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Hard Labor: The Legal Implications of Shackling Female Inmates During Pregnancy and Childbirth

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HARD LABOR: THE LEGAL IMPLICATIONS OF SHACKLING FEMALE INMATES DURING PREGNANCY AND CHILDBIRTH

ABSTRACT

Despite international human rights guidelines that prohibit the practice, thirty-eight states and the Federal Bureau of Prisons currently allow corrections officials to shackle pregnant inmates during the third trimester of pregnancy. Of these, twenty-three states and the Bureau also allow restraints to be used during active labor. Only two state legislatures, Illinois and California, have addressed the issue of using physical restraints on pregnant inmates; the vast majority of states rely on corrections officials to craft policy.

This article analyzes both states' justifications for shackling policies as well as the Constitutional and human rights arguments that have been posed by inmates and their advocates for eliminating the use of physical restraints during pregnancy and childbirth. A historical overview of the treatment of female prisoners as well as an analysis of the current impact of pregnancy in American prisons will reveal that shackling policies are impractical at best, and in the worst scenarios, seriously life-threatening. The second section addresses potential judicial remedies for female inmates who have been affected by shackling policies. Until the mid-1990s, prisoners seeking redress for civil rights violations such as inhumane and senseless use of physical restraints were most likely to turn to §1983 litigation. Since the passage of the Prison Litigation Reform Act in 1996, prisoner plaintiff's access to the courts has been limited by heightened procedural and evidentiary requirements that do not apply to the general public. Therefore, in the final section, this paper concludes that female prisoners and their advocates will most likely have to turn to alternative methods of relief, including innovative prison programs like Catch the Hope, implemented in the Massachusetts state prison systems to provide adequate prenatal and postnatal care within the limitations of a correctional environment.

> *The doctor came and said that yes, this baby is coming right now, and started to prepare the bed for delivery. Because I was shackled to the bed, they couldn't remove the lower part of the bed . . . [or] put my feet in the stirrups. My feet were still shackled together, and I couldn't get my legs apart. . . . [M]y baby was coming but I couldn't open my legs.*
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> *Finally the officer came and unlocked the shackles from my ankles. My baby was born then. I stayed in the delivery room with my baby for a little while, but then the officer put the leg shackles and handcuffs back on me and I was taken out of the delivery room.*[1]

INTRODUCTION

No one knows for sure how many babies are born in the nation's jails and prisons each year.[2] Midway through 2005, the Bureau of

1. Maria Jones, former inmate of the Cook County, Illinois jail, *in* AMNESTY INTERNATIONAL, "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 64, 65 (1999), *available at* http://web.amnesty.org/library/Index/engAMR510011999 [hereinafter AMNESTY INTERNATIONAL, "NOT PART OF MY SENTENCE"]. Jones was imprisoned on drug charges. *Id.* at 64. She had never been charged with or convicted of a violent offense and was not considered an escape risk. *Id.*

2. Nat'l Inst. of Corr., U.S. Dep't of Justice, What is the Difference Between Jail and Prison?, http://web.archive.org/web/20061002035022/http://www.nicic.org/WebPage_378.htm (last visited Jan. 15, 2008). Use of the phrase "corrections" is intended to encompass both prison and jail populations. *Id.* According to the National Institute of Corrections, typically "jails are locally-operated correctional facilities that [usually] confine

Justice Statistics found that female offenders account for approximately ten percent of the nation's corrections population.[3] The Sentencing Project, a non-profit research and advocacy organization that opposes the use of incarceration for many non-violent offenses, calculated that 40,000 new inmates are admitted annually.[4] A 1999 Bureau of Justice Statistics study found that five percent of female prison inmates and six percent of those in jail are admitted during pregnancy.[5] Based on these surveys, the *New York Times* has estimated that 2,000 children are born to women in jails each year.[6] Of course, these studies were conducted by separate organizations with different agendas, in three different years, and used three different statistical samples.[7] None of the studies take into account the effect of release of jail inmates prior to childbirth; abortion, miscarriage, and stillbirth; or impregnation during incarceration on the rate of live births.[8] At best, "2,000 births" represents an extremely rough estimate.[9]

