisons as Sites of Reproductive Injustice*, in *RADICAL REPRODUCTIVE JUSTICE: FOUNDATIONS, THEORY, PRACTICE, CRITIQUE* 10 (Loretta J. Ross et al. eds., 2017); see also NYCLU, *supra* note 115.

¹¹⁷ Roth, *supra* note 116 (The National Commission on Correctional Health Care reported in 2011 that it had accredited almost 500 prisons and jails, accounting for around 400,000 people which was less than 20 percent of the total population of people in prison at that time).

¹¹⁸ NYCLU, *supra* note 115, at 6.

obtain legal recommendations regarding abortion proceedings based on the laws of their state.¹¹⁹

Privately-owned prisons present yet another barrier to consistent and adequate medical care. Profit motives further disincentivize correctional facilities from providing quality health care, and privately owned prisons and jails lack transparent policies that might lead to needed reform.¹²⁰ In the example of New York State, a mixture of on-site medical staff employed by the jail, community health providers, and on-site employees of private companies provide for inmate healthcare.¹²¹ Most of New York State's jails are equipped with incredibly small medical units that are staffed by a single registered nurse or licensed practical nurse.¹²² When medical services are provided by private companies, discretion is left to non-governmental actors with essentially no public accountability. Private correctional facilities have substantial interests in their profits, which almost certainly results in substandard care for those detained at the hands of the state.

¹¹⁹ The NYCLU found that less than half of the counties housing female inmates in New York State had policies specifically addressing inmates' access to abortion and only 23 percent provided for direct access to abortion services. *Id.* at 1. The same NYCLU report explains that while the NCCH suggests implementing standards regarding timely prenatal and postpartum care, including procedures for medical examinations and specific obstetrical services, there is no information on how these policies and procedures are enforced or maintained or what the consequences are if a certain facility fails to meet the several "compliance indicators" purportedly adopted by state and county jails. *Id.* at fn. 40.

¹²⁰ Roth, *supra* note 116, at fn. 13 ("Journalists have written many exposes of private medical companies, in, for instance, Delaware, Michigan, Missouri, New York, and Tennessee. Private companies also insist that they cannot be sued for violating people's rights in the prisons that they operate under government contract").

¹²¹ NYCLU, *supra* note 115.

¹²² Registered Nurses (RN) and Licensed Practical Nurses (LPN) can provide basic medical services but these single staffed units pale in comparison to the rarer, well-equipped units, that include examining tables, beds, and laboratories. *Id.*

Although data are severely limited and outdated, it is estimated that between five and ten percent of incarcerated women are pregnant when they enter jail or prison, and approximately 2,000 babies are born to incarcerated women in the United States each year.¹²³ Over half of all women in United States prisons and 80% of women in jail are mothers.¹²⁴ The majority of these mothers are also the primary caretakers of their children, a fact that highlights the devastating impact that incarceration has on the individuals who are incarcerated and on their immediate families and communities. Known harms of parental incarceration include the child harboring feelings of traumatic loss, elevated levels of anxiety, fear, loneliness, anger, depression, decreased stability, lower educational achievement, behavioral difficulties, sleep deprivation, and prolonged mental and physical health problems that manifest later in life.¹²⁵ Pregnant women who are already separated from their existing children face unique hurdles of stress, isolation, and anxiety while incarcerated.¹²⁶

¹²³ Clarke & Simon, *supra* note 79, at 779–785.

¹²⁴ Wendy Sawyer, *Bailing Moms out for Mother's Day*, PRISON POL'Y INITIATIVE (May 8, 2017), <https://www.prisonpolicy.org/blog/2017/05/08/mothers-day/>.

¹²⁵ See generally Julie Smyth, *Dual Punishment: Incarcerated Mothers and Their Children*, 3 COLUM. SOC. WORK REV. 33 (2012); *Promoting Social and Emotional Well-Being for Children of Incarcerated Parents*, FED. INTERAGENCY WORKING GROUP FOR CHILDREN OF INCARCERATED PARENTS (2013) (The Federal Interagency Working Group for Children of Incarcerated Parents includes representatives from the Department of Health and Human Services, the Department of Justice, the Department of Education, the Social Security Administration, the Department of Agriculture, and the Domestic Policy Council); John Hagan & Holly Foster, *Intergenerational Educational Effects of Mass Imprisonment in America*, AM. SOC. ASSOC., 85 SOC. OF EDUC. (PINCITE NEEDED) (2012).

¹²⁶ See Carolyn Sufrin et al., *Reproductive Justice, Health Disparities and Incarcerated Women in the United States*, 47 PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH 213-19 (Dec. 2015).

D. Pregnant Pretrial Detainees are Subjected to Unconstitutional Conditions of Confinement

Pretrial detainees are absorbed into an effectively punitive environment when confined before trial. Their movement, food intake, interactions, and access to basic medical care are all highly restricted and supervised. Women of color, already uniquely marginalized and judged for their patterns of so-called sexual deviance, find themselves further stigmatized while pregnant inside.¹²⁷ Brenda Peppers, a woman in South Carolina who tested positive for drugs while on probation and was sent to jail for the entire seventh month of her pregnancy, described her experience:

I was placed in a small one room cell with ten and sometimes as many as fifteen other women. I was forced to sleep on a mat on the floor, sometimes near the overflowing toilet. Never being allowed out of the cell, I could do nothing more than stand, squat or lay for the entire thirty days. I was not allowed milk or juice because the other inmates could not have the same. It being the month of August, temperatures were soaring. There was no air conditioning or even a fan. I was truly miserable. I repeatedly requested medical attention, but to no avail...They would promise that I would see the jail doctor the next day, but tomorrow never came.¹²⁸

Women across the country in a range of detention facilities have shared stories similar to Brenda's. Her experience speaks to the lack of uniform health care and unchangingly punitive nature of jails

¹²⁷ See ROBERTS, *supra* note 8, and accompanying discussion in text of the Jezebel archetype and the myth of the lascivious Black mother.

¹²⁸ Roth, *supra* note 116, at 69–70 (quoting “Statement of Brenda Peppers,” no date, from National Advocates for Pregnant Women).

and prisons throughout the United States.¹²⁹ The government routinely fails to address pregnant people's serious medical needs when they are taken into custody, even before they have been adjudged guilty of any crime.

