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## Birthing Barbarism: The Unconstitutionality of Shackling Pregnant Prisoners

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# BIRTHING BARBARISM: THE UNCONSTITUTIONALITY OF SHACKLING PREGNANT PRISONERS

CLAIRE LOUISE GRIGGS\*

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## I. INTRODUCTION

While public opinion largely dictates that shackling is too barbaric for civilized society, it happens with frightening frequency.<sup>1</sup> A majority of states shackle female prisoners during childbirth; forty states allow the shackling of female prisoners during labor, delivery, and post-partum recovery.<sup>2</sup> Some women give birth alone in their cells, despite statutes dictating that these women must receive medical attention.<sup>3</sup> While shackling is illegal in several states, such as Illinois, California, and New York, these efforts are not sufficient because far too many states legalize the practice.<sup>4</sup> Further, even in states where shackling is illegal, waves of lawsuits claiming that shackling practices continue are prevalent despite the laws banning the practice.<sup>5</sup>

However, there are encouraging times ahead, as states such as Tennessee and Georgia are drafting legislation prohibiting shackling.<sup>6</sup> Recently, in

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1. See Editorial, *One Protection for Prisoners*, N.Y. TIMES, Oct. 14, 2009, at A30, available at [http://www.nytimes.com/2009/10/14/opinion/14wed3.html?\\_r=1](http://www.nytimes.com/2009/10/14/opinion/14wed3.html?_r=1) (defining shackling as the practice of placing women in leg shackles, handcuffs, and a belly chain with a box that connects the handcuffs and belly chain).

2. See Colleen Mastony, *Childbirth in Chains*, CHI. TRIB., July 18, 2010, [http://articles.chicagotribune.com/2010-07-18/news/ct-met-shackled-mothers-20100718\\_1\\_shackles-handcuffs-labor](http://articles.chicagotribune.com/2010-07-18/news/ct-met-shackled-mothers-20100718_1_shackles-handcuffs-labor) (contending that most sheriff officials consider labor to be only the moments immediately before birth). *But cf.* Reviewed by Louise Chang MD, *Normal Labor and Delivery Process*, WEBMD, Feb. 1, 2010, at 1, available at <http://www.webmd.com/baby/guide/normal-labor-and-delivery-process> (considering labor to begin whenever contractions start, known as the latent stage).

3. See Rachel Roth, *Pregnant, in Prison and Denied Care*, THE NATION, Dec. 21, 2009, available at <http://www.thenation.com/article/pregnant-prison-and-denied-care> (recounting various situations in which prison officials denied inmates proper medical attention during labor).

4. See generally AMNESTY INT’L USA, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN A STATE-BY-STATE SURVEY OF POLICIES AND PRACTICES IN THE USA (2001) [hereinafter AMNESTY INT’L USA, ABUSE OF WOMEN IN CUSTODY] (giving state by state reports of statutes outlining shackling policies).

5. See Mastony, *supra* note 2 (reporting that since 2008, more than twenty former female inmates have filed lawsuits against the Cook County Sheriff’s office alleging incidents of shackling while giving birth).

6. See Jane E. Allen, *Shackled: Women Behind Bars Deliver in Chains Federal Prisons Ban Practice, But 40 States Still Allow Shackling of Incarcerated Pregnant*

the landmark decision *Nelson v. Correctional Medical Services*, the United States Court of Appeals for the Eighth Circuit declared shackling unconstitutional and in violation of the Eighth Amendment.<sup>7</sup>

This Comment argues that pro-shackling laws are unconstitutional, violating the Eighth Amendment's prohibition against cruel and unusual punishment because shackling not only causes excessive physical pain, it deprives prisoners of a constitutionally guaranteed level of medical care.<sup>8</sup> Part II discusses the history of shackling, its prevalence and health implications, and the statutory medical standards of care for prisoners.<sup>9</sup> Part III argues that states that currently allow shackling are employing what should be illegal methods in violation of the U.S. Constitution.<sup>10</sup> Part IV discusses how other states should implement anti-shackling legislation.<sup>11</sup> Finally, Part V concludes that the *Nelson* Court and state statutes prohibiting shackling could provide a foundation for courts interpreting state statutes that permit shackling to find this practice unconstitutional.<sup>12</sup>

## II. BACKGROUND

### A. America's Shackling Epidemic

The majority of female inmates shackled during labor are non-violent offenders and are not considered flight risks.<sup>13</sup> Samantha L., a Wisconsin

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*Women*, ABC NEWS MED. UNIT, Oct. 21, 2010, at 3, available at <http://abcnews.go.com/Health/WomensHealth/pregnant-shackled-women-bars-deliver-chains/story?id=11933376&page=1> (noting that there are still some legislative setbacks, like in California where Gov. Schwarzenegger vetoed a statute that would have extended the prohibition on shackling throughout an inmate's pregnancy).

7. See U.S. CONST. amend. VIII (declaring it illegal to inflict cruel or unusual punishment). See generally 583 F.3d 522 (8th Cir. 2009) (en banc) (holding that shackling inflicts cruel and unusual punishment).

8. See *Nelson v. Corr. Med. Servs.*, 583 F.3d at 531-32 (holding that shackling is cruel and unusual punishment under the Constitution); see also CAL. GOV'T CODE § 845.6 (West 2011) (providing a statutory minimum standard of care for prisoners); D.C. CODE § 24-211.02 (2011) (providing a minimum standard of care for prisoners); 745 ILL. COMP. STAT. ANN. 10/4-105 (West 2011) (providing a statutory minimum standard of care for prisoners); N.Y. CORRECT. LAW § 508 (McKinney 2011).

9. See *infra* Part II (outlining that at the state level, no legal or medical justification exists for the use of shackling).

10. See *infra* Part III (arguing that states allowing shackling should recognize that it violates human decency, and adopt the legislative intent of states with anti-shackling legislation).

11. See *infra* Part IV (arguing that states like Tennessee and Georgia should follow the California and New York model to ensure that their shackling legislation is enforced).

12. See *infra* Part V (applying the standards set forth in *Estelle* and *Nelson*, stating that shackling violates the Eighth Amendment).

13. See Allen, *supra* note 6 (noting that the majority of women in prison today are there for drug offenses or other non-violent crimes).

inmate, gave birth with her ankles shackled eighteen inches apart.<sup>14</sup> Her shackles remained in place until moments before the actual birth of her child.<sup>15</sup>

Inmate Latiana W. is one of several suing the Cook County, Illinois, Sheriff's Office for using restraints on prisoners in labor, contrary to Illinois law.<sup>16</sup> Despite multiple objections from her attending physician, the corrections officer present during Latiana's labor refused to remove the restraints.<sup>17</sup> As a result, her physician could not administer an epidural.<sup>18</sup> Being shackled also hindered her childbirth, as Latiana could not properly position her legs to push out the placenta.<sup>19</sup>

Another horrifying experience happened in Florida's Collier County Jail.<sup>20</sup> In this case, Joan repeatedly pleaded for medical help because she began leaking amniotic fluid, but officers denied and ignored her.<sup>21</sup> By the time she finally received an ultrasound—two weeks later—her doctor informed her that she had leaked out all of her amniotic fluid and, as a result, her fetus's skull had collapsed.<sup>22</sup>

It is unclear exactly how and why the practice of shackling originated, but many historians believe the practice began in the 1970s when criminal justice facilities began adopting gender-neutral policies.<sup>23</sup> The main justifications for shackling are maintaining security and decreasing flight

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14. Press Release, Amnesty Int'l USA, States Policies Fail to Protect Women From Sexual Misconduct in Prison, Allow Shackling During Pregnancy & Labor, Amnesty International Finds (Mar. 2, 2006), available at <http://www.commondreams.org/cgi-bin/print.cgi?file=/news2006/0302-06.htm> (stating how doctors required that Samantha pace for several hours while in labor with her ankles shackled leaving them raw).

15. *See id.* (recounting when the corrections officer permanently appointed to stand guard in her room finally removed the shackles).

16. *See* Mastony, *supra* note 2 (revealing how Latiana is one of the twenty inmates to come forward since 2008 to accuse Cook County of continuing to use these practices contrary to Illinois law).

