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# GIVING BIRTH IN SHACKLES: A CONSTITUTIONAL AND HUMAN RIGHTS VIOLATION

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## INTRODUCTION

United States prisons commonly shackle and chain pregnant inmates to a hospital bed during childbirth.<sup>1</sup> This practice violates the U.S. Constitution as well as internationally recognized standards of human rights. Prisons are obligated to provide for prisoners’ health and medical treatment under

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1. See, e.g., Julie B. Ehrlich & Lynn M. Paltrow, *Jailing Pregnant Women Raises Health Risks*, WOMEN’S ENEWS, Sept. 9, 2006, <http://www.womensenews.org/article.cfm/dyn/aid/2894> (last visited Nov. 3, 2007).

the Constitution's prohibition on cruel and unusual punishment under the Eighth Amendment as well as under international human rights law.<sup>2</sup> International law provides for broad protections for women throughout pregnancy and delivery, the rights to the highest attainable standard of health, the right to security of person, and the right to be free from torture and inhumane or degrading treatment, all of which are violated by this practice.<sup>3</sup> In fact, the Committee on Torture, the enforcement body to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has explicitly informed the U.S. that its prisons are violating women's human rights by shackling pregnant inmates during childbirth. The country's various legislative bodies should look to international human rights as an indication of how American law should protect its pregnant prisoners. United States federal and state prisons, departments of corrections, and state legislatures should prohibit this inhumane and dehumanizing treatment of female prisoners, and bring the country in line with both its constitutional and international obligations to the pregnant prison population.

## BACKGROUND

### *I. Where and How Shackling Is Happening*

The vast majority of states remain silent on the practice of shackling pregnant inmates during childbirth. Forty-eight out of fifty states lack legislation that protects imprisoned pregnant women.<sup>4</sup> While in labor, incarcerated women are typically shackled or chained to the hospital bed, by the ankle, wrist, or both.<sup>5</sup> Warnice Robinson, an inmate convicted of shoplifting in Illinois, a state that has since prohibited the shackling of pregnant inmates during childbirth, told Amnesty International USA ("Amnesty") that

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2. U.S. CONST. amend. VIII.

3. See U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation 24, Women and Health* (Twentieth Session, 1999), U.N. Doc. A/54/38 at 5 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 27, U.N. Doc. HRI/GEN/1/REV.6 at 271 (2003), available at <http://www1.umn.edu/humanrts/gencomm/gener124/htm> [hereinafter CEDAW] (articulating that women's unique biological needs require them to have greater medical protection than men).

4. Amnesty Int'l, *Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women*, [http://www.amnestyusa.org/women/custody/keyfindings\\_restraints.html](http://www.amnestyusa.org/women/custody/keyfindings_restraints.html) (last visited Sept. 23, 2007) [hereinafter Amnesty Int'l, *Abuse of Women in Custody*] (listing Illinois and California as the only two states that have legislation regulating the restraint of pregnant women in prison).

5. See *id.* (stating that women are often restrained without regard to whether they have a history of violence).

[g]iving birth while incarcerated was one of the most horrifying experiences of my life. At the hospital I was shackled to a metal bed post by my right ankle throughout seven hours of labor, although a correctional officer was in the room with me at all times . . . . Imagine being shackled to a metal bedpost, excruciating pains going through my body, and not being able to adjust myself to even try to feel any type of comfort, trying to move and with each turn having hard, cold metal restraining my movements.<sup>6</sup>

Another inmate, Maria Jones, told Amnesty that

[b]ecause I was shackled to the bed, they couldn't remove the lower part of the bed for the delivery, and they couldn't put my feet in the stirrups. My feet were still shackled together, and I couldn't get my legs apart. The doctor called for the officer, but the officer had gone down the hall. No one else could unlock the shackles, and my baby was coming but I couldn't open my legs.<sup>7</sup>

Similarly, Samantha Luther, an inmate in Wisconsin, was forced to give birth while her ankles were shackled approximately eighteen inches apart.<sup>8</sup> Her shackles were not removed until just before the actual birth.<sup>9</sup> Samantha described that “[i]t was so humiliating. My ankles were raw.”<sup>10</sup> Due to the lack of legislative and regulatory protection for pregnant female prisoners in the United States, these stories, unfortunately, are quite common.

Not only do the vast majority of states lack legislation on this prison practice, twenty-three state corrections departments and the Federal Bureau of Prisons expressly allow the use of restraints on pregnant inmates during childbirth.<sup>11</sup> Amnesty reported that in Alabama, “often two extremities are restrained.”<sup>12</sup> In Louisiana, Amnesty found that the state permits the use of leg irons, while the state of Nevada typically employs only wrist restraints, and New Hampshire allows “one foot to be shackled to the bed during labor.”<sup>13</sup> Women in Michigan told Amnesty in 1998 “that they were

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6. Amnesty Int'l, *Not Part of My Sentence: Violations of the Human Rights of Women in Custody, Section IV: Restraints*, <http://www.amnesty.org/ailib/intcam/women/report5.html> (last visited Sept. 24, 2007) [hereinafter Amnesty Int'l, *Not Part of My Sentence*].

7. *Id.*

8. See Amnesty Int'l, *Abuse of Women in Custody*, *supra* note 4 (noting that although Samantha remained shackled, she was required to pace in order to induce labor).

9. See *id.* (explaining that the shackles were finally removed right before the actual birth so that Samantha could push).

10. *Id.*

11. See *id.* (noting that state policies vary on when, during labor, a woman may be shackled and in what manner).

12. *Id.*

13. Amnesty Int'l, *Abuse of Women in Custody*, *supra* note 4.

transported to the hospital secured by belly chains and handcuffs, and were kept in restraints at the hospital even though they were constantly supervised by prison guards.”<sup>14</sup> “Jails and prisons use restraints on women as a matter of course, regardless of whether a woman has a history of violence (which only a minority have); regardless of whether she has ever absconded or attempted to escape (which few women have) . . . .” and regardless of whether a guard is present.<sup>15</sup> In addition to shackling, Amnesty reports that “[t]wenty-four state departments of corrections station an officer in the delivery room while an inmate is in labor.”<sup>16</sup>

## *II. Effects of Shackling on Women’s Physical and Mental Health*

Amnesty International USA and the American College of Obstetricians and Gynecologists (“ACOG”) have reported that shackling poses health risks to both the woman and her baby.<sup>17</sup> The ACOG has expressed its view that

[p]hysical restraints have interfered with the ability of physicians to safely practice medicine by reducing their ability to assess and evaluate the physical condition of the mother and the fetus, and have similarly made the labor and delivery process more difficult than it needs to be; thus, overall putting the health and lives of the women and unborn children at risk.<sup>18</sup>

According to Amnesty, women undergoing childbirth need to be “mobile so that they can assume various positions as needed,” and women’s mobility is greatly limited and sometimes altogether prevented due to shackling.<sup>19</sup> Additionally, because of the relatively common need for emergency cesareans (“C-sections”), shackling women poses additional risks because “[i]f there were a need for a C-Section, the mother needs to be moved to an operating room immediately and a delay of even five minutes could result in permanent brain damage for the baby.”<sup>20</sup> Maria Jones’s experience, detailed above, demonstrates the reality of potential delays in removing the shackles and the call for concern posed by any such

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14. Amnesty Int’l, *Not Part of My Sentence*, *supra* note 6.

15. *See id.* (noting that exceptions may be made for certain medical conditions); *see also* CYNDI BANKS, *WOMEN IN PRISON: A REFERENCE HANDBOOK* 87 (ABC-CLIO 2003).

16. Amnesty Int’l, *Abuse of Women in Custody*, *supra* note 4.

17. *See id.*

18. *Governor Signs Bill to End Shackling of Women During Labor and Delivery*, MED. NEWS TODAY, Oct. 10, 2005, <http://www.medicalnewstoday.com/medicalnews.php?newsid=31786> (last visited Nov. 5, 2007).

19. Amnesty Int’l, *Abuse of Women in Custody*, *supra* note 4.

20. *Id.*

delays.<sup>21</sup> Similar to the concerns expressed by ACOG, Amnesty reports that “[h]aving the woman in shackles compromises the ability to manipulate her legs into the proper position for treatment,” thereby reducing the doctor’s ability to carefully treat the patient.<sup>22</sup> Furthermore, “[p]regnant women in their third trimesters may already have balance problems; shackling their legs heightens the risk that the women will fall, potentially injuring them and their fetuses.”<sup>23</sup> Finally, “[t]he mother and baby’s health could be compromised if there were complications during delivery such as hemorrhage or decrease in fetal heart beat,” in which case immediate removal of the shackles would be required and delays could cause further complications.<sup>24</sup> In addition to causing mental distress and humiliation to incarcerated women, shackling poses significant physical health risks that the government could eliminate by providing prison guard supervision of inmates, rather than shackling.<sup>25</sup>

### *III. Shackling Affects a Significant Number of American Women Each Year*

In 1999, the U.S. Department of Justice reported that women only account for approximately sixteen percent of the “total corrections population,” however, this number is consistently rising, causing the number of women affected by the common prison practice of shackling during childbirth to grow.<sup>26</sup> Approximately six percent of women, on average, are pregnant when admitted to local jails, and approximately five percent of women, on average, are pregnant when admitted to state prisons.<sup>27</sup> The Sentencing Project, a nonprofit organization dedicated to studying criminal justice policy and data,<sup>28</sup> “estimates that 40,000 women are admitted to the nation’s prisons each year, suggesting that 2,000 babies

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21. See Amnesty Int’l, *Not Part of My Sentence*, *supra* note 6 (explaining that even though the state never charged Maria Jones with a violent crime, she was shackled during childbirth and this caused complications with her delivery).

