Comment

Abortion Rights for ICE Detainees: Evaluating Constitutional Challenges to Restrictions on the Right to Abortion for Women in ICE Detention

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Introduction

IMMIGRATION HAS BEEN a perpetual hot topic throughout American history. Debates surrounding immigration policy reform have spurred several major legislative initiatives over the last fifteen years. In 1996, Congress made significant changes to immigration law in the wake of the Oklahoma City bombing with the passage of two laws: the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Congress’s primary purposes in enacting IIRIRA included strengthening border patrol, increasing deportation, and broadening mandatory detention. Under the AEDPA, Congress limited the power of federal judges to grant relief by streamlining proce-

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3. See H.R. Rep. No. 104-469(1), at 111 (1996) (outlining the need for legislation); see also id. at 114 ("Congress should establish as a fundamental strategy for immigration enforcement the deterrence of illegal migration across the land borders of the United States."); id. at 123 (noting that the major reason many deportable aliens are not removed
Several provisions of these laws have codified anti-immigrant sentiment and resulted in strict enforcement and detention policies. Recent congressional efforts have continued to focus on limiting "illegal" immigration through enforcement measures.

United States Immigration and Customs Enforcement ("ICE") is the federal agency tasked with implementing United States immigration laws. Since the enactment of the IIRIRA and AEDPA in 1996, the ICE detainee population has grown steadily. In 2007, ICE detained over 311,000 aliens, with an average daily population of over 30,000. The average length of stay for a detainee was thirty-seven days. As from the United States is due to the inability of the INS to detain such aliens through the course of their deportation proceedings, thus the law seeks to increase detention space)

4. See H.R. Rep. No. 104-383, at 40 (1995) ("Title VI, section 621 ... establishes an expedited asylum procedure for those individuals who arrive in the United States without proper immigration documents and fail to demonstrate a credible fear of persecution in their countries of origin. ... Section 623 of title VI subjects illegal aliens to exclusion from the United States following an administrative adjudication where the alien is found to have unlawfully entered the United States. Once such a finding is made, the alien will be subject to expulsion, subject only to administrative review of the exclusion order and habeas corpus protections. This type of expedited expulsion procedure will apply regardless of the length of time the illegal entrant has been unlawfully present within the United States. The provision recognizes that there is an obvious and fundamental difference between aliens, who entered the United States lawfully and later become deportable, and those whose initial entry was wholly illegal.").


10. Id.
the population of immigrants detained by ICE increases, the legal community must develop workable standards for evaluating detainees' constitutional rights.

ICE detainees are held pursuant to civil immigration laws. The detainee population is made up of individuals awaiting immigration hearings and decisions, as well as individuals who are detained pending deportation. Women account for ten percent of this detainee population. Since most female ICE detainees are asylum seekers who are fleeing persecution or are victims of other forms of violence, they are particularly vulnerable. This vulnerability is exacerbated in the context of medical care at detention facilities, where women's reproductive health is uniquely at issue.

The conflict between immigration, ICE detention policies, and access to abortion was poignantly captured in a recent exposé that tracked Maria, a Honduran woman who was brutally raped during her journey to the United States. Upon entering the United States, Maria was picked up by Border Patrol and sent to a detention center where she was required to take a pregnancy test; the test result was positive. The story continued:

For two months, while Maria awaited her detention hearing, [her counselor] says they met about once every two weeks to talk about the ordeal. Maria asked about her options for ending the pregnancy. "I can't do it," [the counselor] remembers her saying. "The baby's face will just remind me of him—the man who did this."

But Maria ran into a practice limiting the reproductive rights of ICE detainees. For pregnant women in immigration detention facilities, it is virtually impossible to obtain an abortion. . . . [the counselor] told her, "If you weren't in detention, these would be your options" . . . . But while she was detained, it just wasn't a possibility.


14. Id.


16. Id.

17. Id.
This account provides a context to better understand the various issues of immigration and detention, and their effect on a woman’s access to abortion. It also highlights the role that comprehensive administrative guidelines and clear legal standards could play in protecting the reproductive rights of women in ICE detention.

No administrative agency has considered whether a woman in ICE detention has a constitutional right to access abortion services. However, courts have addressed the broader issue of access to health-care for ICE detainees, as well as for prisoners generally. This Comment argues that women in ICE detention have three cognizable constitutional claims when their right to choose to terminate a pregnancy is restricted or denied by detention policies and/or officials. Part One provides an overview of ICE operations and policies, and a background on United States constitutional rights for non-citizens. Part Two outlines the due process fundamental rights framework and argues it is most effective for challenging detention policies that restrict access to abortion services. Part Three charts the Fifth Amendment framework and argues that while useful for challenging institutional policies or actions of individuals, the framework is most helpful to support an expansion of detainees’ rights to basic health care under the Due Process Clause. Part Four summarizes the Eighth Amendment framework and argues it is the most appropriate to support a claim based on the actions of individual staff members or officials for denying access to abortion services; however, current standards have rendered inconsistent outcomes. This Comment concludes that in the absence of federal agency regulations supporting a detainee’s right to an abortion, female ICE detainees and their advocates have three viable causes of action available to protect the right to choose abortion while in ICE detention.


19. See generally Victoria W. v. Larpenter, 369 F.3d 475 (5th Cir. 2004) (reviewing prisoner’s claim that prison policy requiring a court order to receive an elective abortion violated her civil rights).

20. This Comment will not address issues related to public funding for abortion services.
I. Background

A. ICE Operations

After the 9/11 attacks, President Bush created the Department of Homeland Security21 ("DHS") in the largest reorganization of the federal government since the creation of the Department of Defense.22 During this massive reorganization, the Immigration and Naturalization Service ("INS") was eliminated and its enforcement duties were transferred to ICE, which became part of the new DHS.23 ICE enforces United States immigration policy through arrest, detention, and removal of undocumented aliens.24

Immigration enforcement policies such as mandatory detention and family detention have led to an explosive increase in the ICE detainee population. In December 2007, the average daily detainee population was almost 29,000—a 61% increase from January 2006.25 Congress hoped to address concerns that deportable criminal aliens frequently fail to appear for their removal hearings by requiring mandatory detention of certain classes of aliens during proceedings.26 Family detention policies are the result of Congress’s attempt to promote family values in the context of immigration detention.27 Previously, if a family was not released as a unit, the members would be separated from each other and detained individually: parents re-

24. Id.
25. Id.
26. H.R. REP. No. 104-469(I), at 117-19 (1996) ("The INS also admits that some criminal aliens are released from custody prior to having their deportation proceedings completed. This is often done because of a lack of detention space. These aliens are generally released on bond; however, some of them do not appear for their deportation hearings and thus disappear into the general population of illegal aliens.").
27. See H. R. REP. No. 109-79, at 38 (2006) ("[C]hildren apprehended by DHS, even as young as nursing infants, are being separated from their parents and placed in shelters operated by the Office of Refugee Resettlement (ORR) while their parents are in separate adult facilities. Children who are apprehended by DHS while in the company of their parents are not in fact 'unaccompanied'; and if their welfare is not at issue, they should not be placed in ORR custody. The Committee expects DHS to release families or use alternatives to detention such as the Intensive Supervision Appearance Program whenever possible. When detention of family units is necessary, the Committee directs DHS to use appropriate detention space to house them together.").
mained in adult facilities while children were placed with the Office of Refugee Resettlement ("ORR") Division for Unaccompanied Children's Services. To avoid this separation, ICE opened the T. Don Hutto Family Residential Facility in Texas to accommodate families in ICE custody while they await immigration proceedings.

