CHILDBIRTH IN CHAINS: A REPORT ON THE CRUEL BUT NOT SO UNUSUAL PRACTICE OF SHACKLING INCARCERATED PREGNANT FEMALES IN THE UNITED STATES

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I. INTRODUCTION

Although the practice of shackling an incarcerated pregnant female is consistently condemned by both national and international public opinion as well as leading medical and public health associations, it remains routine practice in the majority of prisons and jails throughout the United States. Further, although some states have recently adopted legislation banning such practices, the swarm of litigation surrounding the issue of shackling in those states illustrates that this treatment is still occurring despite the extraordinary efforts of advocates and laws banning the practice. This paper begins by discussing the origins of shackling in order to provide a framework, and then presents two individual accounts before offering information detailing the serious health risks that shackling imposes upon female inmates and their babies. This paper then dives into analyses of the strong legal challenges against the barbaric practice, outlining shackling's clear violations of both constitutional and international human rights laws. Finally, this paper notes the significant progress achieved thus far and what needs to be done to achieve complete abandonment of the grossly inhumane practice.

II. THE ORIGINS OF SHACKLING

The origins of shackling can be traced back numerous centuries, with the earliest restraint relics dating back to prehistoric times, and the earliest references appearing numerous times in the Bible. However, it remains unclear exactly when United States detention centers began employing the practice of shackling pregnant inmates. Historians generally cite the 1970s and 1980s as the time period when the practice likely became common, as it was during these decades that criminal justice facilities adopted gender-neutral policies in response to the civil rights and women's rights movements.[1] Thus, those policies resulted in the shackling of most prisoners – regardless of gender and condition – who were involved in any transport outside of the detention facility.

At the time that gender-neutral criminal justice policies were adopted, women were underrepresented at all levels of the criminal justice system. "Little or no thought was given to the possibility of a

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[1] Colleen Mastony, *Childbirth in Chains,* CHI. TRIB., July 18, 2010.

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."[2] Consequently, prison infrastructures and policies were established to handle the prototypical violent male offender, and shackling, specifically, was employed for the purposes of decreasing flight risk and maintaining the safety of the officers and public against the prototypical violent male offender.[3]

III. TODAY'S SHACKLING EPIDEMIC UPON PREGNANT FEMALE INMATES – HOW DID THIS HAPPEN?

The prison and jail populations in the United States have vastly diversified since the adoption of gender-neutral policies. Within the last quarter century, the number of women involved in the United States' criminal justice system has skyrocketed. In fact, United States' prisons and jails now house approximately two hundred thousand women.[4] Since 1980, the number of women in prison has increased at nearly double the rate for men, and more than fifty percent of female inmates are under the age of thirty-five.[5] Thus, it comes as no surprise that the fastest growing prison population in the country consists of mothers of young children.[6] Further, four percent of women in state prisons, three percent of women in federal prisons, and approximately five percent of women in jail reported being pregnant at the time of their incarceration.[7] Accordingly, it is estimated that nearly two thousand babies are born to women in prison or jail annually,[8] and due to the continual increase in female inmates, this figure is on the rise.

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[2] MARC MAUER & MEDA CHESNEY-LIND, eds., INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 181 (2002).
[3] Mastony, *supra* note 1.
[4] TODD D. MINTON, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2011 – STATISTICAL TABLES 1 (2012), *available at* http://bjs.gov/content/pub/pdf/jim11st.pdf.
[5] B. JAYE ANNO, U.S. DEP'T OF JUSTICE, CORRECTIONAL HEALTH CARE: GUIDELINES FOR THE MANAGEMENT OF AN ADEQUATE DELIVERY SYSTEM 233 (2001), *available at* http://www.nicic.org/pubs/2001/017521.pdf.
[6] RICKIE SOLINGER, PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA 243 (2005).
[7] LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: MEDICAL PROBLEMS OF JAIL INMATES (2006), *available at* http://bjs.gov/content/pub/pdf/mpji.pdf.
[8] Ronald L. Braithwaite, Henrie M. Treadwell & Kimberly R.J. Arriola, *Health Disparities and Incarcerated Women: A Population Ignored*, 95 AM. J. PUB. HEALTH 1679 (2005).

The drastic increase in the number of female inmates has been largely attributed to the past quarter-century's "war on drugs" and the implementation of mandatory drug sentencing policies.[9] Stephanie R. Bush-Baskette, a former member of the New Jersey State Legislature and renowned researcher and author of women's imprisonment issues, explained in a recent publication, "Inadvertently, the war on drugs became the war on women…."[10] Between the years of 1986 and 1996, the number of women incarcerated for drug offenses increased by an astonishing 888 percent.[11] Thus, the United States' prisons and jails, which were designed to house violent male offenders, are now home to growing numbers of non-violent female offenders, a situation that the original framers of penological policy never anticipated.

Despite the extreme number of women entering the United States' criminal justice system, female offenders are much less likely to be incarcerated due to violent crimes. In fact, women only account for approximately fourteen percent of all violent offenses.[12] Further, even when females are convicted of violent crimes, simple assault accounts for nearly seventy-five percent of those convictions.[13] This illustrates that even when women are accountable for violent crime, the majority are classified on the lowest end of the violence spectrum, as opposed to violent crimes committed by men.

As illustrated above, today's prison and jail population in the United States has vastly diversified since the adoption of gender-neutral policies. Unfortunately, changes in criminal justice policy have failed to keep pace with these changes. Thus, shackling remains in practice, and is, unfortunately, being imposed upon pregnant female inmates at alarming rates. The following accounts of two former inmates detail the gruesome experiences that shocking numbers of pregnant female inmates have experienced and are continuing to experience.

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[9] LENORA LAPIDUS, ET AL, AM. CIVIL LIBERTIES UNION, CAUGHT IN THE NET: THE IMPACT ON DRUG POLICIES ON WOMEN AND FAMILIES 15-16 (2005), *available at* https://www.aclu.org/files/images/asset_upload_file431_23513.pdf.

[10] 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 Davids, eds. 1999).

[11] U.S. DEP'T OF JUSTICE, GENDER-RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS 74 (2002), *available at* nicic.gov/library/files/018017.pdf.

[12] LAWRENCE A. GREENFIELD & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, WOMEN OFFENDERS 1 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf.

[13] *Id*.

