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Searching for the State: Who Governs Prisoners' Reproductive Rights?

Abstract

This article investigates the nature of "the state" that governs the reproductive rights of women imprisoned in the United States. Rather than being transparent, the state in the prison context is instead opaque, multifaceted, increasingly privatized, and characterized by high levels of decentralization, delegation, and discretion that render ambiguous the locus of official state authority. This particular configuration of state power creates distinctive challenges and vulnerabilities for women seeking to safeguard their reproductive health and rights and raises serious questions about accountability for how governments regulate women's lives.

In spring 2002, a seventeen-year-old Texas girl was put on probation for a year and sentenced to sixty days in boot camp by a state judge. There she discovered she was pregnant, and the judge ordered her to leave the boot camp and serve her time instead in a privately run residential treatment center with which the county had a contract. After consulting with her mother, the girl, identified in court papers as Jane Doe, decided to have an abortion, and her mother scheduled an appointment with Planned Parenthood.

But when Jane's mother called to pick up her daughter, the center's administrator refused to let her, insisting on written permission from either Jane's probation officer or the judge. The mother started looking

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for help and called the Texas Abortion and Reproductive Rights Action League, who called Jane's Due Process (an organization that helps minors going through the judicial bypass procedure), who contacted Annette Lamoreaux of the Houston chapter of the American Civil Liberties Union (ACLU), an attorney with experience in both prisoners' rights to medical care and minors' rights to abortion. Although it was the ACLU's position that federal court decisions barred requiring written permission or a court order for an incarcerated woman to get an abortion, Lamoreaux went along with this strategy because everyone thought it would be the quickest route to get Jane what she needed. First, the probation officer said s/he couldn't sign off on releasing Jane without the judge's approval. The county attorney agreed that Jane had the right to leave the residential center for an abortion but wouldn't intervene. Then the sentencing judge refused, opining that an abortion was not in Jane's best interest—despite Jane's decision and her mother's concurrence that it was. (*Jane Doe, a Minor vs. Minola's Place of Texas Residential Treatment Center*, Plaintiff's Memorandum of Law in Support of Temporary Restraining Order and Preliminary Injunction, U.S. District Court, Southern District of Texas, Houston Division, June 4, 2002.)

After this series of roadblocks, and with the clock ticking (Jane was nearing the end of her first trimester), Lamoreaux reached the national office of the ACLU late on a Friday afternoon. Four days later, she went to federal district court armed with new papers asking that Jane be released into her mother's custody. As the motion stated, Jane "will suffer irreparable harm" if the court does not grant her relief and order the center to release her, "because no remedy at law can ever undo the far-reaching changes or eliminate the health risks wrought by the denial of access to a timely and safe abortion. Nor can a remedy at law undo the risk to [Jane's] health posed by the delay." The judge decided to hold an emergency hearing the next day, and Lamoreaux sent a process server to notify the center's director of Jane's lawsuit. In yet another twist, when the server went to the address of the center, s/he instead found a branch of Mailboxes, Etc. No one would give the address over the phone, even though the center was under contract with the county to house and treat wards of the state. The persistent server located the address and the center, only to have the staff member who answered the door refuse to take the papers and then kick them off the porch when they were "drop served" (Lamoreaux 2003; Ruiz 2002a, 2002b).[1]

This story illustrates the difficulties that imprisoned women routinely encounter when they try to obtain abortions. Although Jane was a minor, she had no conflict with her mother over consent for the abortion; the obstacles in her path lay elsewhere. This story also illustrates

the difficulty of identifying and studying "the state" that governs prisoners' reproductive rights. Who is the state in this story? There are multiple state actors: the appointed federal judge, the elected Texas judge, the probation officer, and the county attorney. And what about the treatment center's administrator? As this multiplicity of actors suggests, the state is not monolithic but fragmented, multilayered, potentially conflicted, and increasingly a hybrid of public and private—in this case, the private treatment center confining juveniles under government contract. In other cases, private, for-profit companies contract to provide essential services or operate and own entire prisons.

As a scholar of reproductive politics witnessing the steady expansion of prison systems throughout the 1990s, I became interested in the construction, regulation, and constraint of women's reproductive rights in institutions of state confinement. I was surprised to realize how little scholarship addresses or even acknowledges the crucial problems raised by Jane's story and the experiences of other imprisoned women, whether struggling against medical neglect or trying to hold on to their parental rights. Most research on prisons focuses on men, and most research on women in prison does not address the state. Almost without exception, research on prisoners' reproductive rights hails from antiprison circles.[2]

This article bridges these fields of research to bring prisons into our understanding of state governance of reproduction and to draw attention to the injustices experienced by incarcerated women. Through examples of women's conflicts with state power, I show that the contemporary penal state is rife with problems of accountability and transparency that undermine women's reproductive health and rights. I do not necessarily mean to suggest that things are worse than they used to be. After all, accountability for prison abuses has a relatively short history.[3] Rather, I want to suggest that the proliferation of confinement institutions—and the web of relationships among them *and* between them and private organizations and for-profit businesses—has changed the landscape and introduced new challenges to holding state actors accountable. I argue that the multifaceted nature of the state, characterized by decentralization, delegation, and discretion, makes justice elusive for imprisoned women who experience threats to their reproductive rights.

Compared to the state that governs reproductive rights on the outside, the state that governs prisoners' reproductive rights appears far more variable and arbitrary, beyond the diversity we expect in a federalist system of government. The multiple layers of state authority and discretion that obscure the locus of official power, the lack of a core set of rights recognized across jurisdictions, and of course the power to physically confine all suggest that imprisoned women have

to contend with a qualitatively different kind of state control than women in the "free world." Working through these layers to understand the constitution of state authority is a challenge, in part because prisons are closed institutions, operating largely, as an editorial recently put it, "in the shadows, outside public scrutiny" (*New York Times* 2004). Yet doing so is important, because understanding who, what, and where "the state" lies is necessary to foster any kind of accountability for women deprived of their liberty.[4] Although the scale of imprisonment makes this problem particularly acute in the United States, the shift to privatization under way in many countries, including the privatization of prisons operated by multinational corporations, may complicate questions of the state's identity and accountability in many places.

