

Winter 2017

## Innocent until Born: Why Prisons Should Stop Shackling Pregnant Women to Protect the Child

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### Recommended Citation

Melanie Kalmanson, *Innocent until Born: Why Prisons Should Stop Shackling Pregnant Women to Protect the Child*, 44 Fla. St. U. L. Rev. 851 ( ).  
<https://ir.law.fsu.edu/lr/vol44/iss2/9>

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# INNOCENT UNTIL BORN: WHY PRISONS SHOULD STOP SHACKLING PREGNANT WOMEN TO PROTECT THE CHILD

MELANIE KALMANSON\*

## ABSTRACT

*The practice of American prisons to shackle and otherwise restrain incarcerated, pregnant women is problematic for several reasons. Such practices include shackling, chaining, and handcuffing pregnant inmates during their third trimester, transportation to and from medical facilities, labor and delivery, and postpartum recovery. Current discourse on this topic focuses primarily on how these practices invade the woman’s civil liberties, particularly the Eighth Amendment right against cruel and unusual punishment, and international human rights. Recent case law vindicates policy rationales for such practices—safety of others, safety of the woman herself, and securing flight risks.*

*These discussions overlook and this Note confronts the state’s interests in fetal rights and then, after birth, the child’s rights as a constitutionally protected person. Shifting the shackling discussion to protecting the child, this Note argues that shackling practices should be banned in all American institutions because they unconstitutionally infringe upon the child’s rights to due process and against cruel and unusual punishment.*

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## I. INTRODUCTION

Between 1977 and 2004, the number of incarcerated females in the United States increased by 757%,<sup>1</sup> primarily as a result of “the so-called war on drugs and related changes in legislation, law enforcement practices, and judicial decision-making.”<sup>2</sup> This increase was not a result of an upsurge in violence perpetrated by American women.

Increasing female prison<sup>3</sup> populations heightens a related, gender-specific concern: how the pregnant prison population is treated while incarcerated. In 2009, it was reported that, “at any given time, more than 10,000 pregnant women are” incarcerated.<sup>4</sup> In other terms, a 2013 report indicated that 6% of the incarcerated female population is pregnant.<sup>5</sup> It is unclear whether this incarcerated, pregnant population is comprised of women who *enter* prison pregnant<sup>6</sup> or become

\* J.D., *Magna Cum Laude*, Florida State University College of Law, 2016; B.S., *Magna Cum Laude*, Florida State University, 2013. Thank you to Professor Avlana Eisenberg for supporting this project as part of her extremely insightful Prison Reform Seminar. Also, as my last Note of law school, thank you to all of my professors who contributed to my developing passion for academia—specifically Mary Ziegler, P. Mark Spottswood, and Courtney Cahill.

1. AM. CIV. LIBERTIES UNION, ACLU BRIEFING PAPER: THE SHACKLING OF PREGNANT WOMEN & GIRLS IN U.S. PRISONS, JAILS & YOUTH DETENTION CENTERS, at \*1, [https://www.aclu.org/files/assets/anti-shackling\\_briefing\\_paper\\_stand\\_alone.pdf](https://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf) [<https://perma.cc/9TSE-GP2L>] [hereinafter ACLU BRIEFING PAPER].

2. DOROTHY Q. THOMAS ET AL., HUMAN RIGHTS WATCH WOMEN’S RIGHTS PROJECT, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 17 (1996).

3. A “[c]orrectional institution” is any facility that “has the power to detain or restrain, or both, a person under the laws of [its respective] state,” whether private or public. 55 ILL. COMP. STAT. 5/3-15003.6(a)(4) (2016); accord FLA. STAT. 944.241(2)(a) (2012). For this discussion, ‘prison’ is used synonymously with this definition of a ‘correctional institution’ and implies no significant difference to a ‘jail’ or ‘detention center,’ or any other term to refer to a place in which those convicted of a crime are detained.

4. Diana Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict with Constitutional Standards?*, 41 VIEWPOINT 59, 59 (2009), <https://www.gutmacher.org/pubs/journals/4105909.pdf> [<https://perma.cc/AXQ3-9FN2>].

5. INT’L HUMAN RIGHTS CLINIC ET AL., THE SHACKLING OF INCARCERATED PREGNANT WOMEN: A HUMAN RIGHTS VIOLATION COMMITTED REGULARLY IN THE UNITED STATES 3 (2013) [hereinafter SHACKLING OF INCARCERATED WOMEN], <https://ihrclinic.uchicago.edu/sites/ihrclinic.uchicago.edu/files/uploads/Report%20-%20Shackling%20of%20Pregnant%20Prisoners%20in%20the%20US.pdf> [<https://perma.cc/9TA7-AWFK>].

6. See EDNA WALKER CHANDLER, WOMEN IN PRISON 44 (1973) (“[M]any women come to prison pregnant. . . . During 1972 there were 227 babies born to women in the thirty prisons reporting.”); FAMILY PLANNING & CONTRACEPTIVE RESEARCH, ABORTION & REPRODUCTIVE HEALTH CARE FOR INCARCERATED WOMEN (2014) [hereinafter FAMILY PLANNING & CONTRACEPTIVE RESEARCH], <http://docplayer.net/23552500-Policy-brief-abortion-reproductive-health-care-for-incarcerated-women.html> [<https://perma.cc/EBC9-LKAF>] (“Approximately six to 10 percent of women are already pregnant when they enter a prison or jail . . .”).

pregnant in prison.<sup>7</sup> Sexual abuse by prison guards has been an endemic issue in American prisons for decades,<sup>8</sup> so it is possible that an inmate may become pregnant while incarcerated as a result of such abuse.<sup>9</sup> On the other hand, recent legislative and executive focus on prosecuting pregnant women who use illegal substances or abuse legal substances would, of course, contribute to the increased pregnant prison population.<sup>10</sup> Nevertheless, the number of pregnant women who are incarcerated in the United States is significant.

The problem is not that this population exists, but instead how pregnant women in American correctional institutions are treated—an essentially barbaric practice. Women are being chained and shackled during their third trimester, labor and delivery,<sup>11</sup> and postpartum recovery.<sup>12</sup> States justify these practices as safety precautions for society, the authorities, and the woman herself. However, this Note dispels these alleged safety concerns and presents a new perspective on why these policies should be banned, as suggested by recent federal legislation.

Rather than focusing on the incarcerated mother's rights,<sup>13</sup> this Note shifts the focus to the fetus and, thereafter, child by applying (1) abortion jurisprudence when discussing the fetus and (2) constitutional law and child custody principles to protect the child, once born. Based on the reasoning presented herein, each state should enact legislation to ban the restraint—shackling, abdominal-chaining, and

7. See FAMILY PLANNING & CONTRACEPTIVE RESEARCH, *supra* note 6 (“[W]omen can become pregnant while incarcerated during private visits with their partners, home visits, while in work release programs . . .”). Cf. Bill Mears, *Supreme Court Allows Abortions for Inmates*, CNN (Mar. 24, 2008, 9:56 PM), [http://www.cnn.com/2008/US/03/24/scotus/index.html?eref=rss\\_us](http://www.cnn.com/2008/US/03/24/scotus/index.html?eref=rss_us) [<https://perma.cc/QUS3-6JLL>] (“The inmate . . . found out she was pregnant *just after* she had been sentenced . . . to four months in the county jail for driving while intoxicated.” (emphasis added)).

8. See, e.g., HUMAN RIGHTS WATCH WOMEN’S RIGHTS PROJECT, *supra* note 2, at 38-45; IF/WHEN/HOW, REPRODUCTIVE JUSTICE IN THE PRISON SYSTEM 7 (2016), <http://www.ifwhenhow.org/resources/reproductive-justice-in-the-prison-system/> [<https://perma.cc/LD5L-UY9M>] [hereinafter IF/WHEN/HOW].

9. FAMILY PLANNING & CONTRACEPTIVE RESEARCH, *supra* note 6 (“[W]omen can become pregnant while incarcerated . . . as a result of sexual assault by staff.”).

10. See Mary Ziegler, Opinion, *Everyone Agrees Women Who Have Abortions Shouldn’t Be Penalized. Or Do They?*, WASH. POST (Apr. 1, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/04/01/everyone-agrees-women-who-have-abortions-shouldnt-be-penalized-or-do-they/?utm\\_term=.b95f760e5a56](https://www.washingtonpost.com/posteverything/wp/2016/04/01/everyone-agrees-women-who-have-abortions-shouldnt-be-penalized-or-do-they/?utm_term=.b95f760e5a56) [<https://perma.cc/P3PC-TLV2>] (“The mainstream antiabortion movement had also expanded fetal rights, backing the prosecutions of pregnant women who abused drugs or otherwise put pregnancies at risk”). See generally Eileen D. Collins, *To Prosecute or Not to Prosecute: The Dilemma Posed by Pregnancy and Substance Abuse*, 9 PUB. INT. L. REP. 23, 23 (2004).

11. See *infra* notes 44, 196-98 and accompanying text.

12. See *infra* note 45 and accompanying text.

13. See, e.g., *Brown v. Plata*, 563 U.S. 493, 510 (2011) (“As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty.”).

handcuffing<sup>14</sup>—of incarcerated, pregnant women to protect the state’s interests in fetal life and safety and the child upon birth. Part II canvasses the current prison environment in which incarcerated, pregnant women live, including their limited access to abortion and the types of restraints that are applied to them during pregnancy. Part II also samples existing state legislation beginning this movement towards reduced restraints but explains that it is unlikely these protections are being enforced. Part III juxtaposes abortion jurisprudence—namely, doctrine from the U.S. Supreme Court in *Roe v. Wade*<sup>15</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>16</sup> and their progeny—to establish that the state has an interest in protecting the fetus being carried by an incarcerated, pregnant woman. Part III then argues that once the child is born, or the time-period shifts from the third trimester to labor and delivery, an independent, constitutionally protected individual exists, which requires banning restraints during labor and delivery. Part III also applies the statutory best interests framework, which is at the center of child custody disputes, to emphasize how restraining a pregnant inmate undermines the state’s interest in protecting the child. Part IV recommends the enactment of nation-wide legislation mirroring policies purportedly applied by the Federal Bureau of Prisons.

## II. PREGNANT WOMEN IN THE CURRENT U.S. PRISON SYSTEM

That incarcerated women are shackled, chained, and handcuffed in prison during some of the most physically taxing times of their pregnancy is a reality of which many unimprisoned Americans are unaware.<sup>17</sup> Yet, related topics like women’s access to reproductive care—contraception,<sup>18</sup> abortion,<sup>19</sup> etc.—are mainstream issues. Disconnect

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14. IF/WHEN/HOW, *supra* note 8, at 6.