IV. A CASE TOO CLOSE TO HOME

Juana Villegas was nine months pregnant when she was driving home from a doctor's appointment with her eleven-year-old son, fourteen-year-old son, and two-year-old daughter on July 3, 2008.[14] While travelling through the City of Berry Hill in the greater Nashville, Tennessee area, Ms. Villegas was stopped by Officer Tim Coleman.[15] Without notifying Ms. Villegas of why she had been stopped, Officer Coleman asked for Ms. Villegas' license and registration.[16] Ms. Villegas failed to produce a valid driver's license, and Officer Coleman instructed Ms. Villegas to call someone with a valid driver's license to retrieve her children and vehicle, and immediately placed her under arrest.[17] Despite Ms. Villegas' condition and the presence of her children, Officer Coleman ordered Ms. Villegas to get into his patrol car under the threat of cuffing her, and transported her to a Davidson County pretrial detention center.[18]

Ms. Villegas went into labor while alone in a cell in the detention center on the evening of July 5, 2008.[19] After complaining of severe pain from contractions and pleading with the guard on duty, Ms. Villegas was taken to the nurse's station, where her hands and feet were shackled in anticipation of transport.[20] Ms. Villegas was then transported by ambulance to Nashville General Hospital, where she remained shackled.[21] Despite medical staff requests, Ms. Villegas was forced to change into a hospital gown in the presence of two male officers.[22] The officers refused to allow Ms. Villegas any privacy while changing or during examinations, and prohibited Ms. Villegas from contacting her husband to notify him of the impending birth of their son.[23] Throughout the entirety of the labor process, Ms. Villegas' left foot and right hand were shackled to the hospital bed.[24] Despite complaints of the hospital staff that such treatment was barbaric and

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[14] Complaint at ¶ 7, Villegas v. Metro. Gov't of Davidson Cnty., 789 F. Supp. 2d 895 (M.D. Tenn. 2011) (No. 09CV00219).
[15] *Id*. at ¶ 8.
[16] *Id*. at ¶ 11.
[17] *Id*. at ¶ 13.
[18] *Id*. at ¶ 24.
[19] *Id*. at ¶ 43.
[20] *Id*.
[21] *Id*. at ¶ 44.
[22] *Id*. at ¶ 45.
[23] *Id*. at ¶ 46.
[24] *Id*. at ¶ 47.

dangerous to Ms. Villegas and her child, Ms. Villegas remained shackled.[25]

Ms. Villegas gave birth to her son during the early hours of July 6, 2008.[26] Ms. Villegas was instructed by nurses to walk around as much as possible post-delivery in order to encourage muscle rehabilitation.[27] However, Ms. Villegas was prohibited from doing so as her feet remained shackled throughout the entirety of her two-day post-partum recovery period, even while bathing and using the toilet.[28] Further, Ms. Villegas was immediately separated from her newborn son.[29]

A nurse had provided Ms. Villegas with a breast pump and moisturizers to enable her to express her breast milk safely and to alleviate pain while she was unable to nurse due to the separation from her newborn.[30] However, the officer accompanying Ms. Villegas during transport refused to allow Ms. Villegas to take the materials with her despite pleas and medical explanations of the hospital staff.[31] As a result, Ms. Villegas' breasts became extremely swollen and painful, preventing her from moving or sleeping.[32] Eventually, Ms. Villegas developed mastitis, an infection of the breast tissue caused by the inability to express breast milk.[33] Further, because Ms. Villegas was prohibited from properly exercising her lower body muscles post-delivery as instructed due to her shackles, Ms. Villegas experienced weeks of cramping, stiffness, and leg pain so severe that she could not straighten her left leg, which had been shackled to the hospital bed.[34]

Ms. Villegas was not reunited with her newborn son until her release from the detention center.[35] Subsequent to her release, Ms. Villegas went to municipal court to challenge the basis for the stop in her case.[36] Ultimately, the charge upon which she was stopped was dismissed.[37] The municipal court ignored the shackling of Ms. Villegas, noting that it was acceptable because it was implemented pursuant to Davidson County Sherriff's Office policy despite the fact

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[25] *Id*. at ¶ 48.
[26] *Id*. at ¶ 51.
[27] *Id*. at ¶ 53.
[28] *Id*. at ¶¶ 53-55.
[29] *Id*. at ¶ 59.
[30] *Id*. at ¶ 62.
[31] *Id*.
[32] *Id*. at ¶ 66.
[33] *Id.*
[34] *Id*. at ¶ 67.
[35] *Id*. at ¶ 68.
[36] *Id*. at ¶ 73.
[37] *Id*.

that Ms. Villegas had not had any outstanding criminal charges, arrests or warrants, was never violent or uncooperative, and posed no flight risk before delivery due to the advanced stage or her pregnancy, or after delivery due to her condition.[38]

V. SHAWANNA NELSON'S NIGHTMARE

On June 3, 2003, Shawanna Nelson was placed in an Arkansas Department of Correction detention facility following convictions for credit fraud and writing checks with insufficient funds.[39] At the time of Ms. Nelson's entrance into the Arkansas Department of Correction, she was six months pregnant with her second child. On September 20, 2003, Ms. Nelson went into labor at the detention facility, and was sent to the prison infirmary after complaining of severe pain to a corrections officer.[40] Despite having contractions recurring at six to seven minute intervals, the infirmary nurse sent Ms. Nelson back to her cell.[41] Ms. Nelson returned to the infirmary shortly thereafter, barely able to walk down the hall due to the intense pain, but was again sent back to her cell as her contractions intensified to five to six minute intervals.[42] Ultimately, after witnessing the severity of the situation and the lack of the infirmary staff's concern, the correctional officer demanded that Ms. Nelson be taken to a hospital and took action herself.[43]

Correctional Officer Patricia Turensky escorted Ms. Nelson to the hospital.[44] Although Officer Turensky stated that she never felt threatened by Ms. Nelson at any time, and that Ms. Nelson neither said nor did anything to suggest she posed a flight risk, Officer Turensky shackled Ms. Nelson's legs to a wheelchair upon arrival at the hospital.[45] Upon arriving in the maternity ward, Ms. Nelson changed into a hospital gown and was placed on a stretcher.[46] At this point, Ms. Nelson was in the very final stages of labor, as her cervix had dilated to seven centimeters.[47] Nonetheless, Officer Turensky

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[38] *Id.* at ¶ 38.
[39] Elizabeth Alexander, *Unshackling Shawanna: The Battle over Chaining Women Prisoners During Labor and Delivery*, 32 U. ARK. LITTLE ROCK L. REV. 435, 441 (2010).
[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] Nelson v. Corr. Med. Servs., 583 F.3d 522, 525 (8th Cir. 2009).
[46] *Id*.
[47] *Id*. at 526.

shackled both of Ms. Nelson's ankles to opposite ends of the hospital bed.[48]

Due to the shackles on both of her ankles, Ms. Nelson was unable to move her legs, stretch, or change positions to alleviate the extreme pain.[49] Medical staff pleaded with Officer Turensky to remove Ms. Nelson's restraints, but to no avail.[50] Further, because it was too close to delivery for the administration of an epidural, Ms. Nelson was only given only Tylenol.[51] Ms. Nelson gave birth to a nearly ten-pound baby boy on September 20, 2003 at 6:23 in the evening.[52]

As a direct result of being shackled, Ms. Nelson suffered a hip dislocation, torn stomach muscles, and an umbilical hernia during labor and delivery.[53] During the first night of her post-partum recovery in the hospital, Ms. Nelson was prevented from accessing the restroom without first being unshackled from her hospital bed. By the time the accompanying officer responded to Ms. Nelson's pleas and unlocked the shackles, Ms. Nelson had been forced to soil herself.[54]

Following Ms. Nelson's release from the hospital and correctional facility, she underwent major surgeries for both the hip dislocation and umbilical hernia she suffered due to shackling during labor and delivery.[55] Ms. Nelson's hip injury ultimately caused permanent deformities to her hips, resulting in permanent inabilities to sleep or bear weight on her left side, or to sit or stand for extended periods of time.[56] Additionally, Ms. Nelson was advised to never have any more children due to the permanent damage that shackling imposed on her physical health.[57]

VI. HEALTH IMPLICATIONS

Leading medical experts throughout the United States and the entire world have voiced their clear opposition to the practice of shackling pregnant inmates. The American College of Obstetricians and Gynecologists, the American Medical Association, and various

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[48] *Id*.
[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] Alexander, *supra* note 39, at 442.
[55] *Id*. at 443.
[56] *Nelson*, 583 F.3d at 526.
[57] *Id*.

other experts in fields concerning fetal and maternal health have expressed their deep concerns regarding the dangers that shackling poses to the physical health of both the mother and child, as well as the mental health of the mother.

