Pregnancy in Confinement, Anti-Shackling Laws and the "Extraordinary Circumstances" Loophole

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> "One might have hoped that, by this hour, the very sight of chains on black flesh, or the very sight of chains, would be so intolerable a sight for the American people, and so unbearable a memory, that they would themselves spontaneously rise up and strike off the manacles. But, no, they appear to glory in their chains; now, more than ever, they appear to measure their safety in chains and corpses." – James Baldwin[1]

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The draconian practice of shackling pregnant women is a scourge on the human rights of incarcerated persons, particularly women of color.[2] An approach to abolishing the practice that intricately supplements current Eighth Amendment methodology with other legal frameworks while improving deficient legislation may provide unique and unexplored pathways to remedy. Understanding how shackling incarcerated women in labor adversely affects intersectional identities of women based on race, class, immigration status, and gender identity or expression can anchor the expansion of jurisprudence around prisoners' rights.

This Note will explore how these frameworks, from international human rights to a critical race lens, can provide an understanding of the issue of shackling pregnant prisoners. It will seek to demonstrate how anti-shackling laws, when they do exist, actually serve to bolster the practice of shackling by way of a highly discretionary "extraordinary circumstances" loophole. Part I will explore the current state of shackling in U.S. prisons, jails, and detention centers and how the history of female confinement has led us here. Part II explains how current laws and policies regarding shackling end up promoting, rather than restraining, prison

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1. James Baldwin, *An Open Letter to My Sister, Miss Angela Davis*, N.Y. REV. OF BOOKS (Jan. 7, 1971), http://www.nybooks.com/articles/1971/01/07/an-open-letter-to-my-sister-miss-angela-davis/.

2. Throughout this Note, references to "women," "female" prisoners, or "mothers" who have experienced shackling during pregnancy will commonly be used. While other individuals with uteruses may experience pregnancy within prison (such as transgender men, gender non-conforming persons, or intersex persons), documented cases of those incidents are difficult to find. Based on the statistical information available, the overwhelming majority of cases of shackling of pregnant individuals concern women. Therefore, for sake of clarity, the language throughout, including pronouns (she/her/hers) will be gendered.

officials engaged in shackling pregnant prisoners through discretionary loopholes. Part III looks to the courts to see how judges have shaped Eighth Amendment jurisprudence on shackling in recent years. Lastly, Part IV attempts to map new approaches for advocacy groups dealing with individuals who have been—or are facing the prospect of being—shackled during pregnancy, particularly during labor, delivery, or post-partum recovery. It outlines an approach that combines impact litigation, improved state and federal legislation, and grassroots organizing, working interdependently, to bring about the eradication of the insidious practice of shackling pregnant women.

I. HOW SHACKLING OPERATES IN U.S. PRISONS, JAILS, AND DETENTION CENTERS

In April 2013, just two months into a one-year sentence at the Milwaukee County Jail, Melissa Hall went into labor with her third child.[3] When she was transferred from the jail to the hospital to give birth, her ankles were shackled and her wrists handcuffed.[4] Her handcuffs were then connected to a chain wrapped around her belly during transport.[5] In the hospital's delivery room, armed guards shackled her right wrist and her left ankle to her hospital bed, the manacles digging into her flesh, despite doctors' repeated pleas to remove them.[6] The chains made the epidural difficult to administer to Hall, leaving only part of her body numb.[7] They also prevented her from moving naturally during delivery, leaving her susceptible to a greater risk of complications.[8]

She finally delivered her healthy son, Jesus.[9] But as she held him, "she had to put a pillow between his tiny body and the crook of her arm so he wouldn't get hit by her chains."[10] In March of 2017, Hall filed a lawsuit against Milwaukee County on behalf of herself and a class of plaintiffs, alleging a violation of her constitutional rights.[11]

A. How Did We Get Here?

In recent decades, there has been a staggering growth in the population of women incarcerated in U.S. prisons, jails, and detention facilities. Since 1980, the female population locked up has ballooned by more than 700%.[12] Currently,

3. Rebecca Nelson, *She Knew She'd Deliver Her Son While She Was in Jail. She Didn't Expect to Do It in Chains*, COSMOPOLITAN (Oct. 25, 2017), http://www.cosmopolitan.com/politics/a13034685/pregnancy-prison-childbirth-chains/.

4. *Id*.

5. *Id*.

6. *Id*.

7. Nelson, *supra* note 3.

8. *Id*.

9. *Id*.

10. *Id*.

11. Hall v. County of Milwaukee, No. 2:17-cv-00379 (E.D. Wis. filed Mar. 14, 2017).

12. THE SENTENCING PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS (2015).

almost one-third of female prisoners around the world are incarcerated in the United States.[13]

Among all people incarcerated, Black women represent the fastest-growing demographic group, broken down by race and gender, within the past few decades.[14] In fact, Black women in the United States are incarcerated at a higher rate than the total populations of South Africa, Spain, and England combined.[15] In recent years, however, the racial disparity between white, Black, and Hispanic women in prison has actually become less lopsided with an increase in white women being incarcerated.[16] Though the imprisonment rate for Black women (96 per 100,000) is still roughly double what it is for white women (49 per 100,000), due to the larger population size of white women, they currently outpace the total number of Black women in prison by roughly 2.5 to 1.[17] Additionally, over 60% of women in prison are ages 18-39, the age group for whom pregnancy most often occurs.[18]

It is no coincidence that this dramatic uptick in incarcerated women, especially Black women, began during the 1970s and 1980s, a period when enforcement of zero-tolerance anti-drug policies became more pronounced. The federal government's "War on Drugs" dominated law enforcement and carceral policies beginning in the 1960s, though enforcement was heavily increased from the Nixon administration through the Clinton administration.[19] These policies are primarily responsible for the increase in female prisoners, mainly women of color.[20] The federal Anti-Drug Abuse Acts of 1986 and 1988 substantially increased not only the number of women incarcerated, but also the duration of their sentences.[21] Harsh state anti-drug laws disproportionately impacted women as well.[22] While the War on Drugs had a harmful effect on both men and women, drug policies that commenced during the Reagan administration demonstrate the disparate effect on women. The number of women incarcerated in state facilities for drug-related offenses increased by 888% between 1986 and 1999, far surpassing

13. ROY WALMSLEY, INT'L CENTRE FOR PRISON STUD., WORLD FEMALE IMPRISONMENT LIST 1 (2012).

14. MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 122 (2015); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (explaining how adherence to facially colorblind criminal laws nonetheless adversely affects Black people in practice, especially with regards to drug laws' effect on women of color).

15. GOTTSCHALK, *supra* note 14, at 5.

16. E. ANN CARSON, PRISONERS IN 2016, BUREAU OF JUSTICE STATISTICS 8 (2018).

17. *Id*. at 13.

18. *Id*.

19. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 166 (2016).

20. GOTTSCHALK, *supra* note 14, at 122; *see also* LENORA LAPIDUS ET. AL., ACLU, BRENNAN CTR. FOR JUSTICE & BREAK THE CHAINS, CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES (2005) (arguing that the wide net cast by drug laws which expand criminal liability to reach relatives and bystanders has contributed to women being incarcerated at a skyrocketing rate and with racially disparate effects).

21. GOTTSCHALK, *supra* note 14, at 122.

22. *Id*.

the rate of growth for men incarcerated for drug-related offenses.[23] Even today, over half of incarcerated women are locked up for property or drug offenses, not violent crimes.[24] The War on Drugs manifested itself as a war on people who used drugs, enforced most violently upon poor people and people of color, many of them women.

This context not only provides an understanding for why female incarceration is so prevalent in the United States, but also how prison practices such as shackling during pregnancy disproportionately affect women of color and their children by virtue of their disproportionate levels of incarceration.[25] In a prison system rife where the rates of incarcerated women, particularly young women, continue to grow, there are a substantial number of births taking place within penal facilities today. While statistical evidence is difficult to come by (given the uncertainty of pregnancy status at the onset of incarceration), present figures estimate between 5-10% of incarcerated women enter correctional facilities pregnant.[26] Given current statistics of women in state and federal prisons, this would result in approximately 5,000-10,000 children born in confinement every year.[27] However, this may be a significant underestimate given the staggering amount of women (96,000) confined in local jails, 60% of whom have not been convicted of a crime and are merely awaiting trial.[28]

Traditionally, incarceration has been viewed as a predominantly male problem, despite the fact that separate women's prisons and convict labor camps have existed since Reconstruction. In the late nineteenth century, separate prisons exclusively for women began to be established in the Northeast, focusing on the reformatory model that would stress domestic training for the women incarcerated.[29] This was a major reform in womens' incarceration. However, southern Black women in convict labor camps simultaneously advocated for separation from their male counterparts, not out of a desire for reformatory treatment but as a resistance to Jim Crow modernity and mode of sabotage towards the carceral state.[30] Despite separation, as the civil rights and feminist movements pushed for equality during the second half of the twentieth century, the fight for equality included a push for gender-neutral policies in the criminal legal system as well. The shackling of pregnant prisoners was an unexpected

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23. LAPIDUS ET. AL., *supra* note 20, at 1.

