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## Shackling Women during Labor: A Closer Look at the Inhumane Practice Still Occurring in Our Prisons

*Amanda Glenn\**

### INTRODUCTION

Giving birth to a child is both a wonderful and confusing time. You are bringing a new life into this world and simultaneously feeling the most incredible pain you have ever felt, all while you're grappling with the thought that you are now responsible for someone else's life other than your own. Now, imagine having to endure labor while you are shackled by the wrists and ankles to a hospital bed or to the door handles of a prison transport on the way to the hospital. Women experience intense pain during childbirth. There is no reason that they should have to suffer the further indignity of being restrained before, during, or after delivering a child. However, pregnant incarcerated women are still being shackled during childbirth all over the country, despite policy and legislation prohibiting it.

Change is needed at both the federal and state levels before the inhumane practice of shackling pregnant women during labor can be eliminated completely. Enacting federal legislation and revising existing state laws is the first step toward eliminating this practice. Monitoring the enforcement through required reports, education, and a combination of incentives for compliance and penalties for those institutions that continue to shackle women during childbirth will help ensure that the laws are strictly adhered to so that pregnant women in prison do not suffer needlessly.

This article discusses the issues and efficiency surrounding current shackling laws in the United States, the changes that still need to be made, and proposed solutions to bring about that change. Part I of this article discusses the background of shackling laws in the United States on both the

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federal and state levels and the medical issues and health risks associated with being shackled or restrained before, during, or after giving birth and how these risks impact both mother and baby.<sup>1</sup> Part II discusses the current laws and policies in place at both the federal and state levels and the progression of anti-shackling laws across the country. Part III discusses the holes present at both the federal and state levels and includes personal stories of women who have suffered the pain and humiliation of being shackled during childbirth, even though the state in which they reside has statutes prohibiting the practice. Part IV discusses potential solutions to help solve this problem; namely that comprehensive legislation is needed at the federal level, and that states must not only better enforce current anti-shackling laws, but also update and revise what is already in place.

### THE HISTORY OF SHACKLING PREGNANT INMATES

Pregnant women are not the first demographic that comes to mind when thinking of a prisoner. However, of the over 1.5 million prisoners estimated to be under the jurisdiction of federal and state correctional authorities as of 2015, 111,495 of them are women.<sup>2</sup> The last time the Bureau of Justice Statistics did a report on the medical conditions of prisoners that included statistics on pregnancy was 2004, and at that time, an estimated seven percent of female inmates were pregnant at the time of admission.<sup>3</sup> According to an additional source, a 2006 article in the *American Journal of Public Health*, approximately six percent to ten percent of the female prison population are pregnant.<sup>4</sup> Unfortunately, there is no current national statistical information on pregnant inmates.

#### SHACKLING PREGNANT INMATES WAS A COMMON PRACTICE IN THE UNITED STATES BEFORE 2008.

In 1997-98, more than 2,200 women in prison or jail were pregnant and more than 1,300 babies were born to those women during that time.<sup>5</sup> Then, "it [was] common for restraints to be used on sick and pregnant incarcerated when they [were] transported to and kept in [the] hospital, regardless of whether they have a history of violence . . . and regardless of

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1. While the dictionary definitions of "shackles" and "restraints" differ slightly, the words will be used interchangeably in this paper, just as they are in the majority of sources cited.

2. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 250229, PRISONERS IN 2015 (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf> (last visited Jan. 21, 2017).

3. Laura M. Marschak, *Medical Problems of Prisoners*, BUREAU OF JUSTICE STATISTICS (Apr. 22, 2008), <https://www.bjs.gov/content/pub/pdf/mpp.pdf>.

4. Jennifer G. Clarke, MD, MPH, et al., *Reproductive Health Care and Family Planning Needs Among Incarcerated Women*, 96 AM. J. OF PUB. HEALTH 834 (May 2006).

5. USA: "Not part of my sentence": Violations of the human rights of women in custody, AMNESTY INTERNATIONAL (Feb. 28, 1999), <http://www.amnestyusa.org/node/57783?page=show>.

whether they have ever absconded or attempted to escape . . . .”<sup>6</sup> When compiling a report to shed light on sexual abuse against women in prisons, Amnesty International representatives visited a hospital in California where local prisons hospitalized women who were either in labor or had just given birth.<sup>7</sup> Every inmate in the room Amnesty International visited was shackled to the bed by leg restraints, despite the fact that the ward was locked and four armed guards were present.<sup>8</sup> Even in states where correctional policies exist, such as in New York’s Department of Corrections, women were routinely restrained.<sup>9</sup> Despite this anti-shackling policy, Amnesty International received numerous reports from women who were restrained during childbirth.<sup>10</sup> One woman reported being handcuffed to the bed while she gave birth alone, screaming, in the delivery room.<sup>11</sup> Amnesty International described another woman’s situation:

While inducing her labor she was put into handcuffs. They took the handcuffs off when the baby was about to be born. After the baby was born she was shackled in the recovery room. She was shackled while she held the baby. Had to walk with shackles when she went to the baby. She asked the officer to hold the baby while she went to pick something up. The officer said it was against the rules. She had to maneuver with the shackles and the baby to pick up the item. In the room she had a civilian roommate and the roommate had visitors and she had to cover the shackles, she said she felt so ashamed . . . She was shackled when she saw her baby in the hospital nursery (a long distance from the room). Passing visitors were staring and making remarks. She was shackled when she took a shower; only one time when she was not.<sup>12</sup>

These incidents were happening with regularity.<sup>13</sup>

In 2001, Amnesty International did a follow-up report and found that pregnant prisoners were still being shackled during both medical care and during transportation to and from the hospital, and this continued to be a routine practice.<sup>14</sup> In the same report, Amnesty International detailed the sexual misconduct occurring in prisons across the United States.<sup>15</sup> Amnesty International called upon all state legislatures to develop anti-shackling

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6. *See supra* note 5.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. USA: “Not part of my sentence”: Violations of the human rights of women in custody, AMNESTY INTERNATIONAL (Feb. 28, 1999), <http://www.amnestyusa.org/node/57783?page=show>.

13. *Id.*

14. AMNESTY INTERNATIONAL, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN 2 (2001).

15. *Id.* at 11.

laws because shackling pregnant women was an unacceptable practice.<sup>16</sup> Amnesty also encouraged prisons and jails to adopt internal policies restricting the use of restraints on pregnant women in their custody while being transported, waiting to give birth at the hospital, and after having just given birth.<sup>17</sup>

THE HEALTH RISKS ASSOCIATED WITH SHACKLING A WOMAN DURING  
CHILDBIRTH ARE EXTENSIVE TO BOTH MOTHER AND CHILD.

Pregnant incarcerated women already face a higher percentage of high-risk pregnancies due to the lack of adequate nutrition and prenatal care in prison.<sup>18</sup> Shackling a woman during labor adds to the risks that come with any pregnancy, and increases the number of risks women already experience during labor and delivery.<sup>19</sup> Medical professionals oppose the practice of shackling a woman during childbirth for many reasons, including that the practice is harmful to both mother and baby.<sup>20</sup>

The American College of Obstetricians and Gynecologists, the professional association of OB/GYNs, opposes the use of restraints on pregnant women, asserting that the practice “interfere[s] with the ability of healthcare providers to safely practice medicine by reducing their ability to assess and evaluate the mother and the fetus and making labor and delivery more difficult.”<sup>21</sup> The presence of restraints also gets in the way of necessary testing; for example, if a woman complains of abdominal pain, the tests needed to determine what is wrong cannot be performed while a woman is restrained.<sup>22</sup> Additionally, common pregnancy complications, such as hypertension (which occur in approximately twelve to twenty-two percent of pregnancies and accounts for a little less than twenty percent of maternal deaths in the United States) can become an incredibly serious concern if not treated properly.<sup>23</sup> Restraints make any routine procedure performed to treat these common complications, and more serious complications, difficult.