17. *See id.* (stating how the corrections officer removed the shackles only ten minutes before the actual birth of Latiana's son and then replaced them immediately afterward).

18. *See id.* (describing the unnecessary and excessive pain Latiana experienced during her labor).

19. *See id.* (noting how the immediate replacement of the shackles resulted in Latiana not being able to safely finish her delivery).

20. *See* Roth, *supra* note 3 (illustrating the total lack of regard for proper inmate care through repeatedly denied requests for medical attention).

21. *See id.* (showing how in this case, the prisoner did not even have the luxury of being shackled to a bed).

22. *See id.* (recounting that continued denial of medical care on behalf of jail officials, even after diagnosis of fetal death, caused staggering increase in threat of septic shock and death).

23. *See* Mastony, *supra* note 2 (noting that because male prisoners are shackled during any type of hospitalization, including surgery, this practice was then applied to female prisoners during childbirth).

risk.<sup>24</sup> However, the justifications for shackling pale in comparison to the severe damage and degradation it causes.<sup>25</sup> What is clear is that shackling affects a significant amount of women.<sup>26</sup> The shackling policies themselves hearken back to an era that considered convicted women morally subhuman and especially condemned any evidence of sexual activity.<sup>27</sup> Many jurisdictions failed to modify these restraint policies to accommodate pregnancy.<sup>28</sup> Shackling policies that consider the differences between male and female inmates recognize that the shackling of female inmates is less necessary.<sup>29</sup> For example, women are more likely than men to be serving time for a drug offense, and less likely to be serving time for a violent crime.<sup>30</sup>

### B. Shackling on a Case by Case Basis

#### I. Women Prisoners v. District of Columbia

A group of female prisoners sued the District of Columbia prisons in *Women Prisoners v. District of Columbia*, alleging widespread Eighth Amendment violations regarding the conditions of confinement for female inmates.<sup>31</sup> The D.C. Circuit Court reaffirmed that the only deprivations that triggered Eighth Amendment scrutiny “are deprivations of essential human needs.”<sup>32</sup> The court amended the trial court’s ruling that shackling

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24. *See id.* (noting that women in labor are a much lower safety and flight risk than other prisoners).

25. *See* Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES, Mar. 2, 2006, [http://www.nytimes.com/2006/03/02/national/02shackles.html?\\_r=1&scp=1&sq=Adam+Liptak&st=nyt](http://www.nytimes.com/2006/03/02/national/02shackles.html?_r=1&scp=1&sq=Adam+Liptak&st=nyt) (arguing that shackling laws that seek to protect security officers from a woman in labor, who has no previous history of violence, is not a legitimate justification for shackling her).

26. *See id.* (noting an estimated five percent of women incarcerated in state prisons and three percent of women incarcerated in federal prisons are pregnant upon admission, resulting in approximately 2,000 births per year).

27. *See* L. MARA DODGE, WHORES AND THIEVES OF THE WORST KIND: A STUDY OF WOMEN, CRIMES, AND PRISONS, 1835-2000, 30 (2002) (describing female penitentiary inmates as unredeemable).

28. *See* Matony, *supra* note 2 (aligning the origin of shackling with the creation of gender neutral policies resulting in the shackling of both male and female prisoners when being transported to a hospital regardless of their condition).

29. *See* DODGE, *supra* note 27, at 30 (noting that women have shorter, less violent criminal histories than men; while more than half of male prisoners have committed two or fewer offenses, compared to two-thirds of female prisoners); *see also* Mastony *supra* note 2 (noting that most women in Cook County are in jail for nonviolent crimes).

30. *See id.* (noting that men are twice as likely as women to be violent recidivists).

31. *See generally* 93 F.3d 910, 913 (D.C. Cir. 1996) (alleging violations of various statutory and constitutional provisions such as sexual abuse of prisoners and inadequate medical care).

32. *See id.* at 928 (quoting *Inmates of Occoquan v. Barry*, 844 F.2d 828, 836 (D.C.

violates the Eighth Amendment, and rejected the provision that prisons have written protocols regarding the use of restraints on pregnant women.<sup>33</sup> While the District of Columbia Department of Corrections' (DOC) protocol supposedly prohibits the use of restraints during labor, delivery, and recovery, unless the woman has demonstrated a history of violent behavior, the District of Columbia (D.C.) has no actual legislation limiting the use of shackling on pregnant inmates.<sup>34</sup> Thus, pursuant to *Women Prisoners* and current law, D.C. has some limits on the practice of shackling, but does not ban the practice outright.<sup>35</sup>

## 2. Nelson v. Correctional Medical Services

More recent is the notable anti-shackling case of *Nelson v. Correctional Medical Services*, where the court strengthened constitutional protections against shackling methods.<sup>36</sup> The pregnant prisoner in *Nelson* entered the Arkansas prison system on June 3, 2003, for credit fraud.<sup>37</sup> On September 20, 2003, she started experiencing labor pains; upon arrival at the hospital, the officer shackled her to a wheelchair and wheeled her to the maternity ward.<sup>38</sup> At more than seven centimeters dilated, the officer then shackled Nelson to a bed.<sup>39</sup> The Eighth Circuit held that the law "clearly established" that shackling a woman prisoner during labor and delivery violated the Eighth Amendment, imposing cruel and unusual punishment.<sup>40</sup> The court also discussed the standard of confinement and medical care, and found that the security officer acted with deliberate indifference.<sup>41</sup> The

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Cir. 1988)).

33. *See id.* at 932, 944 (vacating an order requiring prison officials to develop a written protocol for prenatal care, reasoning that the District Court did not have supplemental jurisdiction as to this issue).

34. *See* AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY, *supra* note 4, at 321 (reporting policies in D.C. based on DOC responses to Amnesty International's surveys).

35. *See* Movement Builds to Stop Shackling Pregnant Prisoners, CRIME REP., Aug. 31, 2009, <http://thecrimereport.org/2009/08/31/movement-builds-to-stop-shackling-pregnant-prisoners> (noting that suggested limits certainly do not carry the same effect as actual legislation).

36. *See generally* 583 F.3d 522 (8th Cir. 2009) (en banc) (detailing the case of Shawanna Nelson).

37. *See id.* at 522 (noting that Nelson was incarcerated for a non-violent offense).

38. *See id.* at 525-26 (noting that the officer later testified that Nelson remained shackled despite the fact that the officer never felt threatened by her or thought Nelson presented a escape risk).

39. *See id.* at 526 (noting that when a cervix has dilated seven centimeters that is well into the final stages of labor).

40. *See id.* at 522 (assuming no security justification existed for the restrains such as a history of violence).

41. *See id.* at 529 (noting how an Eighth Amendment claim of deliberate indifference contains both a subjective and objective component).

court further noted that either interference with care, or infliction of unnecessary suffering establishes deliberate indifference in medical care cases in violation of the Eighth Amendment.<sup>42</sup>

### C. *The Health Implications of and Justifications for Shackling*

Shackling practices are degrading, barbaric, humiliating, and life threatening to both mother and child.<sup>43</sup> Pregnant women are already more prone to tripping and falling because they have a different center of gravity: shackling their arms or ankles, therefore increases the risk of them falling on their stomachs.<sup>44</sup> In addition, labor and delivery are extremely unpredictable and waiting for a guard to remove a prisoner's shackles can have dire consequences.<sup>45</sup> For example, it is important that the delivering physician can quickly move and manipulate the mother to avoid potentially life-threatening emergencies.<sup>46</sup> In *Nelson*, the prisoner suffered a hip dislocation and an umbilical hernia directly resulting from the shackles that prevented movement of the prisoner's legs.<sup>47</sup>

### D. *Medical Standards of Care for Prisoners*

Several states have enacted legislation that prohibits shackling.<sup>48</sup> In 2000, Illinois passed legislation prohibiting the use of leg irons or shackles or waist shackles on any pregnant prisoner in labor.<sup>49</sup> California followed in 2006, enacting a statute banning shackling unless it is strictly necessary for the safety of officers and the public.<sup>50</sup> In 2009, New York similarly

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42. *See id.* at 532 (noting that the determination of interference with medical care, or the infliction of unnecessary suffering is an issue solely determined by the evidence in a specific case).