A. Shackling Imposes an Unacceptable Risk to the Physical Health of both the Mother and Child

The use of shackles on pregnant female inmates poses substantial risks to the physical health of both the mother and child. First, physical restraints interfere with the ability of health care providers to safely perform necessary actions. Shackles specifically inhibit a practitioner from adequately assessing and evaluating the health of the mother and fetus, assisting the mother during labor and delivery, and conducting emergency procedures if necessary.[58] Dr. Patricia Garcia, an obstetrician and gynecologist at Northwestern University's Prentice Women's Hospital, explained, "Having the woman in shackles compromises the ability to manipulate her legs into the proper positions for necessary treatment."[59] Numerous imperative assessments are inhibited by the presence of shackles. For example, tests for conditions such as appendicitis, preterm labor, vaginal bleeding, venous thrombosis, and kidney infection all cannot be performed upon a shackled patient.[60] Further, hypertensive disease, which occurs in approximately 12-22% of pregnancies, and is directly responsible for approximately 18% of all maternal deaths in the United States, cannot be safely treated while a woman is shackled.[61]

Shackles also impose a dangerous burden should complications arise. Dr. Garcia specifically stated that "women in labor need to be mobile so that they can assume various positions as needed and so they can quickly be moved to an operating room" in case exigent complications arise.[62] Particular potential emergencies of concern, due

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[58] AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, HEALTH CARE FOR PREGNANT AND POSTPARTUM INCARCERATED WOMEN AND ADOLESCENT FEMALES, 2011 Comm. Op. No. 511, at 3 *available at* http://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Health_Care_for_Underserved_Women/Health_Care_for_Pregnant_and_Postpartum_Incarcerated_Women_and_Adolescent_Females.

[59] *Id*.

[60] *Id*.

[61] *Id*.

[62] AMNESTY INT'L, "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (1999), *available at* http://www.amnesty.org/en/library/asset/AMR51/019/1999/en/685257e6-e33d-11dd-808b-bfd8d459a3de/amr510191999en.html.

to their common occurrences, include shoulder dystocia, hemorrhage, fetal heart rate abnormalities, and the need for an immediate cesarean section.[63] The dangerous delays that shackling imposes in such cases are remarkably hazardous. Dr. Garcia explained to Amnesty International that if the need for an emergency cesarean section were to arise, the presence of restraints on the mother could possibly be the difference between life and death for the mother or her child: "If there were a need for a C-section (caesarian delivery), the mother needs to be moved to an operating room immediately and a delay of even five minutes could result in permanent brain damage for the baby."[64]

Second, shackling hampers the mother from shifting positions in order to alleviate the extreme pains of labor and childbirth. Such restraint leads to increased stress and desperation, which may decrease the amount of oxygen available to the fetus, and often results in severe bruising, abrasions, and other injuries to the mother. Warnice Robinson was forced to give birth while shackled in Illinois after a conviction for shoplifting.[65] Ms. Robinson described her experience of giving birth while incarcerated as "one of the most horrifying experiences of my life."[66] In an interview with Amnesty International, Ms. Robinson continued, "I was shackled to a metal bed post by my right ankle throughout seven hours of labor. Imagine being shackled to a metal bedpost, excruciating pains going through my body, and not being able to adjust myself to even try to feel any type of comfort, trying to move and with each turn having hard, cold metal restraining my movements."[67] Samantha Luther was forced to give birth in Wisconsin while her ankles were shackled approximately eighteen inches apart.[68] Ms. Luther was required to pace in order to induce

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[63] AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, HEALTH CARE FOR PREGNANT AND POSTPARTUM INCARCERATED WOMEN AND ADOLESCENT FEMALES, 2011 Comm. Op. No. 511, at 3 *available at* http://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Health_Care_for_Underserved_Women/Health_Care_for_Pregnant_and_Postpartum_Incarcerated_Women_and_Adolescent_Females.

[64] AMNESTY INTERNATIONAL, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN (2001), *available at* http://www.amnestyusa.org/pdf/custodyissues.pdf.

[65] AMNESTY INT'L, "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (March 1999), *available at* http://www.amnesty.org/en/library/asset/AMR51/019/1999/en/685257e6-e33d-11dd-808b-bfd8d459a3de/amr510191999en.html.

[66] *Id*.

[67] *Id*.

[68] AMNESTY INT'L, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN (2001), *available at* http://www.amnestyusa.org/pdf/custodyissues.pdf.

birth while shackled, and was so tightly restrained that her shackles were only finally removed immediately prior to birth after it was determined that she was unable to adequately push.[69] Ms. Luther recounted that the experience was "so humiliating. My ankles were raw."[70] Shawanna Nelson was forced to endure most of the final stages of labor with her legs spread and cuffed to opposite sides of a hospital gurney.[71] Although her shackles were eventually removed after numerous demands by both nurses and physicians, Ms. Nelson suffered a permanent hip injury, torn stomach muscles, and an umbilical hernia requiring surgical repair as a result of the shackling.[72] Ms. Nelson's injuries were so extensive that she is now unable to bear weight on her left side, sit or stand for extended periods, and has been advised not to have any more children.[73] Ms. Nelson's orthopedist noted that the shackling caused permanent deformity of Ms. Nelson's hips.[74]

Third, restraints increase the risk of a life threatening injury as a result of the mother losing her balance and falling. Pregnancy, especially during the second and third trimesters, is notorious for causing balance problems due to the shift of the mother's center of gravity.[75] Falling is an extremely common occurrence in pregnant women, and is a noted cause of miscarriage, stillbirth, and injury to both the mother and the child. Shackling only exacerbates these problems.[76] Further, shackling not only heightens the risk of a pregnant woman falling, but also then prevents a woman from bracing herself during a fall in order to protect herself or her child from injury.[77]

Fourth, the use of shackles after delivery prevents mothers from effectively healing and caring for the child during the post-