Like so many others in American life, prisons are not equal opportunity institutions. Most women in prison are poor and will return to poor communities after serving their time. They tend to be relatively young, mothers of at least one child, and disproportionately African American, Latina, and Native American. Like women who receive public assistance, prisoners come from groups that share a history of coercive government intrusion into reproduction (May 1995; Roberts 1997, 2002; Mink 1998; Silliman and Bhattacharjee 2002).[5] The permanent disadvantages that come with having a prison record in the United States, especially a felony drug record, should be of interest to welfare scholars as well as scholars of punishment. I hope that this volume will encourage feminist scholars who write about intersecting oppressions to begin to include the status of being a prisoner or a former prisoner as a vital category of analysis. Likewise, feminists in the policy world should incorporate imprisonment into their work to ensure, for example, that programs for welfare recipients do not inadvertently exclude women with criminal records. Because jails and prisons are part of the fabric of life for many families and communities, ignoring prisoners distorts analysis of the needs, experiences, and rights of women of color and lower-income women in general.

Throughout this article, I explore the complex and sometimes elusive location of state power governing reproductive rights, showing how that power becomes manifest at different levels and in different forms. First, I review the role the state plays in two divergent schools of research on women in prison, arguing that whether the state is absent or looms large, these frameworks do not give us a way to understand the regulation of women's reproductive rights. Next, I sketch the complex institutional arrangements that characterize contemporary imprisonment to show how the state that governs reproductive rights in prison differs from the state that governs on the outside.

Third, I examine the ways that the nature of state power undermines women's reproductive rights, arguing that this occurs whether the state governs by unwritten rules or written rules, thus opening a new perspective onto women's relationship with the state.

Searching for the State in the Literature

Everything from political decisions about where to site and build prisons to jail- and prison-specific visitation policies to local implementation of federal and state foster care laws affects whether women prisoners can maintain their parental rights and relationships with their children. Similarly, everything about imprisoned women's experiences of pregnancy is shaped by state actors and by institutional, local, state, and federal policies, including whether they can get an abortion and whether they will be taken to the hospital in chains to give birth, still shackled, under the watchful eye of one or more guards, to how long they can spend with their newborn baby (twenty-four hours, twelve months) and where the baby will be placed. Given the state's enormous influence on prisoners' reproductive rights, what picture of the state emerges from the literature?

Because my research focuses on the United States, this section reviews my search for the state in scholarship about the United States. My institutional location as a political scientist suggested that I look within my own discipline. Yet despite the discipline's historic preoccupation with the state and with questions of power, public policy, and implementation, political scientists have spent little time studying prisons and do not routinely include prisons in their understanding of the state or state institutions.[6]

If political science tends to ignore prisons, research on prisons tends to ignore women. To consider just one example, David Garland's (2001) recent anthology about mass imprisonment asks what it means to be a country that imprisons so many people, yet leaves women out of the discussion. Garland and the contributors to the volume are interested in the "social concentration of imprisonment's effects," in what happens when prisons become "a shaping institution for whole sectors of the population," and in the "systematic imprisonment of whole groups," by which they mean young black urban men (Garland 2001, 1, 2). The book offers little insight into the ways that the incarceration of so many young black men affects women—who are connected to them as mothers, daughters, sisters, lovers, and the mothers of their children—let alone insight into women's imprisonment, which is growing rapidly along the same racial lines as men's.[7]

Among those who do study women in prison, two distinct bodies of literature have emerged that exemplify two different approaches

to the state: feminist criminology and feminist criticism of the prison-industrial complex.[8] Much feminist criminology organizes accounts of prison around broad social processes, such as gender stereotyping and medicalization, ignoring the state or treating it as a monolithic creation of patriarchy. Moreover, rather than being structural, historical, or discursive, the underlying concepts of patriarchy are often individualized, identifying men qua men as culprits (compare, e.g., Padamsee and Adams [2002, 189] with Girshick [1999, 183, 20]). Representing this approach, criminologist Lori Girshick writes that "the criminal justice system punishes women defined as 'unruly' for betraying 'true womanhood' and stepping outside their prescribed gender roles of femininity and passivity," and that women who deviate from the roles of "good wife, mother, and homemaker" "may be defined as criminal or perhaps mentally ill" and wind up in prison (Girshick 1999, 21, 20).

Framing women's experiences as cultural or medical obscures the role of the state and ultimately rests on a conception of women that relegates the state to a minor role. That is, this literature depicts women as gendered, medicalized, and frequently victimized by patriarchal norms and institutions, instead of as detained citizens or rights-bearing subjects who can make claims, however compromised, on the state. Analytically, it only makes sense to talk about remedies if women are conceived as having rights to vindicate. Consider two examples from Joanne Belknap. She describes the practice of subjecting women to vaginal searches when they return from court appearances or giving birth in a hospital as evidence that prisons "medicalize" women. Yet if it is "typically" nonmedical staff who conduct these invasive searches, they might instead be evidence of abuse and harassment under the guise of security—security being a common justification for all kinds of objectionable practices in prisons (Belknap 2001, 165).[9] Belknap also classifies sexual abuse under "prison subculture" and compares it to sexual harassment by college professors, analytical moves that suggest that abuse that takes place in a coercive state institution is not particularly distinctive (Belknap 2001, 190). This orientation may explain why Belknap does not mention that almost every state has passed a criminal law prohibiting sex between prisoners and staff members. These laws vary in scope and how well they work is an open question, but they do represent one of the few areas where the state—specifically, state legislatures—has responded to prisoners' grievances, thanks in large part to the public pressure generated by political campaigns asserting the human rights of prisoners.[10]

Accounts of how women negotiate the aftermath of imprisonment may also mute attention to the state. For example, one recent study of Kansas women "making it" after prison mentions welfare as a source

of financial support without explaining that the 1996 Temporary Assistance to Needy Families (TANF) law bars people with felony drug convictions from eligibility; nor does it address laws barring people with felony records from holding the very jobs that they trained for in state and federal prisons (O'Brien 2001).[11] Because federal and state policies systematically shape the obstacle course that awaits women when they leave prison and attempt to establish a place to live, get a job, or regain custody of their children, studies emphasizing how women can develop their own inner resources but not how the state creates barriers will inevitably be theoretically and practically incomplete.