24. CARSON, *supra* note 16, at 14.

25. Along with severe disparity between white and Black women, women of Hispanic origin are incarcerated at 1.2 times the rate of white women. *See* THE SENTENCING PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS (2015).

26. Ronald L. Braithwaite, Henrie M. Treadwell & Kimberly R.J. Arriola, *Health Disparities and Incarcerated Women: A Population Ignored*, 95 AM. J. PUB. HEALTH 1679, 1680 (2005).

27. CARSON, *supra* note 16, at 4

28. ALEKS KAJSTURA, PRISON POLICY INITIATIVE, WOMEN'S MASS INCARCERATION: THE WHOLE PIE 2017 (2017).

29. Nicole Hahn Rafter, *Prisons for Women, 1790-1980*, 5 CRIME & JUSTICE 129, 146-47 (1983).

30. *See* SARAH HALEY, NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY 253 (2016) (noting that the inescapable violence of convict labor evidences gendered racial terror that made separation an act of resistance rather than a "critique of forced proximity to masculinity.").

byproduct of this move.[31] In prisons where men are regularly shackled during transport outside of penal facilities, equal treatment meant shackling women as well, including pregnant women. But even though the adoption of gender-neutral regulations may be justified on equality grounds, some practices "can impose gender-specific indignities on female prisoners."[32] This is particularly true for the gender-specific issue of pregnancy, affecting a vulnerable subset of women in prisons and jails. The steadfast adoption of shackling in practice has become "emblematic of the failure of the prison system to adapt its policies of general application to the unique situations faced by members of the female prison population."[33]

Shackling of pregnant women also displays a rigid adherence to maintaining correctional policies outside of penal facilities, where "prison rules are unthinkingly exported to a hospital setting."[34] The practice, therefore, demonstrates not just the brazen commitment to punitiveness in incarceration but also the unintended consequences of a push for equal treatment under law in the United States, including its prisons and jails.

B. Approaches to Shackling as Punishment for Women in a Historical Context

The evolution of punishment in the United States is defined by changes in form, not function. As for its underlying principles, correctional control has remained largely punitive through the centuries. This has remained constant despite punishment being administered through disparate methods. While there have been momentary shifts in the direction of a more rehabilitative approach towards incarcerated persons, such periods are aberrations from the custom of retributive punishment.[35]

The United States has a long history of reproductive control of women's bodies, particularly Black bodies. Just as the rise of the chain gang was treated as a progressive and enlightened improvement upon the convict leasing system, the shackling of pregnant prisoners, though a brutal deprivation of autonomy, is often rationalized as a more enlightened version of other forms of direct female reproductive intervention (e.g. eugenics, forced sterilization, Norplant abuse in

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31. Colleen Mastony, *Childbirth in Chains*, CHICAGO TRIBUNE (July 18, 2010), http://articles.chicagotribune.com/2010-07-18/news/ct-met-shackled-mothers-20100718_1_shackles-handcuffs-labor; *see also* Claire Louise Griggs, *Birthing Barbarism: The Unconstitutionality of Shackling Pregnant Prisoners*, AM. U. J. GENDER SOC. POL'Y & L. 247, 250 (2011) (observing that the justifications for shackling—decreasing flight risks and maintaining security—fit under a gender-neutral framework).

32. Deborah Ahrens, *Incarcerated Childbirth and Broader "Birth Control": Autonomy, Regulation, and the State*, 80 MO. L. REV. 1, 5 (2015).

33. Dana Sussman, *Bound by Injustice: Challenging the Use of Shackles on Incarcerated Pregnant Women*, 15 CARDOZO J.L. & GENDER 477, 478 (2009).

34. Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, NEW YORK TIMES (Mar. 2, 2006), http://www.nytimes.com/2006/03/02/us/prisons-often-shackle-pregnant-inmates-in-labor.html.

35. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 166 (2016); *see also* NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 3 (2014) ("[T]he rise of mass incarceration [became] the triumph of retribution over rehabilitation.").

prisons, etc.).[36] Shackling takes the form of indirect reproductive intervention, one in which officials allow childbirth to occur but under circumstances which prevent enjoyment of the full, uninhibited right, free from State intrusion. Such an intervention is meant simply to punish pregnancy itself, painting childbirth as an act to be tolerated but not supported. Shackling during pregnancy, after all, "could have no deterrent effect on the original crime, and thereby punishes the prisoner for bearing children, not for breaking the law."[37]

Analyzing shackling through a Black feminist framework, Priscilla Ocen argues that "Black women's subjugation during slavery and punishment regimes in the post-Civil War era shaped stereotypes of Black women, views of female prisoners, and modern prison policy."[38] These included being viewed by the state, distinct from white women, as "abject, malingering, criminal beings immune to pain and incapable of sexual consent or restraint."[39] Those stereotypes are clouds hanging over a sociological profile of Black female prisoners as sexually dangerous and incapable of responsible motherhood. Because Black women filled prisons during the rise of mass incarceration, these stereotypes began to infuse how the female prison population at large was viewed, regardless of race. The treatment of incarcerated women of color by the State began to be outsourced to the female prison population as a whole, erasing barriers in treatment to the detriment of white women in prison. This is an example of "leveling up" in response to racial disparities in punishment—rather than lessening punishment for Black prisoners or other minority groups to even the disparity, penal policymakers "raise the ante for whites by subjecting them to tougher prison [conditions]."[40]

Some scholars have even pointed to pregnancy itself as being criminalized for Black mothers. Dorothy Roberts points to the introduction of laws punishing drug use during the prenatal period and subsequent prosecutions in the 1980s as establishing a trend whereby pregnant mothers' harsher punishments could be explained by pregnancy itself.[41] There is a paternalistic belief that prosecuting pregnant mothers, rather than attempting to mollify rampant poverty, is a racially

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36. *See* GOTTSCHALK, *supra* note 14, at 27 (noting that despite decades of political agitation that led to the end of convict leasing, the chain gangs that replaced them is one of many "bursts of optimism" in the evolution of criminal justice "that ended up yielding a sharp right turn in penal policy."); this is not to allege that these other forms of reproductive control are not still practiced, just to lesser degrees and more subject to reprimand than shackling. *See* Derek Hawkins, *Tenn. Judge Reprimanded for Offering Reduced Jail Time in Exchange for Sterilization*, WASH. POST (Nov. 21, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/11/21/tenn-judge-reprimanded-for-offering-reduced-jail-time-in-exchange-for-sterilization/?utm_term=.a720256052df (reporting on a reprimand for a Tennessee judge's offer to reduce prison sentences by thirty days to women who received birth control implants).

37. Claire Louise Griggs, *Birthing Barbarism: The Unconstitutionality of Shackling Pregnant Prisoners*, Am. U. J. Gender Soc. Pol'y & L. 247, 257 (2011).

38. Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1245 (2012).

39. Haley, *supra* note 30, at 120.

40. GOTTSCHALK at 124.

41. KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 180 (2nd ed. 2017).

neutral way of "protecting" Black infants and ensuring healthy development.[42] As explained earlier, white mothers are no longer immune from such a political calculation given the ways that incarceration has become a scarlet letter for all incarcerated women.

It is important to emphasize how these types of changes in the penal system occur not only to understand how control over vulnerable persons morphs over time but also to note that even if shackling is eradicated, other punitive (though likely more "enlightened" policies) may take its place. Understanding the sociological underpinnings of the practice helps us to reframe the issue as one steeped in a larger liberation struggle for intersectional identities.[43]

C. The Health Costs of Shackling Pregnant Women

Though the historical subjugation of incarcerated mothers provides context, the medical effects appeal to how shackling during pregnancy manifests into cognizable injury. The practice of shackling women who are pregnant, during labor, delivery, or in postpartum recovery, presents a multitude of health dangers, not just for the mother, but for the child as well.

i. Shackling during pregnancy

Medical professionals have described in detail the physical risks of safety to mothers during the third trimester of pregnancy up until labor. During later stages, leg shackles prevent women from being able to shift positions to manage extreme pain associated with pregnancy.[44] Shackles also restrict an individual's mobility, which is often necessary to manage pain and ensures successful cervical dilation.[45] For the unborn child, shackling the mother presents an unnecessary physical risk to his or her safety. Shackling pregnant women by the ankles during transport creates problems with balance that increases the chance of falling and of not being able to break the fall, thus leading to potential injury to the fetus.[46]

ii. Shackling during labor/delivery

Shackles impede a woman's ability to move to alleviate the pain from contractions, which can decrease the flow of oxygen to the fetus.[47] In addition,

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42. *Id*. at 184-85.