43. *See Allen, supra* note 6 (stating that shackling not only impedes a safe birth, but can cause immediate physical pain like raw ankles or wrists).

44. *See id.* (noting the potential for serious damage to the baby if the mother falls on her stomach).

45. *See id.* (listing consequences including, dropping of a baby's heart rate, prohibiting the mother to change position to increase blood flow, or impeding a timely emergency c-section).

46. *See Nelson*, 583 F.3d at 529 (explaining that shackling is inherently dangerous to both mother and child).

47. *See id.* at 526 (stating that shackling caused a severe amount of pain and requiring additional surgery for both injuries).

48. *See AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY, supra* note 4, at 13 (identifying Illinois, as the first, and New York, as the most recent, states to pass such legislation).

49. *See* 55 ILL. COMP. STAT. ANN. 5/3-15003.6 (West 2011) (prohibiting the use of shackles during the transportation of a female prisoner prior to delivering a baby).

50. *See* CAL. PENAL CODE § 6030 (West 2011) (establishing standards of health for pregnant women as well, such as a balanced diet and prenatal health care provided by a doctor).

banned the practice.<sup>51</sup>

There exists no shortage of instances where officers deny pregnant inmates proper medical attention when the prisoners alert correctional officers that they are in labor.<sup>52</sup> The Illinois code regarding failure to provide medical care to prisoners limits the liability of the public entity, except where the employee knows that a prisoner is in need of medical care and wantonly disregards the need.<sup>53</sup> The statute strictly states that an employee observing that a prisoner is in need of immediate medical care must take reasonable action to summon such care.<sup>54</sup> The California code is almost identical, providing that an employee is liable only if they know or have reason to know that a prisoner is in need of care and fail to try and provide such care.<sup>55</sup> New York provides that it is within the discretion of the sheriff to determine if an inmate requires outside medical attention and if that outside treatment is necessary.<sup>56</sup> Finally, the D.C. code specifies that the Department of Corrections shall have the power to provide for an inmate's proper treatment and care.<sup>57</sup>

Case law dictates the entitlement of inmates to specific standards of care.<sup>58</sup> In *Estelle v. Gamble*, the Supreme Court held that deliberate indifference to a prisoner's serious condition or injury constitutes cruel and unusual punishment.<sup>59</sup> The Court clearly held that the government has an obligation to provide medical care to anyone incarcerated for the purpose

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51. See N.Y. CORRECT. LAW § 611 (McKinney 2011) (providing the most recently drafted anti-shackling legislation).

52. See, Mastony, *supra* note 2 (stating how inmates are often met with distrust and disbelief when they inform officers they are pregnant).

53. See 745 ILL. COMP. STAT. ANN. 10/4-105 (West 2011) (applying this standard to the case of Latiana Watson where the correctional officer arguably knew that Watson needed medical care and that the shackles were impeding the proper administration of medical care, the officer could be found to have willfully and wantonly failed to take reasonable action by removing the shackles).

54. See *id.* (noting that an employee who disobeys the requirement to summon medical care is liable for injury proximately caused by lack of medical attention).

55. See CAL. GOV'T CODE § 845.6 (West 2011) (applying persuasive authority such as the California statute, to a case such as that of Joan S. in Wisconsin, the correctional officers could be held liable for their blatant disregard for the health of a prisoner if Wisconsin were to adopt shackling legislation).

56. See N.Y. CORRECT. LAW § 508 (requiring that in-prison treatment is insufficient to treat the prisoner).

57. See D.C. CODE § 24-211.02 (2011) (applying this standard to any case where shackling or lack of medical attention interferes with the safety and efficiency of childbirth).

58. See *generally* *Estelle v. Gamble*, 429 U.S. 97 (1976) (holding that the Eighth Amendment ensures prisoners a minimum standard of medical care).

59. See *id.* at 97 (stating that while the Court ultimately found that deliberate indifference was not present, it did set forth a strict legal standard that prison officials cannot willfully deny prisoners care).

of punishment.<sup>60</sup> The Court based the government's obligation to provide medical care on an evolving standard of human decency that it says is the mark of a progressing and maturing society.<sup>61</sup> The Court further held that deliberate indifference to the serious medical needs of prisoners is an "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment.<sup>62</sup>

### III. ANALYSIS

#### *A. Shackling Deprives Prisoners of Their Constitutionally Guaranteed Level of Medical Care Under Estelle v. Gamble.*

Inmates still maintain constitutional rights while in prison.<sup>63</sup> Prisoners have an unalienable constitutional right to medical care.<sup>64</sup> The willful disregard of an inmate's medical needs violates the Eighth Amendment.<sup>65</sup> In *Estelle*, the Supreme Court explained that the acts or omissions depriving an inmate of medical care must be sufficiently harmful so as to show deliberate indifference to serious medical needs in order to be unconstitutional.<sup>66</sup> This deliberate indifference constitutes a willful disregard of an inmate's medical needs.<sup>67</sup> Perhaps most notably, the *Estelle* Court concluded that the deliberate indifference standard applies where a prison guard intentionally denies or delays access to medical care, or intentionally interferes with the treatment a prisoner is prescribed.<sup>68</sup>

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60. *See id.* at 103 (stating that in the most extreme cases lack of attention to these medical needs can actually produce physical torture or lingering death, and in less severe cases may result in pain and suffering).

61. *See id.* at 102 (citing *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)) (stating that the elements of this standard are broad and idealistic civilized standards, such as dignity, humanity, and decency).

62. *See id.* at 104 (noting that this standard holds true whether the indifference is manifested by a prison doctor in response to a prisoner's needs, or by the prison guards intentionally denying or delaying access to medical care).

63. *See Turner v. Safley*, 482 U.S. 78, 95 (1987) (holding that the status of "prisoner" curbs some constitutional rights in the interest of legitimate objectives such as deterrence of crime, rehabilitation, and internal security and order).

64. *See Estelle*, 429 U.S. at 103 (noting that denying an inmate medical care could result in pain and suffering which would not serve a legitimate penological purpose).

65. *See id.* (holding that serious medical needs of prisoners cannot be ignored under the Eighth Amendment).

66. *See id.* at 106 (stating that the Court is applying the Eighth Amendment conditions of confinement standard of deliberate indifference).

67. *See id.* (reasoning that deliberate indifference and willful disregard are both cruel and unusual, and therefore synonymous for the purposes of medical care under the Eighth Amendment).

68. *See id.* at 104 (noting that the infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law).

Essentially, *Estelle* provides an undeniable anti-shackling standard construed pursuant to the Constitution.<sup>69</sup> An example of a flagrant violation of the standard set forth in *Estelle* is the case of nineteen-year-old Terra K., who pounded on the door to her cell as she went into labor, but prison guards ignored her and she ultimately gave birth alone in her cell.<sup>70</sup>

This violates *Estelle* because the prison guards deliberately denied the inmate medical care when she clearly had extremely delicate and complicated medical needs.<sup>71</sup> Prison guards intentionally interfered with that inmate's treatment by ignoring her cries that she was in labor and denied her access to medical care by keeping her locked in her cell.<sup>72</sup> While the case of Terra K. may not be facially unconstitutional under the standard set forth in *Estelle*, it violates the Eighth Amendment, because prison guards inflicted cruel and unusual punishment by denying Terra K. access to medical care.<sup>73</sup>

Another example of a constitutional violation is the previously mentioned case of Joan S.<sup>74</sup> By the time prison guards actually allowed Joan access to medical care, her doctor informed her that her fetus's skull had collapsed.<sup>75</sup> Prison guards violated Joan's Eighth Amendment right, as they delayed taking her to the hospital and her acquisition of proper medical attention.<sup>76</sup> Prison guards violated the standard set forth in *Estelle* entitling prisoners to medical care by forcing Joan to carry her dead child for several days, an obvious health emergency that requires urgent medical attention.<sup>77</sup>

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69. *See id.* (noting that so long as the shackling of a prisoner is not an accident, any time that shackling of a prisoner interferes with, denies, or delays a pregnant inmate's access to medical care, under *Estelle*, it is a violation of the Eighth Amendment).

70. *See* Roth, *supra* note 3 (recounting the case of an inmate in Dubuque County Jail in Iowa where no one noticed her giving birth).