Another argument is that it is necessary for a woman to physically

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16. *See supra* note 14.

17. *Id.* at 32.

18. INT'L HUMAN RIGHTS CLINIC AT THE UNIV. OF CHICAGO L. SCH., THE SHACKLING OF INCARCERATED PREGNANT WOMEN: A HUMAN RIGHTS VIOLATION COMMITTED REGULARLY IN THE UNITED STATES, 4 (Aug. 2013), <https://ihrclinic.uchicago.edu/sites/ihrclinic.uchicago.edu/files/uploads/Report%20%20Shackling%20of%20Pregnant%20Prisoners%20in%20the%20US%20%28Final%201.8.14%29.pdf>.

19. International Human Rights Clinic, *supra* note 18.

20. *Id.* at 5.

21. COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE OPINION NO. 511, HEALTH CARE FOR PREGNANT AND POSTPARTUM INCARCERATED WOMEN AND ADOLESCENT FEMALES 3 (Nov. 2011), <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co511.pdf?dmc=1&ts=20130725T1738421657>.

22. *Id.*

23. *Id.*

move around during labor.<sup>24</sup> Shackling a woman during labor inhibits the ability of the woman to move and shift positions while giving birth and this could negatively affect the outcome of the birth.<sup>25</sup> Research has shown “that walking, moving, or changing positions in labor can result in shorter labor, less severe pain, and less need for pain medications.”<sup>26</sup> Being able to change positions is also incredibly important. Women need to be able to change positions from lying flat on her back to lying on her side, and that is difficult when wearing restraints.<sup>27</sup> Even if the woman is able to move around while shackled, restraints greatly increase the risk of falling and inhibit a woman from being able to break her fall to protect herself and her baby.<sup>28</sup> When a pregnant woman’s center of gravity has shifted, restraints can throw her off balance.<sup>29</sup>

In addition to it being necessary for a woman to be able to move during labor, if something goes wrong during labor and delivery, the presence of restraints keeps medical professionals from being able to properly do their job in a case of an emergency.<sup>30</sup> Putting a woman in restraints does not allow the medical staff to move the woman into the positions necessary for giving birth.<sup>31</sup> As Dr. Patricia Garcia<sup>32</sup> stated, “[h]aving the woman in shackles compromises the ability to manipulate her legs into the proper position for necessary treatment. The mother and baby’s health could be compromised if there were complications during delivery, such as hemorrhage or [a] decrease in fetal heart tones.”<sup>33</sup>

After the woman has given birth, shackles and restraints interfere with her ability to bond with her child.<sup>34</sup> An infant should remain with their mother following birth to promote the mother-child bonding that is so important for optimal child development.<sup>35</sup> In addition to limiting a mother’s ability to suitably breastfeed, as she cannot properly hold the child, shackling puts a woman at “a substantial risk of thromboembolic disease and postpartum hemorrhage.”<sup>36</sup> The arguments made here, and any other argument that identifies the medical risks to women being shackled at any point during labor and delivery, help solidify the fact that these risks

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24. International Human Rights Clinic, *supra* note 18, at 5.

25. Association of Women’s Health, Obstetric and Neonatal Nurses, *Position Statement: Shackling Incarcerated Pregnant Women*, 40 J OBSTETRIC GYNECOLOGIC & NEONATAL NURSING 817, 817–18 (2011).

26. *Id.*

27. Committee on Healthcare, *supra* note 21.

28. International Human Rights Clinic, *supra* note 18, at 6.

29. *Id.*

30. *Id.* at 5–6.

31. Amnesty International, *supra* note 5.

32. As of 1999, Dr. Garcia was an obstetrician and gynecologist at Northwestern University Prentice Women’s Hospital. Her statement was provided to Amnesty International by Chicago Legal Aid to Incarcerated Mothers, Dec. 1998.

33. Amnesty International, *supra* note 5.

34. Committee on Healthcare, *supra* note 21.

35. *See id.*; *see also* International Human Rights Clinic, *supra* note 18, at 6.

36. International Human Rights Clinic, *supra* note 18, at 6.

are serious and real. The risks are also completely unnecessary.

### THE STATE OF ANTI-SHACKLING LAWS: 2008 TO THE PRESENT

After the 2001 Amnesty International reports, legislation surrounding the practice of shackling pregnant women during childbirth started to evolve, becoming more comprehensive and more wide-spread. In 2015, the United Nations declared that “instruments of restraint shall never be used on women during labour, during childbirth and immediately after childbirth.”<sup>37</sup> Amnesty International “considers the routine use of restraints on pregnant women, and particularly on women in labor, a cruel, inhuman and degrading practice that seldom has any justification in terms of security concerns.”<sup>38</sup> The American Public Health Association (APHA) states that “women must never be shackled during labor and delivery.”<sup>39</sup> The APHA argues that any patient “has the right to be free from restraints of any form that are not medically necessary” and that restraints “must only be used by health care staff in emergency situations if needed to prevent prisoners from harming themselves or others.”<sup>40</sup> Soon after the Amnesty and APHA reports came out, the United States started making changes to its policies regarding shackling pregnant women.

#### FEDERAL ADVANCES MADE IN 2008 WERE INSTRUMENTAL IN CHANGING POLICIES REGARDING SHACKLING PREGNANT WOMEN DURING LABOR.

In 2008, advocates for women's rights and safety in the United States had a huge year. Several strides were made in the fight against shackling pregnant women, and in somewhat rapid succession. First, in April, President George W. Bush signed the Second Chance Law into effect that required “all federal correctional facilities document and report the use of physical restraints on pregnant female prisoners during pregnancy, labor, delivery, and post-delivery, and justify the use of the restraints with

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37. G.A. Res 70/175, Rule 48 (Dec. 17, 2015) (“1. When the imposition of instruments of restraint is authorized in accordance with paragraph 2 of rule 47, the following principles shall apply:

Instruments of restraint are to be imposed only when no lesser form of control would be effective to address the risks posed by unrestricted movement;

The method of restraint shall be the least intrusive method that is necessary and reasonably available to control the prisoner's movement, based on the level and nature of the risks posed;

Instruments of restraint shall be imposed only for the time period required, and they are to be removed as soon as possible after the risks posed by unrestricted movement are no longer present.

2. Instruments of restraint shall never be used on women during labour, during childbirth and immediately after childbirth.”).

38. Amnesty International, *supra* note 14.

39. AMERICAN PUBLIC HEALTH ASSOCIATION, STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS, 108, (2003).

40. *Id.*

documented security concerns.”<sup>41</sup> Then, in September, the United States Marshals released new policies regarding the use of restraints on pregnant women.<sup>42</sup> According to their policy, putting restraints on pregnant women should be the exception to the rule and, if restraints are deemed necessary, the restraints should be the least restrictive means available that still ensure the safety and security of all involved.<sup>43</sup> In October of the same year, the Federal Bureau of Prisons (Bureau) also made a policy change and finally updated their regulations to reflect this new and changing attitude, eliminating the use of shackles or restraints on pregnant women during labor, delivery, or post-delivery recuperation unless special circumstances required it.<sup>44</sup> Section 570 of the U.S. Department of Justice, Federal Bureau of Prisons Program statement regarding escorted trips states that:

An inmate who is pregnant, in labor, delivering her baby, or in post-delivery recuperation, or who is being transported or housed in an outside medical facility for treating labor symptoms, delivering her baby, or post-delivery recuperation, should not be placed in restraints unless there are reasonable grounds to believe the inmate presents an immediate, serious threat of hurting herself, staff, or others, or that she presents an immediate, credible risk of escape that cannot be reasonably contained through other methods.<sup>45</sup>

#### AFTER 2008, CONTINUED IMPROVEMENT IN INDIVIDUAL STATES HELPED RESTRICT THE USE OF SHACKLES ON PREGNANT INMATES.

At the state level, things continued to improve. Before 2008, Illinois was the first state in the country to pass legislation completely banning the use of shackles or restraints on pregnant women during transportation or labor.<sup>46</sup> After Illinois, California passed legislation to “prohibit the shackling of incarcerated pregnant women during labor, delivery, and recovery after childbirth,” but it was not a complete ban on the use of restraints.<sup>47</sup> Soon, other states began to follow their lead and propose legislation for consideration. State after state started to pass laws dealing with, in one form or another, the issue of restraining pregnant inmates.