43. *See* Kimberlé Williams Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. Rev. 1418, 1426–27 (2012) (countering narratives that are singularly focused in either race or gender analysis of mass incarceration, which fail to explain why women of color are disproportionately affected).

44. ACLU REPRODUCTIVE FREEDOM PROJECT AND ACLU NATIONAL PRISON PROJECT, ACLU BRIEFING PAPER: THE SHACKLING OF PREGNANT WOMEN & GIRLS IN U.S. PRISONS, JAILS & YOUTH DETENTION CENTERS, online at https://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf (last visited Aug. 4, 2017) [hereinafter *ACLU Briefing Paper*].

45. Am. Coll. of Obstetricians and Gynecologists, *Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females* at 3, online at https://www.acog.org/~/media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co511.pdf?dmc=1&ts=20130725T1738421657 (2011).

46. *See ACLU Briefing Paper*, *supra* note 44, at 3.

47. Kendra Weatherhead, *Cruel But Not Unusual Punishment: The Failure to Provide Adequate*

shackles lead to severe bruises and cuts on ankles and wrists because of the strains associated with childbirth.[48] Leg shackles also inhibit the mother from being able to manipulate her legs into the proper position for necessary treatment during delivery procedures.[49]

Both the mother and baby's health are compromised if there are any complications during delivery, such as hemorrhaging or abnormalities in fetal heart rate.[50] Shackling makes the diagnosis and treatment of complications such as hypertensive disease, which is responsible for more than one out of six maternal deaths, extremely difficult.[51] If the medical team deems sudden emergency procedures necessary, shackles interfere with complete access to the mother by doctors.[52] For an emergency caesarian delivery, the mother would need to be moved immediately. A slight delay of even five minutes could permanently damage the baby's brain.[53]

iii. Post-partum shackling

Continued shackling postpartum prevents mothers from effectively healing.[54] Leg shackles also inhibit the postpartum recovery period, as doctors recommend that women walk to rehabilitate muscles after delivery during the postpartum period (also known as puerperium, the time after childbirth before the uterus has returned to its normal size).[55] Effective care of a newborn can also be inhibited by the presence of shackles because women may have difficulty breastfeeding or otherwise attending to a newborn who requires immediate attention.[56]

Medical Treatment to Female Prisoners in the United States, 13 Health Matrix 429, 430 (2003).

48. *See ACLU Briefing Paper*, *supra* note 44, at 3.

49. *See, e.g.*, Dana L. Sichel, *Giving Birth in Shackles: A Constitutional and Human Rights Violation*, 16 AM. U.J. GENDER SOC. POL'Y & L. 223, 225 (2008) (describing the plight of Maria Jones, whose legs were shackled during delivery, restricting her from spreading her legs apart or from getting her feet into the stirrups).

50. Am. Coll. of Obstetricians and Gynecologists, *supra* note 45, at 3.

51. INT'L HUMAN RIGHTS CLINIC OF UNIV. OF CHICAGO LAW SCHOOL, THE SHACKLING OF INCARCERATED PREGNANT WOMEN: A HUMAN RIGHTS VIOLATION COMMITTED REGULARLY IN THE UNITED STATES 5 (Brian Citro et. al. eds., 2013), online at https://ihrclinic.uchicago.edu /sites/ihrclinic.uchicago.edu/files/uploads/Report%20-%20Shackling%20of%20Pregnant%20Prisoners%20in%20the%20US.pdf.

52. *Id*. at 4–5.

53. AMNESTY INT'L USA, WOMEN IN CUSTODY 30, online at http://www.amnestyusa.org/pdf/custodyissues.pdf [hereinafter *Women in Custody*].

54. *Id*.; *see also* Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow'*, N.Y. TIMES (Jul. 21, 2017), https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html?_r=0 (describing the plight of a Brooklyn woman who delivered prematurely and was discharged in a great deal of post-partum pain, only to be shackled in a detention cell to await her public defender, severely limiting her ambulatory abilities).

55. *ACLU Briefing Paper*, *supra* note 44, at 3.

56. *See, e.g.*, Brawley v. Washington, 712 F. Supp. 2d 1208, 1214 (W.D. Wash. 2010) (describing plaintiff's inability to reach her newborn son when he was choking and vomiting in her room, despite pulling against the chains that were keeping her shackled to the bed).

Aside from physical harm posed to the mother and child, medical professionals have identified mental and psychological risks to mothers from the use of shackles during labor, delivery, and post-partum recovery. After experiencing childbirth in shackles, mothers may take on a significant amount of psychological and emotional trauma, including contributions to post-traumatic stress disorder and postpartum depression.[57] That trauma is further exacerbated in the carceral system where "women frequently have serious histories of sexual and physical abuse that have already traumatized them."[58]

Based on the health risks of current shackling practices, the American Medical Association's ("AMA") Advocacy Resource Center has drafted legislation for states to adopt on shackling.[59] However, though the AMA's reform advocacy places great emphasis on the health costs to mothers and their children, their draft legislation includes some of the same issues that plague many current anti-shackling laws, as explored below.

II. CURRENT LAWS AND CORRECTIONAL POLICIES REGARDING SHACKLING OF PREGNANT INMATES

Currently, twenty-one states and the District of Columbia have laws restricting the shackling of pregnant women in prisons and jails in some way.[60] That leaves almost thirty states without any laws regarding shackling of pregnant women on the books. That list includes Wisconsin, where Melissa Hall was chained during delivery of her son.[61] States without anti-shackling legislation address limitations on the practice either by milquetoast departmental policy or not at all.

State anti-shackling laws that do exist are often portrayed as legislation "banning" or "prohibiting" shackling of pregnant prisoners.[62] To understand the laws is to understand that without them, no binding legal mechanism to curb

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57. AM. PSYCHOL. ASS'N, END THE USE OF RESTRAINTS ON INCARCERATED WOMEN AND ADOLESCENTS DURING PREGNANCY, LABOR, CHILDBIRTH, AND RECOVERY 2 (2017), online at https://www.apa.org/advocacy/criminal-justice/shackling-incarcerated-women.pdf.

58. Elizabeth Alexander, *Unshackling Shawanna: The Battle Over Chaining Women Prisoners During Labor and Delivery*, 32 U. ARK. LITTLE ROCK L. REV. 435, 436 (2010).

59. AMA, AN "ACT TO PROHIBIT THE SHACKLING OF PREGNANT PRISONERS" MODEL STATE LEGISLATION (2015), online at https://www.ama-assn.org/sites/default/files/media-browser/specialty%20group/arc/shackling-pregnant-prisoners-issue-brief.pdf (last visited Oct. 16, 2017).

60. ARIZ. REV. STAT. ANN. § 31-601 (2012); CAL. PENAL CODE § 3407 (West 2013); COLO. REV. STAT. § 17-1-113.7 (2011); DEL. CODE ANN. tit. 11, § 6603 (2012); D.C. CODE § 24-276.02 (2015); FLA. STAT. § 944.241 (2012); HAW. REV. STAT. § 353-122 (2011); IDAHO CODE § 20-901 (2011); 55 ILL. COMP. STAT. 5/3-15003.6 (2018); LA. STAT. ANN. § 15:744.3 (2012); ME. STAT. tit. 34-A, § 3102 (2015); MD. CODE ANN., CORR. SERVS. § 9-601 (West 2014); MASS. GEN. LAWS ch. 127, § 118 (2014); MINN. STAT. § 241.88 (2015); N.M. STAT. ANN. § 33-1-4.2 (2009); N.Y. CORRECT. LAW § 611 (McKinney 2016); 61 PA. CONS. STAT. § 5905 (2010); 42 R.I. GEN. LAWS § 42-56.3-3 (2011); TEX. GOV'T CODE ANN. § 501.066 (West 2009); VT. STAT. ANN. tit. 28, § 801a (2005); WASH. REV. CODE § 72.09.651 (2010); W. VA. CODE § 31-20-30a (2010).

61. *See supra* notes 3–11.