Initially, ICE owned and operated eight Service Processing Centers ("SPCs") that housed detainees. To accommodate the growing detainee population, ICE expanded its detention capacity with seven Contract Detention Facilities. Additionally, ICE has contracted with over 350 state and local jails through Intergovernmental Service Agreements ("IGSAs") to house detainees. Most of the IGSA facilities were not designed to hold a civil detainee population, especially for an extended period of time. ICE's budget for fiscal year 2008 was $5.58 billion, $2.38 billion of which was allocated to the Office of Detention and Removal Operations to fund 32,000 bed spaces. The Agency dedicated over forty percent of its budget to an operational office tasked with "identification, apprehension and removal of illegal aliens from the United States." This apportionment of resources demonstrates ICE's commitment to making these activities a priority and illustrates the growing number of people affected by ICE's policies.


32. Id.

33. DETAINEE MEDICAL CARE HEARING, supra note 99, at 90–91 (statement of Mary Meg McCarthy, Director, National Immigrant Justice Center).


B. ICE Health Standards

Detention standards for all facilities are dictated by ICE's forty-one Performance Based National Detention Standards, located within its Detention Operations Manual ("DOM"). Although ICE provides detention centers located throughout the country with general guidelines, these guidelines are supplemented by specific internal procedures that are individually developed by each facility. It is important to note that the DOM is not legally binding. Since the standards are not codified in law, they remain difficult to enforce, thus severely limiting their overall effectiveness. Nevertheless, these standards are informative because they represent the only uniform detention operations standards ICE promulgates.

Standard twenty-two, which addresses medical care, states that ICE facilities are expected to provide "[d]etainees... access to a continuum of health care services, including prevention, health education, diagnosis, and treatment." As to women's health, the DOM explicitly states that "[f]emale detainees shall have access to pregnancy testing and pregnancy management services that include routine prenatal care, addiction management, comprehensive counseling and assistance, nutrition, and postpartum follow-up." Additionally, detainees have twenty-four-hour access to "sick call" procedures, which "allow[ ] detainees the unrestricted opportunity to freely request health care services." The Division of Immigration Health Services ("DIHS") provides health care for ICE detainees or arranges for outside health care services. "On-site medical staff must get approval

40. Id.
41. Standard 22: Medical Care, supra note 3838, at 1.
42. Id. at 18.
43. Id. at 16.
44. Detention Management Program, supra note 3131.
from DIHS to provide medically necessary referrals before treating detainees.\footnote{Am. Civil Liberties Union, ACLU Calls on Congress to Improve and Codify Immigration Detention Standards, http://www.aclu.org/immigrants/detention/30437res20070710.html (last visited May 2, 2009).}

Staff shall take seriously all statements from detainees claiming to be victims of sexual assaults and respond supportively and non-judgmentally. Any detainee who alleges that he or she has been sexually assaulted shall be offered immediate protection from the assailant and referred for a medical examination and/or a clinical assessment of the potential for negative symptoms. Staff becoming aware of an alleged assault shall immediately follow the reporting requirements set forth in the written policies and procedures. Id. at 8.}

Other portions of this standard provide for collection of evidence and transfer outside the ICE detention center to a community facility for treatment.\footnote{Id. at 8–9.} When these services are provided "in house," guidelines explicitly require detention centers to address concerns of sexually transmitted diseases and mental health affects;\footnote{See Anna Glasier & David Baird, The Effects of Self-Administering Emergency Contraception, 339 NEW ENG. J. MED. 1, 1 (1998) (finding that making emergency contraception more accessible may reduce the rate of unintended pregnancies).} however, there is no explicit mention of pregnancy testing or mandatory availability of emergency contraception. Inability to obtain emergency contraception vastly increases the likelihood of an unwanted pregnancy.\footnote{50. See Anna Glasier & David Baird, The Effects of Self-Administering Emergency Contraception, 339 NEW ENG. J. MED. 1, 1 (1998) (finding that making emergency contraception more accessible may reduce the rate of unintended pregnancies).}
tion.”\textsuperscript{51} This benefits package confuses the nature of elective abortion. Elective abortions are inherently non-emergency; thus, an ICE detainee’s elective abortion would never be covered under the benefits package provided by DIHS.

Although standards fourteen and twenty-two address medical care standards for detainees, the Government Accountability Office (“GAO”) reported that typical complaints filed by detainees included “lack of timely response to requests for medical treatment.”\textsuperscript{52} This is particularly troubling since many detainees suffer from chronic diseases.\textsuperscript{53} Despite the presence of the DOM, Congress, the news media, and advocates for detainee rights have expressed concern over egregious denials of adequate medical care for detainees.\textsuperscript{54} Since 2004, sixty-two deaths have been reported at ICE detention facilities.\textsuperscript{55} The circumstances surrounding these deaths have spurred much litigation in the area of detainee medical rights.\textsuperscript{56}

The lack of adequate medical care poses unique concerns for female detainees. Despite DOM requirements to provide pregnant women with gynecological services, female detainees housed at the T. Don Hutto Family Residential Facility reported that they did not receive adequate prenatal care.\textsuperscript{57} The Bush administration’s widespread policies encouraging women to carry pregnancies to term hindered

\begin{itemize}
\item \textsuperscript{51} Div. of Immigration Health Servs., U.S. Dep’t of Homeland Sec., DIHS Medical/Dental Detainee Covered Services Package 26, http://icehealth.org/ManagedCare/Combined%20Benefit%20Package%202005.doc (last visited May 2, 2009).
\item \textsuperscript{52} Detainee Medical Care Hearing, supra note 99, at 40 (statement of Richard M. Stana, Director, Homeland Security and Justice Issues, U.S. Government Accountability Office).
\item \textsuperscript{53} Julie L. Myers, Caring for Immigration Detainees, \textit{Wash. Post}, May 20, 2008, at A13 (stating that in 2007, “preexisting chronic conditions were diagnosed and initially treated in 34 percent of detainees”).
\item \textsuperscript{56} See Complaint, ACLU v. Dep’t of Homeland Sec., http://www.aclu.org/images/asset_upload_file33_35774.pdf (action for release of deceased ICE detainee records under Freedom of Information Act).
\item \textsuperscript{57} \textit{Brane & Butera}, supra note 2828, at 2.
\end{itemize}
women’s access to unbiased information about reproductive health and services for abortion.\textsuperscript{58} Simultaneously, the policies failed to provide resources for healthy pregnancy.\textsuperscript{59} Although President Obama lifted the widespread prohibition on federal fund distribution to organizations that provide advice, counseling or information regarding abortion during his first month in office,\textsuperscript{60} his administration has yet to address concerns surrounding reproductive health care for ICE detainees. Thus, in the absence of binding regulations, detainees must look to the Constitution for protection.

C. Brief History of Constitutional Protections for Non-Citizens

The Supreme Court has long recognized constitutional protections for non-citizens. In 1886, the Supreme Court in \textit{Yick Wo v. Hopkins}\textsuperscript{61} declared that “[t]he rights of the petitioners . . . are not less, because they are aliens and subjects of the Emperor of China.”\textsuperscript{62} A decade later, in \textit{Wong Wing v. United States},\textsuperscript{63} the Court reaffirmed this holding with regard to non-citizen prisoners.\textsuperscript{64} The Court agreed that the Fourteenth Amendment is not limited to the protection of citizens\textsuperscript{65} and applied this reasoning to the Fifth and Sixth Amendments.\textsuperscript{66} The Court held:

all persons within the territory of the United States are entitled to the protection guarantied by [the] amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor

\textsuperscript{58} Consolidated Appropriations Act, Pub. L. No. 110-161, 121 Stat. 1844, 2208 (2008) (prohibiting the use of federal funds for any abortion). This disproportionately affects low-income families that may be likelier to receive health services through Medicaid or Title X of the Public Health Service Act. See Memorandum for the Administrator of the United States Agency for International Development: Restoration of the Mexico City Policy, 1 PUB. PAPERS 216 (Jan. 22, 2008) (reinstating the Mexico City Policy, which conditioned dispersal of United States foreign aid funds on nongovernmental organizations’ agreements not to perform nor actively promote abortion as a method of family planning).