After their first round of legislation in 2005, California decided that an

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41. Dana Sussman, *Bound by Injustice: Challenging the Use of Shackles on Incarcerated Pregnant Women*, 15 CARDOZO J.L. & GENDER 477, 492–93 (2009).

42. *Id.* at 492.

43. *Id.*

44. Sussman, *supra* note 41, at 492.

45. FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT, ESCORTED TRIPS, §570.55, [https://www.bop.gov/policy/progstat/5538\\_006.pdf](https://www.bop.gov/policy/progstat/5538_006.pdf).

46. Lilya Dishchyan, *Shackled During Labor: The Cruel and Unusual Truth*, 14 WHITTIER J. CHILD & FAM. ADVOC. 140, 149 (2015).

47. *Shackling Pregnant Inmates Banned Under California Law, But Many States Allow the Practice*, THE HUFFINGTON POST (Oct. 11, 2012), [http://www.huffingtonpost.com/2012/10/11/pregnant-women-shackles-giving-birth-two-thirds-33-states\\_n\\_1958319.html](http://www.huffingtonpost.com/2012/10/11/pregnant-women-shackles-giving-birth-two-thirds-33-states_n_1958319.html).



update was necessary and introduced a new law in 2012 to ban the most dangerous uses of restraints on pregnant inmates at any time during pregnancy, labor, delivery, or recovery.<sup>48</sup> “This law would prohibit a pregnant inmate . . . in labor, in recovery, or after delivery, from being restrained by the use of leg irons, waist chain, or handcuffs behind the body.”<sup>49</sup> The bill would also “prohibit . . . restraint by the wrists, ankles, or both, unless deemed necessary for the safety and security of the inmate, staff, or public.”<sup>50</sup> The bill unanimously passed in the Assembly and was signed into law on September 28, 2012.<sup>51</sup>

In New York, similar legislation was adopted. In 2009, an anti-shackling bill was overwhelmingly passed by the New York Legislature and subsequently signed by then Governor David Paterson.<sup>52</sup> The bill’s language prohibited a pregnant inmate from having “restraints of any kind” used on her when being transported to or from the hospital, when the woman was in labor, or when the inmate was recovering after giving birth.<sup>53</sup> An update to that law was submitted to Governor Andrew Cuomo for his signature in 2015.<sup>54</sup> Not only would this bill “ban the use of restraints on pregnant inmates at any point during their pregnancy and until eight weeks after childbirth,” it would also “require that every pregnant inmate be notified of her right not to be shackled.”<sup>55</sup> Governor Cuomo signed it into law on December 22, 2015.<sup>56</sup>

Other states, such as Nevada, began passing their own legislation in response to the growing concern surrounding the shackling of pregnant inmates. Nevada statute Section 209.376, enacted in 2011, prohibits the use of restraints of any type on any pregnant inmate in labor, during delivery, or during recovery and only allows restraints to be used if there are “compelling reasons to believe” that the use of restraints is necessary.<sup>57</sup>

While the passing of legislation in California, Nevada, and New York was progress in the eyes of those striving for change, when California last updated their anti-shackling laws in 2012, approximately thirty-three states still allowed their correctional officers to shackle or restrain pregnant

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48. *Id.*

49. ASSEMB. B. 2530, 2012 REG. SESS. (Cal. 2013) (adding CAL. PENAL CODE § 3407 (West 2017)).

50. *Id.*

51. ACLU, *Bill to Stop Shackling of Pregnant Women (AB2530) Unanimously Passes Assembly*, ACLUNC.ORG, (May 12, 2012), <https://www.aclunc.org/news/bill-stop-shackling-pregnant-women-ab-2530-unanimously-passes-assembly>; Huffington Post, *supra* note 47.

52. *S 1290 – Anti-shackling Bill – Key Vote*, VOTESMART.ORG, <https://votesmart.org/bill/9514/25929/anti-shackling-bill#.WMG7bxIrJE5> (last visited March 13, 2017).

53. S. 1290-A, 2009 Leg., (N.Y. 2009).

54. Nina Liss-Schultz, *6 Years Ago, New York Banned the Shackling of Pregnant Inmates. So Why Are These Women Still Being Restrained?*, MOTHERJONES.COM, (Oct. 13, 2015), <http://www.motherjones.com/politics/2015/10/new-york-shackling-pregnant-inmates>.

55. *Id.*

56. S. 983A, 2015 Leg., (N.Y. 2015).

57. NEV. REV. STAT. ANN. § 209.376 (West 2017).

inmates at some point during the labor and delivery process.<sup>58</sup> As of October of 2015, that number had slightly decreased, but only twenty-two states and the District of Columbia, had any sort of regulation regarding the use of restraints or shackles on pregnant women.<sup>59</sup> This means that there are still twenty-eight states in our country that allow the shackling of incarcerated pregnant women at some point in their pregnancy, labor, childbirth, or recovery.<sup>60</sup> Even when those states have regulations on the books, their policies are not always enough.<sup>61</sup> Danyell Williams, a former doula who worked almost exclusively for prisoners in Philadelphia and has firsthand experience with these practices, says of the laws, “[t]hese 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.”<sup>62</sup> So what is in place to ensure that these women are not being restrained during their pregnancy or childbirth, even when there are laws on the books?

### THE GAPS IN THE SYSTEM

With legislation and policy now in place at the federal level and in states across the country, the landscape should be one in which no pregnant inmate is shackled during childbirth. However, stories and personal accounts continue to provide harrowing accounts of women being restrained while giving birth, even in states where legislation prohibits the use of such restraints. This shows that there are definite flaws in the system.

#### NO LEGISLATION EXISTS AT THE FEDERAL LEVEL TO PROTECT PREGNANT INCARCERATED WOMEN FROM BEING SHACKLED DURING LABOR.

In 1994, a federal district court in the District of Columbia held that shackling a woman while she is in labor is inhumane and a violation of her constitutional rights.<sup>63</sup> Yet, shackling pregnant incarcerated women during labor was still a common occurrence. When the Bureau updated their restraint procedures in 2008, instead of passing nationwide legislation that would completely prohibit the use of any type of restraint being used on a pregnant inmate at any point in their pregnancy, the Bureau released it via a

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58. HUFFINGTON POST, *supra* note 47.

59. Collier Meyerson, *The Shocking Practice Pregnant Women Endure in American Prisons*, SPLINTER (Oct. 12, 2015), <https://splinternews.com/the-shocking-practice-pregnant-women-endure-in-american-1793851746>.

60. *Id.*

61. *Id.*

62. Audrey Quinn, *In Labor, in Chains: The Outrageous Shackling of Pregnant Inmates*, N.Y. TIMES (July 26, 2014), [https://www.nytimes.com/2014/07/27/opinion/sunday/the-outrageous-shackling-of-pregnant-inmates.html?\\_r=0](https://www.nytimes.com/2014/07/27/opinion/sunday/the-outrageous-shackling-of-pregnant-inmates.html?_r=0).

63. *Women Prisoners of the D.C. Dep’t of Corr. v. D.C.*, 877 F. Supp. 634, 668–69 (D.D.C. 1994).