1. Restrictions on Movement and Physical Restraints Risk the Health and Safety of Pregnant Pretrial Detainees

In 2008, the Department of Health and Human Services (HHS) issued *Physical Activity Guidelines for Americans*.¹³⁰ The report was intended to “help Americans understand the types and amounts of physical activity that offer important health benefits.”¹³¹ Now in its second edition, the report also details the “risks of sedentary behavior and the relationship with physical activity.”¹³²

¹²⁹ Stories like Brenda's are endemic to the criminal justice system and too numerous to tally in one place. Studies reveal that conditions for detained pregnant women are, as the standard, extremely dangerous. One recent study of women in the King County Jail in Seattle, Washington found that the women “all complained of being uncomfortable, lacking pillows and chairs, having to sit on cold cement, being exposed to toxic cleaning materials, and feeling constantly hungry.” *Id.* See also Carole Schroeder & Janice Bell, *Doula Birth Support for Incarcerated Pregnant Women*, 22 PUB. HEALTH NURSING 53-58 (Jan. 2005).

¹³⁰ U.S. DEP'T OF HEALTH & HUMAN SERVS., PRESIDENT'S COUNCIL ON SPORTS, FITNESS & NUTRITION, *Physical Activity Guidelines for Americans*, <https://www.hhs.gov/fitness/be-active/physical-activity-guidelines-for-americans/index.html> (last visited Apr. 15, 2020).

¹³¹ *Id.*

¹³² HHS explains its use of the term sedentary behavior: “In general, sedentary behavior refers to any waking behavior characterized by a low level of energy expenditure (less than or equal to 1.5 METs) while sitting, reclining, or lying. The Guidelines operationalizes the definition of sedentary behavior to include self-reported sitting (leisure time, occupational, and total), television (TV) viewing or screen time, and low levels of movement measured by devices that assess movement or posture. Standing is another activity with low energy expenditure, but it is distinct from sedentary behavior in how it affects health.” U.S. DEP'T OF HEALTH AND HUMAN SERVS. PHYSICAL ACTIVITY GUIDELINES FOR AMERICANS (2nd ed. 2018).

The 2018 advisory committee found a “strong relationship between time in sedentary behavior and the risk of all-cause mortality and cardiovascular disease mortality in adults.”¹³³ The guidelines even include a heat map that demonstrates, on two axes, the relationship among moderate-to-vigorous physical activity, sitting time, and the risk of all-cause mortality in adults.¹³⁴ The risk of all-cause mortality decreases with even the smallest additions of moderate-to-vigorous activity.

The report also includes “Key Guidelines for Women During Pregnancy and the Postpartum Period”:

- Women should do at least 150 minutes (2 hours and 30 minutes) of moderate-intensity aerobic activity a week during pregnancy and the postpartum period. Preferably, aerobic activity should be spread throughout the week.
- Women who habitually engaged in vigorous-intensity aerobic activity or who were physically active before pregnancy can continue these activities during pregnancy and the postpartum period.
- Women who are pregnant should be under the care of a health care provider who can monitor the progress of the pregnancy. Women who are pregnant can consult their health care provider about whether or how to adjust their physical activity during pregnancy and after the baby is born.¹³⁵

¹³³ *Id.* at 21.

¹³⁴ *Id.* at Fig. 1-3 (The map is adapted from data found in Ulf Ekelund et al., *Does physical activity attenuate, or even eliminate, the detrimental association of sitting time with mortality? A harmonized meta-analysis of data from more than 1 million men and women*, 388 LANCET 1302 (2016)); *Id.* at 23.

¹³⁵ *Id.* at 9.

This section of the report explains that physical activity during pregnancy benefits a woman's overall health, maintains or increases cardiorespiratory fitness, reduces the risk of excessive weight gain, reduces the risk of gestational diabetes, and reduces symptoms of postpartum depression.¹³⁶ Regular physical activity in the postpartum period is also shown to improve the general mood and well-being of mothers.¹³⁷

As previously discussed, there is a total lack of uniform health care policy in detention facilities across the country, not to mention any means of ensuring whether pregnant women who are detained are even able to meet the physical activity guidelines proscribed by HHS. The overall movement of pregnant detainees is severely limited while they are in jail. This extreme restriction is accompanied by a range of serious health risks. Not only are detainees confined to small spaces during the vast majority, and sometimes entirety, of their days, prison officials regulate their movement in every sense. Pregnant prisoners and pretrial detainees are often unable to convince guards that they need to see a doctor, or are automatically denied care during count and lock-down.¹³⁸

The practice of shackling pregnant women and women in labor is perhaps the most egregious example of how pregnant women's bodies are policed and punished while confined. The American College of Obstetricians and Gynecologists (ACOG) define shackling as the use of "any physical restraint or mechanical device to control the movement of a prisoner's body or limbs, including handcuffs, leg shackles, and belly chains."¹³⁹ Despite recent policy advances such as the 2018 passage of the First Step Act, which prohibits the shackling of pregnant women in federal

¹³⁶ *Id.* at 79.

¹³⁷ *Id.*

¹³⁸ Roth, *supra* note 116 (citing court records and other documents showing that correction officers and medical personnel "ignore, disregard, and discount women's own knowledge that something is happening and that they need medical attention.").

¹³⁹ ACOG Comm. Op., *supra* note 88, at 2.

custody, pregnant women are still regularly shackled, even in states where the practice has been outlawed.¹⁴⁰

The New York Civil Liberties Union (NYCLU) recently launched an investigation of health care policies specific to women in county jails in New York State.¹⁴¹ The NYCLU found that while many incarcerated women in New York State are legally entitled to reproductive health care, “few county jails have policies ensuring comprehensive access to such care.”¹⁴² Only three counties had specific policies addressing the use of restraints. Other counties responding to the NYCLU’s requests for information stated that the use of restraints on pregnant women is often left to the discretion of the correctional staff.¹⁴³ In 2012, a report from the Correctional Association of New York revealed that 23 out of 27 incarcerated women were shackled during delivery, even after the New York state ban had occurred.¹⁴⁴

Shackling is both medically hazardous and emotionally traumatizing. Pregnant women who are shackled are at increased risk of falling, especially during the antepartum period due to their shifting center of gravity.¹⁴⁵ Shackling makes it more difficult to identify pregnancy-related complications, and can lead to loss of life

¹⁴⁰ Discussing the prevalence of shackling, despite it being illegal on the federal level and in many states, Lauryn King writes: “Despite being prohibited during labor and delivery at the federal level, and in 22 states and the District of Columbia, perinatal shackling remains standard operating procedure in most correctional facilities. A number of factors contribute to the continuation of this practice even in jurisdictions where it is illegal, including poor implementation of laws banning shackling, lack of training for individual correctional officers, and perpetration of stereotypes about what makes a “good” or “bad” mother.” Lauryn King, *Labor in Chains: The Shackling of Pregnant Inmates*, 25 J. PUB. POL’Y AND ADMIN. 55 (2018).

¹⁴¹ NYCLU, *supra* note 115.