\textsuperscript{59} See Harriette B. Fox et al., Maternal & Child Health Pol’y Research Ctr., Children Not the Target of Major Medicaid Cuts But Still Affected by States’ Fiscal Decisions 5 (2004), http://www.mchpolicy.org/documents/MedicaidreportJune2004.pdf (stating that some states have lowered income eligibility or otherwise made program enrollment more burdensome as a cost-sharing strategy).

\textsuperscript{60} Mexico City Policy and Assistance for Voluntary Population Planning: Memorandum for the Secretary of State [and] the Administrator of the United States Agency for International Development, 74 Fed. Reg. 4903 (Jan. 28, 2009).

\textsuperscript{61} 118 U.S. 356 (1886).

\textsuperscript{62} Id. at 368.

\textsuperscript{63} 163 U.S. 228 (1896).

\textsuperscript{64} Id. at 238.

\textsuperscript{65} Yick Wo, 118 U.S. at 369.

\textsuperscript{66} Wong Wing, 163 U.S. at 238.
be deprived of life, liberty, or property without due process of law. 67

In these cases, the Court subscribed to a broad view of the Constitution that included protections for all persons.

Almost a century after *Wong Wing*, the Supreme Court’s approach to the rights of non-citizens shifted in *United States v. Verdugo-Urquidez*. 68 In the context of a Fourth Amendment search of a non-citizen’s extraterritorial residence, the Court, in referencing a series of cases extending constitutional protections to aliens, including *Wong Wing* and *Yick Wo*, stated that although these cases extend constitutional protections to aliens, they “expressly accord[ ] differing protection to aliens than to citizens.” 69 Although the Court declined to extend Fourth Amendment protections in *Verdugo-Urquidez*, the extent of constitutional protections for aliens remains unclear.

In a wave of post-9/11 claims, the Supreme Court had occasion to address the due process rights of individuals detained in the “War on Terror.” During this time, the Court handed down opinions in various cases that generally affected due process rights of detainees, as well as the due process rights of non-citizens. 70 In *Hamdi v. Rumsfeld*, 71 the Court held that detention of persons captured while fighting against United States forces in Afghanistan “is so fundamental and accepted an incident to war as to be an exercise of the necessary and appropriate force Congress has authorized the President to use.” 72 While these individuals may be detained for the duration of the conflict, a citizen-detainee characterized as an enemy combatant is entitled to “receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” 73 In *Rasul v. Bush*, 74 the Court stated that United States courts have jurisdiction to consider writs of habeas corpus by foreign

67. *Id.*
69. *Id.*
71. 542 U.S. 507.
72. *Id.* at 518 (internal quotation marks omitted).
73. *Id.* at 533.
74. 542 U.S. 466.
nationals captured in conflict abroad and incarcerated at Guantanamo Bay.\(^7\)

The Court later determined that despite a non-citizen detainee's classification as a dangerous individual, the procedure of trial and punishment must observe the "Rule of Law."\(^6\) And just last year, in Boumediene v. Bush,\(^7\) the Court rejected the Government's argument that non-citizen "enemy combatants" detained at Guantanamo Bay have "no constitutional rights and no privilege of habeas corpus."\(^8\) It concluded that those detainees are in fact "entitled to the privilege of habeas corpus to challenge the legality of their detention."\(^9\) It remains to be seen what effect Boumediene will have on attempts to invoke other constitutional rights by non-citizens detained by ICE.

While these cases have created only a thin patchwork of protections for non-citizens detained by the United States government, they nonetheless provide a foundation for the notion that non-citizens are guaranteed rights under the United States Constitution.

II. Fundamental Rights Framework

A. ICE Detainees Are Akin to Prisoners

In many ways, ICE detainees are like inmates in the United States prison system. Often, detainees are even housed in the same facilities and subject to similar institutional rules and regulations.\(^8\) While prison inmates are limited in their ability to exercise all of their constitutional freedoms to the full extent of average citizens, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."\(^8\) Accounts of persons housed at the T. Don Hutto family detention facility in Texas suggest that ICE detention facilities are operated much like prisons. The ACLU has done exten-

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75. Id. at 483-84.
76. Hamdan v. Rumsfeld, 548 U.S. 557, 567, 635 (2006) ("[T]he military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.").
78. Id. at 2244.
79. Id. at 2262.
sive work addressing the conditions of ICE detention centers, specifically with regard to the treatment of children at Hutto.  

In response to a complaint filed on behalf of a minor detainee at the Hutto facility, the United States District Court of the Western District of Texas noted that "the Hutto facility is a converted medium security prison. It is operated by the Corrections Corporation of America, a private operator of prisons."  

Documents submitted to the court report unreasonably cold rooms, inadequate medical care, substandard food, and psychologically abusive guards. Plaintiffs further assert the facility is run like a prison: there is 24/7 camera surveillance of residents in both communal and personal living areas, the residents are escorted everywhere within the facility and are not allowed to move from one area to another by themselves, the facility has a secure perimeter, and no contact visits are allowed.  

[T]he facility and the officers exercise a high level of control over virtually every aspect of the families' functioning, including things like what time they get up in the morning, what time they shower, what time they eat, when their meal stops, where they go, whether they have access to a game or a toy. That really in every important respect—in every important aspect of the family's functioning throughout the day that it's the facility, it's the officers who administer the rules there that retain control.  

Additionally, testimony before the United States House of Representatives reported various specific instances in which ICE detainees were treated like criminals. Among other accounts, the testimony indicated that the practice of "ICE detainees who are not serving criminal sentences are nonetheless handcuffed and/or shackled when transported to outside hospitals for medical care and even when in  


84. Id. at *5, *7.  

85. See Detention and Removal Hearing, supra note 5454, at 14–15 (statement of Francisco Castaneda, former detainee, testifying that he received inadequate cancer treatment); id. at 44 (statement of Edwidge Danticat, niece of deceased detainee, testifying that her deceased uncle was refused medical treatment while detained); id. at 47–48 (statement of June Everett, sister of deceased detainee, testifying that her deceased sister was restricted from receiving her medication and eventually given the incorrect medication).
their hospital ward." At a different hearing before the same subcommittee, an attorney with the Florence Immigrant & Refugee Rights Project testified that "[f]acility officials refused to permit the detainees to walk through the prison yard to attend the [legal] orientation, claiming that they could not allow the detainees to walk unsupervised through the morning fog." Taken together, the comprehensive restrictions on mobility, as well as other aspects of detainees' daily lives, forcefully demonstrate that ICE detainees are treated like prison inmates.

B. The Turner Standard

Prisoners maintain rights under equal protection and due process, and courts have a duty to protect prisoners from regulations or practices that offend fundamental constitutional guarantees. The Supreme Court's decision in Turner v. Safley established the basic framework for evaluating prisoner rights. In Turner, prisoners housed by the Missouri Division of Corrections challenged two regulations: one restricting correspondence between inmates and the other restricting inmates' ability to marry. In order to marry while incarcerated, the marriage regulation required an inmate to show a compelling reason for wanting to marry, such as the birth of a child, and to obtain permission from the superintendent of the prison. The Turner Court, in reviewing the regulations, established a deferential standard: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legiti-

86. Id. (statement of Cheryl Little, Executive Director, Florida Immigrant Advocacy Center).
88. Under the Equal Protection Clause of the Fourteenth Amendment, the government cannot deny equal protection of the laws. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 617 (2d ed. 2005). Due process provides substantive and procedural protections to ensure the government does not deny life, liberty, or property without due process of the law. Id. at 521. Generally, the Supreme Court evaluates the constitutionality of laws according to the rational basis test, the least onerous standard. Id. at 619. When the law burdens a "suspect classification" or a fundamental right, the Court applies a stricter standard. Id. at 618–22.
90. Id.
91. Id.
92. Id. at 82.
93. Id.
mate penological interests. In our view, such a standard is necessary if 'prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations.'\(^{94}\)

The *Turner* Court applied four factors to determine the reasonableness of the prison’s restriction.\(^{95}\) First, there must be a “valid, rational connection” between the regulation and the government’s interest; it must be both legitimate and neutral.\(^{96}\) Second, the court looked to “whether there are alternative means of exercising the right that remain open to prison inmates.”\(^{97}\) Third, the Court considered the “impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.”\(^{98}\) Fourth, the Court considers evidence provided by the inmate of the existence of an alternative policy that “fully accommodates the prisoner’s rights at [de minimis] cost to valid penological interests.”\(^{99}\)

In applying the four factors, the *Turner* Court struck down the prison’s marriage policy.\(^{100}\) The prohibition on marriage was an exaggerated response to security concerns and the prison could have employed alternative methods that imposed lesser restrictions on prisoners’ constitutional rights without compromising penological objectives.\(^{101}\) The Court stated that “the decision to marry (apart from the logistics of the wedding ceremony) is a completely private one.”\(^{102}\) Thus, the prohibition was not a reasonable restriction on an inmate’s fundamental right to marry.