15. 410 U.S. 113 (1973).

16. 505 U.S. 833 (1992).

17. See, e.g., Stephen D. Sowle, *A Regime of Social Death: Criminal Punishment in the Age of Prisons*, 21 N.Y.U. REV. L. & SOC. CHANGE 497, 501-02 (1994) (referring to a disconnect between society and what happens inside prisons).

18. E.g., Ziegler, *supra* note 10; *Roman Catholic Archbishop of Washington v. Burwell*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/roman-catholic-archbishop-of-washington-v-burwell/> [<https://perma.cc/R275-4JTH>] (discussing a case pending currently before the U.S. Supreme Court addressing whether companies’ First Amendment rights are being violated by being forced to comply with the federal government mandate to provide contraception to employees, despite the religious beliefs of the owners against the practice); *Smear Campaign Against Planned Parenthood*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/about-us/newsroom/smear-campaign-against-planned-parenthood> [<https://perma.cc/5LKK-VCH7>] (detailing recent pushback against Planned Parenthood’s efforts to provide reproductive care to women, including legislative movements).

19. E.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (most recent case from the U.S. Supreme Court on abortion); see Mary Ziegler, *Symposium: The Court Once Again Makes the “Undue-Burden” Test a Referendum on the Facts*, SCOTUSBLOG (June 27,

between prison and civic societies explains why, until recently, the maltreatment of pregnant, incarcerated women was generally undetected and not addressed in legislation.<sup>20</sup>

This Part first explains the current environment in which pregnant women who are incarcerated live and the governmental rationale for the surrounding policies. It then samples related state legislation from across the country and summarizes recent efforts challenging shackling practices on the basis of constitutional and international human rights. This informative Part sets the stage of the current discourse for the shift in discussion that Part III introduces.

### A. *How Incarceration Limits a Woman's Access to Care*

Women compose an increasing proportion of the American prison population;<sup>21</sup> and, approximately 6% of the female prison population is pregnant.<sup>22</sup> Pregnancy in prison is much different than being pregnant in 'free' society. When an incarcerated woman is pregnant, her options as to how her pregnancy will proceed are severely limited by her incarceration and the prison facility's resulting control over her medical care.<sup>23</sup> In contrast, a 'free' woman may completely control her pregnancy, including whether the pregnancy will be carried to term, which doctor treats her, how and where she will give birth, how and where she will recover from labor and delivery, etc.

"An inmate must rely on prison authorities to treat his [or her] medical needs; if the authorities fail to do so, those needs will not be met."<sup>24</sup> In 1976, the U.S. Supreme Court stated that it is "the government's obligation to provide medical care for those whom it is punishing by incarceration."<sup>25</sup> When medical care is denied, the result is, at least, "pain and suffering which no one suggests would serve any penological purpose."<sup>26</sup> At its worse, such denial of medical care could amount to a vio-

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2016, 2:34 PM), <http://www.scotusblog.com/2016/06/symposium-the-court-once-again-makes-the-undue-burden-test-a-referendum-on-the-facts/> [<https://perma.cc/8MLM-UBUY>].

20. Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237, 240 (2009); see, e.g., SHACKLING OF INCARCERATED WOMEN, *supra* note 5; Sowle, *supra* note 17, at 501-02.

21. See Stav Ziv, *Report: America's Prison Population Is Growing Again*, NEWSWEEK (Dec. 22, 2014, 2:55 PM), <http://www.newsweek.com/americas-correctional-system-numbers-293583> [<https://perma.cc/YR8W-7BSC>].

22. See SHACKLING OF INCARCERATED WOMEN, *supra* note 5.

23. *Brown v. Plata*, 563 U.S. 493, 510-11 (2011).

24. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

25. *Id.*

26. *Id.*

lation of the inmate's Eighth Amendment right against cruel and unusual punishment.<sup>27</sup> Nonetheless, "[e]ach day, men, women, and children behind bars suffer needlessly from lack of access to adequate medical and mental health care. Chronic illnesses go untreated, emergencies are ignored, and patients with serious mental illness fail to receive necessary care."<sup>28</sup> Pregnant women are among those inmates not receiving adequate medical care from American correctional institutions.<sup>29</sup>

More significantly, a woman's pregnancy is altered by incarceration. For example, in 1973, the U.S. Supreme Court established that women have a right to choose to have an abortion, protected by the Due Process Clause of the Fourteenth Amendment.<sup>30</sup> This holding of *Roe v. Wade* in 1973 was affirmed in 1992 by the U.S. Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>31</sup> In 2008, the U.S. Supreme Court denied certiorari without comment—thereby tacitly assenting to or "let[ting] stand"—"a lower court's ruling that female inmates have a constitutional right to abortions off jail grounds."<sup>32</sup> Thus, the fundamental right to choose to have an abortion, is *not* a right lost upon incarceration.<sup>33</sup>

Despite these constitutional protections, correctional institutions often limit, or sometimes altogether eliminate, a female inmate's right

27. *Id.* at 103-04; Sara Baez, *Student Argues Reproductive Rights of Incarcerated Women at Conference in Dominican Republic*, MIAMI LAW (June 28, 2016), <http://www.law.miami.edu/news/2016/june/student-argues-reproductive-rights-incarcerated-women-conference-dominican-republic> [<https://perma.cc/8U5S-URAW>]; see U.S. CONST. amend. VIII.

28. *Medical and Mental Health Care*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/prisoners-rights/medical-and-mental-health-care> [<https://perma.cc/GB24-WDP7>]; *accord Medical Care for Prisoners*, CTR. FOR PRISONER HEALTH & HUM. RIGHTS, <http://www.prisonerhealth.org/resources-for-prisoners-families-and-advocates/prisoners-and-families/> [<https://perma.cc/PW8Z-L69U>].

29. See Vania Leveille, *Bureau of Prisons Revises Policy on Shackling of Pregnant Inmates*, AM. CIV. LIBERTIES UNION (Oct. 20, 2008), <https://www.aclu.org/blog/speakeasy/bureau-prisons-revises-policy-shackling-pregnant-inmates> [<https://perma.cc/7AG6-3A9G>].

30. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

31. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe*, 410 U.S. 113.

32. Mears, *supra* note 7. That denying reproductive rights due to incarceration amounts to a violation of the Eighth Amendment is likely a compelling argument not presented here. See *Brown v. Plata*, 563 U.S. 493, 510-11 (2011); *Arpaio v. Doe*, 552 U.S. 1280 (2008).

33. *E.g.*, FAMILY PLANNING & CONTRACEPTIVE RESEARCH, *supra* note 6; Complaint at 2, *Doe v. Singleton*, No. 3:15-cv-01215-AKK (N.D. Ala. July 20, 2015) [hereinafter Complaint] ("[A] woman has a fundamental right to decide whether or not to bear a child. This right survives incarceration."); see *Arpaio*, 552 U.S. at 1280; see also *Brown*, 563 U.S. at 510 ("[T]he law and the Constitution demand recognition of certain other rights."). *But cf.* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 28-29 (2012) (listing the rights one does lose upon conviction—during incarceration and after release—such as the right to vote, the right to serve on a jury, and eligibility for welfare assistance).

to choose to terminate her pregnancy.<sup>34</sup> In fact, “a significant proportion of [correctional] facilities refuse to allow abortion access” to inmates.<sup>35</sup> Even facilities that, in theory, allow inmates to choose an abortion fail to assist women in actually accessing abortions, further undermining the reality that incarcerated women can exercise their fundamental right to choose to terminate a pregnancy.<sup>36</sup> As a result, incarcerated women are essentially forced to carry their pregnancies to term.<sup>37</sup> One scholar, in particular, drawing from international human rights standards “argues that the denial of an abortion to an incarcerated woman should constitute torture and a violation of the Eighth Amendment.”<sup>38</sup> Justice Ginsburg’s 2016 concurrence in *Whole Woman’s Health v. Hellerstedt*<sup>39</sup> may also suggest an Eighth Amendment violation from such denial due to the danger and possible complications of childbirth that the state is thereby forcing upon incarcerated women.<sup>40</sup> Further, the U.S. Supreme Court in *Hellerstedt* suggested that abortion implicates “important human values.”<sup>41</sup> That said, if a woman is pregnant, incarcerated, and obliged to carry her pregnancy to term, how is the state treating her during pregnancy and the fetus during gestation?

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34. *Roe*, 410 U.S. at 164.

35. Kasdan, *supra* note 4, at 59; *accord*, e.g., Complaint, *supra* note 33, at 2 (requesting relief under the Eighth and Fourteenth Amendments as the Sheriff denied Plaintiff, a pregnant inmate, access to an abortion).

36. Kasdan, *supra* note 4, at 59; *accord* FAMILY PLANNING & CONTRACEPTIVE RESEARCH, *supra* note 6. Officers’ ability to act depending on the specific case and their related personal feelings towards an inmate furthers the frustration of reproductive access for female inmates. Kimberly Goldberg, *Pregnant Women and Mothers Behind Bars*, 8 L. & SOC’Y J. UCSB 125, 128 (2009).

37. *E.g.*, Goldberg, *supra* note 36, at 128 (explaining the story of how a combination of bureaucracy and state laws in Louisiana forced Victoria W. to carry her pregnancy to term); *id.* at 133 (“Women in prison need to be able to have the choice of an abortion readily available to them.”); Samantha Lachman, *Alabama Moves to Deny Inmate Parental Rights So She Can’t Have Abortion*, HUFFINGTON POST (July 29, 2015), [http://www.huffingtonpost.com/entry/alabama-inmate-parental-rights-abortion\\_us\\_55b9056ee4b0224d8834ca9b](http://www.huffingtonpost.com/entry/alabama-inmate-parental-rights-abortion_us_55b9056ee4b0224d8834ca9b) [https://perma.cc/A9NB-X3FC]. This is not elaborated on here; though, the denial of abortion to an inmate could likely amount to an infringement on an inmate’s Eighth Amendment rights under *Estelle v. Gamble*, 429 U.S. 97 (1976).

38. Baez, *supra* note 27.

39. 136 S. Ct. 2292 (2016).

40. *See also id.* at 2320 (Ginsburg, J., concurring) (“When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety.”).

41. *Id.* at 2305 (majority opinion) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24, cmt. f (AM. LAW INST. 1982)).

