

# BOUND BY INJUSTICE: CHALLENGING THE USE OF SHACKLES ON INCARCERATED PREGNANT WOMEN

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## INTRODUCTION

The use of shackles to restrain a pregnant woman during the birthing process is a barbaric practice that needlessly inflicts excruciating pain and humiliation. It is widely condemned by members of the international community, including leading medical and public health associations. Although human rights advocates have effected significant policy change in the past ten years to eliminate the use of shackles on women in labor, it remains routine practice in many American prisons and jails. Reproductive rights advocates should consider this a reproductive justice issue and build on the gains of the human rights community to bring legal claims challenging such practices. Part I of this article applies the reproductive justice framework to this issue. Part II explains how human rights advocates have utilized international human rights law to effect change in the United States. Part III discusses the remedies that exist under U.S. law for women who have been—or are threatened with being—shackled during the birthing process.

## PART I

### *A. The Shackling of Incarcerated Women in Context*

Over the past ten years, human rights advocates have shed light on a brutal and widespread practice occurring in prisons and jails across the United States. Pregnant prisoners are routinely shackled while in labor, both during transport to the hospital and during childbirth. While this practice continues in many states today, advocates have orchestrated a remarkably successful effort to raise the public's consciousness about the issue and to initiate policy change at the federal and state levels. International human rights law has proven to be a powerful tool in this regard, exposing the practice as extreme, in violation of international standards

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and basic human rights principles. Despite the progress that has been made through human rights advocacy, civil rights litigation remains essential to ensuring that the rights of a vulnerable population are protected. Such litigation can build on the successes achieved by human rights advocates in the domestic policy arena.

Women have been underrepresented at all levels of the criminal justice system. This underrepresentation has resulted in a penal system in which the diverse needs of women prisoners are forgotten or ignored.<sup>1</sup> “Little or no thought was given to the possibility of a female prisoner until she appeared at the door of the institution. It was as though crime and punishment existed in a world in which gender equaled male.”<sup>2</sup> A prison infrastructure established to handle the prototypical violent male offender ignores women’s distinct needs. Incarcerated women have historically faced grossly inadequate medical care,<sup>3</sup> crumbling and overcrowded facilities,<sup>4</sup> a devastating lack of privacy,<sup>5</sup> and the ever-present threat of sexual abuse at the hands of prison guards.<sup>6</sup> The practice of shackling prisoners while in labor is emblematic of the failure of the prison system to adapt its policies of general application to the unique situations faced by members of the female prison population.<sup>7</sup>

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<sup>1</sup> Ronald L. Braithwaite, Henrie M. Treadwell & Kimberly R.J. Arriola, Editorial, *Health Disparities and Incarcerated Women: A Population Ignored*, 95 AM. J. PUB. HEALTH 1679 (2005).

<sup>2</sup> INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 79 (Marc Mauer & Meda Chesney-Lind, eds., 2002).

<sup>3</sup> Female prisoners enter prison with more serious and longstanding health problems than male prisoners and prisons are ill-equipped to confront them. “Women’s reproductive events of pregnancy, childbirth, and puerperium [the period between childbirth and the return of the uterus to its normal size] give women unique morbidity risks not experienced by men. . . . Even when reproductive conditions are removed from consideration, significant sex differences persist. . . . Compared to men, women have higher illness rates for infective disease, respiratory and digestive system conditions, injuries, ear disorders, headaches, genitourinary disorders, and skin and musculoskeletal diseases.” SILJA J.A. TALVI, WOMEN BEHIND BARS: THE CRISIS OF WOMEN IN THE U.S. PRISON SYSTEM 88 (2007) (quoting Tammy Anderson, *Issues in the Availability of Health Care for Women Prisoners in THE INCARCERATED WOMAN: REHABILITATIVE PROGRAMMING IN WOMEN’S PRISONS* 49-60 (Susan F. Sharp, ed., 2003)).

<sup>4</sup> TALVI, *supra* note 3, at 107 (“I’ve interviewed women who sleep in unheated horse barns; on the floors of control units in seeping toilet water; in housing units infested with roaches, spiders, and vermin; in tiny rooms designed for two prisoners but packed with eight bodies; and on mattress so hard, worn and thin that there is no way for a woman to leave prison without a back problem.”).

<sup>5</sup> AMNESTY INTERNATIONAL USA, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN (2001) (concluding that the vast majority of women’s prisons permit cross gender patdowns and inspections), available at [www.amnestyusa.org/women/custody/custody-all.pdf](http://www.amnestyusa.org/women/custody/custody-all.pdf) [hereinafter ABUSE OF WOMEN IN CUSTODY].

<sup>6</sup> HUMAN RIGHTS WATCH, ALL TOO FAMILIAR—SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1997) (reporting on the conditions in women’s prisons in five states between 1994 and 1996). The report found significant abuses of female prisoners, including rape, sexual harassment, impregnation, forced abortions, privacy violations, and retaliation. *Id.* at 1-4.

<sup>7</sup> “These shifts [in the incarcerated population] raise concerns about the way male-dominated institutions deal with a burgeoning female population. Women menstruate. They get pregnant. They stress over losing their children to Child Protective Services. Many come into the system physically and sexually abused.” M. L. Lyke, *Number of Female Inmates Soars*, SEATTLE POST-INTELLIGENCER, Mar. 5, 2003, at A1.

While this article focuses primarily on women in custody in U.S. prisons and jails, it is important to note that women held in immigration detention centers endure similarly horrific conditions.<sup>8</sup> Two recent reports indicate that minimum standards set forth in the Detention Operations Manual,<sup>9</sup> established by the Attorney General and the Immigration and Naturalization Service in 2000, are not being met and that immigration officials are particularly unresponsive to the gender-specific needs of women detainees.<sup>10</sup> Detainees describe lengthy delays in receiving needed medical attention, no formalized translation assistance, and a shocking lack of concern for pregnant women and breastfeeding mothers.<sup>11</sup> Pregnant women in detention are routinely shackled during transport to and from offsite visits to medical providers.<sup>12</sup> Shackling of detained immigrant women during labor and delivery has occurred; however, it is believed that many pregnant detainees are the targets of sudden and forcible detention and deportation raising the question of whether “pregnancy has become a red flag for removal” by immigration officials so that such women do not give birth while in custody.<sup>13</sup>

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<sup>8</sup> NINA RABIN, SOUTHWEST INSTITUTE FOR RESEARCH ON WOMEN, UNSEEN PRISONERS: A REPORT ON WOMEN IN IMMIGRATION DETENTION FACILITIES IN ARIZONA 9 (2009) [hereinafter UNSEEN PRISONERS]; HUMAN RIGHTS WATCH, DETAINED AND DISMISSED: WOMEN’S STRUGGLES TO OBTAIN HEALTH CARE IN UNITED STATES IMMIGRATION DETENTION (2009) available at [http://www.hrw.org/sites/default/files/reports/wrd0309webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/wrd0309webwcover_0.pdf) [hereinafter DETAINED AND DISMISSED].

<sup>9</sup> U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DETENTION OPERATIONS MANUAL (2009), available at <http://www.ice.gov/pi/dro/opsmanual/index.htm>.

<sup>10</sup> UNSEEN PRISONERS, *supra* note 8, at 20-21. Human Rights Watch reports that women are unable to access enough sanitary napkins to avoid bleeding through their clothing; women are denied gynecological care and refused hormonal contraception; breastfeeding mothers are denied breast pumps; and pregnant women, even those with high-risk pregnancies, are not provided with adequate pre-natal care. DETAINED AND DISMISSED, *supra* note 8, at 3.

<sup>11</sup> UNSEEN PRISONERS, *supra* note 8, at 20-21. UNSEEN PRISONERS describes a woman who was six months pregnant and was shackled during transport to and from the detention facility, denied monitoring or treatment for an ovarian cyst that posed a risk to herself and the fetus, received no response to her requests for prenatal vitamins, and was assigned to a top bunk bed. Another woman was separated from her breastfeeding baby, who was less than two months old. Her request for a breast pump was denied and she had to express her milk supply manually. In addition, it took immigration officials four days to respond to her request for medical attention for the residual bleeding she was experiencing from childbirth. *Id.* Similarly, Human Rights Watch reports the systematic denial of breast pumps to detained mothers, resulting in fever, pain, mastitis, and the inability to continue breastfeeding upon release. DETAINED AND DISMISSED, *supra* note 8, at 56.

<sup>12</sup> Under ICE policy, security staff may use restraints on pregnant women with the consultation of a medical provider. In July 2008, a coalition of over one hundred women’s rights and immigrants’ rights groups wrote to ICE to request that the agency’s policy be changed to prohibit the routine restraint of pregnant women during medical appointments, transport to appointments, labor, delivery, and post-delivery. ICE declined to make any revisions to the existing policy, stating in a response that it “properly balances the safety of the public, detainees and ICE personnel.” DETAINED AND DISMISSED, *supra* note 8, at 35 (citing Letter from Malika Saada Saar, Executive Director, The Rebecca Project for Human Rights [on behalf of 111 organizations], to Julie L. Myers, Assistant Secretary of Homeland Security, ICE, July 17, 2008; Letter from Susan M. Cullen, Director of Policy, ICE, to Malika Saada Saar, Executive Director, The Rebecca Project for Human Rights, September 10, 2008).

<sup>13</sup> Priscilla Huang, *Anchor Babies, Over-Breeders, and the Population Bomb: The Reemergence of Nativism and Population Control in Anti-Immigration Policies*, 2 HARV. L. & POL’Y REV. 385, 401 (2008) (citing Ruben Rosario, *Deportation Case Is No Model of Justice Served*, ST. PAUL PIONEER PRESS, Nov. 7, 2005, at 1B) (describing the case of Cynthia Lamah, a Cameroonian woman who

Incarcerated women have not historically been the focus of the mainstream feminist or reproductive rights movements. “Very little feminist advocacy is devoted to the many primarily poor and non-white women who are prisoners.”<sup>14</sup> While mainstream reproductive rights groups have litigated cases to ensure that incarcerated women have access to abortion services,<sup>15</sup> few cases have been brought to challenge shackling policies on behalf of women who have given birth, or will give birth, while incarcerated.<sup>16</sup> The right of incarcerated women to bear children with dignity, free of unnecessary pain and restraint, demands greater attention from mainstream reproductive rights advocates, especially litigators.