In contrast, feminist critics of the prison-industrial complex are relentless in their critique of state power, including the ways that corporate interests have thoroughly permeated the penal system. As Angela Davis and Cassandra Shaylor (2001, 2; see also Hallinan 2001) argue,

> The proliferation of prisons and prisoners is more clearly linked to larger economic and political structures and ideologies than to individual criminal conduct and efforts to curb 'crime.' Indeed, vast numbers of corporations with global markets rely on prisons as an important source of profit and thus have acquired clandestine stakes in the continued expansion of the prison system.

Aiming to articulate critiques that are feminist and antiracist, these writers highlight the particular problems of women without underplaying the significance of race in shaping the politics of imprisonment in the United States and other countries (Bhavnani and Davis 1999; Davis and Shaylor 2001; and Sudbury 2002).[12] By broadening the frame of analysis, this work should encourage more feminist scholars and organizations to put imprisonment on their agenda, and analyze the social costs of mass imprisonment—including the imprisonment of men, for feminists are not likely to get the kinds of policy change they want as long as so many public resources are sunk into incarceration.

Yet for all its virtues, this broad approach, focused on state power writ large, also treats the state as monolithic. The scale of the critique does not lend itself to analyzing various incarnations of the state or possible conflicts between different arenas of the state, nor to finding points of leverage or possible avenues of change. This tendency may stem from a deep suspicion of the state and thus any possibility of using "the master's tools to dismantle the master's house," as well as a political allegiance to prison abolition as opposed to prison reform.[13]

Searching for the State in the Field

The "state" is usually fairly readily apparent in reproductive rights policy, even given the federalist nature of the U.S. government. For example, state legislatures typically establish abortion policies, within parameters set by Congress and the courts—or with the explicit intention of challenging those parameters and overturning *Roe v. Wade*. The state Department of Health or Medicaid agency then issues administrative regulations to implement the law. Similarly, state legislatures make welfare policy choices based on the latitude specified by Congress.

Not so with penal policy, which is characterized by local discretion. "Local" has two meanings. First, about 40 percent of women are confined in local jails—some 3,300 of them, run largely without state oversight by sheriffs or other municipal officials. Second, legislative bodies typically delegate broad powers to those who run prison systems, whether public or private. Although the federal prison sector has expanded greatly since the 1980s, crime is still primarily a state matter in the United States. State governments may neither require nor allow for public involvement in policy making about prisons. In Colorado, for instance, Department of Corrections (DOC) policies are statutorily exempt from the standard rule-making procedures that guide the regulatory process. Yet the DOC calls its internal policies "administrative regulations," masking their insular nature. Directors of DOCs in turn may delegate broad authority to devise and implement policies to individual prison wardens or private actors, who may yet delegate authority to front-line workers.

These high levels of decentralization, delegation, and discretion often obscure the locus of official decision-making authority over reproduction. Are relevant policies formalized and written down? Are they publicly available? Are they available to the women subject to them? Are the identities of the policy makers and those charged with implementation known? Are lines of decision-making authority clear and communicated? Is the policy-making process open to the public or subject to some form of regular monitoring or oversight by citizen review boards or other state actors, such as legislative committees or the attorney general? In many cases, the answer to these questions is no.

The lack of transparency and accountability is deeply troubling because reproductive rights are critically important for prisoners. Demographically, the typical prisoner is in her late twenties or early thirties—in other words, someone for whom reproductive health and control is very salient. An estimated 5–10 percent of women enter prison and jail pregnant, and others become pregnant while they are

imprisoned. Because few states permit conjugal visits—and prisoners must be legally married to qualify—most women are getting pregnant with someone who works on the inside.[14]

The multiple modes of control over refugee women who are seeking asylum illustrate several critical features of the constitution of state authority over prisoners in the contemporary United States. Asylum seekers are under the jurisdiction of the U.S. Bureau of Immigration and Customs Enforcement (BICE), a unit of the Department of Homeland Security, which absorbed the detention functions of the now-defunct Immigration and Naturalization Service (INS). They may be confined in one of several ways: in immigration processing centers run by the BICE, in immigration detention centers run by private companies that contract with the BICE, or, most often, in local jails that that contract with the BICE to confine them. At the discretion of BICE officials, those detained may be sent to jails far from the communities where they have relatives and are seeking to establish a new life. As a matter of federal policy, asylum seekers are supposed to get more liberal visitation as well as telephone messages from their attorneys, something to which other prisoners are not entitled, but advocates report that they rarely get such messages because federal authorities do not monitor or enforce their own regulations in the local jails. At a public meeting of stakeholders in Miami, for instance, the warden of the county jail said, "We've bent over backwards. We've cleaned and we've painted, but I can't treat the INS detainees any differently. I'll have problems, and remember, I have 1,200 inmates in here." Similarly, at a county commission meeting, the head of the county DOC said, "It's a jail, so we have to strip search. Perhaps it's not appropriate for these women, but we have to follow the rules" (Women's Commission for Refugee Women and Children 2001, 7, 10). "We have to follow the rules"—but which rules? Local rules or those governing women under federal jurisdiction?[15]

Like refugee women who may be transferred to other facilities against their will, it has become increasingly common for prisoners to find themselves farmed out under contractual arrangements to institutions in other states or localities. When the Alabama DOC sent 200 women to a private prison in Louisiana, for instance, the women missed out on visits from their families and found themselves without access to education programs or even Alabama legal materials (Crowder 2003). Whether and to what extent prisoners can assert rights under the policies of their home state is an evolving question legally and an open question practically (Boston and Manville 1995, 326–27).

Finally, privatization further undermines accountability. Although relatively few women are confined in private prisons, many have to

rely on private companies for medical care. According to a survey conducted by the National Institute of Corrections (NIC), forty-four state DOCs contract out at least some provision of medical care, representing $706 million in 1996 (NIC 1996, 8).[16] Correctional Medical Services (CMS), the nation's largest private vendor, has contracts covering the entire prison system in ten states and additional facilities in seventeen other states, for a total of 214,000 people, or one-tenth of the nation's prisoners (Hylton 2003, 44, 48). Privatization introduces a profit motive into the provision of treatment, and prisoners are an especially vulnerable group because of their serious health needs as well as their structural position. Privatized services are rarely monitored adequately and rarely save money; indeed, proper monitoring makes any contract more expensive (Bates 1998; Coyle et al. 2003). Whether private contractors can be held liable for medical neglect or abuse under state law varies by state; private contractors are not immune from challenges under the federal civil rights law governing actions against state and local governments (42 U.S.C. Section 1983). The Supreme Court has held, however, that private corporations that run prisons under federal contract are shielded from lawsuits for constitutional violations—a decision that blurs the distinction between the "state" and "nonstate" actors to prisoners' disadvantage (Alexander 2003a).