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[69] *Id*.
[70] *Id*.
[71] Nelson v. Corr. Med. Servs., 583 F.3d 522, 525-26 (8th Cir. 2009).
[72] *Id.* at 526.
[73] *Id*.
[74] *Id*.
[75] *See* Julie B. Ehrlich & Lynn M. Paltrow, *Jailing Pregnant Women Raises Health Risks*, WOMEN'S ENEWS, (Sept. 20, 2006), http://womensenews.org/story/health/060920/jailing-pregnant-women-raises-health-risks.
[76] *Id.*
[77] AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, HEALTH CARE FOR PREGNANT AND POSTPARTUM INCARCERATED WOMEN AND ADOLESCENT FEMALES, 2011 Comm. Op. No. 511, at 3 *available at* http://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Health_Care_for_Underserved_Women/Health_Care_for_Pregnant_and_Postpartum_Incarcerated_Women_and_Adolescent_Females.

partum recovery period. Shackling specifically hinders a woman's post-partum recovery. In order to begin the muscular rehabilitative process, it is imperative for a woman to begin walking after delivery. Such exercise is either made dangerous or is completely prohibited by shackling. Further, as detailed by the ACLU of Georgia and American College of Nurse Midwives, it is critical for a woman to remain unshackled postpartum to prevent thromboembolic disease or hemorrhaging.[78] Elizabeth, a woman who was forced to give birth while shackled in Virginia in 2006, was forced to endure all aspects of labor, delivery, and postpartum recovery while shackled.[79] Further, she was taken back to a Virginia Correctional Center after only an hour after delivering, and before she had expelled the placenta after birth.[80] After multiple weeks and while still incarcerated, Elizabeth experienced a severely painful hemorrhage and finally expelled the placenta that had remained inside of her.[81]

Shackling also hampers imperative mother-child bonding practices, which are essential to the healthy development of the child.[82] Dr. Patricia Garcia explained, "The use of restraints creates a hazardous situation for the mother and the baby, compromises the mother's ability postpartum to care for her baby, and keeps her from being able to breastfeed."[83] Unfortunately, the vast majority of women who are forced to endure labor and delivery while shackled not only remain shackled through post-partum recovery, but also either never get to see their newborn child, or are immediately separated from them, thus preventing any chance for mother-child bonding.[84]

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[78] AM. CIVIL LIBERTIES UNION, SHACKLING OF PREGNANT INMATES: PROTECTING WOMEN'S RIGHTS IN PRISONS (2013), *available at* http://www.acluga.org/issues/women-s-rights/shackling-of-pregnant-inmates/.

[79] NATIONAL RELIGIOUS CAMPAIGN AGAINST TORTURE, SHACKLING STORIES FROM INSIDE VIRGINIA'S CORRECTIONAL FACILITIES, *available at* http://www.nrcat.org/storage/documents/shackling%20stories_va.pdf.

[80] *Id.*

[81] *Id.*

[82] AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, HEALTH CARE FOR PREGNANT AND POSTPARTUM INCARCERATED WOMEN AND ADOLESCENT FEMALES, 2011 Comm. Op. No. 511, at 3 *available at* http://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Health_Care_for_Underserved_Women/Health_Care_for_Pregnant_and_Postpartum_Incarcerated_Women_and_Adolescent_Females.

[83] AMNESTY INT'L, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN (2001), *available at* http://www.amnestyusa.org/pdf/custodyissues.pdf.

[84] *See, e.g.* Complaint at ¶ 43-49, 52-56, 59-60, 68, Villegas v. Metro. Gov't of Davidson County, 789 F. Supp. 2d 895 (M.D. Tenn. 2011) (No. 09CV00219).

B. Shackling Imposes an Unacceptable Risk to the Mental Health of the Mother

In addition to the extreme physical risks that are imposed upon incarcerated mothers and their children by shackling, many women face additional mental health issues after being forced through such a horrific and humiliating experience. In its opposition to the practice of shackling, the American College of Obstetricians and Gynecologists has asserted that shackling is both unnecessary and demeaning and causes severe mental anguish.[85] Further, the ACLU has labeled shackling as degrading, and continuously voices concerns about shackling's effects on not only the physical welfare, but also the mental welfare of its victims.[86]

Melissa Hall, who was arrested for possession of a controlled substance, remembers having to appear in court in leg irons, a chain belt, and handcuffs, creating a crippling fear of falling and injuring herself and her child.[87] Further, Ms. Hall was forced to endure more than forty-eight hours in labor while shackled with her legs spread in stirrups while a male officer was present in her room.[88] The officer refused to remove the restraints or allow Ms. Hall any privacy, and remained in the room watching and cheering during the NBA Finals while the baby was crowning.[89] Ms. Hall described the experience as the worst, most degrading of her life and she now suffers from serious depression.[90]

After giving birth to a nearly ten-pound child while shackled, Shawanna Nelson endured various severe injuries and now suffers from extreme mental distress.[91] During the night after giving birth and being separated from her newborn child, Ms. Nelson needed to relieve

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[85] AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, HEALTH CARE FOR PREGNANT AND POSTPARTUM INCARCERATED WOMEN AND ADOLESCENT FEMALES, 2011 Comm. Op. No. 511, at 3 *available at* http://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Health_Care_for_Underserved_Women/Health_Care_for_Pregnant_and_Postpartum_Incarcerated_Women_and_Adolescent_Females.

[86] AM. CIVIL LIBERTIES UNION, ACLU BRIEFING PAPER: THE SHACKLING OF PREGNANT WOMEN & GIRLS IN U.S. PRISONS, JAILS & YOUTH DETENTION CENTERS (2012), *available at* http://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf.

[87] Allison Tung, *Illinois: Stop Shacking Pregnant Prisoners*, FORCE CHANGE, http://forcechange.com/8959/illinois-stop-shackling-pregnant-prisoners/ (last visited January 1, 2015).

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] Alexander, *supra* note 39, at 443.

herself in the restroom.[92] However, the restriction of the shackles in addition to the injuries she sustained during her shackled birth severely limited her mobility.[93] Thus, Ms. Nelson was unable to wait to use the restroom before the accompanying officer unlocked her shackles, and was forced to soil herself.[94] In Ms. Nelson's statement in the prison grievance system, she described her experience by stating:

> I am traumatized by this event, my hip is still very sore, and I can only sleep on my back. It is not a day that goes by that I don't wonder why I was treated that way. [Officer] Turensky had a gun so, why was I restrained? . . . . It is enough to be separated from a newborn baby, but to be treated like an animal while giving birth totally ruins your whole mental and emotional state of mind.[95]

VII. CONSTITUTIONAL CHALLENGES

A. Shackling Constitutes an Unconstitutional Violation of the Eighth Amendment

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."[96] In contrast, inmates maintain their constitutional rights while incarcerated: "Admittedly, prisoners do not shed all constitutional rights at the prison gate."[97] While lawful incarceration may bring about necessary limitations of privileges and rights, such limitations may only be imposed for a legitimate penological interest. No such interest justifies the alienation of a prisoner from her rights to be spared from cruel and unusual punishment under the Eighth Amendment of the Constitution.