22. *Id.*

23. See Ehrlich & Paltrow, *supra* note 1 (lamenting that shackling incarcerated women throughout pregnancy and during their delivery is a national norm).

24. Amnesty Int’l, *Abuse of Women in Custody*, *supra* note 4.

25. See Amnesty Int’l, *Not Part of My Sentence*, *supra* note 6 (advocating for restraints only to be used to prevent an inmate from escaping or hurting herself or others).

26. See LAWRENCE A. GREENFELD & TRACY L. SNELL, U.S. DEP’T OF JUSTICE, *WOMEN OFFENDERS* (2000) (noting that in 1999 women comprised eight percent of convicted violent felons, twenty-three percent of property felons and seventeen percent of drug felons).

27. See *id.* at 8 (elaborating that three percent of women received prenatal care while in local jails and four percent of women received prenatal care in state prison).

28. THE SENTENCING PROJECT, *WOMEN IN PRISON* (2006), <http://www.sentencingproject.org/pdfs/1032.pdf> (last visited Nov. 6, 2007) [hereinafter *WOMEN IN PRISON*].

are born to American prisoners annually,”<sup>29</sup> and due to the continual increase in female inmates, this number is on the rise.

Female offenders are much less likely to be violent offenders.<sup>30</sup> Women only account for approximately fourteen percent of violent offenses, and “three out of four violent female offenders committed simple assault,”<sup>31</sup> demonstrating that even when females are convicted of violent crimes, they are rarely convicted of the more violent crimes such as assault with a deadly weapon, attempted murder, and murder. The Sentencing Project reported that “[w]omen in state prisons in 2002 were . . . less likely than men to be incarcerated for violent offenses” and that thirty-two percent of convicted female offenders were convicted of violent offenses, compared with fifty-two percent of their male counterparts.<sup>32</sup>

#### *IV. Legislative Efforts to Ban Shackling in California, Illinois, and New York*

Recently, California, Illinois, and New York have taken the lead in passing statewide legislation to eliminate the common prison practice of shackling women during childbirth. California’s legislation, which went into effect in January of 2006, states that a pregnant “inmate shall not be shackled by the wrists, ankles, or both during labor, including during transport to a hospital, during delivery, and while in recovery after giving birth . . . .”<sup>33</sup> Similarly, Illinois’s legislation, which went into effect in January of 2000, states that

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 circumstance 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.<sup>34</sup>

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29. See Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES, Mar. 2, 2006, at A16 (explaining that most states restrain women during labor).

30. See WOMEN IN PRISON, *supra* note 28 (noting that thirty-five percent of women are incarcerated for violent offenses, whereas fifty-three percent of men are incarcerated for violent crimes).

31. See GREENFELD & SNELL, *supra* note 26, at 1 (stating that males commit violent offenses at a per capita rate six times more than females).

32. See WOMEN IN PRISON, *supra* note 28 (finding that although women are less likely to be incarcerated for a violent offense, the overall number of incarcerated women has increased at double the rate of men since 1980).

33. See CAL. PENAL CODE § 3423 (West 2006) (requiring that the prison board provide means for care to children born to incarcerated mothers).

34. See 55 ILL. COMP. STAT. 5/3-15003.6 (2000).

Additionally, New York has a pending bill that would provide protection for pregnant prisoners.<sup>35</sup> It states,

No restraints of any kind shall be used during transport, except where the officer in charge of the institution has determined that such a woman presents a substantial flight risk, such woman may be handcuffed. Under no circumstances shall restraints of any kind be used on any pregnant woman who is in labor. Any such personnel as may be necessary to supervise the woman to and from the hospital and during her stay at the hospital shall be provided to ensure adequate care, custody and control over the woman.<sup>36</sup>

An additional five states, Connecticut, Florida, Rhode Island, Washington, and Wyoming prohibit the practice through state department of corrections regulation.<sup>37</sup> Despite the progress of these states, the Federal Bureau of Prisons has failed to promulgate any regulations on the shackling of pregnant inmates during childbirth, most states continue to ignore the problem, and many states retain provisions allowing the practice.<sup>38</sup>

Amnesty has made the following recommendation to correct this problem in American prisons:

the Federal Bureau of Prisons (FOB) and State Legislatures develop laws to ban shackling of pregnant inmates, and that the FOB and Departments of Corrections, prisons and jails adopt policies on the use of restraints in accordance with the following:

- Restraints should be used only when they are required as a precaution against escape or to prevent an inmate from injuring herself or other people or damaging property. In every case, due regard must be given to an inmate's individual history.
- Policies should prohibit the use of restraints on pregnant women when they are being transported and when they are in hospital awaiting birth, and after they have just given birth.<sup>39</sup>

California's legislation, which states that a pregnant "inmate shall not be shackled by the wrists, ankles, or both during labor, including during transport to a hospital, during delivery, and while in recovery after giving birth,"<sup>40</sup> is an example of the type of legislation that fits Amnesty's suggestions. California's legislation is a broad prohibition on the use of

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35. See A. 4105, 2007-2008 S. Assem., Reg. Sess. (N.Y. 2007).

36. *Id.*

37. See Amnesty Int'l, *Abuse of Women in Custody*, *supra* note 4 (elaborating that Hawaii, Iowa, and Kansas have no written policy, but that the state correctional practice is to not shackle women during childbirth).

38. See *id.* (observing that most states did not provide Amnesty with details about the form of restraints used during delivery, nor did states provide Amnesty with a copy of their restraint policy).

39. *Id.*

40. CAL. PENAL CODE § 3423 (West 2006).

restraints on pregnant inmates during transport to the hospital, labor, delivery, and recovery, allowing no exceptions.<sup>41</sup> California's legislation is more protective than that suggested by Amnesty because Amnesty's suggestion allows for exceptions to its prohibition on the use of restraints "as a precaution against escape" and to prevent injury to the inmate, others, or property.<sup>42</sup>

Conversely, the Illinois legislation prohibits the use of restraints during transport to the hospital and during labor, but leaves the recovery period unaddressed, which may be inconsistent with Amnesty's recommendation that the state prohibit the use of restraints after the woman has "just given birth."<sup>43</sup> Similar to California, the Illinois law does not contain any exceptions to its prohibition on the use of restraints.<sup>44</sup> The Illinois law ensures for security and prevention of escape by mandating that a prison official be stationed "immediately outside the delivery room."<sup>45</sup>

The pending New York bill mandates that no restraints be used during transport to the hospital, with the exception of a woman who presents a "substantial flight risk," in which case handcuffs are permitted.<sup>46</sup> This exception is acceptable under Amnesty's suggestions because Amnesty allows the use of restraints only as a "precaution against escape" or to prevent injury.<sup>47</sup> In addition, the New York bill prohibits the use of any restraints during labor; however, like the Illinois law, the New York bill leaves the use of restraints during recovery unaddressed, causing it to possibly be inconsistent with the Amnesty suggestions.<sup>48</sup> Lastly, the New York bill, provides for, but does not require, prison personnel to accompany the woman and remain with her at the hospital in order "to ensure adequate care, custody and control over the woman."<sup>49</sup> Where the Illinois legislation requires this supervision, the New York bill simply

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41. *Id.*

42. See Amnesty Int'l, *Abuse of Women in Custody*, *supra* note 4 (advocating that the state should evaluate the needs of each individual prisoner when determining whether shackling during childbirth is necessary).

43. 55 ILL. COMP. STAT. 5/3-15003.6 (2000).

44. *Id.*

45. *Id.*

46. A. 4105, 2007-2008 S. Assem., Reg. Sess. (N.Y. 2007).

47. See Amnesty Int'l, *Not Part of My Sentence*, *supra* note 6 (noting that the state may allow the use of chains or irons when ordered by a medical officer, or to prevent a prisoner from injuring herself or others).

48. Compare A. 4105, 2007-2008 S. Assem., Reg. Sess. (N.Y. 2007) (allowing for the elimination of shackling during transportation and labor, but failing to address post-delivery recovery), and 55 ILL. COMP. STAT. 5/3-15003.6 (2000) (forbidding shackles during labor, but not afterwards), with Amnesty Int'l, *Not Part of My Sentence*, *supra* note 6 (recommending that the state not shackle or chain women who have just given birth).

49. A. 4105, 2007-2008 S. Assem., Reg. Sess. (N.Y. 2007).



provides for it.

The California and Illinois laws are the most protective of inmates who experience childbirth while incarcerated because they do not include any exceptions, while the New York bill contains an exception for a “substantial flight risk.”<sup>50</sup> The California law is the only one that expressly extends these protections throughout the recovery period.<sup>51</sup> Both the Illinois legislation and the New York legislation, however, address the concerns of security and flight risk and alleviate these concerns by providing for supervision of the inmate during transport to the hospital and during her stay there. In balancing between the concerns for the women experiencing childbirth while incarcerated and the need for security and prevention of escape, it seems that a combination of the California law and the Illinois law provides the best solution. By combining these two laws, a state could broadly prohibit the use of restraints on pregnant women during transport to the hospital, labor, delivery, and recovery, with no exceptions, as well as provide mandatory supervision of the woman throughout this process by the stationing of a guard immediately outside the hospital room. In this manner, the states could eliminate the health concerns posed by shackling, yet still prevent escape and injury by supervising inmates during childbirth.