¹⁴² There is little state oversight for the county jail system. *Id.*

¹⁴³ The NYCLU found that the use of restraints was left entirely to the discretion of correctional staff in Cattaraugus, Tioga, Rensselaer, and St. Lawrence Counties. Restraints were also used, unless “medically inappropriate,” in Chautauqua, Fulton, Montgomery, Putnum and Westchester counties. *Id.*

¹⁴⁴ King, *supra* note 140, at 58.

¹⁴⁵ *Id.* at 59; *see also* ACOG Comm. Op., *supra* note 88, at 2.

for both the fetus and the mother.¹⁴⁶ Serious conditions such as preeclampsia and hypertensive disease are incredibly difficult to treat quickly when medical professionals must first tend to the shackles between them and their patient.¹⁴⁷ Restraints also interfere with the ability of medical staff to act quickly in the case of emergency Cesarean sections where “a delay of as little as five minutes is enough to cause permanent brain damage to the child.”¹⁴⁸

The humiliating and dehumanizing costs of being shackled during labor are horrific. One woman who gave birth while incarcerated described her experience:

When they shackled me I had two handcuffs, one was on my wrist and the other one was attached to the bed... My leg and my arm were attached to the bed so there was no way for me to move and to try and deal with the labor pains. And the metal, cause when you're swollen, it would just cut into your skin. I had bruises after the fact that stood on me for three weeks. I mean, purple bruises from my ankle and my wrist from them having them shackles and handcuffs on me. Even when I had to get an epidural, they didn't take the shackles and the handcuffs off. I just had to bend over and just pray that I could stay in that position while they were putting that needle in my back through the whole procedure. Not once did he [the correctional

¹⁴⁶ Clarke & Simon, *supra* note 79, (noting that “in 2011, the American College of Obstetricians and Gynecologists (ACOG) released a committee opinion concluding that “[p]hysical restraints have interfered with the ability of physicians to safely practice medicine by reducing their ability to assess and evaluate the physical condition of the mother and the fetus, and have similarly made the labor and delivery process more difficult than it needs to be; thus, overall putting the health and lives of the women and unborn children at risk”) (internal citations omitted).

¹⁴⁷ ACOG Comm. Op., *supra* note 88.

¹⁴⁸ ACLU Briefing Paper, *supra* note 81, (citing Dr. Patricia Garcia, Statement to Chi. Legal Aid to Incarcerated Mothers (Dec. 1998)).

officer] try and loosen them. And the doctor asked him, you know, ‘Can’t you take them off of her? She can’t go nowhere. She can’t walk. She’s not goin’ nowhere.’ ‘It’s procedure and policy. Can’t do it.’¹⁴⁹

Another woman spent two months of her pregnancy at the Westchester County Jail in New York. She had yet to be examined when she went into early labor in her second trimester.¹⁵⁰ She was strip-searched and shackled at the hands, waist, and ankles before being taken to the hospital, where she gave birth to twins while handcuffed to a bed.¹⁵¹ She was still handcuffed to the bed when, three hours after the delivery, she learned that her premature twins had both passed away.¹⁵² She learned at the hospital that her early labor was the result of a treatable infection.¹⁵³

The shackling of pregnant women is opposed by national correctional and medical associations who recognize the practice as almost entirely unnecessary.¹⁵⁴ The cost of shackling pregnant women greatly outweighs any possible risks of flight or

¹⁴⁹ Interview with Diana Delgado, WOMEN AND PRISON: A SITE FOR RESISTANCE,

http://womenandprison.org/interviews/view/interview_with_diana_delgado.

¹⁵⁰ Shared experience of Bridgette Gibbs, Victoria Law, *U.S. Prisons and Jails Are Threatening the Lives of Pregnant Women and Babies*, IN THESE TIMES, (Sept. 28, 2015), <http://inthesetimes.com/article/18410/u.s.-prisons-are-threatening-the-lives-of-pregnant-mothers-and-newborns>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ ACLU Briefing Paper, *supra* note 81 (explaining that ACOG is opposed to shackling and recognizes the practice as “demeaning and unnecessary,” the American Medical Association (AMA) opposes the use of restraints of any kind on women in labor as well as during and after delivery, the American Public Health Association has stated that women “must never be shackled during labor and delivery,” and the Federal Bureau of Prisons, U.S. Immigration and Customs Enforcement, the U.S. Marshals Service, and the American Correctional Association have all instituted policies that limit the use of shackles on incarcerated pregnant women).

security.¹⁵⁵ Significant legal and legislative battles have also been won against the use of restraints on pregnant women inside.¹⁵⁶

The movement to end all shackling of all pregnant women in confinement is an important step in the movement for reproductive justice. Yet eliminating the use of all restraints on pregnant women in custody would not alter what is, at its heart, a system based on an unchangingly punitive environment. The practice of shackling, the absence of adequate nutrition, small living quarters, reduced or no access to medical care, separation from existing children and support systems—these are all elements of confinement that are part of a wider apparatus that inflicts a tremendous amount of stress on pregnant prisoners and pretrial detainees.

2. Pregnant Women Are Subjected To An Unalterable Environment of High Stress That Poses a Serious Risk to Their Health And Safety

Over the past two decades, a significant amount of psychiatric research has been conducted concerning the stress, anxiety, and depression often experienced by women during pregnancy and the

¹⁵⁵ Geraldine Doetzer, *supra* note 86 (“While the specific policies and procedures may vary, the main justifications for the continued practice of shackling women in advanced stages of pregnancy and through labor are identical to those used to justify restraining male or female inmates in the general population: to maintain security and decrease flight risk”); *See also* Adam Liptak, *supra* note 86.

¹⁵⁶ Landmark decisions concerning the shackling of pregnant prisoners include *Nelson v. Correctional Medical Services*, 583 F.3d 522, 532 (8th Cir. 2009) (holding that the shackling of pregnant prisoners was unconstitutional, violating the Eighth Amendment: “. . . either interference with care or infliction of ‘unnecessary suffering’ establishes deliberate indifference in medical care cases in violation of the Eighth Amendment”); *Women Prisoners of D.C. v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996) (featuring a class action suit brought by women inmates where the court held that correctional officers could not use restraints on pregnant women in labor, delivery, or in recovery immediately following delivery); *Brawley v. State of Washington*, 712 F.Supp.2d 1208 (W.D. Wash 2010) (recognizing the shackling of a pregnant woman as violating the Eighth Amendment).

resulting implications for the health of the mother and the infant.¹⁵⁷ While psychiatric research on pregnancy has been primarily focused on diagnosable anxiety and depressive disorders, the fields of behavioral medicine, health psychology, and social epidemiology have recently produced research on “pregnancy anxiety.” Pregnancy anxiety is a comparatively newer concept that is “among the most potent maternal risk factors for adverse maternal and child outcomes.”¹⁵⁸

