

# HEINONLINE

Citation:

Leah Ginsberg, Do Prisoners Get a Better Deal - Comparing the Abortion Rights and Access of Military Women Stationed Abroad to Those of Women in Prison, 11 Cardozo Women's L.J. 385 (2005)

Content downloaded/printed from [HeinOnline](#)

Thu Feb 7 21:24:37 2019

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

## [Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

# DO PRISONERS GET A BETTER DEAL? COMPARING THE ABORTION RIGHTS AND ACCESS OF MILITARY WOMEN STATIONED ABROAD TO THOSE OF WOMEN IN PRISON

LEAH GINSBERG\*

## I. INTRODUCTION

In June of 2002, Senators Olympia Snowe and Patty Murray<sup>1</sup> received a letter from a retired female Army Lieutenant General<sup>2</sup> supporting their efforts to overturn a statutory ban on performing elective abortions on military personnel and dependents at overseas military treatment facilities (MTF).<sup>3</sup> Lieutenant General Claudia J. Kennedy wrote: “[M]any of the issues that relate to non-military women also are a part of the social and medical environment of military women. However, some distinctions do exist, making it imperative that our soldiers have access to safe, confidential abortion services at U.S. military hospitals overseas.”<sup>4</sup>

Kennedy went on to tell the story of an officer who had come to her after a horrifying experience trying to obtain an abortion in a foreign country, because soldiers are prohibited from having abortions at base medical facilities.<sup>5</sup> According to Kennedy, about fifteen years ago, while stationed in Germany, one of the senior women in her battalion came to her and asked permission for her and another young female soldier to have a day off.<sup>6</sup> The woman explained that the soldier wanted to have an abortion. She could not have the procedure done at a military

---

\* *Juris Doctor* candidate, June 2005, Benjamin N. Cardozo School of Law.

<sup>1</sup> Olympia Snowe is a Republican Senator from Maine. Patty Murray is a Democratic Senator from Washington.

<sup>2</sup> Letter from Lieutenant General Claudia J. Kennedy to Senate on Abortion Ban for Women in the Military (June 10, 2002), CENTER FOR REPRODUCTIVE RIGHTS, at [http://www.crlp.org/hill\\_tr\\_0602mil.html](http://www.crlp.org/hill_tr_0602mil.html).

<sup>3</sup> The amendment that would have overturned the statutory ban on performing abortions in Military Treatment Facilities (MTF) was offered in the House of Representatives by Loretta Sanchez, a Democratic Representative from California. Similar amendments to repeal the ban have been introduced and defeated repeatedly since the ban was reinstated in 1996. Jan Erickson & Leonard Tengco, *Congress Endangers Military Women's Health with Ban*, NATIONAL ORGANIZATION OF WOMEN (May 28, 2003), at [www.now.org/issues/military/052803ban.html](http://www.now.org/issues/military/052803ban.html); see also CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country: The Ban on Abortion for Women in the Military* (June 2003), at [www.reproductiverights.org/pub\\_fac\\_military.html](http://www.reproductiverights.org/pub_fac_military.html).

<sup>4</sup> Kennedy letter, *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

facility because it was forbidden, and flying home to the United States to get an abortion was not an option.<sup>7</sup> The soldier did not want to reveal her private decision to a chain of command, which she would need to do to get the time off and make arrangements to return home. But she had found out about a clinic in another German city.<sup>8</sup>

The officer reported back after the trip. According to Kennedy:

[T]he experience had been both mortifying and painful . . . no pain killer of any sort was administered for the procedure; the modesty of this soldier and the other women at the clinic had been violated (due to different cultural expectations about nudity); and neither she nor the soldier understood German, and the instructions were given in almost unintelligible English. I believe that they were able to get some follow up care for the soldier at the U.S. Army medical facility. But it was a searing experience for all of us—that in a very vulnerable time, this American who was serving her country overseas could not count on the Army to give her the care she needed.<sup>9</sup>

The story is even more disturbing because the same thing is still happening to women in the military and women dependents today. This same lack of care is occurring in a period when approximately 150,000 troops are deployed in Iraq alone,<sup>10</sup> and more may be needed.<sup>11</sup> Since September 11, 2001 and the fall of Saddam Hussein, the United States has increasingly depended on military personnel deployed abroad to ensure our safety. Since the number of women in the military is increasing, women are playing a greater and more important role in securing the safety of this country, especially in combat situations.<sup>12</sup> According to Julia Ernst, Legislative Counsel for the Center for Reproductive Rights, “this regulation, which is not imposed on American civilians, violates the constitutional rights of our armed forces personnel during the crucial time they are sacrificing themselves to serve our country.”<sup>13</sup>

---

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Bradley Graham, *Army Plans to Keep Iraq Troop Level Through '06*, WASHINGTON POST, Jan. 25, 2005, at A1; James Hider, *Mob Mutilates Bodies of US Soldiers in Show of Hatred in Baghdad*, THE LONDON TIMES, Nov. 24, 2003, at 14.

<sup>11</sup> Molly M. Ginty, *Record Number of Female Soldiers Fall*, WOMEN'S E NEWS, March 20, 2005, at [www.womensenews.org/article.cfm/dyn/aid/2226/context/cover/](http://www.womensenews.org/article.cfm/dyn/aid/2226/context/cover/).

<sup>12</sup> George Barnes, *Strength in Reserve*, SUNDAY TELEGRAM (Massachusetts), Nov. 9, 2003, at A1.

<sup>13</sup> *Center for Reproductive Rights Expert Contact Regarding Abortion in the Military Bill Before Congress* (June 18, 2002), at [www.crlp.org/pr\\_02\\_0618military.html](http://www.crlp.org/pr_02_0618military.html). It is also disturbing in light of the fact that the Defense Department pays for Viagra. Rep. Nita Lowey, *Lowey Fights Congressional Anti-Abortion Laws*, WESTCHESTER COALITION FOR LEGAL ABORTION, INC., at [www.wcla.org/99-summer/lowey.html](http://www.wcla.org/99-summer/lowey.html).

There are more than 216,000 women on active duty in the military—that is nearly fifteen percent of all armed forces.<sup>14</sup> More than 25,400 women have been deployed in operation Iraqi Freedom,<sup>15</sup> with about 17,000 enlisted women deployed.<sup>16</sup> Women are dying for the United States:<sup>17</sup> More than 30 female U.S. soldiers have already been killed in Iraq and Afghanistan, and at least 240 have been wounded, often severely.<sup>18</sup> Americans have propped female soldiers up to celebrity status, bringing even more attention to the role of women in the military. One only has to look as far as Private First Class Jessica Lynch. The young soldier and former prisoner of war has been called “the most famous soldier to emerge from the second Gulf War”<sup>19</sup> since her dramatic rescue was broadcast on television.<sup>20</sup> She made it to the cover of *Time* magazine,<sup>21</sup> received a \$1 million book deal,<sup>22</sup> and was the subject of “Saving Private Lynch,” an unauthorized movie of the week on NBC.<sup>23</sup> The country loved Pfc. Lynch: “[T]he letters keep pouring in, and old women press notes scribbled on napkins into her hands when she goes to the mall [that say] ‘Thank you for your service.’”<sup>24</sup> But despite all this, the government still treats women in the military and women dependents of military families like second-class citizens when it comes to constitutionally guaranteed abortion rights. In fact, a closer look reveals that in many cases, prison inmates—women who have been convicted of often serious crimes—have more access to, help with, and funding for abortions than the thousands of women willing to take on the monumental task of defending our country. This is especially true for the women and women dependents stationed abroad.

---

<sup>14</sup> Barnes, *supra* note 12 at A1.

<sup>15</sup> WOMEN’S RESEARCH AND EDUCATION INSTITUTE, *Chronology of Significant Legal and Policy Changes Affecting Women in the Military: 1947-2003*, p. 6, at <http://www.wrei.org/projects/wiu/wim/index.htm>.

<sup>16</sup> Ginty, *supra* note 11.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Selling Private Lynch* (August 8, 2003), at [www.cbsnews.com/stories/2003/08/08/entertainment/main\\_567363.html](http://www.cbsnews.com/stories/2003/08/08/entertainment/main_567363.html). The family even has a “spokesperson.” *Id.*

<sup>20</sup> Nancy Gibbs, *The Private Jessica Lynch*, *TIME*, Nov. 17, 2003, at 24. “Lynch was captured March 23 after her 507th Maintenance Company convoy from Fort Bliss, Texas, was ambushed in the southern Iraqi city of Nasiriyah. She was retrieved from a hospital in the city on April 1 after al-Rehaief alerted U.S. forces.” *Selling Private Lynch*, *supra* note 19.

<sup>21</sup> Gibbs, *supra* note 20.

<sup>22</sup> *Stories of the Year*, *PEOPLE*, Dec. 29, 2003, at 64.

<sup>23</sup> *Selling Private Lynch*, *supra* note 19.

<sup>24</sup> Gibbs, *supra* note 20, at 24.

These harsh regulations restricting abortion with regard to the military affect an estimated 100,000 women and dependents stationed overseas.<sup>25</sup> It is difficult to reconcile the discrepancy between the availability of and support for abortions for soldiers and their families and for civilians,<sup>26</sup> and even more so for prisoners. Though recent events in abortion regulation may indicate that some would like the gap to be closed by further restricting abortion for women in prison,<sup>27</sup> the opposite should be the case—restrictions on abortion for women in the military should be relaxed. This note will describe the abortion laws that women in the military face, as well as those regarding prisoners, including counseling and referral, making of abortion arrangements, funding and required permission. It will also make a comparison of the two groups' situations because of these laws and regulations. Finally, it will discuss solutions to the military's problem, like passing an amendment repealing the ban altogether, allowing assistance when it comes to counseling, referral, arrangement and transportation, mandatory and/or private granting of medical leave, and even setting up an official line of communication so that pregnant women stationed abroad and their superiors can properly deal with a situation where the woman chooses to have an abortion.