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94. *Id.* at 89 (quoting Jones v. N.C. Prisoners’ Union, 433 U.S. 119, 128 (1977)). The rational basis test requires that a law be rationally related to a legitimate government purpose. *Erwin Chemerinsky, Constitutional Law: Principles and Policies* 540 (3d ed. 2006). “[T]he law will be upheld unless the challenger proves that the law does not serve any conceivable legitimate purpose . . . . [I]t is enormously deferential to the government.” *Id.* When the Supreme Court has articulated a rational basis standard, yet applied a more stringent analysis, the test is said to possess “bite.” *Id.* at 542. One could argue the Court’s scrutiny in *Turner* is more akin to rational basis “with bite.”


96. *Id.* at 89–90 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

97. *Id.* at 90.

98. *Id.*

99. *Id.* at 91.

100. *Id.* at 81.

101. *Id.* at 98.

102. *Id.*
C. The Fundamental Right to Abortion

Like the right to marry, abortion has also been considered a fundamental right by the Supreme Court. Roe v. Wade\(^{103}\) established that the constitutional right of personal privacy encompasses a woman's fundamental right to choose whether or not to terminate her pregnancy.\(^{104}\) In Roe, a pregnant woman seeking a non-therapeutic abortion\(^{105}\) challenged the constitutionality of Texas's statute criminalizing abortion except when necessary to save the life of the mother.\(^{106}\) The Court recognized that by denying this choice, the State would impose various detriments on pregnant women, ranging from "[s]pecific and direct harm medically diagnosable even in early pregnancy" to psychological harm and social stigma.\(^{107}\) The Court established a trimester timeline to determine the validity of the State's "important and legitimate interest in preserving and protecting the health of the pregnant woman . . . [and] still another important and legitimate interest in protecting the potentiality of human life."\(^{108}\) In striking down Texas' criminal abortion statute, the Court applied strict scrutiny, requiring the state interest to be compelling and the regulation to be narrowly tailored.\(^{109}\)

Almost twenty years later, in Planned Parenthood of Southeastern Pennsylvania v. Casey,\(^{110}\) the Supreme Court reaffirmed the basic holding in Roe, while redefining the abortion right as a "liberty interest" instead of a fundamental right.\(^{111}\) In doing so, the Court articulated a test less onerous than strict scrutiny: the "undue burden" test stipulated that "[o]nly where [a] state regulation imposes an undue burden on a woman's ability to make th[e] decision [to terminate her pregnancy] does the power of the State reach into the heart of the liberty protected by the Due Process Clause."\(^ {112}\) Under this lower standard, not every burden on a woman's liberty to choose abortion is

\(^{103}\) 410 U.S. 113 (1973).
\(^{104}\) Id. at 154.
\(^{105}\) "Nontherapeutic abortions are defined as elective, or not necessary to protect the life or health of the mother, whereas medically necessary abortions are in fact necessary to preserve a woman's life or health." Richard Guidice Jr., Procreation and the Prisoner: Does the Right to Procreate Survive Incarceration and Do Legitimate Penological Interests Justify Restrictions on the Exercise of the Right, 29 FORDHAM URB. L.J. 2277, 2316 n.351 (2002).
\(^{106}\) Roe, 410 U.S. at 120.
\(^{107}\) Id. at 153.
\(^{108}\) Id. at 162.
\(^{109}\) Id. at 155.
\(^{111}\) Id. at 915.
\(^{112}\) Id. at 874.
considered undue.\textsuperscript{113} An "undue burden" is defined as a regulation with "the purpose or effect of placing a \textit{substantial obstacle} in the path of a woman seeking an abortion of a nonviable fetus."\textsuperscript{114} This new test rejected the rigid \textit{Roe} trimester framework in favor of using viability as the distinction between a woman's liberty interest and the state's interest in potential life.\textsuperscript{115}

In \textit{Gonzales v. Carhart},\textsuperscript{116} the Court used the undue burden test to review the constitutionality of the Partial-Birth Abortion Ban Act of 2003, which prohibited the specific abortion procedure of "dilation and evacuation."\textsuperscript{117} The Court held that the absence of a health exception for the woman and the outright ban on a particular method of abortion did not impose an undue burden on a woman's right to terminate her pregnancy.\textsuperscript{118} Essentially, although a woman's right to choose abortion has been weakened since \textit{Roe}, it remains a fundamental liberty interest protected under due process.\textsuperscript{119}

D. Applying \textit{Turner} to Abortion Rights for Prisoners

In the prison context, courts have applied the \textit{Turner} standard to evaluate prison policies that impede an inmate's ability to choose abortion.\textsuperscript{120} Assuming that ICE detainees are analogous to female prison inmates, courts should apply the \textit{Turner} standard to determine the validity of an ICE detention center's policy obstructing a female detainee's access to an abortion. In \textit{Roe v. Crawford},\textsuperscript{121} a pregnant inmate at the Missouri Department of Corrections ("MDC") requested an abortion, which would require transportation to an off-site provider.\textsuperscript{122} This request was denied based on security and cost considerations.\textsuperscript{123} Another pregnant inmate, "Jane Roe," initially requested an abortion at a California correctional facility but was transferred to the...
MDC before she could obtain the procedure.124 Upon transferring to the MDC, Roe again requested abortion services but was denied.125 The class of inmates challenged the constitutionality of the MDC's policy prohibiting transportation of inmates for elective, non-therapeutic abortions.126 The Eighth Circuit acknowledged the Turner balancing standard as it applied to prison restrictions on the right to marry and observed that this analysis "[l]ogically . . . holds true for access to abortions as well."127 The Eighth Circuit went on to explain the analogy between marriage and abortion rights: "Certainly, no prisoner could simply elect to leave the institution at will to obtain an abortion. This does not, however, mean any exercise of the right is entirely inconsistent with incarceration, any more than is marriage."128

The Eighth Circuit used the Turner factors to evaluate the constitutionality of the MDC policy prohibiting transportation for non-therapeutic abortions, leaving only an exception for the life or health of the mother.129 As to the first factor regarding the policy's reasonable relationship to a legitimate penological interest, the MDC argued that there is an increased security risk any time a prisoner is transported off-site, both for prison staff and clinic protesters.130 Given the deferential nature of this standard, the court agreed with the state.131 Next, the court determined that the MDC's transportation policy "completely eliminate[ed] any alternative means of obtaining an elective abortion, [which] represents precisely the 'exaggerated response to . . . security objectives' that Turner forbids."132

The claimant also prevailed on the third factor, the impact on prison personnel and the allocation of prison resources, because the state could not demonstrate a significant budgetary effect.133 The resources expended in providing transportation off-site for elective abortions were the same or less than those expended for providing transportation off-site for pregnancy-related doctor appointments and

124. Id. at 945–46.
125. Id.
126. Crawford, 514 F.3d at 793.
127. Id. at 794 n.2.
128. Id.
129. Id. at 792.
130. Id. at 795.
131. Id. at 796 ("Given the deference owed to prison officials in such matters, the district court erred in finding the MDC policy is irrational simply because no [security] problems occurred in the past.").
132. Id. at 797.
133. Id. at 798.
Lastly, the court looked to the MDC's previous policy that provided transportation for inmates choosing elective abortions, as well as other jurisdictions' policies requiring court orders, as "ready alternatives" to its current prohibition. The Eighth Circuit declared the correctional facility's absolute ban on transportation for inmates to receive elective abortions unconstitutional under *Turner*.