The complex local situations in which prisoners find themselves, and the paths of redress open to them, are given overall shape by the federal government. Congress and the federal courts have constrained the extent to which prisoners can make claims as well as the kinds of claims they can make. First, at the practical level, they limit their access to representation and to the courts (through adverse decisions and congressional bans on legal aid funding for prisoners' rights cases, the Prison Litigation Reform Act, and habeas restrictions). Second, at the discursive level, court decisions have narrowed prisoners' rights and interpretations of the Eighth Amendment.[17]

Bearing in mind these complex institutional arrangements, what do we find when trying to make sense of state power in the lived experiences of women negotiating reproductive health needs in prison? Because written policies are a critical element of transparency, the next two sections are organized according to whether women's conflicts with the state arise from the absence of official written policy or despite official policies. Where policies are unwritten, this creates a dangerous void within which women must figure out how to maneuver. The question of who gets to make a decision in the absence of official policy may not be at all clear. Where policies are written, however, the inquiry does not end, for questions remain about who gets to interpret and implement those written policies

and how they do so. As the number of actors multiplies, so does the problem of accountability.

Governing by Unwritten Rules

Two recent conflicts over abortion access illustrate the kinds of obstacles imprisoned women confront when state authority rests in unwritten rules. In early 2003, a county sheriff in Texas transferred a woman to state prison to avoid dealing with her abortion request, an action that may suggest at least tacit cooperation among state agents (Lamoreaux 2003; Ruiz 2003a, 2003b). Confined in a Houston jail for violating her probation and facing two years in state prison, this woman sought to terminate her first-trimester pregnancy. During her three weeks at the jail, she was told that she would not be taken to a clinic for an abortion without a court order.[18] Neither the woman nor the ACLU, which intervened on her behalf, ever succeeded in obtaining a written copy of the jail's policy. Lo and behold, the county sheriff transferred the woman to state prison the day after she filed a lawsuit in federal court, a move that rendered the case moot, because she was no longer in the sheriff's custody.

Although ACLU attorney Annette Lamoreaux told a reporter, "The county sheriff cannot just turn any one of my plaintiffs to [state custody] to avoid being sued," it appears that it is exactly what happened (Ruiz 2003b). Although this particular woman may be better off in the state prison system, which has written guidelines to handle abortion requests, her transfer by the sheriff leaves other women coming to the jail vulnerable to the same arbitrary treatment she experienced there.[19] Given the size of the Harris County jail system, this status quo potentially affects thousands of women.[20]

The second case, spanning fall 2002, concerns a young Missouri woman sent to the St. Louis County jail because she missed a meeting with her probation officer (Lieberman 2003a, 2003b). When her pregnancy test came back positive, she immediately asked for an abortion—and kept asking. Told "we don't do that," she filled out medical requests and grievances. As October gave way to November, she grew increasingly worried. Somehow, in early December, she found her way to the National Abortion Federation (NAF) hotline, and used all of her allotted telephone time to call the staff there. NAF contacted the ACLU Reproductive Freedom Project in New York, which contacted the legal director of the local ACLU, Denise Lieberman; NAF also relayed Lieberman's contact information to the jailed woman.

Initially, Lieberman did not fare much better with the powers that be than Lamoreaux had in Houston. Both the medical director at the jail (before she stopped talking to Lieberman) and the county attorney

maintained that they were not required to provide the woman with an abortion, calling it a purely elective procedure, "like plastic surgery," and not medically necessary. Then finally, on the day before Christmas, the county attorney agreed to transport the woman to a local clinic for an abortion—just as Lieberman was digging her car out of the snow to go to the federal courthouse and file a lawsuit. But even this did not end the negotiations—more ensued over whether the woman would be shackled during the procedure (the clinic refused), and whether the guard would stand inside the room or outside the door. Because the county would not pay, Lieberman scrambled to raise the money from emergency abortion funds and a network of local women attorneys.

The county never produced any kind of written policy statement, leaving all other women confined in the jail in the same insecure position. In 2002, the jail admitted more than 1,500 women, a majority of whom were African American.[21] A less determined person than the subject of this story might have given up. The irony, if such a term is even appropriate, is that she was due to be released in three weeks anyway—but those extra three weeks would have pushed her to need a more expensive, more complicated, and less accessible abortion. Although we can never know precisely how many other women have encountered such problems, news reports and court documents identify similar conflicts between women and local penal authorities in at least twelve additional states: Arizona, California, Florida, Georgia, Idaho, Louisiana, New Jersey, New York, Ohio, Oregon, Pennsylvania, and Virginia. Some of these women never managed to obtain abortions.

As a matter of constitutional law, federal courts have consistently held that prisoners retain the right to abortion, yet corrections informants in several states indicated that they would review women's abortion requests on a case-by-case basis or that their practice is to allow minimum-security prisoners out on furlough, suggesting that higher-security prisoners would not be able to get an abortion.[22] At the state level, some fourteen state DOCs lack official written abortion policies, and others will not release their policies to the public ("for security reasons"); at the federal level, the BICE has no publicly available policy about detained immigrants' access to abortion services.[23] Because abortion is a time-sensitive need, the status quo in these states represents serious potential problems for women. To run through the obvious candidates, would the medical staff, the warden of the prison, the medical director for the central DOC, or some other DOC official get to decide? What if the medical provider is private company and nothing about abortion was written into the contract?