## II. ABORTION RIGHTS IN GENERAL

### *Setting the Scene: Griswold v. Connecticut and Eisenstadt v. Baird*

The roots of a woman's right to abortion began to grow in 1965, when the United States Supreme Court decided *Griswold v. Connecticut*, which challenged a statute prohibiting the use of birth control.<sup>28</sup> The Court struck down the statute as unconstitutional,<sup>29</sup> speaking specifically about the "zone of privacy" within the marital bedroom.<sup>30</sup> The Court called such governmental intrusion "repulsive to the notions of privacy surrounding the marital relationship."<sup>31</sup> However, the opinion was of much broader importance. It was the first time the Supreme Court recognized that the fundamental right to privacy encompassed some scope of reproductive rights.<sup>32</sup> The court further determined that these rights were protected by the penumbras emanating from the Bill of Rights.<sup>33</sup>

---

<sup>25</sup> CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country*, *supra* note 3.

<sup>26</sup> For an interesting discussion, see Marshall L. Wilde, *Air Force Women's Access to Abortion Services and the Erosion of 10 U.S.C. §1093*, 9 WM. & M. J. OF WOMEN & L. 351 (2003).

<sup>27</sup> See *Victoria W. v. Larpenter*, 205 F. Supp.2d 580 (E.D.L.A. 2002), *aff'd* 369 F.3d 475 (5th Cir. 2004) (finding, *inter alia*, that it is constitutional for a correctional facility to require a court order before releasing an inmate for an abortion).

<sup>28</sup> *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

<sup>29</sup> *See id.*

<sup>30</sup> *Id.* at 485.

<sup>31</sup> *Id.* at 486.

<sup>32</sup> *See generally id.*; Cynthia Gorney, *Roe v. Wade: What Is the Legal Legacy of the 1973 Supreme Court Decision on Abortion?* (January 30, 1998), PUBLIC BROADCASTING SYSTEM ONLINE FORUM, at <http://www.pbs.org/newshour/forum/january98/roe1.html>.

<sup>33</sup> *Griswold*, 381 U.S. at 484.

Then, in 1972, the right to reproductive privacy was further articulated by the Supreme Court in *Eisenstadt v. Baird*.<sup>34</sup> The court made it clear that such rights are not unique specifically to marriage, but instead are based on the Constitution's Equal Protection Clause: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>35</sup>

### B. *The Tipping Point: Roe v. Wade*

Based on the foundations that were laid in *Griswold* and *Eisenstadt*, the Supreme Court affirmed a woman's right to choose to terminate her pregnancy in the landmark 1973 opinion, *Roe v. Wade*, which overturned a Texas statute criminalizing abortion.<sup>36</sup> In deciding the case, the Court asserted that the constitutional right to privacy founded in the Fourteenth Amendment's "concept of personal liberty and restrictions upon state action"<sup>37</sup> is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>38</sup>

However, the Court found that a woman's right to abortion is not absolute.<sup>39</sup> Where such fundamental rights are concerned, the state may regulate if it has a compelling interest and the statute is narrowly tailored to its purpose.<sup>40</sup> The state's ability to regulate depends on the stage of the pregnancy. During the first trimester, a woman's right to privacy outweighs any state interest, because the fetus is still non-viable and the procedure is considered safe.<sup>41</sup> In this case, the decision is left up to the woman's physician.<sup>42</sup> During the second trimester, when the procedure is less safe,<sup>43</sup> the state may regulate abortion in any way that is "reasonably related to maternal health."<sup>44</sup> During the final trimester, the state may go as far as proscribing abortion (except where it is medically necessary to preserve the health or the life of the mother), because post-viability, the state has a compelling interest in preserving potential life, according to the Court.<sup>45</sup>

---

<sup>34</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>35</sup> *Id.* at 453.

<sup>36</sup> *Roe v. Wade*, 410 U.S. 113 (1973). See also *Doe v. Bolton*, 410 US 179 (1973). This was a "companion" decision that came down at the same time as *Roe v. Wade*. *Roe*, 410 U.S. at 116. *Bolton* invalidated a provision of a Georgia statute that required committee approval to get permission for an abortion, but upheld a provision that abortion be performed only when necessary in a licensed physician's best judgment. See generally *Doe*, 410 U.S. 179 (1973).

<sup>37</sup> *Roe*, 410 U.S. at 153.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 153-54.

<sup>40</sup> *Id.* at 155.

<sup>41</sup> *Id.* at 163.

<sup>42</sup> *Roe*, 410 U.S. at 163.

<sup>43</sup> *Id.* at 149, 163-64.

<sup>44</sup> *Id.* at 164.

<sup>45</sup> *Id.*

C. *One Step Forward, Two Steps Back: Webster v. Reproductive Health Services and Planned Parenthood of Southeastern Pennsylvania v. Casey*

Over the next decade and a half following *Roe*, the Supreme Court ruled on a variety of statutes regulating abortion.<sup>46</sup> During that period, in 1989, *Webster v. Reproductive Health Services* upheld a Missouri statute prohibiting the use of public funds, employees, and facilities for non-lifesaving abortions—meaning there is not an affirmative right to governmental aid for abortions.<sup>47</sup> The Court also upheld a provision providing for viability testing for pregnancies twenty weeks along or more.<sup>48</sup> In addition, the Court left untouched the preamble of the Missouri statute, which stated that life begins at conception, and that unborn children have “protectable interests in life, health, and well-being.”<sup>49</sup> They reasoned that the statement had not been applied or used to restrict abortions, so there was no constitutional question at issue. The decision signaled the Court’s apparent willingness to allow restrictions on abortion,<sup>50</sup> and set the stage for *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992.<sup>51</sup>

In *Casey*, the Court upheld statutory provisions imposing a twenty-four hour waiting period, informed consent, parental consent with a judicial bypass option for minors, and reporting requirements on the performance of abortions.<sup>52</sup> But the significance of the decision lies in the emergence of a new standard for reviewing the constitutionality of abortion legislation.<sup>53</sup> Though *Casey* did not explicitly overrule *Roe*, it rejected the original trimester framework.<sup>54</sup> In its place, the Court articulated the less stringent<sup>55</sup> “undue burden” test. It stated: “A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”<sup>56</sup> Also noteworthy in the *Casey* opinion was the Court’s announcement that the state had an interest in protecting potential life for the entire pregnancy, not just post-viability as in *Roe*, and therefore could regulate abortion throughout.<sup>57</sup>

---

<sup>46</sup> J. Lewis & Jon O. Shimabukuro, *Abortion Law Development: A Brief Overview*, Congressional Research Service, § IV, (Jan. 28, 2001), at [http://www.policyalmanac.org/culture/archive/crs\\_abortion\\_overview.shtml](http://www.policyalmanac.org/culture/archive/crs_abortion_overview.shtml) (discussing regulations concerning consent, waiting periods, spousal and parental consent, parental notification, reporting requirements, abortions by non-physicians, and more).

<sup>47</sup> *Webster v. Reproductive Health Services*, 492 U.S. 490, 507 (1989).

<sup>48</sup> *Id.* at 513.

<sup>49</sup> *Id.* at 504-06.

<sup>50</sup> Michael Herz, Lecture at Benjamin N. Cardozo School of Law (Oct. 14, 2003).

<sup>51</sup> Lewis & Shimabukuro, *supra* note 46 at § V; *see generally* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>52</sup> *Planned Parenthood*, 505 U.S. at 833.

<sup>53</sup> Herz, *supra* note 50.

<sup>54</sup> *Casey*, 505 U.S. at 873.

<sup>55</sup> Lewis & Shimabukuro, *supra* note 46 at § VI.

<sup>56</sup> *Casey*, 505 U.S. at 877.

<sup>57</sup> Lewis & Shimabukuro, *supra* note 46 at § VI. Since *Casey*, the major abortion rights battleground has been the so-called partial birth abortion ban. President Clinton twice vetoed the Partial

*D. Fund-amental Right? General Funding Restrictions from Maher v. Roe, to Harris v. McRae, to Rust v. Sullivan*

In 1976, the Hyde Amendment was passed by Congress as a rider to the appropriations bill for the Department of Health.<sup>58</sup> The amendment prohibited funding of abortions through Medicaid, except where the woman's life was in danger.<sup>59</sup> The first case to address such abortion-funding restrictions was *Maher v. Roe* in 1977.<sup>60</sup> An indigent woman charged that a Connecticut statute was unconstitutional for restricting Medicaid funding for first trimester abortions to only those that were medically necessary.<sup>61</sup> The Supreme Court rejected this idea, stating that refusing to pay for non-therapeutic abortions did not unduly burden a woman's right to abortion as articulated in *Roe v. Wade*,<sup>62</sup> because the regulation only need be rationally related to a legitimate state interest, such as potential life.<sup>63</sup> Therefore, simply making a value judgment favoring childbirth via funding is constitutional.<sup>64</sup> In 1980, the Hyde Amendment was challenged in *Harris v. McRae*.<sup>65</sup> In that case, a class of pregnant women brought a claim contending that the amendment's denial of funding for medically necessary abortions via Medicaid impinged upon women's due process rights.<sup>66</sup> But the Supreme Court found that states were not obligated to fund abortions through state spending if they would not be reimbursed by federal funds, and that the Hyde Amendment itself does not violate women's rights.<sup>67</sup> The Court went on to explain:

---

Birth Abortion Ban Act during his presidency. Press Release, PR Newswire, Senate Passes Partial-Birth Abortion Ban—President Vows to Sign (March 13, 2003), For Release.Com: The Archive, at <http://www.forrelease.com/D20030313/dct033.P2.03132003132756.13357.html>. Several years later, in 2000, a statute banning certain late-term abortion procedures was struck down because it was over-inclusive (it seemed to outlaw another more accepted procedure), and because there was exception made for the health of the mother. See *Stenberg v. Carhart*, 530 U.S. 914 (2000). On November 5, 2003, the Partial Birth Abortion Ban Act of 2003 was signed into law by President George Bush. Within twenty-four hours, however, courts had already issued restraining orders against enforcing the ban, and pro-choice forces vowed to challenge the law's constitutionality. *On the Story* (CNN television broadcast, Nov. 8, 2003). While the language of the new law attempts to clarify which procedures are included under the ban, there is still no provision for the health or life of the mother, because according to the law, there is no circumstance under which this would be necessary. See Melissa C. Holsinger, *The Partial-Birth Abortion Ban Act of 2003: The Congressional Reaction to Stenberg v. Carhart*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 603 (2003).