The Eighth Amendment of the United States Constitution prohibits the infliction of cruel and unusual punishment.[98] In order to assert an Eighth Amendment violation, "the offending conduct must be wanton."[99] The word wanton is not strictly defined, and its meaning in the Eighth Amendment context depends upon the circumstances in

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[92] *Id.* at 442.
[93] *Id.*
[94] *Id.*
[95] *Id*. at 443.
[96] Turner v. Safley, 482 U.S. 78, 84 (1987).
[97] Sandin v. Conner, 515 U.S. 472, 485 (1995).
[98] U.S. CONST. amend. XIII.
[99] Wilson v. Seiter, 501 U.S. 294, 302 (1991).

which the alleged violation occurs.[100] However, the history of the constitutional prohibition of "cruel and unusual punishment" has been recounted at length in Supreme Court opinions, and sheds light on the primary concerns of the drafters.

The phrase "cruel and unusual" first appeared in the English Bill of Rights of 1689, and appears to have been directed against punishments unauthorized by statute, beyond the jurisdiction of the court, or disproportionate to the offense involved.[101] However, it appears that when the American drafters adopted the phrase for incorporation into the United States Constitution, they were primarily concerned with the prohibition of tortures and other barbarous methods of punishment.[102]

The Supreme Court, accordingly, first applied the Eighth Amendment's prohibitions to cases involving challenged methods of execution. However, the Court has since expanded its interpretation, holding that the Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[103] "The Court early recognized that 'a principle to be vital, must be capable of wider application than the mischief which gave it birth.'"[104] "Thus the Clause forbidding 'cruel and unusual' punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'"[105] Thus, the Court has more recently established precedent that the Eighth Amendment proscribes treatment incompatible with "the evolving standards of decency that mark the progress of a maturing society."[106]

In *Estelle v. Gamble*, the Court relied on the fundamental principles above in establishing a constitutionally guaranteed level of medical care for prison inmates.[107] The Court held that the government has an obligation to provide medical care for those whom it is punishing by incarceration.[108] Furthermore, deliberate indifference by prison personnel to an inmate's medical needs constitutes cruel and unusual punishment contravening the Eighth Amendment.[109] The Court explained that while incarcerated, an

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[100] *Id*.
[101] Gregg v. Georgia, 428 U.S. 153, 169 (1976).
[102] *Id*.
[103] Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).
[104] *Gregg*, 428 U.S. at 171 (citing Weems v. United States, 217 U.S. 349, 373 (1910)).
[105] *Id*. at 171 (citing Weems, 217 U.S. at 378).
[106] Trop v. Dulles, 356 U.S. 86, 101 (1958).
[107] Estelle v. Gamble, 429 U.S. 97 (1976).
[108] *Id*.
[109] *Id*. at 97.

inmate is completely dependent and at the mercy of prison authorities to properly handle his or her medical needs.[110] In the worst cases, failure to do may produce conditions of physical torture and even impending death.[111] In even the best cases, failure to do so may result in pain and suffering that no one can argue is justified by any legitimate penological purpose.[112] "The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency . . . ."[113]

In even more recent cases, the Court has further extended the rationale of its holding in *Estelle v. Gamble*, holding that prison officials have the additional obligation to ensure humane conditions for inmates at all times of incarceration, and to protect prisoners in custody from any substantial risks of harm to their health or safety.[114] In *Helling v. McKinney,* for example, a prisoner brought a cause of action under the Eighth Amendment by alleging that prison officials had, with deliberate indifference, exposed him to levels of environmental tobacco smoke that posed an unreasonable risk of serious damage to his future health.[115] The Court held for the prisoner, concluding that Eighth Amendment protection against deliberate indifference to prison health problems extends to conditions that threaten to cause health problems in the future, as well as current health risks.[116] In *Hope v. Pelzer*, an inmate filed suit after he was handcuffed to a hitching post by prison guards.[117] Hope, the inmate, had gotten into an argument with a prison guard after he was caught napping on the bus ride to a worksite.[118] Hope was subsequently handcuffed and transported back to the prison, where he was then handcuffed to a hitching post for seven hours in the sun.[119] The Court held that Hope had been subjected to cruel and unusual punishment in violation of the Eighth Amendment because the guards had knowingly subjected him to "a substantial risk of physical harm, unnecessary pain, unnecessary exposure to the sun, prolonged thirst and taunting, and a deprivation of bathroom breaks that created a risk of particular

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[110] *Id.* at 103.
[111] *Id.*
[112] *Id*.
[113] *Id*.
[114] *See, e.g*., Hope v. Pelzer, 536 U.S. 730, 737 (2002); Helling v. McKinney, 509 U.S. 25, 31-32 (1993); Wilson v. Seiter, 501 U.S. 294, 297-302 (1991).
[115] *Helling*, 509 U.S. 25, 27-28.
[116] *Id.* at 35.
[117] *Hope*, 536 U.S. at 734.
[118] *Id*.
[119] *Id*. at 734-35.

discomfort and humiliation."[120] Writing for the majority, Justice Stevens noted that, "the Eighth Amendment violation is obvious."[121]

It is no stretch to conclude that the act of shackling a pregnant prison inmate, especially during labor, childbirth, or the post-partum recovery process, constitutes a violation of the Eighth Amendment as provided by *Estelle v. Gamble*. This is especially apparent in light of *Helling v. McKinney* and *Hope v. Pelzer*. By shackling a pregnant prison inmate, a prison official is knowingly subjecting the inmate to grossly inhumane conditions, a substantial risk of harm to both the health and safety of the inmate and her child, unnecessary pain and suffering, and significant humiliation and discomfort. In the words of Justice Stevens in *Hope v. Pelzer*, the Eighth Amendment violation in cases involving the shackling of pregnant female inmates is obvious.

B. No Reasonable Penological Interest Justifies Shackling Pregnant Female Inmates

Not only does the act of shackling exhibit a deliberate indifference to a pregnant prisoner's medical needs in violation of the Eighth Amendment of the Constitution, but also there exists no competing penological interest to justify such barbaric treatment. Still, however, those resistant to banning the practice cite security interests, safety needs, and decreasing flight risks as justifications.

In *Turner v. Safley*, the Court held that prison standards, such as shackling, are subject to a "reasonableness" standard of review. The Court explained, "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[122] An analysis using the Court's framework in *Turner v. Safley* invalidates the claim that shackling is reasonably related to legitimate penological purposes.