### E. Assessing *Turner*’s Effectiveness

The court's application of *Turner* in *Roe v. Crawford* provides a helpful framework for evaluating claims in the context of ICE detention. A *Turner* analysis in the ICE setting would permit female detainees to successfully bring claims against ICE detention facilities for policies that unreasonably restrict a female detainee's liberty interest in the right to decide whether or not to terminate her pregnancy. ICE detention facilities would be unable to institute broad transportation prohibitions on a detainee's right to receive non-therapeutic abortions. With respect to outcome, *Roe v. Crawford* presents a positive analogy for detainees' rights. Similarly, a hypothetical policy prohibiting or delaying access to emergency contraception for ICE detainees who have been sexually assaulted could also be challenged under the *Turner* standard with a likelihood of success. *Turner* sets forth an effective framework for challenging prison policies that restrict access to abortion and related services.

However, *Turner*’s deferential standard would only protect detainees from the most egregious policies that restrict access to abortion rights, such as the prohibition on transportation in *Roe v. Crawford*. The Eighth Circuit suggested agreement with the Fifth Circuit's determination that suitable policies "requiring inmates to obtain a court order authorizing the abortion" could be sustained under *Turner*. Thus, while *Turner* would protect detainees from policies prohibiting transportation, it might not protect women from lesser intrusions on their rights.

134. *Id.* at 795 ("[T]he MDC policy does not appear to reduce the number of out-counts. For example, other than for those inmates released before carrying their children to term, the MDC would still need to transport the pregnant inmates on outcounts for medical examinations associated with pregnancy, including delivery.").

135. *Id.*

136. *Id.* at 801.

137. *See* discussion *supra* Part II.B (noting that ICE's DOM lists no current policy as to the availability and use of emergency contraceptives).


139. *Crawford*, 514 F.3d at 798.
Despite the effectiveness of the Turner standard in Roe v. Crawford, it can be a limiting framework for advocates wishing to develop a standard that secures broader abortion protections for both inmates and ICE detainees. Notably, the inmate-claimant in Doe v. Arpaio\textsuperscript{140} proposed an undue burden analysis\textsuperscript{141} for challenging Maricopa County's correctional policy requiring an inmate to obtain a court order for transportation off-site to receive abortion services.\textsuperscript{142}

In Doe, the county's Correctional Health Services ("CHS") provided only medically necessary medical care to inmates housed in the jail facilities.\textsuperscript{143} CHS arranged for the county to transport the inmate when medical services off-site were required.\textsuperscript{144} Covered services included pre-natal care and pregnancy delivery services—non-therapeutic abortion services were excluded.\textsuperscript{145} Due to the county's policy prohibiting transportation of inmates off-site for elective medical procedures, female inmates seeking an elective abortion were required to secure a court order in order to receive transportation off-site.\textsuperscript{146}

As a preliminary matter, the court stated that "[t]he interests at stake, and the constitutional analysis of any rights associated with such interests, will necessarily depend on the specific elective procedure sought."\textsuperscript{147} Because this case dealt with access to abortion services, the court also acknowledged that "involuntary delays in obtaining an abortion have constitutional significance because time is likely to be of the essence in an abortion decision."\textsuperscript{148}

Inmate Doe urged the court to evaluate the county's policy using the heightened scrutiny of the "undue burden" test, the applicable standard of review of restrictions on the right to choose abortion outside the prison context.\textsuperscript{149} Doe relied on the Supreme Court's decision in Johnson v. California,\textsuperscript{150} which held that a prison regulation requiring race-based segregation of inmates required strict scrutiny, rather than the deferential review provided by Turner.\textsuperscript{151} Ultimately, the court was not persuaded by this argument.

\begin{enumerate}
\item[140.] 150 P.3d 1258 (Ariz. Ct. App. 2007).
\item[141.] Id. at 1261.
\item[142.] Id. at 1260.
\item[143.] Id. at 1259.
\item[144.] Id.
\item[145.] Id.
\item[146.] Id. at 1259–60.
\item[147.] Id. at 1261.
\item[148.] Id. (internal quotation marks omitted).
\item[149.] Id. at 1261–62.
\item[150.] 543 U.S. 499 (2005).
\item[151.] Id. at 515.
\end{enumerate}
The Arizona Court of Appeals found that a challenge to a prison’s “restriction on a woman’s right to terminate her pregnancy is not analogous to the equal protection challenge to a race-based prison regulation.” 152 Thus, the policy obstructing abortion only received rationality review under Turner. 153 The court concluded that under the Turner analysis the policy was an “exaggerated response” to the County’s penological interests. 154 Again, Doe leaves inmates and abortion rights advocates with a positive result, despite the low standard of review.

Although Turner’s rationality review has proven effective for protecting the right to choose abortion against excessive transportation restrictions, courts should adopt the undue burden test articulated in Casey in order to secure broader abortion protections for detainees. The inmate in Doe claimed that “a woman’s right to choose to terminate her pregnancy, like the right to be free from racial discrimination, is not inconsistent with incarceration, bears no relationship to the goals of criminal deterrence or social isolation, and implicates no security concerns.” 155 For those reasons, the undue burden test is equally applicable inside the prison/detention context.

Heightened scrutiny under the undue burden standard would be the most effective method for protecting detainees’ right to choose abortion against a broader range of detention policies. For example, the Eighth and Fifth Circuits suggested that policies requiring a prisoner/detainee to obtain a court order before receiving an abortion would survive the Turner analysis. 156 However, a court would likely strike down such policies for placing a substantial obstacle in the path of a woman’s right to choose abortion under the undue burden standard. While Turner is effective for challenging excessive prison regulations, the undue burden standard is more appropriate for protecting the right to terminate a pregnancy against a broader range of lesser infringements.

152. Doe, 150 P.3d at 1262 (holding that the constitutionality of a race-based prison policy should not be reviewed under the deferential Turner standard, but rather under strict scrutiny).

153. Id. at 1267.

154. Id.

155. Id. at 1262.

156. See Victoria W. v. Larpenter, 369 F.3d 475, 485 (5th Cir. 2004) (“We are persuaded that the policy of requiring judicial approval of elective medical procedures is here reasonably related to legitimate penological interests [under Turner].”); Roe v. Crawford, 514 F.3d 789, 798 (8th Cir. 2008) (discussing the fourth Turner factor, and stating that “[a]lternatively, the MDC could implement a policy similar to that in Victoria W., requiring inmates to obtain a court order authorizing the abortion”).
III. Due Process for Detainees: Fifth Amendment Framework

As discussed, an ICE detainee’s status is analogous to that of a prisoner. ICE detainees are also akin to pretrial criminal detainees: “We consider a person detained for deportation to be the equivalent of a pretrial detainee.”157 Like pretrial detainees, ICE detainees are placed in detention facilities while they are processed through the courts.158 Once the detainee’s case is adjudicated, their removal is enforced.159 It is well established that “the Government has a substantial interest in ensuring that persons accused of crimes are available for trials . . . or that confinement of such persons pending trial is a legitimate means of furthering that interest.”160 Nonetheless, under the Due Process Clause, a pretrial detainee has the “right to be free from punishment [and] to be as comfortable as possible during his confinement.”161 In evaluating such a claim, the court must consider whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. . . . Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to “punishment.” Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court plausibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.162

In sum, the legal standard for determining the existence of unconstitutional conditions of pretrial detainees is “whether those conditions amount to punishment of a detainee.”163

Some forfeiture of rights is inherent in detention; thus, not every “loss of freedom of choice and privacy” is considered a punishment.164 However, this de minimus forfeiture of rights must be balanced against “[t]he Fifth Amendment’s Due Process Clause [which] forbids the Government to ‘depriv[e]’ any ‘person . . . of . . . liberty . . . with-