71. *See generally Estelle*, 429 U.S. at 104 (noting that it is a clear mark of human decency—which the Court lays out as a necessary element of determining deliberate indifference—to render assistance to a woman in labor).

72. *See id.* (noting that prisoners cannot care for themselves by reason of their deprivation of liberty, and so they depend on the state for proper care).

73. *See id.* (using the Supreme Court's standard that wanton infliction of unnecessary pain violates the Eighth Amendment, and holding that forcing a woman to give birth in her cell alone clearly constitutes wanton infliction of unnecessary pain).

74. *See* Roth, *supra* note 3 (recounting how Joan sought medical attention for two weeks because she was near her due date and leaking amniotic fluid).

75. *See id.* (stating that doctors told Joan that the death of her fetus was a direct result of the loss of all her amniotic fluid and that she was at severe risk of septic shock the longer the dead fetus was inside her).

76. *See id.* (observing that prison guards were clearly aware of Joan's medical condition and intentionally delayed taking her to a hospital, preventing access to necessary medical attention).

77. *See id.* (noting that such a severe infliction of pain and suffering clearly violates the cruel and unusual punishment provision proscribed by the Eighth Amendment).

Officials were deliberately indifferent when they denied Joan medical care by refusing to take her to a doctor despite her repeated pleas; delayed taking her to a hospital; forced her to carry her dead fetus; and delayed getting her a necessary shot associated with her rare blood type that would help prevent complications with future pregnancies.<sup>78</sup> The behavior of the jail officials in the case of Joan S. is a flagrant violation of her Eighth Amendment rights, and a clear deprivation of her constitutionally protected right to medical care.<sup>79</sup>

The act of chaining pregnant inmates to hospital beds during labor constitutes deliberate indifference to the prisoners' medical needs.<sup>80</sup> Restricting a woman's movement while she is in labor exacerbates the pain and distress associated with the birthing process, and may lead to complications that pose serious risks to the lives and health of both the mother and her baby.<sup>81</sup> Further, the shackling of inmates during labor serves no legitimate objective because, although they are convicted felons, it is extremely difficult—and in some cases impossible—for pregnant inmates to either try and escape or pose a safety risk.<sup>82</sup> Indeed, shackling a woman to a bed during childbirth serves no justifiable penological purpose, as her being pregnant would have no relevance on her sentence.<sup>83</sup> Shackling during labor could have no deterrent effect on the original crime, and thereby punishes the prisoner for bearing children, not for breaking the law.<sup>84</sup>

While the Eighth Circuit ultimately found that shackling violates the Eighth Amendment's prohibition on cruel and unusual punishment, Nelson's ordeal also invokes a claim under the *Estelle* standard.<sup>85</sup> Prison officials refused to take Nelson to a hospital to give birth until she was

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78. *See id.* at 103 (applying the *Estelle* standard, the jail officials' deliberate indifference to Joan's serious illness constitutes cruel and unusual punishment, violating the Eighth Amendment).

79. *See id.* at 103 (noting that the pain and suffering Joan experienced served no penological purpose).

80. *See* AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY, *supra* note 4, at 23 (stating that such measures exacerbates the dangers of the childbearing process).

81. *See id.* (providing that an obligation not to put inmates in a situation of elevated risk or purposefully cause a heightened and unnecessary amount of pain).

82. *See* Allen, *supra* note 6 (stating that if a woman has been given epidural anesthesia, the numbness makes it impossible for her to run off).

83. *See* Nelson v. Corr. Med. Servs., 583 F.3d 522, 530 (8th Cir. 2009) (en banc) (noting the argument that the shackling of inmates serves a security interest).

84. *See* AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY, *supra* note 4, at 3 (arguing that there is no legitimate punitive correlation between the original crime for which the prisoner is incarcerated, and shackling her during childbirth).

85. *See generally* Nelson, 583 F.3d at 522 (upholding that shackling violates the Constitution because it is an Eighth Amendment violation and because it infringes on a prisoner's constitutionally protected right to medical care).

already in active labor.<sup>86</sup> Nelson was still in leg shackles when she started to deliver her baby, despite the repeated pleas of doctors and nurses to remove the shackles.<sup>87</sup>

While decided under a different standard, *Nelson* clearly exhibits a violation of a prisoner's constitutionally protected right to medical care.<sup>88</sup> When applying the standard of deliberate indifference to a serious medical need, as in the *Estelle* case, it is clear that Nelson was not subject to humane conditions of confinement.<sup>89</sup> The prison infirmary nurse denied and delayed Nelson's access to medical care by sending her back to her cell despite her nearing active labor.<sup>90</sup> Further, the officer stationed on duty in Nelson's delivery room displayed deliberate indifference when she refused to remove the shackles despite the requests of medical professionals.<sup>91</sup> By refusing to transport Nelson to the hospital in a timely manner, and refusing to remove the shackles at the request of medical professionals causing unnecessary bodily harm, the prison guards intentionally interfered with Nelson's access to medical care.<sup>92</sup> This violated her constitutionally protected right to medical care.<sup>93</sup> In *Estelle*, the Supreme Court held that denying, delaying, or inhibiting a prisoner's access to medical care constitutes cruel and unusual punishment.<sup>94</sup> Under this standard shackling is unconstitutional because, as was seen in *Nelson*, the act of shackling clearly delays and inhibits a prisoner's access to medical care.<sup>95</sup>

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86. See *Nelson v. Corr. Med. Services*, 104CV00037 JMM-JWC, 2007 WL 1703562, at \*2-3 (E.D. Ark. June 11, 2007) (recalling how Nelson had repeatedly asked to be taken to the hospital and the infirmary nurse denied her request), *rev'd in part*, 533 F.3d 958 (8th Cir. 2008) and *aff'd in part, rev'd in part*, 583 F.3d 522 (8th Cir. 2009).

87. See *Nelson*, 583 F.3d at 526. (explaining that as a result of the shackles, every time Nelson experienced a labor contraction her leg would cramp up and she would experience severe pain, ultimately causing a dislocated hip).

88. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (showing that Nelson suffered as a direct result of the deliberate indifference of the prison officials).

89. See *Nelson*, 583 F.3d at 529 (noting the adequate satisfaction of the objective and subjective tests, and that the deliberate indifference to Nelson's medical needs caused cruel and unusual punishment as proscribed by the Eighth Amendment).

90. See *Nelson*, 2007 WL 1703562, at \*2-3 (explaining the importance in taking a woman to a hospital once she reaches active labor to help ensure no delivery complications occur).

91. See *Nelson*, 583 F.3d at 529 (declaring that the officer's refusal to remove the shackles impeded with the birthing process and caused severe undue pain and suffering, resulting in a hernia and dislocated hip).

92. See *id.* at 529 (applying the holding in *Estelle* that denying or delaying a prisoner's access to medical care is cruel and unusual punishment).

93. See *id.* at 529, 531 (stating that these actions resulted in a wanton infliction of unnecessary pain in violation of the Eighth Amendment).

94. See *Estelle*, 429 U.S. at 103 (noting the obligation of prison officials to ensure that the Constitutional rights of prisoners remain intact during incarceration).

95. See *Nelson*, 583 F.3d at 526 (stating that shackling caused Nelson unnecessary injuries, and that doctors could not properly attend to her due to her restrains, thus

*B. Shackling is Unconstitutional In Violation of the Eighth Amendment.*

*1. Shackling Laws Are Unconstitutional Under Nelson v. Correctional Medical Services.*

Pregnancy and labor are serious medical conditions.<sup>96</sup> As is established in *Estelle*, failing to provide care for a serious medical condition is a constitutional violation.<sup>97</sup> Therefore, policies permitting the shackling of pregnant inmates during childbirth violate the Eighth Amendment of the United States Constitution, which prohibits inflicting cruel and unusual punishment.<sup>98</sup>

In *Nelson v. Correctional Medical Services*, the court touched on the asserted security interests justifying shackling.<sup>99</sup> Not only does the act of shackling exhibit a deliberate indifference to the prisoner's medical needs, but in *Nelson*, and all other shackling cases, there is no competing institutional need or penological interest served by the practice.<sup>100</sup> Arguably, shackling would be permissible if it served some legitimate objective, such as public safety.<sup>101</sup> However, it is reasonable to assume that no woman while in labor poses a flight risk.<sup>102</sup> Thus, the policy of shackling pregnant inmates during childbirth clearly does not provide the requisite valid connection between prison regulations and the legitimate governmental interests put forward to justify it.<sup>103</sup> It is illogical to have

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inhibiting her access to medical care).