### B. Chained and Shackled by American Correctional Institutions

In addition to a general lack of medical care and severely restricted access to abortion,<sup>42</sup> pregnant inmates in U.S. correctional facilities are often physically restrained during the third trimester,<sup>43</sup> transportation to and from medical facilities, labor and delivery,<sup>44</sup> and postpartum recovery.<sup>45</sup> Yet, “[a]t least two courts have held that pregnancy, at least in its later stages, constitutes a serious medical need,”<sup>46</sup> indicating that medical care may not be denied to inmates under Eighth Amendment jurisprudence.<sup>47</sup> In Illinois, the pioneer in anti-shackling legislation—as explained in Section 1 below—defines “restraints” as:

[A]ny physical restraint or mechanical device used to control the movement of a prisoner’s body or limbs, or both, including, but not limited to, flex cuffs, soft restraints, hard metal handcuffs, a black box, Chubb cuffs, leg irons, belly chains, a security (tether) chain, or a convex shield, or shackles of any kind.<sup>48</sup>

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42. FAMILY PLANNING & CONTRACEPTIVE RESEARCH, *supra* note 6 (reporting low rates of pregnancy care—prenatal exercise, nutrition counseling, medication, testing, etc.—for inmates). *But cf.* Goldberg, *supra* note 36, at 132 (“Many argue that because the majority of women in prison are poor, they are actually receiving better services for their pregnancy than they would outside of prison.”).

43. SHACKLING OF INCARCERATED WOMEN, *supra* note 5; Andrea Hsu, *Difficult Births: Laboring and Delivering in Shackles*, NPR (July 16, 2010, 3:35 PM), <https://www.npr.org/templates/story/story.php?storyId=128563037> [<https://perma.cc/EW48-M5QW>].

44. AM. MED. ASS’N., AN “ACT TO PROHIBIT THE SHACKLING OF PREGNANT PRISONERS” MODEL STATE LEGISLATION (2015), <https://www.ama-assn.org/sites/default/files/media-browser/specialty%20group/arc/shackling-pregnant-prisoners-issue-brief.pdf> [<https://perma.cc/2HVN-7X6F>]; ACLU BRIEFING PAPER, *supra* note 1. “Labor” is defined as: [T]he period of time before a birth and shall include any medical condition in which a woman is sent or brought to the hospital for the purpose of delivering her baby. These situations include: induction of labor, prodromal labor, pre-term labor, prelabor rupture of membranes, the 3 stages of active labor, uterine hemorrhage during the third trimester of pregnancy, and caesarian delivery including pre-operative preparation.

55 ILL. COMP. STAT. 5/3-15003.6(a)(2) (2016); *accord* FLA. STAT. § 944.241(2)(e) (2015).

45. AM. MED. ASS’N., *supra* note 44. “Post-partum” is defined by Illinois, for example, as “the period immediately following delivery, including the entire period a woman is in the hospital or infirmary after birth.” 55 ILL. COMP. STAT. 5/3-15003.6(a)(3) (2016). Florida’s definition is a bit more restrictive, defining “postpartum recovery” as: [T]he period immediately following delivery, including the recovery period when a woman is in the hospital or infirmary following birth, up to 24 hours after delivery unless the physician after consultation with the department or correctional institution recommends a longer period of time. FLA. STAT. § 944.241(2)(f) (2015) (emphasis added).

46. ACLU NAT’L PRISON PROJECT, AM. CIV. LIBERTIES UNION, KNOW YOUR RIGHTS: MEDICAL, DENTAL AND MENTAL HEALTH CARE 3, [https://www.aclu.org/sites/default/files/field\\_document/know\\_your\\_rights\\_-\\_medical\\_mental\\_health\\_and\\_dental\\_july\\_2012.pdf](https://www.aclu.org/sites/default/files/field_document/know_your_rights_-_medical_mental_health_and_dental_july_2012.pdf) [<https://perma.cc/MVV7-WA8F>].

47. *See supra* notes 24-27 and accompanying text.

48. 55 ILL. COMP. STAT. 5/3-15003.6(a)(1) (2016).

Generally, when such policies exist without restrictive legislation, these restraints are used “regardless of [the woman’s] history of violence or escape,”<sup>49</sup> meaning the practices are uniformly applied without consideration of case-by-case necessity or appropriateness. This Section further explains existing shackling practices,<sup>50</sup> the policy rationales supporting these practices, and current legislation aiming to reduce such practices—the effectiveness of which may be doubtful.

Security is the central tenant of pro-shackling contentions. Likely the most broadly accepted rationale for shackling practices is that they protect third parties—the public, health professionals, and guards—from the woman when she is outside of the correctional facility for medical treatment.<sup>51</sup> For example, when a woman is transported to the hospital to give birth, advocates would say shackling is necessary to ensure the safety of those with whom she may come in contact.<sup>52</sup> Likewise, shackling and chaining pregnant women allegedly ensures that the woman will not escape, which would pose harm to society and the woman herself.<sup>53</sup> To that end, shackling also allegedly protects the pregnant woman from harming herself. In essence, prison “administrators will not lose sight of the fact that *some* of the imprisoned women are dangerous criminals . . .,” which, to them, generally justifies these practices.<sup>54</sup>

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49. FAMILY PLANNING & CONTRACEPTIVE RESEARCH, *supra* note 6.

50. An entirely separate discussion could be had on the history and locality of shackling practices. Briefly, are traditionally conservative institutes more apt to have these policies in place because they have historically minimized women’s rights; or, are they less likely to have these policies due to their strong opposition to abortion and support of fetal protection? See Amy E. Lerman & Joshua Page, *The State of the Job: An Embedded Work Role Perspective on Prison Officer Attitudes*, 14 PUNISHMENT & SOC’Y 503, 509, 519 (2012). I would hypothesize something towards the former because the discussion on shackling, for the most part, has focused on the mother and her rights. That is what sets this Note apart: its differential focus on the fetus rather than the mother. To that end, the states that received an F on their shackling “report card” in 2008 were Delaware, Florida, Georgia, Louisiana, Massachusetts, Montana, and North Carolina. The Rebecca Project for Human Rights, *Shackling Policies*, in NAT’L WOMEN’S LAW CTR., MOTHERS BEHIND BARS, 19 (Oct. 2010), <http://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf> [<https://perma.cc/BXD5-D59M>] [hereinafter *Shackling Policies*]. Or, is the prison industry a completely separable group from its respective geographical states with its own ideals that support these practices? See Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 118, 135 n.387 (2016).

51. See SHACKLING OF INCARCERATED WOMEN, *supra* note 5, at 6.

52. *E.g.*, Goldberg, *supra* note 36, at 125 (“In September 2005, . . . a pregnant inmate in Wisconsin, was rushed to the hospital in handcuffs and leg shackles to have her labor induced . . . [Her] restraints were left on even after the doctor ruptured her amniotic sac and asked her to pace the hallway for several hours to start the labor going.”); *id.* at 132.

53. *E.g.*, Claire Louise Griggs, *Birthing Barbarism: The Unconstitutionality of Shackling Pregnant Prisoners*, 20 AM. U. J. GENDER SOC. POL’Y & L. 247, 250-51 (2011).

54. CHANDLER, *supra* note 6, at 34 (emphasis added).

### 1. *Current Policies on Shackling and Chaining*

Until recently, neither federal nor state legislation was concerned with the physical well-being of imprisoned women.<sup>55</sup> Since then, the Federal Bureau of Prisons (FBP) has promulgated restrictive policies on shackling practices; some states have enacted restrictive legislation; and organizations have set suggestive standards limiting the use of these restraints. This Sub-Section describes those efforts and expounds upon their effect.

#### (a) *Federal Policy*

In 2008, the FBP banned the “shackling of pregnant prisoners absent extenuating circumstances.”<sup>56</sup> This federal policy change requires all states to “follow the same federal policies regarding incarcerated pregnant women.”<sup>57</sup> The FBP’s report stated “that no restraints may be used on a pregnant prisoner *unless there is a risk of escape or a threat that the prisoner will cause harm to herself or staff.*”<sup>58</sup> The FBP also allowed an exception for “extremely violent prisoner[s],” who may be restrained so long as the measures used are the least restrictive.<sup>59</sup> The FBP also banned any use of control belts—“a device that administers an electrical shock when triggered”—on pregnant women.<sup>60</sup> This federal legislation sends a strong message on the seriousness of shackling; however, the practical effectiveness of this federal legislation is minimal.<sup>61</sup>

Due to fundamental federalism concerns and the Tenth Amendment, direct control of prison operations and policies is indefinitely localized.<sup>62</sup> As an issue of health and safety, prison management and health concerns therein are a matter of state police power in which the federal government may not dip its toe.<sup>63</sup> Likewise, the FBP legislation

55. See Goldberg, *supra* note 36, at 126. Generally, there is a lack of focus in legislation on the rights of the accused and incarcerated. See generally Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993) (arguing that this absence of legislation is a result of public choice theory).

56. Goldberg, *supra* note 36, at 125; accord FAMILY PLANNING & CONTRACEPTIVE RESEARCH, *supra* note 6.

57. Goldberg, *supra* note 36, at 130.

58. *Id.* (emphasis added).

59. *Id.* This seems to reflect the strict scrutiny standard. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

60. Goldberg, *supra* note 36, at 130 (citing U.S. DEP’T OF JUST., ESCORTED TRIPS 13-14 (2008), [www.aclu.org/pdfs/prison/bop\\_policy\\_escorted\\_trips\\_p5538\\_05.pdf](http://www.aclu.org/pdfs/prison/bop_policy_escorted_trips_p5538_05.pdf)).

61. See Leveille, *supra* note 29.

62. U.S. CONST. amend. X; e.g., Goldberg, *supra* note 36, at 126; *id.* at 125 (“Although the passing of the new federal law is a step towards women gaining the rights they deserve, it remains vague and does little for the overall well being of pregnant women in prison.”).

63. *Due Process of Law: Health, Safety, and Morals*, JUSTIA, (citing *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)) <http://law.justia.com/constitution/us/amendment-14/14-health-mine-morals.html> [<https://perma.cc/9RQJ-XGB3>]; see Melanie Kalmanson, *Filling the Gap*

practically “only applies [as binding authority] to prisons and detention centers operated by the federal government, and does not reach state and local facilities.”<sup>64</sup> As a result, shackling policies and legislation differ from state-to-state.<sup>65</sup>

(b) *State Legislation*

Likely underlying the varying policies is each state’s theory of imprisonment, namely whether the focus should be punitive or rehabilitative.<sup>66</sup> Shackling furthers penal goals but undermines rehabilitative goals. But, lack of transparency complicates any real analysis of local policies because the prison system and implementation of policies is localized to the point that determining exactly what happens ‘on the inside’ is almost impossible.<sup>67</sup> Thus, state statutes are not completely indicative of what *actually* occurs inside correctional facilities—a significant portion of which are privately operated.<sup>68</sup> Nevertheless, this Section surveys existing state legislation.