159. Id.
160. Bell v. Wolfish, 441 U.S. 520, 534 (1979) (citing Stack v. Boyle, 342 U.S. 1, 4 (1951)). Since pretrial criminal detainees have not yet been adjudicated as guilty, the Eighth Amendment’s prohibition on cruel and unusual punishment is generally inapplicable. Id. at 535 n.16 (quoting Ingraham v. Wright, 430 U.S. 651, 671 & n.40, 672 (1977)). But see infra Part IV (arguing the Eighth Amendment applies to ICE detainees).
161. Bell, 441 U.S. at 534.
162. Id. at 538–39 (internal citations omitted).
163. Id. at 535.
164. Id. at 537.
out due process of law.' Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects."\textsuperscript{165} Using this balancing scheme, the Court in \textit{Bell v. Wolfish}\textsuperscript{166} determined that policies such as "double-bunking,"\textsuperscript{167} prohibiting receipt of hardcover books unless they are mailed directly from a publisher or book club,\textsuperscript{168} and restricting receipt of outside food\textsuperscript{169} did not amount to unconstitutional punishment of pretrial detainees under the Fifth Amendment.\textsuperscript{170}

\textbf{A. Applying the Fifth Amendment}

The Supreme Court has held that "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law."\textsuperscript{171} In the absence of direct protection under the Eighth Amendment, the Court, in \textit{Bell v. Wolfish} recognized that "pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners."\textsuperscript{172} For pretrial detainees, as well as ICE detainees, the Court has applied the Fifth Amendment.

Several years later in \textit{City of Revere v. Massachusetts General Hospital},\textsuperscript{173} the Court again considered the constitutional protections afforded to pretrial detainees.\textsuperscript{174} There, the claimant was injured while being apprehended by the police.\textsuperscript{175} Because his guilt had not been adjudicated, the Court noted that the Eighth Amendment was not the appropriate standard.\textsuperscript{176} While the Court did not specifically address the question of the government’s due process obligations to provide medical care for pretrial detainees, it reiterated the point that his protection was "at least as great as the Eighth Amendment protections.

\textsuperscript{166}. 441 U.S. 520.  
\textsuperscript{167}. \textit{Id.} at 541.  
\textsuperscript{168}. \textit{Id.} at 551.  
\textsuperscript{169}. \textit{Id.} at 555.  
\textsuperscript{170}. The Court also found that conducting random searches of inmates' living quarters and visual inspections of inmates' body cavities did not violate the Fourth Amendment rights of the pretrial detainees. \textit{Id.} at 555–60.  
\textsuperscript{172}. \textit{Bell}, 441 U.S. at 545.  
\textsuperscript{173}. 463 U.S. 289.  
\textsuperscript{174}. \textit{Id.} at 240.  
\textsuperscript{175}. \textit{Id.} at 244.  
\textsuperscript{176}. \textit{Id.}
available to a convicted prisoner.” For further clarification, the Court stated that “[t]here is no reason to believe, moreover, that the Supreme Judicial Court’s analysis of the rights of pretrial detainees would be any different under the Due Process Clause.” This standard, however, has proven especially ambiguous as it pertains to immigrant detainees.

For example, when presented with an immigration detainee’s claim alleging cruel and unusual punishment based on disciplinary segregation from the general population, the Fifth Circuit articulated its interpretation of the standard: “We consider a person detained for deportation to be the equivalent of a pretrial detainee; a pretrial detainee’s constitutional claims are considered under the due process clause instead of the Eighth Amendment.” The Fifth Circuit’s constitutional standard for pretrial detainees is the same as that applied to prisoners under the Eighth Amendment. Under this standard the court held that detention center officials were not deliberately indifferent to the due process rights of the detainee.

In contrast, the Third Circuit’s articulation of the applicable standard in Dahlan v. Department of Homeland Security was slightly different than the standard used by the Fifth Circuit. In Dahlan the court stated that Dahlan’s situation as an immigration detainee... [is] comparable to that of a pretrial detainee. In the pretrial detainee setting, a claim asserting unconstitutional conditions of confinement is reviewed pursuant to the Due Process Clause. The test is whether the challenged conditions amount to punishment under the Due Process Clause. . . . The inquiry into whether given prison conditions constitute punishment under the Due Process Clause considers the totality of the circumstances within a given institution.

Applying this standard, the court found that the DHS’s alleged failure to provide timely medical care for the detainee’s knee problem did

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177. Id.
178. Id. at 245 n.6.
179. Federal circuits are split as to whether a convicted prisoner’s due process protection is the same as his Eighth Amendment protection, or whether his due process protection is greater. Compare Edwards v. Johnson, 209 F.3d 772, 778 (5th Cir. 2000) (holding the Eighth Amendment is inapplicable to immigration detainees), and Dahlan v. Dep’t of Homeland Sec., 215 Fed. Appx. 97, 100 n.2 (3d Cir. 2007) (affirming the lower court’s decision under the Eighth Amendment even though the proper analysis was due process), with Jones v. Blanas, 393 F.3d 918, 931 (9th Cir. 2004) (holding a more protective due process standard applies to pretrial detainees).
180. Edwards, 209 F.3d at 778.
181. Id.
183. Id. at 100 (internal citations omitted).
not constitute a Due Process violation. Although the standards are not uniform across circuits, the Third Circuit’s description of “comparable” rather than “equivalent” did not warrant a different result.

In *Cesar v. Achim*, the court reviewed the claim of a Haitian male ICE detainee who suffered from various medical conditions, including hypertension, depression, diabetes, and arthritis. Prior to entering ICE detention, the claimant received prescription medication for his ailments, after entering detention, he only received Tylenol. The detainee alleged that ICE had “violated his Fifth Amendment right to adequate medical care.” The court held the same standard “under the Eighth Amendment applies in a due process analysis of whether plaintiff stated a denial of medical care claim,” in that “[t]he protections for pre-trial detainees are at least as great as the Eighth Amendment protections available to a convicted prisoner.” In *Cesar v. Achim*, the district court concluded that the ICE detainee properly stated a claim under the Fifth Amendment for denial of medical care.

B. Assessing the Fifth Amendment’s Effectiveness

While pretrial detainees are to remain free from punishment, detention staff are permitted to maintain security within a detention facility. Courts must determine whether a detention center’s efforts to maintain security are reasonably related to a legitimate goal or are arbitrary or purposeless restrictions. Claims raised by pretrial detainees have been subject to similar, yet varying standards in different jurisdictions. While Eighth Amendment claims brought by prisoners require intent, the Seventh Circuit has held that pretrial detainees do not have to prove an “intent to punish” to establish a substantive due process violation. Thus, a substantive due process claim may be established under *Bell v. Wolfish* when “(1) a restriction does not ration-

184. Id. at 99–100.
185. 542 F. Supp. 2d 897 (E.D. Wis. 2008).
186. Id. at 899, 907.
187. Id. at 907.
188. Id. at 906.
189. Id. at 907.
190. Id. (quoting Washington v. LaPorte County Sheriff’s Dep’t, 306 F.3d 515, 517 (7th Cir. 2002)).
191. Id. at 908.
194. Id. at 566 (citing Hart v. Sheahan, 396 F.3d at 892–94).
ally relate to a legitimate, non-punitive government purpose, (2) a restriction is excessive in light of that purpose, or (3) prison officials are deliberately indifferent to a substantial risk to a detainee's safety."\textsuperscript{195}

Alternatively, the Eleventh Circuit has reasoned that even if intent to punish is required for claims raised by pretrial detainees, this intent "‘may be inferred when[ever] a condition of pretrial detention is not reasonably related to a legitimate government[al] goal.’"\textsuperscript{196} Although these approaches are slightly different structurally, the pertinent point is that substantive due process protects pretrial detainees from any punishment, not just Eighth Amendment cruel and unusual punishment, so a different standard should apply.\textsuperscript{197}

Thus, while case law under the Fifth Amendment has not addressed abortion, the Fifth Amendment protects ICE detainees from "conditions that amount to punishment without due process of law."\textsuperscript{198} Broad descriptions from various courts expressing the notion that detainees, whether pretrial or ICE detainees, are guaranteed \textit{at least} as much protection as prisoners is promising.\textsuperscript{199} Any litigation for abortion rights for ICE detainees should include a Fifth Amendment claim—such litigation holds the most promise for securing broad rights to abortion access for women in detention.