Leading researchers Christine Dunkel Schetter and Lynlee Tanner from the University of California, Los Angeles Department of Psychology have pioneered the inquiry into pregnancy anxiety and have written extensively on their findings.¹⁵⁹ Pregnancy anxiety, as opposed to state anxiety during pregnancy, involves fears about the health of the baby, fear of hospital and healthcare experiences, fear of survival in pregnancy, fear of the aftermath of childbirth, and fear of the maternal role.¹⁶⁰ Studies have revealed “remarkably convergent empirical evidence” across diverse populations concerning the adverse effects of pregnancy anxiety.¹⁶¹ Of the many adverse birth outcomes studied, pregnancy anxiety (as well as stress and anxiety generally) have consistently been linked to preterm birth (PTB) and low birth weight (LBW).¹⁶²

Dunkel Schettel and Tanner concluded in a 2012 study:

¹⁵⁷ Christine Dunkel Schetter & Lynlee Tanner, *Anxiety, Depression and Stress in Pregnancy: Implications for Mothers, Children, Research, and Practice*, 25 CURR. OPIN. PSYCHIATRY 1 (2012).

¹⁵⁸ *Id.* at 2.

¹⁵⁹ See Schetter & Tanner, *supra* note 157.

¹⁶⁰ *Id.* See also, Christine Dunkel Schetter, *Psychological Science on Pregnancy: Stress Processes, Biopsychosocial Models, and Emerging Research Issues*, ANN. REV. PSYCHOL. (2010).

¹⁶¹ Schetter & Tanner, *supra* note 157. See also, Christine Dunkel Schetter, *Stress in Pregnancy: Empirical Evidence and Theoretical Issues to Guide Interdisciplinary Researchers*, in HANDBOOK OF STRESS SCIENCE: BIOLOGY, PSYCHOLOGY, AND HEALTH (R. Contrada & A. Baum, eds., 2010).

¹⁶² Schetter & Tanner, *supra* note 157, at 3.

Anxiety, depression, and stress in pregnancy are risk factors for adverse outcomes for mothers and children. Anxiety in pregnancy is associated with shorter gestation and has adverse implications for fetal neurodevelopment and child outcomes. Anxiety about a particular pregnancy is especially potent. Chronic strain, exposure to racism, and depressive symptoms in mothers during pregnancy are associated with lower birth weight infants with consequences for infant development. These distinguishable risk factors and related pathways to distinct birth outcomes merit further investigation.¹⁶³

Other leading studies have arrived at similar conclusions: exposure to prenatal stress not only affects the physical development of the infant (birth weight, head size, etc.), but also affects certain indications of functional development, such as poor psychomotor performance and difficult behavior during the early years of childhood.¹⁶⁴ Retrospective studies have linked maternal psychological stress during pregnancy resulting from familial problems or the death of a partner (as well as external stressors such as aircraft noise) to delayed motor development and behavioral disorders in young children.¹⁶⁵

Mother-infant attachment is another critical element of the birth process and greatly affects the infant's psychological development as well as the mother's mental health.¹⁶⁶ Mothers in correctional

¹⁶³ *Id.* at 6.

¹⁶⁴ E.J.H. Mulder et al., *Prenatal Maternal Stress: Effects on Pregnancy and the (Unborn) Child*, 70 *EARLY HUM. DEV.* 3, 3–14 (2002).

¹⁶⁵ *Id.*; see also, M. Weinstock, *Does Prenatal Stress Impair Coping and Regulation of Hypothalamic–Pituitary–Adrenal Axis?*, 21 *NEUROSCI. BIO. BEHAV. REV.* 1, 1–10 (1997).

¹⁶⁶ Carolyn Sufrin, *Pregnancy and Postpartum Care in Correctional Settings*, NAT'L COMM'N ON CORRECTIONAL HEALTH CARE 2, 5 (March 2018), <https://www.ncchc.org/filebin/Resources/Pregnancy-and-Postpartum-Care-2018.pdf>.

settings are typically separated from their newborns as soon as they are discharged from the hospital, rendering it impossible for the mother and infant to bond in the infant's earliest stage of life outside the womb.¹⁶⁷ ACOG and the American Academy of Pediatrics also recommends "exclusive breastfeeding for the first six months," citing the numerous short-term and long-term benefits that breast milk has for newborns.¹⁶⁸ These benefits include lower risk of respiratory and ear infections, allergic diseases, obesity, and type 2 diabetes.¹⁶⁹ A Committee Opinion published by the ACOG Breastfeeding Expert Work Group states: "Enabling women to breastfeed is a public health priority because, on a population level, interruption of lactation is associated with adverse health outcomes for the woman and her child."¹⁷⁰ Most prisoners and detainees are unable to breastfeed and bond with their newborns during the first few weeks, let alone the first six months of the infant's life.

The impact of stress on perinatal health is also reflected in the staggering rate of Black maternal mortality in the United States. In 2019, the Centers for Disease Control reported that Black women living in the United States are two to three times more likely than White women to die from pregnancy-related causes.¹⁷¹ A recent feature in the New York Times Magazine by Linda Villarosa bared this stark reality, emphasizing that the crisis of maternal death and

¹⁶⁷ ACOG, COMM. ON HEALTHCARE FOR UNDERSERVED WOMEN, *Healthcare for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, Comm. Op. 511 (reaffirmed 2016), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2011/11/health-care-for-pregnant-and-postpartum-incarcerated-women-and-adolescent-female.pdf>.

¹⁶⁸ ACOG, COMM. ON OBSTETRIC PRACTICE, *Optimizing Support for Breastfeeding as Part of Obstetric Practice*, Comm. Op. 756, 132 *OBSTETRICS & GYNECOLOGY* 4 (2018), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2018/10/optimizing-support-for-breastfeeding-as-part-of-obstetric-practice.pdf>.

¹⁶⁹ *Id.*; see also Sufrin, *supra* note 166.

¹⁷⁰ ACOG, *supra* note 167, at 187.

¹⁷¹ *Racial and Ethnic Disparities Continue in Pregnancy-Related Deaths—Black, American Indian/Alaska Native women most affected*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 5, 2019), <https://www.cdc.gov/media/releases/2019/p0905-racial-ethnic-disparities-pregnancy-deaths.html>.

near-death is not limited to women of a certain class.¹⁷² After discussing tennis champion Serena Williams' near-death experience following the birth of her daughter, Villarosa writes:

For black women in America, an inescapable atmosphere of societal and systemic racism can create a kind of toxic physiological stress, resulting in conditions—including hypertension and pre-eclampsia—that lead directly to higher rates of infant and maternal death. And that societal racism is further expressed in a pervasive, longstanding racial bias in health care—including the dismissal of legitimate concerns and symptoms—that can help explain poor birth outcomes even in the case of black women with the most advantages.¹⁷³

As pregnant pretrial detainees enter facilities of confinement, they face the polar edges of a system so devoted to its racist foundations that it denies Serena Williams, one of the most accomplished athletes in the world, her bodily integrity.