<sup>58</sup> The Department of Health, Education and Welfare is now known as the Department of Health and Human Services. Center for Reproductive Rights, *Roe v. Wade and the Right to Privacy*, Third Edition, 30 (2003), at <http://www.reproductiverights.org/pdf/roepriacy.pdf>.

<sup>59</sup> CENTER FOR REPRODUCTIVE RIGHTS, *Portrait of Injustice: Abortion Coverage Under the Medicaid Program* (November 2003), available at [http://www.reproductiverights.org/pub\\_fac\\_portrait.html](http://www.reproductiverights.org/pub_fac_portrait.html).

<sup>60</sup> *Maher v. Roe*, 432 U.S. 464 (1977).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 474.

<sup>63</sup> *Id.* at 478, 479.

<sup>64</sup> *Id.* at 474.

<sup>65</sup> *Harris v. McRae*, 448 U.S. 297 (1980).

<sup>66</sup> *Id.* The specific issue was whether the Hyde Amendment "contraven[e]d the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment, or either of the Religion Clauses of the First Amendment." *Id.* at 301.

<sup>67</sup> *Id.* at 309.

[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation . . . . The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency . . . . [T]he Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in *Wade*.<sup>68</sup>

Abortion funding restrictions progressed even further with the 1991 decision in *Rust v. Sullivan*.<sup>69</sup> In this instance, the Supreme Court upheld the so-called "gag rule,"<sup>70</sup> by which Department of Health and Human Services Regulations disallowed physicians who work at facilities receiving federal funding<sup>71</sup> from "provid[ing] counseling concerning the use of abortion as a method of family planning or provid[ing] referral for abortion as a method of family planning"<sup>72</sup> and also from "engaging in activities that encourage, promote or advocate abortion as a method of family planning."<sup>73</sup> According to the Supreme Court, the government may choose to monetarily support one method of family planning over another, as it is not required to fund the exercise of any fundamental right, only to not prohibit the exercise of such a right.<sup>74</sup>

### III. ABORTION IN THE MILITARY VERSUS ABORTION IN PRISON

The Supreme Court decisions that delineate a woman's right to choose abortion apply to all women. However, because of their special circumstances (*i.e.*, overseas assignment or incarceration) women in the military and women in prison are also subject to intervening laws and circumstances.

<sup>68</sup> *Id.* at 316-17.

<sup>69</sup> *Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>70</sup> Anna Quindlin, *Freedom of the Press: The Most Serious Threat is Rust v. Sullivan*, COLUMBIA JOURNALISM REVIEW (November/December 1991), available at <http://archives.cjr.org/year/91/6/rust.asp>.

<sup>71</sup> Title X of the Public Health Service Act, 84 Stat. 1506 (codified as amended at 42 U. S. C. §§ 300 to 300a-6) (providing federal funding for family-planning services).

<sup>72</sup> *Rust*, 500 U.S. at 179. See also, 42 CFR § 59.8(a)(1) (1989).

<sup>73</sup> 42 CFR §§ 59.8(a)(1) and 59.10(a):

Forbidden activities include lobbying for legislation that would increase the availability of abortion as a method of family planning, developing or disseminating materials advocating abortion as a method of family planning, providing speakers to promote abortion as a method of family planning, using legal action to make abortion available in any way as a method of family planning, and paying dues to any group that advocates abortion as a method of family planning as a substantial part of its activities.

*Rust*, 500 U.S. at 180, 181. In this instance, these Department of Health and Human Services Regulations were seen and challenged as an attack on the First Amendment's freedom of speech, not only as a violation of women's reproductive rights. Quindlen, *supra* note 70.

<sup>74</sup> *Rust*, 500 U.S. at 193.

*A. Talk About Zero Tolerance: Law Concerning Abortion in the Military*

1. Funding

Despite the growing restrictions on government funding for civilian abortions,<sup>75</sup> laws concerning the funding of abortions for women in the military are actually stricter. Restrictions on Department of Defense funding began during the same era as the Hyde Amendment and other Medicaid funding restrictions. Interestingly, this was also a time when many barriers were coming down for women in the military.<sup>76</sup> The Department of Defense (DoD) was first prohibited from funding abortions by its 1979<sup>77</sup> appropriations bill, which forbade payment except where the woman's life was in danger, or where there would be severe health consequences, or in cases of rape or incest.<sup>78</sup> By the 1980<sup>79</sup> bill, funding was further limited—the exception for severe health consequences was eliminated.<sup>80</sup> By 1982, funding was finally choked off for all abortions but those performed in order to save the life of the mother.<sup>81</sup> This even more restrictive ban was codified in 1984 with the passage of the Department of Defense Authorization Act,<sup>82</sup> which states: “Funds available to the Department of Defense may not be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.”<sup>83</sup>

2. Health Insurance

The Department of Defense's health insurance program for service members, called TRICARE, and its counterpart for military dependents, CHAMPUS (Civilian Health and Medical Program of the Uniformed Services), are both bound by the government's ban on Department of Defense funding for abortions.<sup>84</sup> In addition to the Department of Defense Authorization Act restrictions, these policies further narrow payment, even in cases where the life of the mother is endangered, to cover only certain very specific conditions.<sup>85</sup> They also explicitly exclude coverage of

<sup>75</sup> See generally CENTER FOR REPRODUCTIVE RIGHTS, *Portrait of Injustice*, *supra* note 59.

<sup>76</sup> WOMEN'S RESEARCH AND EDUCATION INSTITUTE, *supra* note 15 at 2, 3.

<sup>77</sup> Fiscal year.

<sup>78</sup> CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country*, *supra* note 3.

<sup>79</sup> Fiscal year.

<sup>80</sup> CENTER FOR REPRODUCTIVE RIGHTS, *Portrait of Injustice*, *supra* note 59.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> 10 U.S.C. §1093.

<sup>84</sup> Marshall L. Wilde, Note, *Air Force Women's Access to Abortion Services and the Erosion of 10 U.S.C. § 1093*, 9 WM. & MARY J. OF WOMEN & L. 351, 377 (2003).

<sup>85</sup> *Abortions*, TRICARE/CHAMPUS POLICY MANUAL 6010.47-M, Dec 1998 (April 19, 1983), at Chapter 3, §13.6. Authority: *Defense Appropriations Act, Fiscal Year 1982 and Subsequent Years*, defines abortion as “[T]he premature stoppage of a pregnancy,” and elective abortion as: “[T]he intentional termination of pregnancy by artificial means done for a purpose other than that of producing a live birth.” It also reads:

care for any complications resulting from abortion,<sup>86</sup> cases of abortion due to fetal abnormality,<sup>87</sup> or abortions necessary for psychological reasons.<sup>88</sup> Counseling and referral for non-covered abortions are similarly excluded.<sup>89</sup>

### 3. Performance at Military Medical Treatment Facilities

All the funding regulations in place up until this point meant that military women and dependents could have abortions and abortion-related services, but they had to pay for these procedures themselves, regardless of whether they received the services at military medical treatment facilities.<sup>90</sup> Then, in 1988, under President George Bush, the Department of Defense further extended the Authorization Act ban to forbid the performance of any abortions or abortion-related services at military medical treatment facilities altogether.<sup>91</sup> This meant that even when a woman was willing to privately pay for an abortion, unless the procedure was necessary to save her life, or in cases of incest or rape, she would be denied access to an abortion.<sup>92</sup> This restrictive change was made at the same time in military history that 30,000 positions in the armed forces were made available to women.<sup>93</sup> However, the ban was reversed in 1993, when Bill Clinton became president.<sup>94</sup> Within two days of his inauguration, President Clinton changed things with an Executive Order.<sup>95</sup> In a memorandum to the Secretary of Defense, he wrote:

---

III. POLICY A. Payment for elective abortions is prohibited by law unless the life of the mother would be endangered if the fetus were carried to term. Payment is limited to the following conditions which may result in a significant mortality risk should the pregnancy be continued: 1. Malignancies (e.g., leukemia, lymphoma . . . . 2. Malignancies (e.g., carcinoma of the breast) influenced by placental hormones/estrogen. 3. Renal failure and /or nephritis. 4. Diabetes mellitus in patients with significant hypertension, renal, or cardiovascular disease. 5. Congestive heart failure . . . . 6. Severe cardiac disease without congestive heart failure . . . . 7. Pulmonary insufficiency that fails to respond to appropriate therapy. 8. Malignant hypertension . . . . 9. Primary pulmonary hypertension. 10. Seizures uncontrolled with therapeutic blood levels of analeptic . . . . 12. Crohn's disease or ulcerative colitis not responsive to therapy . . . . 14. Sickle cell anemia . . . . 16. Past history of severe isoimmunization in a prior pregnancy. 17. Thromboembolic disorders. 18 Clotting defects. 19. Prior history of acute fatty liver. B. Spontaneous, missed or threatened abortions and abortions related to ectopic pregnancies, including all related services and supplies, as medically necessary, may be cost-shared. C. Services which are medically necessary because of fetal demise may be cost-shared. Documentation must accompany the claim which verifies that the death was from natural causes and not intentionally brought on by human intervention . . . . IV. Exclusions A. Services or supplies related to a noncovered abortion, including complications . . . .