\section*{IV. Medical Care for Prisoners: Eighth Amendment Framework}

While \textit{Turner} was effective for challenging prison regulations and policies restricting the right to choose abortion, an Eighth Amendment claim is more appropriate for a prisoner/detainee challenging the denial of medical treatment or services at the behest of individual staffers. The Eighth Amendment provides that "cruel and unusual punishments" shall not be inflicted.\textsuperscript{200} A corollary to this limitation on government power is the Eighth Amendment's affirmative obligation on the government "to provide medical care for those whom it is punishing by incarceration."\textsuperscript{201} While Eighth Amendment claims are gen-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{195} Id.
\item \textsuperscript{196} Id. (citing McMillian v. Johnson, 88 F.3d 1554, 1564 (11th Cir. 1996)).
\item \textsuperscript{197} Id. at 566–67.
\item \textsuperscript{199} See Washington v. Laporte County Sheriffs Dep’t., 306 F.3d 515, 517 (7th Cir. 2002); Kost v. Kazakiewicz, 1 F.3d 176, 188 n.10 (3d Cir.1993).
\item \textsuperscript{200} U.S. CONSTR. amend. VIII.
\item \textsuperscript{201} Estelle v. Gamble, 429 U.S. 97, 103 (1976).
\end{enumerate}
\end{footnotesize}
eraly reserved for criminal punishment, the Supreme Court has recognized that "some punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment."202

Since ICE detainees are similarly situated to prisoners, legal standards used in the prison context may be applied in the context of ICE detention. Further, the Ninth Circuit has determined that the deliberate indifference standard employed in the Eighth Amendment applies to "pretrial detainees."203 Accordingly, in Castaneda v. United States,204 the court accepted an ICE detainee’s Eighth Amendment claim for "unconstitutionally-inadequate medical care."205 In Castaneda, a male ICE detainee was housed at a San Diego facility where DIHS denied him adequate medical attention for penile cancer.206 The court held that the detainee had "stated a cognizable claim for an Eighth Amendment violation."207 The availability of an Eighth Amendment claim was not appealed to the Ninth Circuit; thus there is precedent for providing Eighth Amendment claims to ICE detainees.208

Moreover, since the Fifth Amendment due process framework dictates that pretrial detainees have at least those constitutional rights that are enjoyed by convicted prisoners,209 an Eighth Amendment claim may be warranted regardless of how a court classifies an ICE detainee.

A. The Estelle Standard

The Supreme Court's decision in Estelle v. Gamble210 established the basic framework for evaluating prisoners' Eighth Amendment protections against cruel and unusual punishments.211 In Estelle, an inmate who sustained an injury while performing prison work brought a civil rights claim under the Eighth Amendment for inadequate medi-

205. Id. at 1295.
206. Id. at 1281–84.
207. Id. at 1295.
208. Castaneda v. United States, 546 F.3d 682 (9th Cir. 2008) (holding that public health officials were not immune from Eighth Amendment claims under section 233(a) of the Public Health Service Act).
211. See id. at 104.
cal treatment. The Court concluded "that deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment." The standard of "deliberate indifference to serious medical needs" encompasses a range of actions or inactions "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." Estelle contains both an objective and a subjective element: "To prevail on an Eighth Amendment claim of deliberate indifference to serious medical needs, an inmate must prove that [s]he suffered from one or more objectively serious medical needs, and that prison officials actually knew of but deliberately disregarded those needs."

Despite its broad language concluding that deliberate indifference to serious medical needs of prisoners violates the Eighth Amendment, the Estelle Court articulated limits to the Eighth Amendment protection regarding medical care. The Court clarified that "an inadvertent failure to provide adequate medical care cannot be said to constitute an unnecessary and wanton infliction of pain." Mere negligence in diagnosis or treatment does not establish a valid Eighth Amendment claim based on medical maltreatment. To bring a cognizable Eighth Amendment claim for medical maltreatment, the inmate "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."

B. Applying Estelle

1. Abortion as a Serious Medical Need

Demonstrating that a non-therapeutic abortion is a serious medical need is best illustrated by discussing how a lack of access to abortion results in a serious medical condition: pregnancy. The Centers for Disease Control ("CDC") noted the long-term implications of data

212. Id. at 98.
213. Id. at 104 (internal citation and quotation marks omitted).
214. Id. at 104-05 (internal quotation marks omitted).
215. Roe v. Crawford, 514 F.3d 789, 798 (8th Cir. 2007) (quoting Hartsfield v. Colburn, 491 F.3d 394, 396-97 (8th Cir. 2007)).
216. Id. at 105.
217. Id. at 105-06.
218. Id. at 106 (emphasis added).
219. "Serious medical need" and "serious medical condition" are used interchangeably throughout this Comment.
collected in its six-year study of pregnancy-related deaths in minority women. Based on available census data, the CDC predicted:

By 2025, Hispanic, Asian/Pacific Islander, and American Indian/Alaska Native women [will] represent approximately 25% of the females of reproductive age in the United States. The findings in this report indicate that these women have a significantly higher risk for pregnancy-related death than white women. The report also found that being born outside the 50 states and DC may be a more important risk factor than racial/ethnic heritage for some groups; increased risk for pregnancy-related death was found among foreign-born Hispanic women and possibly among Asians/Pacific Islanders.

This research shows that foreign-born women, which theoretically includes all female ICE detainees, are disproportionately likely to suffer pregnancy-related deaths. This observation makes an especially convincing case that denial of access to abortion services for female ICE detainees could result in a serious medical condition.

The average pregnancy encompasses a wide range of potential health risks for both the mother and the fetus that must be regularly monitored by medical personnel. In Doe v. Gustavus, a female inmate brought suit against the prison security and medical staff for deliberate indifference to her serious medical needs. The court inquired whether "failure to treat the [inmate’s] condition (i.e., pre-birth, birth, and post-birth) . . . resulted in significant injury or the unnecessary and wanton infliction of pain." Since the Supreme Court had not formulated a standard, the district court applied the definition of "serious medical need" articulated by the Seventh Circuit and utilized by several other circuits: "a ‘serious’ medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention." Using this definition, the Seventh Circuit concluded that the claimant’s pregnancy was a serious


221. Id.

222. E.E.O.C. Decision on Coverage of Contraception (Dec. 14, 2000), available at http://www.eeoc.gov/policy/docs/decision-contraception.html ("It is widely recognized in the medical community that pregnancy is a medical condition that poses risks to, and consequences for, a woman.").


224. Id. at 1004.

225. Id. at 1008 (citing Gutierrez v. Peters, 111 F. 3d 1364, 1373 (7th Cir. 1997)).

medical condition. The next logical step to the conclusion that pregnancy is a serious medical need, is that forcing an inmate to carry a pregnancy to term, by prohibition or delay, imposes a serious medical condition on the woman.

In the prison context, courts have applied the Estelle test to evaluate prison policies that impede an inmate’s ability to choose abortion. In Roe v. Crawford, the Eighth Circuit also reviewed the MDC’s policy prohibiting transportation for elective abortions under the Eighth Amendment Estelle test. The element of serious medical need was at the heart of the court’s discussion here. While the inmate contended that an elective, non-therapeutic abortion represents a serious medical need, the MDC argued that “any elective procedure, by its very nature, cannot represent a serious medical need.” According to the Eighth Circuit’s characterization of the MDC’s argument, “if a procedure is not medically necessary, then there is no necessity for a doctor’s attention.”