62. *See e.g.*, Melissa Jeltsen, *New York Bans 'Barbaric' Practice of Shackling Pregnant Inmates*, HUFFINGTON POST (Dec. 23, 2015), https://www.huffingtonpost.com/entry/shackling-pregnant-inmates-new-york_us_567ab103e4b0b958f658c559 (lauding the most recent update to New York's anti-shackling law as "the most progressive in the nation").

shackling of inmates would exist. Without them, pregnant prisoners would only be able to rely on administrative policy decisions by state correctional departments or non-binding *stare decisis* in state common law where shackling cases have been decided (which is not the situation in many states). The existence of anti-shackling laws, therefore, is important. The laws place limitations on an otherwise unfettered practice, either temporally (e.g. prohibitions during labor and delivery, during transport, during the second or third trimester of pregnancy, etc.) or methodologically (e.g. prohibitions of leg shackles, waist restraints, and/or both wrists being handcuffed, etc.).[63]

However, none of the current laws ban the use of shackles outright.[64] Rather, at their most restrictive, the anti-shackling laws' prohibitions on official utilization of shackles are beholden to a determination of whether "extraordinary circumstances" exist to allow their use. These "extraordinary circumstances" differ throughout state legislation, but there are a few commonalities in how they are defined. The end result is the creation of a massive loophole to effective enforcement of the laws.

A. The Legislative Justifications for Shackling (and its Limitations)

For those who recognize the inherent rights of incarcerated persons, it may be difficult to understand exactly how the practice of shackling could be justified as necessary rather than it being a mere control mechanism. However, correctional associations have broadly determined that shackles are justified for three reasons. First, shackles prevent the prisoner from harming themselves or a member of the medical staff.[65] Second, they help prevent escape, particularly if the prisoner is a flight risk.[66] And third, shackles are useful as a punitive instrument to remind the prisoner of their punishment.[67] These are the justifications given for shackling generally across all incarcerated populations. However, they neglect to consider the special circumstances of pregnant women.

When applied to pregnant women, the justifications reveal their tensile weakness. The risk of harm to another individual from a pregnant prisoner is vastly minimized by her condition, primarily due to lack of mobility. Further, officials rarely differentiate between women considered flight risks and those with no history of escape attempts or between violent and non-violent women when making shackling determinations.[68] Even when prison officials differentiate between women, such a classification can sometimes be based solely upon irrational factors such as immigration status. This points to the intersectional nature of such claims, by which undocumented women can experience greater risk of harm due to their overlapping identities in multiple disadvantaged identities.

63. *See supra* note 60.
64. *See id.*
65. *Id*.
66. *Id*.
67. *Id*.
68. *Women in Custody*, *supra* note 53, at 30.

For instance, Juana Villegas was nine months pregnant at the time of her arrest.[69] The only reason she was detained was for not having a valid driver's license.[70] Despite her pregnancy, she was assigned a medium-security designation because of her Immigration and Customs Enforcement (ICE) detainer, justifying to authorities the use of shackles despite no indications that she would attempt to escape.[71] Because many undocumented women are subjected to increased scrutiny of law enforcement and deportation at any time, some believe that "pregnancy has become a red flag for removal by immigration officials so that such women do not give birth while in [United States] custody."[72]

Regarding flight risk, the presence of a correctional officer, often armed, outside of the hospital room is more than sufficient to address any concerns regarding escape. As one federal judge noted, "[i]n order to flee or pose a threat, [the prisoner] would have had to harm or elude armed officer(s) and the nurse authorizing entry and exit from the maternity ward charged with unlocking the doors."[73] This illustrates the absurdity that a woman experiencing labor or regular contractions can pose a substantial escape risk if not shackled to her hospital bed.

With the first two justifications offered being applied far too broadly (and often without justification) to incarcerated pregnant women, that leaves the last rationale—the punitive value of shackling as punishment. This justification, however, is inadequate. As explained previously, punitiveness has largely defined corrections in recent years, but punitiveness for punitiveness' sake does not override the corresponding health risks to pregnant women of shackling.[74] Merely using a punishment rationale treats women "not as expectant mothers in need of comprehensive medical care, but as criminals . . . [who have] forfeited the right to experience childbirth in a respectful, humane, and decent manner."[75] This is symptomatic of the shift in recent decades away from separation between the criminal act and the person who committed the crime to one in which "the crime is the essence of the criminal."[76] An inability to separate an expectant mother's humanity from her incarcerated status leads to overreliance on the punitive value of shackling as justification.

In a majority of jurisdictions, shackling pregnant inmates is a determination reserved for prisons themselves. Laws governing shackling only constrain the otherwise default approval of the practice. However, without a rational justification for shackling this specific population, default approval of the practice

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69. Villegas v. Metro. Gov't of Nashville, 709 F.3d 563, 566 (6th Cir. 2013).

70. *Id*.

71. *Id*.

72. Dana Sussman, *Bound by Injustice: Challenging the Use of Shackles on Incarcerated Pregnant Women*, 15 CARDOZO J.L. & GENDER 477, 478 (2009) (quotations omitted) (citing Priscilla Huang, *Anchor Babies, Over-Breeders, and the Population Bomb: The Reemergence of Nativism and Population Control in Anti-Immigration Policies*, 2 Harv. L. & Pol'y Rev. 385, 401 (2008)).

73. Villegas, 709 F.3d at 582 (White, J. dissenting).

74. *See supra* Part I(b).

75. Sussman at 482.

76. ANNE-MARIE CUSAC, CRUEL AND UNUSUAL: THE CULTURE OF PUNISHMENT IN AMERICA 14 (2009).

lacks a logical foundation. None of the three standard justifications provide that logical foundation.

B. The "Extraordinary Circumstances" Loophole

While the primary language of state anti-shackling laws is aimed at explicitly limiting shackling during a range of times or by a range of methods, all of the statutes include overriding exceptions. These exceptions would allow correctional officers to shackle pregnant individuals during any stage of the hospital visit, from transport to recovery, including delivery.

There are a few similarities that are apparent across the pieces of legislation. One aspect of almost every law is a mechanism for shackling based on an individualized determination by a correctional officer or some other official.[77] This language introduces unilateral subjectivity to what should be an objective standard. Some laws require that this determination be made only when there are "compelling grounds" based on an "extraordinary medical or security circumstance" such as a substantial flight risk or an immediate threat to themselves or others. However, the only *legal* constraints on such individualized discretion are that the "least restrictive means necessary" be used and that, in some states, written explanations for the use of shackles be filed within a reasonable time, usually ten to fourteen days.[78] These are hardly effective constraints on discretion that can easily be abused. While the laws themselves purport to make treatment better for women during pregnancy, the exception swallows the rule.

The "extraordinary circumstances" loophole is made possible by the broad, discretionary nature of provisions that sanction the shackling of pregnant prisoners. With anti-shackling laws that expressly *allow* shackling under certain circumstances, correctional officers can continue to adhere to, if they deem it appropriate, the almost fetishized commitment to punitiveness as punishment in U.S. prisons. The shackling of pregnant prisoners displays the worst aspects of that punitiveness, where susceptibility to maintaining stringent gender neutrality in

77. *See, e.g.*, ARIZ. REV. STAT. ANN. § 31-601 (2012); COLO. REV. STAT. § 17-1-113.7 (2011); DEL. CODE ANN. tit. 11, § 6603 (2012); D.C. CODE § 24-276.02 (2015); FLA. STAT. § 944.241 (2012); HAW. REV. STAT. § 353-122 (2011); IDAHO CODE § 20-901 (2011); 55 ILL. COMP. STAT. 5/3-15003.6 (2018); ME. STAT. tit. 34-A, § 3102 (2015); MD. CODE ANN., CORR. SERVS. § 9-601 (West 2014); MASS. GEN. LAWS ch. 127, § 118 (2014); MINN. STAT. § 241.88 (2015); N.Y. CORRECT. LAW § 611 (McKinney 2016); 61 PA. CONS. STAT. § 5905 (2010); TEX. GOV'T CODE ANN. § 501.066 (West 2009); WASH. REV. CODE § 72.09.651 (2010).

78. The "least restrictive means necessary" constraint has a clear parallel in the strict scrutiny requirement that a law or policy that curtails a compelling government interest in a fundamental constitutional right must be the least restrictive means for achieving that interest. *See* Thomas v. Review Bd. Of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981). While no caselaw explicitly governs the purview of "least restrictive means necessary" in restraining women during pregnancy, cases brought by prisoners under the Religious Land Use and Institutionalized Persons Act (RLUIPA) make clear that "courts must defer to the expert judgment of the prison officials unless the prisoner proves by 'substantial evidence . . . that the officials have exaggerated their response' to security considerations." *See* Hoevenaar v. Lazaroff, 422 F.3d 366, 370–71 (6th Cir. 2005) (quoting Espinoza v. Wilson, 814 F.2d 1093, 1099 (6th Cir. 1987)) (determining that individualized exemptions to a prison regulation regulating hair length and banning Native Ameircan "kouplocks" was not sufficient to "promot[e] prison safety and security" and that a blanket ban was the "least restrictive means necessary").

prisoner treatment underlies the discretionary loophole that can make anti-shackling laws ineffective.