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at IV. C. p. 3.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> CENTER FOR REPRODUCTIVE RIGHTS, *Portrait of Injustice*, *supra* note 59.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> WOMEN'S RESEARCH AND EDUCATION INSTITUTE, *supra* note 15 at 4.

<sup>94</sup> *Id.*

<sup>95</sup> *See generally* 58 Fed. Reg. 6439 (Jan. 22,1993).

Section 1093 of title 10 of the United States Code prohibits the use of Department of Defense (“DOD”) funds to perform abortions except where the life of a woman would be endangered if the fetus were carried to term. By memoranda of December 21, 1987, and June 21, 1988, DOD has gone beyond what I am informed are the requirements of the statute and has banned all abortions at U.S. military facilities, even where the procedure is privately funded. This ban is unwarranted. Accordingly, I hereby direct that you reverse the ban immediately and permit abortion services to be provided, if paid for entirely with non-DOD funds and in accordance with other relevant DOD policies and procedures.<sup>96</sup>

The change was relatively short lived. In 1995, Republicans gained a majority in Congress, and the more restrictive provision was reinstated by codification for fiscal year 1996.<sup>97</sup> 10 U.S.C. §1093(b) now states:

Restriction on use of facilities. No medical treatment facility or other facility of the Department of Defense may be used to perform an abortion except where the life of the mother would be endangered if the fetus were carried to term or in a case in which the pregnancy is the result of an act of rape or incest.<sup>98</sup>

Since the performance of elective abortions at MTFs was completely forbidden, there have been annual attempts by congressmen to amend the Department of Defense Authorization Act so that it would once again allow privately funded abortions at domestic and overseas military facilities.<sup>99</sup> However, each time, the amendments have failed to pass in either the House or the Senate.<sup>100</sup>

---

<sup>96</sup> *Id.*

<sup>97</sup> President Clinton objected to the provision of the Department of Defense authorization bill but let it pass into law without his signature in order to preserve other important provisions of the bill, including issues surrounding Bosnia. NATIONAL RIGHT TO LIFE CENTER, *U.S. Senate Votes to Keep Abortion Off Military Bases*, 51-49 (June 8, 1999), at <http://www.nrlc.org/news/1999/NRL699/senvot.html>; Press Briefing on Defense Bill, The Whitehouse, Office of the Press Secretary (February 10, 1996) at <http://www.clintonfoundation.org/legacy/020996-press-briefing-on-defense-bill.htm>.

<sup>98</sup> 10 U.S.C. 1093.

<sup>99</sup> CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country*, *supra* note 3. See also Republican Study Committee, Rep. John Shadegg (R-Arizona), Chairman Neil Bradley, Executive Director, *Summary of Amendments Made in Order to H.R. 1588—The National Defense Authorization Act for FY 2004* (May 21, 2003), at <http://www.house.gov/burton/rsc> or at [johnshadegg.house.gov/rsc/DODAuthAmd04.pdf](http://johnshadegg.house.gov/rsc/DODAuthAmd04.pdf).

<sup>100</sup> CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country*, *supra* note 3. See also Republican Study Committee, *Summary of Amendments Made in Order to H.R. 1588*, *supra* note 99.

*B. The Only Group with Guaranteed Healthcare:  
Law Concerning Abortion in Prison*

1. Background: Eighth Amendment, *Estelle* and *Turner*

In order to understand a woman's right to an abortion behind bars, one must first understand the legal basis for such prisoners' rights overall. Once a person is incarcerated, she loses many of her rights as a citizen. This is appropriate as both a component of punishment and in light of administrative necessity.<sup>101</sup> However, the Eighth Amendment of the United States Constitution proscribes "cruel and unusual punishment."<sup>102</sup> Early Eighth Amendment jurisprudence dealt only with "barbarous physical punishments,"<sup>103</sup> but in the last few decades, the definition has been extended to include any "punishment that violates 'the evolving standards of decency that mark the progress of a maturing society.'"<sup>104</sup>

The Supreme Court case *Estelle v. Gamble* recognized that one of the most basic necessities guaranteed to prison inmates via the Constitution is the right to adequate medical care, something that inmates cannot provide for themselves.<sup>105</sup> In *Estelle*, an inmate in a Texas prison claimed lack of diagnosis and inadequate care relating to a back injury he suffered while working.<sup>106</sup> Though the Court rejected his particular claim, they established the test for determining an Eighth Amendment violation as "deliberate indifference" to a "serious medical need"<sup>107</sup> which can result in torture, "lingering death," or the "'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."<sup>108</sup> It is not clear exactly what constitutes the first prong of the test, a serious medical need, but the Court gave examples, including unnecessarily removing a patient's ear, refusing treatment and withholding prescribed pain killers.<sup>109</sup> As for deliberate indifference, this requirement means that not every instance of inadequate medical treatment will rise to the level of an Eighth Amendment violation.<sup>110</sup> Inadvertent mistakes, and even medical malpractice in certain instances, do not qualify.<sup>111</sup> Such deliberate indifference to a serious medical need is unconstitutional whether manifested by medical staff or prison guards.<sup>112</sup>

<sup>101</sup> *Monmouth County Institutional Inmates v. Lanzaro*, 834 F.2d 326, 333 (3d Cir. 1987), cert. denied, 486 U.S. 1006 (1988).

<sup>102</sup> U.S. CONST. amend. XIII.

<sup>103</sup> *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981).

<sup>104</sup> *Id.* at 372 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

<sup>105</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 104.

<sup>108</sup> *Id.* at 103.

<sup>109</sup> *Id.* at 105.

<sup>110</sup> *Estelle*, 429 U.S. at 105.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

Another important background concept is the *Turner* Standard. According to the Supreme Court, “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.”<sup>113</sup> Still, inmates are not always entitled to the full extent of their constitutional rights. In *Turner v. Safley*, a group of inmates claimed their constitutional rights were being denied by two prison policies: the first denied them the right to marry unless they had the permission of the superintendent; the second curtailed correspondence between inmates at different prisons.<sup>114</sup> The Court found that the marriage policy did indeed inappropriately deny inmates their constitutional right to the marital relationship.<sup>115</sup> But the correspondence policy did not deny them their First Amendment rights.<sup>116</sup>

The Supreme Court articulated a balancing test for determining when it is permissible to restrict prisoners’ constitutional rights: “When a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”<sup>117</sup> This allowed prison officials to retain autonomy in making administrative decisions.<sup>118</sup> Several factors must be considered in determining if a regulation is reasonably related. They are: whether there is a “valid, rational connection” between the regulation and the stated legitimate, neutral government interest; whether other ways for the prisoner to exercise this right remain possible; what impact accommodating the prisoners’ constitutional right will have on guards, other inmates, and allocation of prison resources;<sup>119</sup> and whether alternative means to exercise the right are readily available.<sup>120</sup>

## 2. The Seminal Case:

### *Monmouth County Correctional Institutional Inmates v. Lanzaro*

The previously mentioned concepts came together in the context of the right for an inmate to choose abortion in *Monmouth County Correctional Institutional Inmates v. Lanzaro*.<sup>121</sup> In 1986, pregnant inmates at Monmouth County Correctional Facility in New Jersey requested to have their first trimester pregnancies terminated.<sup>122</sup> Prison officials informed the inmates that pursuant to their institutional policy, prisoners would not be provided with access to, or funding for, any abortion without a court order, unless the need for an abortion was

---

<sup>113</sup> *Turner v. Safley*, 482 U.S. 78, 84 (1987).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 89.

<sup>118</sup> *Turner*, 482 U.S. at 89.

<sup>119</sup> *Id.* at 89-90.

<sup>120</sup> *Id.* at 90.

<sup>121</sup> *Monmouth County Institutional Inmates v. Lanzaro*, 834 F.2d 326, 333 (3d Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988).

<sup>122</sup> *Id.*

a medical emergency that endangered the life of the mother.<sup>123</sup> In what was until now the defining decision for such cases, the Court of Appeals for the Third Circuit determined that the inmates' constitutional rights to abortion could not be restricted by requiring a court order.<sup>124</sup> Utilizing *Estelle*, the Court reasoned that denying an inmate an abortion constituted deliberate indifference to a serious medical need.<sup>125</sup> Further, in line with *Turner*, the Third Circuit said that denying inmates funding and access to abortion has no rational relationship to a penological interest, and is therefore not acceptable.<sup>126</sup> Prison officials subsequently appealed to the Supreme Court, but they were denied certiorari.<sup>127</sup> In subsequent cases that have arisen since *Monmouth County Institutional Inmates v. Lanzaro*, most federal courts<sup>128</sup> faced with similar issues of restrictions on inmates' right to abortion have followed *Lanzaro*.<sup>129</sup>

#### IV. A COMPARISON: MILITARY WOMEN'S ACCESS TO ABORTION VERSUS PRISONERS' ACCESS TO THE SAME PROCEDURES

##### A. Counseling and Referrals

The issue of abortion counseling and referrals with regard to the military is not easy to pinpoint. First of all, there is not much clear-cut information on the subject. For example, the topic is not mentioned at all in the Department of Defense Authorization Act's ban on funding and performance of abortion. However, it does appear that perhaps the armed forces are actually supposed to have methods in place to provide these kind of services to military women and

<sup>123</sup> *Id.* at 328.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 349.

<sup>126</sup> *Lanzaro*, 834 F.2d at 338.

<sup>127</sup> *Lanzaro v. Monmouth County Correctional Institutional Inmates*, 486 U.S. 1006 (1998).

<sup>128</sup> CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country*, *supra* note 3.