IV. PREGNANT WOMEN SHOULD NOT BE DETAINED

There is no mitigation or institutional reform that could totally neutralize the harm pregnant women endure while detained. For many pretrial detainees, that harm is inevitable simply because they cannot afford bail.¹⁷⁴ In 2017, 60% of women in jail in the United States had not been convicted of a crime and were awaiting

¹⁷² Linda Villarosa, *Why America's Black Mothers and Babies are in a Life-or-Death Crisis*, N.Y. TIMES MAG. (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/magazine/black-mothers-babies-death-maternal-mortality.html>.

¹⁷³ *Id.*

¹⁷⁴ Dobbie et al., *supra* note 90.

trial.¹⁷⁵ Because Black women are incarcerated at higher rates¹⁷⁶ and are often more economically disadvantaged than White women, cash bail in America has devastating consequences for Black women. While recent developments in federal and state cash bail reform will undoubtedly shield some pregnant women from pretrial detention, legislatures are hesitant to embrace sweeping reforms, and the future remains chaotically uncertain. This section considers how pregnant pretrial detainees might rely on the Second Circuit's objective deliberate indifference standard to prove Fourteenth Amendment violations, the possibility of class action habeas as a viable form of relief, and how cash bail reform may affect relief for some.

A. Attempts at Relief

Courts have resisted identifying “pregnancy in and of itself” as a serious medical need absent complications or some other aggravating factor.¹⁷⁷ As this Note argues, however, pregnancy in the context of forced detention necessarily involves a range of serious health risks. A pretrial detainee without a conviction is at risk of a range of serious adverse outcomes for herself and her fetus, not to mention a physically and mentally humiliating series of traumas.

In 1987, the Third Circuit decided the case of *Monmouth County Correctional Institutional Inmates v. Lazaro*.¹⁷⁸ The inmates of Monmouth County Correctional Institution brought a class action alleging several conditions of confinement claims, including overcrowding and the inadequacy of the facility's healthcare

¹⁷⁵ Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2017*, PRISON POLY INITIATIVE (Oct. 19, 2017), https://www.prisonpolicy.org/factsheets/women_pie_chart_report_2017.pdf.

¹⁷⁶ Sufrin et al., *supra* note 126.

¹⁷⁷ Rachel Roth, *Obstructing Justice: Prisons as Barriers to Medical Care for Pregnant Women*, UCLA WOMEN'S L.J. 79, 98 (2010).

¹⁷⁸ *Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987).

services.¹⁷⁹ The action also involved allegations that the County’s “refusal to provide pregnant inmates with *all* necessary medical care related to their pregnancies—including abortion-related services—constituted a deliberate indifference to their serious medical needs and deprived them of equal protection of the law in violation of the eighth and fourteenth amendments.”¹⁸⁰

The Third Circuit found pregnancy to be a unique medical condition, rejecting the Monmouth County Correctional Institution’s argument that pregnancy ought not to be considered a serious medical need. The court stated:

Pregnancy is unique. There is no other medical condition known to this Court that involves at the threshold an election of options that thereafter determines the nature of the necessary medical care. In other words, the condition of pregnancy, unlike cancer, a broken arm or a dental cavity, will require very separate and distinct medical treatment depending upon the option—childbirth or abortion—that the woman elects to pursue. The County’s suggestion that, to come within the purview of *Estelle*, an inmate must suffer from “an abnormal medical condition,” is simply wrong. That pregnancy itself is not an “abnormal medical condition” requiring remedial, medical attention does not place it beyond the reach of *Estelle*. Nor does the fact that pregnancy presents a woman with the alternatives of childbirth or abortion affect the legal characterization of the nature of the medical treatment necessary to pursue either alternative.¹⁸¹

¹⁷⁹ *Id.* at 328.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 348.

The Third Circuit recognized that pregnancy involves a continuum of choices that the person who is pregnant is entitled to make. The choices a woman makes throughout the duration of her pregnancy, the court reasoned, require medical care whether or not the woman decides to have an abortion.¹⁸² Unfortunately, *Monmouth County* has been distinguished by more recent cases where Circuit judges have upheld the constitutionality of similar challenges to abortion policies and prenatal healthcare.¹⁸³

In *Patterson v. Carroll County Detention Center*, Elizabeth A. Patterson brought a wrongful death and 42 U.S.C. § 1983 action against Carroll County prison officials in the state of Kentucky.¹⁸⁴ Patterson was pregnant in May 2004 when she was admitted to the Carroll County Detention Center to serve a felony sentence.¹⁸⁵ On July 6, after experiencing abnormally severe cramping, Patterson told an official that she was in a significant amount of pain.¹⁸⁶ She was ignored by the guard, who “laughed off” her concerns and assumed the pains were simply routine pregnancy discomfort.¹⁸⁷ Early the next morning, Patterson’s water broke, and some of the inmates who shared her cell (around ten) alerted staff of the emergency.¹⁸⁸ Carroll County Detention Center staff could not decide which hospital Patterson should be transferred to, denied her initial requests to contact family members, and transferred Patterson to the hospital by way of the “paddy wagon.”¹⁸⁹

¹⁸² *Id.* at 349.

¹⁸³ *See, e.g.,* *Bryant v. Maffucci*, 923 F.2d 979 (2d Cir. 1991) (ruling that prison authorities’ actions did not rise above the level of negligence); *Jamison v. Nielsen*, 32 Fed. Appx. 874 (9th Cir. 2002) (holding that the condition of being two to three months pregnant was not sufficiently serious as to trigger a constitutional protection).

¹⁸⁴ *Patterson v. Carroll Cty. Det. Ctr.*, No. CIV.A. 05-101-DLB, 2006 WL 3780552, at *1 (E.D. Ky. Dec. 20, 2006).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

Patterson went into labor at the hospital, where she miscarried her child.¹⁹⁰ The medical records stated the baby was “friable and gray.”¹⁹¹ An OB/GYN on duty in the emergency room at the time explained that the “friable and gray” state of the fetus indicated that the fetus had likely been dead inside Patterson’s womb for days or even weeks prior to her labor and delivery.¹⁹² Patterson lost a significant amount of blood while emergency room staff waited for her to deliver the afterbirth.¹⁹³ Although the court conceded that Patterson’s condition was serious after her water broke, they refused to recognize Patterson’s pregnancy before the incident as constituting a serious medical need. In a footnote, the court states:

Plaintiffs attempt to define the context of “serious” in terms of Patterson's condition generally, referring only to her pregnancy as the serious condition requiring treatment. This untenable application of the legal standard is an effort by Plaintiffs to suggest that because Patterson was pregnant, she was in a permanently serious medical condition and, therefore, once the guard ignored her painful calls of cramping, she was acting with deliberate indifference. However, the general condition of being pregnant does not necessarily constitute a serious medical need at any given moment in time during incarceration absent a development that “must require immediate attention.”