Legislators tend to leave the "extraordinary circumstances" language in as a failsafe, in cases where a prisoner may pose a physical threat to themselves or others or they pose a particularly strong flight risk. But shackling has affected a great number of women who meet none of these qualifications. Each one of those risks, despite being an "extraordinary circumstance" under normal circumstances, is fully mitigated by the presence of armed guards outside of the hospital room and the simple condition of the prisoner—pregnancy. Individuals in labor are in no position to flee, nor are violent criminals prone to violence when they are about to give birth. Instead, and as has been documented,[79] there is a much higher danger of the language being used to justify shackling under the guise of an "extraordinary circumstance" where none actually exists.

C. Enforcement of Current Anti-Shackling Laws

Impact litigation meant to affirm an individual's constitutional rights tend to offer the most promising means of remedy when correctional officers fail to adhere to the pronunciations of state law or when they utilize glaring loopholes in current anti-shackling laws. Class-action lawsuits have proceeded in recent years in Arizona and Illinois on behalf of inmates who were shackled even after those states enacted anti-shackling legislation.[80] Part III will explore how those constitutional claims shape the jurisprudence around the Eight Amendment and shackling of pregnant women who are incarcerated. But for now, it is important to note that litigation efforts and class-action suits, like Melissa Hall's, are an essential part of forcing compliance and receiving justice ex post for individuals who have had to endure the trauma of giving birth in chains.

Danyell Williams, a former doula for prisoners in Philadelphia, has seen the effect of impact litigation efforts on noncompliance with state laws for pregnant prisoners. She says that such lawsuits are crucial to ensuring proper compliance with anti-shackling laws. "These laws were passed . . . and everybody patted themselves on the back for doing what was right and human and then went on about their business. But there's no policing entity that's really going to hold these institutions responsible."[81] When enforcement is not the default, litigation provides one of the only pathways to remedy.

The stratagem of class action lawsuits against prisons and jails is to make the shackling of pregnant women too cost-prohibitive to continue. If prisons are forced to dole out damages or settlement payouts, the logic goes, they will institute safeguards to avoid the financial burden. After all, even in states where laws restrict shackling of incarcerated women during labor, delivery, or postpartum

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79. *See* Nina Liss-Schultz, *6 Years Ago, New York Banned the Shackling of Pregnant Inmates. So Why Are These Women Still Being Restrained?*, MOTHER JONES (Oct. 13, 2015), http://www.motherjones.com/politics/2015/10/new-york-shackling-pregnant-inmates/# (describing the continued shackling of pregnant women due to lack of education of correctional officers and lack of oversight).

80. Mendiola-Martinez v. Arpaio, 836 F.3d 1239(9th Cir. 2016); Zaborowski v. Dart, 2011 WL 6660999 (N.D. Ill. Dec. 20, 2011).

81. Audrey Quinn, *In Labor, in Chains: The Outrageous Shackling of Pregnant Inmates*, N.Y. TIMES, July 27, 2014, at SR5.

recovery, the practice is quite prevalent. Prior to the current New York legislation passed in 2016, there was an anti-shackling bill passed in 2009.[82] However, a report by the Correctional Association of New York found stark noncompliance from the Department of Corrections, including almost half of the women interviewed being shackled on the way to the hospital and over half shackled during recovery, in contravention of the law.[83] In Illinois, the state with the earliest of the anti-shackling laws, a class-action lawsuit was filed just a few years after, citing widespread noncompliance by correctional officers.[84] That ended in a $4.1 million settlement for over 80 women who had been subjected to the cruelty of shackling during pregnancy or delivery.[85]

Legislation, particularly that which tends to legitimize a progressive shift towards recognizing human rights, is only as good as its enforcement. For rights to be cognizable, there must be general acceptance upon the population for whom adherence is mandatory. As the Rebecca Project for Human Rights noted, "Laws and policies that are intended to meet the needs of incarcerated women and mothers are only meaningful if those who are responsible for effectuating them are properly educated and trained, and if serious repercussions are in place if they fail to follow the laws and policies."[86] Without specialized training, diligent enforcement, or a steadfast commitment to judicial oversight, the purposive vision of current anti-shackling laws goes unrealized.

Enforcement is more difficult in states without anti-shackling laws, and where policies, if they exist, differ from facility to facility within local municipalities.[87] Thus, a uniform implementation of durable policy regarding shackling of pregnant prisoners is next to impossible. Laws, not just facility policies, are the most efficient and durable gateway for ensuring the protection of rights.

For instance, in Milwaukee, where Melissa Hall was shackled to her hospital bed while giving birth, no Wisconsin law nor state policy prohibited the use of shackling on pregnant prisoners in any way.[88] Since Ms. Hall filed her complaint, the Milwaukee County Board has proposed a policy regarding shackling, taking up the same "extraordinary circumstances" language in which use of restraints would be opposed "unless there are extraordinary situations requiring restraints for the legitimate safety and security needs of the person, correctional staff or

82. N.Y. CORRECT. LAW § 611 (McKinney 2015).

83. TAMAR KRAFT-STOLAR, CORR. ASS'N OF N.Y., REPRODUCTIVE INJUSTICE: THE STATE OF REPRODUCTIVE HEALTH CARE FOR WOMEN IN NEW YORK STATE PRISONS 137–38 (2015); *see also* Rahel Gebreyes, *Formerly Incarcerated Woman Remembers Giving Birth While Shackled to a Bed*, HUFFINGTON POST (Mar. 11, 2015), https://www.huffingtonpost.com/2015/03/11/incarcerated-woman-birth-shackled_n_6846112.html (recounting Mario Caraballo's experience of giving birth while chained to her hospital bed in Bedford Hills, NY years after the 2009 law was in effect).

84. Zaborowski, 2011 WL 6660999 at *2–3.

85. Colleen Mastony, *$4.1 Million Settlement For Pregnant Inmates Who Say They Were Shackled*, CHI. TRIB. (May 23, 2012), http://www.chicagotribune.com/news/local/breaking/chi-lawsuit-by-pregnant-jail-inmates-who-say-they-were-shackled-settled-for-41-million-20120522-story.html.

86. REBECCA PROJECT FOR HUM. RTS., MOTHERS BEHIND BARS 10 (2010).

87. Deborah Ahrens, *Incarcerated Childbirth and Broader "Birth Control": Autonomy, Regulation, and the State*, 80 MO. L. REV. 1, 21 (2015).

88. *See supra* note 3; *see also infra* note 89.

public."[89] However, the County Board has no authority to impose policies at the jail, since the jail is administered by the Sheriff's Office.[90] This makes the policy symbolic rather than enforceable.

Creating an environment where pregnant women who are shackled feel emboldened to report and seek redress is one way to ensure that current laws are enforced. Often, incarcerated women risk backlash from correctional officers for making grievances to the Department of Corrections (the necessary first step to litigation under the Prisoner Litigation Reform Act of 1996).[91] Further, "[i]t is important to note that the scarcity of reported cases of such abuse may reflect the mindset of the women who are being shackled while giving birth rather than the incidence of such cases. Women in custody are routinely shackled and often do not make complaints about practices that they see as inherent factors of incarceration."[92] Conditions of confinement, to many, are what comes with the territory of being incarcerated. However, inhumane conditions or practices are challengeable, particularly something as grievous as shackling during pregnancy or childbirth. Litigation is a necessary step towards eradicating the shackling of pregnant women by making engagement in the practice too steep of a financial burden.

III. THE EIGHTH AMENDMENT ALONE IS INSUFFICIENT FOR LIMITING THE PRACTICE

Incarcerated women who are shackled during labor, delivery, or post-partum recovery have an established framework available to them by which to assert a violation of their constitutional rights under the Eighth Amendment and Fourteenth Amendment.[93]

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments."[94] This includes the conditions *within* prisons, not just the particular sentence.[95] Incarcerated women are sentenced to time in the prison or jail and, as such, the commensurate conditions are part of that time served.[96] As the Supreme Court wrote in *Farmer v. Brennan*, "The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones, and it is now settled that the

89. Don Behm, *Milwaukee County Board considers limits on use of restraints on pregnant inmates*, MILWAUKEE J. SENTINEL, (Sept. 14, 2017), https://www.jsonline.com/story/news/local/milwaukee/2017/09/14/milwaukee-county-board-considers-limits-use-restraints-pregnant-inmates/664248001/.