96. See U.S. Equal Emp't Opportunity Comm'n., Fact Sheet: The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 (July 6, 2000), available at <http://www.eeoc.gov/policy/docs/fmlaada.html> (stating that while pregnancy is not a disability under the ADA, it is considered a serious condition under the Family and Medical Leave Act).

97. See generally *Estelle*, 429 U.S. at 97 (holding that infringing on a prisoner's Constitutionally protected right to medical care constitutes cruel and unusual punishment).

98. U.S. CONST. amend. VIII; see also *Estelle*, 429 U.S. at 104 (noting that ignoring the medical needs of prisoners causes undue pain and suffering, delays access to medical care, and often inhibits necessary medical attention).

99. See *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 530-31 (8th Cir. 2009) (en banc) (supposing the security interest to be the possibility of an inmate fleeing from the hospital while in labor).

100. See *id.* (stating that there was no evidence in *Nelson's* case to suggest that she would flee or pose a security threat).

101. See *id.* at 533 (discussing the regulatory exception that would potentially allow a corrections officer to shackle an inmate after delivery if there is clear and convincing evidence that she poses a serious safety risk to herself, hospital staff, or the officer).

102. See *id.* at 531 (noting that *Nelson* was under the supervision of an experienced correctional officer who was equipped with a fire arm, and that this is a sufficient form of security).

103. *But cf.* *Turner v. Safley*, 482 U.S. 78, 86, 91 (1987) (noting however, that security and prevention of escape are legitimate governmental interests).

genuine concerns that a woman in active labor poses a legitimate security risk or would try to escape.<sup>104</sup>

A complaint must show two elements to successfully allege an Eighth Amendment violation: 1) an objective standard, determining whether the prisoner filing suit had a serious medical need or faced a risk to their health or safety; and 2) a subjective standard, analyzing whether the prison official had knowledge of the need or risk but ignored it.<sup>105</sup> The *Nelson* court found the objective and subjective prongs of the Eighth Amendment standard easily satisfied.<sup>106</sup> First, expert medical testimony satisfied the objective standard when the doctor witness declared that it is always dangerous to shackle a woman during the final stages of labor.<sup>107</sup> Second, statements from prison guard demonstrated her actual knowledge of risk to the shackled prisoner and satisfied the subjective component of the Eighth Amendment standard.<sup>108</sup> Moreover, evidence that, as a result of being shackled while in labor, Nelson soiled her bed sheets, causing her actual discomfort and humiliation, and subjecting her to the risk of infection, further satisfied the subjective standard.<sup>109</sup> The court also noted that an officer had been present while the nurses were attempting to help the prisoner push her baby through the birth canal, and that medical personnel had repeatedly asked for the removal of the shackles.<sup>110</sup> Further, since the prisoner was not a flight risk, she clearly established that the government could not reasonably claim that her case warranted shackling.<sup>111</sup>

Applying *Nelson's* holding, other cases are also obviously unconstitutional.<sup>112</sup> For example, in the case of *Desiree C.*, prison guards rushed her to the hospital with one ankle chained to a gurney, with contractions every three minutes.<sup>113</sup> She had an emergency C-section, and

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104. *Cf.* Allen, *supra* note 6 (stating that the majority of convictions of pregnant inmates are for non-violent crimes).

105. *See Nelson*, 583 F.3d at 529 (stipulating that there must be clear and convincing evidence to satisfy these elements).

106. *See id.* (stating that the elements involve a showing of an excessive risk of substantial harm).

107. *See id.* (relying on the testimony given at trial by an expert in the field of obstetrics and gynecology).

108. *See id.* (finding that the jury could find that Officer Turensky knew of the risk to Nelson simply because of the obviousness of the risk).

109. *See id.* at 526 (explaining that Nelson's injuries prevent her from participating in many activities and that she was advised not to have more children as a result of her injuries).

110. *See id.* at 530 (observing no justification for continuing to shackle after repeated requests on the part of medical personnel to unshackle the prisoner).

111. *See id.* at 522 (noting that there needs to be clear and convincing evidence of flight risk).

112. *See id.* (applying a standard of deliberate indifference).

113. *See Karen de Sá, Legislation Calls for an End to Cuffing Women During*

when she awoke from general anesthesia she spent four days in recovery, shackled to a bed and under the watch of an armed guard.<sup>114</sup> The shackles made physical recovery more difficult, as her doctor instructed her to get up and walk to help her stomach muscles heal.<sup>115</sup>

When applying the *Nelson* standard to this situation, it is clear that the prison officials violated Desiree's constitutional rights, as they showed a clear deliberate indifference to her situation.<sup>116</sup> Under *Nelson*, Desiree had a clearly established right to not be shackled, as there was no clear and convincing evidence that she was a flight risk.<sup>117</sup> Further, Desiree was not subject to humane conditions of confinement as prescribed under *Nelson*, as she had to walk to aid her recovery while still in shackles.<sup>118</sup> Under the standards set forth in *Nelson*, Desiree experienced deliberate indifference with regards to her medical condition and unnecessary pain and suffering from the shackling, thus violating her Eighth Amendment rights.<sup>119</sup>

The existence of the obvious and simple alternative of supervising pregnant inmates during childbirth, which many states are already doing, and the lack of a logical connection between the goals of security and prevention of escape and the policy permitting the shackling of pregnant inmates during childbirth, demonstrate that this common practice and prison policy is unconstitutional.<sup>120</sup>

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*Labor*, MERCURY NEWS, Aug. 1, 2005, available at <http://www.november.org/stayinfor/breaking3/ShacklingWomen.html> (noting that contractions that are three minutes apart constitute active labor).

114. *See id.* (stating that while the prisoner had an emergency C-section, the baby still died).

115. *See id.* (noting that the shackles around the prisoner's ankles seriously impeded her ability to walk, as she was instructed to do so by her physician).

116. *See Nelson*, 583 F.3d at 522 (noting that it often takes several hours to reach active labor, and as such prison officials were deliberately indifferent to the prisoner's medical needs if she did not arrive at the hospital until she was already in active labor, meaning officials delayed her access to medical care).

117. *See de Sá, supra* note 113 (noting that Desiree was under anesthesia as part of her emergency C-section, making it impossible for her to flee the hospital).

118. *See Nelson*, 583 F.3d at 529 (noting that the pain and restricted position of confinement caused by the shackles brought unnecessary discomfort and humiliation upon Nelson).

119. *See id.* at 531-32 (reasoning that the right to not be shackled is constitutionally protected).

120. *Compare* *Turner v. Safley*, 482 U.S. 78, 90 (1987) (holding that prison regulations may amount to a constitutional violation if there are easy alternatives indicating that the current regulation may be unreasonable), *with* AMNESTY INT'L USA, NOT PART OF MY SENTENCE: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 11-12 (1999) <http://www.amnesty.org/en/library/asset/AMR51/019/1999/en/7588269a-e33d-11dd-808b-bfd8d459a3de/amr510191999en.pdf> (presenting clear alternatives for the amendment of policies regarding state use of restraints during child birth that infringe less upon the civil rights of pregnant prisoners).