<sup>129</sup> One contrary opinion was *Gibson v. Matthews*, 926 F.2d 532 (6th Cir. 1991), where an inmate sued prison officials whose actions prevented her from having an abortion. *Id.* at 533. The court held that officials were immune from prosecution, and in any event, they did not act with "deliberate indifference" because at the time the event took place, pre-*Lanzaro*, "It was also not clearly established that the Fifth Amendment required prison officials to accommodate prisoners desiring to have abortions." *Id.* at 536. The court further determined that "[t]he regulations regarding prisoner abortions, 28 C.F.R. § 551.23, do not use language of an 'unmistakably mandatory character' with 'specified substantive predicates.' Thus, official discretion may be employed." *Id.* at 537 (quoting *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Washington v. Starke*, 855 F.2d 346 (6th Cir. 1988)). See also Sarah Tankersley, *Reproductive Freedom: Abortion Rights of Incarcerated and Non-Incarcerated Women*, 85 KY. L.J. 219, 232 (1996). More recently, the Fifth Circuit upheld a Louisiana district court's findings that, *inter alia*, a pregnant inmate unable to have an abortion did not have her rights violated. See *infra* text accompanying notes 174-75. This is not to say that women (in federal prison, particularly) do not have trouble obtaining abortions. Despite the Federal Regulations urging that inmates be facilitated in their choice to terminate a pregnancy, federal prisoners must still pay for their own abortions. Since prisoners make very little money if they work at all, an inmate's ability to earn enough money to pay for an abortion can be a formidable task. Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM. U.J. GENDER SOC. POL'Y & L. 1 n.35 (1998).

dependents at Continental United States (CONUS) MTFs.<sup>130</sup> For example, Air Force regulations require that Medical Group Commanders (MGC) comply with all local laws and practices, including informed consent.<sup>131</sup> This implies that Air Forces physicians have to counsel women regarding abortion.<sup>132</sup> And according to the Navy Abortion Policy, physicians are supposed to give counseling prior to any invasive procedure that “allow[s] the patient sufficient time to consider her decision” at least twenty-four hours before the operation if at all feasible.<sup>133</sup> However, it is unclear whether such counseling is relevant only for the narrow class of abortions actually performed in MTFs.<sup>134</sup>

In any event, there is evidence that policies that could be available are not always implemented, often due to a misunderstanding of the laws and guidelines.<sup>135</sup> For example, interviews conducted with Air Force doctors showed that they misinterpreted the abortion ban to include counseling and referral, or they believed that the so-called “conscience clause” extended to referral and counseling, as it had in the past.<sup>136</sup> This may mean that many doctors do not perform these tasks because many medical personnel opt out of the performance of abortion based on their own beliefs.<sup>137</sup> Additionally, military health insurance, TRICARE/CHAMPUS, explicitly states that no counseling or referral services relating to an abortion will be covered by the plan.<sup>138</sup> None of this specifically refers to or deals with counseling or referral available to military women or dependents stationed abroad, and military doctors overseas are so overburdened that they have little time to deal with such issues.<sup>139</sup>

By contrast, the topic of counseling for federal prisoners is dealt with directly by the Bureau of Prisons Federal Register, which mandates counseling and referral: “The Warden shall offer to provide each pregnant inmate with medical, religious, and social counseling to aid her in making the decision whether to carry the pregnancy to full term or to have an elective abortion.”<sup>140</sup> In fact, providing pregnant inmates with appropriate counseling is included as a program objective in

<sup>130</sup> Wilde, *supra* note 26, at 373; cf. DEP’T OF THE NAVY, SECNAV INSTRUCTION 6300.4 (June 1, 1990).

<sup>131</sup> Wilde, *supra* note 26, at 372.

<sup>132</sup> *Id.*

<sup>133</sup> NAVY, SECNAV INSTRUCTION, *supra* note 130, at 2.

<sup>134</sup> There is no language indicating what they mean.

<sup>135</sup> Wilde, *supra* note 26, at 372.

<sup>136</sup> *Id.* at 372-73.

<sup>137</sup> Many doctors and nurses wanted no part in performing abortions even when the ban was lifted. Kathryn Jean Lopez, *Pro-Life Military: Keeping Abortion Out of the Military Hospitals*, NATIONAL REVIEW ONLINE, May 21, 2003, available at [www.nationalreview.com/lopez/lopez052103.asp](http://www.nationalreview.com/lopez/lopez052103.asp).

<sup>138</sup> TRICARE/CHAMPUS POLICY MANUAL, *supra* note 85, at § V.

<sup>139</sup> Wilde, *supra* note 26, at 374-75.

<sup>140</sup> 28 C.F.R. § 551.23(b) (1996). The Legal Resource Guide to the Federal Bureau of Prisons reiterates this point. BUREAU OF PRISONS, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 27 (1996), available at [www.bop.gov/ipapg/legal\\_guide.pdf](http://www.bop.gov/ipapg/legal_guide.pdf).

the Bureau of Prisons' Program Statement.<sup>141</sup> In addition, it ensures that the warden will "ensure compliance with the applicable law regarding these matters."<sup>142</sup>

### B. Arranging the Procedure

The policy of the Armed Forces dictates that the military must adhere to the laws of its host nation when it comes to abortion.<sup>143</sup> This means that if a woman is stationed in a country where abortion is illegal, it can be difficult to determine where to get the procedure and how to make arrangements. Despite the fact that military women are stationed in these countries to help ensure the freedom and safety of their fellow American citizens, and despite all the difficulties that come with their location, as was alluded to in the letter from Lieutenant General Kennedy, women stationed abroad seeking abortions are still left to find abortion services on their own.<sup>144</sup>

Now more than ever, with many women currently serving abroad in places such as Iraq and Afghanistan,<sup>145</sup> this often means trying to make arrangements in a country where they do not speak the language.<sup>146</sup> If the facility they use is not nearby, they must also arrange their own transportation, and even overnight accommodations.<sup>147</sup> This is especially troublesome when women are stationed in a country where non-lifesaving abortion is illegal,<sup>148</sup> because it can mean the woman must make arrangements to travel to a different country.<sup>149</sup>

---

<sup>141</sup> U.S. DEPARTMENT OF JUSTICE, BUREAU OF PRISONS' PROGRAM STATEMENT ON BIRTH CONTROL, PREGNANCY, CHILD PLACEMENT AND ABORTION, 6070.5 §551.20 at 1-2.

<sup>142</sup> *Id.* at 1.

<sup>143</sup> Wilde, *supra* note 26, at 377. See also, CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country*, *supra* note 3 (discussing how military women overseas can only receive an abortion in their host nation to the extent that it is legal in that country).

<sup>144</sup> Kennedy letter, *supra* note 2.

<sup>145</sup> Serving in connection with Operation Enduring Freedom and Operation Iraqi Freedom. *Stupak Bill to Provide a One-Time \$1500 Bonus for U.S. Combat Zone Troops*, SPECIAL REPORT: IRAQ, AFGHANISTAN FOREIGN AND VETERAN'S AFFAIRS (Bart Stupak Newsletter, Washington, D.C.) Nov. 5, 2003, at 2, at [www.house.gov/stupak/StupakNewsletter-2003.pdf](http://www.house.gov/stupak/StupakNewsletter-2003.pdf).

<sup>146</sup> Kennedy letter, *supra* note 2.

<sup>147</sup> *Id.*; CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country*, *supra* note 3. In fact, the reality of the situation is illustrated by the fact that abortions are not the only area in which women face these problems. A May 2002 General Accounting Office (GAO) report questioned commanders' understanding of women's health needs and discussed how military women overseas in remote locations had concerns about access to acceptable health care. For example, GAO found that women were concerned about the availability and quality of the services and the English fluency of the medical personnel treating them. It was found that such issues sometimes meant that treatment was put off until the woman could return to the United States. For women in remote areas, women sometimes had engaged in lengthy communications with the State Department to get help finding an acceptable provider—an option apparently not available to a woman seeking an abortion. "Women specifically complained of unhappiness with coordination of care, physical comfort, respect for their preferences, emotional support, involvement of family and friends, information and education." In response, the Department of Defense reiterated that these concerns existed. Wilde, *supra* note 26, at 394-97. Prisoners, on the other hand, just by virtue of being incarcerated, are guaranteed a certain level of healthcare. See *Lanzaro*, 834 F.2d at 341.

<sup>148</sup> Kennedy letter, *supra* note 2.

<sup>149</sup> CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country*, *supra* note 3.

However, according to the Federal Register, prison inmates should have all abortion arrangements made for them. "Upon receipt of the inmate's written statements [that she has voluntarily made the decision to have an abortion], ordinarily submitted through the unit manager, the Clinical Director shall arrange for an abortion to take place."<sup>150</sup> This includes arranging and facilitating transportation to and from the off-site facility where the abortion will be performed.<sup>151</sup> "In all cases . . . whether the BOP [Bureau of Prisons] pays for the abortion or not, the BOP may expend funds to escort the inmate to a facility outside the institution to receive the procedure."<sup>152</sup>

### C. Freedom of Choice? Getting Permission to Obtain an Abortion

Once again, the women of the armed forces are at the mercy of prohibitive regulations. While a woman technically does not need to obtain permission to have an abortion just because she is a service member, in reality it often ends up working out to be that way. First of all, if a woman is not stationed on a military base in a city or country in which there is easy access to abortion services, it is very likely she will have to take time off to travel to another city, nearby country, or even the United States to get the abortion.<sup>153</sup> Because of military policy, in cases such as these, a military woman must request a leave from her superiors.<sup>154</sup> Not only does this mean that she may have to divulge her very personal decision to a perhaps male and/or non-sympathetic officer, but there is not even any guarantee that she will be granted leave.

For example, according to Air Force policy, commanders are not required to grant any particular request for leave.<sup>155</sup> "The regulation encourages commanders to grant leave liberally, but gives them virtually unchecked power to deny or cancel leave for reasons of military necessity or for the general reason of in the interest of the Air Force."<sup>156</sup> In addition, in order to take non-emergency medical leave, an Air Force member must have accumulated enough time off.<sup>157</sup> Superiors may grant "advance of" leave for a personal or medical emergency, and the Air Force usually pays for transportation to the nearest point in the continental United States, but such decisions are still completely left to the discretion of the granting officer.<sup>158</sup> Perhaps the most scary policy of all is that an Air Force Commander has the ability to deny release to a pregnant woman stationed in a remote location overseas until her twenty-fourth week of pregnancy, which, depending on abortion

<sup>150</sup> 28 C.F.R. §551.23(c) (1996).