The relevant four-part test provided by the Court in *Turner v. Safley* examines "whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns."[123] First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it.[124] Thus, a regulation cannot be sustained where the logical connection between the regulation and the asserted

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[120] *Id*. at 731.
[121] *Id*. at 738.
[122] Turner v. Safley, 482 U.S. 78, 89 (1987).
[123] *Id*. at 87.
[124] *Id*. at 89.

goal is so remote as to render the policy arbitrary or irrational.[125] Moreover, the governmental objective must be a legitimate and neutral one.[126]

Second, whether there are alternative means of exercising the right that remain open to prison inmates must be considered.[127] Where "other avenues" remain available for the exercise of the asserted right, courts should be particularly conscious of the "measure of judicial deference owed to corrections officials ... in gauging the validity of the regulation."[128]

Third, an analysis of "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally" is required.[129] The Court in *Turner v. Safley* explained, "In the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order."[130] Further, "[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials."[131]

Finally, the fourth factor involves consideration of the existence of alternatives. The Court noted that the "absence of ready alternatives is evidence of the reasonableness of a prison regulation,"[132] while "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns."[133] However, the Court warned:

> This is not a "least restrictive alternative" test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de*

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[125] *Id*. at 89-90.
[126] *Id*. at 90.
[127] *Id.*
[128] *Id*. (citation omitted).
[129] *Id*.
[130] *Id*.
[131] *Id*.
[132] *Id*.
[133] *Id*.

> *minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.[134]

The prison policy of shackling pregnant female inmates fails the *Turner v. Safley* test. First, there exists no "valid, rational connection" between the prison regulation of shackling and any legitimate governmental interest put forward to justify it. Security maintenance and flight risk are cited as the two principal justifications for shackling. While these justifications may serve as legitimate governmental interests when applied to the prototypical violent male offenders that shackling was originally adopted to control, these justifications are completely illogical when applied to pregnant female inmates. The majority of female inmates are non-violent offenders, and thus pose no security risk in the first place. Further, it is irrational to conclude that a pregnant inmate, especially one in the active labor process or one recovering from having just given birth, poses any significant threat in terms of security or flight. In the unimaginable case where such a pregnant inmate does attempt to escape, it seems far-fetched that she would be able to travel very far before being stopped. As William Schultz, executive director of Amnesty International succinctly stated, "this is the perfect example of rule-following at the expense of common sense. . . . [I]t's almost as stupid as shackling someone in a coma."[135] Thus, shackling cannot be sustained as a reasonable regulation when imposed upon pregnant female inmates, as the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.[136]

The second part of the *Turner v. Safley* test, which requires contemplation of "whether there are alternative means of exercising the right that remain open to prison inmates"[137] illustrates the unconstitutionality of shackling female prison inmates because there simply are no other alternative means offered to alleviate pregnant female inmates from giving birth while being forced to endure the barbaric and torturous practice of shackling. The lack of "other avenues" available clearly demonstrates a gross and unjustified

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[134] *Id*. at 90-91.
[135] Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES, Mar. 2, 2006, at A16.
[136] *See* Turner, 482 U.S. at 89-90.
[137] *Id.* at 90.

deference toward prison officials and, consequently, the invalidity of such a regulation.[138]

Third, "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally" must be considered.[139] The Court in *Turner v. Safley* explained, "In the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order."[140] However, the shackling of pregnant female inmates is, in fact, the perfect example of a regulation that, if abolished, will have "no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order."[141] The only ramification of abolishing the shackling of pregnant female inmate is the positive ramification of allowing her to serve her sentence without being exposed to cruel, inhumane, and dangerous treatment.

Lastly, the Court's declaration that "absence of ready alternatives is evidence of the reasonableness of a prison regulation" must be considered.[142] The Court noted that "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns."[143] This is exactly the case here. Various alternatives exist to shackling pregnant female inmates. For example, states could elect to merely supervise pregnant female inmates rather than shackle them. As stated previously, it is irrational for a state to consider a pregnant inmate a security or flight risk, especially if that inmate is in labor, giving birth, or recovering from giving birth. Further, even if a woman has a history of violence (which few female inmates have), or has ever attempted to escape before (which few female inmates have), the likelihood that supervision would not completely prevent a security breach or immediately remedy it is nominal at best.

It is clear, applying the test in *Turner v. Safley*, that shackling pregnant female inmates constitutes an invalid and unconstitutional prison regulation, as it fails to be even remotely related to legitimate penological interests.[144]

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[138] *See id*.
[139] *Id*.
[140] *Id*.
[141] *See id*.
[142] *Id*.
[143] *Id*.
[144] *See id.* at 89.

VIII. INTERNATIONAL PERSPECTIVE

Although international human rights law is not binding on the United States courts, it does act as persuasive authority. This is particularly important in the specific arena of shackling for two reasons. First, there is evidence that the United States Supreme Court has, within the past decade, given more acknowledgment and consideration to international consensus, especially in consideration of human rights issues.[145] Second, this attention is especially valuable, because if the United States does turn to the international arena for guidance on the issue of shackling, it will be met with unwavering, consistent outrage and criticism voiced by international committees, health experts, and legislatures urging the United States to immediately ban all shackling of pregnant inmates.

A. Increasing Acknowledgment of International Law and Consensus

The United States Supreme Court has just recently started to both refer to and rely upon international human rights law. This encouraging shift was first illustrated in 2003 through the Court's decision in *Lawrence v. Texas*.[146] In *Lawrence v. Texas*, the Court held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in consensual acts of sodomy in the privacy of their home.[147] The Court explained that the statute constituted a violation of the petitioners' right to privacy, impinging on their exercise of liberty interests protected by the Due Process Clause of the Fourteenth Amendment.[148]

This case was of particular importance for two reasons. First, the Court overruled its previous holding in *Bowers v. Hardwick*, in which the Court steadfastly upheld a Georgia statute criminalizing consensual sodomy.[149] In *Bowers v. Hardwick*, the Court refrained from giving much consideration to homosexuality from a human rights standpoint, and firmly invalidated the issue as unrelated to any fundamental right.[150] The Court was "quite unwilling" to confer upon

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[145] Dana L. Sichel, *Giving Birth in Shackles: A Constitutional and Human Rights Violation*, 16 AM. U. J. GENDER SOC. POL'Y & L. 223, 237 (2007).
[146] Lawrence v. Texas, 539 U.S. 558 (2003).
[147] *Id*.
[148] *Id*.
[149] Bowers v. Hardwick, 478 U.S. 186 (1986).
[150] *Id.* at 191.

homosexuals a fundamental right to engage in sodomy, insisting that none of the rights announced in the Court's prior cases dealing with family relationships, marriage, or procreation bear any resemblance to the asserted right to engage in sodomy.[151] Further, the Court harshly concluded that "to claim that a right to engage in [homosexual] conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[152] Thus, by overruling its holding in *Bowers v. Hardwick*, the Court illustrated significant progress in its consideration and acknowledgement of the progression of human rights issues, and necessary adaptation.

Even more importantly, the Court's holding in *Lawrence v. Texas* is significant due to the Court's reference to and reliance upon international human rights law and opinion in its decision. While outlining its justifications and considerations for overturning its previous ruling in *Bowers v. Hardwick*, the Court referred to the parallel holding of the European Court of Human Rights in *Dudgeon v. United Kingdom*, in which the European Court of Human Rights struck down a Northern Ireland law that prohibited consensual homosexual conduct.[153] The Court explained, "To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v* [sic] *United Kingdom*."[154] The Court continued:

> Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.[155]

A second illustration of the United States Supreme Court's encouraging recognition and reliance upon international consensus and

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[151] *Id.* at 190-91.
[152] *Id.* at 194.
[153] Lawrence, 539 U.S. at 573, 576-77 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981)).
[154] *Id.* at 576-77.
[155] *Id*. at 576-77.

human rights law came in *Roper v. Simmons*,[156] decided in 2005. The Court in *Roper v. Simmons* held that the Eighth and Fourteenth Amendments prohibit execution of individuals who were under 18 years of age at time of their capital crimes.[157] Like the holding in *Lawrence v. Texas*, the Court's holding in *Roper v. Simmons* is important for two reasons.