### *B. The Reproductive Justice Framework*

The mainstream reproductive rights movement, for better or for worse, has grounded reproductive rights in the right to personal autonomy; the term “pro-choice” overtly reflects this notion.<sup>17</sup> To name the reproductive rights movement “pro-choice” implies that all women enjoy a full spectrum of real choices embodied in rights that not only exist but are accessible and actionable, including the choice to bear a child or several children, the choice to raise a cohesive family unit, the choice to not bear children, to prevent pregnancy, or to terminate an unwanted pregnancy. The mainstream reproductive rights movement has focused primarily on challenging legislation that restricts abortion provision.<sup>18</sup> While this work is

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miscarried while in U.S. Immigrations and Customs Enforcement (“ICE”) custody awaiting deportation). See also Richard Jacques, *RHS Senior Deported; Parents Concerned*, ROSWELL DAILY REC., Dec. 8, 2007, available at <http://roswell-record.com/main.asp?Search=1&ArticleID=19403&SectionID=49&SubSectionID=112&S=1> (recounting how a local police officer removed Karina Acosta, a pregnant 18-year-old from Mexico, from class for a traffic ticket and then notified immigration authorities of her illegal status); *Pregnant Mother’s Arrest at School Sparks Outrage*, LA OPINIÓN, Dec. 21, 2007, available at [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=0840ee70d1c0286d3525db8b242adabb&from=rss](http://news.newamericamedia.org/news/view_article.html?article_id=0840ee70d1c0286d3525db8b242adabb&from=rss) (reporting on the arrest and deportation of Maria Ramirez, a married high school student who was eight months pregnant).

<sup>14</sup> Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571, 594 (2006).

<sup>15</sup> For example, the Center for Reproductive Rights (“CRR”) litigated *Victoria W. v. Larpen*, 369 F.3d 475 (5th Cir. 2004) challenging the prison's policy of requiring a female inmate to obtain a court order in order to receive elective abortion under the Eighth and Fourteenth Amendments. The Fifth Circuit held that the policy was reasonably related to the prison's penological interests. The ACLU Reproductive Freedom Project brought *Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007) challenging a policy that required a court order for inmates to be transported to location outside jail for elective medical procedures. The Court of Appeals, Division One, of Arizona held that the policy was unconstitutional. *Id.*

<sup>16</sup> The author is only aware of three cases, *Nelson v. Corr. Med. Serv.*, 2008 WL 2777423 (8th Cir. 2008), *Women Prisoners of Dist. of Columbia Dep't. of Corr. v. Dist. of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), and *Zaborowski v. Sheriff of Cook County*, No. 08-cv-06946 (N.D.Ill. filed Dec. 4, 2008) that have addressed shackling of incarcerated women as an Eighth Amendment violation.

<sup>17</sup> Mainstream pro-choice groups, believing that the American public would not support “women's rights,” framed the issue of abortion in terms of the protection against intrusions into personal privacy by big government, a fundamentally conservative approach. WILLIAM SALETAN, *BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR* 15 (2003).

<sup>18</sup> See SALETAN *supra* note 17 (detailing the thirty year history of the pro-choice movement and its singular focus on fighting restrictive abortion laws).

intrinsic to ensuring that abortion providers can keep their clinic doors open, which plays a crucial role in ensuring that women have access to abortion services, women of color have long critiqued this narrow approach.

The reproductive justice movement, founded by women of color to address the shortcomings of the pro-choice framework, maintains that the pro-choice message is too narrow and fails to resonate with communities of color because many women in those communities lack the resources necessary to exercise real choice.<sup>19</sup> “Choice implies a marketplace of options in which women’s right to determine what happens to their bodies is legally protected, ignoring the fact that for women of color, economic and institutional constraints often restrict their ‘choices.’”<sup>20</sup> The choice framework has long been criticized for ignoring the hardships that some women endure in preventing unwanted pregnancies or accessing abortion care because of financial constraints and the limited availability of public funding.<sup>21</sup> The choice message also inappropriately presumes that having children is a choice available to all women.<sup>22</sup> The movement has overlooked the fact that the ability of poor women of color to bear children and head cohesive family units has been circumscribed by a history of forced sterilizations, family caps under state welfare laws, and racism and sexism that devalues women of color and portrays them as unfit and undeserving mothers.<sup>23</sup>

Therefore, a framework that speaks to the experiences of women of color must acknowledge the inherently dualistic nature of their reproductive needs—that accessible means of controlling one’s own reproduction must coexist with the elimination of coercive fertility control programs.

Women of color have had no trouble distinguishing between population control—externally imposed fertility control policies—and voluntary birth

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<sup>19</sup> Angela Hooton, *A Broader Vision of the Reproductive Rights Movement: Fusing Mainstream and Latina Feminism*, 13 AM. U. J. GENDER SOC. POL’Y & L. 59, 65 (2005).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 30. The “divisive and watershed moment for the pro-choice movement” was the passage of the Hyde Amendment in 1977, which prohibited federal funding for abortion. The leading women’s organizations that had rallied together for the passage of *Roe v. Wade* did not organize a large-scale response. The issue was of primary importance to women of color, who are disproportionately low-income.

<sup>22</sup> RICKIE SOLINGER, BEGGERS AND CHOOSERS 199-200 (2001).

Choice also became a symbol of middle-class women’s arrival as independent consumers. Middle-class women could afford to choose. They had earned the right to choose motherhood, if they liked. According to many Americans, however, when choice was associated with poor women, it became a symbol of illegitimacy. Poor women had not earned the right to choose. *Id.*

<sup>23</sup> *Id.* at 66. The oft-cited example of the racialized welfare queen exemplifies this point. See Khiara M. Bridges, *Wily Patients, Welfare Queens, and the Reiteration of Race in the U.S.*, 17 TEX. J. WOMEN & L. 1, 13 (2007). See also Lucy A. Williams, *Race, Rat Bites, and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J., 1159, 1163 (1995) (“This mother is usually African-American (and increasingly Latina). She has many children, is not a ‘productive’ member of the labor force, and does not share the ideals of mainstream Americans. Variations on this theme include unmarried teen pregnancy, drug use, child abuse or neglect and failure to ensure children’s attendance at school or adequate medical care.”).

control—women making their own decisions about fertility. For women of color, resisting population control while simultaneously claiming their right to bodily self-determination, including the right to contraception and abortion or the right to have children, is at the heart of their struggle for reproductive control.<sup>24</sup>

The reproductive justice movement seeks to embed issues of reproductive health and gender inequality within broader struggles against oppression and injustice, establishing that reproductive oppression is inherently connected to the struggle for social justice and human rights. “[R]eproductive justice will be achieved when women and girls have the economic, social, and political power and resources to make healthy decisions about our bodies, sexuality, and reproduction for ourselves, our families, and our communities in all areas of our lives.”<sup>25</sup>

Because women of color are overrepresented in American prisons and jails,<sup>26</sup> the shackling of incarcerated women is more often than not the shackling of women of color. The continued practice of shackling represents a reproductive injustice and a human rights violation, and reveals the interlocking of multiple oppressions. Women are treated not as expectant mothers in need of comprehensive medical care, but as criminals with a propensity for uncontrollable violence, having forfeited the right to experience childbirth in a respectful, humane, and decent manner. Shackling women during the birthing process further supports the pervasive beliefs that such women are unfit mothers, that they should not have gotten pregnant in the first place, and that medically adequate and compassionate care is a privilege to which they are not entitled.<sup>27</sup> Shackling women during childbirth “functions as a punishment appropriate for reproductively insubordinate women—that is, women who should not be having babies, who do not deserve to be mothers, and yet they are.”<sup>28</sup> The practice draws parallels to this country’s long history of controlling the reproductive bodies of black women. “The history in the United States of chattel slavery and breeding enslaved people makes the shackling and alienation of women of color in the criminal justice system from their children

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<sup>24</sup> Jael Silliman, Marlene Gerber Fried, Loretta Ross & Elena R. Gutierrez, *Undivided Rights: Women of Color Organize for Reproductive Justice* 7 (2004) [hereinafter *UNDIVIDED RIGHTS*].

<sup>25</sup> Eveline Shen, *Reproductive Justice Commentary: How Pro-Choice Activists Can Work to Build a Comprehensive Movement*, MOTHER JONES, Jan. 24, 2006, available at [http://www.motherjones.com/commentary/columns/2006/01/reproductive\\_justice.html](http://www.motherjones.com/commentary/columns/2006/01/reproductive_justice.html).

<sup>26</sup> Studies indicate that women of color are “over-arrested, over-indicted, under-defended and over-sentenced” as compared to white women. Cynthia Chandler, *Death and Dying in America: The Prison Industrial Complex’s Impact on Women’s Health*, 18 *BERKELEY WOMEN’S L.J.* 40, 42 (2003) (quoting Nancy Kurshan, *Behind the Walls: The History and Current Reality of Women’s Imprisonment*, in *CRIMINAL INJUSTICE: CONFRONTING THE PRISON CRISIS* 136 (Elihu Rosenblatt ed., 1996)).

<sup>27</sup> “Looking inside women’s prisons, we can see policies and practices that reinforce enduring eugenic attitudes about women deemed unfit to bear children. When incarcerated pregnant women are denied prenatal health care, this is a sign that the system finds them unfit and doesn’t care if they stay that way.” RICKIE SOLINGER, *PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA* 245 (2005).