## ANALYSIS

### *I. Shackling Violates the U.S. Constitution*

“Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”<sup>52</sup> Rather, inmates maintain their constitutional rights as long as such rights are consistent with their status as an inmate.<sup>53</sup> According to both Eighth Amendment jurisprudence and U.S. Supreme Court case law dealing with the constitutionality of prison regulations, policies permitting the shackling of pregnant inmates during childbirth are likely violating the United States Constitution.

In contrast to the minimal state law regulating the treatment of incarcerated women during childbirth, there is currently no federal law aimed at protecting pregnant women in prison. Nonetheless, this issue falls

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50. *Compare* A. 4105, 2007-2008 S. Assem., Reg. Sess. (N.Y. 2007) (providing that an officer in charge of the institution may determine whether a woman poses a flight risk and needs to be handcuffed during transportation), *with* 55 ILL. COMP. STAT. 5/3-15003 (mandating that no handcuffs, shackles, or restraints of any kind be used when transporting a pregnant inmate to a hospital).

51. CAL. PENAL CODE § 3423 (West 2006).

52. *Turner v. Safley*, 482 U.S. 78, 84 (1987).

53. *See id.* at 95 (holding that these rights are curbed by legitimate penological objectives, such as deterrence of crime, rehabilitation, and internal security and order).

under the Eighth Amendment of the United States Constitution.<sup>54</sup> Under the Eighth Amendment, “cruel and unusual punishments [shall not be] inflicted.”<sup>55</sup> The U.S. Supreme Court held, in *Estelle v. Gamble*, that:

[T]he government [has an] obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met . . . . [D]enial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.

. . .

We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the “unnecessary and wanton infliction of pain,” proscribed by the Eighth Amendment.<sup>56</sup>

Under *Estelle*, pregnant prisoners are entitled to medical care related to their pregnancies.<sup>57</sup> The Court further explained that, “[i]n order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.”<sup>58</sup> The act of chaining pregnant inmates to hospital beds could constitute deliberate indifference to the prisoners’ medical needs because restricting a woman’s movement while she is in labor exacerbates the pain and distress associated with the birthing process and may lead to complications that pose serious risks to the lives and health of both the mother and her baby.<sup>59</sup>

Although the existence of the right to medical treatment while in prison has been established, the common practice of shackling women to the hospital bed while in labor has not been specifically challenged.<sup>60</sup> In *Turner v. Safley*, the U.S. Supreme Court held that prison regulations are subject to a “reasonableness test.”<sup>61</sup> In *Turner*, the Court considered the

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54. U.S. CONST. amend. VIII.

55. *Id.*

56. *See* 429 U.S. 97, 103-04 (1976) (remanding the case to the lower court to determine whether the plaintiff, who had incurred an injury while working at his assigned prison job, had a cause of action against the Director of the Department of Corrections for denying or delaying the plaintiff’s medical care).

57. *See id.* at 104 (holding that serious medical needs of prisoners cannot be ignored under the Eighth Amendment).

58. *See id.* at 106.

59. *See* Amnesty Int’l, *Abuse of Women in Custody*, *supra* note 4 (noting that women in labor need to be readily mobile so as to move into position quickly for emergency treatment).

60. *See id.* (indicating that while Illinois and California have recognized that shackles should not be used during labor and delivery, the other forty-eight states, the District of Columbia, and the Federal Bureau of Prisons have no codified laws restricting the routine use of shackles).

61. 482 U.S. 78, 89 (1987) (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).

constitutionality of two prison regulations promulgated by the Missouri Division of Corrections, one regulated inmate marriage, the other regulated “inmate-to-inmate correspondence.”<sup>62</sup> In making this determination, the Court set the standard for reviewing prison regulations and the factors relevant in making this determination:<sup>63</sup> when determining the constitutionality of prison regulations, the relevant test is “whether a prison regulation that burdens fundamental rights is ‘reasonably related’ to legitimate penological objectives, or whether it represents an ‘exaggerated response’ to those concerns.”<sup>64</sup> In applying this test in *Turner*, the court listed four factors as “relevant in determining the reasonableness of the regulation at issue.”<sup>65</sup>

First, there must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it. Thus, a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.<sup>66</sup>

The second factor is “whether there are alternative means of exercising the right that remain open to prison inmates.”<sup>67</sup> The third factor is “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.”<sup>68</sup> Finally, the fourth factor is “the absence of ready alternatives,” and “the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns.”<sup>69</sup>

In applying the *Turner* reasonableness test to the two Missouri regulations at issue, the Supreme Court found that the prison regulation dealing with correspondence between inmates was “promulgated for security reasons” and that because of the growing prison gang problem, “mail between [prison] institutions can be used to communicate escape plans and to arrange assaults and other violent acts.”<sup>70</sup> Consequently, the

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62. *See id.* at 81 (upholding the regulation of inmate-to-inmate correspondence, but invalidating the marriage restrictions because it was unrelated to legitimate penological interests).

63. *Id.* at 87-90 (ruling that a lesser standard than strict scrutiny is appropriate when determining the constitutionality of prison rules).

64. *Id.* at 87 (explaining that the test for reasonableness of prison regulations must be flexible enough for prison officials to anticipate security problems and adopt creative solutions).

65. *Id.* at 89.

66. *Id.* at 89-90.

67. *Id.* at 90.

68. *Id.*

69. *Id.*

70. *See id.* at 91.

Court upheld this regulation finding that “[t]he prohibition on correspondence between institutions is logically connected to these legitimate security concerns.”<sup>71</sup> The marriage regulation prohibited prisoners from marrying unless they received approval from the prison superintendent and required that the superintendent have a compelling reason for permitting the marriage.<sup>72</sup> The right to marry was further limited because “generally only pregnancy or birth of a child [was] considered a ‘compelling reason’ to approve a marriage.”<sup>73</sup> Despite the state’s claim that the regulation was supported by security concerns, the court found that the marriage regulation “represents an exaggerated response to such security objectives.”<sup>74</sup> The Court also explained that “[t]here are obvious, easy alternatives to the Missouri regulation that accommodate the right to marry while imposing a *de minimus* burden on the pursuit of security objectives.”<sup>75</sup>

The Court’s holding in *Turner* is important on several fronts. First, it lays out the reasonableness test by which prison regulations are to be examined.<sup>76</sup> Second, it provides two examples of the application of the test, one in which the regulation was upheld, and one in which the regulation was found unconstitutional.<sup>77</sup> The shackling of pregnant women during childbirth is both a common prison practice and an expressly permitted practice, which courts should analyze in the same manner as any other prison policy under *Turner*.

*Turner* recognizes that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.”<sup>78</sup> In order to protect the constitutional rights of pregnant prisoners, courts must examine whether this policy is “‘reasonably related’ to legitimate penological objectives, or whether it represents an ‘exaggerated response’ to those concerns.”<sup>79</sup> In this case, prison authorities will likely argue that pregnant prisoners are shackled during childbirth to serve the penological goals of eliminating security and flight risks.

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71. *Id.*

72. *See id.* at 96.

73. *Id.* at 96-97.

74. *Id.* at 97-98 (holding that incarceration does not negate the emotional support, public commitment, and spiritual significance of marriage; therefore, such prohibitions on inmate marriages impinge on important social and constitutional rights of both inmates and civilians who wish to marry each other).

75. *Id.* at 98.

76. *See id.* at 89-91 (holding that regulations must have a valid government interest, provide alternative means of expressing rights for inmates, avoid reallocation of prison resources, and not have ready alternatives).

77. *See id.* at 81.

78. *Id.* at 84.

79. *Id.* at 87.

The policy of shackling pregnant inmates during childbirth likely fails the first factor of the *Turner* test, that there be a “‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it.”<sup>80</sup> Although security and prevention of escape are legitimate governmental interests, it is illogical for any state to have genuine concerns that a woman in active labor poses a security risk or that such a woman would attempt to escape. Even if a woman in active labor did attempt to escape, it seems unlikely that she could get very far. Furthermore, women in active labor, experiencing severe labor pains and often highly medicated, will likely be unable to truly disrupt security in the hospital. As for security concerns, women are much less likely than their male counterparts to be convicted of violent crimes,<sup>81</sup> and three out of four females convicted of violent offenses were convicted of simple assault,<sup>82</sup> demonstrating that even violent female offenders are not often convicted of the more violent offenses including assault with a deadly weapon, attempted murder, and murder.<sup>83</sup> “[P]eople who have studied the issue said, women are shackled because prison rules are unthinkingly exported to a hospital setting.”<sup>84</sup> The executive director of Amnesty, William F. Schulz, explained that “[t]his is the perfect example of rule-following at the expense of common sense . . . It’s almost as stupid as shackling someone in a coma.”<sup>85</sup> The facts that many fewer female offenders have been convicted of violent offenses and that women in active labor rarely pose a real security or flight risk, demonstrate that the policy of shackling pregnant inmates during child birth “cannot be sustained [because] the logical connection between the regulation and the asserted goal is so remote as to render the policy . . . irrational.”<sup>86</sup>

Moreover, when compared to the regulation that prohibited inmate-to-inmate mail, which was upheld to prevent any planning of violent acts or escapes, the shackling of pregnant women during childbirth to ensure security and prevent escape is illogical because “jails and prisons use restraints on women as a matter of course, regardless of whether a woman has a history of violence (which only a minority have); regardless of whether she has ever absconded or attempted to escape (which few women have) . . .” and regardless of whether a guard is present, which in many

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80. *Id.* at 89.