In an opinion that belies the reality of negotiating for medical care behind bars, the U.S. Fifth Circuit Court of Appeals recently held that a jail can require a woman to obtain a court order authorizing her to be released or transported for an abortion. This decision also rests on the notion that abortions are elective medical procedures that jails are not required to provide. In contrast, the Third Circuit Court of Appeals has held that it is unreasonable to require a court order for an abortion.[24] The Third Circuit is also the one federal appellate court to consider the question of public funding; it ruled that if prisoners cannot pay for an abortion, then the state must do so (in this specific case, the Monmouth County Jail in New Jersey), because prisoners cannot fend for themselves and the state is obligated to provide for prisoners' serious medical needs (*Monmouth County Correctional Institute Inmates v. Lanzaro*, 34 F.2d 326 [3rd Cir. 1987], cert. denied 486 U.S. 1006). As a matter of official or default policy, though, many states impose on women all of the costs of transportation, security, and abortion—a significant burden, compounded by the concentration of abortion services in urban areas, and the concentration of prisons in rural areas.

The impact of privatization on abortion and pregnancy care is an area about which we know especially little but have reason to be concerned. Although financial incentives would lead to policies freely permitting abortion, because an abortion costs less than pregnancy care and giving birth in a hospital, this is not necessarily the case. One state corrections informant told me that CMS is antichoice, for instance. Privatization thus raises questions about whether abortion policy in a contracted medical setting emanates from the state, and even more so whether state or private actors make decisions in individual women's cases.

A recent investigation into CMS exposed the lengths to which at least some employees would go to save the company money, revealing the kind of merging of state and corporation that critics of the prison-industrial complex warn about (Hylton 2003, 52–53). A former supervisory nurse of a Northern jail explained how she would notify the lieutenant of any new prisoners admitted to the jail with serious health problems; the lieutenant would then try to arrange with a judge to have the person's bail lowered or have the person released (what the lieutenant told the judges, the investigator does not say). To avoid incurring the cost of hospital-based delivery, the CMS nurse said the jail would release pregnant women who went into labor and then rearrest them after they gave birth. The regular routines established between company employee, jail staff, and judges suggest that the policy was unwritten but not unofficial.

Governing by Written Rules

Of course it would be naive to assume that written policies in and of themselves always suffice to guarantee reproductive rights. Policies may be unclear, contravene women's rights, or bear little resemblance to practice. Official written abortion policies, for instance, are models of neither transparency nor accountability. First, almost all formal state-level abortion policies are devised and approved without going through the regular administrative rule-making process, and the results may be inaccessible or incomplete. The Idaho DOC, for instance, posts the full text of its pregnancy testing and prenatal care policies on its Web site, but not the full text of its abortion policy. Alaska has a provision banning abortion funding in its overall "scope of [medical] services" policy, but no specific guidelines on abortion, including how a woman can get one with her own money. States may not define the category of therapeutic abortions for which, according to policy statements, they pay. Second, written policies may clearly limit women's abortion rights or burden them to the point where they cannot be exercised. Only two state policies, in Minnesota and Wisconsin, explicitly mention that they pay for abortions if a woman has been raped, making prison policies stingier than even federal Medicaid policy. Others make women pay for all of the costs associated with an abortion—transportation, security, and the procedure itself—which may put an abortion out of reach, especially if there is no local provider and if state law mandates in-person counseling by the clinic or other requirements necessitating more than one trip to the clinic.

Compared to some state policies, the federal Bureau of Prisons' policy is a model of transparency, if not of maximum access. The bureau, which since fiscal year 1987 has paid for abortion only in cases of rape or life endangerment but does pay for transportation, publishes its abortion policy in the *Federal Register* and posts it on its Web site.[25] But one federal prisoner's story shows that written policies do not necessarily secure rights, especially when women must contend with multiple incarnations of the state (*Gibson v. Matthews*, 926 F.2d 532 [6th Cir. 1991]). During her trial for bank robbery, a federal crime, a woman was confined in a Texas jail. She was thus under the jurisdiction of the U.S. marshals, though in the physical custody of a county jail. Although the facts are not entirely clear, she attempted to get an abortion, asking both federal officials (marshals, her public defender, and the judge) and county jail personnel (nurses and a corrections officer) for help. According to court records, the federal judge "asked" that the abortion "be carried out as soon as possible," presumably during the next few weeks before her transfer

to federal prison. But nothing happened. She then went on a multistate odyssey through several federal prisons in Oklahoma, Georgia, and West Virginia, where she was to serve her sentence, but was told she could not have an abortion. She finally ended up in Kentucky, where she was sent to have the abortion, but by then it was too late. Whatever the county jail's policy may have been at the time, the federal Bureau of Prisons had an established policy to provide abortion services.

Although women's abortion claims may evoke more political controversy, women who need pregnancy care, preventive health care to preserve their fertility, and treatment for reproductive health problems also find their reproductive rights jeopardized by imprisonment. Because few jail or prison officials would say they do not provide prenatal and gynecological care, the problems here are more likely to be about standards of care, monitoring, and accountability than official policy. As one example, according to a lawsuit brought in 2002 by women in Alabama, the DOC and its private vendor NaphCare discourage women from seeking medical treatment, and the contract is designed to discourage the company from providing treatment. To discourage women, for instance, the prison holds sick call in the middle of the night (*Laube v. Haley*, second amended complaint, December 18, 2002). To discourage spending money on treatment, the contract defers to "physician judgment" on whether to treat preexisting conditions; a woman sentenced to prison after surgery for breast cancer received no chemotherapy for eighteen months (Cason 2002).

The promise of recourse through the federal courts can be waylaid by the diffusion among multiple state actors of power to design, implement, and interpret official policy. Consider the California case of *Shumate v. Wilson* (settlement agreement, August 11, 1997), a class action brought in 1995 by women in two prisons to improve medical care.[26] The DOC entered into what the women's lawyers thought was a very good settlement ("a real breakthrough"), mandating, among other things, that the prisons "provide for" a range of preventive services to preserve women's health and fertility. Specifically, the agreement called for the prisons to "implement policies that provide for periodic physical examinations, including pelvic and breast examinations, pap smears, and screening mammograms consistent with community standards."[27] But prison officials interpreted the phrase "provide for" to mean that the prison must make services available, without assuming any affirmative responsibility to reach out to women or schedule exams for them. The monitor appointed by the court accepted that laissez-faire interpretation—a reading of the language that the women's lawyers had never anticipated. A twenty-nine-year-old

woman recently died of cervical cancer in California's Central California Women's Facility, underscoring the importance of these health services, especially for women with HIV who need more frequent cancer screenings (Cooper 2002). After a two-year monitoring period, the court found the prisons in compliance and dismissed the lawsuit, bringing the entire case to a bitter conclusion for the women who had put themselves on the line as named plaintiffs and for their advocates.[28]