The Crawford Court rejected a broad construction of serious medical need and instead adopted the approach outlined in Victoria W v. Larpenter. In Victoria W, a female inmate was informed she was pregnant during a routine physical and immediately notified the medical personnel that she wished to terminate the pregnancy, a procedure which necessitated a court order. At a subsequent court date, the inmate’s attorney did not inform the court that she sought an abortion. She was released, but unable to obtain an abortion because she was more than twenty-five weeks pregnant. She later gave birth and put the child up for adoption. The Victoria W court held that “under the facts and circumstances of a particular case, an abortion could very well be a serious medical need” but that “[t]he inconvenience and financial drain of an unwanted pregnancy are simply insufficient in terms of the type of egregious treatment that the Eighth Amendment prescribes.”

227. Doe, 294 F. Supp. 2d at 1008.
229. Id. at 792.
230. Id. at 799.
231. Id.
232. 205 F. Supp. 2d 580 (E.D. La. 2002); Crawford, 514 F.3d at 801.
233. Victoria W., 205 F. Supp. 2d at 583.
234. Id. at 584.
235. Id. at 585.
236. Id.
237. Id. at 601.
According to this logic, the Eighth Circuit concluded in *Crawford* that "an elective, non-therapeutic abortion does not constitute a serious medical need, and a prison institution's refusal to provide an inmate with access to an elective, non-therapeutic abortion does not rise to the level of deliberate indifference to constitute an Eighth Amendment violation."238

The Third Circuit took an alternative approach to whether an elective abortion constitutes a serious medical necessity. In *Monmouth County Correctional Institute Inmates v. Lanzaro*,239 the Third Circuit conceded that an elective abortion is not a serious medical need akin to other life-threatening conditions.240 However, the court re-framed the issue: "Here, the relevant medical care is that necessary to effectuate the inmates' choices to terminate their pregnancies."241 The Third Circuit reasoned that:

it is evident that a woman exercising her fundamental right to choose to terminate her pregnancy requires medical care to effectuate that choice. Denial of the required care will likely result in tangible harm to the inmate who wishes to terminate her pregnancy. Characterization of the treatment necessary for the safe termination of an inmate's pregnancy as "elective" is of little or no consequence in the context of the *Estelle" serious medical needs" formulation. An elective, non-therapeutic abortion may nonetheless constitute a "serious medical need" where denial or undue delay in provision of the procedure will render the inmate's condition "irreparable."242

Accordingly, in *Monmouth*, the court concluded that the inmates had demonstrated a "serious medical need."243

2. Obstructing Abortion as Deliberate Indifference

Under *Estelle*, ICE detainees will argue that ICE detention officials' actions resulting in an obstruction of a detained woman's right to abortion care constitute deliberate indifference. Since the deliberate indifference standard is subjective,244 the court's inquiry is very fact-specific, and the claimant's burden to show deliberate indifference can be difficult to prove.

238. Roe v. Crawford, 514 F.3d 789, 801 (8th Cir. 2008).
239. 834 F.2d 326 (3d Cir. 1987).
240. Id. at 348.
241. Id.
242. Id. at 349.
243. Id.
244. Roe v. Crawford, 514 F.3d 789, 798 n.7 (8th Cir. 2008) (quoting Hartsfield v. Colburn, 491 F.3d 394, 396–97 (2007)).
In Farmer v. Brennan, the Supreme Court clarified the definition of deliberate indifference. The Court reviewed the Eighth Amendment claim of a transsexual inmate who was placed in the facility's general population and subsequently sexually assaulted. Farmer held that "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." The difficulty of proving the knowledge requirement could bar the success of an Eighth Amendment claim under Estelle. This difficulty would be further aggravated in the context of ICE detention by language barriers between detainees and detention facility staff, as well as the varying levels of cultural competency displayed by detention facility staff.

C. Assessing Estelle's Effectiveness

In addition to the Estelle test's high burden of proof, the standard it sets forth is relatively ambiguous. Application of the Estelle test for a cognizable Eighth Amendment claim against a prison official for restricting the right to choose abortion yielded very different results in Crawford, Monmouth, and Victoria W. Presumably, the Estelle test applied to the ICE detention setting would have similar results. Courts do not agree as to whether a non-therapeutic abortion constitutes a serious medical need. Because the Supreme Court has not ruled on this issue, any future claim brought under Estelle by a female ICE detainee seeking a non-therapeutic abortion will not have a predictable outcome.

Advocates for abortion rights for ICE detainees should pursue such cases using the reasoning of the Third Circuit in Monmouth. The Third Circuit appropriately discussed the intersection of the medical need and the abortion right by discounting the importance of whether or not the abortion was elective. By concluding that an elective abortion "may nonetheless constitute a serious medical need

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246. Id. at 832, 837 (rejecting an objective test for deliberate indifference and instead adopting a requirement that the official have knowledge of and disregard for an excessive risk to the inmate’s health or safety).
247. Id. at 848–49.
248. Id. at 847 (emphasis added).
249. James R. P. Ogloff et al., Mental Health Services in Jails and Prisons: Legal, Clinical, and Policy Issues, 18 LAW & PSYCHOL. REV. 109, 120 (1994) (explaining that the standard of care articulated in Estelle is ambiguous because the Court did not clearly define the terms "deliberate indifference" or "serious" medical needs).
where denial or undue delay in provision of the procedure will render the inmate’s condition irreparable,” the Third Circuit broadened the scope of the right to abortion in the detention context.\textsuperscript{251}

Taken together, \textit{Estelle} and \textit{Monmouth} could support broad protections for elective abortions for female ICE detainees. The Third Circuit’s interpretation of \textit{Estelle} in \textit{Monmouth} would likely result in successful claims for detainees against staff that deny or delay a woman’s access to abortion care. Unfortunately, a given jurisdiction could just as easily apply \textit{Victoria W.} or \textit{Roe v. Crawford} instead of \textit{Monmouth}—a uniform application of \textit{Estelle} in the abortion context has not emerged. While the Eighth Amendment is the most appropriate framework to support a claim based on the actions of individual staff members or officials for denying access to abortion services, recent applications of the \textit{Estelle} standard have rendered inconsistent outcomes. Thus, \textit{Estelle} does not create a reliable standard by which female ICE detainees can ensure protection of their right to terminate a pregnancy against ICE detention officials who violate their Eighth Amendment right to medical care.

\textbf{Conclusion}

Women in ICE detention are particularly vulnerable with respect to their reproductive health. Congress has not enacted specific statutes to protect the general health of ICE detainees, let alone to protect the scope of abortion rights for female ICE detainees. ICE has not promulgated binding regulations for its detention facilities, nor has it created adequately detailed guidelines to protect access to emergency contraception for sexual assault victims or access to abortion for all detainees. In the absence of statutory or regulatory protections, female ICE detainees must look to the Constitution for protection of the right to medical care.

As to constitutional claims, the due process fundamental rights framework is most effective for challenging detention policies that restrict access to abortion services based on the \textit{Turner} standard. Future litigation should focus on efforts to apply the \textit{Casey} undue burden standard in the context of detention. The Fifth Amendment framework, while useful for challenging institutional policies or actions of individuals or policies, is most helpful to support an expansion of detainees’ rights to basic health care under the Due Process Clause. The Eighth Amendment is the most appropriate framework to support a

\textsuperscript{251} \textit{Id.} at 349.
claim based on the actions of individual staff members for denying access to abortion services. However, the ambiguous standard articulated in *Estelle* has rendered inconsistent outcomes.

Legal and legislative efforts should focus on expanding protections for a woman's right to choose abortion while in ICE detention. However, while Congress and federal agencies lag in their attempts to codify protections for a controversial population of ICE detainees and a contentious right to abortion, female ICE detainees must rely on the courts. This patchwork of constitutional claims provides detainees and advocates with weighty causes of action to challenge detention personnel and policies that obstruct a female ICE detainee's right to choose an abortion.