In 2000, Illinois was the first state to act on the issue of shackling policies by enacting legislation, stating:

Notwithstanding any other statute, directive, or administrative regulation, when a pregnant female prisoner is brought to a hospital from a County Department of Corrections facility 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 prisoner who is in labor. Upon the pregnant female prisoner’s entry to the hospital delivery room, a county correctional officer must be posted immediately outside the delivery room. The Sheriff must provide for adequate personnel to monitor the pregnant female prisoner

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*of Domestic Violence Protection: Returning Human Rights to U.S. Victims*, 43 FLA. ST. U.L. REV. 1359, 1381 n.186 (2016) (explaining the framework surrounding the Tenth Amendment of the U.S. Constitution in more depth).

64. SHACKLING OF INCARCERATED WOMEN, *supra* note 5, at 10; *accord* Leveille, *supra* note 29.

65. *E.g.*, Goldberg, *supra* note 36, at 128; FAMILY PLANNING & CONTRACEPTIVE RESEARCH, *supra* note 6. For a comprehensive look at state-by-state legislation, relative to other states, see *Shackling Policies*, *supra* note 50.

66. *See generally, e.g.*, Sowle, *supra* note 18 (explaining these different rationales for punishment).

67. Goldberg, *supra* note 36, at 128; Kasdan, *supra* note 4, at 59; Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 852-53 n.4 (1995); SHACKLING OF INCARCERATED WOMEN, *supra* note 5, at 13.

68. *See* Goldberg, *supra* note 36, at 128 (“Almost all states have general policies regarding pregnant inmates, but those policies are not explicitly articulated in the law and can therefore be violated by corrections departments without many consequences.”).

during her transport to and from the hospital and during her stay at the hospital.<sup>69</sup>

In 2012, Florida enacted its Healthy Pregnancies for Incarcerated Women Act.<sup>70</sup> This Act proscribes the use of restraints “on a prisoner who is known to be pregnant during labor, delivery, and postpartum recovery, *unless* the corrections official makes an individualized determination that the prisoner presents an *extraordinary circumstance*.”<sup>71</sup> Even in the excusable “extraordinary circumstance,” however, “leg, ankle, or waist restraints [cannot] be used on any pregnant prisoner who is in labor or delivery.”<sup>72</sup> When the exception of “extraordinary circumstance[s]” is invoked, Florida requires that restraints be “applied . . . in the least restrictive manner necessary,” and the officer invoking the exception “shall make written findings . . . as to the extraordinary circumstance that dictated the use of the restraints.”<sup>73</sup> Florida also requires that shackling policies be posted in correctional facilities so that inmates are aware of the practices.<sup>74</sup>

Minnesota is a state with a more rehabilitative focus,<sup>75</sup> and its shackling policies seem to reflect such disposition. Minnesota’s statute is similar to Florida’s and provides an exception to its ban of restraints for specific circumstances and requires “the least restrictive [means] available and the most reasonable [restraints] under the circumstances” when the exception is invoked.<sup>76</sup> It also seems to clarify, or expand upon, Florida’s vague “extraordinary circumstance” language, providing that “a woman known to be pregnant” cannot be restrained “*unless* the representative makes an individualized determination that restraints are *reasonably necessary for the legitimate safety and security needs of the woman, correctional staff, other inmates, or the public*.”<sup>77</sup> Note the consistency here with the policy rationales for these practices in general, i.e., protecting third parties who may come in contact with the woman. Further, if the woman is in labor or has given

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69. 1999 Ill. Laws 91-253 (effective Jan. 1, 2000); *accord* SHACKLING OF INCARCERATED WOMEN, *supra* note 5, at 10.

70. FLA. STAT. § 944.241(3)(a) (2015).

71. *Id.* (emphasis added). Note the knowledge requirement here, almost imposing a mens rea standard on the state, which creates an apparent excuse if the state somehow may claim it did not know the woman was pregnant.

72. *Id.*

73. *Id.* § 944.241(3)(b).

74. *Id.* § 944.241(5)(b).

75. *See generally* Lerman & Page, *supra* note 50 (comparing the theories of punishment of California and Minnesota by analyzing their policies and the attitudes of officers).

76. MINN. STAT. § 241.88(1)(a) (2015).

77. *Id.* (emphasis added).

birth within the preceding three days—referred to as postpartum—<sup>78</sup> Minnesota law provides that restraints may only be used if:

- (1) there is a substantial flight risk or some other extraordinary medical or security circumstance that dictates restraints be used to ensure the safety and security of the woman, the staff of the correctional or medical facility, other inmates, or the public;
- (2) the [correctional facility] representative has made an individualized determination that restraints are necessary to prevent escape or injury;
- (3) there is no objection from the treating medical care provider; and
- (4) the restraints used are the least restrictive type and are used in the least restrictive manner.<sup>79</sup>

Minnesota also addresses another aspect of shackling concerns that is seemingly absent from Florida's statute: the transportation of pregnant inmates. Minnesota limits restraints during transportation, specifically prohibiting restraints that "cross or otherwise touch the woman's abdomen" and any type of wrist restraint that is "affixed behind the woman's back."<sup>80</sup> Also, Minnesota goes further than Florida's notice requirement and requires that facility staff be trained on these statutory provisions.<sup>81</sup>

As of August 2013, eighteen states had laws limiting the restraint of pregnant inmates; twenty-four states had less formal policies limiting the restraint of pregnant inmates; and, eight states did not have any form of regulation on the restraint of pregnant inmates.<sup>82</sup>

### (c) *Organizational Standards*

Shackling is also an organizational concern, and organizations like the American Bar Association (ABA) signal to the states by promulgating standards to suggest appropriate legislation or restrictions. The ABA weighed in on the shackling discussion, setting the following related standards:

- (a) A pregnant prisoner should receive necessary prenatal and postpartum care and treatment, including an adequate diet, clothing, appropriate accommodations . . . , and childbirth and infant care education. *Any restraints used on a pregnant prisoner or one who*

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78. See *supra* note 45.

79. MINN. STAT. § 241.88(1)(c).

80. *Id.* § 241.88(1)(b).

81. *Id.* § 241.88(2).

82. SHACKLING OF INCARCERATED WOMEN, *supra* note 5, at 10. This is a significant improvement from 2008, when forty-seven states had no legislation to restrict the practice of shackling pregnant women. Leveille, *supra* note 29.

*has recently delivered a baby should be medically appropriate; correctional authorities should consult with health care staff to ensure that restraints do not compromise the pregnancy or the prisoner's health.*

(b) . . . . *A prisoner should not be restrained while she is in labor, including during transport, except in extraordinary circumstances after an individualized finding that security requires restraint, in which event correctional and health care staff should cooperate to use the least restrictive restraints necessary for security, which should not interfere with the prisoner's labor.*

(c) *Governmental authorities should facilitate access to abortion services for a prisoner who decides to exercise her right to an abortion, as that right is defined by state and federal law . . . .*

. . . .

(e) . . . . *Governmental authorities should ordinarily allow a prisoner who gives birth while in a correctional facility or who already has an infant at the time she is admitted to a correctional facility to keep the infant with her for a reasonable time, preferably on extended furlough or in an appropriate community facility or, if that is not practicable or reasonable, in a nursery at a correctional facility that is staffed by qualified persons.* Governmental authorities should provide appropriate health care to children in such facilities.

(f) *If long-term imprisonment is anticipated, a prisoner with an infant should be helped to develop necessary plans for alternative care for the infant following the period described in subdivision (e) of this Standard, in coordination with social service agencies. A prisoner should be informed of the consequences for the prisoner's parental rights of any arrangements contemplated. When a prisoner and infant are separated, the prisoner should be provided with counseling and other mental health support.*<sup>83</sup>

These standards from the ABA seem to be the most protective, as compared to the FBP's policies and state legislation. First, the ABA starts with providing the inmate the option to terminate the pregnancy by directing access to abortion.<sup>84</sup> Proceeding through gestation, the ABA's standards restricting shackling or other physical restraints cover all three time periods—third trimester (albeit the entire pregnancy), labor and delivery, and postpartum—and also explicitly provide for transportation during these times. The ABA standards also include a

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83. ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS § 23-6.9, at 173-74 (AM. BAR ASS'N, 3d ed. 2011) [hereinafter ABA STANDARDS], [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/Treatment\\_of\\_Prisoners.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf) [<https://perma.cc/4QDS-FHBS>] (emphasis added).

84. *Id.* § 23-6.9(c).

notice provision,<sup>85</sup> like that in Florida's statute.<sup>86</sup> Most significantly, the ABA standards provide the most deference to medical professionals and direct the most restrictive usage of such restraints when the narrow exception for "extraordinary circumstances" is invoked.<sup>87</sup> Further, they recognize the importance of the postpartum period and direct that the mother and infant not be separated "for a reasonable time."<sup>88</sup> These ABA-promulgated standards appear to be the most comprehensive step toward protecting incarcerated, pregnant females from the detrimental effects of shackling practices.<sup>89</sup>

## 2. *Efforts to Reduce or Ban Shackling and Relevant Case Law*

Likewise, the treatment of pregnant, incarcerated women in American correctional institutions has been recently contemplated by interest group efforts, scholarship, and court actions. Current movements look to the following authorities to advocate for the repeal of shackling practices: international human rights standards, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR), and the U.S. Constitution, specifically the Eighth Amendment.<sup>90</sup>

The international human rights approach draws upon fundamental understandings of basic human rights, particularly the principles that (1) all humans, regardless of incarceration, must be treated with dignity and respect and (2) torture or cruel punishment are prohibited.<sup>91</sup> These are the same arguments advanced against using torture in the War on Terror. Organizations like the International Human Rights Clinic at the University of Chicago Law School and the ACLU National Prison Project argue that shackling practices violate these inalienable human rights.<sup>92</sup> The international human rights community recognized this concern in 2006 when the Human Rights Committee ("Committee") raised questions about reconciling shackling practices within the context of the guarantees of the ICCPR.<sup>93</sup>

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85. *Id.* § 23-6.9(f).