2. *The Court in Women Prisoners v. District of Columbia Should Have Found That Shackling Laws are Unconstitutional.*

In *Women Prisoners v. District of Columbia*, the appellate court erred in reversing the trial court and should have declared the practice of shackling unconstitutional.<sup>121</sup> This would have been a perfect opportunity for the court to establish a clear standard with regards to the law.<sup>122</sup> The court should have let the standard set forth by the trial court stand, for had it done so there would be a firm standard in case law declaring shackling illegal and in violation of the Eighth Amendment.<sup>123</sup> Instead, the decision leaves the power to administer remedies for shackling in the hands of local D.C. courts.<sup>124</sup> However, this is insufficient, as it not only leaves D.C. without any anti-shackling laws, but also provides ample opportunity for an uneven application of a remedy.<sup>125</sup>

In *Women Prisoners I*, the trial court found the shackling of pregnant women to be a violation of federal law.<sup>126</sup> The trial court was correct in ordering the appellants to hire a nurse midwife to provide services, establish a pre-natal clinic, and arrange for obstetrical examinations within women's prisons.<sup>127</sup> However, the United States Court of Appeals for the District of Columbia Circuit made a grave error in dissolving the injunction.<sup>128</sup> By doing so, the Court of Appeals left D.C. without a strict anti-shackling standard.<sup>129</sup> The Court of Appeals reasoned that because courts have little experience in running a prison, they should give deference

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121. See generally *Women Prisoners v. D.C. Dep't of Corr.*, 93 F.3d 910 (D.C. Cir. 1996) (noting that while the main focus of the case was prison conditions, the court could have left intact the lower court's ruling regarding the shackling of female prisoners).

122. But see AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY, *supra* note 4, at 321 (noting that D.C. still has no legislation limiting the use of shackles on pregnant inmates).

123. See *Women Prisoners*, 93 F.3d at 931-32 (inhibiting the establishment of an actual standard, rather than simply leaving a potential remedy in such cases at the discretion of the courts of the District of Columbia).

124. See *id.* (noting the reticence of the Court of Appeals to establish a standard on a new and ambiguous law).

125. Cf. *id.* (making it more difficult for women who have been shackled to seek a remedy because of the absence of an actual standard).

126. See *id.* at 916 (reviewing the lower court's holding that shackling violates the Eighth Amendment and the Civil Rights Act of 1871, 42 U.S.C. § 1983 (2006)).

127. See *id.* at 923 (establishing these measures as minimums in ob/gyn care in prisons).

128. See *id.* (stating that while these measures may be highly desirable, the Supreme Court has warned against such detailed orders because they circumvent the authority of local legislatures).

129. See AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY, *supra* note 4, at 321 (noting that D.C. has no legislation limiting shackling).

to prison officials where possible.<sup>130</sup> The court erred in making this ruling, as it created a self-regulating system for prisons.<sup>131</sup> In vacating the order for gynecological care, the Court of Appeals left pregnant inmates defenseless against inhumane treatment and improper medical care.<sup>132</sup> The court leaves the regulation of caring for pregnant prisoners to local D.C. Code, which has no formal provisions regarding shackling.<sup>133</sup> As such, the Court of Appeals aided the furtherance of an unconstitutional system by leaving the practice of shackling unregulated and with no form of a legal check on the system.<sup>134</sup>

*C. Illinois, California, and New York Have All Outlawed Shackling and Other States Should Follow Their Model and Move Towards Passing Legislation that Also Outlaws Shackling.*

In addition to violating the Eighth Amendment's prohibition against cruel and unusual punishment, shackling also violates state statutes requiring a minimum standard of care for prisoners.<sup>135</sup> Even worse than the minimal number of state laws regulating the treatment of incarcerated women during childbirth is the complete absence of a federal law aimed at protecting pregnant women in prison.<sup>136</sup> States such as California, Illinois, and New York, chose to forego litigation in favor of a legislative solution.<sup>137</sup>

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130. *See Women Prisoners III*, 93 F.3d at 931-32 (regarding the running of the prisons, program implementation, and prison upkeep).

131. *Cf. id.* (assuming—incorrectly—that prisons will always act in the best interest of the prisoner).

132. *See id.* (vacating the order of the trial court, and leaving as recompense only the ability for appellees to renew their arguments to the court regarding the substandard medical care).

133. *See AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY*, *supra* note 4, at 321 (ignoring D.C.'s lack of legislation banning shackling).

134. *See Women Prisoners*, 93 F.3d at 931-32 (leaving the regulation of the prisons up to the prison officials themselves, basing the regulation of shackling on non-existent D.C. law, and providing no legal remedy for clear Eighth Amendment violations).

135. *Compare* CAL. PENAL CODE § 6030(e)-(f) (West 2011) (calling for prenatal and postpartum care for pregnant inmates, as well as prohibiting shackling of prisoners who are in labor), *with* N.Y. CORREC. LAW § 611 (McKinney 2011) (prohibiting restraints on prisoners who are in labor, except under extraordinary circumstances, during which they may be cuffed by one wrist); *see also* Liptak, *supra* note 25 (stating that the New York law is very similar to those enacted by California and Illinois).

136. *See AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY*, *supra* note 4, at 328 (observing that there is no U.S. Bureau of Prisons legislation nor an agency policy that bans the shackling of pregnant inmates).

137. *See* Liptak, *supra* note 25 (commenting on a New York bill similar to statutes enacted by California and Illinois, that has subsequently been adopted).

*1. Other States Should Follow the Model Laid Out by the Illinois Law and Enact Laws Banning Shackling.*

In 2000, the Illinois legislature amended the state's Unified Code of Corrections to add an anti-shackling provision.<sup>138</sup> The revised statute clearly lays out the standard that prohibits restraints on an inmate in labor during any point of her transport or delivery.<sup>139</sup>

Unfortunately, despite the strict shackling prohibitions in Illinois law, the practice is still widely used, and the case of Latiana Walton is just one example of the gross disobedience of these crucial laws.<sup>140</sup> Walton—another non-violent offender—had an arm and leg chained to her bed during labor, and wrist handcuffed throughout the entire delivery.<sup>141</sup> The Illinois Unified Code of Corrections clearly states that when a pregnant inmate is brought to a hospital for the purposes of giving birth, under no circumstances may handcuffs, shackles, or restraints of any kind can be used during labor.<sup>142</sup> The statute does allow for the posting of a correctional officer immediately outside the delivery room, but even this is disregarded, and corrections officers often stay in the delivery room.<sup>143</sup>

The case of Latiana exhibits a gross violation of not only Illinois state law regarding the minimum standard of care for inmates and the use of shackles on pregnant inmates during delivery, but also a person's constitutionally protected Eighth Amendment right against cruel and unusual punishment.<sup>144</sup>

Other states, such as Louisiana, which currently have no legislation limiting the use of shackles on pregnant inmates and allows restraints on inmates in the third trimester as well as during transport and labor, should adopt the Illinois standards.<sup>145</sup> Louisiana could easily adopt certain

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138. See 730 ILL. COMP. STAT. 5/3-6-7 (West 2011) (stating that when a pregnant female is brought to a hospital for the purposes of delivering her baby, no shackles, handcuffs, or restraints of any kind may be used).

139. See *id.* (noting the absence of language that allows for shackling if a guard feels that the inmate is a security risk, providing a much stricter anti-shackling standard).

140. See Mastony, *supra* note 2 (noting that Illinois passed anti-shackling legislation in 1999, and twelve years later, it is still disregarded).

141. See *id.* (stating that Walton's original charge was for retail theft, and her incarceration stemmed from missing a court date).

142. See 730 ILL. COMP. STAT. 5/3-6-7 (noting that prohibitions on shackling apply during transportation to the hospital and delivery).

143. See Mastony, *supra* note 2 (recounting the case of Melissa Hall, an inmate who was not only shackled during delivery, but also had a guard sitting in her room watching the NBA finals during the entirety of her labor).

144. See *id.* (showing a willful disregard on the part of the corrections officer since the officer repeatedly ignored the doctor's request that Walton's shackles be removed).

145. See AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY, *supra* note 4, at 137 (stating that Louisiana allows four and five point restraints on pregnant inmates and allows for the application of leg irons and handcuffs during delivery).

provisions from the Illinois statute—such as prohibiting leg irons on a woman in labor—making its current laws illegal.<sup>146</sup> The legislative intent of the Illinois anti-shackling legislation is to protect the well-being of the child and mother, and to not inflict any undue pain or suffering caused by shackling.<sup>147</sup> States such as Louisiana should strive to enforce this objective within their own legislation.<sup>148</sup>

A clear example of where shackling caused undue pain and suffering in Louisiana is the case of Joe Doe B., where corrections officers left her in shackles after she went into labor.<sup>149</sup> Under Illinois law, the Louisiana law is unconstitutional, as Illinois strictly prohibits the use of shackles during active labor.<sup>150</sup> Shackling during active labor is unconstitutional because it serves no legitimate purpose and causes undue pain and suffering.<sup>151</sup>

## 2. Other States Should Follow the Model Laid Out by California Law and Enact Laws Banning Shackling.

In 2005, the California Legislature followed Illinois' example by passing an anti-shackling provision.<sup>152</sup> The legislature's decision to ban the practice of shackling prisoners adheres to United Nations policy.<sup>153</sup> The

146. *See id.* (noting that the ACLU has filed a lawsuit in Louisiana regarding the Orleans Parish Prison's policy of keeping women shackled during labor).