[...] Simply put, the serious medical need only arose in this case when Patterson entered premature labor as manifested by her water

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

breaking because it was only then that “a lay person would easily recognize the necessity for a doctor's treatment.”¹⁹⁴

Although Patterson had not complained of any prior complications relating to her pregnancy and was taking no medication other than prenatal vitamins, Ambien for sleep, and BuSpar,¹⁹⁵ the conditions she was subjected to in confinement put her health at serious risk.

The court in *Patterson* was not following the objective deliberate indifference standard that has emerged in the Second Circuit for pretrial detainees asserting failure to protect claims under the Fourteenth Amendment.¹⁹⁶ Pretrial detainees are no longer bound by the same notice and knowledge requirements that governed the decision in *Patterson*.¹⁹⁷ Pregnant pretrial detainees are now in the position to assert failure to protect claims, under the precedents of *Kingsley* and *Darnell*, because of the objective deliberate indifference standard that would not have been successful in prior years.¹⁹⁸

Nelson v. Correctional Medical Services provides a helpful framework for the discussion of pretrial pregnant detainees and their

¹⁹⁴ *Id.* at *3, fn. 5.

¹⁹⁵ *Id.* at *1.

¹⁹⁶ *Id.* at *3 (E.D. Ky. Dec. 20, 2006) (In *Patterson*, the Court stated: “[W]hile the objective component of the deliberate indifference standard looks to ‘contemporary standards of decency,’ the subjective component requires that the actor ‘must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and [she] must also draw the inference.’” (internal citations omitted). *Id.* This standard differs from the deliberate indifference standard now followed by the Second Circuit that lacks a knowledge requirement).

¹⁹⁷ *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) (“After *Kingsley*, it is plain that punishment has no place in defining the mens rea element of a pretrial detainee’s claim under the Due Process Clause. Unlike a violation of the Cruel and Unusual Punishments Clause, an official can violate the Due Process Clause of the Fourteenth Amendment without meting out any punishment, which means that the Due Process Clause can be violated when an official does not have subjective awareness that the official’s acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm.”).

¹⁹⁸ *Id.*

own Fourteenth Amendment failure to protect claims.¹⁹⁹ In *Nelson*, an acutely divided Eighth Circuit Court of Appeals heard a pregnant, convicted prisoner's allegations of Eighth Amendment violations.²⁰⁰ The opinion discussed the fact that there was no reason to believe Nelson posed a threat or flight risk, and yet she was repeatedly unshackled and re-shackled as the doctor recorded her cervical dilation during labor.²⁰¹ The Nelson court relied on *Farmer* in its analysis:

A prison official is deliberately indifferent if she “knows of and disregards” a serious medical need or a substantial risk to an inmate's health or safety. *Farmer v. Brennan*. A claim of deliberate indifference has both an objective and a subjective component. Thus, the relevant questions here are: (1) whether Nelson had a serious medical need or whether a substantial risk to her health or safety existed, and (2) whether Officer Turensky had knowledge of such serious medical need or substantial risk to Nelson's health or safety but nevertheless disregarded it.²⁰²

¹⁹⁹ *Nelson v. Corr. Med. Services*, 583 F.3d 522 (8th Cir. 2009) (en banc).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 526 (“According to Nelson's testimony, the shackles prevented her from moving her legs, stretching, or changing positions. A nurse told Officer Turensky that “[s]he wished that they wouldn't have to put those restraints on” Nelson, but to no avail. Each time a nurse needed to measure Nelson's dilation, that nurse had to ask Turensky to unshackle her. Although it was clear that Nelson was in the final stages of labor and no one on the hospital staff ever requested that she be reshackled, Nelson testified that Turensky “hooked [her] right back up” to the bed rails after each cervical measurement was taken. Turensky herself noted in her security check log that by 4:38 pm Nelson was dilated to 8 centimeters”). See also Brett Dignam and Eli Y. Adashi, *Health Rights in the Balance: The Case Against Perinatal Shackling of Women Behind Bars*, 16 HEALTH & HUM. RTS. J. 13, 4–23 (2014).

²⁰² *Nelson*, 583 F.3d at 528 (en banc).

For pretrial detainees, the Second Circuit has affirmed that the second prong of the *Farmer* deliberate indifference test relied on in *Nelson* does not have a knowledge or intent requirement, in the same way the Supreme Court ruled in *Kingsley* for an excessive force claim.²⁰³ It is enough to prove that prison officials *should* have known of the serious medical need or risk to the detainee's health or safety.

B. Habeas Class Action

On January 27, 2017, President Donald Trump signed Executive Order 13769, "Protecting the Nation from Foreign Terrorist Entry into the United States,"²⁰⁴ effectively barring entry into the country by all nationals of seven foreign states (Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen). Litigation prompted by the order brought forward noteworthy procedural arguments²⁰⁵ regarding

²⁰³ *Darnell v. Pineiro*, 849 F.3d 17, 21 (2d Cir. 2017) ("A pretrial detainee may establish a § 1983 claim for allegedly unconstitutional conditions of confinement by showing that the officers acted with deliberate indifference to the challenged conditions. This means that a pretrial detainee must satisfy two prongs to prove a claim, an "objective prong" showing that the challenged conditions were sufficiently serious to constitute objective deprivations of the right to due process, and a "subjective prong"—perhaps better classified as a "mens rea prong" or "mental element prong"—showing that the officer acted with at least deliberate indifference to the challenged conditions. The reason that the term "subjective prong" might be a misleading description is that, as discussed below, the Supreme Court has instructed that "deliberate indifference" roughly means "recklessness," but "recklessness" can be defined subjectively (what a person actually knew, and disregarded), or objectively (what a reasonable person knew, or should have known)") (internal citations omitted).