86. FLA. STAT. § 994.241(5) (2016).

87. ABA STANDARDS, *supra* note 83, § 23-6.9(b).

88. *Id.* § 23-6.9(e).

89. *See* discussion *infra* Section III.A.

90. ACLU BRIEFING PAPER, *supra* note 1; Int'l Human Rights Clinic, *Shackling of Pregnant Prisoners in the United States*, <https://ihreclinic.uchicago.edu/page/shackling-pregnant-prisoners-united-states> [<https://perma.cc/GFN6-A23G>].

91. *See* SHACKLING OF INCARCERATED WOMEN, *supra* note 5, at 1 (arguing that shackling practices violate the ICCPR).

92. *Id.*

93. *Id.* at 2. There was a follow-up to this initial concern in 2013. *Id.* at 3.

Regardless of the legitimacy of this international human rights argument, achieving change via international authority is inherently difficult.<sup>94</sup> The United States has a history of denying responsibility under international norms in varying contexts or denying the authority of international documents.<sup>95</sup> Likewise, the United States' response to the Committee's concerns has been to point to existing legislation—federal and state—that conforms to the ICCPR.<sup>96</sup> Existing legislation is incomplete, though. Some states completely lack legislation addressing these concerns. The goal should be to create uniform standards or legislation to ensure that all states are in conformance with the demands of international human rights.<sup>97</sup>

The Eighth Amendment approach argues that shackling practices amount to “cruel and unusual punishment[.]”<sup>98</sup> These claims are reviewed under the “deliberate indifference” standard, which is comprised of conjunctive objective and subjective elements,<sup>99</sup> whereby an official must demonstrate “deliberate indifference to a prisoner’s serious illness or injury.”<sup>100</sup> First, the objective element requires that “a detainee faced a substantial risk of serious harm and that such a risk is one that society chooses not to tolerate.”<sup>101</sup> In other words, if society feels sufficiently threatened by an unrestrained inmate, shackling is objectively justified. Next, the subjective element requires proving that the officer had “a sufficiently culpable state of mind.”<sup>102</sup>

In 2009, in *Nelson v. Correctional Medical Services*,<sup>103</sup> the U.S. Circuit Court of Appeals for the Eighth Circuit vindicated this argument and held that shackling practices violate the Eighth Amendment.<sup>104</sup> There, the Plaintiff, who was pregnant while incarcerated for the non-violent crime of credit fraud, was shackled to her wheel chair while

94. See generally, e.g., Kalmanson, *supra* note 63, at Section IV.A (discussing the struggle of vindicating international authority within the context of protecting victims of domestic violence in the United States, despite international norms requiring such protection).

95. See Kalmanson, *supra* note 63, at Section IV.A (discussing the demeanor of the United States in the domestic violence context under the authority of the American Declaration of Human Rights).

96. SHACKLING OF INCARCERATED WOMEN, *supra* note 5, at 3.

97. Cf. discussion *supra* Section II.B.1.b (explaining the state-specific nature of this legislation).

98. U.S. CONST. amend. VIII; SHACKLING OF INCARCERATED WOMEN, *supra* note 5, at 9.

99. *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013) (citing *Harrison v. Ash*, 539 F.3d 510, 518 (6th Cir. 2008)) (requiring that both the objective and subjective element be established before a violation is proven).

100. *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (finding no Eighth Amendment violation for medical malpractice).

101. *Villegas*, 709 F.3d at 569; *accord id.* at 568 (citing *Helling v. McKinney*, 509 U.S. 25, 36 (1993)).

102. *Id.* at 569 (citing *Harrison*, 539 F.3d at 518); *accord id.* at 575-76.

103. 583 F.3d 522 (8th Cir. 2009).

104. *Id.* at 534.

experiencing medical pains and then shackled to the bed during labor.<sup>105</sup> The Eighth Circuit found that the security officer imposing these restrictions acted with deliberate indifference (discussed below) in using these restraints, with the shackling amounting to a violation of the Eighth Amendment.<sup>106</sup>

In 2013, in *Villegas v. Metropolitan Government of Nashville*,<sup>107</sup> the U.S. Court of Appeals for the Sixth Circuit again applied the “deliberate indifference” standard, analyzing whether instances of shackling are unconstitutional.<sup>108</sup> Though ultimately reversing summary judgment for the Plaintiff (inmate) due to factual disputes,<sup>109</sup> the Sixth Circuit established that “the shackling of pregnant detainees while in labor offends contemporary standards of human decency such that the practice violates the Eighth Amendment’s prohibition against the ‘unnecessary and wanton infliction of pain’—i.e., it poses a substantial risk of serious harm.”<sup>110</sup> The court made clear that “shackling women during labor runs afoul of the protections of the Eighth Amendment” of the U.S. Constitution.<sup>111</sup> However, the Court observed that “the right to be free from shackling during labor is not unqualified.”<sup>112</sup>

The Sixth Circuit reaffirmed previously established exceptions to allow such ‘unconstitutional’ restraint when the pregnant inmate “presents a danger to herself or others,” or “poses a flight risk.”<sup>113</sup> Essentially, the Sixth Circuit, like the Eighth, vindicated the policy rationales for shackling in the first place. The subjective element allowed the Court to excuse an officer for not removing restraints, despite a “no restraint order” from the hospital, because there was no proof that the officer himself was aware of the order.<sup>114</sup>

These practices and the remaining loopholes in the regulations show that even at her most tender and intimate life-stage—child birth—a woman is viewed and treated like a monster, or sub-human, in American institutions.<sup>115</sup> Thus, these rulings that shackling violates the Eighth Amendment are practically weak and serve only to embellish

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105. Griggs, *supra* note 53, at 252.

106. *Id.* (citing *Nelson*, 583 F.3d at 522, 529).

107. 709 F.3d 563 (6th Cir. 2013).

108. *Id.* at 571 (6th Cir. 2013) (citing *Wilson v. Seiter*, 501 U.S. 294, 303 (1991)).

109. *Id.* at 578.

110. *Id.* at 574 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

111. *Id.*

112. *Id.* Note the parallel here to *Roe v. Wade*, 410 U.S. 113, 154 (1973), where the Court concluded that “the right of personal privacy includes the abortion decision, but [such] right is not unqualified . . . .”

113. *Villegas*, 709 F.3d at 574.

114. *Id.* at 576.

115. See Lerman & Page, *supra* note 50, at 524.

the courts' sympathy without actually effectuating protection for pregnant inmates. The issue remains that broad exceptions exist which officials may invoke with little to no oversight to allow shackling.

### III. RECOGNIZING THE OTHER ENTITY: BANNING SHACKLING PRACTICES TO PROTECT THE FETUS AND THEN CHILD

Anti-shackling arguments, explained above, generally focus on the mother's rights; if any discussion centers on the fetus or child, it is a general notion of the medical effects borne by the fetus or child as a result of the restraints. The rationale may be that a fetus does not have rights under the Constitution, and so it seems more obvious and advantageous to focus on the mother.<sup>116</sup> Biologically inherent in this conversation, though often overlooked, is another human being: the child who enters the world at a time when shackling is still employed.<sup>117</sup>

What previous and developing arguments fail to adequately consider is that shackling is increasingly problematic when the fetus becomes a child. To that end, in all time periods discussed here, the fetus is one that will be carried to term, thereby distinguishing this issue from abortion, through which the fetus will not be carried to term and does not reach the second point of the shackling discussion—labor and delivery. We know that this discussion is different based on prisons' efforts to undermine female inmates' access to abortion.<sup>118</sup>

This Part first explains the detrimental effects shackling has on the mother, the fetus, and the child. Section B then sets up the argument that banning shackling would protect the fetus—for which the state has accepted responsibility upon viability in the abortion context—and the child by discussing the state's interests involved in shackling. Section C bolsters the state's interests against shackling by dispelling the purported safety policy justifications behind shackling. Assembling this discussion, Section D contends that shackling practices are unconstitutional when viewed in light of the state's interests in protecting potential fetal life—the full gestation of which is almost guaranteed in this context—and the child's individual, untampered constitutional rights as a "person" under the U.S. Constitution, independent from its incarcerated mother.

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116. *But cf.* Lachman, *supra* note 37 (explaining efforts in Alabama to recognize fetal interests).

117. Note this is distinguishable and non-transferable to abortion discourse wherein the fetus is never intended to be born and remains a fetus rather than a child.

118. *See supra* discussion Section II.A.

### A. *Detrimental Effects of Shackling*

“[T]he justifications for shackling pale in comparison to the severe damage and degradation it causes.”<sup>119</sup> The effects of shackling on the mother are an obvious concern, especially considering that incarcerated women are generally “treated less well than men while their gender-specific needs have been ignored.”<sup>120</sup> Few things are more gender specific than pregnancy and childbirth,<sup>121</sup> not to mention the emotional intensity of the childbearing process, which is increased not only by incarceration but also the use of these barbaric devices.<sup>122</sup> Shackling the mother during labor and delivery inherently complicates these intimate and life-changing processes and poses risk to the infant.<sup>123</sup>

Directly affecting the mother and the fetus, restraints interfere with the mother’s balance.<sup>124</sup> When restrained, it is more likely that the mother will lose her balance and fall, risking injury to the fetus “because of [the mother’s] inability to catch herself” when handcuffed.<sup>125</sup> Florida’s statute directly addresses this concern, providing that “[i]f wrist restraints are used [in the third trimester], they must be applied in the front so the pregnant prisoner is *able to protect herself in the event of a forward fall*.”<sup>126</sup>

Inherent in the word “restraint” is the fact that using shackles, handcuffs, and chains on a pregnant woman during labor and delivery complicates these processes. Specifically, the woman’s movement is restricted, lessening her ability to change positions as necessary.<sup>127</sup> For example, in *Nelson* (the Eighth Circuit case discussed above), the mother/inmate “suffered a hip dislocation and an umbilical hernia directly resulting from the shackles that prevented” her from moving her legs.<sup>128</sup> Medical personnel are also restricted in their access to the mother and fetus during delivery, which may jeopardize the safety of

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119. Griggs, *supra* note 53, at 251.

120. HUMAN RIGHTS WATCH WOMEN’S RIGHTS PROJECT, *supra* note 2, at 22.

121. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992); *Geduldig v. Aiello*, 417 U.S. 484, 500-01 (1974) (Brennan, J., dissenting).