81. WOMEN IN PRISON, *supra* note 28.

82. GREENFELD & SNELL, *supra* note 26, at 1.

83. *See id.* (stating that seventy-five percent of violent crimes for which women receive convictions are simple assault, while only half of the violent crimes for which men receive convictions are for this offense).

84. Liptak, *supra* note 29, at A16.

85. *Id.*

86. *See Turner v. Safley*, 482 U.S. 78, 89-90 (1987).

states is the case.<sup>87</sup> If shackling was the exception to the rule, rather than the normal practice, and shackles were permitted only when an inmate's individual history suggested that supervision would not suffice to eliminate the security or escape risk, a logical connection between the penological interests and the policy would more likely exist. However, in states where no research is done into the individual inmate's history of violent behavior or escape attempts and shackling is applied as the standard practice, a "'rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it" is lacking.<sup>88</sup>

However, even if departments of corrections are genuinely concerned about security and escape, an "obvious, easy alternative[]" exists to protect these concerns.<sup>89</sup> The Court, in the fourth factor of the *Turner* reasonableness test, explained "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns."<sup>90</sup> Rather than shackling women to their hospital beds during childbirth, states could simply supervise pregnant prisoners throughout their time away from the prison. Similar to the Illinois ban on the use of restraints on inmates during childbirth, states could require that a "correctional officer must be posted immediately outside the delivery room."<sup>91</sup> Because "[t]wenty four state departments of corrections [already] station an officer in the delivery room while an inmate is in labor,"<sup>92</sup> in at least these twenty-four states, no additional costs would be incurred by creating a policy of supervising pregnant inmates during childbirth, rather than shackling them. Consequently, under the third reasonableness factor listed in *Turner*—"the impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"<sup>93</sup>—there will not likely be a large enough impact to justify the continued shackling of pregnant inmates during childbirth.

Finally, the second factor of the *Turner* test, "whether there are alternative means of exercising the right that remain open to prison inmates,"<sup>94</sup> also favors a finding that the common practice of shackling

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87. See Amnesty Int'l, *Not Part of My Sentence*, *supra* note 6; see also BANKS, *supra* note 15, at 87.

88. See *Turner*, 482 U.S. at 89.

89. See *id.* at 98 (explaining that prisons do not have to use the "least restrictive alternative" test if an alternative solution accommodates the prisoner's rights at a minimal cost to valid penological interests).

90. *Id.*

91. See 55 ILL. COMP. STAT. 5/3-15003.6 (2000).

92. Amnesty Int'l, *Abuse of Women in Custody*, *supra* note 4.

93. *Turner*, 482 U.S. at 90.

94. *Id.*

pregnant inmates during childbirth is unconstitutional. Because women have no “means of exercising” their right to give birth while in prison other than within the confines of prison policy, women will be unable to give birth without the use of shackles unless this policy is explicitly abolished.

The existence of the obvious and simple alternative of supervising pregnant inmates during childbirth, which many states are already doing, and the lack of a logical connection between the goals of security and prevention of escape and the policy permitting the shackling of pregnant inmates during childbirth, demonstrate that this common practice and prison policy is likely unconstitutional.<sup>95</sup> State departments of corrections, state legislators, and the federal prison system should follow the example set by California, Illinois, and New York and enact and implement state regulations and legislation to protect pregnant inmates who give birth while incarcerated, thus bringing the country in line with its constitutional obligations.<sup>96</sup>

## *II. Human Rights Law is Persuasive Authority*

International human rights law is not binding on American courts; however, it indicates international consensus as to the basic human rights that court should recognize and enforce worldwide.<sup>97</sup> The U.S. Supreme Court has begun to acknowledge the importance of such international consensus by referring to and relying on international human rights law in two very recent and important Supreme Court cases.<sup>98</sup> First, in 2003, the Supreme Court decided *Lawrence v. Texas*, a case in which the Court struck down a Texas statute criminalizing sexual activity between members of the same sex.<sup>99</sup> The Court cited the European Court of Human Rights, the enforcement body for the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”), to

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95. Compare *Turner*, 482 U.S. at 90 (holding that prison regulations may amount to a constitutional violation if there are easy alternatives indicating that the current regulation may be unreasonable), with Amnesty Int’l, *Not Part of My Sentence*, *supra* note 6 (presenting clear alternatives for the amendment of policies regarding state use of restraints during child birth that infringe less upon the civil rights of pregnant prisoners).

96. See Amnesty Int’l, *Abuse of Women in Custody*, *supra* note 4.

97. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (determining the level of punishment for juveniles that results in a violation of the Eighth Amendment by considering in part what other countries have found to be disproportionate punishment); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (using European laws as guidance in finding that one’s decision to engage in consensual homosexual acts should be a protected liberty interest).

98. See *Roper*, 543 U.S. at 576; *Lawrence*, 539 U.S. at 577.

99. See *Lawrence*, 539 U.S. at 578-79 (finding that the state failed to present a legitimate state interest for enforcing anti-sodomy laws, and that such enforcement had violated the Due Process Clause of the Constitution).

demonstrate that a similar decision had been made regarding a Northern Ireland law that forbade consensual homosexual conduct.<sup>100</sup> The Court explained that many countries recognize the rights asserted by the plaintiff in *Lawrence* as an “integral part of human freedom.”<sup>101</sup> The U.S. Supreme Court relied in part on this international consensus as support for the proposition that a prior case that upheld a statute similar to the Texas statute at issue should be overruled.<sup>102</sup>

Even more recently, in *Roper v. Simmons*, decided in March of 2005, the U.S. Supreme Court held that the Eighth Amendment’s prohibition of cruel and unusual punishment “forbid[s] the imposition of the death penalty on offenders who were under the age of [eighteen] when their crimes were committed.”<sup>103</sup> In *Roper*, the Court affirmed the Missouri Supreme Court’s holding which set aside the death sentence imposed on the defendant who was under eighteen at the time he committed the crime.<sup>104</sup> The Court explained that in order to determine whether the Eighth Amendment barred the juvenile death penalty, the court must conduct “a review of the objective indicia of consensus” as well as “determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.”<sup>105</sup> The Court confirmed its own conclusion that the death penalty is a disproportionate punishment for offenders under the age of eighteen by relying on international consensus that the imposition of the death penalty on juveniles is a violation of their human rights.<sup>106</sup> The Court noticed that the “United States is the only country in the world that continues to give official sanction to the juvenile death penalty”<sup>107</sup> and that the “Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under [eighteen].”<sup>108</sup> Finally, the court explained that “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions . . .

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100. *See id.* at 573 (providing an example of the value of foreign laws in deciding American civil liberties through *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (1981), which held that anti-sodomy laws were invalid under the European Convention on Human Rights).

101. *Lawrence*, 539 U.S. at 577.

102. *See id.* at 576-77 (showing the trend in several nations against affirming anti-sodomy laws, which eventually contributed to the decision to overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

103. 543 U.S. at 578.

104. *Id.* at 578-79.

105. *Id.* at 564.

106. *Id.* at 578.

107. *Id.* at 575.

108. *Id.* at 576.



[T]he express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”<sup>109</sup>

These examples demonstrate that in recent years the U.S. Supreme Court has opened the door for international human rights and international consensus to be used as persuasive authority. In *Roper*, the Court went so far as to rely on the Convention on the Rights of the Child, a convention not even ratified by the United States.<sup>110</sup> Additionally, in *Lawrence*, the Court referred to the European Convention, a treaty ratified by only European countries.<sup>111</sup> Through its *Roper* and *Lawrence* opinions, the Supreme Court has opened the door for the use of international human rights law in American courts. Because reliance on international human rights treaties provides greater human rights protections, the Court should continue to refer to international human rights law and global consensus as a persuasive authority and as an indicator of how American law should function.

### *III. Shackling Violates International Human Rights*

The placement of restraints on incarcerated women while in labor violates an assortment of international human rights guaranteed to women. First, human rights law provides broad protections to pregnant women, which U.S. federal and state prisons routinely violate by shackling and chaining pregnant prisoners during childbirth. Additionally, international human rights law provides for broad guarantees to the “highest attainable standard of physical and mental health,”<sup>112</sup> security of person, dignity, and freedom from cruel, inhumane, or degrading treatment, all of which are violated by the habitual practice of chaining and shackling pregnant women during labor.

#### *A. Broad Protections for Pregnancy and Maternity*

The placement of restraints on incarcerated women while in labor contravenes the broad protections afforded to pregnant and birthing women under international law.<sup>113</sup> International human rights law protects

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109. *Id.* at 578.

110. *See id.* at 576 (developing the Court’s holding that imposition of the death penalty upon juveniles violates the Eighth Amendment based on non-binding foreign authority).

111. *See Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (referencing laws in Northern Ireland with no binding effect in the United States that were used to reject laws forbidding homosexual conduct).