To say this case illustrates the divide between policy and practice is an understatement. The California DOC, based in the state capital, does not communicate policy to the thirty-two prisons it putatively oversees, nor does it monitor implementation, which is left instead to each prison warden. Elizabeth Alexander, director of the ACLU National Prison Project, notes that when the *Shumate* legal team took depositions from medical staff at the prisons, the staff members said that they were not familiar with the policy and procedure manuals that the state attorney general had provided to the women's lawyers.[29]

Further illustrating the gap between written policy and practice is women's inability to get into community-based prisons. The California DOC currently runs three Community Prisoner Mother Programs (CPMP) designed for pregnant women and women with children under the age of six. Although pregnant women are eligible for transfer to these facilities under the terms of a settlement agreement and other official state policy, they have reported for several years that they cannot get into the programs until after they give birth because the prison doctor will not sign off on their transfer. The doctor apparently tells women that they are too "high-risk" to travel for several hours to reach the program sites. As one woman writes: "I have a full duty paper from the doctor which states that I can work any job that is give[n] to me. Examp. Kitchen where there is water all over and very dangerous. And to me that's more of a high risk than traveling on a bus or van."[30]

Getting into one of these programs before having the baby is important to minimize the chance that something will go wrong. That is, women who have already transferred to CPMP can bring their baby back with them after they give birth. If they are still in the regular prison, and no one in the family is available to pick up the baby from the hospital on short notice, then the state would assume custody, creating the potential for problems later on when someone tries to claim the baby. Most pregnant women are sentenced to Valley State Prison for Women in California's San Joaquin Valley. Relatives may have to travel long distances to reach the hospital in Madera, where the women give birth. Madera is more than 215 miles from

Los Angeles and about 180 miles from San Francisco; add up to 365 miles for those living north of the Bay Area, making the journey especially difficult for anyone who does not have a car. Even though women are aware of their rights, they are virtually powerless, by themselves, to hold the state accountable (Pierson 2003a, 2003b).[31]

Women's problems with the state do not stop when they are released from prison. As suggested earlier, a complicated and ever-widening net of official federal and state policies jeopardizes women's access to public goods and services that they, as low-income mothers, may need to regain custody of their children—benefits such as public housing, public assistance, food stamps, and student loans, not to mention employment. This is assuming they have been able to maintain their parental rights in the first place, escaping the impact of the 1997 Adoption and Safe Families Act (ASFA), which speeds up the process of terminating a parent's rights if her children are in foster care. No systematic research about the impact of ASFA has yet been done (and will be very difficult, as family court proceedings are closed to the public, unless they go up on appeal), but the anecdotal evidence from California to New York is that the law has hurt prisoners.[32] Some number of children subject to ASFA time limits become "legal orphans" because judges terminate their parents' rights before they have moved into permanent adoptive homes, and case workers fail invoke the statutory exceptions that might prevent this outcome. Given the disproportionate number of African American children brought into the foster care system, some advocates consider fast-track adoption a modern form of genocide or political subordination (McCray 2003; Roberts 2002). No one who testified before Congress raised the particular concerns of incarcerated parents; nor did any members of Congress express them during debate. In addition to ASFA, many states have their own statutes and court decisions that allow incarceration to be taken into account in proceedings concerning child placement or even target prisoners for termination of parental rights. Together, these policies continue to exact punishment even after someone has served her time. Paying one's debt to society becomes a permanent condition of life that undermines women's rights to be mothers.

Governing by Other Means: Pregnant Women in the Belly of the Beast

Pregnant women's encounters with staff members, in both security and custody roles and in medical roles, illustrate the ways that individuals wield the discretionary power of the state, cutting across the written/unwritten divide. Consider two examples that women brought to the attention of Legal Services for Prisoners with Children (LSPC), an organization that works with women and their families in California.

As home to the two largest women's prisons in the world, California's policies and practices affect the lives of a significant number of prisoners in the country. Although California may be unusual in the size of its prison apparatus and the level of organized advocacy on behalf of women, the problems plaguing its medical system are by no means unique to the state.[33]

One woman described going into labor during count—a surveillance ritual, performed several times each day, where each prisoner is locked in her cell and counted. Because the guards would not let her go to the infirmary until count was complete, she wound up giving birth alone twenty minutes after she got to the infirmary instead of at the hospital. Her story highlights how tensions between security and medicine are "resolved" in favor of security: here, the prison staff subordinated the woman's need for immediate medical attention to concerns with following standard security practices.

Another woman writes of her experience several months into her pregnancy:

> I went for my monthly checkup. They couldn't find my baby's heartbeat. . . . [Five days later] I was in a lot of pain and was spotting a lot. I told my housing staff and he called the MTA. She told him I didn't have proof, that she wouldn't see me. At that time the bleeding slow down so I put a pad on. It was blood on it but not good enough for her. She told me that *All Pregnant Women Bleed*. I told her that I was a high risk and when I seen the doctor last week he couldn't find a heartbeat. So she called the doctor and he told her to send me back to my unit. . . . [Three days later at 3:00 A.M.] I lost my baby in my bathroom.[34]

MTA stands for medical technical assistant, a corrections officer who has trained to be a licensed vocational nurse. As this story shows, the MTAs work as gatekeepers to medical services, and critics argue that they render judgments far outside their licensed scope of practice. Contrary to medical and corrections ethics, they maintain dual roles as medical and security staff (American Nurses Association 1995; Anno and Spencer 1998; Start 1998). As LSPC medical advocacy coordinator Heidi Strupp says, "It's a fundamental conflict to have the person who can spray pepper spray in your eyes be the person to clean it out" (Strupp 2003). The MTA position is unique to California, a gift to the state's powerful corrections union, but other jurisdictions are creating positions that blur the lines.[35] In Chicago, the county jail has begun training corrections officers to serve as doulas, birth attendants whose purpose is to support and advocate for pregnant women (Hall, personal communication 2004). Again, institutional loyalties would seem to undermine this role.