122. See *Casey*, 505 U.S. at 852 (“The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.”); Goldberg, *supra* note 36, at 131 (“[T]rauma [is] caused by shackling a pregnant prisoner.”).

123. Goldberg, *supra* note 36, at 131 (quoting Assemblywoman Sally J. Leiber) (citing AMNESTY INT’L USA, STOP VIOLENCE AGAINST WOMEN).

124. *E.g.*, Griggs, *supra* note 53, at 253.

125. Goldberg, *supra* note 36, at 131; *accord* Griggs, *supra* note 53, at 253.

126. FLA. STAT. § 944.241(3)(c)(2) (2015) (emphasis added). Minnesota’s statute also considers this, just not as explicitly. See *supra* note 79 and accompanying text.

127. Goldberg, *supra* note 36, at 131.

128. Griggs, *supra* note 53, at 253. For more information on an umbilical hernia, see *Umbilical Hernia*, MAYO CLINIC (Apr. 24, 2015), <http://www.mayoclinic.org/diseases-conditions/umbilical-hernia/basics/definition/con-20025630> [<https://perma.cc/N2NK-5VBW>].

the child.<sup>129</sup> Especially in an emergency situation, restricting medical personnel could cause physical harm to the child.<sup>130</sup> In fact, even a minor delay could cause “permanent brain damage to the child.”<sup>131</sup>

In conclusion, the risks posed by using restraints on pregnant inmates outweigh any possible benefit these practices could serve. Specifically, these practices pose medical, physical, and emotional risks to the mother and fetus/infant/child. Thus, pregnancy is itself an extraordinary circumstance that repudiates the use of shackles, handcuffs, or other restraints on pregnant inmates.

### B. *The State's Interests*

When considering almost any legislation, two sides are almost always involved. Here, the two interests to review are (1) the state's interests in enacting the legislation and (2) the interests of those affected by the legislation. This is the fundamental structure of American constitutional law, regardless of the level of review being applied. With respect to shackling, when analyzing these interests, the focus has been on the woman—the state's interest in protecting society from an inmate who may be dangerous, and the woman's interest in maintaining her bodily autonomy consistent with the right against cruel and unusual punishment under the Eighth Amendment and the Fourteenth Amendment.<sup>132</sup>

This discussion shifts the analysis to the fetus and child who is also affected by shackling practices. Directly transposing abortion jurisprudence shows that the state's interests in protecting potential human life and fetal dignity are not unique to the abortion context and may be even stronger in this context where the state acts to essentially ensure that the fetus is delivered. Then, upon birth, the analysis shifts to view the interests in light of an innocent, newborn infant with unfettered rights, which the state has an interest in protecting.

Regarding an inmate's ability to choose abortion, “the State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus *that may become a child*.”<sup>133</sup> How, then, can the state reject the *same* rights in the shackling context? This discussion does not contend that fetal rights should be recognized or constitutionalized, as that would significantly complicate women's

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129. Griggs, *supra* note 53, at 253; ACLU BRIEFING PAPER, *supra* note 1, at \*3.

130. ACLU BRIEFING PAPER, *supra* note 1.

131. *Id.* at \*4.

132. *See Brown v. Plata*, 563 U.S. 493, 510 (2011).

133. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (emphasis added).

access to abortion.<sup>134</sup> Rather, this discussion functions within the current abortion framework that recognizes state interests in protecting fetal life, to a certain extent. Then, the focus shifts to the constitutionally protected citizen once the child is born. To contextualize this discussion, the U.S. Supreme Court in *Roe v. Wade* stated:

The State has a legitimate interest in seeing to it that abortion, *like any other medical procedure*, is performed under circumstances that *insure maximum safety for the patient*. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise.<sup>135</sup>

It goes without saying that there are glaring discrepancies between this language and what is happening to incarcerated women and the children born to them. This Section illustrates the state's interests in shackling, first during gestation as it relates to potential fetal life, and second, after birth as it relates to the child.

### *1. Protecting Fetal Health—A State Interest Vindicated by Abortion Law*

The U.S. Supreme Court increasingly recognizes and upholds the state's interests in protecting a fetus as gestation progresses.<sup>136</sup> To that end, the U.S. Supreme Court stated in *Gonzales v. Carhart*, fifteen years after *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>137</sup> that regardless of “one’s views concerning the *Casey* joint opinion, . . . a premise central to its conclusion [is clear]—. . . the government has a legitimate and substantial interest in preserving and promoting fetal life . . . .”<sup>138</sup> To accomplish consistency in a world in which *Casey* and its progeny controls,<sup>139</sup> the state must recognize that its interests in “preserving and promoting fetal life” are not exclusive to the abortion context. No medical difference exists between a fetus being carried in the third trimester by a woman who is seeking an abortion and a fetus being carried in the third trimester whose mother plans to

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134. See generally Fiona de Londras, *Constitutionalizing Fetal Rights: A Salutory Tale from Ireland*, 22 MICH. J. GENDER & L. 243 (2015).

135. *Roe v. Wade*, 410 U.S. 113, 150 (1973) (emphasis added).

136. See *Gonzales v. Carhart*, 550 U.S. 124, 145-46 (2007); *Casey*, 505 U.S. 833, 846.

137. 505 U.S. 833.

138. *Gonzales*, 550 U.S. at 145.

139. The “undue burden” standard from *Casey* is controlling is an even more concrete notion following the Supreme Court’s decision in *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which despite its opportunity to overturn *Roe v. Wade*, 410 U.S. 113 (1973), and/or *Casey*, explicitly applied and thereby affirmed the standard from *Casey*. See also *Hellerstedt*, 136 S. Ct. at 2321 (Ginsburg, J., concurring).

give birth. If anything, the difference is that the latter will certainly be delivered. Thus, the state's recognized interests in protecting fetal life must also apply when discussing incarcerated pregnancy.

Yet, such interests are directly contradicted by the enactment and implementation of shackling practices. Under the *Casey* "undue burden" framework, the state emphasizes its interest in protecting both the mental health of the woman and the health of the fetus once it reaches viability.<sup>140</sup> Viability is "the point at which a fetus could potentially live outside the mother's womb without medical aid."<sup>141</sup> *Casey* suggests that the state's interests are valid before the child is born.<sup>142</sup> While this may differ from the wishes of some abortion advocates, for now, this is the current framework—women have the right to choose without any substantial obstacle until the state's interests become significant enough to be involved in the consideration.<sup>143</sup> Living in the *Casey* framework, the state should not be allowed to abandon its responsibility to the fetus simply because the mother is incarcerated.

In sum, shackling incarcerated women undercuts the state's purported interests in fetal wellbeing, the fundamental premise of the *Casey* "undue burden" framework. Though a woman—or anyone for that matter—loses civil liberties when imprisoned,<sup>144</sup> such deprivation should not extend so far as to impede the medical interests of an innocent child,<sup>145</sup> which segues to the next Section discussing the child's rights. In other words, "imprisonment . . . does not completely strip individuals [or their offspring] of their most basic constitutional and human rights."<sup>146</sup>

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140. See *Casey*, 505 U.S. at 846.

141. MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 11 (2015).

142. See *Casey*, 505 U.S. at 846.

143. See generally *id.* at 833.

144. Forman, Jr., *supra* note 33, at 27-29; Kasdan, *supra* note 4, at 59-60.

145. See *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

146. Kasdan, *supra* note 4, at 59-60.

## 2. *Protecting the Child—A Constitutional “Person”*

A significant event takes place when the fetus exits the womb and enters the world.<sup>147</sup> “[W]hen a *child* draws his first breath, he [becomes] protected under the law”<sup>148</sup> and the U.S. Constitution as a “person” and U.S. citizen.<sup>149</sup> This distinction is reflected in the U.S. Supreme Court’s decision *Gonzales v. Carhart*,<sup>150</sup> where the Court defined the specific point during birth at which the fetus has been partially born and its death may then justify criminal liability.<sup>151</sup> The state has an “interest and general obligation to protect life”<sup>152</sup> and “respect . . . the dignity of human life.”<sup>153</sup> After birth, therefore, the state cannot infringe upon the child’s constitutional rights. Such rights, as characterized by the U.S. Supreme Court, are “virtually coextensive with that of an adult.”<sup>154</sup>

Even further distinguishing the child from its incarcerated mother is the reality that so many children born to incarcerated mothers are not parented by these mothers. In fact, “most babies [born to incarcerated women] are removed [from the mother] within 24 hours of birth.”<sup>155</sup> “Newborns are usually given to grandmothers or other family”<sup>156</sup> or become wards of the state and are either sent into foster care or adoption.<sup>157</sup> Therefore, the state’s interest in protecting a child born to an incarcerated mother is arguably stronger because the state will become the guardian of the child,<sup>158</sup> as opposed to a child born to a ‘free’ mother

147. See *Gonzales*, 550 U.S. at 157; Collins, *supra* note 10, at 24 (“Abortion advocates . . . contend[] that life does not begin until birth.”).

148. Collins, *supra* note 10, at 24 (emphasis added).

149. *Roe v. Wade*, 410 U.S. 113, 156-57 (1973) (stating that “person” within the Constitution is applied “only postnatally”); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

150. 550 U.S. 124.

151. *Id.* at 147-48. Mens rea (or the subjective intent) for causing the death must also be proven to impose criminal liability. *Id.* at 148-49.

152. *Roe*, 410 U.S. at 150. How life is defined is what affects abortion jurisprudence; however, here, life is non-debatable once the child is born.

153. *Gonzales*, 550 U.S. at 157.

154. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

155. FAMILY PLANNING & CONTRACEPTIVE RESEARCH, *supra* note 6.

156. *Id.*

157. *E.g.*, CHANDLER, *supra* note 6, at 43-44; RAM SUBRAMANIAN & ALISON SHAMES, VERA INST. JUST., SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES 3, 16 (2013), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/sentencing-and-prison-practices-in-germany-and-the-netherlands-implications-for-the-united-states/legacy\\_downloads/european-american-prison-report-v3.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/sentencing-and-prison-practices-in-germany-and-the-netherlands-implications-for-the-united-states/legacy_downloads/european-american-prison-report-v3.pdf) [<https://perma.cc/Z3BS-F8TG>].