Therefore, it is difficult to know how many mothers and children are affected by the widely-embraced practice of shackling female inmates during pregnancy, labor, and childbirth. Despite international human rights guidelines that prohibit the practice,[10] thirty-eight

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persons [with] . . . sentence[s] of 1 year or less. . . . Prisons are operated by either a state or the federal government, and they confine only those individuals who have been sentenced to 1 year or more of incarceration." *Id.*

3. *See* PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB'L NO. 213133, PRISON AND JAIL INMATES AT MIDYEAR 2005, at 5, 8 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim05.pdf (indicating that just over 200,000 women populate the nation's jails and prisons).

4. *See* Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES, Mar. 2, 2006, at A16.

5. *See* LAWRENCE A. GREENFELD & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB'L NO. 175688, WOMEN OFFENDERS 8 (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf.

6. *See* Liptak, *supra* note 4.

7. *See supra* notes 2-5 and accompanying text.

8. *See id.*

9. *See* Liptak, *supra* note 4.

10. *See, e.g.*, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, Switz., Aug. 22-Sept. 23, 1955, *Standard Minimum Rules for the Treatment of Prisoners*, ¶¶ 33-34, U.N. Doc. A/CONF.6/L.17 (Dec. 1, 1955).

> [C]hains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:
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> (a) as a precaution against escape during a transfer . . . ;
>
> (b) on medical grounds by direction of the medical officer;
>
> (c) . . . in order to prevent a prisoner from injuring himself or others or from damaging property . . . .
>
> . . . [Restraints] must not be applied for any longer time than is strictly necessary.

Id.

states and the Federal Bureau of Prisons (BOP) currently allow corrections officials to physically restrain pregnant inmates during the third trimester of pregnancy.[11] Of these, twenty-three states and the BOP also allow restraints to be used during active labor.[12] Legislatures in only two states, Illinois and California, have addressed the issue of using physical restraints on pregnant inmates;[13] the vast majority of states rely on corrections officials to craft policy.[14]

Actual practices vary widely from jurisdiction to jurisdiction.[15] Policies address a dizzying array of variables in numerous combinations: the kinds of restraints that can be used; the parts of the body that can be restrained; the stage of the pregnancy, labor, and delivery; the inmate's criminal history prior to incarceration and her disciplinary history since the beginning of her sentence; and finally, the amount of discretion held by medical and correctional officials.[16] For example, "Louisiana and the Federal Bureau of Prisons have no restrictions on the application of restraints [on female inmates] other than specifying that pregnant women should not be restrained face-down in four-point restraints."[17] In Arkansas, women can also be restrained throughout pregnancy, but those with "lesser disciplinary records" are controlled using a single flexible nylon restraint.[18] Female inmates in Oregon can be shackled throughout their pregnancies, but restraints are only used during labor and delivery at the specific request of the attending medical official.[19]

While the specific policies and procedures may vary, the main justifications for the continued practice of shackling women in advanced stages of pregnancy and through labor are identical to those used to justify restraining male or female inmates in the general population: to maintain security and decrease flight risk.[20] According to the spokeswoman for one corrections department, officials are faced with

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11. Amnesty International, Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women (2006), http://www.amnestyusa.org/women/custody/keyfindings_restraints.html (last visited Jan. 15, 2008) [hereinafter Amnesty International, Abuse of Women].

12. *Id.*

13. *See* CAL. PENAL CODE §§ 3423, 5007.7 (2006); § 55 ILL. COMP. STAT. 5/3-15003.6 (2000). New York is currently considering a bill that would ban the use of physical restraints on inmates during childbirth. *See* Assemb. 3804, 2005 Assemb., 228th Sess. (N.Y. 2005).