Program Statement.<sup>64</sup> Instead of having the weight and force of a law, the shackling prohibition is merely a policy. There was hope when the Second Chance Act was signed into law in 2008, but while federal law on this issue now existed, it did not concentrate on any of the problems facing pregnant incarcerated women. The Second Chance Act addressed the use of restraints or shackles, but the Act still allowed restraints to be used.<sup>65</sup> The relevant language of the Act states:

Not later than 1 year after the date of enactment of this Act, the Attorney General shall submit to Congress a report on the practices and policies of agencies within the Department of Justice relating to the use of physical restraints on pregnant female prisoners during pregnancy, labor, delivery of a child, or postdelivery recuperation, including the number of instances occurring after the date of enactment of this Act in which physical restraints are used on such prisoners, the reasons for the use of the physical restraints, the length of time that the physical restraints were used, and the security concerns that justified the use of the physical restraints.<sup>66</sup>

The Act only required that prisons produce a report stating when they restrain pregnant women, how long they did so, and the justification behind the use of restraints in that situation.<sup>67</sup> The problem is that this federal legislation does not eliminate, or even put limits on, the use of restraints at all. It does, however, on its face, hold the agencies it applies to responsible for their use of restraints as it forces federal facilities to keep track of when restraints are used and provide some sort of justification for their use.

The Bureau policy on shackling, on the other hand, is promising, but there are a couple of major issues. First, it is a policy set forth by an agency, and does not carry the force of law. Second, as of February 24, 2018, the total number of female inmates under the Bureau's jurisdiction was only 12,511.<sup>68</sup> That accounts for 6.8% of the prison population that the Bureau is currently responsible for monitoring.<sup>69</sup> Thus, this policy only applies to an incredibly small number of women in the United States prison system. As of December of 2015, there were approximately 1,249,900 women incarcerated in federal and state adult correctional institutions.<sup>70</sup> When looked at in this light, the Bureau's policy regarding the use of

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64. FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT § 570.45, [https://www.bop.gov/policy/progstat/5538\\_006.pdf](https://www.bop.gov/policy/progstat/5538_006.pdf).

65. Second Chance Act of 2007, H.R. 1593, 110th Cong. §232 (2008).

66. *Id.*

67. Dana Sussman, *Bound by Injustice: Challenging the Use of Shackles on Incarcerated Pregnant Women*, 15 CARDOZO J.L. & GENDER 477, 492–3 (2009).

68. FEDERAL BUREAU OF PRISONS, GENDER STATISTICS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_gender.jsp](https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp), (last updated Feb. 24, 2018).

69. *Supra*, note 68.

70. BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES (2015), 14, (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/epus15.pdf>.

shackles or restraints clearly affects only a fraction of the women that it needs to protect. There is, however, an additional problem. State and local facilities are not subject to federal policies or legislation.

In Milwaukee, Sheriff David Clarke has been repeatedly sued over the conditions for pregnant women in his jail.<sup>71</sup> In July of 2016, an inmate was forced to give birth on the floor of her cell and her newborn child did not survive.<sup>72</sup> On March 14, 2017, another lawsuit was filed against Sheriff David Clarke and the County of Milwaukee, on behalf of Melissa Hall, but with the hopes of seeking other class action members.<sup>73</sup> While a 2013 report states that Wisconsin has a policy in place regarding the shackling of pregnant women, this policy is not publicly available.<sup>74</sup> According to the complaint, the jail has a policy and custom of shackling all inmates during medical treatment and makes no mention of any statewide policy, and instead relies upon the federal policy from the Bureau.<sup>75</sup> In the complaint, Hall stated she “was forced to receive pre-natal care, labor, give birth, and undergo post-partum treatment” all while shackled.<sup>76</sup> In the hospital, while in labor, Hall was forced to wear a “belly-chain” with her wrists and ankles attached when she used the restroom; the medical staff had issues giving her an epidural and even when medical providers asked for the chains to be removed, the deputies refused.<sup>77</sup> Hall sued because jail policy was not in line with federal guidelines and “includes no provisions for individualized evaluations of each pregnant inmate . . . and ensures that correctional officers shackle all pregnant women . . . without regard . . . or medical history” and the jail has perpetuated this unconstitutional behavior.<sup>78</sup> There is no reason that this practice should be encouraged and implemented at any level.

However, these issues do not take into account the uncertainty surrounding whether or not federal policy is being actively enforced. Another one of the downsides surrounding the use of policy, instead of legislation, in this regard, is that the policies are usually subject to the administration in charge, as heads of agencies change with the incoming administration. Additionally, statements of policy are not legally binding and are usually “issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary

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71. Carimah Townes, *Lawsuit: Sheriff David Clarke's Jail Forced a Woman to Give Birth While in Shackles*, THINKPROGRESS.ORG (Mar. 20, 2017, 8:33 PM), <https://thinkprogress.org/lawsuit-sheriff-david-clarkes-jail-forced-a-woman-to-give-birthwhile-in-shackles-fc62122ec9cd#.bzo3cwxxz1>.

72. Townes, *supra* note 71.

73. *Id.*; Hall v. Cty. of Milwaukee et al., No. 2:17-cv-00379, 2017 WL 1020019 (E.D. Wis. *filed* Mar 14, 2017).

74. International Human Rights Clinic, *supra* note 18, at 21 n.40.

75. Complaint at 2–3, 5–6, Hall v. Cty. of Milwaukee et al., No. 2:17-cv-00379, 2017 WL 1020019 (E.D. Wis. *filed* Mar 14, 2017), ECF No. 1.

76. *Id.* at 2.

77. *Id.* at 3.

78. *Id.* at 3–4, 7.

power.”<sup>79</sup> When a new agency head is appointed, they may choose to enforce, or not enforce, whatever existing policies are in place; this often changes with the political party in power. The policy is merely a guide to the agency’s use of discretionary power.<sup>80</sup>

The Hall case shows how the present situation is incredibly challenging for pregnant women who are currently incarcerated, as well as those who will either become pregnant while imprisoned or will be sent to prison in the next four years. The current administration has made it incredibly clear that women’s rights are not a priority to the president and have shown through both words and actions that this is indeed true. President Trump has demonstrated through his cabinet nominations that his primary concern is big business and corporations as most of his nominees are CEOs of multimillion dollar companies.<sup>81</sup> In his first fifty days in office, President Trump has indicated that his focus is not only not on women’s rights, but has signed executive orders regarding immigration and travel bans and started regulatory rollbacks that “have led to the repeal or delay of more than 90 federal regulations from the Obama era.”<sup>82</sup> The direct result of these immigration orders are the arrests of those who would not have been a priority under the previous administration, including a mother of four from Chicago, and a mother from Arizona, whose two children are United States citizens.<sup>83</sup> From this, we can surmise that the welfare of pregnant women currently sitting in jail who may be subject to outdated shackling procedures are not a presidential priority.

#### LEGISLATION AT THE STATE LEVEL DOES NOT ALWAYS PROTECT INCARCERATED PREGNANT WOMEN FROM BEING SHACKLED DURING LABOR AND DELIVERY.

There are twenty-two states that currently have statutes that prohibit, in some form, the use of restraints or shackles on incarcerated pregnant women at some point during transportation to or from the hospital, labor, delivery, or post-birth recovery.<sup>84</sup> However, there are definite loopholes in

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79. CONGRESSIONAL RESEARCH SERVICE, GENERAL POLICY STATEMENT: LEGAL OVERVIEW 3, 7 (Apr. 2016), <https://fas.org/sgp/crs/misc/R44468.pdf>.

80. Home Builders Ass’n of Chester & Del. Counties v. Commonwealth, 828 A.2d 446 (Pa. Commw. Ct. 2003).

81. *See generally Trump’s cabinet nominees*, CNN (March 2017), <http://www.cnn.com/interactive/2016/11/politics/new-cabinet/>.

82. Jordan Fabian, *What Trump has Accomplished in his first 50 days*, THE HILL.COM (Mar. 10, 2017, 6:00 AM) <http://thehill.com/homenews/administration/323300-trump-leans-on-executive-power-in-his-first-50-days>.