First, by holding that the Eighth Amendment's prohibition of cruel and unusual punishment forbids the imposition of the death penalty upon offenders who were juveniles at the time of the crime's commission, the Court abrogated its previous ruling in *Stanford v. Kentucky*, which is illustrative of progress. In *Stanford v. Kentucky*, the Court held that imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age did not violate evolving standards of decency and thus did not constitute cruel and unusual punishment under the Eighth Amendment.[158] Writing for the majority, Justice Scalia declined to take international consensus into consideration, and focused his analysis solely on the Constitution and precedent of United States courts.[159] Justice Brennan, however, with whom Justice Marshall, Justice Blackmun, and Justice Stevens joined, pointed to persuasive international law and opinion in his dissent. Justice Brennan insisted that although the majority seemed determined to root its holding in constitutional grounds, "indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis."[160] Justice Brennan explained:

> Many countries, of course – over 50, including nearly all in Western Europe – have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason. Twenty-seven others do not in practice impose the penalty. Of the nations that retain capital punishment, a majority – 65 – prohibit the execution of juveniles. Sixty-one countries retain capital punishment and have no statutory provision exempting juveniles, though some of these nations are ratifiers of international treaties that do prohibit the execution of juveniles. Since 1979, Amnesty International has recorded only eight executions of

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[156] Roper v. Simmons, 543 U.S. 551 (2005).
[157] *Id.*
[158] Stanford v. Kentucky, 492 U.S. 361, 380 (1989).
[159] *See id.* at 364-380.
[160] *Id*. at 389.

> offenders under 18 throughout the world, three of these in the United States. The other five executions were carried out in Pakistan, Bangladesh, Rwanda, and Barbados. In addition to national laws, three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties. Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.[161]

Although the dissent did not have an effect on the holding of *Stanford v. Kentucky* in 1989, it most certainly grabbed some attention, and possibly influenced Justice Kennedy's majority opinion in *Roper v. Simmons* in 2005.

Accordingly, the second reason that *Roper v. Simmons* is significant in that, unlike in *Stanford v. Kentucky*, the majority relied heavily upon international consensus in its holding, thus securing international human rights law's credibility in the United States Supreme Court's decision-making process. In its opinion, the Court took notice of "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[162] Justice Kennedy explained:

> [O]nly seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.[163]

Further, the Court explained:

> It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young

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[161] *Id.* at 389-90 (internal citations omitted).
[162] *Roper*, 543 U.S. at 575.
[163] *Id.* at 577 (internal citations omitted).

> people may often be a factor in the crime. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.[164]

The Court's decisions and consideration in both *Lawrence v. Texas* and *Roper v. Simmons* are encouraging, as they illustrate the Supreme Court's increasing acknowledgment of international human rights law and international consensus as persuasive authority. This shift is especially valuable in regards to the shackling epidemic in the United States, because if the United States does turn to the international arena for guidance on the issue of shackling, it will find unwavering, consistent support for the abolishment of the barbaric practice.

B. International Opposition

In addition to constituting a violation of the United States Constitution, the shackling of pregnant female inmates is also a clear violation of various international human rights laws and conventions, which afford broad protections to pregnant women. Most specifically, the United States' shackling of pregnant female inmates violates two major international treaties: the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[165] and the International Covenant on Civil and Political Rights,[166] both of which are ratified by the United States.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, also known as CAT, was adopted by the General Assembly of the United Nations on December 10, 1984.[167] The Convention entered into force on June 26, 1987, and has been ratified by 151 nations, including the United States, which ratified the treaty in 1994.[168] Thus, it is both ironic and concerning that the United State continues to employ the practice of shackling

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[164] *Id.* at 578 (internal citations omitted).
[165] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51, at 197 (1984).
[166] International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6313, at 52 (1966).
[167] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51, at 197 (1984).
[168] Office of the U.N. High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (July 14, 2006).

pregnant female inmates, as CAT implicitly prohibits such action. In Article I, Section I of CAT provides:

> "[T]orture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[169]

Furthermore, Article 16 of CAT provides that actions which fall short of torture may still constitute cruel, inhuman, or degrading treatment,[170] thus providing a catch-all provision. The United Nations Committee Against Torture serves as the monitoring body of CAT.[171] The Committee is a United Nations body of ten independent experts that meets twice per year in Geneva, Switzerland to monitor the implementation of CAT and review State compliance.[172]

Similarly, the International Covenant on Civil and Political Rights, known as ICCPR, was adopted by the United Nations General Assembly on December 16, 1966, and entered into force on March 23, 1976.[173] ICCPR currently has 74 signatories and 167 parties, including the United States, which ratified the treaty in 1992.[174] ICCPR has five core provisions, outlining individual rights to physical integrity, liberty and security of person, procedural fairness and rights

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[169] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51, at 197 (1984).
[170] *Id.*
[171] *Committee Against Torture: Monitoring the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS HUMAN RIGHTS, http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIntro.aspx (last visited January 1, 2015).
[172] *Id.*
[173] International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6313, at 52 (1966).
[174] Office of the U.N. High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (July 14, 2006).

of the accused, individual liberties, and political rights.[175] The United Nations Human Rights Committee serves as the monitoring body of ICCPR.[176] The United Nations Human Rights Committee is a United Nations body of eighteen independent experts that meets approximately three times per year in Geneva, Switzerland or New York to review compliance of member states with ICCPR.[177] The members of the Committee, who must be of high moral character and recognized competence in the field of human rights, are elected by the member states on an individual basis.[178]

Since 2000, various complaints have been submitted to both governing Committees, drawing attention to the United States' violations of the two treaties through the practice of shackling pregnant female inmates. Two reports stand out in significance. In May of 2000, Amnesty International filed a complaint with the United Nations Committee against Torture, reporting that in the United States, 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."[179] The report led to international condemnation of the practice, and criticism of the United States for their violation of the treaty.[180] The United Nations Committee Against Torture expressly stated, "The Committee is concerned at the treatment of detained women in the State party, including gender-based humiliation and incidents of shackling women detainees during childbirth" as prohibited by Article 16.[181] The Committee continued, "The State party should adopt all appropriate measures to ensure that women in detention are treated in conformity with international standards."[182] The Human Rights Committee issued concluding observations directed at the United States, reiterating its position that