14. *See* Amnesty International, Abuse of Women, *supra* note 11. Eight states have no written policy regarding the use of shackles on pregnant inmates and presumably rely on informal policies and practices. *Id.*

15. *See id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *See* Liptak, *supra* note 4.

the unwelcome burden of balancing inmate health and safety with that of the general public: "Though these are pregnant women . . . they are still convicted felons, and sometimes violent in nature. There have been instances when we've had a female inmate try to hurt hospital staff during delivery."[21]

This note will analyze both stated justifications for shackling policies as well as the Constitutional and human rights arguments that have been posed by inmates and their advocates for eliminating the use of physical restraints during pregnancy and childbirth. A historical overview of the treatment of female prisoners and an analysis of the current impact of pregnancy in American prisons reveals that shackling policies are impractical at best,[22] and in the worst cases, seriously life-threatening.[23]

The second section will address potential judicial remedies for female inmates who have been affected by shackling policies. Although shackling practices have been specifically addressed in only a few cases,[24] prisoners have successfully challenged inhumane conditions, which this note will argue are analogous to the shackling policies, via Eighth and Fourteenth Amendment litigation.[25]

Third, the note will examine two alternatives to the current majority approach of ad hoc policies developed by corrections authorities. First, this note will consider the statutory solutions developed by the state legislatures of Illinois, California, and New York.[26] Finally, the note will examine Massachusetts' "Catch the Hope" program for incarcerated mothers; this case study will show that the use of excessive physical restraints on pregnant inmates is unnecessary from a policy standpoint.[27]

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21. *See id* (quoting Dina Taylor, spokeswoman for the Arkansas Department of Corrections).

22. According to William F. Schulz, Executive Director of Amnesty International U.S.A., "[Shackling] is the perfect example of rule-following at the expense of common sense . . . . It's almost as stupid as shackling someone in a coma." (quoted in Liptak, *supra* note 4.

23. *See, e.g.*, AMNESTY INTERNATIONAL, "NOT PART OF MY SENTENCE," *supra* note 1, at 66 ("The mother and baby's health could be compromised if there were complications during delivery, such as hemorrhage or decrease in fetal heart tones. If there were a need for a C-section . . . a delay of even five minutes could result in permanent brain damage for the baby.") (quoting Dr. Patricia Garcia).

24. *See, e.g.*, Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 877 F.Supp. 634, 646-47 (D.D.C. 1994), *partially aff'd*, 93 F.3d 910, 914-15, 918 (D.C. Cir. 1996).

25. *See, e.g.*, Goebert v. Lee County, No. 2:04-cv-505-FtM-29DNF, 2005 U.S. Dist. LEXIS 31478, at *3 (D.Fla. Dec. 7, 2005).

26. CAL. PENAL CODE §§ 3423, 5007.7 (2006); § 55 ILL. COMP. STAT. 5/3-15003.6 (2000); Assemb. 3804, 2005 Assemb., 228th Sess. (N.Y. 2005).

27. *See* Cathy Romeo, *Catch the Hope Program at Massachusetts Correctional Institution — Framingham: A Model for Providing Critical Services to Incarcerated*

I. HISTORY OF FEMALE INMATES IN THE UNITED STATES: THE CUSTODIAL AND REFORMATORY MODELS

Women's prisons and female inmates have received little scholarly attention because of the fact that women comprise such a small percentage of the overall prison population, and thus "shed little light on the nature of the prison system as a whole;"[28] but further, because it has been assumed that the experiences of women inmates are simply a smaller-scale version of those of their male counterparts.[29]

The first separate facilities for women were dormitory-like rooms adjacent to male prisons;[30] gradually, women were placed in their own cellblocks and came under the supervision of female matrons.[31] This segregation arose for practical reasons — the increasing number of female prisoners and the desire to prevent sexual contact[32] — as well as the sense, prevalent throughout the period, that female criminals were particularly corrupt.[33] Considered more naturally docile and moral than men, a woman who fell into a life of crime had fallen far indeed, if she was redeemable at all.[34] This "custodial model" prison housed mainly felons,[35] and required inmates to work long hours for little or no pay at industrial jobs that supported the prison system as a whole.[36]

The "reformatory model" emerged out of the custodial prisons during the late nineteenth century,[37] and was characterized by the paternalistic attitudes that dominated Victorian America.[38] Designed to cater only to women, and mainly those guilty of misdemeanors or "moral crimes" like prostitution or public drunkenness,[39] reformatories were "decidedly 'feminine' institutions."[40] Inmates in reformatories

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Pregnant Women, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 417, 421 (1998).