<sup>151</sup> Kennedy letter, *supra* note 2. See also, CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country*, *supra* note 3.

<sup>152</sup> BUREAU OF PRISONS, LEGAL RESOURCE GUIDE, *supra* note 140, at 25.

<sup>153</sup> CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country*, *supra* note 3.

<sup>154</sup> Kennedy letter, *supra* note 2.

<sup>155</sup> Wilde, *supra* note 26, at 393.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

laws, can enable the Commander to effectively prevent a woman who reports to him from having an abortion at all.<sup>159</sup> As the Republican Pro-Choice Coalition puts it: "This presents a Catch 22 situation for young servicewomen overseas; women can neither receive abortions on base nor be permitted to take medical leave to obtain an abortion, thereby preventing them from having safe and reasonable access to the procedure."<sup>160</sup>

This lingering possibility that a military woman's leave can be delayed, or denied altogether, is devastating, because such situations could jeopardize the woman's health.<sup>161</sup> As many courts seem to understand (unlike some military officials), "[t]ime is likely to be of the essence in an abortion decision."<sup>162</sup> "Moreover, a 'plethora of cases' have 'reiterated with little variation' the risks involved when delays are imposed on the abortion decision."<sup>163</sup> This reality has not moved military policy makers.

A pregnant woman not wanting to reveal her situation, but needing leave to have an abortion is exactly the situation Lt. Kennedy wrote about in her letter.<sup>164</sup> According to Lt. Kennedy, "[a woman in the military] is subject to the orders of the officers appointed over her. Every hour of her day belongs to the U.S. Army, and she must have her seniors' permission to leave her place of duty."<sup>165</sup> This process can entail revealing her very personal situation.<sup>166</sup>

Many different courts have recognized that prisoners, on the other hand, cannot be required to seek permission via a court order when they wish to terminate a pregnancy because it is unconstitutional. In the case of inmates, *Monmouth County Institutional Inmates v. Lanzaro* found that requiring a prisoner to get a court order so that she can leave the prison to obtain an abortion is unconstitutional.<sup>167</sup> The Court said:

[T]he County's policy of requiring court-ordered release to obtain an elective, nontherapeutic abortion affirmatively imposes an obstacle in the pregnant inmate's path to an abortion. This obstacle . . . directly infringes on the pregnant inmate's exercise of her otherwise retained right to choose to terminate her pregnancy.<sup>168</sup>

---

<sup>159</sup> *Id.* While problems relating to grant of leave may not be an obstacle that prevents dependents of military members from obtaining abortions, the other problems of access do apply.

<sup>160</sup> Memorandum of Support from the Republican Pro-Choice Coalition, Snowe-Murray Amendment to Provide Comprehensive Reproductive Health Services to Women in the Military (2003), at [www.rpcc.org/legislation/03wm.shtml](http://www.rpcc.org/legislation/03wm.shtml).

<sup>161</sup> CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country*, *supra* note 3.

<sup>162</sup> *Lanzaro*, 834 F.3d at 339 (quoting *H. L. v. Matheson*, 450 U.S. 398, 412 (1981)).

<sup>163</sup> *Id.* at 339 (quoting *Zbaraz v. Hartigan*, 763 F.2d 1532, 1536-37 (7th Cir. 1985)).

<sup>164</sup> Kennedy letter, *supra* note 2.

<sup>165</sup> *Id.*

<sup>166</sup> CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country*, *supra* note 3.

<sup>167</sup> *Lanzaro*, 834 F.2d 326.

<sup>168</sup> *Id.* at 342. The court also found that "the County's policy unreasonably favors a more costly procedure without legitimate penological justification"—violating, in the courts opinion, the *Turner* reasonableness standard. *Id.* at 341, 342 n24.

Since the *Monmouth County Institutional Inmates v. Lanzaro* case, other courts faced with similar issues have come to the same conclusion. In 1998, a Pennsylvania court found that Luzerne County Correctional Facility's policy of requiring a court order for a prisoner to be able to obtain an abortion off-premises at a nearby clinic was unconstitutional.<sup>169</sup> The judge also decided that once an inmate requests an abortion, it is medically necessary per se and must always be allowed.<sup>170</sup> In 1999, River City Correctional Center in Ohio was ordered to release an inmate for an elective abortion.<sup>171</sup> Judge Susan Dlott forced a county sheriff to allow an inmate to have an abortion because preventing the procedure violated the inmate's constitutional rights.<sup>172</sup> She said: "The sheriff might find such a right morally repugnant," but "ours is a government of laws, not of men."<sup>173</sup> Other states have had similar cases, and many prisons already provide inmates access to abortion as part of their facilities' policies.<sup>174</sup>

It remains to be seen whether these decisions will be affirmed by other jurisdictions as new cases arise. In 2003, a Louisiana District Court case went the other way for an inmate in a local jail. In *Victoria W. v. Larpenter*, the district court found, *inter alia*, that it is constitutional to put restrictions on prisoners who want to obtain abortions because termination of pregnancy is not a serious medical need, and such a restriction serves a valid penological objective—namely the safety of people who might be exposed to an inmate being transported to an abortion facility.<sup>175</sup> The court makes the argument with a straight face even though pregnant female inmates are escorted to various places for natal care and other medical issues all the time. In April of 2004, the Fifth Circuit affirmed the district court's decision.<sup>176</sup>

Whether the Supreme Court will one day choose to speak on the issue also remains to be seen. After *Monmouth County Institutional Inmates v. Lanzaro*, the Supreme Court declined to grant a request for certiorari.<sup>177</sup> There is always a chance that the Supreme Court may have to take a position at some point. Simon Heller, a lawyer for the Center for Reproductive Law and Policy, thinks the Court will have to make a ruling eventually.<sup>178</sup> One can only hope that if the Supreme

---

<sup>169</sup> CENTER FOR REPRODUCTIVE RIGHTS, *Federal Court Orders Pennsylvania Prison to Release Inmate to Obtain an Abortion*, Nov. 24, 1998, at [www.crlp.org/pr\\_98\\_1124pa.html](http://www.crlp.org/pr_98_1124pa.html).

<sup>170</sup> *Id.*

<sup>171</sup> Ben L. Kaufman, *Inmate Can Have Abortion*, CINCINNATI ENQUIRER, Aug 13, 1999, available at [www.enquirer.com/editions/1999/08/13/loc\\_inmate\\_can\\_have.html](http://www.enquirer.com/editions/1999/08/13/loc_inmate_can_have.html).

<sup>172</sup> Kristina Goetz, *Judge Susan Dlott, the Biggest Case in Town Is In Her Court*, CINCINNATI ENQUIRER, Feb. 17, 2002, at 1A.

<sup>173</sup> CENTER FOR REPRODUCTIVE RIGHTS, *Fifth Circuit Set to Hear Case Involving Prison Inmate Forced to Carry Pregnancy to Term* (Sept. 2, 2003), at [http://www.reproductiverights.org/pr\\_03\\_0902lprisoner.html](http://www.reproductiverights.org/pr_03_0902lprisoner.html).

<sup>174</sup> *Id.*

<sup>175</sup> *Larpenter*, 205 F. Supp. 2d 580.

<sup>176</sup> *Larpenter*, 369 F.3d 475.

<sup>177</sup> *Lanzaro*, 486 U.S. 1006.

<sup>178</sup> *Good Morning America Sunday: Abortion in Prison* (ABC television broadcast, Jan. 31, 1999).

Court decides a case related to women's rights to abortion in prison, the Court will reinforce those rights, not take them away.

#### *D. Funding*

As discussed, the Department of Defense Authorization Act, and consequently, TRICARE/CHAMPUS, prohibits any funding of abortion or abortion-related services for military women and dependents, including providing the facilities for these kinds of procedures.<sup>179</sup> TRICARE/CHAMPUS even goes as far as to preclude coverage of complications resulting from an abortion.<sup>180</sup> In addition, “[m]ilitary personnel flying for personal reasons must fly stand-by on military aircraft or fly commercial airlines at their own expense. Many service personnel may be unable to afford commercial passage.”<sup>181</sup> All this has to be looked at in light of the fact that though early term abortions in the United States usually cost around \$200 to \$400, the case is very different overseas.<sup>182</sup> With delays, the procedure itself, and follow-up care, an abortion abroad can end up costing a woman thousands of dollars.<sup>183</sup>

If a prisoner cannot afford an abortion, however, in many cases it is likely that the services will still be provided for her. The seminal case, *Monmouth County Institutional Inmates v. Lanzaro* held:

[The prison] may not condition the provision of . . . needed medical services that it has an affirmative duty to ensure and provide upon the inmates' ability and/or their willingness to pay . . . [I]n the absence of alternative methods of funding, the County must assume the cost of providing its inmates with needed medical care.<sup>184</sup>

This medical care includes abortion, which has been deemed to be a serious medical need.<sup>185</sup> The decision was based on law laid down by the United States Supreme Court in *City of Revere v. Massachusetts General Hospital*.<sup>186</sup> There, the Court stated that “[i]f of course, the governmental entity can obtain the medical care needed for a detainee only by paying for it, then it must pay.”<sup>187</sup>

But it is not only the procedure that may be paid for. Despite the ban on federal funding for abortions, even the Bureau of Prisons allows for money to be

<sup>179</sup> 10 U.S.C. § 1093 (2005).

<sup>180</sup> TRICARE/CHAMPUS POLICY MANUAL, *supra* note 85.

<sup>181</sup> AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, ABORTION SERVICES IN MILITARY HOSPITALS OVERSEAS (Jan.2003), at [www.aauw.org/takeaction/policyissues/abortionsservices\\_military.cfm](http://www.aauw.org/takeaction/policyissues/abortionsservices_military.cfm).