<sup>28</sup> *Id.*

seem more than coincidental. The predominance of women's race as an identity consideration enables inhuman treatment.<sup>29</sup>

And the injustices committed against the incarcerated mother persist after childbirth; children born to incarcerated women are often permanently removed from their mothers' custody because the conditions of incarceration make it impossible for mothers to meet the parenting conditions of the Adoption and Safe Families Act.<sup>30</sup> The state serves to negate these women's identities as mothers by fast-tracking the termination of their parental rights.<sup>31</sup>

The human rights framework complements the reproductive justice agenda. Human rights doctrine mandates that *all individuals* are entitled to human rights protections simply because they are human; such protections are not conditioned on individuals' race, class, gender, or status as prisoners.<sup>32</sup>

An allegiance to an inalienable entitlement to the same basic rights, irrespective of and indifferent to geography, status, class, birth, gender, race, age, or sexual orientation is not firmly embedded in recent interpretations of our Constitution. Yet these rights do exist in international law, articulated through treaties and documents including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The entitlement to basic rights in these and other international human rights documents is based solely on the unalterable status of being human.<sup>33</sup>

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<sup>29</sup> E. Christi Cunningham, *Exit Strategy for the Race Paradigm*, 50 HOW. L.J. 755, 772-73 (2007).

<sup>30</sup> This legislation, designed to move children more quickly into permanent adoption, has had the effect of expediting the permanent separation of children from incarcerated parents. Under the law, states are required to terminate the parental rights to children who have been in foster care for fifteen of the last twenty-two months, subject to limited exceptions. ASFA makes no exception for incarcerated parents. Given that the median sentence imposed by state courts for non-violent felony drug offenses is thirty-one months, children who have been in foster care while their mothers who are incarcerated may be permanently removed from their mothers' custody under the federal law. Proceedings to terminate the parental rights of incarcerated parents more than doubled nationwide between 1997 and 2002. JULIE KOWITZ MARGOLIES & TAMAR KRAFT-STOLAR, CORRECTIONAL ASSOCIATION OF NEW YORK, WOMEN IN PRISON PROJECT, WHEN FREE MEANS LOSING YOUR MOTHER: THE COLLISION OF CHILD WELFARE AND THE INCARCERATION OF WOMEN IN NEW YORK STATE 15-16 (2006), available at [http://www.correctionalassociation.com/publications/download/wipp/reports/When\\_Free\\_Rpt\\_Feb\\_2006.pdf](http://www.correctionalassociation.com/publications/download/wipp/reports/When_Free_Rpt_Feb_2006.pdf). Like so many other areas of the criminal justice system in the United States, this has had a significantly greater impact on families of color—black children are more than nine times more likely than white children to have a parent in prison. Jenni Gainsborough, *Women in Prison: International Problems and Human Rights-Based Approaches to Reform*, 14 WM. & MARY J. WOMEN & L. 271, 295 (2008).

<sup>31</sup> "Incarcerated mothers resemble insubordinate mothers in the nineteenth century, vulnerable to losing custody of their children. Incarcerated mothers also resemble enslaved women, who, as a condition of their enslavement, had control over neither their own bodies nor their children." SOLINGER, *supra* note 27, at 243.

<sup>32</sup> Deborah Labelle, *Bringing Human Rights Home to the World of Detention*, 40 COLUM. HUM. RTS. L. REV. 79, 80 (2008).

<sup>33</sup> *Id.*

This principle does not exist in American constitutional law as it applies to prisoners. The Supreme Court has held that restrictions on prisoners' fundamental rights are not entitled to the same strict scrutiny as restrictions on non-prisoners' fundamental rights.<sup>34</sup> Incarcerated women are marginalized because they are women, because they are prisoners, and because they are disproportionately poor, under-educated, and women of color. Human rights law mandates rights protection for these individuals to the same degree that rights are protected for every other human; they are no less entitled to be free from "cruel, inhuman, or degrading treatment."<sup>35</sup>

### C. The Female Prison Population

The number of incarcerated women has increased seven-fold since 1980;<sup>36</sup> today, there are approximately two hundred thousand incarcerated women in federal, state, and local prisons and jails.<sup>37</sup> Eighty-five percent of incarcerated women are imprisoned for non-violent crimes—crimes that frequently arise out of drug addiction and poverty, such as shoplifting, prostitution, drug use, and welfare fraud.<sup>38</sup> African-American women are disproportionately represented in the criminal justice system. While they constitute only thirteen percent of women in the United States, nearly fifty percent of the women in prison are African American<sup>39</sup> and two-thirds of incarcerated women are women of color.<sup>40</sup> Black women are four times as likely as white women and twice as likely as Latinas to be imprisoned.<sup>41</sup> Women prisoners are typically of reproductive age: more than half are under the age of thirty-five,<sup>42</sup> and two-thirds are mothers to minor children.<sup>43</sup>

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<sup>34</sup> In *Turner v. Safley*, 482 U.S. 78 (1987), the Court considered a First Amendment claim based on restrictions of prisoners' rights to marry and use the mail. The Court fashioned a new, significantly lower level of scrutiny for inmates' constitutional claims. Under the lower "rational basis" test, a prison practice or regulation that burdens fundamental rights will be upheld so long as it is "reasonably related to legitimate penological objectives" of the government. *Id.* at 80.

<sup>35</sup> This language is found in several human rights treaties, including the International Covenant on Civil and Political Rights, and the Convention Against Torture.

<sup>36</sup> Rachel Roth, *Justice Denied: Violations of Women's Reproductive Rights in Prison*, PRO-CHOICE FORUM, Sept. 2004, available at [http://www.prochoiceforum.org.uk/psy\\_ocr10.asp](http://www.prochoiceforum.org.uk/psy_ocr10.asp).

<sup>37</sup> U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 203947, PRISON AND JAIL INMATES AT MIDYEAR 2003, (May 2004), available at <http://www.ojp.gov/bjs/pub/pdf/pjim03.pdf>.

<sup>38</sup> U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 175688, WOMEN OFFENDERS (Dec. 1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf>.

<sup>39</sup> U.S. DEP'T OF JUSTICE, NAT'L INST. CORRECTIONS, GENDER-RESPONSIVE STRATEGIES: RESEARCH PRACTICE AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS 2 (2003), available at [www.nicic.org/pubs/2003/018017.pdf](http://www.nicic.org/pubs/2003/018017.pdf) [hereinafter GENDER-RESPONSIVE STRATEGIES].

<sup>40</sup> Women in Prison Project, Correctional Association of New York, *Women in Prison Fact Sheet* (Mar. 2002), available at [http://www.prisonpolicy.org/scans/Fact\\_Sheets\\_2002.pdf](http://www.prisonpolicy.org/scans/Fact_Sheets_2002.pdf).

<sup>41</sup> U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 217675, PRISON AND JAIL INMATES AT MIDYEAR 2006 (June 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/pjim06.txt>.

<sup>42</sup> U.S. DEP'T. OF JUSTICE, NAT'L INST. CORRECTIONS, CORRECTIONAL HEALTH CARE: GUIDELINES FOR THE MANAGEMENT OF AN ADEQUATE DELIVERY SYSTEM 233 (2001), available at <http://www.nicic.org/pubs/2001/017521.pdf>.

<sup>43</sup> GENDER-RESPONSIVE STRATEGIES, *supra* note 39, at 2, 7. The median age for a woman in jail is thirty-one; in state prison, it is thirty-three; and in federal prison, it is thirty-six. Seventy percent of

Indeed, the fastest-growing prison population in the United States consists of mothers of young children.<sup>44</sup>

Female prisoners are one of the most marginalized groups in the United States population.<sup>45</sup> Typically coming from the most economically and socially disadvantaged segments of society, these women have had extremely limited access to social services and preventative health care.<sup>46</sup> Women entering prison have much higher rates of life-threatening diseases such as HIV, Hepatitis C, and reproductive diseases than the general population.<sup>47</sup> Studies reveal that nearly half of female inmates report that they were previously physically abused, and one third acknowledged prior sexual abuse.<sup>48</sup> More than seventy-two percent of female inmates were drug users prior to their incarceration.<sup>49</sup>

Prison health care consistently fails to address female inmates' specific needs regarding reproductive health, substance abuse, physical and sexual abuse, and HIV/AIDS.<sup>50</sup> Most women's prisons lack sufficient medical staff.<sup>51</sup> As a result, women experience severe delays in getting treatment, and women's health needs are screened by officials with no medical training.<sup>52</sup> According to statistics from 1996, only forty-six percent of women prisoners received a medical exam when they entered prison.<sup>53</sup> Prisons do not perform routine gynecological exams, nor do they uniformly provide the exams on admission.<sup>54</sup> Many prisons do not have physicians trained in obstetrics and gynecology.<sup>55</sup>

The dramatic increase in the number of incarcerated women during the past twenty years has been attributed to the implementation of federal and state mandatory drug sentencing laws and policies.<sup>56</sup> These policies have had

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those women in jail are mothers to minor children, sixty-five percent of those in state prison are mothers to minor children, and fifty-nine percent of those in federal prison are mothers to minor children.

<sup>44</sup> SOLINGER, *supra* note 27, at 243.

<sup>45</sup> Jenni Vainik, *The Reproductive and Parental Rights of Incarcerated Mothers*, 46 FAM. CT. REV. 670, 676 (2008).

<sup>46</sup> Chandler, *supra* note 26, at 42.

<sup>47</sup> *Id.*

<sup>48</sup> Martin Geer, *Human Rights and Wrongs in our own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States' Prisons*, 13 HARV. HUM. RTS. J. 71, 80 (2000).

<sup>49</sup> Vainik, *supra* note 45, at 677.

<sup>50</sup> *Id.*

<sup>51</sup> AMNESTY INT'L, USA, AI Index AMR 51/001/1999, RIGHTS FOR ALL: "NOT PART OF MY SENTENCE": VIOLATION OF HUMAN RIGHTS OF WOMEN IN CUSTODY (1999), *available at* <http://www.amnesty.org/en/library/asset/AMR51/001/1999/en/dom-AMR510011999en.html> [hereinafter NOT PART OF MY SENTENCE].

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> National Commission on Correctional Health Care, Position Statements: Women's Health Care in Correctional Settings, <http://www.nchc.org/resources/statements/womenshealth2005.html> (last visited Mar. 27, 2009).