28. Nicole Hahn Rafter, *Prisons for Women, 1790-1980*, *in* 5 CRIME & JUSTICE 129, 129 (Michael H. Tonry & Norval Morris eds., 1983) [hereinafter Rafter, *Prisons for Women*].

29. *Id.* at 129-30.

30. *Id.* at 132.

31. *Id.* at 135-36.

32. *Id.* at 137, 139.

33. *Id.* at 138.

34. *See* L. MARA DODGE, "WHORES AND THIEVES OF THE WORST KIND": A STUDY OF WOMEN, CRIMES, AND PRISONS, 1835-2000, at 30 (2002); *see also* Rafter, *Prisons for Women*, *supra* note 28, at 146 (describing female penitentiary inmates as being considered "unredeemable").

35. Rafter, *Prisons for Women*, *supra* note 28, at 143.

36. *See id.* at 146. For example, some women produced uniforms for the inmates in other prisons or caned chairs destined to furnish prisons throughout the jurisdiction. *Id.*

37. *Id.*

38. *Id.* at 158.

39. *Id.* at 157.

40. *Id.* at 147.

tended to be younger than women incarcerated in custodial institutions who were considered more hardened criminals.[41] One of the classic characteristics of a reformatory prison was the indeterminate sentences imposed on women in order to assure reformation.[42] Cellblocks were abandoned in favor of a "cottage system" in which the inmate population was dispersed, settled in small "houses" led by a quasi-maternal matron.[43] Rather than performing industrial work designed to reduce system operating costs,[44] reformatory inmates were trained to perform domestic tasks that would prepare them for lives as maids, and eventually wives, after their release.[45]

II. WOMEN IN AMERICAN PRISONS TODAY

Today's criminal justice system combines the punitive nature of the early custodial prisons with the differential treatment of the reformatory system.[46] Although a "campus model" aspires to address the special needs of female inmates while rejecting the gender stereotyping of the late nineteenth and early twentieth centuries,[47] the treatment of female inmates in contemporary American correctional facilities suggests that many of the negative aspects of both historical models have been retained.[48]

The brutality and chaos of early custodial facilities is mirrored by the frequent incidence of sexual violence perpetrated by male prison guards against women inmates.[49] While women in reformatories were frequently able to maintain custody of their infant children,[50] today's

41. *Id.* at 158. "A few states went so far as to prohibit their reformatories from receiving women over thirty on the theory that older women were unlikely to reform." *Id.*

42. *Id.* at 161. For example, women convicted of prostitution were sent to the Detroit House of Corrections for three years, without regard to the facts of their case or their criminal history. *Id.* They could be paroled before that time, but only if they proved that their moral character had been reformed. *Id.*

43. Isabel C. Barrows, *The Reformatory Treatment of Women in the United States*, *in* PENAL AND REFORMATORY INSTITUTIONS 129, 133 (Charles Richmond Henderson ed., 1910) ("It was believed that if small groups could be placed in cottages enough motherly women could be found to give them the sort of affection which would most surely help to redeem them.").

44. *See supra* note 36 and accompanying text.

45. Rafter, *Prisons for Women*, *supra* note 28, at 162.

46. *See id.* at 173.

47. *Id.* at 172.

48. *Id.*

49. *See* Deborah M. Golden, American Constitution Society for Law And Policy, *The Prison Litigation Reform Act — A Proposal for Closing the Loophole for Rapists* 95, 96 (June 2006), *available at* http://www.acslaw.org/node/2927 (follow "Golden" hyperlink under "Attachment").