<sup>182</sup> Wilde, *supra* note 26, at 392.

<sup>183</sup> *See id.*

<sup>184</sup> *Lanzaro*, 834 F.2d 326, 351 (3d Cir. 1987). The court order stated: “County defendants shall assume responsibility for insuring the availability of funding for all inmate abortions. If alternative means of funding are nonexistent, the County must assume the full cost of all inmate abortions.” *Id.*

<sup>185</sup> *See id.*

<sup>186</sup> *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239 (1983).

<sup>187</sup> *Lanzaro*, 834 F.2d at 350 (citing *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 245 (1983)).

expended for the transport of inmates to obtain an abortion.<sup>188</sup> *Monmouth County Institutional Inmates v. Lanzaro* also allows money to be spent on “transportation to an appropriate medical facility” in addition to “the necessary funding for the procedure.”<sup>189</sup> The court adds that “[t]he government’s Eighth Amendment obligations to sentenced inmates, in other words, may require the concomitant expenditure of public funds to meet those obligations.”<sup>190</sup>

#### V. ADDITIONAL BURDENS MILITARY WOMEN STATIONED ABROAD MUST FACE

Military women abroad can face an additional impediment to having a safe and affordable abortion. Military rules require that military installments overseas adhere to their host nation’s local law.<sup>191</sup> Often, this can mean that abortion is illegal in the country where a military woman or dependent’s base is located.<sup>192</sup> Out of 193 countries surveyed by the United Nations, only fifty-two allow for abortion on request, only eighty-three allow abortion in case of rape or incest, and there are actually four countries that have outlawed abortion altogether; abortion is not permitted even to save a woman’s life.<sup>193</sup>

One can see the problem more clearly by taking a look at some of the countries in which our troops are currently stationed, particularly those in the Middle East.<sup>194</sup> In Iraq, abortion is legal only when needed to save the life of the mother, or because of fetal impairment.<sup>195</sup> Even when it is allowed, approval from two physicians and written consent of the woman’s husband is also required.<sup>196</sup> Nearby countries do not provide much more opportunity for a woman to have a non-lifesaving abortion. Iran only allows abortion to save the life of the mother, and even then still requires consultation and authorization with a professional or panel of professionals.<sup>197</sup> Kuwait has the most liberal policy in the Persian Gulf region, allowing abortion to save the mother’s life, to preserve her physical or mental health, or when there is some sort of fetal impairment.<sup>198</sup> Nevertheless, Kuwait imposes many restrictions:

---

<sup>188</sup> 28 C.F.R. § 551.20 (2002).

<sup>189</sup> *Lanzaro*, 834 F.2d at 341 (citing *Turner*, 482 U.S. at 84).

<sup>190</sup> *Id.* at 350.

<sup>191</sup> See *Wilde*, *supra* note 26, at 406. See also CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country*, *supra* note 3 (discussing the requirement for military personnel to adhere to a host nation’s laws).

<sup>192</sup> See *Wilde*, *supra* note 26, at 351-53; CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country*, *supra* note 3.

<sup>193</sup> UNITED NATIONS, POPULATION DIVISION OF THE UNITED NATIONS SECRETARIAT, WORLD ABORTION POLICIES 1999, at [www.un.org/esa/population/publications/abt/abtpwld.txt](http://www.un.org/esa/population/publications/abt/abtpwld.txt).

<sup>194</sup> *Wilde*, *supra* note 26, at 389-90.

<sup>195</sup> UNITED NATIONS, ABORTION PROFILES: A GLOBAL REVIEW (2002), at [www.un.org/esa/population/publications/abortion/profiles.htm](http://www.un.org/esa/population/publications/abortion/profiles.htm).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

Except in urgent cases, an abortion may be performed only in public hospitals after a medical committee, composed of three specialists under the chairmanship of a specialist in gynaecology [sic] and obstetrics, has processed the application. An abortion is allowed if it is established that the child if born will suffer from a grave and incurable physical or mental deficiency. The consent of both the woman and her husband must be obtained. The hospital director must be notified before the abortion is performed.<sup>199</sup>

Ten percent of forces serving in Afghanistan and Iraq are women,<sup>200</sup> yet abortion is only legal in Afghanistan when it is done to save the life of the mother.<sup>201</sup> But even in countries where abortions are generally legal, there is often an acute shortage of skilled doctors to perform the procedure.<sup>202</sup> For example, recently, 319 troops had to be evacuated so they could receive gynecological treatments—and these were treatments that have not been banned or restricted in their host countries. “It’s easier for us to evacuate [the women] to Germany than to keep a gynecologist in Baghdad,” explained Virginia Stephanakis, a spokeswoman for the U.S. Army surgeon general.<sup>203</sup>

A dozen years ago, during Desert Storm, 40,782 women were stationed in the Persian Gulf.<sup>204</sup> They were subject to the same abortion restrictions from the military and lack of access to abortion as the women stationed or serving in the area today. Women have served in many other areas where abortion is virtually or totally unavailable. Twelve hundred women served in Haiti,<sup>205</sup> where a safe and legal abortion is also hard to obtain.<sup>206</sup> More than 15,000 women have served in Bosnia,<sup>207</sup> where abortion is only permitted in order to save the life of the mother.<sup>208</sup> Another 8,000 went to Kosovo, a country that has the same abortion restriction that are in place in Bosnia.<sup>209</sup>

Even where abortion is legal, local facilities may still be inaccessible.<sup>210</sup> According to the Center for Reproductive Rights, women overseas seeking abortions via local healthcare face the following problems:

[Many overseas facilities] are inadequate, unsafe, below the standards of U.S. medical facilities, or lack trained medical personnel; U.S. military

---

<sup>199</sup> *Id.*

<sup>200</sup> WOMEN'S RESEARCH AND EDUCATION INSTITUTION, DID YOU KNOW? at <http://www.wrei.org/projects/wiu/wim/didyouknow.htm>.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Roger Roy, *Toll on U.S. Troops Grows; Nearly 10,000 Killed, Wounded in Battle, Injured or Sickened in Iraq*, ORLANDO SENTINEL, Nov. 23, 2003, at A1.

<sup>204</sup> WOMEN'S RESEARCH AND EDUCATION INSTITUTION, *supra* note 200, at 5.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> WOMEN'S RESEARCH AND EDUCATION INSTITUTE, *supra* note 200, at 5.

<sup>210</sup> CENTER FOR REPRODUCTIVE RIGHTS, *Penalized for Serving Their Country*, *supra* note 3.

bases may be located in remote areas without access to local medical facilities; U.S. military personnel may be serving in countries where animosity toward the United States runs high, jeopardizing the safety of U.S. service personnel if they were to use local health facilities; and U.S. military personnel may be serving in an area under active hostilities, imposing a significant threat to the safety of personnel who leave the U.S. military base.<sup>211</sup>

## VI. POLICY CONSIDERATIONS

### *A. Military Madness*

It is almost ironic that the military makes it so hard for women stationed abroad to obtain abortions and related services, because the military has historically been quite hostile to pregnant enlisted women.<sup>212</sup> Some feel “[p]regnancy is perhaps the greatest impediment to women’s assimilation in the U.S. Armed Forces.”<sup>213</sup> However, in the military, the atmosphere is not supportive of women choosing to have an abortion. According to Lt. Kennedy, while stationed in Hawaii in the 1990s:

[T]here were Army doctors who displayed posters which were extremely disapproving of abortion . . . creating a climate of intimidation for anyone who might want to discuss what is a legal option. Since the doctors are officers and far out-rank enlisted soldiers, and since the soldiers have no way to choose which doctor they see on sick call, it was only with good luck that a young soldier might be seen by someone who would treat her decision with the respect she deserved.<sup>214</sup>

In addition, medical personnel generally wanted no part in performing abortions when the ban on performing them was lifted by President Clinton in 1993.<sup>215</sup> In fact, Clinton looked into bringing in non-military personnel to perform abortions.<sup>216</sup> Lt. Kennedy acknowledged the ridiculousness of the situation, and wrote, “the [military] cannot have it both ways: to deny women safe and reasonable access to abortion (in a world in which there is no 100% effective birth control), and at the same time to complain that women are pregnant.”<sup>217</sup>

---

<sup>211</sup> *Id.*

<sup>212</sup> Lydia Zaidman, *Combating the “Warrior Mentality:” A Review of Ground Zero: The Gender Wars in the Military*, 20 WOMEN’S RIGHTS L. REP. 33, 39-40 (book review).

<sup>213</sup> *Id.*

<sup>214</sup> Kennedy letter, *supra* note 2.

<sup>215</sup> Lopez, *supra* note 137.

<sup>216</sup> *Id.*

<sup>217</sup> Kennedy letter, *supra* note 2.

### B. Policy for Prisoners

Conversely, many have theorized that it is better to let inmates have abortions than to give birth to unwanted children whom they will not be able to care for.<sup>218</sup> In *Monmouth County Institutional Inmates v. Lanzaro*, amici curiae briefs submitted by the American Civil Liberties Union (ACLU) and the American Public Health Association suggested that providing an inmate with a meaningful choice of whether or not to have an abortion “is consistent with the government’s interest in inmate rehabilitation.”<sup>219</sup> A similar argument was submitted in the New Jersey Association on Correction’s *amicus* brief, suggesting that forcing an inmate to care for a child upon her release could “foster recidivism.”<sup>220</sup>

## VII. ARE CHANGES COMING?

### A. Military Movement

It seems changes were slowly creeping in with regard to abortion and the military—even if they did not specifically address the unique problem of military women overseas. However, those hope recently been dashed. In the last few years, courts had started to find certain military abortion decisions unconstitutional. For example, a federal court held unconstitutional the provision of CHAMPUS that denies coverage to abortions of anencephalic fetuses. In *Britell v. United States*,<sup>221</sup> the wife of a captain in the Air National Guard was pregnant with her second child when she was given devastating news—the baby was developing without a brain and had absolutely no chance of survival.<sup>222</sup> After consulting with her doctor and her priest, Ms. Britell made the very difficult decision to have an abortion.<sup>223</sup> Subsequently, Ms. Britell’s CHAMPUS health coverage refused to pay for the procedure on grounds that she did not need it to save her life; in fact, the abortions of anencephalic fetuses were specifically mentioned as excluded from CHAMPUS coverage.<sup>224</sup> Ms. Britell took her claim to court, alleging that the CHAMPUS provision, as applied to her,<sup>225</sup> violated her Fifth Amendment Due Process rights.<sup>226</sup>

In what was thought to be a small step for constitutional abortion in the military, the District Court of Massachusetts found for Ms. Britell, stating that there was no rational basis for the prohibition.<sup>227</sup> Furthermore, because anencephaly is

---

<sup>218</sup> *Lanzaro*, 834 F.2d at 343 n25.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Britell v. United States*, 204 F. Supp. 2d 182 (D. Mass. 2002).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 183.