83. *Id.*

84. *See* ARIZ. REV. STAT. ANN. § 31-601 (2016); CAL. PENAL CODE §§ 3407, 3423 (West 2016); COLO. REV. STAT. ANN. § 17-1-113.7 (West 2016); DEL. CODE ANN. tit. 11, § 6601-6605 (West 2017); FLA. STAT. § 944.241 (2016); HAW. REV. STAT. ANN. § 353-122 (West 2016); IDAHO CODE ANN. § 20-902 (West 2017); 55 ILL. COMP. STAT. ANN. 5/3-15006.6 (West 2016), 730 ILL. COMP. STAT. ANN. 5/3-6-7, 125/17.5 (West 2016); LA. STAT. ANN. §

these laws since at least nine states either “have no specific language about shackling women during their first, second, and third trimesters,” and there is no specific language about restraints being used when the inmates are transported to the hospital or while they are in postpartum care.<sup>85</sup> Stories about women being shackled and restrained during labor are still common, even though laws designed to protect against this injustice have been enacted.

Arkansas’ Policy Was Not Enough to Protect Shawanna Nelson.

Arkansas is one of twenty-one states that does not have legislation regarding the shackling of a pregnant inmate; instead, women’s rights advocates rely on a combination of federal and state policies.<sup>86</sup> An Arkansas Department of Corrections administrative regulation effective on March 10, 1994 states that restraints or shackles should only be used “when circumstances require the protection of inmates, staff, or other individuals from potential harm or to deter the possibility of escape.”<sup>87</sup> There is, however, no mention of when to use, or more aptly when not to use, restraints on pregnant prisoners.<sup>88</sup>

One of the more appalling cases illustrating the problems with the Arkansas Department of Corrections’ policy regarding shackling is the story of Shawanna Nelson. Nelson was six months pregnant when she was booked into the McPherson Unit of Arkansas’ Department of Corrections.<sup>89</sup> On September 20, 2003, she went into labor and went to the prison infirmary for help.<sup>90</sup> Within twenty minutes of arriving at the infirmary, her contractions were only five to six minutes apart.<sup>91</sup> Prison officers tried to get Nelson to the transport van to go to the hospital; this proved to be very difficult. One of the prison nurses testified that “Nelson had to stop twice on the way to the sally port because she was in so much pain ‘she couldn’t walk’ and had to lean against the wall for support.”<sup>92</sup> Officer

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15:744.2 (2016); ME. REV. STAT. ANN. Tit. 30, §1582, tit. 34, § 3102 (2017); MD. CODE ANN., CORR. SERVS. §§ 9-601, 11.206 (West 2017); MASS. GEN. LAWS ANN. ch. 127, § 118 (West 2017); MINN. STAT. ANN. § 241.88 (West 2016); NEV. REV. STAT. ANN. § 209.376 (West 2016); N.M. STAT. ANN. § 33-1-4.2 (West 2017); N.Y. CORRECT. LAW § 611 (McKinney 2017); 61 PA. STAT. AND CONS. STAT. ANN. § 5905 (West 2016); R.I. GEN. LAWS ANN. § 42-56.3-3 (West 2016); TEX. GOV’T CODE ANN. § 501.066 (West 2015), TEX. HUM. RES. CODE ANN. § 244.075 (West 2015), TEX. LOC. GOV’T CODE ANN. § 361.082 (West 2015); VT. STAT. ANN. tit. 28 § 801a (West 2016); WASH. REV. CODE ANN. §§ 13.40.650, 70.48.500, 72.09.651 (West 2016); W.VA. CODE ANN. §§ 25-1-16, 31-20-30a (West 2016).

85. Meyerson, *supra* note 59.

86. International Human Rights Clinic, *supra* note 18, at 16.

87. Ark. Dep’t of Corr. Admin Reg. 403 § V (1994), <http://adc.arkansas.gov/images/uploads/AR403.pdf>.

88. *Id.*

89. Nelson v. Corr. Med. Servs., 583 F.3d 522, 525 (8th Cir. 2009).

90. *Id.*

91. *Id.*

92. *Id.*

Turensky, the transportation officer assigned to accompany Nelson to the hospital, testified that her superior officer had instructed her not to use handcuffs on Nelson during transport, but Turensky ignored this order.<sup>93</sup> Upon arriving at the hospital, Turensky shackled Nelson's legs to a wheelchair.<sup>94</sup> Then, after being freed long enough to change into a hospital gown, Nelson was "shackled by both of her ankles to opposite sides of her hospital bed."<sup>95</sup> Shawanna Nelson was in the final stages of labor, dilated to seven centimeters, and yet had both ankles shackled to the bed.<sup>96</sup>

The shackles prevented Nelson from changing positions or stretching out her legs.<sup>97</sup> Every time a nurse needed to check how far Nelson was dilated, they had to ask Officer Turensky to remove the shackles, and then they were immediately put back on even though no one on staff requested that Turensky replace them.<sup>98</sup> At nine centimeters, Nelson was still shackled when nurses started helping her "push her baby along the birth canal" and was possibly only unshackled at the request of the obstetrician on the way to the delivery room.<sup>99</sup> Because of the restraints, Nelson was unable to move around during labor, including "the most painful and stressful" part of the labor process.<sup>100</sup> "Extreme mental anguish and pain" were only a small part of the discomfort Nelson underwent because of the use of restraints.<sup>101</sup> She also sustained torn muscles in her abdomen and an umbilical hernia that required surgery to fix.<sup>102</sup> She suffered permanent injury and deformation of her hips due to the fact that the restraints kept her hips from "going 'back into the place where they need[ed] to be'" after labor.<sup>103</sup> The transportation officer had received training on hospital escorts, both in her initial prison orientation and the forty hours of continuing education required each year.<sup>104</sup> Several of the regulations she trained on (such as Admin. Reg. 403) specifically discussed when the shackling of prisoners was appropriate or inappropriate.<sup>105</sup> As previously stated, the regulation required that shackles or restraints were only to be used when the safety of the inmate, staff, or other individuals were at risk, or to deter the possibility of the inmate escaping.<sup>106</sup> So then, why was Shawanna Nelson shackled almost every minute of her transportation, labor, delivery, and recovery?

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93. *Id.*

94. *Id.*

95. *Id.* at 526.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. Nelson, *supra* note 89, at 526.

104. *Id.* at 526–527.

105. *Id.* at 527.

106. *Id.*

According to one of the two separate circumstances in which inmates should be shackled as described in the regulation, Nelson should only have been shackled if there was a threat of self harm or a threat to Officer Turensky or the medical staff. However, at trial, Turensky testified that she had never felt threatened by Nelson at any point.<sup>107</sup> The medical staff in the hospital attending to Nelson specifically requested that she not be shackled and repeatedly asked for Officer Turensky to remove the restraints.<sup>108</sup> By continuing to express their desire to have the shackles restraining Nelson removed, the medical staff did not feel threatened by Nelson while she was in the hospital, or they would have had little objection to Nelson being restrained in some way. The second circumstance necessitating the use of restraints or shackles is to deter the possibility of the inmate escaping. As previously stated, Nelson had to be helped down the hallway to the transportation van and had to stop, on more than one occasion, due to the fact that she was in so much pain that she could not move.<sup>109</sup> Furthermore, the Eighth Circuit held that “[a] reasonable factfinder could determine from the record evidence that Nelson did not present a flight risk while under the supervision of Turensky, an experienced correctional officer who was equipped with a fire arm.”<sup>110</sup>

In Shawanna Nelson’s case, the Eighth Circuit found that the Arkansas Department of Corrections had policies in place to direct the actions of officers in situations such as Nelson’s.<sup>111</sup> They also held that “Nelson’s protections from being shackled during labor had . . . been clearly established by decisions of the Supreme Court and the lower federal courts” before Nelson had even gone into labor.<sup>112</sup> The Eighth Circuit said that “[e]xisting constitutional protections . . . would have made it sufficiently clear to a reasonable officer in September 2003 that an inmate in the final stages of labor cannot be shackled absent clear evidence that she is a security or flight risk.”<sup>113</sup> Shawanna Nelson was neither.