158. See Laura Oren, DeShaney’s *Unfinished Business: The Foster Child’s Due Process Right to Safety*, 69 N.C. L. REV. 113, 116, 122-24 (1990) (explaining how the foster care system allows the state to usurp the parent’s role).

who will raise the child on her own.<sup>159</sup> With that, the interests of the child who will be permanently disconnected from its incarcerated mother become individually more significant. Switching to the state's focus on the parents rather than the child: The child's *new* parents—foster, adoptive, or the state—have an interest in the child being taken care of, or protected, by the state until the child reaches their care.<sup>160</sup>

*C. Empirically Dispelling Security Concerns—Escape, Harm to Herself, Harm to Others*

The security rationales for shackling have been empirically refuted. First, women are primarily incarcerated for nonviolent offenses, such as drug use.<sup>161</sup> So, women inmates generally do not have violent dispositions and have not shown a propensity for violence.<sup>162</sup> In fact, some academics propose the exact opposite: that the prison population is comprised of victims rather than people who cause harm to others.<sup>163</sup> Thus, the idea that these women, especially when pregnant and nearing the most enduring part of their pregnancy, pose a risk to those around them is based on false pretenses.

Further, even if they were dangerous, these women, and inmates in general, do not enter medical facilities at their leisure. Shackling and chaining policies demonstrate this point in the extreme. Instead, in addition to physical restraints, inmates are usually escorted by officers who stay with the inmate throughout treatment.<sup>164</sup> Thus, if a woman attempted to escape, despite the argument above, she would be stopped by the guard—rendering shackling/chaining essentially superfluous and merely punitive, if anything. In states that have eliminated or significantly limited shackling/chaining practices, no escapes of incarcerated, pregnant women have been reported.<sup>165</sup>

This is intuitively sound; a woman enduring child birth is unlikely to muster the energy or ability to escape a medical facility. Even if she could escape, why would she? She needs medical care to deliver her child and recover from child birth. Assumedly, a woman would not

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159. *Cf.* Lachman, *supra* note 37 (explaining how Alabama basically used this interest as leverage to stop the incarcerated woman from having an abortion by moving to terminate her parental rights).

160. *See* Oren, *supra* note 158, at 116.

161. *See* CHANDLER, *supra* note 6, at 34.

162. *See* MARY BOSWORTH, *ENGENDERING RESISTANCE: AGENCY AND POWER IN WOMEN'S PRISONS* 56 (David Nelken ed., 1999); CHANDLER, *supra* note 6, at 34.

163. *See id.* at 56.

164. *See* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., *ESCORTED TRIPS* § 570.40 (2008) (stating that approved prisoners are generally transported for medical care).

165. *Cf.* SUBRAMANIAN & SHAMES, *supra* note 157, at 13 (reporting that only one percent of inmates who were given passes for visitation in Germany tried to abuse the privilege and escape).

think it is in the best interests of her child or herself to escape a medical facility and confront the burden and risk of child birth alone. Further, escaping prison is generally disadvantageous to the woman and almost always results in re-incarceration.<sup>166</sup> Similarly, the idea that a woman poses a security risk to herself significantly lacks empirical support. In Florida, for example, there were only six suicides among incarcerated women—pregnant and non-pregnant—between 2000 and 2015.<sup>167</sup> For the same time period, there were 119 male suicides.<sup>168</sup>

Consolidating and contextualizing this disapproval of security concerns within a constitutional analysis, we see that shackling and chaining policies are unconstitutional. While the state's security concerns are barely valid, even with a valid security concern, the policies are not narrowly tailored to address these concerns.<sup>169</sup> The next Section discusses further the unconstitutionality of these policies within the context of the state's interests in protecting fetal rights—as outlined in the abortion framework—and the child's rights—as outlined by the Constitution and child custody laws.

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166. CHANDLER, *supra* note 5, at 79-80.

167. *Inmate Mortality: Cause of Death by Gender 2000-2016*, FLA. DEP'T CORRECTIONS <http://www.dc.state.fl.us/pub/mortality/index.html> (last visited Feb. 16, 2016). There was one female suicide in 2000, one in 2003, one in 2006, one in 2008, and there were two in 2009. *Id.*

168. *Id.* The gender populations for each year was as follows:

	Men	Women
2015	93,032	7,018
2014	93,792	7,150
2013	93,813	7,071
2012	93,579	6,948
2011	95,139	7,180
2010	95,088	7,144
2009	93,857	7,037
2008	91,304	6,888
2007	86,294	6,550
2006	82,360	6,216
2005	79,221	5,680
2004	76,675	5,299
2003	72,520	4,796
2002	69,164	4,389
2001	67,762	4,245
2000	67,214	4,019

*Inmate Population, Index to Statistics and Populations*, FLA. DEP'T OF CORRECTIONS, <http://www.dc.state.fl.us/pub/> (assessing Departmental Annual Reports for FY 2015 through FY 2000) (last visited Feb. 16, 2016).

169. *Cf.* Griggs, *supra* note 53, at 261.

*D. Why Shackling the Mother Is Unconstitutional—The Child's Rights and State's Interest in Fetal Life*

When a newborn is delivered, the child is no longer a fetus and becomes a 'person' of its own right to protection under the U.S. Constitution. With such embodiment comes civil liberties and undeniable human rights. Stated another way, the child is an individual separate from the mother with its own rights. The child custody context illustrates this principle, in which the system considers and compares the child's rights juxtaposed with the parents' rights. At times, infants, toddlers, and children of all ages are separated from their parents to protect the *child's* interests;<sup>170</sup> as mentioned above, such is the case for many children of incarcerated parents.<sup>171</sup>

Shackling supporters "argue that the shackling of women during labor is not inhumane because these women are prisoners."<sup>172</sup> No matter the crime for which the mother is sentenced, though, the child has not committed any crime.<sup>173</sup> Thus, the rights of the newborn child must be protected, despite any loss of civil liberties by the mother<sup>174</sup> via incarceration that may support the rhetoric for keeping shackling practices intact.<sup>175</sup> This Section addresses the fetus's and then the child's rights throughout the most problematic periods in which female inmates are being restrained—the third trimester of pregnancy, labor and delivery, and postpartum recovery. Underlying this entire discussion is the notion that the only pregnancies which are relevant here are those that will be carried to term—due either to the mother's choice to have her child or her inability to access an abortion due to the prison facility's control. This becomes the basis for the argument that shackling is unconstitutional for reasons other than the rights of the mother and why states implementing or allowing shackling practices are neglecting their interests assumed in other arenas, such as abortion.<sup>176</sup> Despite the fact that shackling practices have "been around for at least

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170. See Melanie Kalmanson, *Giving the Pawns a Voice: A Call for Mandatory Representation of Children in High-Conflict Custody Battles*, 5 T. MARSHALL SCH. L.J. GENDER, RACE & JUST. 54, Part II (2015) (explaining the custody system's focus on the child's best interests).

171. See *supra* note 157 and accompanying text.

172. Goldberg, *supra* note 36, at 132.

173. *Supra* note 145, 154 and accompanying text.

174. See *Brown v. Plata*, 563 U.S. 493, 510 (2011).

175. *Cf. Roe v. Wade*, 410 U.S. 113, 150, 158 (1973).

176. See *Roe*, 410 U.S. at 163-64 (stating that the state has an "important and legitimate interest in potential life" at viability "because the fetus then presumably has the capability of meaningful life outside the mother's womb").

a century[.] . . . the law on the shackling of pregnant women is underdeveloped,”<sup>177</sup> and history’s acceptance does not dictate that these modernly repulsive practices be allowed.<sup>178</sup>

*1. Invoking Abortion Jurisprudence to Invalidate Shackling During the Third Trimester*

The third trimester of a pregnancy includes weeks twenty-seven through forty of gestation.<sup>179</sup> “Gestation” is “the development of a human embryo or fetus between fertilization and birth.”<sup>180</sup> At thirty-eight weeks, “the fetus is considered full term.”<sup>181</sup> The third trimester is significant, especially within the context of the current abortion framework, as the time-frame in which the fetus reaches viability.<sup>182</sup> As explained above, viability is the point at which the state’s interests in fetal life become concrete and protectable by acceptable legislation.

In *Roe v. Wade*, the U.S. Supreme Court banned abortion during the third trimester (unless necessary for the mother’s health), finding that the state’s interests in protecting fetal life outweighed the mother’s privacy interests at that point.<sup>183</sup> The Court stated:

Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail.

. . .

In assessing the State’s interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the

177. *Villegas v. Metro. Gov’t of Nashville*, 709 F.3d 563, 569 (6th Cir. 2013). Nor is this a reason for the practice to stand.

178. *Cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

179. *Fetal Development: Third Trimester*, AM. PREGNANCY ASS’N, [hereinafter AM. PREGNANCY ASS’N], <http://americanpregnancy.org/while-pregnant/third-trimester/> [<https://perma.cc/3E95-L789>] (defining the third trimester as starting at the twenty-seventh week); *Fetal Development: The Third Trimester*, MAYO CLINIC, <http://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/fetal-development/art-20045997> [<https://perma.cc/HPU9-YSPG>]. Note, however, that Florida, for example, just redefined “[t]hird trimester” to mean “the period of time from the beginning of the 24th week of gestation through birth.” FLA. STAT. § 390.011(12)(c) (2016) (Act became effective July 1, 2016).

180. FLA. STAT. § 390.011(6) (2016) (Act became effective July 1, 2016).

181. AM. PREGNANCY ASS’N, *supra* note 179.

182. *See supra* note 141 and accompanying text (defining viability).

183. 410 U.S. 113, 159 (1973). Further, the U.S. Supreme Court’s 1973 decision in *Roe v. Wade* emphasized the doctor-patient relationship involved in abortion procedures to establish that the decision to terminate a pregnancy is within a woman’s right to privacy under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. *See id.* at 163. The physician-patient dynamic is also reflected in shackling policies, where legislation allows for physicians to affect whether restraints are used on the woman. The significance of this physician-patient relationship should also be further emphasized and respected in shackling policies.

State may assert interests beyond the protection of the pregnant woman alone.<sup>184</sup>

Doing away with the trimester framework from *Roe*, the U.S. Supreme Court nevertheless reaffirmed the state's interest in protecting viable fetal life in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>185</sup>

Accordingly, it is significant in the shackling context that third trimester fetuses *will* be carried to term. Even if abortion jurisprudence were to change from the present standard to allow abortions up until birth, the state's interests in protecting the fetus in the shackling context are still arguably stronger. This is because, as previously discussed, inmates have limited access to abortion and, therefore, a general obligation to carry the pregnancy to term. In other words, regardless of third trimester abortion jurisprudence, it is virtually guaranteed in the shackling context that *potential life* will become *human life*, barring any unexpected medical complications.