90. *Id*.

91. *See* 42 U.S.C. § 1997e(a) (1996) (explaining the exhaustion requirement that mandates prisoners go through administrative channels in their correctional facilities in an attempt to remedy their claim before filing suit in federal court).

92. *Women in Custody*, *supra* note 53, at 33.

93. The Eighth Amendment protection against cruel and unusual punishment was incorporated against the states, pursuant to the Fourteenth Amendment, in *Robinson v. California*, 370 U.S. 660 (1962).

94. U.S. CONST. amend. VIII.

95. *See* Estelle v. Gamble, 429 U.S. 97, 103 (1976) (holding that the denial of medical care within prisons violates the Eighth Amendment).

96. *See* Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (establishing that conditions that "deprive inmates of the minimal civilized measure of life's necessities" could be considered cruel and unusual punishment).

treatment a prisoner receives in prison and the condition under which he is confined are subject to scrutiny under the Eighth Amendment."[97]

The Eighth Amendment "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . against which we must evaluate penal measures."[98] In juxtaposition to these concepts of humanity are "unnecessary and wanton inflictions of pain," which constitute cruel and unusual punishment in violation of the Eighth Amendment.[99] In making this determination in the context of conditions of confinement, courts must "ascertain whether [an official] acted with deliberate indifference to the inmates' health or safety."[100]

A prison official acts with "deliberate indifference" towards prisoners if one "knows of and disregards a serious medical need or a substantial risk to an inmate's health or safety."[101] Eighth Amendment claims require both an objective and subjective component.[102] For the *objective* component, one must prove that "the detainee faced a substantial risk of serious harm."[103] It also requires that courts "assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency—that is, it is not one that today's society chooses to tolerate."[104] For the *subjective* component, a prison official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[105] This subjective state of mind "may be inferred from the fact that the risk of harm is obvious."[106] In some cases, courts have pointed to the obviousness of the harms caused in relation to their virtually non-existent penological concerns to find in favor of petitioners. In *Brawley*, the court cited mere common sense as controlling in the case—"[c]ommon sense . . . tells us that it is not good practice to shackle women to a hospital bed while they are in labor."[107] In *Women Prisoners v. District of Columbia*, the district court found that "the risk of injury to women prisoners is obvious"[108] and that during labor, "shackling is inhumane."[109] And in *Villegas*, the Court broadened the scope to proclaim that, in general, "shackling women during labor runs afoul of the protections of the Eighth Amendment."[110]

However, meeting the requirements of both prongs of the "deliberate indifference" standard remains a difficult hurdle to clear. To some scholars, Eighth

97. 511 U.S. 825, 832 (1994) (quotations omitted).

98. *Estelle*, 429 U.S. at 102 (quotations omitted).

99. Hope v. Pelzer, 536 U.S. 730, 737 (2002) (quotations omitted).

100. *Id.*; *see also Estelle*, 429 U.S. at 104 (holding that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain.'")

101. Nelson v. Corr. Med. Servs., 583 F.3d 522, 528 (8th Cir. 2009) (quotations omitted).

102. Coleman v. Rahija, 114 F.3d 778, 784 (8th Cir. 1997).

103. Villegas v. Metro. Gov't of Nashville, 709 F.3d 563, 568 (6th Cir. 2013).

104. *Id*. (quotations omitted).

105. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

106. Brawley v. Washington, 712 F. Supp. 2d 1208, 1220 (W.D. Wash. 2010) (citing Hope v. Pelzer, 536 U.S. 730, 737 (2002)).

107. *Id*. at 1219.

108. Women Prisoners v. D.C., 877 F. Supp. 634, 669 (D.D.C. 1994).

109. *Id*. at 668.

110. Villegas v. Metro. Gov't of Nashville, 709 F.3d 563, 574 (6th Cir. 2013).

Amendment doctrine is too focused on an individual actor's intent rather than the collective effects of the institution on those incarcerated.[111] This critique highlights an issue that often arises under the "evolving standards of decency" metric for cruel and unusual punishment, that large scale institutional and societal constraints are overlooked, and, thus, disproportionately difficult to successfully litigate.[112]

The individualized way that the "deliberate indifference" standard is determined in pregnant shackling claims disregards the reliance on power structures in modern day U.S. corrections. Harms suffered by incarcerated persons often stem from the indifference of an institution or entire system, rather than a particular officer.[113] This is a common critique of mass incarceration as a whole. Zooming out to grasp how the prevalent shackling of women in labor indicts systemic indifference to a class of persons does not require an analysis of whether personal animus or disregard was present. When institutions fail to rein in abuse, they embody the system's deliberate indifference towards pregnant women. This institutional critique of how the "deliberate indifference" standard is implemented demonstrates how the individualized discretion of the "extraordinary circumstances" loophole weakens the standard's potential for correcting systemic abuses. A single official, in many cases, has the authority to determine when an extraordinary circumstance exists to justify shackling, based upon little or no corroborating evidence. Therefore, the provision becomes a loophole, providing a pseudo defense to the current standard by ensuring that no single individual is deliberately indifferent.

Where anti-shackling laws do not exist, meeting the demands of the deliberate indifference standard is also difficult, because pointing to constructive knowledge of proper standards is met by the existence of anti-shackling legislation. In such cases, lack of knowledge to the risk of harm to the pregnant individual may be used as a defense. Though the "extraordinary circumstances" loophole is not present where no law exists, defendants may also invoke the principle that anchors the loophole—a discretionary determination that shackles were necessary. This may be combined with a "lack of knowledge" defense to justify the exercise of discretion as "necessary." Such a situation creates potential litigation difficulties in cases such as Melissa Hall's class action lawsuit against Milwaukee County Jail, by providing two defenses that rest on individualized standards—lack of individual knowledge or the invocation of individual discretion.

A better "evolving standards of decency" standard would take a holistic view of the dichotomy between harm to the pregnant mother versus penological concerns. Traditional focus on "cruel *and* unusual" in an age of mass incarceration,

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111. *See* Ocen, *supra* note 38, at 1246 ("the doctrinal framework for 'cruel and unusual punishments' is focused on the harmful intent of individual actors rather than institutions, and views conditions of confinement from the perspective of the perpetrator instead of the prisoner").

112. See Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

113. *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 926 (2009) (arguing that, "by virtue of its design and operation, [institutions] systematically subject[] some subset of the population to needless and avoidable suffering" via their deliberate indifference).

where confinement is the default mechanism for punishment, shifts the normative construction of "cruel" to its punitive extreme. So long as shackling, within the community by which contemporary standards of decency are measured, meets the requirement that it is not unusual, the practice passes constitutional muster.

A broader view of the "evolving standards of decency" could draw upon international standards, as explored in Part IV. Such a construction would present a more prisoner-centered way of assessing the validity of constitutional claims regarding violation of pregnant individuals' rights vis-à-vis shackling. A broader scope for the standard would be instrumental in correcting the gradual shift toward individuals over the collective in Eighth Amendment jurisprudence.

While courts have developed standards within the past few decades for determining the constitutionality of shackling pregnant women, there is room for growth away from stringent individual subjectivity and towards a standard that more clearly updates the evolving standards of what is cruel and unusual in U.S. prisons.

IV. MAPPING A NEW APPROACH

In the absence of truly effective implementation of measures that would curb the shackling of pregnant women in prison, a three-prong strategy is imperative. A strategy that combines (1) impact litigation aimed at obtaining relief, (2) state legislation intended to dismantle discretionary loopholes, and (3) grassroots efforts built on empowering affected communities and educating those in power could provide meaningful steps toward the eradication of shackling pregnant women.

Different approaches to litigation that reject the constraints of traditional Eighth Amendment precedence may derive from the Reconstruction Amendments or by drawing upon international human rights law and adopting an analogous framework. Legislative efforts would require lawmakers to close loopholes that grant unilateral discretion to officers in how they treat pregnant individuals under their control. In addition to new legislation, there are grassroots activist efforts that aim to use the momentum of social movements to eradicate shackling of pregnant prisoners and elevate public awareness of other efforts to curb injustice against incarcerated women. This three-pronged approach does not view any one of these prongs as a panacea, but rather each one as interdependent for achieving the abolition of shackling generally, but particularly of pregnant individuals. While grassroots efforts use extra-institutional methods of affecting change, they must coincide with institutional changes in law. Those changes in law can be spurred by effective impact litigation that takes novel legal approaches to broaden the scope of Eighth Amendment understanding on shackling.