147. *Cf.* 730 ILL. COMP. STAT. 5/3-6-7 (showing how a revision of the full Unified Code of Corrections and the penal code of Illinois exhibits a philosophical shift in the legislature, the recognition of the barbarity of the practice, and the necessity to implement anti-shackling provisions in all sections of Illinois law).

148. *See id.* (allowing the pregnant prisoner to have the freedom of movement she needs to deliver her baby while also ensuring that she is adequately monitored by prison officers).

149. *See* AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY, *supra* note 4, at 138 (noting that Louisiana policy is to place a guard outside the delivery room door, which serves the legitimate safety interest in question without causing undue pain and suffering).

150. *Cf.* 730 ILL. COMP. STAT. 5/3-6-7; AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY, *supra* note 4, at 112 (stating that in addition to its anti-shackling efforts, Illinois also has programs in place for inmate mothers and their infants where the child can reside with the mother until he or she is one year old).

151. *See* 730 ILL. COMP. STAT. 5/3-6-7 (showing the state's obligatory interest in the care of prisoners by making the Sheriff responsible for providing adequate personnel to monitor the health of the inmate).

152. CAL. PENAL CODE § 5007.7 (West 2011); *see* AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY, *supra* note 4, at 61 (showing that, prior to the implementation of the 2006 law, California had no policy that prevented female prisoners from being shackled to their hospital beds during labor and throughout their hospital stay).

153. *See* AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY, *supra* note 4, at 22 (recommending that pregnant inmates taken to a hospital for the purposes of giving birth shall not be shackled by the ankles, wrists, or both); *see also* California Legislature Considering Bill That Would Ban Shackling of Prison Inmates During Childbirth, MED. NEWS. TODAY, AUG. 2, 2005, <http://www.medicalnewstoday.com/releases/28474.php> (noting that the previous justification for shackling inmates during labor was a public safety issue and to prevent

legislature's reliance on the United Nations policy against shackling shows a clearer human rights standard than the legislation used in Illinois.<sup>154</sup> The California statute states that once an inmate is in labor, she shall not be shackled by the ankles, wrists, or both, and that she will be transported in the least restrictive way possible.<sup>155</sup>

California's statute can extend to a state like Minnesota, which has no anti-shackling legislation.<sup>156</sup> Not only does Minnesota have no legislation limiting the use of shackling on pregnant inmates, but the state has a written policy requiring that inmates be restrained during medical procedures and be restrained to the bed with at least one set of restraints at all times.<sup>157</sup> Minnesota has the least progressive shackling laws of any state, requiring the use of restraints during transportation and labor, and requiring an officer inside the delivery room during delivery.<sup>158</sup> All of these provisions should be illegal, and they could be in Minnesota if the state adopted the regulations of the California statute.<sup>159</sup> If, under California law, it is illegal to shackle a woman during active labor, this standard should apply to Minnesota, making the requirement under Minnesota law that prisoners have at least one shackle during active labor unconstitutional.<sup>160</sup> The Minnesota law flouts the legislative intent of the California code, disregarding all concepts of basic human dignity and civility, when in actuality those same elements of humanity and decency can, and should, be the driving force behind shackling legislation.<sup>161</sup>

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their escape).

154. See *California Legislature Considering Bill That Would Ban Shackling of Prison Inmates During Childbirth*, *supra* note 153 (implying that United Nations standards are synonymous with International Human Rights standards, showing that the shift in legislation was morally motivated and aimed to address the issue of human decency).

155. Compare CAL. PENAL CODE § 5007.7 (stating merely that transportation must occur in the least restrictive way possible, and suggesting a more flexible standard), with 730 ILL. COMP. STAT. 5/3-6-7 (specifying strictly that no restraints of any kind be used during childbirth related transportation).

156. See AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY, *supra* note 4, at 168-69 (elaborating that Minnesota has no legislation limiting the use of shackling on pregnant inmates during the third trimester and a policy that they are to be shackled during labor).

157. See *id.* at 168 (noting that, according to the Minnesota Department of Corrections, there are no administrative rules concerning pregnancy and delivery in Minnesota).

158. See MINN. STAT. ANN. § 241.07 (West 2011) (noting that officers will only partially remove shackles if requested by a doctor, and that officers are authorized to refuse the request all together).

159. See CAL. PENAL CODE § 5007.7.

160. See *id.*

161. See MINN. STAT. ANN. § 241.07 (noting that Minnesota law dictates the use of full restraints—waist chain, black box over handcuffs and leg irons—during transportation of an inmate for the purpose of giving birth, which, when viewed under California law is clearly unconstitutional).

3. *Other States Should Follow the Model Laid Out by New York Law and Enact Laws Banning Shackling.*

The New York law accomplishes the same goals as its California and Illinois counterparts.<sup>162</sup> The bill allows the cuffing of women by one wrist during transfer if they are deemed a risk, but otherwise forbids any mechanical restraint during transport when a woman is in labor and admitted to a hospital for delivery or is recovering after giving birth.<sup>163</sup> The justification for the Assembly bill was the recognition that New York was still one of the many states that permitted the shackling of pregnant inmates.<sup>164</sup> In New York City, a 1990 consent decree agreement ended the shackling of pregnant inmates, recognizing that the use of mechanical restraints on a pregnant inmate constituted a cruel and inhumane form of punishment and posed a serious risk to both the mother and her unborn child.<sup>165</sup> While New York recognized a need for cohesion in the laws of the entire state, other states without shackling laws should recognize the need to come in line with the necessary statutory provisions outlined in other state laws.<sup>166</sup>

One such state that should take this step is Oklahoma, as it currently has no legislation limiting the use of shackling on pregnant inmates.<sup>167</sup> Oklahoma allows the shackling of inmates during their third trimester, transport to the hospital for childbirth, and during labor.<sup>168</sup> The legislative intent of the New York bill easily applies to the statutes of Oklahoma.<sup>169</sup> When persuasively applying the authority of the New York bill, which

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162. *See* N.Y. CORRECT. LAW § 611 (McKinney 2011) (prohibiting the use of restraints of any kind from being used during labor).

163. *See id.* (noting that the minimal restraint during transport only applies if the inmate is a hazard to herself or others, or is a flight risk).

164. *See id.* (recognizing that the practice served no penological purpose as adequate safeguards could be implemented without the shackling of the prisoner in addition to the notion that if New York enacted anti-shackling legislation that other states might follow suit); *see also Pa. House Panel Approves Anti-Shackling Bill*, PA INQUIRER, Jan. 27, 2010, available at <http://www.prisonofficer.org/pennsylvania/10639-anti-shackling-bill.html> (stating that the pending anti-shackling legislation in Pennsylvania is a direct result of the New York anti-shackling legislation).

165. *See* Assemb. B. 4105, 2007 Leg., 230th Sess. (N.Y. 2007) (recognizing a need for the laws of the entire state to strive to achieve a unified purpose and have a similar legislative intent).

166. *See id.* (noting that it would be easy for a state like Oklahoma to follow in the footsteps of a state like New York and mimic its shackling legislation).

167. *See* AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY, *supra* note 4, at 241 (noting that Oklahoma does not publish any administrative rules concerning pregnancy and delivery).

168. *See id.* at 242 (noting that the state also requires the presence of a corrections officer in the delivery room).