The central holding of *Roe v. Wade*,<sup>186</sup> the governing framework of *Casey*,<sup>187</sup> and the application of these in cases like *Gonzales v. Carhart*,<sup>188</sup> *Planned Parenthood v. Danforth*,<sup>189</sup> and *Whole Woman's Health v. Hellerstedt*<sup>190</sup> remain valid.<sup>191</sup> *Gonzales v. Carhart* seems to be substantially applicable in this context.<sup>192</sup> There, the U.S. Supreme Court upheld the Partial-Birth Abortion Ban Act, relying partially on the brutality of the operation that would be allowed if the Court invalidated the Act.<sup>193</sup> The Court further stated that *Casey* "confirms the State's interest in promoting *respect for human life at all stages in the pregnancy*."<sup>194</sup> Therefore, the state may legitimately ban barbaric practices to further its interests in fetal life and the dignity thereof. Thus, the state has an interest in banning the use of shackling and other

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184. *Id.* at 150.

185. 505 U.S. 833, 846 (1992). The undue-burden standard from *Casey* was further affirmed in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016).

186. 410 U.S. at 153.

187. 505 U.S. 833; *see supra* note 137-146 and accompanying text.

188. 550 U.S. 124 (2007).

189. 428 U.S. 52 (1976).

190. 136 S. Ct. 2292.

191. *Id.* at 2300.

192. *See generally* 550 U.S. 124 (upholding the Partial-Birth Abortion Ban Act of 2003).

193. *Id.* at 160.

194. *Id.* at 163 (emphasis added). Whether the *Carhart* reasoning is sound within the context of the mother's right to choose to terminate her pregnancy is immaterial here because inmate pregnancies being discussed herein will not be aborted. Even if they were, the state's interests would essentially be equal to those at play in abortion.

restraints during the third trimester of an incarcerated women's pregnancy because it undermines the dignity and safety of fetal life after viability,<sup>195</sup> as understood in current abortion jurisprudence.

## 2. *Labor and Delivery*

"Labor is the process by which the fetus and the placenta leave the uterus."<sup>196</sup> There are three stages of labor that may "begin weeks before a woman delivers her infant."<sup>197</sup> The final stage of labor "begins with the birth [of the infant] and ends with the completed delivery of the placenta and afterbirth."<sup>198</sup> This stage, thus, invokes the constitutionally significant birth. As discussed above, the Sixth and Eighth Circuits have determined that shackling practices during labor and delivery are unconstitutional under the Eighth Amendment.<sup>199</sup>

### (a) *The Child's Constitutional Rights*

Aside from the empirical evidence undermining the Sixth Circuit's recognition of the objective exceptions, what the *Carhart* Court fails to recognize is the other constitutionally protected, involved human whose rights are being violated. This Section explains how the infant's constitutional right against cruel and unusual punishment (Eighth Amendment) and guarantee of substantive due process (Fourteenth Amendment) are violated by shackling practices.

Beginning with the Eighth Amendment, regardless of the applicability of any 'exception,' which is empirically rare,<sup>200</sup> society does not tolerate harm to innocent infants. In fact, much of society—expressed vehemently by the pro-life movement—disavows negative treatment of a fetus, which is not even constitutionally protected. Relating back to the "deliberate indifference" standard applied in the *Nelson* and *Villegas* cases explained above,<sup>201</sup> there are two prongs to establish an Eighth Amendment violation. Subjectively, regardless of official notice, the harm being caused, or the significantly increased likelihood of harm, to an infant born by a restrained mother seems quite apparent.

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195. See *supra* note 141 and accompanying text (defining viability).

196. *What is Labor?*, EUNICE KENNEDY SHRIVER NAT'L INST. OF CHILD HEALTH & HUM. DEV., <https://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo/pages/labor.aspx> [<https://perma.cc/Z6SE-YV53>].

197. *Id.*

198. *Id.*

199. See *supra* notes 103-12 and accompanying text discussing *Nelson v. Correctional Medical Services*, 583 F.3d 522 (8th Cir. 2009), and *Villegas v. Metropolitan Government of Nashville*, 709 F.3d 563 (6th Cir. 2013).

200. See discussion *supra* Section III.C.

201. See *supra* notes 103-12 and accompanying text discussing *Nelson*, 583 F.3d 522, and *Villegas*, 709 F.3d 563.

So, official notice seems unnecessary. In all, there is a *per se* Eighth Amendment violation by subjecting an innocent—therefore undeserving of punishment—infant to the harm of shackling practices during labor and delivery.<sup>202</sup>

Further, subjecting these infants to restraints by and through the mother intrudes upon the child's due process right to safety, bodily autonomy, etc. These rights are especially implicated since the restraints are being placed by the state on the infant's mother, who is confined by the state.<sup>203</sup> Thus, governmental action is much more directly involved here than in cases where due process claims have been denied for lack of state action, such as *DeShaney v. Winnebago County Department of Social Services*,<sup>204</sup> where the plaintiff's due process claim against the child protective services agency for failing to adequately protect his safety was denied because the abuse was perpetrated by a private actor, the plaintiff's father.<sup>205</sup> Under the Due Process Clause of the Fourteenth Amendment, "[t]he [S]tate (by its own acts) may not deprive an individual of life, liberty or property without due process of law."<sup>206</sup> Children, as constitutionally protected persons,<sup>207</sup> have "substantive rights to safety and freedom from undue restraint,"<sup>208</sup> which are therefore violated when the state imposes shackling practices on the child's mother during labor and delivery, subjecting the child to substantial harm. Thus, shackling practices are unconstitutional because they violate the child's due process rights.

(b) *Statutory Analysis of the Child's Best Interests*

When a court must determine which parent is the most suitable to care for a child in a custody dispute, its analysis centers around the child's best interests.<sup>209</sup> Best interests statutes "usually present several factors which are considered to directly correlate with the 'child's physical, intellectual, moral, and spiritual well-being.' Courts are to analyze the unique facts of each case within the framework of such factors to determine the most favorable corresponding custody arrangement."<sup>210</sup> These factors also shed light on the shackling discussion, which directly implicates the child's best interests.

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202. *Cf.* *Brown v. Plata*, 563 U.S. 493, 510 (2011).

203. *See* Oren, *supra* note 158, at 128.

204. 489 U.S. 189 (1989).

205. *See generally id.* at 189.

206. Oren, *supra* note 158, at 129.

207. *See id.* at 139 (stating that children have equal rights to adults in another context).

208. *Id.* at 137.

209. Kalmanson, *supra* note 170, at Part II (explaining the current custody structure in depth).

210. *Id.* at 57 (quoting *S.J.S. v. M.J.S.*, 76 A.3d 541, 554 (Pa. Super. Ct. 2013)) (citations omitted); *accord, see, e.g.*, FLA. STAT. § 61.13(3) (2015).

In this context, a few best interest factors are especially relevant.<sup>211</sup> For example, “[t]he moral fitness of the parents”<sup>212</sup> and “[t]he mental and physical health of the parents”<sup>213</sup> are both best interests factors, meaning that these parental statuses affect the adult’s ability to parent the child.<sup>214</sup> In that sense, due to the detrimental effects of shackling practices on the mother’s health—physically and emotionally—shackling practices directly undermine these two best interests factors by lessening the mother’s “moral fitness” and “mental and physical health,” which contribute to her parenting.

Further, “[t]he developmental stages and needs of the child and the demonstrated capacity and disposition of each parent to meet the child’s developmental needs,” another factor in the best interests analysis,<sup>215</sup> would be complicated with a child who is a victim of shackling practices. This interest is completely independent of the mother and the effect shackling may have on her well-being. In other words, by implementing shackling practices, the state undermines this best interest factor regardless of the mother’s actions.

### 3. *Postpartum*

Despite being distinct legal entities, the time immediately following birth—known as postpartum—is critical for the infant’s development and the mother’s recovery.<sup>216</sup> Today, “[m]others and babies are no longer separated almost immediately after birth.”<sup>217</sup> Restraining a woman or removing the child from her undermines the child’s ability to bond with its mother, or at least reap the biological benefits from this postpartum period. This is especially important when the child will not be put into adoption or foster care and will eventually be raised by its biological mother following her incarceration. Even when the inmate will not raise the child, though, there are benefits that the biological mother may provide to the baby immediately following birth. Considering the significance that the postpartum period has for the child’s development, restraints should also be eliminated during this time to allow the mother’s full recovery, which will, in the long term,

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211. Drawn from Florida’s best interests statutory factors, for example.

212. FLA. STAT. § 61.13(3)(f).

213. *Id.* § 61.13(3)(g).

214. Obviously, the fact of incarceration would militate against the mother having custody of the child; however, for this analysis, it is considered for the longevity of the parent-child relationship, continuing after incarceration.

215. *Id.* § 61.13(3)(s).

216. SUBRAMANIAN & SHAMES, *supra* note 157, at 12.

217. Mary M. Murry, *Labor and Delivery: Then vs. Now*, MAYO CLINIC (Apr. 8, 2014), <http://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/expert-blog/labor-and-delivery-than-and-now/bgp-20090302>.

benefit the child by maintaining and preserving the mother's physical and emotional well-being and allowing the necessary biological development.

#### IV. CONCLUSION

A newborn is minutes old; its entire life lies ahead. Such life can either be cloaked in innocence, as the “‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law’ ” would suggest;<sup>218</sup> or, it can be immediately tainted with an environment of unnecessary punishment, likely imposing physical and emotional difficulties. Fetal life, or the state's interests in protecting the same, and the subsequent, more substantial, interests of the child born to an incarcerated woman render unconstitutional shackling and other restraints of pregnant, incarcerated women.

Current shackling discourse generally underemphasizes these interests, which are supplemented by both the mother's and the child's human rights to dignity, respect, and protection against cruel and unusual punishment. This Note brings those interests, unfettered by incarceration, to the forefront, presenting a likely more universally acceptable rationale for following the precedent set by the Federal Bureau of Prisons and American Bar Association for severely restricting the use of physical restraints on pregnant inmates in American correctional facilities to protect the resulting children.<sup>219</sup>

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218. *In re Winship*, 397 U.S. 358, 363 (1970) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

219. Recognizing the effects shackling practices have on both incarcerated women and the children they bear unveils a significant need for uniformity in anti-shackling legislation. Across-the-board legislation is the first step. State-wide legislation can only ensure protection to a certain extent due to the localization of prison management. Enforcement of restrictive legislation, including oversight at the local level, is the ultimate end-goal to ensure that pregnant inmates and their children are protected.