A. The Constraints and Opportunities of Impact Litigation

In many ways, impact litigation may act as the spark necessary to create change in laws. In modern jurisprudence, there are several impediments, as well as opportunities for creativity, to advancing anti-shackling efforts.

i. The Daunting Threshold Requirement of the PLRA

Since 1996, when Congress passed the Prison Litigation Reform Act ("PLRA"), incarcerated individuals have had difficulty meeting the heightened requirements that lawmakers imposed upon them for filing claims.[114] The PLRA imposes filing and evidentiary requirements on prisoners and limits prospective relief in court.[115] The primary constraint of the PLRA on prospective plaintiffs is that prisoners must exhaust *all* administrative remedies before filing a civil claim in federal court.[116] There are only three circumstances in which an administrative remedy is not deemed available.[117] However, these occur only on a case-by-case basis and are dependent on facility administrative protocols.[118] The exceptions do not encapsulate all incarcerated pregnant women as a class.

After Congress passed the PLRA, many states followed suit, enacting similar legislation for their courts.[119] These state laws limit prisoners' ability to seek remedies through litigation, because most prisoners in the United States are incarcerated in state prisons and jails. Since the passage of the PLRA, lawsuits have greatly decreased, including §1983 civil claims and Civil Rights of Institutionalized Persons Act ("CRIPA") claims.[120] In addition, the requirement under the PLRA that incarcerated individuals exhaust all remedies before filing suit in court may further exacerbate the trauma by forcing women to continue reliving events that caused great suffering by recounting the same story during each successive grievance.

A repeal of the PLRA (and its state-level offshoots) is the clearest avenue for allowing shackling claims by pregnant women to be heard in court. Due to the risk of overcrowded courts, that is likely a tenuous proposition. But permitting non-administrative remedies allows courts to apply more pertinent legal solutions for the claims of shackled pregnant women in U.S. prisons and jails.

If a lawsuit does pass the threshold requirements of the PLRA, taking an approach that bears in mind the Thirteenth Amendment, as explained below, can provide an opportunity for litigation to shape remedies for victims, even in the absence of adequate legislation that closes discretionary loopholes.

ii. The Antisubordination Approach

There are a few unexplored methodologies available for combatting shackling of pregnant individuals that may prove effective through impact litigation.

As far as reshaping litigation regarding shackling, some scholars have advanced one innovative approach, dubbed the "antisubordination approach."[121]

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114. Prison Litigation Reform Act, 42 U.S.C. § 1997e (1996); *see also* JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL 546, 4th ed. (2010).

115. 42 U.S.C. § 1997e.

116. *Id*.

117. Ross v. Blake, 136 S.Ct. 1850, 1859 (2016).

118. *Id*.

119. Ivy A. Finkenstadt, *Representing Prisoner Clients: Prison Litigation Reform Act*, 44-DEC Md. B.J. 58, 60 (2011).

120. 42 U.S.C. § 1983 (2012); Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997 (1980).

121. *See, e.g.*, Ocen, *supra* note 38, at 1248.

This proposal approaches the Eighth Amendment and the shackling of pregnant women through a Thirteenth Amendment lens. If the values of the Thirteenth Amendment guide a determination of the "evolving standards of decency" under the Eighth Amendment, courts would consider the ways that the latter encapsulates the eradication of slavery and, to a larger extent, racial hierarchy, which is at the crux of the Thirteenth Amendment.[122]

Such an approach requires viewing shackling of incarcerated pregnant women, a large number of whom are not Black, as a badge or incident of slavery. Chaining people in general, but particularly women during the late stages of pregnancy, is the type of scarlet letter that the Framers of the Reconstruction Amendments would have considered a badge of slavery. Non-Black individuals who are shackled during pregnancy may still be able to make the claim, provided they show an adequate nexus between the history of slavery practices and the nature of the injury suffered.[123] Without showing this nexus, the Thirteenth Amendment becomes diluted by introducing grievances unrelated to slavery. But here, where chains and shackles on Black bodies were an inherent mark of slavery, particularly for Black mothers through slave breeding, shackling during pregnancy is a badge or incident of slavery. This would focus the badge or incident specifically on the practice of shackling, which has the starkest connection to the experiences of enslaved women. Some scholars have even expressed support for recognizing the more general "denial of Black women's reproductive autonomy" as a badge of slavery.[124] Thus, there could be a possible expansion of shackling legislation through use of Section 2 of Thirteenth Amendment.[125] But even if Congress determines that shackling pregnant women is a badge or incident of slavery, such laws would only abrogate the practice if they did not include any discretionary loopholes.

The Thirteenth Amendment is the most likely assistant of all the Reconstruction Amendments, since the Fourteenth Amendment's Equal Protection and Due Process Clauses would not help. An equal protection claim would not prevail absent intentional or purposeful discrimination on an individualized basis, since pregnancy discrimination is not outlawed by the Equal Protection Clause.[126] Further, without solid data regarding the specific racial breakdown of women shackled during pregnancy, claims on the basis of race as harming a "discrete or insular minority", a sufficient substantive due process claim would be difficult to make.[127]

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122. *Id*.

123. *See* William M. Carter, *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1317–18 (2007) (arguing for an interpretation of the Thirteenth Amendment's Enforcement Clause that is evolutionary, with regard for the experiences of those who were victimized by human bondage.).

124. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 304 (2d ed. 2017).

125. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 (1968) (holding that the enforcement section of the Thirteenth Amendment empowered Congress to regulate private property transactions to prevent racial discrimination, describing such restrictive covenants as "badges and incidents of slavery").

126. Geduldig v. Aiello, 417 U.S. 484, 497 (1974).

127. This Note will not delve into whether lack of restraints during pregnancy constitute a

iii. Using International Law Standards to Shape the Eighth Amendment

One novel avenue that could enlighten Eighth Amendment jurisprudence is adopting an international human rights framework. This has been helpful in litigation regarding the gay rights movement, sparked by *Lawrence v. Texas*, which overturned Texas's anti-sodomy law that outlawed consensual homosexual conduct.[128] In the opinion, the Court drew upon how values in foreign countries have shaped the values of the U.S. with regards to homosexuality, including from the European Court of Human Rights.[129] A similar approach may be instructive for the court in handling shackling claims for pregnant individuals in American prisons and jails. The United States has ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), one of the core treaties shaping international human rights law. The CAT outlaws cruel, inhuman, or degrading punishment even in instances that do not rise to the level of torture as defined in Article 16.[130] Another core international human rights treaty is the Convention on the Elimination of Discrimination Against Women (CEDAW), which holds that "State Parties shall ensure women appropriate services in connection with pregnancy, confinement and the post-natal period."[131] Though the United States has signed CEDAW, they are one of only six countries that have not ratified it.[132]

The U.N. Standard Minimum Rule for the Treatment of Prisoners requires that chains or irons never be used as restraints for any prisoner, not just for pregnant prisoners.[133] In addition, Amnesty International has reported on shackling in the U.S. and finds many key indicia of violations under customary international law.[134] A Shadow Report on Shackling of Incarcerated Pregnant Women was submitted for the periodic report on U.S. adherence to the International Covenant on Civil and Political Rights (ICCPR), which implicates the U.S. as having violated international obligations due to state policies on shackling and its widespread (and permissive) utilization.[135]

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fundamental right under the Fourteenth Amendment.

128. 539 U.S. 558 (2003).

129. *Id*. at 576–77; *see also* Alison L. Smock, *Childbirth in Chains: A Report on the Cruel but not so Unusual Practice of Shackling Incarcerated Pregnant Females in the United States*, 3 TENN. J. RACE, GENDER & SOC. JUST. 111, 131–32 (2014).

130. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.S., Dec. 10, 1984, 1465 U.N.T.S. 85.

131. Convention on the Elimination of Discrimination Against Women, art. 12(2), *adopted* Dec. 18, 1979, 1249 U.N.T.S.13.

132. *Id.*

133. United Nations Standard Minimum Rules for the Treatment of Prisoners, U.S., Aug. 30, 1955, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. A/CONF/611.

134. AMNESTY INT'L USA, "NOT PART OF MY SENTENCE"—VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 11 (1999), available at https://www.amnestyusa.org/reports/usa-not-part-of-my-sentence-violations-of-the-human-rights-of-women-in-custody/.

135. INT'L HUMAN RIGHTS CLINIC OF UNIV. OF CHICAGO LAW SCHOOL, THE SHACKLING OF INCARCERATED PREGNANT WOMEN: A HUMAN RIGHTS VIOLATION COMMITTED REGULARLY IN THE UNITED STATES 5 (Brian Citro et. al. eds., 2013), online at https://ihrclinic.uchicago.edu/sites/ihrclinic.uchicago.edu/files/uploads/Report%20-%20Shackling%20of%20Pregnant%20Prisoners%20in%20the%20US.pdf.