<sup>55</sup> *Id.*

<sup>56</sup> AMERICAN CIVIL LIBERTIES UNION ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 16 (2005), *available at* [http://www.aclu.org/images/asset\\_upload\\_file393\\_23513.pdf](http://www.aclu.org/images/asset_upload_file393_23513.pdf) [hereinafter CAUGHT IN THE NET].

devastating and disparate effects on women and on women of color in particular. Women of color are more likely to be arrested and imprisoned for drug use since, due to greater poverty in communities of color; they are more likely to be in contact with government agencies where their drug use can be detected.<sup>57</sup>

The number of women incarcerated for drug offenses rose by 888 percent from 1986 to 1996.<sup>58</sup> In 1979, approximately one in ten women in American prisons was serving a sentence for a drug conviction; in 1999, this figure was approximately one in three.<sup>59</sup> Criminal prosecutions for conspiracy, accomplice liability, and constructive possession have expanded criminal liability to reach partners, relatives, and bystanders.<sup>60</sup> Thus, under current drug policies, women who are only peripherally involved in the drug trade face charges and sentences of the same severity as the principal actors.<sup>61</sup> Such women are actually more vulnerable to long prison terms for drug crimes because they have little access to information to aid prosecutors in exchange for lighter sentences.<sup>62</sup> "Inadvertently, the war on drugs became a war on women, particularly poor women and women of color."<sup>63</sup>

Considering the increasing number of women in prison and the fact that the majority of these women are incarcerated during a portion of their reproductive years, it is unsurprising that between five and ten percent of incarcerated women enter prison pregnant, and that approximately two thousand babies are born to women in prison or jail annually.<sup>64</sup> Pregnancies among this population are usually unplanned, high risk, and have higher rates of poor outcomes compared to the general population due to histories of drug or alcohol abuse, high STD rates, and a lack of routine health care prior to entering the prison system.<sup>65</sup> Of further concern is the lack of adequate prenatal care in many prison healthcare systems.<sup>66</sup> Many

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<sup>57</sup> Andrea Smith, *Beyond Pro-Choice and Pro-Life: Women of Color and Reproductive Justice*, 17 NAT'L WOMEN'S STUD. ASS'N J. 125 (2005).

<sup>58</sup> GENDER-RESPONSIVE STRATEGIES, *supra* note 39, at 62.

<sup>59</sup> *Id.* at 63.

<sup>60</sup> CAUGHT IN THE NET, *supra* note 56, at 35-36.

<sup>61</sup> In 1998, Congress added conspiracy to commit a drug offense to the list of crimes for which a federal mandatory minimum sentence would be imposed. *Id.* at 35.

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

<sup>63</sup> Stephanie R. Bush-Baskette, *The War on Drugs: A War Against Women?* in HARSH PUNISHMENT: INTERNATIONAL EXPERIENCES OF WOMEN'S IMPRISONMENT 211, 216-17 (Sandy Cook & Susanne Davies, eds., 1999).

<sup>64</sup> Braithwaite et al., *supra* note 1, at 1679-81.

<sup>65</sup> Jennifer G. Clarke, Megan R. Hebert, Cynthia Rosengard, Jennifer S. Rose, Kristen M. DaSilva & Michael D. Stein, *Reproductive Health Care and Family Planning Needs Among Incarcerated Women*, AM. J. PUB. HEALTH, 834-39 (2006). This article reports the first comprehensive study of reproductive histories among incarcerated women, revealing an association between extensive histories of both substance abuse and commercial sex work among incarcerated women, and an elevated risk of reproductive health problems.

<sup>66</sup> Prenatal care for pregnant prisoners varies greatly from jurisdiction to jurisdiction. Deficiencies in the correctional response to the needs of pregnant inmates may include the lack of proper nutrition, inadequate education regarding childbirth and parenting, and inadequate preparation for the mother's separation from the infant following delivery. Leslie Acoca, *Defusing the Time Bomb: Understanding*

state prisons have no written policies that specifically address the provision of prenatal care services.<sup>67</sup> Even if such policies exist, inmates are often unable to access care, available services are inadequate, and providers are insensitive to female inmates' unique emotional needs.<sup>68</sup>

It is believed that the use of restraints on incarcerated women was the default practice for departments of corrections across the country until light was shed on its occurrence several years ago.<sup>69</sup> A significant step was made in drawing attention to the issue and documenting its occurrence when Amnesty International published its human rights fact-finding report on the practice in 1999. The report's authors described visiting female prisoners in Madera County Hospital in California, where incarcerated women are routinely taken when they are in labor.<sup>70</sup> Despite the fact that the ward is locked and four armed guards are stationed there, every inmate was chained by her leg to the hospital bed, preventing the women from rolling over.<sup>71</sup> The Amnesty Report compiled women's stories from across the country describing the trauma of being shackled by their wrists or ankles during hours of labor.<sup>72</sup>

Shackling pregnant inmates, in addition to being needlessly punitive and traumatizing, leads to otherwise avoidable health risks for the mother and the baby.<sup>73</sup> According to the Amnesty report, when a woman is shackled while being transported to the hospital, she is at an increased risk of falling, and will not be able to protect herself by breaking her fall due to the restraints.<sup>74</sup> During the birthing process, shackles hamper a woman's ability to move to alleviate the pain of her contractions, which increases stress on the woman's body and may decrease the flow of oxygen to the fetus.<sup>75</sup> The use of restraints may delay the doctors' ability to perform an emergency caesarean section.<sup>76</sup> Finally, leg shackles inhibit a woman's recovery, as many experts recommend walking to rehabilitate muscles after a delivery.<sup>77</sup>

Two leading professional organizations in the United States have spoken out against the practice of shackling incarcerated women during labor and delivery. The American College of Obstetricians and Gynecologists has stated that:

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*and Meeting the Growing Health Care Needs of Incarcerated Women in America*, 44 CRIME & DELINQUENCY 49 (1998).

<sup>67</sup> Vainik, *supra* note 45, at 677.

<sup>68</sup> *Id.*

<sup>69</sup> NOT PART OF MY SENTENCE, *supra* note 51.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Vainik, *supra* note 45, at 678.

<sup>74</sup> NOT PART OF MY SENTENCE, *supra* note 51.

<sup>75</sup> Kendra Weatherhead, *Cruel But Not Unusual Punishment: The Failure to Provide Adequate Medical Treatment to Female Prisoners in the United States*, 13 HEALTH MATRIX 429, 430 (2003).

<sup>76</sup> NOT PART OF MY SENTENCE, *supra* note 51.

<sup>77</sup> *Id.*

The practice of shackling an incarcerated woman in labor may not only compromise her health care but is demeaning and unnecessary. . . . Women [who have been shackled during labor] describe the inability to move to allay the pains of labor, the bruising caused by chain belts across the abdomen, and the deeply felt loss of dignity.<sup>78</sup>

The American Public Health Association, which promulgates standards for the provision of healthcare in prisons, warns that “[w]omen must never be shackled during labor and delivery.”<sup>79</sup>

## PART II

### *A. Shackling Pregnant Inmates is a Violation of Established International Human Rights Law*

Two major international human rights treaties ratified by the United States<sup>80</sup>—the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”)<sup>81</sup> and the International Covenant on Civil and Political Rights (“ICCPR”)—proscribe cruel, inhuman, or degrading treatment.<sup>82</sup> The CAT has been ratified by 141 nations including the United States, which

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<sup>78</sup> American College of Obstetricians and Gynecologists, Letter in Opposition to Shackling (June 12, 2007) available at <http://www.acog.org/departments/underserved/20070612saarLTR.pdf> [hereinafter ACOG Letter].

<sup>79</sup> AMERICAN PUBLIC HEALTH ASSOCIATION, TASK FORCE ON CORRECTIONAL HEALTH CARE STANDARDS, STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS 108 (2003). Released on April 13, 2003, the third edition of this manual is a model for quality prison healthcare based on fundamental principles in public health and legal guidelines set forth in the U.S. Constitution, international treaties, and court rulings.

<sup>80</sup> Although the U.S. has ratified the two treaties, it has attached reservations and failed to pass domestic enabling legislation. In addition to the prohibitions of cruel, inhuman, or degrading treatment set forth in the CAT and the ICCPR, other international conventions and declarations impose an obligation on states to protect women during pregnancy and childbirth. For example, the Universal Declaration of Human Rights declares that mothers are “entitled to special care and assistance.” Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948). Similarly, the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) requires that mothers be given special protection before and after childbirth. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, at 49, 21 U.N. GAOR Supp., No. 16, U.N. Doc. A/6316 (Dec. 16, 1966). The Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) likewise requires that states “ensure women appropriate services in connection with pregnancy, confinement, and the post-natal period.” Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 34/180, at 193, 34 U.N. GAOR Supp., No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979).

<sup>81</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, at 197, 39 U.N. GAOR Supp., No. 51, U.N. Doc. A/39/51 (1984).

<sup>82</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A, at 52, 21 U.N. GAOR Supp., No. 16, U.N. Doc. A/6316 (1966).

ratified the treaty in 1994.<sup>83</sup> The ICCPR has been ratified by 156 countries including the United States, which ratified the treaty in 1992.<sup>84</sup>

The United States' practices and policies relating to the reproductive health concerns of incarcerated women have been brought to the attention of the monitoring bodies of both the CAT and the ICCPR. In May 2000, Amnesty International took its findings to the United Nations Committee Against Torture, the U.N. body that monitors states' compliance with CAT, and reported that it "remains common for restraints to be used on pregnant women prisoners when they are transported to and kept at the hospital, regardless of their security status."<sup>85</sup> As a result of Amnesty's submission, the Committee Against Torture expressed concern about the often "humiliating and degrading circumstances" in which female prisoners are detained in the United States.<sup>86</sup> Similarly, in a collaborative shadow report submitted during the United Nations' review of the United States under the ICCPR, the Open Society Policy Center, Penal Reform International, and the Sentencing Project wrote, "women [in prison] are especially at risk for sexual abuse and humiliation, inadequate medical and obstetric care, including shackling during childbirth, and loss of contact with their children."<sup>87</sup>

The group further noted that, "women in 23 state prison systems and the federal bureau of prisons who give birth while in prison continue to be subjected to cruel, inhuman and degrading punishment by the use of restraints, including leg irons and shackles, during labor and child birth."<sup>88</sup> As a result, the Human Rights Committee, the U.N. body that monitors compliance with the ICCPR, issued concluding observations to the United States expressing concern over jurisdictions that had not yet abolished the practice of shackling pregnant prisoners during the birthing process.<sup>89</sup> It recommended that the United States "prohibit the shackling of detained women during childbirth" in order to come into compliance with the treaty.<sup>90</sup>

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<sup>83</sup> See Office of the U.N. High Comm'r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* 12 (July 14, 2006), available at <http://www2.ohchr.org/english/bodies/docs/status.pdf>. Compliance with its provisions is officially monitored by the Committee Against Torture.