#### The Presence of Legislation in Illinois Does Not Stop Women from Being Shackled During Labor.

While Arkansas only had a policy in place, making it more difficult to enforce, Illinois passed legislation regarding the shackling of pregnant inmates in 1999.<sup>114</sup> The legislation was the first of its kind as it explicitly

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107. *Id.* at 525.

108. *Id.* at 530.

109. *Id.* at 525.

110. *Id.* at 531.

111. *Id.* at 535.

112. *Id.* at 533.

113. Nelson, *supra* note 89, at 534.

114. Amy Fettig, *\$4.1 Million Settlement Puts Jails on Notice: Shackling Pregnant Women is Unlawful*, ACLU BLOG (MAY 24, 2012, 5:52 PM), <https://www.aclu.org/blog/41-million-settlement-puts-jails-notice-shackling-pregnant-women-unlawful?redirect=blog/content/41-million-settlement-puts-jails-notice-shackling-pregnant-women-unlawful>.



banned prisoners or detainees from being shackled or restrained during childbirth.<sup>115</sup> The statute states that “when a female prisoner is brought to a hospital from a county jail for the purpose of delivering her baby, no handcuffs, shackles, or restraints of any kind may be used during her transport to a medical facility for the purpose of delivering her baby.”<sup>116</sup> The same restrictions apply while the female prisoner is in labor.<sup>117</sup> Unfortunately, that did not keep it from happening frequently.

When Cora Fletcher was sentenced to jail time, she was seventeen years old, convicted of retail theft, and already eight months pregnant.<sup>118</sup> When a prenatal checkup showed that her baby had no heartbeat, she was taken to a county hospital and shackled by her hands and feet to sides of her hospital bed, before she even went into labor.<sup>119</sup> Three days later, when labor actually started, Fletcher was only partially released from her restraints: one arm and one leg were left shackled to the bed.<sup>120</sup> Unfortunately, she delivered a stillborn baby.<sup>121</sup> In addition to the emotional trauma of realizing her child may not have a heartbeat and the subsequent stillbirth, Fletcher had to experience the “harmful and degrading effects of being shackl[ed].”<sup>122</sup>

Another woman incarcerated in Illinois in 2010, LaDonna Hopkins, was caught stealing clothes in Rock Island, Illinois and sentenced to jail time.<sup>123</sup> Hopkins recounted her experience of giving birth after she went to prison:

Being shackled in transport to give birth was a demoralizing, uncomfortable and frightening experience. I was at Dwight [Correctional Facility] when I went into labor. I was placed in handcuffs, had a heavy chain across my belly that my hands were attached to, along with leg irons on my ankles. I was scared to walk because of the restrictive leg irons ... When I got to the hospital, I felt the cold, hard stares of people as I was escorted into the lobby of the hospital. People were whispering and pointing at me and the receptionist was very rude. Birthing my child should have brought joy to me, but instead I remember the alienation and the looks of disgust I got. No one saw me as a woman—I was hidden away in the last room like someone's dirty little secret. I have never committed a violent crime—I [was] minimum security,

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115. *Id.*

116. 730 ILL. COMP. STAT. ANN. 125/17.5 (West 2016).

117. *Id.*

118. Dishchyan, *supra* note 46, at 150.

119. *Id.*

120. *Id.* at 150.

121. *Id.*

122. *Id.*

123. Sharona Coutts, ‘No Hope for Me’: Women Stripped of Parental Rights After Minor Crimes, THE DONALDSON ADOPTION INSTITUTE (Apr. 2, 2015), <http://www.adoptioninstitute.org/news/no-hope-for-me-women-stripped-of-parental-rights-after-minor-crimes/>.

but I was treated like I was a murderer.<sup>124</sup>

With a statute that was supposed to protect pregnant inmates from being restrained, this should not have happened. Laws existed that expressly prohibited the use of any type of restraint on a pregnant inmate while in labor.

However, the use of shackles on pregnant incarcerated women in Illinois did not stop there. In 2011, a group of approximately eighty women filed a class action lawsuit against the Cook County Jail, claiming that they were shackled while they were pregnant and during labor, in spite of the Illinois statute prohibiting the practice.<sup>125</sup> Even with the statute regulating the use of restraints during labor, in 2006 and 2008, the Sheriff of Cook County issued two general orders reiterating the fact that “NO handcuffs, leg irons or waist chains shall be used on a female inmate (detainee) who is in labor” and also included when the inmate was “being transported to a medical facility.”<sup>126</sup> However, despite this, evidence showed that inmates were still being shackled on the way to the hospital, after they arrived, and remained shackled while the women were in labor.<sup>127</sup> The Superintendent of External Operations testified that “until October 2008, correctional officers shackled all detainees” until they were in active labor.<sup>128</sup> Ultimately, the lawsuit got settled out of court and preliminary approval to a settlement of \$4.1 million to the group of detainees at the heart of the lawsuit.<sup>129</sup> This lawsuit not only gave each inmate involved an average settlement of \$35,000, it also, according to the lead attorney for the female inmates, Thomas Morrissey, forced both the county and sheriff to move toward “a more humane method of handling women who are pregnant and in labor.”<sup>130</sup>

The stories of Fletcher, Hopkins, and the women of Cook County Jail show that despite existing policy and legislation, incarcerated pregnant women continue to be subjected to the indignity of being shackled while giving birth. These stories are just a few small chapters in a much larger book. Incarcerated women all over the United States are still being subjected to the inappropriate use of restraints.

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124. International Human Rights Clinic, *supra* note 18, at 5.

125. Colleen Mastony, *\$4.1 million settlement for pregnant inmates who say they were shackled*, CHICAGO TRIBUNE, (May 23, 2012), [http://articles.chicagotribune.com/2012-05-23/news/chi-lawsuit-by-pregnant-jail-inmates-who-say-they-were-shackled-settled-for-41million-20120522\\_1\\_pregnant-women-pregnant-inmates-shackles-and-belly-chains](http://articles.chicagotribune.com/2012-05-23/news/chi-lawsuit-by-pregnant-jail-inmates-who-say-they-were-shackled-settled-for-41million-20120522_1_pregnant-women-pregnant-inmates-shackles-and-belly-chains).

126. Jackson v. Dart, No. 08-C-6946, 2011 U.S. Dist. LEXIS 146000, at \*9 (N.D. Ill. Dec. 20, 2011).

127. *Id.* at \*8.

128. *Id.* at \*12.

129. Mastony, *supra* note 125.

130. Mastony, *supra* note 125.

Women in Other States Are Still Being Shackled Despite Legislation Prohibiting the Practice.