112. International Covenant on Economic, Social and Cultural Rights art. 12(1), Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 [hereinafter ICESCR].

113. *See, e.g., CEDAW, supra* note 3, ¶ 27 (reflecting a trend in international law of

pregnant prisoners by requiring “adequate delivery assistance,”<sup>114</sup> “safe motherhood,”<sup>115</sup> and “special care and assistance.”<sup>116</sup> The common U.S. prison practice of shackling pregnant inmates during childbirth constitutes a breach of international mandates for broad protections of pregnant and birthing mothers.

As early as 1948, the international community has emphasized the importance of providing protections to women throughout pregnancy and childbirth.<sup>117</sup> First, the Universal Declaration of Human Rights (“UDHR”), proclaimed by the United Nations General Assembly in 1948, states that “[m]otherhood . . . [is] entitled to special care and assistance.”<sup>118</sup> Likewise, the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), to which the United States became a signatory in 1977,<sup>119</sup> requires that “[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth.”<sup>120</sup> Similarly, the American Declaration of the Rights and Duties of Man (“American Declaration”) states, “[a]ll women, during pregnancy and the nursing period . . . have the right to special protection, care, and aid.”<sup>121</sup> The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (“Additional Protocol to the American Convention”) mirrors the emphasis on the special care that should be afforded to women during pregnancy and childbirth.<sup>122</sup> Similarly, the Convention on the

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ensuring women’s rights to safe motherhood and emergency obstetric services); International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Report of the ICPD*, ¶ 8.22, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994), available at <http://www.un.org/popin/icpd/conference/offeng/poa.html> [hereinafter *Report of the ICPD*] (urging the broad expansion of maternity health care, including educational programs on safe motherhood and nutrition, prenatal care, delivery and referral services, post-natal care, and family planning services).

114. *Report of the ICPD*, *supra* note 113, ¶ 8.22.

115. CEDAW, *supra* note 3, ¶ 27.

116. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 25(2), U.N. Doc A/810 (Dec. 10, 1948), available at <http://www.unhcr.ch/udhr/lang/eng.html> [hereinafter UDHR].

117. *Id.*

118. *Id.* art. 25(2).

119. Ratifications to the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360, available at <http://www.ohchr.org/english/countries/ratification/3.htm> [hereinafter Ratifications to ICESCR].

120. ICESCR, *supra* note 112, art. 10(2).

121. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, art. VII (May 2, 1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), available at <http://www.umn.edu/humanrts/oasinstr/zoas2dec.htm> [hereinafter American Declaration].

122. See Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador,” art. 15(3), Nov. 17, 1988, O.A.S.T.S. No. 69, 1144 U.N.T.S. 123 [hereinafter Additional Protocol to the American Convention].

Elimination of All Forms of Discrimination against Women (“CEDAW”), to which the United States became a signatory in 1980,<sup>123</sup> requires that “States Parties shall ensure women appropriate services in connection with pregnancy, confinement and the post-natal period.”<sup>124</sup> The importance of providing women with adequate care throughout pregnancy and childbirth is repeated emphatically throughout international human rights law.

Furthermore, international human rights law specifies that states parties should provide services to ensure that women “go safely through pregnancy and childbirth.”<sup>125</sup> The Programme of Action of the United Nations: Reproductive Rights and Reproductive Health requires states to provide “the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth. . . .”<sup>126</sup> Furthermore, this Programme of Action also demands that states provide “adequate delivery assistance . . . [that] provides for obstetric emergencies.”<sup>127</sup> The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“African Women’s Protocol”) goes even further in its mandates upon States parties.<sup>128</sup> It requires that “States Parties shall take all appropriate measures to . . . establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breastfeeding.”<sup>129</sup> The African Women’s Protocol puts an affirmative duty on its signatories to provide women with adequate care during pregnancy.<sup>130</sup> Even the Convention on the Rights of the Child provides

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(instructing “States Parties . . . . To provide special care and assistance to mothers during a reasonable period before and after childbirth”).

123. Ratifications to the Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, *available at* <http://www.un.org/womenwatch/daw/cedaw/states.htm>.

124. Convention on the Elimination of All Forms of Discrimination against Women art. 12(2), Mar. 1, 1980, 1249 U.N.T.S. 13.

125. *Report of the ICPD*, *supra* note 113, ¶ 7.2; *see* Fourth World Conference on Women, Beijing, China, Sept. 15, 1995, *Beijing Declaration and Platform for Action*, ch. IV, ¶ 96, U.N. Doc. A/CONF.177/20 (Sept. 1995) [hereinafter *Beijing Declaration*].

126. *Report of the ICPD*, *supra* note 113, ¶ 7.2; *see Beijing Declaration*, *supra* note 125, ch. IV, ¶ 96.

127. *Report of the ICPD*, *supra* note 113, ¶ 8.22.

128. *See* Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, O.A.U. CAB/LEG/66.6, art. 14(2) (Sept. 13, 2000) [hereinafter *African Women’s Protocol*] (outlining women’s health and reproductive rights that compel State Parties to provide (1) access to adequate and affordable healthcare and educational services; (2) health and nutritional services throughout pregnancy; and (3) protection of reproductive rights by allowing abortions in extreme circumstances, such as rape, incest, and where there health concerns for the mother or fetus).

129. *Id.* art. 14(2)(b).

130. *See id.* (holding States Parties responsible for the establishment and support of

protection for pregnant mothers; it requires that “States Parties . . . shall take appropriate measures . . . [t]o ensure appropriate pre-natal and post-natal health care for mothers.”<sup>131</sup>

Under international human rights law, these broad protections for pregnant women extend to those incarcerated by the state. The United Nations Standard Minimum Rules for the Treatment of Prisoners requires that “[i]n women’s institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment.”<sup>132</sup> International human rights law consistently mandates that countries provide adequate protections for women throughout pregnancy and childbirth, whether or not they are incarcerated.

Not only do international human rights declarations and conventions mandate special protections for pregnant and birthing women, but the Committee on the Elimination of Discrimination Against Women (“CEDAW Committee”), the enforcement body for CEDAW, has elaborated on this duty in its General Recommendation on Women and Health, a document created to guide State party actions. The CEDAW Committee affirmed “it is the duty of States parties to ensure women’s right to safe motherhood and emergency obstetric services.”<sup>133</sup> Similarly, the Committee on Economic, Social and Cultural Rights (“Committee to the ICESCR”), the enforcement body for the ICESCR, expanded on the ICESCR’s provision of the right to the “highest attainable standard of health” in a General Comment in 2000.<sup>134</sup> The Committee to the ICESCR specified that “[t]he right to maternal, child and reproductive health . . . requir[es] measures to improve . . . maternal health . . . including access to family planning, pre- and post-natal care, [and] emergency obstetric services.”<sup>135</sup> “The Committee [to the ICESCR] also confirm[ed] that the following are obligations . . . (a) To ensure reproductive, maternal (pre-

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pregnancy services to women at the pre-natal, delivery, post-natal, and breast-feeding stages).

131. United Nations Convention on the Rights of the Child art. 24(2)(d), Nov. 20, 1989, 1577 U.N.T.S. 3.

132. Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/1 Annex I, E.S.C. res. 663C, art. 23 (1), U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. E/3048 at 11 (July 31, 1957), *amended by* E.S.C. Res. 2076, U.N. ESCOR, 62 Sess., Supp. No. 1, U.N. Doc. E/5983, at 35 (May 13, 1977) [hereinafter Rules for the Treatment of Prisoners].

133. CEDAW, *supra* note 3.

134. See U.N. Comm. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights., *Gen. Comment 14, Substantive Issues Arising in the Implementation of the Int’l Covenant of Econ., Soc. and Cultural Rights*, ¶ 8-9 U.N. Doc. E/C.12/2000/4 Aug. 11, 2000 [hereinafter ECOSOC, *Substantive Issues*] (stating that the “highest attainable standard of health” includes an acknowledgement of one’s freedoms and entitlements, as well as the facilities, goods, services, and conditions needed to recognize these rights).

135. *Id.* ¶ 14.

natal as well as post-natal) . . . health care.”<sup>136</sup> From the very first international human rights documents, such as the UDHR which was created in 1948, to the most recent, such as the African Women’s Protocol, which went into effect in November of 2005, the international community has consistently required broad protections for pregnant women before, during, and after childbirth, whether incarcerated or not.<sup>137</sup>

Most prisons in the United States continue to permit incarcerated women to be shackled or chained to the hospital bed, often by their ankles, during childbirth and even delivery.<sup>138</sup> By allowing this treatment of pregnant prisoners, U.S. prisons routinely violate the basic and fundamental rights of women to “adequate delivery assistance,”<sup>139</sup> “safe motherhood,”<sup>140</sup> and “special care and assistance”<sup>141</sup> as required by numerous international human rights documents. The common practice of shackling pregnant inmates during childbirth in U.S. prisons constitutes a breach of international mandates for broad protections of pregnant and birthing mothers.

#### *B. Right to the Highest Attainable Standard of Health*

Similar to the broad protections required for pregnant women, international human rights law also continually requires state parties to provide for the “highest attainable standard of . . . health”<sup>142</sup> for their citizens. Because international human rights law expressly extended this broad right to health to prisoners,<sup>143</sup> U.S. prisons commonly violate

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136. *Id.* ¶ 44.