<sup>84</sup> *Id.*

<sup>85</sup> AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA, AMR 51/061/2006, A BRIEFING FOR THE U.N. COMMITTEE AGAINST TORTURE 18 (May 2000), available at <http://www.amnesty.org/en/library/asset/AMR51/061/2006/en/0a299f78-d443-11dd-8743-d305bea2b2c7/amr510612006en.pdf>.

<sup>86</sup> U.N. Committee Against Torture, *Report of the Committee Against Torture*, ¶ 175-80, A/55/44 (Oct. 12, 2001).

<sup>87</sup> The Criminal Justice Policy Foundation, Open Society Policy Center, Penal Reform International, and The Sentencing Project, Comment on the Second and Third Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, at § 281 (Oct. 21, 2005) ¶ 9.

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

<sup>89</sup> See Concluding Observations of the Human Rights Committee: United States of America, 87th Sess., ¶ 33, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (2006).

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

In 2006, another shadow report was submitted to the Committee Against Torture, which questioned the logical underpinnings of states' shackling practices.<sup>91</sup> "Because women are a minority in prison, they suffer from the rules that have been invented for violent men. . . . In most states, no exceptions have ever been made, not even for terminally ill or comatose prisoners, so none are made for pregnant prisoners."<sup>92</sup> In its Concluding Observations, the United Nations Committee against Torture more specifically addressed its concern regarding the treatment of detained women in U.S. prisons and jails, including the practice of gender-based humiliation and incidents of shackling of women detainees during childbirth.<sup>93</sup> The Committee issued a recommendation that the U.S. "should adopt all appropriate measures to ensure that women in detention are treated in conformity with international standards."<sup>94</sup> The United States' shackling practices have been brought to the attention of the United Nations Special Rapporteur on Violence Against Women.<sup>95</sup> In 1998, the Special Rapporteur, Radhika Coomaraswamy, visited the state and federal prison facilities in six states and the District of Columbia. In her Report, the Special Rapporteur described widespread abusive sexual practices by male guards against female inmates.<sup>96</sup> Moreover, Ms. Coomaraswamy noted that pregnant inmates were shackled during transport to the

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<sup>91</sup> Christina M. Vogt, International Gender Organization, *Women in the Criminal Justice System Longitudinal Systemic Abuse, A Briefing Prepared for the United Nations Committee against Torture on the Occasion of its Review of the United States' Second Periodic Report to the Committee against Torture* (2006), available at <http://wvnow.org/Resources/Women%20in%20US%20Prisons.pdf>.

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

<sup>93</sup> U.N. Human Rights Comm., *Conclusions and Recommendations of the Committee against Torture*, ¶ 33 CAT/C/USA/CO/2 (July 23, 2006).

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

<sup>95</sup> In 1993, the United Nations adopted the Declaration on the Elimination of Violence Against Women. G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993). Pursuant to its mandate, the United Nations established the position of Special Rapporteur on Violence Against Women. G.A. Res. 1994/45, (Mar. 4, 1994). The Special Rapporteur's responsibilities include to:

- (a) Seek and receive information on violence against women, its causes and consequences from Governments, treaty bodies, specialized agencies, other special rapporteurs responsible for various human rights questions and intergovernmental and non-governmental organizations, including women's organizations, and to respond effectively to such information;
- (b) Recommend measures, ways and means, at the national, regional and international levels, to eliminate violence against women and its causes, and to remedy its consequences;
- (c) Work closely with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights – and since March 2006 of the Human Rights Council – and with the treaty bodies, taking into account the Commission's request that they all regularly and systematically include in their reports available information on human rights violations affecting women; and cooperate closely with the Commission on the Status of Women in the discharge of its functions. In the discharge of the mandate the Special Rapporteur: Transmits urgent appeals and communications to States regarding alleged cases of violence against women. Undertakes fact-finding country visits. Submits annual thematic reports. See Annual Reports.

Office of the United Nations High Commissioner on Human Rights, Special Rapporteur on Violence Against Women, Introduction, <http://www2.ohchr.org/english/issues/women/rapporteur/>.

<sup>96</sup> Report of the Mission to the United States of America on the Issue of Violence Against Women in State and Federal Prisons, the Fifty-fifth session, Item 12(a) of the provisional agenda, E/CN.4/1999/68/Add.2, Jan. 4, 1999, ¶¶ 55-63.

hospital, during delivery, and after the baby is born, and concluded that the use of restraints in this manner violates international standards and “may be said to constitute cruel and unusual practices.”<sup>97</sup>

Other international authorities have set forth standards that call for the elimination of the use of restraints on prisoners in most instances. The U.N. Standard Minimum Rules for the Treatment of Prisoners, first promulgated in 1955, prohibits the use of shackles on prisoners except in exceptional circumstances.<sup>98</sup> Furthermore, the Standard Minimum Rules require that prisons make special accommodations for the care and treatment of pregnant women.<sup>99</sup> Article 3 of the European Convention on Human Rights prohibits torture and “inhuman or degrading treatment or punishment” and has been interpreted by the European Court of Human Rights to proscribe the use of shackles during the hospitalization of all prisoners unless there exists a serious risk to security.<sup>100</sup> In addition, in 2000, the Council of Europe’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment characterized the limited instances in which pregnant prisoners have been shackled in Europe as “completely unacceptable.”<sup>101</sup> The Committee declared that “[o]ther means of meeting security needs can and should be found.”<sup>102</sup> The continued practice of shackling pregnant prisoners during labor and delivery in the United States marks a sharp departure from the practices of other foreign nations. Since 1996, the Prison Service of England and Wales has forbidden the use of restraints on all pregnant prisoners visiting the hospital for prenatal care and for labor and delivery.<sup>103</sup> Specifically, Prison Service Order 4800 mandates that “[p]regnant women are not handcuffed after their arrival at a hospital or clinic. . . . Women in active labour are not handcuffed either en route to, or while in, the hospital” unless extenuating circumstances exist.<sup>104</sup> Similarly, Her Majesty’s Chief Inspector of Prisons in Scotland has recently admonished prison officials for shackling pregnant inmates, stating that “pregnant women have suffered the humiliating experience of being handcuffed. . . throughout labour, almost to the point of childbirth.”<sup>105</sup> The Chief Inspector recommended that

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<sup>97</sup> *Id.* ¶¶ 53-54.

<sup>98</sup> Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/1Annex 1, E.S.C. res. 663C, U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. E/3048, Rule 33(c) (July 31, 1957).

<sup>99</sup> *Id.* at art. 23(1).

<sup>100</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; *see Henaf v. France*, App. No. 65436/01 (ECHR Feb. 27, 2004); *Avci and Others v. Turkey*, App. No. 77191/01 (ECHR Apr. 16, 2007).

<sup>101</sup> Council of Europe’s Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 10th General Report, CPT/Inf (2000), 13, ¶ 27.

<sup>102</sup> *Id.*

<sup>103</sup> Luisa Dillner, *Shackling Prisoners in Hospital Contravenes International Law*, 312 BRIT. MED. J. 200, 200 (1996).

<sup>104</sup> Prison Service Orders are mandatory instructions that are intended to last for an indefinite period. *See Her Majesty’s Prison Service, Guidance Notes on Gender Specific Standards for Women Prisoners*, Annex A to PSO 4800 (2008), available at [http://pso.hmprisonservice.gov.uk/PSO\\_4800\\_women\\_prisoners.doc](http://pso.hmprisonservice.gov.uk/PSO_4800_women_prisoners.doc).

<sup>105</sup> HM Inspectorate of Prisons: Report on HMP and YOI Cornton Vale, Scottish Government

women escorted out of the prison for any reason be subject only to the level of security appropriate for the risk they present and be treated with reasonable standards of personal dignity and humanity.<sup>106</sup>

*B. Policy Change in the United States*

Domestic advocates have successfully marshaled international and foreign law to bring about important changes to domestic laws and administrative policies. Amnesty International's report presented the first public account of the routine practice of shackling inmates during labor and delivery, calling it "a direct violation of international standards, such as the United Nations Standard Minimum Rules for the Treatment of Prisoners," and demanding the implementation of policies that reflect international law.<sup>107</sup>

Since the publication of Amnesty International's report in 1999, three states have passed anti-shackling legislation and at least eight states' departments of corrections have revised their written shackling policies relating to pregnant prisoners.<sup>108</sup> Moreover, while the United States' obligations under the CAT and the ICCPR are not currently binding on domestic law, not long after both the Committee Against Torture and the Human Rights Committee publicly condemned the United States' current shackling practices on the international stage, several federal shackling policies were revised to reflect the committees' concerns.

Advocacy efforts of groups like the Washington, D.C.-based Rebecca Project for Human Rights have resulted in recent reforms at the federal level. The Rebecca Project worked extensively with lawmakers to revise the Federal Bureau of Prisons' restraint policy.<sup>109</sup> In October 2008, the Federal Bureau of Prisons issued a new policy, which mandates that inmates in labor, delivery, or post-delivery recuperation shall not be placed in restraints unless there are reasonable grounds to believe the inmate presents an immediate, serious threat of hurting herself or others, or there are reasonable grounds to believe the inmate presents an immediate and credible risk of escape.<sup>110</sup> Similarly, in September 2008, the U.S. Marshals released new restraint policies rendering the shackling of pregnant women an exception and ensuring that, when considered necessary, the type of restraints to be used are those that are the least restrictive necessary to ensure safety and security.<sup>111</sup> And in April 2008, President Bush signed the Second Chance Act into law, which will require that all federal correctional facilities document and report

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Publications (2006), available at <http://www.scotland.gov.uk/Publications/2006/07/18095811/4>.

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

<sup>107</sup> ABUSE OF WOMEN IN CUSTODY, *supra* note 5, at 22.