These two women's stories serve as stark reminders that jails and prisons limit women's movement, dramatizing the powerful and literal ways that prisons control women (Stoller 2003). Recall the story of the woman who fought so persistently for her abortion rights in the St. Louis County Jail. The jail is a "direct supervision" facility featuring pod construction, where guards bring meals and daily medications to the pod, instead of having prisoners move about the facility. A guard also picks up prisoners' requests for medical care and brings them to the medical unit. The woman who sought an abortion suspects that the guard did not deliver all of her requests and reports that he tore one up right in front of her. Because she was not free to move about the jail and deliver her requests herself, this woman was severely constrained in her efforts to be her own advocate.

Sometimes it is not guards but civilian medical staff who embody the state for pregnant women. The lengths to which women will go to get into California's CPMP sites signal the strong sense of urgency they feel about finishing their pregnancy and giving birth outside of the state's huge prisons. To obtain medical clearance, women must be approved by a dentist as well as a doctor. After a period of reporting that they could not obtain such clearance, since at least spring 2003, women have been reporting that the dentist "clears" them by pulling their teeth instead of filling cavities or otherwise treating their needs (LSPC n.d.). Because surgery creates the possibility of infection, and missing teeth creates possible health problems down the line, this practice is clearly iatrogenic, exemplifying the need for real mechanisms of accountability.

Conclusion

The accounts related here suggest that prisons and jails construct women's reproductive rights as contingent and expendable, despite the courts' construction of such rights as fundamental. Even though access to monetary resources largely determines the vitality of women's reproductive rights on the outside, state policies still rest on a core foundation that is lacking in the context of incarceration.

Related to the contingent construction of rights is the variable construction of the state. The multiple layers of the state authority that prove so challenging to women may be operationally distinct, as in the case of Jane—the Texas minor who had to contend with her parole officer, a state judge, and a private treatment center administrator who would not let her leave—or they may be dispersed within one system. In the St. Louis case, many actors embody the state—the county attorney, most formally, but also the medical director and the individual corrections officer, all of whom employed their discretion

in the absence of official written policy. In both cases, figuring out who the state is poses a challenge, because regardless of explicit authority, each actor involved represents—and wielded—state power over women's reproductive decisions.

Putting the state at the center of analysis points us in a promising direction to determine just how it is that prisons constrain women's lives and rights. From an advocacy perspective, it is important to know who is responsible for what, to determine the best avenues to press for accountability and change. Depending on the problem and the prison, advocates may fare best by working through the courts, legislature, or bureaucracy or by appealing directly to the public to build community support and public pressure.[36] From a scholarly perspective, attending to prisons yields a more complete understanding of the state and of women's relationships with the state. Prisons are a critical arena for feminist scholars concerned with government budget priorities and with the privatization of crucial state functions, such as welfare, job training, and other social services, and what this privatization means for democracy and accountability, especially as the Bush administration extends its zeal to privatize even to military functions (Krugman 2004). So, too, are prisons a critical arena for feminist scholars who reject "choice" as a framework for reproductive politics. Nowhere is it truer that simple invocations of choice are insufficient to guarantee women's reproductive rights than in prisons, where women are literally held captive by the state. The stories that emanate from women's prisons, including reports of unnecessary and unauthorized hysterectomies, evoke an earlier era and speak powerfully to the vulnerabilities wrought by racism, poverty, and state control. In a contemporary parallel, a perverse and ultimately false pronatalism characterizes the treatment of women in prison and the treatment of poor women outside—one that interferes with abortion so that women will have babies but then fails to support the children and families that result.

To borrow a phrase from anthropologist Jane Guyer, prisons are arenas where we feel "the presence of the state even in its absence" (personal communication 2002). By this I do not mean that the state is truly absent but that its seeming absence is itself one manifestation of contemporary state power. As this article has shown, at the most basic level the state is always present: After all, prisons have the power to hold women and limit their contact with the outside world, and individuals as well as institutions embody that power. Yet the state's contours and workings may be opaque, disjointed, and ambiguous, especially as states contract out the power to treat, confine, and punish. Some manifestations challenge our very ideas of what a prison is—for instance, "secure" community-based "facilities" for

mothers and children that are run by private nonprofit organizations but also staffed by members of the state's corrections union. By interrogating both the absence and presence of official state power, feminist scholarship on prisons may generate new insights into the ways that states govern women's lives and secure a greater measure of justice for imprisoned women.

NOTES

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1. Because Jane is a minor, the judge sealed the order in her case to protect her privacy; the final outcome is not part of the public record. The judge, however, did not seal a permanent injunction requiring the center to inform all young women of their abortion rights and of their right to pro bono legal services. The Texas Administrative Code contains a regulation about minors' access to abortion when they are under the custody of the Texas Youth Commission, but it seemed to play no part in the legal proceedings. The regulation is silent on the question of court orders (37 TAC sec. 91.95, "Pregnancy and Abortion").

2. See, for example, Barry (1996), Bhattacharjee (2002), and Davis and Shaylor (2001, 12–14); Fried's work (1998, 2002) on reproductive rights is an exception.

3. See Midgley (2003) for an overview of prisoners' rights. After turning away from the "hands-off" doctrine to articulate rights for prisoners in the 1960s and 1970s, the U.S. Supreme Court began scaling back. Congress has also curtailed prisoners' rights (Clarke 2003).

4. Although beyond the scope of this article, men also have interests in reproduction, which prison officials may arbitrarily deny. A few men have tried unsuccessfully to claim the right to procreate with their wives outside of prison (Roth 2004a). Although imprisonment forecloses the hopes and dreams of both women and men of having children in the future, women experience distinctive dilemmas by virtue of already being pregnant when they come under state control and because they can become pregnant in prison.

5. Although we know these things in the aggregate, the U.S. Bureau of Justice Statistics and other agencies only periodically publish detailed statistics about women in prison and often present information by gender or race but not both. Amazingly, immigration detention statistics posted on the federal

government's Web site are not broken out by gender at all. The lack of readily accessible data can make it difficult to give the kind of detailed descriptions that an intersectional analysis calls for.

6. There are a few notable exceptions, such as John DiIulio and Ann Lin, and political scientists are showing new interest in the impact of imprisonment and felony disenfranchisement on voting rights, a bread-and-butter issue for the discipline.

7. One contributor at least acknowledges that his article is about men and suggests that the state polices women through welfare and men through prison (Wacquant 2001, 108, n. 1). In contrast, Bhattacharjee (2002) successfully shows how men's imprisonment affects women, especially in immigrant communities.