137. See UDHR, *supra* note 116, art. 25 (recognizing that those in motherhood have rights to necessary social services, special care, and assistance); African Women’s Protocol, *supra* note 128, art. 14(2)(b) (holding States Parties responsible for establishing pre-natal, delivery, post-natal services).

138. See Ellen M. Barry, *Bad Medicine: Health Care Inadequacies in Women’s Prisons*, 16 CRIM. JUST. 39, 40 (2001) (“Pregnant women in county jails and in the state prison system are routinely transported to and from facilities and hospitals in restraints. Women in all stages of labor, including during delivery, are routinely shackled by the ankle to their hospital beds”); see also Ehrlich & Paltrow, *supra* note 1 (“Prisons throughout the United States restrain and shackle women throughout pregnancy and during labor.”).

139. *Report of the ICPD*, *supra* note 113, ¶ 8.22 (specifying that adequate delivery assistance entails services for obstetric emergencies and avoids heavy reliance on C-sections).

140. CEDAW, *supra* note 3, ¶ 27 (noting that States should allocate the maximum available resources to services dealing with childbirth and women’s reproductive health).

141. UDHR, *supra* note 116, art. 25(2).

142. ICESCR, *supra* note 113, art. 12(1) (including both physical and mental health).

143. See Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111, Annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990), princ. 9, available at <http://www1.umn.edu/humanrts/instree/g2bpt.htm> [hereinafter Basic Principles for

women's right to health by shackling incarcerated women during labor and delivery. In fact, prison authorities interfere with the proper medical and health attention that inmates in labor would otherwise receive by requiring that these patients remain shackled to their hospital bed.<sup>144</sup> Because the effects of shackling on the health of both the mother and the baby can be profound, particularly in a situation where an emergency C-section is required, the violations of the mother's right to the "highest attainable standard of health" are evident.<sup>145</sup> In order to abide by international norms and mandates, U.S. prisons should eliminate the common practice of shackling pregnant inmates during childbirth.

Several international human rights documents recognize and stress the right to health. The ICESCR, which was signed by the United States in 1977,<sup>146</sup> requires that "States Parties . . . recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."<sup>147</sup> The UDHR similarly mandates that "[e]veryone has the right to . . . health and well-being . . . and medical care."<sup>148</sup> CEDAW requires States parties to "ensure . . . access to health-care services, including those related to family planning."<sup>149</sup> The Additional Protocol to the American Convention provides that "[e]veryone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental, and social well-being."<sup>150</sup> This right to health is reiterated in the American Declaration,<sup>151</sup> the Vienna Declaration and Programme of Action,<sup>152</sup> the

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the Treatment of Prisoners] (mandating that prisoners' legal status shall not affect their rights to obtain health services available in their home countries).

144. See, e.g., Amnesty Int'l, *Not Part of My Sentence*, *supra* note 6 (describing one inmate's experience of giving birth while shackled, where she was not permitted to move around her room to induce labor and where the shackles were not removed until she was in active labor and was unable to place her legs and feet into the proper position necessary during childbirth).

145. See *id.* (citing a physician's concerns that shackling women during labor endangers the health of the mother and the fetus because it compromises the woman's ability to adjust her body during labor and delays emergency responses to any unexpected complications that may arise during childbirth).

146. See Ratifications to ICESCR, *supra* note 119.

147. ICESCR, *supra* note 112, art. 12 (enumerating specific provisions necessary to achieve the highest attainable standard of health, including those aimed at reduction of infant mortality and promotion of healthy child development).

148. UDHR, *supra* note 116, art. 25(1) (stating that medical care, among other things, is necessary to achieve an adequate standard of living).

149. CEDAW, *supra* note 3, ¶ 8 (urging that access to health services on an equal basis to men and women will aid to eliminate discrimination against women in health care).

150. Additional Protocol to the American Convention, *supra* note 122, art. 10.

151. See American Declaration, *supra* note 121, art. XI (including access to medical care as one way of exercising one's right to the preservation of health and well-being).

152. See World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 31, U.N. Doc A/CONF.157/23 (July 12,

Beijing Declaration and Platform for Action: Human Rights of Women,<sup>153</sup> and the Beijing Declaration and Platform for Action: Women and Health.<sup>154</sup> International human rights law is emphatic and consistent in its guarantees of a fundamental right to health.

Both the CEDAW Committee and the Committee to the ICESCR have made further statements elucidating each convention's guarantees of a right to health as a basic and fundamental human right.<sup>155</sup> The CEDAW Committee explained that it "affirm[s] that access to health care, including reproductive health, is a basic right under the [CEDAW] Convention . . . ."<sup>156</sup> Furthermore, the CEDAW Committee instructed that "States parties should also . . . [m]onitor the provision of health services to women . . . [and r]equire all health services to be consistent with the human rights of women."<sup>157</sup> The Committee to the ICESCR similarly affirmed that "[h]ealth is a fundamental right indispensable for the exercise of other human rights,"<sup>158</sup> and that health care and services be available, accessible, acceptable, and of good quality.<sup>159</sup> The Committee to the ICESCR additionally proclaimed that "[i]t is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful . . . practices and norms that deny them their full reproductive rights."<sup>160</sup> The committees to CEDAW and the ICESCR, conventions that have been signed by the United States, require that signatories provide for an extensive right to health for their citizen populations.<sup>161</sup>

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1993), available at <http://ohchr.org/english/law/pdf/vienna.pdf> (prohibiting the creation of any obstacles that interfere with the right to medical care).

153. See *Beijing Declaration*, *supra* note 125, ch. IV ¶ 223 (reaffirming an individual's right to achieve the highest standard of sexual and reproductive health).

154. See *id.* ¶ 91 (emphasizing that women's right to enjoy the highest achievable standard of health is essential to ensure their full participation in all aspects of society).

155. See ECOSOC, *Substantive Issues*, *supra* note 134, ¶ 3 (discussing the right to health and its interdependency on other basic human rights, such as the right to housing, human dignity and non-discrimination); CEDAW, *supra* note 3, ¶ 2 (agreeing that providing accessible health care services throughout women's life cycles is essential to ensure their well-being).

156. CEDAW, *supra* note 3, ¶ 1.

157. *Id.* ¶ 31(d)-(e).

158. ECOSOC, *Substantive Issues*, *supra* note 134, ¶ 1.

159. See *id.* ¶ 12 (requiring that health services, goods, and facilities be accessible and available to all citizens without discrimination, especially vulnerable and marginalized members of society).

160. See *id.* ¶ 21.

161. See *id.* ¶ 11 (specifying that the right to health includes citizen-participation in health-related decision-making and the availability of factors that affect health, such as water, nutritious food, and healthy environment conditions); CEDAW, *supra* note 3, ¶ 12 (emphasizing that states must consider biological, socio-economic, and psychological factors that distinguish women from men when addressing health care issues that affect women).

The African Charter and the African Women's Protocol follow suit and guarantee an international right to health.<sup>162</sup> However, these documents go even further in protecting this right. The African Charter proclaims that "1. Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention. . . ."<sup>163</sup> The African Women's Protocol requires that "States Parties shall ensure the right to health of women . . ."<sup>164</sup> The African Women's Protocol also mandates that "States Parties shall . . . enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all . . . harmful practices which endanger the health and general well-being of women,"<sup>165</sup> and that "States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards."<sup>166</sup> The repetition of the right to health in such a wide range of international rights documents demonstrates international consensus on the importance of the right to health.

This broad right to health has been expressly extended to incarcerated citizens. The United Nations Basic Principles for the Treatment of Prisoners requires that "[p]risoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation."<sup>167</sup> The United Nations General Assembly explained that "[h]ealth personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment . . . of the same quality and

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162. See African Women's Protocol, *supra* note 128, art. 2(1)(b), (e) (qualifying any practice that harms the health of women as discriminatory and requiring that states should support continental policies that aim to eliminate those practices); African [Banjul] Charter on Human and People's Rights, arts. 2, 16, Oct. 21, 1986, 21 I.L.M. 58 [hereinafter African Charter] (asserting that all people shall enjoy the rights listed in the charter, which includes the right to health, without being subjected to discrimination on the basis of race, ethnic group, national origin, and birth, among other things).

163. African Charter, *supra* note 162, art. 16.

164. African Women's Protocol, *supra* note 128, art. 14(1).

165. *Id.* art. 2(1)(b).

166. *Id.* art. 5.

167. Basic Principles for the Treatment of Prisoners, *supra* note 143, princ. 9; see Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, Annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988), princ. 24, available at <http://www.umn.edu/humanrts/instate/g3bppdi.htm> (requiring that all prisoners be offered prompt medical attention when needed, free of charge); Rules for the Treatment of Prisoners, *supra* note 132, R. 25(1) (mandating that medical personnel should care for prisoners' physical and mental needs and insisting that sick prisoners are entitled to daily visits from the medical staff).



standard as is afforded to those who are not imprisoned or detained.”<sup>168</sup> The Committee to the ICESCR and the Human Rights Committee, the enforcement body to the International Covenant on Civil and Political Rights (“ICCPR”), a convention which the United States ratified in 1992,<sup>169</sup> both stress that prisoners are entitled to equal access to medical and health services.<sup>170</sup> The broad right to health established by international law and the statements of convention enforcement bodies extends to all people, including prisoners. Accordingly, prisoners are entitled to the “health services available in the country without discrimination on the grounds of their legal situation.”<sup>171</sup>

In 1998, the Human Rights Committee, in *Henry v. Jamaica*, ruled that article 10 of the ICCPR, which states “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,”<sup>172</sup> includes a right to medical attention and treatment while incarcerated.<sup>173</sup> Nicholas Henry was convicted for the murder of three policemen in Jamaica and sentenced to death.<sup>174</sup> Henry informed

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168. Principles of Medical Ethics relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 37/194, Annex, princ. 1, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/51 (Dec. 18, 1982), available at <http://www1.umn.edu/humanrts/instree/h3pmerhp.htm>.