169. *See* Assemb. B. 4105 (applying the reasoning that too many states currently permit shackling of female prisoners and the practice violates the code of human decency).

clearly prohibits shackling during active labor, the practices in Oklahoma - such as only removing restraints during labor if the attending physician, head of the medical facility, and head of the correctional facility are all in agreement—should be illegal.<sup>170</sup>

All three pieces of model legislation described above contain clauses that would allow prison officials or attending physicians to mandate the use of limited physical restraints in the case of a specific health or security risk.<sup>171</sup> The legislators in Illinois, California, and New York, however, have recognized an important policy paradigm shift: shackling pregnant inmates should be a rare exception rather than the norm, and the decision to use physical restraints on a woman in active labor must be made carefully and for justifiable reasons.<sup>172</sup>

#### IV. POLICY RECOMMENDATIONS

Preemptive legislation banning the shackling of inmates during labor and delivery is far superior to waiting until a legal injury occurs.<sup>173</sup> Drafting legislation serves myriad purposes, such as keeping an injury from occurring in the first place, keeping cases out of the court system, and providing national guidance.<sup>174</sup> Unfortunately, prisoners are unpopular with the public, politically powerless, and often legally unsophisticated.<sup>175</sup>

Sadly, in states where shackling is illegal, the wave of lawsuits challenging shackling demonstrates that shackling continues to be a prevalent practice despite the law.<sup>176</sup>

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170. *Compare id.*, with AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY, *supra* note 4, at 242 (applying the New York statute to Oklahoma, it becomes apparent that the legislative intent similarly applies to Oklahoma, as the New York statute seeks to eliminate the prevalence of laws permitting shackling).

171. *Accord* 730 CAL. PENAL CODE § 5007.7 (West 2011); ILL. COMP. STAT. 5/3-6-7 (West 2011); Assemb. B. 4105 (addressing concerns of corrections officers who justify shackling pregnant inmates in two major ways: 1) physical restraints restrict prisoners' movements in a way that protects medical personnel and prison officers, and 2) prisoners are prevented from escaping).

172. *See* Assemb. B. 4105 (acknowledging the legitimate justification of public safety).

173. *See* Andrea Hsu, *Difficult Births: Laboring and Delivering in Shackles*, NPR.ORG, July 16, 2010, <http://www.npr.org/templates/story/story.php?storyId=128563037> (showing by a jury's award of \$1 that relief is not always easy to obtain for claims relating to shackling of pregnant prisoners).

174. *See* 730 ILL. COMP. STAT. 5/3-6-7 (2000) (noting that legislation would most importantly prevent such a gross violation of Constitutional rights).

175. *See id.* (citing reasons for why often prisoner legislation is not often aggressively pursued).

176. *See* Mastony, *supra* note 2 (reporting that since 2008 more than twenty former female inmates have filed lawsuits against the Cook County Sheriff's Office alleging incidents of shackling while giving birth).

Circumstances like those in Illinois raise concerns about drafting effective legislation in other states.<sup>177</sup> One notable difference between the statutes of New York and California versus Illinois, is that both New York and California include provisions that would allow for the shackling of a prisoner if it is deemed necessary for the safety of the inmate, the staff, or the public, or if the prisoner is a flight risk.<sup>178</sup>

States such as Pennsylvania and Georgia are currently making strides towards establishing anti-shackling legislation.<sup>179</sup> Under Pennsylvania's Senate Bill 1074, corrections officers are still permitted to use restraints in extreme situations.<sup>180</sup> This provision seems to be the mark of a successfully enforced piece of anti-shackling legislation.<sup>181</sup> While Georgia is not as far along as Pennsylvania, it is moving towards drafting anti-shackling legislation.<sup>182</sup> In order to draft successful shackling legislation that is actually enforced, Georgia will have to specify that guards may not use restraints during transportation or delivery, while still allowing for some security provisions in extreme cases.<sup>183</sup>

In October 2008, the Federal Bureau of Prisons issued a new policy mandating 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>184</sup> Similarly, in April 2008,

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177. See Allen, *supra* note 6 (recognizing that the legislation needs to be enforced, and therefore needs to take into consideration the justifications of the prisons such as public safety).

178. See CAL. PENAL CODE § 5007.7 (West 2011); Assemb. B. 4105 (providing that these provisions apply only in extreme circumstances).

179. See CTR. FOR REPRODUCTIVE RIGHTS, *2010 State Legislative Wrap Up*, available at <http://reproductiverights.org/en/feature/2010-state-legislative-wrap-up> (noting that Pennsylvania is actually in the process of enacting an anti-shackling laws, whereas Georgia is still in the beginning stages of building momentum for legislation).

180. See *Pa. House Panel Approves Anti-Shackling Bill*, *supra* note 164 (stating that the Senate Judiciary Committee endorsed the Healthy Birth for Incarcerated Women Act in a unanimous vote).

181. See *id.* (claiming that because Pennsylvania had no law banning the use of shackles, and so for the interest of security purposes, shackling became a default practice).

182. See Rachel Roth, *AMA Opposes Shackling Pregnant Women in Labor*, RH REALITY CHECK, June 16, 2010, available at <http://www.rhrealitycheck.org/node/13676> (noting that activists are very vocally pressing the issue).

183. See *Our Work: Congress Passes the Second Chance Act*, REBECCA PROJECT FOR HUMAN RIGHTS, [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) (acknowledging the need to allow for shackles in extreme circumstances where the safety of others may be jeopardized and to potentially allow a guard to be posted outside an inmate's room).

184. See *id.* (reporting a working relationship between lawmakers and the Rebecca Project for Human Rights).

President Bush signed the Second Chance Act into law, which requires that all federal correctional facilities document and report 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>185</sup>

The current patchwork system of laws, regulations, written, and unwritten policies has created an atmosphere of confusion and noncompliance.<sup>186</sup> Even in states with legislative bans on the practice of shackling, there have been anecdotal reports that the practice continues to be employed on women during labor and delivery.<sup>187</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 applied with such discretion as to essentially permit the practice in nearly all circumstances.<sup>188</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.

## V. CONCLUSION

Women who have already been seriously physically injured as a result of the use of shackles during pregnancy and childbirth may still be able to use the court system to obtain monetary damages.<sup>189</sup> However, in order to prevent future injury or to simply protest the practice as a human rights violation, female prisoners and their advocates will most likely have to turn to alternative methods of relief.<sup>190</sup> In Illinois, California, and New York, state legislatures have severely limited the ability of prison officials to

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185. See Second Chance Act of 2008, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified as amended at 42 U.S.C. § 17501 *et seq.* (Supp. 2008) (adding extra restrictions to disincentivize the practice, such as ensuring that facilities provide Congress with explanations regarding the reasons for using restraints in particular instances).

186. 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).

187. See *id.* (detailing a special counsel's investigation of the written policies of the Los Angeles jail system).

188. See Mastony, *supra* note 2 (noting the difficulty of enforceability of state statutes prohibiting shackling during childbirth due to differing interpretations of the word "labor").

189. See Second Chance Act of 2008 (providing a much needed form of relief to those that can no longer bring an Eighth Amendment violation claim).

190. See Winton, *supra* note 186 (blaming a lack of relief for those injured on a backlog in the court systems and the complexity of stating a viable Eighth Amendment claim).

shackle pregnant or birthing prisoners.<sup>191</sup> With the Eighth Circuit's decision, there is now a federal standard declaring the practice of shackling unconstitutional for violating the Eighth Amendment.<sup>192</sup> Thus, the law of any state that allows for the shackling of female inmates during labor or delivery is unconstitutional under the *Nelson* standard.<sup>193</sup>

State departments of corrections and state legislators should follow the example set by California, Illinois, and New York and enact and implement state regulations and legislation to protect pregnant inmates who give birth while incarcerated, thus bringing the country in line with its constitutional obligations.<sup>194</sup>

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191. *E.g.*, CAL. PENAL CODE § 5007.7 (West 2011); 730 ILL. COMP. STAT. 5/3-6-7 (West 2011); N.Y. CORRECT. LAW § 611 (McKinney 2011).

192. *See generally* *Nelson v. Corr. Med. Servs.*, 583 F.3d 522 (8th Cir. 2009) (declaring shackling a form of cruel and unusual punishment).

193. *See id.* at 534 (holding that it was unconstitutional to shackle Nelson because the pain and suffering she experienced as a result violated her Eighth Amendment rights).

194. *See* AMNESTY INT'L USA, ABUSE OF WOMEN IN CUSTODY, *supra* note 4, at 24 (noting the obligation to be sensitive to the pregnant inmate's health needs, and not inflict cruel and unusual punishment).