Pregnant inmates being restrained during childbirth is not a new problem. Several years ago in Nevada, where legislation exists prohibiting the use of restraints of any kind during labor, Valerie Nabors was serving a twelve to thirty month sentence for attempting to steal approximately \$300 worth of casino chips from a casino.<sup>131</sup> She went into labor while incarcerated in 2011, and despite statutes prohibiting it, “a Nevada Department Corrections officer shackled Ms. Nabors before she entered the ambulance to be transported to the hospital, and refused to remove the shackles when she arrived at the hospital.”<sup>132</sup> The shackles were temporarily removed, but only after the medical staff told the officer that it would make history if Nabors attempted to escape while she was receiving an epidural.<sup>133</sup> Nabors underwent an emergency cesarean section, and within ten minutes of the surgery, the restraints were replaced and Nabors’ ankles were chained to the bed.<sup>134</sup> Nabors “suffered a separation of her pubic bones and several pulled muscles in her groin.”<sup>135</sup> Her physician determined that her injuries were a direct result of being shackled.<sup>136</sup> Nabors sued and received a settlement of \$130,000 from the state of Nevada in 2014.<sup>137</sup>

Stories like Valerie Nabors’ are difficult to comprehend when anti-shackling laws exist for the sole purpose of making sure that situations like this do not happen. Alicia Walters, a reproductive justice advocate with the ACLU of Northern California, stated that “[p]regnant women are the most vulnerable and the least threatening in the prison system, and should rarely, if ever, be restrained.”<sup>138</sup> Nevertheless, the stories of Maria Carbello, Tina Tinen, and Jacqueline McDougall show us that Nabors’ story was not an aberration. Maria Carbello went into labor in 2010 at Bedford Hills, a maximum-security prison for women in New York.<sup>139</sup> She was knowledgeable about the recent passage of anti-shackling laws in the state and when the guards went to place her in restraints, Carballo informed them that it was against the law for them to do so.<sup>140</sup> The officers told her she did not have a choice and threatened her with discipline affecting her

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131. Dishchyan, *supra* note 46, at 150.

132. *Id.* at 151.

133. *Id.*

134. *Despite Reforms, Shackling of Pregnant Prisoners Persists*, PRISON LEGAL NEWS (Dec. 3, 2014), <https://www.prisonlegalnews.org/news/2014/dec/3/despite-reforms-shackling-pregnant-prisoners-persists/>.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Despite Reforms, Shackling of Pregnant Prisoners Persists*, *supra* note 134.

139. Victoria Law, *Giving birth while shackled may be illegal, but mothers still have to endure it*, THE GUARDIAN.COM, (Feb 15, 2015, 3:25 PM), <https://www.theguardian.com/us-news/2015/feb/13/mothers-prison-illegal-shackled-while-giving-birth>.

140. *Id.*

place in the prison nursery program if she did not comply.<sup>141</sup> Caraballo's hand remained cuffed to the bed the entire time, despite multiple requests from the medical staff to remove the restraint.<sup>142</sup> The restraints were only removed upon returning to the prison ward.<sup>143</sup>

Tina Tinen's and Jacqueline McDougall's stories are incredibly similar. Like Caraballo, both were prisoners at Bedford Hill in New York.<sup>144</sup> Tinen had been wearing ankle irons and handcuffs when she slipped and fell on ice just weeks before going into labor.<sup>145</sup> When she went into labor, she was handcuffed by the wrist to the bar of the gurney and not released until fifteen minutes before she gave birth.<sup>146</sup> On the way back to Bedford, she was so closely restrained that she had to nudge her son's pacifier back into his mouth with her nose because she could not move her hands.<sup>147</sup> McDougall went into labor in 2012 and was handcuffed on her return trip from the hospital after giving birth.<sup>148</sup> She had "undergone an emergency cesarean section and had needed a blood transfusion" and her handcuffs "were linked to a chain around her waist and clamped together over her sutured incision."<sup>149</sup> These women, including Caraballo, were all detained at the same facility in a state that has one of the more comprehensive laws to protect against the shackling of pregnant women.

The common thread weaving through every account is the issue of enforcement. Officials and prison officers may know about the policy or regulation, such as Officer Turensky in Shawanna Nelson's case, but the practice of restraining pregnant inmates continues. Some pregnant inmates know their rights and the law, but most do not. It should not be up to the individual that is in the process of giving birth to ensure that their basic human rights are not being violated. Every correctional officer needs to be aware of the regulations or legislation that apply to the jurisdiction they work in, and should be cognizant of the consequences if they do not follow procedure correctly. Some of the stories concerning women being shackled during childbirth have helped implement change in their state. Others have only served as a reminder that bigger, and more effective, solutions are needed to stop this from happening to other incarcerated women in the United States.

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141. *Id.*

142. *Id.*

143. *Id.*

144. Quinn, *supra* note 62.

145. *Id.*

146. *Id.*

147. Law, *supra* note 139.

148. Quinn, *supra* note 62.

149. *Id.*

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SOLUTIONS ARE NEEDED AT THE FEDERAL AND STATE  
LEVELS IN ORDER TO STOP THE SHACKLING OF  
PREGNANT INMATES DURING CHILDBIRTH

With the holes in the current anti-shackling policies and federal legislation exposed, solutions are needed now, more than ever, to protect pregnant women in prison from having to suffer being chained while giving birth. Several steps can be taken, on both federal and state levels, to help bolster where legislation and regulations have fallen short.

FEDERAL LEGISLATION IS NEEDED TO STOP THE SHACKLING OF PREGNANT  
WOMEN.

Putting policy in place is a start, but it is not enough to protect every incarcerated pregnant woman in the country. The Bureau's current policy only applies to detention centers and prisons run by the federal government.<sup>150</sup> The downside is that state and local facilities are not affected by this federal policy.<sup>151</sup> This means that many pregnant inmates are in facilities that have no policy regarding the shackling of pregnant inmates within their walls. In order to rectify this, federal legislation beyond the Second Chance Act of 2008 needs to be implemented. This legislation should, as the International Human Rights Clinic (IHRC) at University of Chicago Law school suggests, be enacted by Congress.<sup>152</sup> It needs to be worded in such a way that there can be no ambiguity about the meaning of the word "labor" and no confusion as to how and to whom the legislation applies. Ideally, it would apply to every pregnant individual in any type of correctional facility operating at the federal level.

Additionally, the reporting requirements from the Second Chance Act should be expanded to include all facilities who house pregnant inmates. As previously discussed, the Act requires agencies under the Department of Justice to produce an annual report detailing the who what where when and why of shackled pregnant women in the system. This reporting requirement needs to be upgraded to be more frequent, more detailed, and there needs to be serious consequences for the facilities that do not comply and shackle pregnant women during childbirth. The reports would come from more facilities and consist of exact specifications and justifications for why other methods were unacceptable and why using shackles on a pregnant inmate was absolutely necessary. In addition to the correctional officer's justification for why restraints were needed, statements from the medical staff that treated the inmate should be included to ensure that the justification was reasonable and unbiased. This would hold the individual

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150. International Human Rights Clinic, *supra* note 18, at 10.

151. Amy Fettig, et al., *Bureau of Prisons Revises Policy RE: Shackling of Pregnant Inmates in Federal Prisons*, DAILYKOS.COM, (Oct. 20, 2008), <http://www.dailykos.com/story/2008/10/20/636336/-Bureau-of-Prisons-Revises-Policy-RE-Shackling-of-Pregnant-Inmates-in-Federal-Prisons>.

152. *Id.*

officers, and the facilities for which they work, accountable for their actions. Shackling or restraining a pregnant woman during labor should be the absolute last option for a correctional officer and the procedures in place should make that clear. Ideally, federal legislation that calls for the complete prohibition of shackling of any kind on an inmate during any stage of her pregnancy or recovery should be implemented.

While a nationwide ban on the use of restraints on pregnant incarcerated women is the ultimate goal, the most recently elected president and his agenda are currently standing in the way. Getting any legislation through a Republican-controlled Congress and past President Trump is increasingly problematic. The president has made it clear that strengthening women's rights (of any kind) are not at the forefront on his list of priorities. By nominating Jeff Sessions for Attorney General and Neil Gorsuch for Supreme Court Justice, both of whom are fervently against reproductive freedom, Trump has shown his "anti-woman agenda."<sup>153</sup> Thus, it will be difficult to make any changes at the federal level, but that does not mean women's or prisoner's rights groups should give up. Remember, the female inmates in federal prison are a small percentage of incarcerated females overall.

Merely changing the way things are done at federal facilities is not a sufficient, or even a complete, solution. Facilities at every level need to be held accountable in a consistent way. Like the IHRC suggests, the federal government should put pressure on the states to enact their own comprehensive legislation to protect pregnant inmates against shackling during childbirth.<sup>154</sup> Action involving both federal and state government will achieve more far-reaching solutions.