<sup>224</sup> *Id.* See also TRICARE/CHAMPUS, *supra* note 85 at 5.

<sup>225</sup> *Britell*, 204 F. Supp. 2d at 182.

<sup>226</sup> *Id.* at 183.

<sup>227</sup> *Id.* at 185.

uniformly fatal to the fetus, the state has no legitimate interest in “potential life.”<sup>228</sup> Judge Nancy Gertner admonished the military policies, stating that forcing women to carry a fatally ill fetus to term and endangering the mother’s health, “is irrational, and worse yet, it is cruel.”<sup>229</sup> Unfortunately, in June 2004, *Britell* was reversed by the Federal Circuit.<sup>230</sup> The court determined that the government’s interest in potential life did indeed extend to anencephalic fetuses, and therefore the government did not have to cover the abortion.<sup>231</sup>

### B. Prognosis for Prisoners

Unfortunately, the tide may also be turning when it comes to the ability of inmates to receive abortion. Linda Rosenthal, an attorney for the Center for Reproductive Rights, seemed confident when she said that trying to label abortions as elective surgery is a “tried and rejected ploy,” rejected by Federal Courts.<sup>232</sup> However, a recent decision in a case Rosenthal was working on held that a court-order policy for inmates seeking elective surgery, including abortions, was indeed constitutional.<sup>233</sup> It was a disheartening first—other federal courts that addressed the question found such policies violated both the Eighth and Fourteenth amendments of the constitution.<sup>234</sup> Shortly thereafter, the Fifth Circuit affirmed the decision.<sup>235</sup> In *Victoria W. v. Larpenter*, a Louisiana inmate who was in her first trimester of pregnancy wanted to obtain an abortion.<sup>236</sup> The jail at which she was incarcerated had a policy that required women to obtain a court order before they would be allowed to travel to an outside facility to have the procedure.<sup>237</sup> Despite the fact that Victoria W. planned to pay for the procedure and all its related costs by herself, the abortion was not medically necessary to save her life and therefore would not be “provided as part of inmate medical care.”<sup>238</sup> Because of miscommunications or mistakes made while trying to obtain a court order, Victoria did not receive an abortion within the twenty-four week legal abortion window under Louisiana law.<sup>239</sup> She was released from jail twenty-five weeks pregnant

---

<sup>228</sup> *Id.* at 194.

<sup>229</sup> *Id.* at 198.

<sup>230</sup> *Britell v. United States*, 372 F.3d 1370 (Fed. Cir. 2004).

<sup>231</sup> *Id.*

<sup>232</sup> Rosanna Ruiz, *County Inmate Suing for Right to Get Abortion*, HOUSTON CHRONICLE, Feb. 6, 2003 at 25.

<sup>233</sup> See generally *Victoria W.*, 205 F. Supp. 2d 580.

<sup>234</sup> CENTER FOR REPRODUCTIVE RIGHTS, FIFTH CIRCUIT SET TO HEAR CASE INVOLVING PRISON INMATE FORCED TO CARRY PREGNANCY TO TERM, Sept. 2, 2003, at [www.reproductiverights.org/pr\\_03\\_0902lprisoner.html](http://www.reproductiverights.org/pr_03_0902lprisoner.html).

<sup>235</sup> *Larpenter*, 369 F.3d 475.

<sup>236</sup> The judge said in a footnote that Victoria W. wanted to have an abortion for emotional and financial reasons. *Larpenter*, 205 F. Supp. 2d at 583.

<sup>237</sup> *Id.* at 584.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

and no longer a candidate for a legal abortion in her state.<sup>240</sup> She subsequently sued for the violation of her constitutional right to have an abortion.

The Eastern District Court of Louisiana held that requiring a woman prisoner to obtain a court order before allowing her to leave the correctional facility<sup>241</sup> to have an abortion was not unconstitutional, because the elective abortion was not a serious medical need according to *Estelle*.<sup>242</sup> The Fifth Circuit also said the jail policy was reasonably related to the penological objective of public safety in line with *Turner*.<sup>243</sup> The case was appealed to the Court of Appeals for the Fifth Circuit. That court decided the prison policy was indeed constitutional in light of reasonably related legitimate safety interests implicated in transporting Victoria W. to have the abortion.<sup>244</sup> The outcome is not particularly surprising, since Louisiana is a very anti-abortion state in general.<sup>245</sup> So it may soon be a reality that the gap in the way the two groups of marginalized women are treated with regard to abortion is closing. But the gap should close because military women are afforded more ability to exercise their right to terminate a pregnancy, not because incarcerated women are losing it.

#### VIII. PROPOSALS FOR THE FUTURE

The ideal solution to the problem would be for Congress to finally pass an amendment (or the President to issue an Executive Order) to the Department of Defense Authorization Act lifting the ban on performance of abortions in military facilities overseas. Though it is likely that concerned Senators and Representatives will continue to offer amendments to the DOD Authorization Act yearly, past experience has clearly shown that such efforts are not likely to pass both the House and Senate, at least not while there is a conservative majority in Congress.

However, there are still other things that can be done to remedy the situation. First, the military could clarify and solidify their policies on the availability of abortion counseling and referral. Rather than letting military doctors guess at policy or ignore the issue altogether, the military could publish regulations. These regulations could indicate that neither the ban on performance of abortions in MTFs nor the moral objection policy<sup>246</sup> regarding abortion shall allow doctors to opt out of referring military women and dependants seeking abortions or related procedures to safe clinics or doctors locally, in nearby countries, or even to places in the United States.

---

<sup>240</sup> *Larpen*, 205 F. Supp. 2d at 585.

<sup>241</sup> Escorted by jail guards that she was willing to pay for herself.

<sup>242</sup> *See Larpen*, 205 F. Supp. 2d at 585.

<sup>243</sup> *See Larpen*, 205 F. Supp. 2d 580.

<sup>244</sup> *Larpen*, 369 F.3d 475. The court also determined that Victoria W. could not prove the requisite causation need to avoid summary judgment on a 42 USCS § 1983 claim. *Id.*

<sup>245</sup> Press Release, ACLU, ACLU Salutes Louisiana Abortion Providers on National Day of Appreciation (March 10, 2000) at [http://www.laclu.org/News/2000/aclu\\_salutes\\_louisiana\\_abortion\\_.htm](http://www.laclu.org/News/2000/aclu_salutes_louisiana_abortion_.htm).

<sup>246</sup> *See Wilde*, *supra* note 26 at 373 (discussing confusion over policy among Air Force doctors).

In addition, individual branches of the military, or the military overall, could also make certain changes to their leave and emergency leave policies when it comes to women seeking a safe abortion.<sup>247</sup> Policy could be changed so that commanders are required to grant leave in a timely fashion to any woman who wants to obtain an abortion, whether she plans to have the procedure locally or in another country, and would allow her extra time to return to the United States to have the abortion performed.<sup>248</sup>

Another option is to have female officers officially do what Lt. Kennedy did for the soldier who came to her all those years ago: act as a liaison between the soldier and her commanding officer. This option is just one more easy change that could make a big difference. These measures ensure that women protecting our country will be treated with dignity rather than embarrassment and possibly even hostility from male superiors who may not understand the specifics of women's healthcare needs concerning abortion and related procedures.

Finally, prisons could make a commitment to provide inmates with access to abortions and related services to which they are entitled. Courts could also play an important role by continuing to hold unconstitutional the idea that a prisoner must obtain a court order to obtain an abortion. The key is to keep moving in the direction of providing the ability to obtain an abortion rather than away from it.

#### IX. CONCLUSION

“Essentially, the situation for a female in the military is, ‘I have signed up to defend my country and yet my country doesn’t give me the same rights as every other American woman.’”<sup>249</sup> Women serving in the military overseas do a job that so many are not willing to do—living far from home and putting their lives at risk for American freedom and safety. Their work is patriotic, yet these women are denied the rights of the very Constitution they fight to protect. And at the same time, women who have committed crimes are able to exercise their Fourteenth Amendment rights—in fact they have a substantial level of help to do so. Of course, women should not be regarded as any less important or human because they are incarcerated. But the Supreme Court has determined that incarceration can legally limit a prisoner's constitutional rights in some cases. The fact that courts have found the right to choose an abortion too fundamental, important, and necessary to allow its denial only emphasizes the ridiculousness of the federal government's willingness to choke off that same right of women defending our freedom.

---

<sup>247</sup> *Id.* at 411.

<sup>248</sup> *Id.* The problem of returning to the United States is more complicated for dependants seeking an abortion. For an explanation of current policies and alternative solutions, see generally Wilde, *supra* note 26.

<sup>249</sup> Joan Ryan, *She Defends Freedoms She Can't Exercise*, SAN FRANCISCO CHRONICLE, Dec. 18, 2001, available at, [www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/12/18MN202763.DTL](http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/12/18MN202763.DTL).