169. See Ratifications to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, available at <http://www.ohchr.org/english/countries/ratification/4.htm> [hereinafter Ratifications to ICCPR].

170. See ECOSOC, *Substantive Issues, supra* note 134, ¶ 34 (prohibiting discriminatory health practices and disallowing coercive medical treatments of states’ citizens, including prisoners); U.N. Human Rights Comm., *General Comment 20, Article 7, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶11, U.N. Doc. HR1/Gen1/Rev.1 at 30 (1994), available at <http://www1.umn.edu/humanrts/gencomm/hrcom20.htm> [hereinafter U.N. Human Rights Comm., *General Comment 20 Article 7*] (identifying prisoners as vulnerable members of the society who are in need of protective safeguards, such as prompt access to medical personnel).

171. Basic Principles for the Treatment of Prisoners, *supra* note 143, princ. 9; see also G.A. Res. 43/173, *supra* note 167, princ. 26 (ensuring that prisoners shall have access to written records of their medical examinations); Rules for the Treatment of Prisoners, *supra* note 132, R.22 (requiring that prisons provide its population with medical staff with specialized knowledge, especially psychiatry and dentistry, and guaranteeing the right to transfer to facilities providing any specialized treatment necessary for prisoners).

172. International Covenant on Civil and Political Rights, art. 10(1), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

173. See U.N. Human Rights Comm., *Henry v. Jamaica*, ¶ 7.3, Comm. No. 610/1995, U.N. Doc. CCPR/C/64/D/610/1995 (Oct. 21, 1998), available at <http://www.umn.edu/humanrts/undocs/session64/view610.htm> (holding that Jamaica’s failure to provide adequate medical examination to its prisoner violated article 10 of the ICCPR).

174. See *id.* ¶¶ 2.1-2.2 (stating that Henry was accused and convicted, of being an accessory to the murders because he helped in making the weapons used during the attack on the Olympic Police Station, was aware of the attack, allowed those directly involved in the murder to congregate in his house, and participated in hiding weapons

prison authorities of a medical condition he was suffering from, and despite various requests, the authorities failed to take him to the hospital.<sup>175</sup> After approximately three years, Henry finally saw a doctor, who informed him that surgery was necessary.<sup>176</sup> Despite the doctor's instructions and several attempts by Henry and his representatives, he was never hospitalized and never received medical treatment for his condition.<sup>177</sup> The Human Rights Committee considered Henry's allegations and found that "the lack of medical treatment is in violation of article 10 of the Covenant,"<sup>178</sup> and declared that "[t]he State party is under an obligation to take measures that similar violations not occur."<sup>179</sup> Even under the ICCPR, which does not contain a broad right to health, the Human Rights Committee recognized the importance of the right to health by requiring that incarcerated citizens be provided with "medical examination and treatment," like any other citizen.<sup>180</sup> Although American prisons are not denying medical treatment in the exact same manner as the Jamaican prison in *Henry*, the common practice of shackling inmates during childbirth can lead to the denial of medical treatment because it inhibits the doctor's ability to deliver the baby in the safest manner, and it can create and aggravate physical complications.

By shackling incarcerated women during labor and delivery, U.S. prisons are violating women's rights to the "highest attainable standard of health." The U.S. prison system is not following the United Nations mandate that "[p]risoners shall have access to the health services available in the country without discrimination on the grounds of their legal status."<sup>181</sup> Female prisoners are subjected to harsh treatment during childbirth, rather than receiving the "highest attainable standard of health" that other female patients receive.<sup>182</sup> In fact, prison authorities are interfering with the proper medical and health attention that birthing

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after the attack).

175. *See id.* ¶ 3.2 (claiming that Henry had experienced testicular problems since 1988).

176. *See id.* (charging that in 1992, Henry was allowed to see a doctor who scheduled his surgery for April 1992).

177. *See id.* ¶¶ 3.2-3.3 (claiming that not only was Henry denied a necessary surgery, he was assaulted, in 1993, with a metal detector on his testicles, and received no medical treatment for those injuries).

178. *Id.* ¶ 7.3.

179. *Id.* ¶ 9.

180. *See id.* (ruling that an effective remedy to the violation of the ICCPR's guarantee of humane and dignified treatment of prisoners is immediate medical examination).

181. Basic Principles for the Treatment of Prisoners, *supra* note 143, princ. 9.

182. *See, e.g., Ehrlich & Paltrow, supra* note 1 (noting that shackles may increase the risk of injury during childbirth and may impede necessary emergency responses).

prisoners would otherwise receive from their obstetricians.

Finally, the effects of shackling on the health of both the mother and the baby could be profound in an emergency situation. For example, if an emergency cesarean were necessary, even a few minutes delay in removing the shackles, causing a lack of oxygen to the baby, could lead to permanent brain damage.<sup>183</sup> Similarly, “[h]aving the woman in shackles compromises the ability to manipulate her legs into the proper position for treatment.”<sup>184</sup> In order to abide by international norms, U.S. prisons should eliminate the practice of shackling pregnant inmates during childbirth.

### *C. Right to Integrity and Security of Person*

The shackling of pregnant inmates during labor and delivery violates the right to security of person which is guaranteed in international human rights law. Because prisons interfere with the treatment that incarcerated women receive while in labor, by physically restricting their movement and creating a more painful and stressful experience, prisons violate the right to integrity and security of person as consistently guaranteed by international human rights law.

Various international human rights conventions and declarations affirm this right. The UDHR and the ICCPR, which the United States ratified in 1992,<sup>185</sup> mandate that “[e]veryone has the right to . . . security of person.”<sup>186</sup> Furthermore, both the American Convention on Human Rights (“American Convention”),<sup>187</sup> to which the United States became a signatory in 1977,<sup>188</sup> and the American Declaration<sup>189</sup> uphold the right to security of person. The American Convention additionally requires that “[e]very person has the right to have his physical, mental, and moral integrity respected.”<sup>190</sup> The African Charter states that “[e]very human being shall be entitled to respect for . . . the integrity of his person,”<sup>191</sup> and that “[e]very individual shall have the right to . . . the security of his

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183. See Amnesty Int’l, *Abuse of Women in Custody*, *supra* note 4.

184. *Id.*; see also Ehrlich & Paltrow, *supra* note 1.

185. Ratifications to ICCPR, *supra* note 169.

186. UDHR, *supra* note 116, art. 3; ICCPR, *supra* note 172, art. 9.

187. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter Convention on Human Rights].

188. Organization of American States, Ratifications to American Convention on Human Rights “Pact of San Jose, Costa Rica,” Nov. 22, 1969, O.A.S.T.S. No. 361, available at <http://www.oas.org/juridico/english/Sigs/b-32.html> [hereinafter Ratifications to the American Convention].

189. American Declaration, *supra* note 121, art. I (declaring that “Every human being has the right to . . . the security of his person”).

190. Convention on Human Rights, *supra* note 187, art. 5.

191. African Charter, *supra* note 162, art. 4.

person.”<sup>192</sup> Finally, the African Women’s Protocol guarantees that “[e]very woman shall be entitled to respect for . . . the integrity and security of her person.”<sup>193</sup> Interference with the medical attention received by imprisoned women during labor, by requiring that women remain shackled to their hospital bed, may have profound effects on the mother and baby’s health. Rather than respecting women’s bodily integrity and security of person, American prisons forcibly shackle women, restricting their movement and aggravating the already painful and stressful situation of childbirth.<sup>194</sup>

*D. Right to Dignity and Freedom from Cruel, Inhumane, and Degrading Treatment or Punishment*

In addition to the aforementioned rights, the international community has mandated the protection of the right to freedom from cruel, inhumane, and degrading treatment or punishment.<sup>195</sup> Shackling inmates during childbirth without regards to their individual history of escape attempts or violent behavior is cruel, inhumane, and degrading. Childbirth is a difficult, stressful, and painful experience. Restricting women’s movement, subjecting them to health risks, and treating them in a dehumanizing manner violates women’s rights to be treated humanely and with dignity. The experiences of women who have given birth under these conditions speak for themselves. One inmate described her experience: “[i]magine being shackled to a metal bedpost, excruciating pains going through my body, and not being able to adjust myself to even try to feel any type of comfort, trying to move and with each turn having hard, cold metal restraining my movements.”<sup>196</sup> In order to avoid violating the vast amount of international law that requires prisons to treat inmates in a humane and non-degrading manner, U.S. prisons should eliminate the common practice of shackling female prisoners during childbirth.

The right to be treated with dignity and to be free from cruel, unusual or degrading treatment is another right that is guaranteed repeatedly in an assortment of human rights conventions.<sup>197</sup> The UDHR, the ICCPR, and the American Convention state that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment.”<sup>198</sup> Although the United

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192. *Id.* art. 6.