²⁰⁴ Exec. Order No. 13769, "Protecting the Nation from Foreign Terrorist Entry into the United States", 82 Fed. Reg. 13209 (March 9, 2017); Presidential Proclamation No. 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats", 82 Fed. Reg. 45161 (Sept. 24, 2017); *see also* Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

²⁰⁵ In his blog, Josh Blackman has tracked and analyzed litigation following Executive Order 13769. Blackman discusses novel procedural arguments for habeas class action. Josh Blackman, *The Procedural Aspects of "The Airport Cases,"* JOSH BLACKMAN'S BLOG (Jan. 29, 2017),

large habeas²⁰⁶ class actions.²⁰⁷ While these lawsuits do not involve pregnant women or pretrial detainees, they offer a potentially viable procedural model for how pregnant pretrial detainees could retain relief through a writ of habeas corpus²⁰⁸ class action. The release of pregnant pretrial detainees could be realized if they are able to apply for a writ of habeas corpus on behalf of themselves and others similarly situated.²⁰⁹

On January 27, Hameed Khalid Darweesh (an Iraqi husband and father of three) and Sameer Abdulkhaleq Alshawi (an Iraqi husband and father) were blocked from leaving John F. Kennedy International Airport by United States Customs and Border Protections agents.²¹⁰ Darweesh and Alshawi were detained despite their valid entry documents and an assessment by the federal government that neither individual posed a security threat following standard administrative processing and security procedures.²¹¹ The ACLU filed a petition for writ of habeas corpus and a complaint for injunctive declaratory relief on behalf of Darweesh and Alshawi, as well as “all others similarly situated.”²¹² The ACLU subsequently filed a motion for class certification or representative habeas action.

<http://joshblackman.com/blog/2017/01/29/the-procedural-aspects-of-the-airport-cases/>.

²⁰⁶ See 28 U.S.C. §§ 1331, 1361, 2241, 2243, and the Habeas Corpus Suspension Clause of the U.S. Constitution.

²⁰⁷ See, e.g., *Darweesh v. Trump*, No. 17 CIV. 480 (AMD), 2017 WL 388504, at *1 (E.D.N.Y. Jan. 28, 2017). See also “*Darweesh et al. v. Trump et al.*,” YALE LAW SCHOOL, <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/worker-and-immigrant-rights-advocacy-clinic/darweesh-et-al-v-trump-et-al> (last visited Apr. 15, 2020); Josh Blackman, *supra* note 205.

²⁰⁸ Literally meaning “that you have the body,” United States federal courts may use the writ of habeas corpus to find that a state’s detention of a prisoner or detainee is invalid. See, e.g., *Brown v. Allen*, 344 U.S. 443 (1953).

²⁰⁹ In *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974).

²¹⁰ Petition for Writ of Habeas Corpus and Complaint for Injunctive Declaratory Relief, *Darweesh v. Trump*, No. 17 CIV. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017).

²¹¹ *Id.*

²¹² *Id.*

²¹³ The motion argued that habeas class action was appropriate in the case of Darweesh and Alshawi, in line with Second Circuit precedence allowing “a multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure.”²¹⁴

Federal Rule of Civil Procedure 23 requires that in order for one or more members of a class to pursue an action on behalf of all members, four elements must be met: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.²¹⁵ In 1974, the Second Circuit held that although the Federal Rules of Civil Procedure do not directly govern habeas actions, the courts maintain the authority to fashion analogous procedural rules for habeas class actions in particular circumstances.²¹⁶

The Second Circuit’s holding in *United States ex rel. Sero v. Preiser* was articulated in *Wang v. Reno*, where the Eastern District of New York explained:

²¹³ Petitioners’ Motion for Class Certification or Representative Habeas Action, *Darweesh v. Trump*, No. 17 CIV. 480 (AMD), 2017 WL 388504, (E.D.N.Y. Jan. 28, 2017), https://www.aclu.org/sites/default/files/field_document/4_-_motion_for_class_cert.pdf.

²¹⁴ *Id.* (citing *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974)).

²¹⁵ FED. R. CIV. P. 23(a).

²¹⁶ *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974) (“To say that the precise provisions of Rule 23 do not apply to habeas corpus proceedings, however, is *toto caelo* different from asserting that we do not have authority to fashion expeditious methods of procedure in a specific case. *Harris* confirms the power of the judiciary, under the All Writs Act, 28 U.S.C. § 1651 (1970), to fashion for habeas actions ‘appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage.’ We find in the unusual circumstances of this case a compelling justification for allowing a multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure.” citing *Harris v. Nelson*, 394 U.S. 286, 297 (1969)).

Habeas class actions are an appropriate procedural vehicle in certain limited situations. Although habeas actions are not strictly governed by the Federal Rules of Civil Procedure and therefore the class action provisions of the rules do not automatically apply to habeas actions, a court retains the power “to fashion for habeas actions ‘appropriate means of procedure, by analogy to existing rules or otherwise in conformity with judicial usage.’”²¹⁷

A habeas class action on behalf of pregnant pretrial detainees in the Second Circuit could be adjudicated under *Sero*. However, courts would likely still require class certification by court order; without class certification, courts are unable to grant relief to unnamed and unknown parties.²¹⁸

C. Bail Reform

²¹⁷ Wang v. Reno, 862 F. Supp. 801 (E.D.N.Y. 1994) (quoting *Sero v. Preiser*, 506 F.2d at 1125); see generally *Bertrand v. Sava*, 684 F.2d 204 (2d Cir.1982); *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1203 (9th Cir.1975) (class certification appropriate in “unique” circumstances); *Williams v. Richardson*, 481 F.2d 358 (8th Cir.1973); *United States ex rel. Walker v. Mancusi*, 338 F.Supp. 311, 315–16 (W.D.N.Y.1971), aff’d, 467 F.2d 51 (2d Cir.1972) (habeas corpus class certification for 38 prison inmates); *Martin v. Strasburg*, 689 F.2d 365, 374 (2d Cir.1982).

²¹⁸ Although Judge Ann Donnelly granted relief in her order responding to the ACLU’s Emergency Motion for Stay of Removal in which the ACLU requested relief on behalf of “putative class members,” the Court did not request a list of individuals detained pursuant to the Executive Order by the government until after Darweesh and Alwashi had been released, making it difficult to enforce the order for the unnamed members of the “putative class.” *Darweesh v. Trump*, No. 17 CIV. 480 (AMD), 2017 WL 388504, (E.D.N.Y. Jan. 28, 2017).