<sup>108</sup> Compare NOT PART OF MY SENTENCE, *supra* note 51, with current state laws and policies, *infra* notes 114-21, and 123-29 and accompanying text.

<sup>109</sup> The Rebecca Project for Human Rights, *Congress Passes the Second Chance Act*, [http://www.rebeccaproject.org/index.php?option=com\\_content&task=view&id=236&Itemid=152](http://www.rebeccaproject.org/index.php?option=com_content&task=view&id=236&Itemid=152).

<sup>110</sup> Federal Bureau of Prisons, Program Statement § 570.45

<sup>111</sup> United States Marshal Service, Policy 9.1 (Restraining Devices), § (D)(3)(e),(h).

the use of physical restraints on pregnant female prisoners during pregnancy, labor, delivery, and post-delivery, and justify the use of the restraints with documented security concerns.<sup>112</sup> Unfortunately, Immigration and Customs Enforcement remains the only federal government agency to continue its longstanding shackling policy. The policy only requires that certain precautions be taken when shackling a pregnant detainee and that considerations be made to protect the mother and the fetus.<sup>113</sup>

Currently, three states, Illinois, California, and Vermont, have legislation regulating the use of restraints on pregnant women.<sup>114</sup> Additionally, in the 2009 legislative session, six state legislatures introduced bills proscribing the shackling of incarcerated pregnant women during varying states of pregnancy and during labor and delivery.<sup>115</sup> At publication, the New Mexico anti-shackling bill passed both houses and is awaiting the Governor's signature and the New Hampshire bill has passed the House and is in Senate committee.<sup>116</sup> The statutory restrictions vary in their comprehensiveness. In California, female inmates may not be shackled during transportation to the hospital, during labor, delivery, and recovery, "unless deemed necessary for the safety and security of the inmate, the staff, and the public."<sup>117</sup> In Illinois, the law similarly prohibits the use of leg irons, shackles, and waist shackles on any pregnant prisoner during transport to the hospital and during labor; yet they may be placed on a woman during recovery from childbirth.<sup>118</sup> Vermont's anti-shackling law is the broadest, restricting the routine use of restraints on pregnant inmates after the first trimester and through the recovery period in the hospital.<sup>119</sup> Shackles may only be used if the inmate presents a

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<sup>112</sup> Second Chance Act of 2008, Pub. L. No. 110-199, 122 Stat. 657 (2008). The relevant language of the law reads:

"[n]ot later than 1 year after the date of enactment of this Act, the Attorney General shall submit to Congress a report on the practices and policies of agencies within the Department of Justice relating to the use of physical restraints on pregnant female prisoners during pregnancy, labor, delivery of a child, or post-delivery recuperation, including the number of instances occurring after the date of enactment of this Act in which physical restraints are used on such prisoners, the reasons for the use of the physical restraints, the length of time that the physical restraints were used, and the security concerns that justified the use of the physical restraints." *Id.* at § 232 (emphasis added).

<sup>113</sup> Letter from Susan M. Cullen, Director of Policy, U.S. Immigration and Customs Enforcement to Malika Saada Saar, Executive Director, The Rebecca Project (Sept. 10, 2008) (on file with author).

<sup>114</sup> CAL. PENAL CODE § 3423 (West 2006); 730 ILL. COMP. STAT. ANN. 125/17.5 (West 2000); VT. STAT. ANN. tit. 28, § 801(a) (2006). In the 2009 legislative session, the New Hampshire state legislature introduced a bill prohibiting the use of restraints on inmates in active labor unless the inmate presents a substantial flight risk. H.R. 127, 2009 Sess. (N.H. 2009).

<sup>115</sup> S.B. 839, 87th Gen. Assem., Reg. Sess. (Ar. 2009); H.B. 1490, 186th Reg. Sess. (Ma. 2009); H.B. 127, 2009 Sess. (N.H. 2009); S.B. 423, 2009 Reg. Sess. (N.M. 2009), S.B. 1290, 232nd Ann. Legis. Sess., (N.Y. 2009); H.B. 1437/S.B. 1209 (Tn. 2009); HB 3653/HB 3654 (Tx. 2009).

<sup>116</sup> S.B. 423, 2009 Reg. Sess. (N.M. 2009); H.B. 127, 2009 Sess. (N.H. 2009).

<sup>117</sup> CAL. PENAL CODE § 3423, § 5007.7 (West 2006).

<sup>118</sup> 55 ILL. COMP. STAT. ANN. 5/3-15003.6 (West 2000).

<sup>119</sup> VT. STAT. ANN. tit. 28, § 801a(a) (2006).

substantial flight risk or if other extraordinary circumstances are present.<sup>120</sup> In instances where shackles are used, the commissioner of corrections must make written findings concerning why mechanical restraints were necessary. Restraints may be necessary either to prevent escape or to ensure the safety of the inmate, medical and correctional personnel, or the public.<sup>121</sup> Before the laws were passed in Illinois and California, the practice of shackling women during labor and delivery was widespread.<sup>122</sup>

In the absence of legislation to protect the rights of pregnant women in the other forty-seven states and the District of Columbia, state administrative policies on this issue vary greatly. Eight state correctional departments have no formal written policy governing the use of restraints on pregnant women.<sup>123</sup> The departments of corrections of ten states—Arkansas, Connecticut, Florida, Maine, Massachusetts, Oklahoma, Oregon, Rhode Island, Washington, and Wyoming—and the District of Columbia have codified written policies providing that no restraints are to be used on inmates during labor and delivery.<sup>124</sup> As of 2001, eleven state departments of corrections have policies or practices stipulating that no restraints are to be used on inmates during labor and birth, but these policies are not codified.<sup>125</sup> The remaining states do not have laws or formal policies, although some corrections departments report that they do not use restraints as a matter of informal practice.<sup>126</sup> Forty-one state departments of corrections may use restraints

<sup>120</sup> VT. STAT. ANN. tit. 28, § 801a(c) (2006).

<sup>121</sup> *Id.*

<sup>122</sup> Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES, Mar. 2, 2006, available at <http://www.nytimes.com/2006/03/02/national/02/shackles.html>. Before Illinois passed the nation's first anti-shackling law in 2000, the standard practice was to chain one ankle and one wrist to a hospital bed during labor and delivery. In California, until the law was passed, prisoners from the Valley State Prison in Chowchilla were routinely shackled to their beds after giving birth at the nearby Madera Community Hospital. *Id.*

<sup>123</sup> Arizona, Hawaii, Indiana, Iowa, Maine, New Hampshire, New Jersey, and North Carolina. See The Rebecca Project for Human Rights, *Shackling of Pregnant Women in Custody*, [http://www.rebeccaproject.org/images/stories/factsheets/shackling\\_fact\\_sheet.pdf](http://www.rebeccaproject.org/images/stories/factsheets/shackling_fact_sheet.pdf).

<sup>124</sup> Ark. Dep't Corr. Admin. Dir. 04-08 (2004); Conn. Dep't Corr. Admin. Dir. 6.4, 14(a)(3) (2007); Letter from Odie Washington, Director, District of Columbia DOC, to Amnesty International USA (June 27, 2002) (regarding District of Columbia Department of Corrections protocol), available at <http://www.amnestyusa.org/women/custody/states/districtofcolumbia.pdf>; FLA. ADMIN. CODE ANN. r. 39, 33-603.201; Fla. Proc. 506.201; Letter from Denise V. Lord, Associate Commissioner of the Maine Department of Corrections, to Sheila Dauer, Director of Amnesty International USA Women's Human Rights Program (Feb. 20, 2007) (regarding Maine's policy on restraining pregnant inmates); Letter from Michelle A. Donaher, Director of Female Offender Services for the Massachusetts Department of Corrections (Nov. 30, 2007) (regarding Massachusetts' policy on restraining pregnant inmates); Or. Dep't Corr. 40.1.1(H)(1)(d) (2006), available at [http://www.oregon.gov/DOC/PUBSER/rules\\_policies/docs/40.1.1.pdf](http://www.oregon.gov/DOC/PUBSER/rules_policies/docs/40.1.1.pdf); Fax from Asbel T. Wall, II, Director, Rhode Island DOC, to Amnesty International USA (August 26, 2005) (regarding Rhode Island's policy on restraining pregnant inmates), available at <http://www.amnestyusa.org/women/custody/states/rhodeisland.pdf>; Wash. Dep't Corr. 420.250 (2000); Letter from Leslie Snyder and Jill Watson, Division of Prisons Administrator, Wyoming Department of Corrections, to Amnesty International USA (Feb. 20, 2001) (regarding Wyoming Department of Corrections procedure 3.001.3 Part IV L. Pregnant Inmates).

<sup>125</sup> Georgia, Hawaii, Iowa, Kansas, New Jersey, New Mexico, Pennsylvania, South Dakota, Texas, and Wisconsin. See ABUSE OF WOMEN IN CUSTODY, *supra* note 5, at 8.

<sup>126</sup> Liptak, *supra* note 122.

on pregnant women during transportation to the hospital or during other out-patient medical visits.<sup>127</sup> The current patchwork system of laws, regulations, written, and unwritten policies has created an atmosphere of confusion and noncompliance.<sup>128</sup> Even in states with legislative bans on the practice, there have been anecdotal reports that women continue to be shackled during labor and delivery.<sup>129</sup> It is not uncommon for changes in department of corrections' directives or policies to go uncommunicated to prison guards, or for such policies to be so discretionary as to essentially permit the practice in nearly all circumstances.<sup>130</sup> It is clear that while great progress has been made in the effort to end the shackling of incarcerated women during labor and delivery in the past ten years, considerably more needs to be done.

### PART III

#### *A. Litigating an Eighth Amendment Claim*

Although substantial gains have been made in the domestic policy arena, there has been a conspicuous absence of litigation in the United States challenging shackling policies. And despite the recent successes of human rights advocates, litigation is still needed to seek compensation and redress for those women who continue to be subjected to this brutal practice. Indeed, a case was filed in December, 2008 in Illinois on behalf of two women who were shackled by one hand and one foot during labor and delivery and for several days in the hospital post-delivery, even though Illinois passed the country's first anti-shackling statute in 2000.<sup>131</sup>

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<sup>127</sup> The Rebecca Project for Human Rights, *supra* note 123.