193. African Women’s Protocol, *supra* note 128, art. 4.

194. *See* Amnesty Int’l, *Not Part of My Sentence*, *supra* note 6.

195. *See id.*

196. *Id.*

197. *See* Amnesty Int’l, *Abuse of Women in Custody*, *supra* note 4.

198. ICCPR, *supra* note 172, art. 7; Convention on Human Rights, *supra* note 187, art. 5(2); UDHR, *supra* note 116, art. 5; *see* U.N. Human Rights Comm., *General Comment 20 Article 7*, *supra* note 170, ¶ 2 (stating that “[t]he aim of the provisions of article 7 of the [ICCPR] is to protect both the dignity and the physical and mental

States ratified the ICCPR,<sup>199</sup> it reserved as to this provision because of the Eighth Amendment's similar prohibition on "cruel and unusual punishments,"<sup>200</sup> making it slightly more difficult to assert violations of human rights in the context covered by the Eighth Amendment. In any case, the ICCPR also requires that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."<sup>201</sup> The American Convention, also signed by the United States,<sup>202</sup> mirrors this requirement of the ICCPR by stating that "[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."<sup>203</sup> The American Declaration similarly proclaims that "[e]very individual who has been deprived of his liberty . . . has the right to humane treatment during the time he is in custody,"<sup>204</sup> and "not to receive cruel, infamous, or unusual punishment."<sup>205</sup> Both the African Charter<sup>206</sup> and the African Women's Protocol<sup>207</sup> uphold these rights for prisoners. International human rights law's repeated recognition of the right to be treated with dignity and to be free from torture and inhumane and degrading treatment demonstrates its international importance.

Furthermore, the United Nations has created several sets of principles to ensure the humane treatment of prisoners.<sup>208</sup> First, the Basic Principles for the Treatment of Prisoners requires that "[a]ll prisoners shall be treated

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integrity of the individual").

199. See Ratifications to ICCPR, *supra* note 169.

200. U.S. CONST. amend. VIII.

201. ICCPR, *supra* note 172, art. 10; see U.N. Human Rights Comm., *General Comment 21, Article 10, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 4 U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994), available at <http://www.umn.edu/humanrts/gencomm/hrcom21.htm>, [hereinafter U.N. Human Rights Committee, *General Comment 21, Article 10*] ("Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule.").

202. Ratifications to American Convention, *supra* note 188.

203. Convention on Human Rights, *supra* note 187, art. 5(2).

204. American Declaration, *supra* note 121, art. XXV.

205. *Id.* art. XXVI.

206. See African Charter, *supra* note 162, art. 5 ("Every individual shall have the right to the respect of the dignity inherent in a human being . . . . All forms of exploitation and degradation of man particularly . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.").

207. See African Women's Protocol, *supra* note 128, art. 3(1) (determining that "[e]very woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights"). In addition, "States Parties . . . ensure the protection of every woman's right to respect for her dignity." *Id.* art. 3(4). Furthermore, "[a]ll forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited." *Id.* art. 4(1).

208. See generally Basic Principles for the Treatment of Prisoners, *supra* note 143; Rules for the Treatment of Prisoners, *supra* note 132.

with the respect due to their inherent dignity and value as human beings.”<sup>209</sup> The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, states that “[a]ll persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person,”<sup>210</sup> and that “[n]o person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.”<sup>211</sup> The international community has repeatedly expressed its agreement that prisoners should be treated humanely.

Furthermore, the international community has created laws on the use of restraints on prisoners to ensure humane treatment. The United Nations Standard Minimum Rules for the Treatment of Prisoners (“United Nations Standard Minimum Rules”) states

[i]nstruments of restraint, such as handcuffs, chains, irons and strait-jacket, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:

- (a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;
- (b) On medical grounds by direction of the medical officer;
- (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.<sup>212</sup>

Under the United Nations Standard Minimum Rules, the only permitted use of restraints on imprisoned women during childbirth would be those that are “by order of the director” and those “by direction of the medical officer,” because women in labor would not be in transfer as required by part (a) above.<sup>213</sup> According to the United Nations, the shackling of pregnant women during labor should be the exception rather than the rule, and it should only be done in the rare circumstances in which the director or the medical officer believes such restraint is necessary.<sup>214</sup>

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209. Basic Principles for the Treatment of Prisoners, *supra* note 143, princ. 1.

210. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, Annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988), princ.1, *available at* <http://www.umn.edu/humanrts/instree/g3bppdi.htm>.

211. *Id.* princ. 6.

212. Rules for the Treatment of Prisoners, *supra* note 132, art. 33.

213. *Id.*

214. *See id.*

Additionally, the U.S. prison system's treatment of its pregnant inmates violates the international convention dedicated solely to the elimination of torture and other cruel, inhuman or degrading treatment. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), which the United States ratified in 1994,<sup>215</sup> requires that "[e]ach State Party shall take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction."<sup>216</sup> CAT defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>217</sup>

This broad definition could certainly include the treatment pregnant inmates are subjected to during childbirth. First, women who have gone through the experience of giving birth while shackled explain that the shackling did increase the pain and stress of childbirth on both physical and mental levels.<sup>218</sup> Second, the shackling is done based simply on the woman's incarcerated status, regardless of the fact that she may pose little or no security or flight risk.<sup>219</sup> Third, the shackling is inflicted intentionally because the woman is shackled at the direction of the guard or officer escorting her to the hospital.<sup>220</sup> Finally, the shackling is done at the instruction of prison authorities acting in their official capacity.<sup>221</sup> Consequently, CAT may bar this common prison practice.

Regardless, CAT also prohibits "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."<sup>222</sup> Even if the shackling of pregnant inmates

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215. Ratifications to the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, available at <http://www.ohchr.org/english/countries/ratification/9.htm>.

216. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(1), Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

217. *Id.* art. 1(1).

218. See Amnesty Int'l, *Abuse of Women in Custody*, *supra* note 4 (describing the experience of Samantha Luther, who gave birth while her ankles were shackled to the hospital bed and told Amnesty USA that "[i]t was so humiliating. My ankles were raw.").

219. See *id.*

220. See *id.*

221. See *id.*

222. Convention Against Torture, *supra* note 216, art. 16(1).

during childbirth does not constitute torture under CAT, it likely constitutes “degrading treatment or punishment” because the act of shackling pregnant inmates during labor is done at the instigation of and with the consent of the prison guard or officer acting in his or her official capacity. Therefore, the common prison practice of shackling pregnant inmates to their hospital bed during labor and delivery would violate CAT either under its definition of torture, or its prohibition of other inhumane or degrading treatment, or both.

The Committee Against Torture, the enforcement body to CAT, recently informed the United States that the shackling of pregnant inmates during childbirth is a violation of CAT’s prohibition of degrading or inhumane treatment.<sup>223</sup> The Committee Against Torture voiced concern about the routine shackling of pregnant inmates during labor in its report to the United States in July of 2006.<sup>224</sup> In this report, the Committee Against Torture explained to the United States that “[t]he Committee is concerned at the treatment of detained women in the State party, including . . . incidents of shackling women detainees during childbirth” (art. 16, which prohibits degrading and inhumane acts that do not fit the definition of torture in article 1).<sup>225</sup> “The State party should adopt all appropriate measures to ensure that women in detention are treated in conformity with international standards.”<sup>226</sup> Thus, in July of 2006, the Committee on Torture explicitly and directly informed the United States that the common practice of shackling pregnant inmates during childbirth is a violation of CAT.<sup>227</sup> The Committee instructed the United States to take measures to ensure that female prisoners’ international human rights are upheld. Regardless, the practice of shackling continues.<sup>228</sup>

The common prison practice of shackling women during childbirth violates various internationally recognized human rights. In order to meet its international obligations, American prisons should eliminate this dehumanizing practice. The United States has been informed of the Committee on Torture’s disapproval of the policy, and should abolish the practice, bringing its prison systems in line with its international obligations under various human rights treaties that the country has signed and ratified.

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223. See U.N. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, ¶ 33 UN Doc. CAT/C/USA/CO/2 (July 25, 2006), available at <http://daccess-ods.un.org/TMP/4281593.html>.

224. See *id.*

225. *Id.*

226. *Id.*

227. See *id.*

228. See Amnesty Int’l, *Abuse of Women in Custody*, *supra* note 4.



## CONCLUSION

The American prison system's routine shackling of pregnant prisoners during childbirth violates both the Eighth Amendment of the U.S. Constitution and vast amounts of international human rights law. Incarcerated women have been denied their right to health as required under the Eighth Amendment's prohibition on cruel and unusual punishment. Furthermore, international human rights law provides broad protections for pregnant and birthing women and guarantees the rights to the highest attainable standard of health, security of person, and freedom from torture and inhumane or degrading treatment. The United States is violating these internationally agreed upon rights of prisoners, and the Committee on Torture has explicitly informed the country of its violations of human rights. Because the U.S. Supreme Court has opened the door for international human rights arguments, the country should look to international human rights for an indication as to how American law should protect its pregnant prisoners. U.S. federal and state prisons, departments of corrections, and state legislatures should follow the example set by California and Illinois and prohibit this inhumane and dehumanizing treatment of its female prisoners, bringing the country in accordance with both its constitutional and international obligations to its female prison population.