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[175] *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6313, at 52 (1966).
[176] *Human Rights Committee: Introduction: Monitoring Civil and Political Rights*, UNITED NATIONS HUMAN RIGHTS, http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx (last visited January 1, 2015).
[177] *Id.*
[178] *Human Rights Committee: Membership*, UNITED NATIONS HUMAN RIGHTS, http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx (last visited January 1, 2015).
[179] AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA, AMR 51/061/2006, A BRIEFING FOR THE U.N. COMMITTEE AGAINST TORTURE (May 2000).
[180] U.N. Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America,* U.N. Doc. CAT/C/USA/CO/2 (2006).
[181] *Id*. at 33.
[182] *Id.*

the United States should immediately "prohibit the shackling of detained women during childbirth" in order to reach compliance with the treaty and international human rights laws.[183]

The United States was again on the receiving end of harsh criticism after another complaint was filed in 2006. This time, the complaint was filed by the International Gender Organization.[184] The United Nations Committee Against Torture was more specific in its address, dedicating an entire section to its concerns regarding the United States' shackling of pregnant inmates during childbirth.[185] The Committee explained, "The Committee is concerned at the treatment of detailed women in the State part, including gender-based humiliation and incidents of shackling women detainees during childbirth" in violation of Article 16.[186] "The State part should adopt *all appropriate measures* to ensure that women in detention are treated in conformity with international standards."[187]

As evidenced above, the United States is violating women's rights on an international scale by shackling incarcerated pregnant women, and is being repeatedly called out for its barbaric actions by numerous international authorities and experts. The United States must immediately abolish the practice in order to comply with its obligations under various human rights treaties.

IX. PROMISING PROGRESS

Over the past decade, human rights advocates have achieved significant headway in drawing attention to the issue of shackling pregnant female inmates and initiating policy change at the federal and state levels. Amnesty International's report in 2000 constituted the first of its kind, publically bringing the United States under fire for its barbaric, but disturbingly common practice of shackling pregnant female inmates.[188] Amnesty International's report essentially opened

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[183] U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: United States of America*, 87th Sess., U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (2006).
[184] International Gender Organization, *Women in the Criminal Justice System Longitudinal Systematic 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).
[185] U.N. Human Rights Committee, *Conclusions and Recommendations of the Committee Against Torture*, U.N. Doc. CAT/C/USA/CO/2 (2006).
[186] *Id*. at 33.
[187] *Id*. (emphasis added).
[188] *See* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA, AMR 51/061/2006, A BRIEFING FOR THE U.N. COMMITTEE AGAINST TORTURE (May 2000).

the door for what has now become consistent condemnation, being the very first to avoid tip-toeing around the issue, demanding immediate resolution, and declaring the United States' actions "a direct violation of international standards."[189]

This report has led to anti-shackling laws in numerous states. Illinois, California, Vermont, and Rhode Island have all passed anti-shackling legislation. In 2000, the Illinois state legislature amended the state's Unified Code of Corrections by adding an anti-shackling provision.[190] The provision expressly states:

> Pregnant female committed persons. Notwithstanding any other statute, directive, or administrative regulation, when a pregnant female committed person is brought to a hospital from an Illinois correctional center for the purpose of delivering her baby, no handcuffs, shackles, or restraints of any kind may be used during her transport to a medical facility for the purpose of delivering her baby. Under no circumstances may leg irons or shackles or waist shackles be used on any pregnant female committed person who is in labor. Upon the pregnant female committed person's entry to the hospital delivery room, a correctional officer must be posted immediately outside the delivery room. The Department must provide for adequate personnel to monitor the pregnant female committed person during her transport to and from the hospital and during her stay at the hospital.[191]

In 2005, California followed in Illinois' footsteps by enacting an anti-shackling provision. California's provision, outlined in a five-part provision of the Penal Code, succinctly provides, "An inmate known to be pregnant or in recovery after delivery shall not be restrained by the use of leg irons, waist chains, or handcuffs behind the body."[192]

A few state legislatures have implemented shackling provisions, but fall short of calling for the complete abolishment of the practice upon pregnant female inmates. For example, in 2012, Rhode Island's legislature implemented an extensive five-part provision in its

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[189] AMNESTY INTERNATIONAL, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN 22 (2001).
[190] 730 ILL. COMP. STAT. 5/3-6-7.
[191] *Id.*
[192] CAL. PENAL CODE § 3407(a).

Administrative Code. The provision prohibits the use of leg or waist restraints on an inmate during labor and delivery by providing, "Under no circumstances can leg or waist restraints be used on any detainee or inmate during labor and delivery."[193] However, handcuffs are permitted as restraining mechanisms during labor and delivery, and leg and waist restraints are permitted both prior to labor and after the birth of the child if the inmate poses "(1) [a]n immediate and serious threat of physical harm to herself, staff or others; or (2) [a] substantial flight risk and cannot be reasonably contained by other means."[194]

Progress has also been achieved in United States Circuit Courts. In Shawanna Nelson's case, *Nelson v. Correctional Medical Services*, the en banc United States Court of Appeals for the Eighth Circuit made history when it became the first appellate court to finally hold that shackling a female inmate during the labor and delivery processes, in the absence of clear and individualized safety and security justifications, constitutes a violation of one's "clearly established" Eighth Amendment protection against cruel and unusual punishment.[195] The en banc United States Court of Appeals for the Eighth Circuit "determined that there is sufficient evidence in the record to permit a reasonable fact-finder to determine that Turensky's actions [in shackling Nelson] violated the Eighth Amendment . . . ."[196] Additionally, Juana Villegas' case, *Villegas v. Metro. Gov't of Nashville*, continues to be litigated in the Sixth Circuit with encouraging progress.[197] In April of 2011, a United States District Court granted summary judgment to Ms. Villegas, leading a jury to award her $200,000 in damages after a trial.[198] In March of 2013, however, the United States Court of Appeals for the Sixth Circuit reversed the District Court's ruling and remanded the case back for further proceedings due to the existence of material questions of fact.[199]

Despite the noted progress above, these achievements and the extraordinary efforts of activists and attorneys unfortunately still fail to keep pace with the exorbitant rate at which females are entering the United States' criminal justice system, and thus the number of incarcerated pregnant women forced to endure shackling continues to grow.

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[193] R.I. CODE R. 17-1-19:III.
[194] *Id*.
[195] Nelson v. Corr. Med. Servs., 583 F.3d 522 (8th Cir. 2009).
[196] *Id*. at 531.
[197] Villegas v. Metro. Gov't of Nashville, 709 F.3d 563 (6th Cir. 2013).
[198] *Id.* at 566.
[199] *Id.* at 578.

X. CONCLUSION

In failing to immediately implement federal legislation banning the shackling of pregnant female inmates, the United States is allowing a practice to continue that is not only dangerous, barbaric, and inhumane, but also constitutes a violation of the United States Constitution's Eighth Amendment, as well as international human rights laws and treaties. No penological interests can be classified as legitimate justifications for the continued shackling of these female prisoners, especially in light of the excessive medical dangers that shackling imposes upon both the mother and her child. Although advocates and some state legislatures have achieved encouraging progress, these efforts are not enough, and the United States remains an outlier in its cruel practices. The United States needs to follow the advice and recommendations of its international allies, and abandon the grossly inhumane practice of shackling pregnant female inmates.