<sup>128</sup> For example, in July 2008 an undocumented immigrant was held in a county jail for six days after being pulled over for a traffic violation by a local police officer, pursuant to a cooperation agreement between federal immigration authorities and Davidson County, Tennessee, which gives immigration enforcement powers to county officers. Ms. Juana Villegas was nine months pregnant at the time of her arrest, and gave birth in custody, with a sheriff's officer standing guard in her hospital room, where one of her feet was cuffed to the bed most of the time. "Lawyers and immigrant advocates say Mrs. Villegas's case shows how local police can exceed their authority when they seek to act on immigration laws they are not fully trained to enforce." Julia Preston, *Immigrant, Pregnant, Is Jailed Under Pact*, N.Y. TIMES, July 20, 2008, available at <http://www.nytimes.com/2008/07/20/us/20immig.html>.

<sup>129</sup> Richard Winton, *Jail Care for Women is Criticized*, L.A. TIMES, July 12, 2008, at B3 (noting that even though California has a state law prohibiting the use of shackling of a female inmate during childbirth, the Los Angeles County Jail system has not implemented any policies to reflect the law, and that "leg chains, which are heavy but long enough to allow the inmate to get to the bathroom, are often present during childbirth.").

<sup>130</sup> *Id.*

<sup>131</sup> Amended Complaint, *Zaborowski v. Sheriff of Cook County*, No. 08-cv-06946 (N.D.Ill. Jan. 28, 2009). Both women had been housed at a residential treatment facility for pregnant inmates when they went into labor. They remained in the custody of the Sheriff of Cook County. Plaintiff Catherine Zaborowski remained shackled hand and foot to the hospital bed for about eleven hours while she was in labor. An armed deputy sheriff remained in the hospital room during that time. Immediately before the birth, the attending physician requested that the deputy sheriff unshackle Ms. Zaborowski's foot; the deputy sheriff complied. Ms. Zaborowski was shackled to the bed by one arm when she delivered her child. Her leg was reshackled about an hour after birth and remained shackled during the rest of her 48-

Litigation can build on the successes achieved by human rights advocates in the policy arena. International human rights treaties and the law of foreign nations are not viewed by American courts as controlling authority.<sup>132</sup> However, the Supreme Court has long recognized the relevance of international law and the laws of other countries in ascertaining contemporary standards of decency in cases challenging prison policies and prison conditions under the Eighth Amendment.<sup>133</sup> As a result, the advocacy success achieved on the international stage could prove strategically and legally significant to the pursuit of legal reform in the United States.

The use of shackles on a prisoner during childbirth violates the Eighth Amendment's prohibition against "cruel and unusual punishments."<sup>134</sup> In addition to proscribing torture and other methods of punishment considered to be barbaric, the Eighth Amendment proscribes "punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain."<sup>135</sup> That is because the Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."<sup>136</sup>

In *Estelle v. Gamble*, the Supreme Court relied on these principles in holding that the Eighth Amendment imposes an obligation on prison officials to provide medical care for inmates in their custody.<sup>137</sup> It reasoned that the failure to provide such care could result in pain and suffering that serves no valid penological

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hour hospital stay. She was not permitted to use the toilet or to get up from the bed to walk. Plaintiff Simone Jackson remained shackled hand and foot to the hospital bed while in labor and during birth. An armed deputy sheriff remained in the hospital room. Ms. Jackson was shackled hand and foot to the hospital bed for four days in the hospital during which time she was prohibited from and unable to use the toilet or get up from the bed. The complaint alleges that the practice of shackling women during labor and delivery is a policy of the Cook County Jail and plaintiffs are seeking to certify a class of all women in the custody of the defendant Sheriff who, in the two year period preceding the filing of the lawsuit, were shackled during labor and after delivery.

<sup>132</sup> Many articles have explored strategies to turn international human rights law into domestic legal actions. See Martin Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States' Prisons*, 13 HARV. HUM. RTS. J. 71 (2000); Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Home*, 77 FORDHAM L. REV. 459 (2008); Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 4 ALB. L. REV. 417 (2000).

<sup>133</sup> See *Roper v. Simmons*, 543 U.S. 551, 576 (2005) ("[A]t least from the time of the Court's decision in [*Trop v. Dulles*, 356 U.S. 86 (1958)], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'). Additionally, the United States Supreme Court has relied on decisions of the European Court of Human Rights as persuasive authority in interpreting the protections afforded by the Bill of Rights and the Fourteenth Amendment. See *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

<sup>134</sup> U.S. CONST. amend. VIII.

<sup>135</sup> 429 U.S. 97, 102-03 (1976) (internal quotation marks and citations omitted).

<sup>136</sup> *Id.* at 102 (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)). Indeed, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop*, 356 U.S. at 99-100; accord *Hope v. Pelzer*, 536 U.S. 730, 738 (2002).

<sup>137</sup> See *Estelle*, 429 U.S. at 103.

purpose.<sup>138</sup> “The infliction of such unnecessary suffering,” the Court declared, “is inconsistent with contemporary standards of decency.”<sup>139</sup> In a deprivation of medical care case, an inmate must show that the prison official was deliberately indifferent to the inmate’s serious medical needs.<sup>140</sup> In order to succeed, an inmate must show both that she had an objectively serious medical need and that the defendant knew of and disregarded that need.<sup>141</sup>

Several cases relating to inadequate prenatal care have been brought under the Eighth Amendment pursuant to the analysis in *Estelle*.<sup>142</sup> For example, in *Coleman v. Rahija*, a prisoner brought an Eighth Amendment claim alleging that a prison nurse was deliberately indifferent to her complaints that she was in labor in her prison cell.<sup>143</sup> Her requests for medical attention were ignored for nearly two days during which she experienced severe pain, bleeding, and contractions.<sup>144</sup> The Eighth Circuit held that the deliberate indifference standard was met because the defendant had actual knowledge of Coleman’s preterm labor, which constituted a serious medical need, and the defendant’s unnecessary delay in transferring Coleman to a hospital reflected a disregard of such a need.<sup>145</sup>

Emerging from *Estelle* is another line of cases in which the Supreme Court has held that prison officials have an obligation to both ensure humane conditions of incarceration and to protect inmates in their custody from any substantial risks of harm to their health or safety.<sup>146</sup> In *Farmer v. Brennan*, the plaintiff, a male to female transgendered prisoner, brought an Eighth Amendment claim alleging that her placement with male prisoners in the general prison population constituted inhumane prison conditions because she was particularly vulnerable to sexual attack.<sup>147</sup> The Court established that a prison official cannot be found liable under the Eighth Amendment “unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”<sup>148</sup> Thus, a claim challenging prisoner treatment or conditions of confinement consists of both an objective and a subjective

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 105.

<sup>142</sup> *Coleman v. Rahija*, 114 F.3d 778 (8th Cir. 1997). See also *Boswell v. Sherburne County*, 849 F.2d 1117, 1120 (8th Cir. 1988) (pregnant pretrial detainee sued prison officials under *Estelle* for refusing to provide a doctor for her despite the fact that she was cramping, bleeding, and in obvious distress); *Archer v. Dutcher*, 733 F.2d 14 (2d Cir. 1984) (reversing lower court’s grant of summary judgment and holding that plaintiff raised material fact issues with regard to delays in the plaintiff’s access to medical care while in labor); *Pool v. Sebastian County, Ark.*, 418 F.3d 934 (8th Cir. 2005) (applying *Estelle* to deny defendants’ motion for summary judgment on qualified immunity grounds).

<sup>143</sup> *Coleman*, 114 F.3d at 781.

<sup>144</sup> *Id.* at 782-84.

<sup>145</sup> *Id.* at 786.

<sup>146</sup> *Id.*

<sup>147</sup> *Farmer*, 511 U.S. 825, 828 (1994).

<sup>148</sup> *Id.* at 837.

component.<sup>149</sup> The objective component focuses on the seriousness of an alleged deprivation, as measured by contemporary standards of decency.<sup>150</sup> The subjective component focuses on the state of mind of the prison official whose acts or omissions caused the alleged deprivation.<sup>151</sup> In cases concerning conditions of confinement, the requisite state of mind is “deliberate indifference.”<sup>152</sup> Deliberate indifference is akin to recklessness; it exists if a prison official knows of and disregards a substantial risk to inmate health and safety.<sup>153</sup> Whether a prison official had the requisite knowledge of a substantial risk is a question of fact that may be established by showing that a substantial risk to the inmate was “longstanding, pervasive, well-documented, or expressly noted by prison officials and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus ‘must have known’ about it.”<sup>154</sup>

In *Hope v. Pelzer*, the Supreme Court held that both the objective and subjective components of an Eighth Amendment violation were present when inmate Larry Hope was twice handcuffed to a hitching post as a sanction for disruptive conduct.<sup>155</sup> On the first occasion, Mr. Hope was handcuffed to the hitching post for two hours.<sup>156</sup> Because he was only slightly taller than the hitching post, his arms were above shoulder height and grew tired from being handcuffed so high. Whenever he tried moving his arms to improve his circulation, the handcuffs cut into his wrists, causing him pain and discomfort.<sup>157</sup> On the second occasion, Mr. Hope was handcuffed to the hitching post for seven hours.<sup>158</sup> The guards made him take off his shirt and he remained shirtless all day while the sun burned his skin.<sup>159</sup> He was given water only once or twice and was given no bathroom breaks.<sup>160</sup> The Supreme Court held that, based on those facts, the Eighth Amendment violation was “obvious.”<sup>161</sup> It stated:

Despite the clear lack of an emergency situation, the respondents knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the

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<sup>149</sup> *Id.* at 834.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Farmer*, 511 U.S. at 828; *Helling*, 509 U.S. at 32; *Wilson*, 501 U.S. at 303; *Estelle*, 429 U.S. at 104.

<sup>153</sup> *Farmer*, 511 U.S. at 836-37.

<sup>154</sup> *Id.* at 842.

<sup>155</sup> *Hope*, 536 U.S. at 738.

<sup>156</sup> *Id.* at 734.

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

<sup>158</sup> *Id.* at 734-35.

<sup>159</sup> *Id.*

<sup>160</sup> *Hope*, 536 U.S. at 735.