Using international standards and the United States' obligations under international human rights law could significantly enlighten how we view the "evolving standards of decency" under the Eighth Amendment. Drawing upon the ways other civilized countries treat pregnant prisoners, and relying on the obligations to which the U.S. has consented, indicates an understanding that the United States does not exist in a bubble. Similar campaigns to adopt international standards are not unheard of in prisoners' rights advocacy. In 2017, Colorado banned prolonged solitary confinement, citing discussions regarding the adoption of the new "Nelson Mandela Rules" in banning the placement of prisoners in segregation beyond fifteen days.[136] Broadening the scope of the community standards that govern cruel and unusual punishment would help to categorize shackling of pregnant prisoners as falling well short of international human rights standards.

B. Closing the "Extraordinary Circumstances" Loophole in State Laws

As noted in Part II, while twenty-one states and the District of Columbia have laws governing shackling of pregnant individuals, none have an outright ban on the practice. All contain a broadly discretionary provision that is woefully inadequate for fully curbing the effects of shackling. One reason for hope, however, is the recent Congressional bill proposal, the Dignity for Incarcerated Women Act of 2017.[137] Introduced in July 2017, the bill includes an express prohibition on shackling, completely free of potential loopholes. The bill states, "A Federal penal or correctional institution may not use instruments of restraint, including handcuffs, chains, irons, straitjackets, or similar items, on a prisoner who is pregnant."[138] This language includes nothing about "extraordinary circumstances" or "individualized determinations" regarding when shackling may be appropriate for pregnant persons. It also encapsulates the most permissive time period for protection by including even the first trimester of pregnancy. However, federal prisons account for less than 12% of the overall population of incarcerated women.[139] Therefore, the scope of the proposed law is far from a complete solution to curbing the practice in the United States.

State level legislation is also required, with a focus on limiting the "extraordinary circumstances" loophole. While a complete state ban, in the spirit of the proposed federal law, would curtail the loophole, it also would disregard *actual* situations of danger. A ban on shackling during pregnancy, labor, and delivery conditioned *only* upon a determination by medical personnel during pregnancy/labor would allow doctors or nurses to place medical needs at the forefront. Restraints should only be used when an unrestrained individual would impede adequate medical care or pose a significant risk of harm to another or themselves, *as determined by* the medical personnel who have the health interests of the individual as their priority. Medical personnel are almost universally

136. Rick Raemisch, *Why We Ended Long-Term Solitary Confinement in Colorado*, N.Y. TIMES (Oct. 12, 2017),https://www.nytimes.com/2017/10/12/opinion/solitary-confinement-colorado-prison.html?mtrref=www.google.com&assetType=opinion.

137. S. 1524, 115th Cong. § (d)(2) (2017).

138. *Id*.

139. E. ANN CARSON, PRISONERS IN 2015, BUREAU OF JUSTICE STATISTICS 5 (2016).

opposed to shackling during pregnancy and they often express concern when shackles are used during labor or delivery.[140] Therefore, only when the determination is theirs to make could one say that the interests in shackling during pregnancy outweigh the risks to the mother and child.

Congress should pass the Dignity for Incarcerated Women Act to establish a standard from which states can take inspiration. States, both with and without laws regarding shackling of pregnant women should focus on passing legislation that protects incarcerated women and removes the overly discretionary "extraordinary circumstances" loopholes that allow for shackling to go on undeterred.

C. Grassroots Organizing Efforts

One such grassroots effort that has come under the spotlight in recent years is The Movement for Black Lives ("MBL"), a conglomeration of organizations advocating for Black liberation in the wake of the Black Lives Matter movement. Although started in direct response to the killings of Black people by police and vigilantes, MBL has used that groundswell of activism as a gateway to address other issues of systemic inequality. This culminated in the conglomerate releasing a platform of their vision in 2016, which included "the end of shackling of pregnant people."[141] Recognizing the ways shackling disproportionately affects Black women in particular (due to their higher rate of imprisonment than any other racial group), the Movement for Black Lives sees the eradication of shackling for all prisoners as a goal for racial justice. MBL has also "created a public testament to the myriad ways beyond the courts that the law changes, the pressures to which it responds and through which it is constituted."[142] In arguing that the law is not neutral and the state has the capacity to use it for violence, "the movement makes clear that the ordinary channels of accountability cannot be relied on."[143]

Some of their work has been geared toward bringing about steady improvement of the criminal legal system. In Washington, D.C., activists have pushed for "a cascading series of local initiatives" aimed at prisons and policing, including bans on shackling of juveniles in court.[144] Such efforts, though not directed towards pregnant women, can lead to shifting energy toward the plight of other identities of Black persons, such as incarcerated mothers. Additionally, efforts to curb colorblind practices generally that have a disparate impact on Black women will specifically help to uplift all women who are harmed by the practice.

SisterSong is a collective led by women of color fighting for reproductive justice by analyzing the power systems and intersecting oppressions blocking access to meaningful exercise of reproductive rights. Focused on direct action and

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140. *See* AMA, *supra* note 59, at 1 (describing the use of shackles on pregnant women as "a barbaric practice that needlessly inflicts excruciating pain and humiliation.).

141. Movement for Black Lives, *A Vision for Black Lives: Policy Demands for Black Power, Freedom & Justice*, online at https://policy.m4bl.org (last visited Nov. 24, 2017).

142. Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. Legal Educ. 352, 355 (2015).

143. *Id*. at 364.

144. Jason Fernandes, *The Movement for Black Lives is Changing Policing in D.C.*, TALK POVERTY (Aug. 2, 2017), https://talkpoverty.org/2017/08/02/movement-Black-lives-changing-policing-d-c/.

educational programming on reproductive justice issues, SisterSong's efforts to eradicate shackling are draped in a broader abolitionist framework. Ash Williams, an organizer based in North Carolina, explained their mission. "We don't want an alternative to shackling. We want an alternative to prison, which makes the shackling possible."[145] SisterSong's organizing pressured North Carolina's Department of Public Safety to revise their administrative policies, prohibiting the use of restraints while a woman is in labor, during delivery, and during a mother's initial bonding period after birth.[146] Though the policy includes a loophole similar to the "extraordinary circumstances" loophole described above, the shift is significant in its display of the impact that grassroots organizing, rooted in a broader racial justice framework, can have on state shackling policies.

CONCLUSION

Shackling women during the late stages of pregnancy and childbirth is widely practiced in the United States, despite many state laws and recent litigation attempting to restrict it. While incarcerated women are one of the most marginalized groups in society, an embrace of gender-neutral policies in corrections has caused gender-specific harms for pregnant women. Since women of color traditionally have filled prisons and immigration detention facilities and have greater rates of carceral representation in comparison to other groups, they have been disproportionately subject to this mode of punitive punishment. However, as crime became more racialized and those who filled prisons became outcasts, all incarcerated women, regardless of race, were dehumanized by practices meant to eradicate autonomy.

Though almost half of states have legislation meant to curtail shackling, those laws in fact provide officials with the unilateral discretion necessary to impose overly punitive punishment unto the most vulnerable communities in prisons. Further, the courts' application of a "deliberate indifference" standard has worked for many plaintiffs but issues regarding its individual standard and threshold concerns from the PLRA have made litigation difficult for many prisoners. For them, a suitable remedy for their trauma has gone unrealized. Using international human rights standards in U.S. litigation regarding shackling presents an opportunity to shift the "evolving standards of decency," providing a more sympathetic pathway for shackled women. In addition, a framework that incorporates the racial context, particularly through the Thirteenth Amendment, could morph the shape of Eighth Amendment jurisprudence around conditions of confinement standards.

The United States must eradicate the blight of chains on human flesh, particularly the flesh of individuals bearing new human life. Combining methods in litigation, legislation, and social movement to combat the widespread practice of shackling pregnant individuals can break ground for criminal justice advocates

145. Sarah Willets, *Under Pressure, NC Prisons Revise Policy on Restraining Pregnant Detainees*, INDY WEEK (Mar. 26, 2018), https://www.indyweek.com/news/archives/2018/03/26/under-pressure-nc-prisons-revise-policy-on-restraining-pregnant-detainees.

146. Anne Blythe, *NC Prisons Change Restraint Policy for Pregnant Inmates After Complaints*, THE NEWS & OBSERVER (Mar. 26, 2018), http://www.newsobserver.com/news/local/crime/article206877024.html.

to reshape the way we think of "cruel and unusual punishment" and make strides towards ending one of the most inhumane practices in U.S. prisons.