States have begun to embrace cash bail reform, but the terrain is chaotic and currently in flux.²¹⁹ In virtually every jurisdiction, the state (per state statute) is only able to consider two factors when deciding whether to offer bail: (1) the extent to which the defendant poses a flight risk and (2) the likelihood the defendant will be arrested for a new crime before trial.²²⁰ However, the vast majority of pregnant pretrial detainees are not flight risks and pose no threat to public safety.²²¹ The widespread use of monetary bail has drastically changed the landscape of pretrial detention; less than twenty-five percent of felony defendants are released without financial terms, and typical felony defendants are assigned a bail amount of more than \$55,000.²²² States have failed to implement measures to prevent large numbers of defendants from being detained pretrial simply because they lack the resources to meet bail.²²³

Already facing steep socioeconomic disadvantages, women are also disproportionately criminalized by cash bail systems.²²⁴ Women are generally arrested and incarcerated for different types of crimes than men.²²⁵ Women are less likely to be convicted of

²¹⁹ New Jersey and Kentucky are examples of two states that have adjusted their cash bail systems. New Jersey eliminated cash bail in January of 2017 in favor of a risk assessment system. Kentucky relies on similar risk assessment procedures which has resulted in 90% of defendants appearing in court without committing new crimes. Eisen & Chettiar, *supra* note 66, at 14. However, some fear that alternative “risk assessments” can also exacerbate racial disparities because they consider social factors such as education, family structure, and employment history. These risk assessments may very well result in racially discriminatory and disproportionate pretrial detention. *Id.*

²²⁰ Eisen & Chettiar, *supra* note 66, at 14.

²²¹ James Austin et al., *How Many Americans are Unnecessarily Incarcerated?*, BRENNAN CTR. FOR JUST. (2016), https://www.brennancenter.org/sites/default/files/2019-08/Report_Unnecessarily_Incarcerated_0.pdf.

²²² Dobbie et al., *supra* note 90, at 201.

²²³ Digard & Swavola, *supra* note 28.

²²⁴ See STEINBURG, *supra* note 3; Myesha Braden & Phylisia H. Hill, *Women More Likely to be Unable to Afford Bail*, BALT. SUN (May 13, 2018), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0514-women-bail-20180509-story.html>.

²²⁵ See Hotelling, *supra* note 2, at 38.

violent offenses, and more likely to be arrested for drug, alcohol, and property offenses.²²⁶ Poverty and addiction are frequent motivating factors, and when violent offenses are committed, the offenses are often against male abusers.²²⁷ Incarcerated women have lower incomes than incarcerated men, making it even more difficult to afford cash bail.²²⁸ The end result is a significant number of pregnant women, detained before trial, restrained in similar fashions to men who have been convicted of violent crimes, with no way to ensure a safe or uncompromised pregnancy.²²⁹

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POLY INITIATIVE (May 2016) (“Examining the median pre-incarceration incomes of people in jail makes it clear that the system of money bail is set up so that it fails: the ability to pay a bail bond is impossible for too many of the people expected to pay it. In fact, the typical Black man, Black woman, and Hispanic woman detained for failure to pay a bail bond were living below the poverty line before incarceration. The income data reveals just how unrealistic it is to expect defendants to be able to quickly patch together \$10,000, or a portion thereof, for a bail bond. The median bail bond amount in this country represents eight months of income for the typical detained defendant [...] Too many jails are detaining people not because they are dangerous, but because they are too poor to afford bail bonds. One study of felony defendants nationwide found that an additional 25% percent of defendants could be released pretrial without any increases to pretrial crime. The study found that many counties could safely release older defendants, defendants with clean records, and defendants charged with fraud and public order offenses, all without threatening public safety”).

²²⁹ Just because women commit violent crime at lower rates than men do does not mean that women who do commit violent crimes deserve to be shackled or detained while pregnant. It is true however that women commit violent crimes less frequently than men which is significant because much of the justification for the use of restraints of pregnant inmates rests on the idea that pregnant women pose a flight and security risk. Lauryn King writes: “Violent pregnant inmates are also rare, but the construction of the “bad” and even dangerous mother distorts how correctional staff see and respond to them. In addressing the outlier of a pregnant inmate who poses a threat to herself and others, correctional officers and medical staff can use soft restraints instead of handcuffs and only restrain the hands, unless there is a legitimate threat to

On January 1, 2020, New York joined a growing number of states in signing a cash bail reform bill into law.²³⁰ The bill created provisions for pretrial detention, amended criminal procedure and judiciary law, and eliminated cash bail.²³¹ However, almost immediately after the law went into effect, a wave of political pressure threw lawmakers into chaos. On April 1, 2020, Governor Andrew Cuomo and a group of Democratic state lawmakers reached a deal that virtually reversed the January reform bill by increasing the number of defenses for which judges would have the discretion to set bail.²³² While groundbreaking work continues in the “end cash bail” movement,²³³ with many groups focusing on Black women who are detained pretrial,²³⁴ cash bail reform may not be the ultimate relief for the reality that being detained while pregnant causes irrevocable and unmitigable harm.

V. CONCLUSION

safety that necessitates restraining the legs. If needed, staff can also use soft restraints on the legs, and officers can defer to the medical staff present and the comfort of the inmate in making the decision to restrain further. If shackled, staff can allow the inmate to change position as required for comfort or medical attention, as complications may arise from restricted movement.” King, *supra* note 140, at 62.

²³⁰ Roxanna Asgarian, *The controversy over New York’s bail reform law, explained*, VOX (Jan. 17, 2020, 8:30 AM), <https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained>).

²³¹ *Id.*

²³² Jonathan Ben-Menachem, *Cuomo’s Bail Reform Reversal Risks Explosive Coronavirus Spread in Jails*, SLATE (Apr. 1, 2020), <https://slate.com/news-and-politics/2020/04/cuomo-bail-reform.html>.

²³³ The “end cash bail” movement is “a broad coalition of organizations and bail funds within the Movement for Black Lives.” Nnennaya Amuchie, *Cash Bail Fuels the Prison Industrial Complex. But We Can Stop It.*, REWIRE.NEWS (Apr. 10, 2018, 1:55 PM), <https://rewire.news/article/2018/04/10/cash-bail-stop-it/>.

²³⁴ See, e.g., Erin. E. Evans, *#FreeBlackMamas Works to Bail Black Mothers out of Jail in Time for Mother’s Day*, NBC NEWS (May 11, 2019), <https://www.nbcnews.com/news/nbcblk/freeblackmamas-works-bail-black-mothers-out-jail-time-mother-s-n1004511>.

All women, including economically disadvantaged women and women of color, have particular perinatal needs. Unfortunately, the American carceral system regularly denies individuals their human rights to a sovereign conception, pregnancy, and birth. Detainment necessarily involves a substantial risk of serious harm to the health and safety of pregnant pretrial detainees. Women of color are disproportionately justice-impacted and face an additional unique and nefarious set of harms while incarcerated. The recent adoption of an objective deliberate indifference standard in the Second Circuit may make it possible for pregnant pretrial detainees to prevail on failure to protect claims alleging Fourteenth Amendment violations. It is impossible to maintain a healthy, safe, and autonomous pregnancy while detained.