8. For a broader review of the contributions of feminist criminology, see Haney's introduction to this volume.

9. See Midgley (2003) and especially the 1987 Supreme Court decision *Turner v. Safley* (482 U.S. 78) on judicial deference to invocations of security.

10. For information on state laws, see Smith (2002). For women's challenge to the inadequacies of the New York law punishing sexual misconduct, see Otis (2003).

11. Allard (2002) shows how state implementation of the lifetime TANF drug felony ban has disproportionately excluded African American and Latina women. See Butterfield (2002) on bars to employment, and Hirsch et al. (2002) on additional obstacles faced by parents with criminal records.

12. Studies such as Ross (1998) and Johnson (2003) focus on women of color in the United States, but their adherence to traditional criminological concepts places their work closer to feminist criminologists than to critics of the prison-industrial complex. Ross pays greater attention to the state than do many criminologists, however. The state figures most prominently and explicitly in the overarching account of colonialism and sovereignty with which she frames her study of Native American women's experiences in Montana's prison, but readers can identify concrete examples of the influence of the state, such as when a social worker does not know the specifics of the federal law governing the adoption of Native American children.

13. Bhavnani and Davis, (1999, 237) for example, acknowledge the tension between wanting to improve conditions and wanting to abolish prisons. See also related work employing a framework of state violence against women in Silliman and Bhattacharjee (2002); the winter 2000–2001 issue of the magazine *ColorLines*; and the Web site for Incite! Women of Color against Violence, at www.incite-national.org

14. I am inclined to argue that there is no such thing as consensual sex between prisoners and prison staff or volunteers. See Human Rights Watch (1996) and Amnesty International (1999, 2001).

15. My intention in this example is to illustrate the problems that arise when women are in the legal jurisdiction of one arm of the state but the physical custody of another, not to endorse better treatment of any given group of prisoners who may be constructed as "more deserving" than others—because seeking asylum, because not yet convicted of a crime, and so on.

16. The NIC has not updated this survey.

17. Congress enacted the Prison Litigation Reform Act (PLRA) in 1996 in response to claims about so-called frivolous lawsuits and about federal courts' incursions on state authority. The PLRA imposes significant hurdles to litigation and lasting change by requiring prisoners to exhaust in-house administrative remedies before turning to the courts and limiting consent decrees to two years absent new proof of constitutional violations. The exhaustion requirement is especially unworkable for health problems that cannot wait for the gears of bureaucracy to turn. To gauge the impact of this law, consider that many jails, prisons, and entire corrections systems were under court orders to improve conditions for up to twenty years, and that governments successfully petitioned the courts to dissolve these orders after passage of the PLRA.

18. A spokesperson for the sheriff's office deflected the question of whether this is because they consider abortions elective procedures (Ruiz 2003b).

19. There is no public record of what happened to this woman after her transfer to the state prison.

20. Because jails are places of flux—filled with people who have just been arrested, who are waiting to make bail, who are awaiting or on trial, and who are serving short sentences—many more people pass through jails than prisons in a given year. In 2002, the Harris County jails processed approximately 226,000 people (Harris County Sheriff's Office 2004).

21. St. Louis County Department of Justice Services e-mail correspondence 2004. The department reports that 930 women were African American; 641 were white; and two were unknown or "other."

22. For further discussion of abortion law and policy in the prison context, see Roth (2004b).

23. States without official written abortion policies include Alabama, Alaska, Florida, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, and Pennsylvania; Delaware and Wyoming do not release DOC policies to the public.

24. Compare *Monmouth County Correctional Institute Inmates v. Lanzaro* (1987), covering Delaware, New Jersey, and Pennsylvania, with *Victoria W. v. Larpenter* (2004 WL 928682, 5th Cir. [La.]), covering Louisiana, Mississippi, and Texas. Victoria W. was denied an abortion when she was jailed for a probation violation in 1999 in Terrebonne Parish, Louisiana, about 60 miles from New Orleans. She wound up needing an emergency cesarean to deliver her baby, whom she placed for adoption (Simpson 2003).

25. Congress briefly reinstated funding during the early years of the Clinton administration.

26. The prisons are the California Institution for Women, the state's oldest prison for women, in southern California, and the Central California Women's Facility (CCWF), in the San Joaquin Valley. Valley State Prison for Women opened—literally across the street from CCWF in the tiny rural town of Chowchilla—the same month the lawsuit was filed, and the women confined there did not participate in the lawsuit.

27. *Shumate v. Wilson*, settlement agreement, August 11, 1997, Provision N38, on "Preventive Care."

28. Interviews with staff members of Legal Services for Prisoners with Children (LSPC), April 2003, and with Elizabeth Alexander (2003b), director of the ACLU National Prison Project, about *Shumate v. Wilson*.

29. Health care policies are once again being renegotiated as the state works to implement the settlement of a class action lawsuit brought against all but one of the state's prisons. The class did not include any named female plaintiffs, and the initial settlement lacked specific provisions to ensure that women's medical needs would be met, leading advocates to file an objection to the terms of the settlement. (*Plata v. Davis*, Declarations and Exhibits in Support of Objections of Women Class Members, May 24, 2002).

30. Letter to LSPC, quoted by permission.

31. Advocates in California, New York, and Washington report that even though there are far more women eligible for community-based programs and prison nurseries than there are spaces, such programs are rarely full to capacity because prison officials do not make it a priority to inform eligible women.

32. Anecdotal evidence about California from interview with LSPC staff attorney Cassie Pierson (2003b); and about Illinois and New York from a workshop on ASFA at the Tenth National Roundtable for Women in Prison, held on June 22, 2002, in New York City.

33. See, for example, Herivel (2003) on Washington; Ross (1998) on Montana; *Laube v. Haley* on Alabama.

34. Letters to LSPC, summarized and quoted by permission; emphasis in original.

35. Critics of MTAs include the United Nations Special Rapporteur on Violence against Women, who investigated several U.S. women's prisons in 1998.

36. Consider, for example, campaigns by California-based Justice Now for the "compassionate release" of terminally ill prisoners, which use the channel provided by the state but go beyond it to create public awareness and engage in community-based activism, or the media campaigns following the publication of human rights reports.

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