<sup>161</sup> *Id.* at 738. The district court had granted summary judgment in favor of the defendants. In reviewing that judgment, the Supreme Court viewed the facts in the light most favorable to Mr. Hope, the non-moving party. *See id.* at 734 n.1.

sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation. The use of the hitching post under these circumstances violated the basic concept underlying the Eighth Amendment, which is nothing less than the dignity of man.<sup>162</sup>

The inmate treatment standard applied by the Supreme Court to Hope's claims of cruel and unusual punishment provides a solid legal foundation for a claim challenging the use of shackles on incarcerated pregnant women under the Eighth Amendment. There is only one federal case that provides a detailed analysis of Eighth Amendment claims challenging the use of shackles on a prisoner during labor and delivery. In *Nelson v. Correctional Medical Services*, the plaintiff, Shawanna Nelson, alleged that the denial of appropriate medical care and the use of restraints on her body during labor violated her her Eighth Amendment rights.<sup>163</sup> Ms. Nelson went into labor at 5:00 a.m. and was not transported to the hospital until later that evening.<sup>164</sup> She was shackled during transport to the hospital and remained shackled upon admission to the hospital.<sup>165</sup> Prison officials refused to remove her shackles and leg restraints despite requests from the obstetrical nurses and the attending physician.<sup>166</sup> Ms. Nelson's restraints were removed for brief periods of time, during which her vital signs were assessed, but were then reapplied. The restraints were removed when she was placed on the delivery table where she gave birth to a nine pound, seven and three quarter ounce baby by natural childbirth.<sup>167</sup> The restraints were reapplied five minutes after she gave birth.<sup>168</sup> As a result of "enduring wholly natural childbirth" with her legs bound to the hospital bed, Ms. Nelson experienced extreme mental anguish and permanent injury to her back.<sup>169</sup> The district court held that Ms. Nelson's claims against two prison officials, Officer Turnesky, who refused to remove the shackles at the hospital, and Larry Norris, Director of the Arkansas Department of Corrections, who was accused of failing to see that proper policies and customs were implemented with respect to the restraint of inmates in labor, survived a motion for summary judgment on qualified immunity grounds.<sup>170</sup>

Defendants Norris and Turnesky filed an appeal challenging the district court's denial of summary judgment.<sup>171</sup> In reversing the district court's opinion, the Eighth Circuit held that Ms. Nelson's "experience does not rise to the level of

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<sup>162</sup> *Id.* at 738 (internal quotation marks and footnotes omitted).

<sup>163</sup> 2007 WL 1703562 at \*2 (E.D. Ark. June 11, 2007), 2008 WL 2777423 (8th Cir. July 18, 2008), *reh'g granted en banc*.

<sup>164</sup> *Id.* at \*3.

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

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Brief for Appellee at 4, *Norris v. Nelson*, No. 07-2481(8th Cir. Oct. 2, 2007).

<sup>169</sup> *Nelson*, 2007 WL 1703562 at \*3.

<sup>170</sup> *Id.* at \*11.

<sup>171</sup> *Nelson*, 2008 WL 2777423 (8th Cir. July 18, 2008).

unnecessary and wanton infliction of pain implicating the Eighth Amendment” because “nothing in the record indicates defendants deliberately disregarded Nelson’s medical need.”<sup>172</sup> The court relied on the fact that since Ms. Nelson was transported and admitted to the hospital, the defendants “concretely demonstrat[ed] a deliberate concern for [her] well-being and not indifference.”<sup>173</sup> Because the court did not find the “deprivation of an actual constitutional right,” there was no need to inquire further regarding qualified immunity.<sup>174</sup> Ms. Nelson was granted a rehearing en banc and her case was argued on October 24, 2008. At the time of publication, the Eighth Circuit has not yet issued its opinion.

The Eighth Circuit panel focused on the *Estelle* standard of “deliberate indifference to a serious medical need.” It did not consider the substantial risk of serious harm standard set forth in *Farmer* and *Hope*. When that standard is applied to Ms. Nelson’s experience, it is clear that she was denied humane conditions of confinement. First, the use of shackles on an inmate in labor violates the objective test of “contemporary standards of decency.”<sup>175</sup> The ascertainment of contemporary standards of decency is informed by international law.<sup>176</sup> Not only has the practice been universally criticized by the international human rights community, but the American medical establishment, the federal government, and a growing number of states have also recognized its brutality.<sup>177</sup> The seriousness of the deprivation cannot be questioned. Women must endure childbirth in a manner that is not only dehumanizing and humiliating, but in a way that is medically dangerous and extremely painful.

As for the second element of the standard, which requires that a prison official knows of but disregards a substantial risk to the inmate’s health or safety, just as the risk of harm to Mr. Hope was “obvious,” so is the risk of harm to incarcerated women when they are restrained during labor. The parallels between Mr. Hope’s experience when he was tied to a hitching post and the experience of Ms. Nelson are instructive. Neither Mr. Hope nor Ms. Nelson posed an immediate security threat.<sup>178</sup> Mr. Hope suffered unnecessary pain caused by the handcuffs and the restrictions placed on his movements. Ms. Nelson suffered unnecessary pain caused by the shackles and the restrictions placed on her movements while in labor.<sup>179</sup> As a result of being deprived of bathroom breaks, Mr. Hope was

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<sup>172</sup> *Id.* at \*3.

<sup>173</sup> *Id.* (quoting *Haslar v. Megerman*, 104 F.3d 178, 180 (8th Cir. 1997)).

<sup>174</sup> *Id.* at \*2 (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)), \*4.

<sup>175</sup> See *Roper v. Simmons*, 543 U.S. 551, 561-63 (2005). Justice Kennedy’s majority opinion chronicles the use of the “contemporary standards of decency” framework in Eighth Amendment jurisprudence.

<sup>176</sup> *Id.* at 575 (“Yet at least from the time of the Court’s decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”).

<sup>177</sup> See *supra* Part II.

<sup>178</sup> Compare *Hope*, 536 U.S. at 738 with *Nelson v. Correctional Medical Services*, 2007 WL 1703562, \*10 (E.D. Ark. June 11, 2007).

<sup>179</sup> Compare *Hope*, 536 U.S. at 738 with *Nelson*, 2007 WL at \*3, 10.

subjected to the risk of particular discomfort and humiliation. As a result of being shackled while in labor, Ms. Nelson soiled her bed sheets with human waste, which caused her actual discomfort and humiliation, and subjected her to the risk of infection.<sup>180</sup> In addition, both Ms. Nelson and the child she was about to deliver were subjected to the risk of serious physical injury.<sup>181</sup>

It is hardly surprising that so few cases have been brought considering the episodic nature of the practice and the difficulties prisoners regularly face in accessing counsel. However, practitioners can seek prospective relief for pregnant inmates before they are forced to endure childbirth in shackles. A cause of action challenging the use of shackles on a woman in labor may be brought even before the prisoner suffers actual physical injury. As the Supreme Court has recognized, “it would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.”<sup>182</sup> An inmate seeking an injunction on the ground that there is “a contemporary violation of a nature likely to continue,” must come forward with evidence from which it can be inferred that the defendant-officials at the time suit is filed and at the time of summary judgment, were knowingly and unreasonably disregarding an objectively intolerable risk of harm and that they will continue to do so.<sup>183</sup> The subjective element of the two-part test, deliberate indifference, is to be determined in light of the prison authorities’ “current attitudes and conduct.”<sup>184</sup> To establish eligibility for an injunction, the inmate must demonstrate the continuance of the officials’ disregard of the objectively intolerable risk of harm into the future.<sup>185</sup> Thus, a pregnant inmate facing the substantial likelihood of being shackled during labor “does not have to await the consummation of threatened injury to obtain preventative relief.”<sup>186</sup>

#### CONCLUSION

Mainstream reproductive rights groups are now incorporating principles of the reproductive justice and human rights movements into their advocacy and litigation efforts.<sup>187</sup> This expansive agenda must include action that ensures the full spectrum of reproductive rights for incarcerated women, who represent one of the

<sup>180</sup> *Compare Hope*, 536 U.S. at 738 with *Complaint, Nelson*, 2007 WL at \*3.

<sup>181</sup> See ACOG Letter, *supra* note 78.

<sup>182</sup> *Helling v. McKinney*, 509 U.S. 25, 33(1993).

<sup>183</sup> *Farmer*, 511 U.S. at 845-46 (quoting *United States v. Oregon State Medical Soc.*, 343 U.S. 326, 333 (1952)).

<sup>184</sup> *Helling*, 509 U.S. at 36.

<sup>185</sup> *Farmer*, 511 U.S. at 846.

<sup>186</sup> *Id.* (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).

<sup>187</sup> The CRR, for example, has adopted a human rights framework to its domestic advocacy and litigation efforts. CRR has submitted shadow reports to U.N. treaty-monitoring bodies to report on the U.S. government’s failure to respect, protect, and fulfill women’s rights to reproductive healthcare and nondiscrimination. See Center for Reproductive Rights, *Engaging United Nations’ Systems to Implement U.S. Human Rights Violations*, <http://reproductiverights.org/en/project/engaging-united-nations%E2%80%99systems-to-implement-us-human-rights-obligations>.

most marginalized segments of society. These rights include the right to access abortion services, the right to preventative reproductive healthcare, the right to access contraception, the right to proper prenatal care and parenting counseling, and the right to give birth without physical restraints.

Eighth Amendment jurisprudence is one of the few areas of the law where American courts have looked beyond the nation's borders to inform the analysis of domestic legal standards, in particular the assessment of "contemporary standards of decency." This tradition affords litigators a unique opportunity to further incorporate international human rights obligations and standards in domestic litigation.<sup>188</sup> The practice of shackling incarcerated women during labor and delivery has been widely condemned by the international human rights community, and the United States remains an outlier in its restraint practices. Reproductive rights litigators can build on the successes of human rights advocates by informing courts of the growing international and domestic call to end this brutal and needless practice.

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<sup>188</sup> See *Roper*, 543 U.S. at 576 (emphasizing that multiple international treaties contain express prohibitions on capital punishment for crimes committed by juveniles under the age of eighteen).