Hope is on the Horizon with the Introduction of the Dignity for Incarcerated Women Act in July 2017.

In the summer of 2017, Senator Kamala Harris, an alumni of our very own UC Hastings, visited the Central California Women's Facility in Chowchilla, California.<sup>155</sup> The purpose of this visit was to "ensure that bipartisan progress on criminal justice reform, after stalling during election season, [didn't] fade away entirely."<sup>156</sup> Harris met with several women incarcerated in the facility to "discuss the ins and outs of their lives" in prison.<sup>157</sup> Soon after her visit, Senator Harris joined with Sens. Elizabeth Warren, Cory Booker, and Richard Durbin to introduce the Dignity for Incarcerated Women Act, meant to "place female federal prisoners closer

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153. *Donald Trump on Reproductive Freedom*, NARAL: PRO-CHOICE AMERICA, <https://www.prochoiceamerica.org/laws-policy/federal-government/donald-trump-abortion/>.

154. International Human Rights Clinic, *supra* note 18, at 15.

155. Jamilah King, *Kamala Harris Went to Prison So Others Won't Have To*, MOTHERJONES.COM (July 18, 2017, 6:00 AM), <http://www.motherjones.com/politics/2017/07/kamala-harris-went-to-prison-so-others-wont-have-to/>.

156. *Id.*

157. *Id.*

to their families, offer them parenting classes, and establish an ombudsperson at the Justice Department to make sure prisoners' complaints about their conditions [are] at least heard."<sup>158</sup>

The Dignity for Incarcerated Women Act is meant to "improve the treatment of federal prisoners who are primary caretaker parents" and sets out restrictions and guidelines for how those individuals should be treated.<sup>159</sup> This is a giant step forward, and badly needed at the federal level. Not only does this bill list specific healthcare products that all women must have access to, the Dignity Act also requires that every female prisoner have access to a gynecologist.<sup>160</sup> In addition, the Dignity Act specifically states that "[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."<sup>161</sup> If taken at face value, this is a complete ban on the use of shackles or restraints at any point during pregnancy. If passed, all federal prisons and jails would be required to stop this abhorrent practice and it would be a great victory for the prisoners' rights community.

While the introduction of this legislation is promising and necessary, it comes during an administration that has shown their priorities to be elsewhere. As of July 11, 2017, the bill had been introduced in the Senate, read twice and referred to the Committee on the Judiciary.<sup>162</sup> No action has been taken on this bill as of yet. While the passage of this bill would be a promising success for prisoners' and women's' rights groups, those incarcerated in federal prisons are only a small percentage of the women currently incarcerated in the United States. Action at the state level is still required to completely eradicate the use of shackles or restraints on pregnant women incarcerated in this country.

UNCOMPROMISING COMPREHENSIVE LEGISLATION IS NEEDED IN ALL  
STATES TO PROHIBIT THE INHUMANE PRACTICE OF SHACKLING  
PREGNANT INCARCERATED WOMEN.

Legislation at the state level is absolutely necessary. The majority of inmates are housed in facilities that are not subject to the federal policy, and will not be subject to any changes in federal law or policy that may occur in the future. Therefore, change at the local level is paramount to keeping women inmates from being shackled during childbirth.

The first step is to enact legislation in the twenty-eight states that do not have it. Policies are not doing an adequate job of protecting those who need protection the most. The states in which no regulations or policies

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158. *Id.*

159. Dignity Act, S. 1524, 115th Cong. (2017).

160. Dignity Act, *supra* note 159, at § 4050 (j).

161. *Id.* at § 4050 (d)(2).

162. *Id.*

exist might have a little more difficulty. Trying to foster interest in a topic where there may have been none before can be challenging. However, since twenty-two states currently have some sort of prohibition on the books, similar language can be used to draft statutes for those states without any current law, cutting out much of the uncertainty of the process surrounding the wording of the statute. Whether this movement starts with pressure from the federal government (which is unlikely in the current political climate) or from women's or prisoner rights groups, legislation with unambiguous language that completely bans the use of any kind of restraints on incarcerated women in labor must be enacted.

Not only must new laws be enacted, but the legislation that currently exists needs to be upgraded. A complete prohibition, with no loopholes, should be implemented at every level in every state. Legislation that applies to both state and county run facilities would be a start to entirely stopping this inhuman practice of shackling pregnant inmates while giving birth. Some of the states still have instances of restraining pregnant incarcerated women, as we have seen with Nevada and Illinois, even though they have comprehensive legislation prohibiting it. That means that either the knowledge of the prohibition is not reaching the appropriate person, the correctional officers in charge of these women are not properly trained, or the officers simply choose to ignore it. Educational programs and supplemental training for all officers and facility managers should be required to better inform these individuals of the laws regarding the shackling of pregnant women. More education, however, must go hand in hand with removing the fear of discipline from the facility on the correctional officer assigned to the inmate. If the correctional officer is restraining women because they are afraid of consequences from the facility, including losing their jobs if they do not, then legislation, no matter how complete, is ineffective. Implementing educational programs at every employee level in a facility helps ensure that everyone is cognizant of the rules and reduces the chance that correctional officers will be afraid of losing their jobs, as those above them will have a better understanding of what is required of them by law.

Nevertheless, legislation is ineffective without oversight. As suggested at the federal level, all state and local facilities should have to submit a complete and inclusive report of all incidents of shackling women at any point during labor. Shackling a woman during this time must never be the first choice, but if it does happen, every detail of the event should be reported and reviewable by a third party. Additionally, a database should be created for every state (and one for the federal facilities, as well) and should include all the details from the reports, including, but not limited to, the correctional officer's name responsible for the shackling and the name of the facility where the pregnant inmate is housed. This database should be searchable so that repeat offenders cannot hide, whether they be the facility or an individual officer, and be reprimanded accordingly. The presence of this database would help deter violations of the law.



While reporting is part of the solution, if no consequences are in place for violating the statute, none of these recommended solutions will work. Part of the proposed legislation in every state needs to be strict penalties for not following the law that have real, and if necessary, harsh consequences. These can start with written disciplinary actions for first time offenders at the officer level and could go all the way up to revoking a license to run a detention facility for repeated infractions. If these penalties are not in place, there is nothing stopping the continued shackling of pregnant women during labor, because there will be no fear of repercussions. In addition to penalties, instituting an incentives program could also be part of the answer to guaranteeing these laws get enforced. If the facility is compliant with existing laws and report no shackling incidents within the required period of time (when there are pregnant women in the facility,) the state grants them a specified monetary amount to use towards nursery programs or prenatal medical services. Through penalties, incentives, education, and complete and unambiguous legislation, the practice of shackling women during childbirth will cease.

### CONCLUSION

The practice of shackling women during childbirth, while not as prolific as it once was, is an occurrence that happens far too frequently for comfort. Though policy exists at the federal level, as well as legislation that requires some sort of reporting, women are still having to go through this terrible ordeal. Additionally, federal policy only covers a small number of female inmates. Most pregnant inmates are in state run institutions, where often no legislation or policy, exists to protect them. In the states with legislation, loopholes are present that allow the use of restraints at varying stages of pregnancy to continue. In states with policies, the use of restraints still occurs because the policy does not carry the same weight as legislation, and either the officers are not correctly trained, or do not know or practice the specified policy procedures. Women in states with neither legislation nor policy have no protection against this practice. A complementary and integrated system of federal legislation, state legislation, and education is needed to discontinue the practice of shackling women during pregnancy. Through continuing education, reporting requirements, penalties, incentive programs, and perhaps even the raising of public awareness, this inhumane custom can be eradicated from our prisons, jails, and detention facilities. It will take hard work, cooperation, dedication, and compromise on both sides to achieve it, but the women who have to face the incomprehensible situation of giving birth in prison should not have to also undergo all of that pain while their legs and arms are shackled to a hospital bed.