50. Rafter, *Prisons for Women*, *supra* note 28, at 175.

prisons and jails rarely afford inmate mothers this opportunity.[51] Furthermore, because women's prisons are typically smaller and therefore more costly, female inmates are at a greater risk of being transferred to new facilities;[52] this is a special hardship for incarcerated mothers.[53] Substandard gynecological and obstetrical care has also been the subject of several prisoner litigation suits, discussed in greater detail *infra* Part III.[54]

The shackling policies themselves hearken back to an era when convicted women were considered morally subhuman[55] and evidence of sexual activity was especially condemned.[56] Many jurisdictions fail to modify restraint policies to accommodate pregnancy,[57] suggesting an indifference to the special needs of female inmates that dates back to a custodial era.[58] Beyond the fact that shackling policies do not fully accommodate the uniquely female experiences involved with childbearing,[59] they also fail to take into account other differences between male and female inmates that would seem to make shackling female inmates generally less necessary. According to the Bureau of Justice Statistics, "women are substantially more likely than men to be serving time for a drug offense and less likely to have been sentenced for a violent crime."[60] Female inmates also generally have shorter, less violent criminal histories than male inmates: men are twice as

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51. Terri L. Schupak, Comment, *Women and Children First: An Examination of the Unique Needs of Women in Prison*, 16 GOLDEN GATE U. L. REV. 455, 465 (1986).

52. Nicole Hahn Rafter, *Even in Prison, Women are Second-Class Citizens*, 14 HUM. RTS. 28, 30 (1987) [hereinafter Rafter, *Even in Prison*].

53. *See id.*; *see also* TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WOMEN IN PRISON: SURVEY OF STATE PRISON INMATES, 1991, at 6 (1994), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/wopris.pdf. Although approximately the same percentage of male and female prisoners have children, ninety percent of male inmates, compared to twenty-five percent of female inmates, report that their children live with the other parent. *Id.* Because women are so much more likely to serve as the primary custodial parent prior to incarceration, the disproportionately high instance of jurisdictional transfers is especially burdensome for female inmates. *See id.*

54. *See, e.g.*, Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 877 F.Supp. 634, 643-49 (D.D.C. 1994); Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977) (holding that a state prison had exhibited "deliberate indifference" towards female prisoners through the neglectful and insufficient administration of prison health services for women).

55. *See, e.g.*, Liptak, *supra* note 4. Steve Erato, the husband of an inmate who was shackled during labor stated, "It is unbelievable that in this day and age a child is born to a woman in shackles. It sounds like something from slavery 200 years ago." *Id.*

56. *See* DODGE, *supra* note 34, at 30.

57. *See supra* text accompanying notes 11-19.

58. *See id.*

59. AMNESTY INTERNATIONAL, "NOT PART OF MY SENTENCE," *supra* note 1, at 62.

60. SNELL, *supra* note 53, at 1. While nearly one-third of female prisoners are incarcerated because of drug convictions, about thirty percent are imprisoned after committing a violent crime. *Id.* at 3.

likely as women to be violent recidivists and more than half of male prisoners have committed two or fewer offenses, compared to two-thirds of female prisoners.[61] Furthermore, many of the violent crimes committed by women are perpetrated against current or former partners who had sexually or physically abused them.[62]

Based on these facts, the average woman inmate seems to represent a reduced security risk.[63] In addition, women are typically sentenced to shorter prison terms,[64] which correlates to a reduced overall risk of flight.[65] This, combined with the reality that pregnant women — not to mention those in active labor — are physically much less able to mount an attack or escape attempt,[66] suggests that the proffered justifications for shackling pregnant inmates are based on a correctional model that was designed for men.

Other aspects of today's women's prisons are more reflective of the reformatory model.[67] Female inmates in general have fewer educational and recreational opportunities, inferior access to specialized health care, and are paid less for prison labor.[68] A 1994 class action lawsuit brought on behalf of the current and former inmates of the District of Columbia Department of Corrections noted:

> In the area of academic and college education, women prisoners receive only half of the male prisoners' access to ABE and GED classes.
>
> . . . .
>
> . . . Work details at [a neighboring men's prison] are not only more numerous but better in quality . . . . The men perform details that prepare them for trades which command better salaries outside of prison. There is hardly a comparison of the stereotypical details at the [women's prison] (receptionist, housekeeper, beautician,

61. *Id.* at 4.

62. Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System*, *in* GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS 3, 4 (Barbara E. Bloom ed., 2003); *see also* SNELL, *supra* note 53, at 6 ("Half of the violent female inmates who had been [physically or sexually] abused [prior to incarceration] were sentenced for homicide, compared to two-fifths of other violent female inmates.").

63. *See* Covington & Bloom, *supra* note 62, at 4.

64. *See* GREENFELD & SNELL, *supra* note 5, at 10. This is largely related to the fact that women are less likely to commit serious or violent offenses. *Id.*

65. *See* Liptak, *supra* note 4.

66. *Id.* (noting that there are no records of women escaping from prison during labor, and quoting a former prison prenatal instructor: "You can't convince me that it's ever really happened. You certainly wouldn't get far.").

67. Rafter, *Prisons for Women*, *supra* note 28, at 174.

68. Rafter, *Even in Prison*, *supra* note 52, at 28.

> etc.) and the skilled details at [the men's prison] (carpentry, electrical, mechanical, etc.).[69]

The *Women Prisoners* cases not only reveal that modern women's prisons still struggle with gender stereotyping, but could also prove interesting case studies for female inmates seeking to bring Constitutional challenges to oppose shackling policies.

III. JUDICIAL REMEDIES FOR FEMALE INMATES: EIGHTH AMENDMENT CLAIMS UNDER § 1983 AND THE PRISON LITIGATION REFORM ACT

Although only a few published cases deal with the constitutional implications of shackling pregnant inmates,[70] the courts have dealt with a great deal of prisoner litigation brought by individuals or classes of inmates seeking damages or other forms of relief stemming from inhumane institutional policies.[71] Typically, prisoner plaintiffs root their arguments in the Eighth[72] and Fourteenth[73]

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69. Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 877 F.Supp. 634, 677 (D.D.C. 1994), *partially aff'd*, 93 F.3d 910 (D.C. Cir. 1996). Although the D.C. Circuit Court ultimately determined that the unequal opportunities that existed between male and female prisons in D.C. did not violate the Equal Protection Clause because the inmates in the smaller female prisons were not "similarly situated" to their male counterparts, the appeals court did not dispute the fact that such inequities existed. *See id.* at 913, 927.

70. Other cases dealing at least partially with the constitutionality of various state shackling procedures affecting pregnant inmates have been settled out of court. *See, e.g.*, Complaint at 1-2, McDonald v. Fair, No. 80352 (Mass. Super. 1985) (class action suit involving inadequate medical treatment for pregnant women at a state prison for women in Massachusetts); Settlement Agreement, McDonald v. Fair , No. 80352, § H 28-30 (Mass. Super 1985); *see generally* Complaint, West v. Manson, No. H83-366 (D.C. Conn. filed 1983) (class action suit involving living conditions at a state prison for women in Connecticut).

71. *See* discussion *infra* Part IV.

72. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). The "cruel and unusual punishment" clause of the Eighth Amendment provides the basis for most prisoner litigation lawsuits challenging conditions of confinement. *See supra* notes 24-25. The Supreme Court has attempted to define this rather ambiguous language several times, stating variously that the ban on cruel and unusual punishments "prohibits penalties that are grossly disproportionate to the offense . . . ." Hutto v. Finney, 437 U.S. 678, 685 (1978) (citing Weems v. United States, 217 U.S. 349, 367 (1910) (holding a fifteen-year sentence for falsifying a document was disproportionate to the crime and therefore violated the cruel and unusual punishment clause)). The ban not only prohibits "physically barbarous treatment," but also all penalties that conflict with "broad and idealistic concepts of dignity, civilized standards, humanity, and decency." Estelle v. Gamble, 429 U.S. 97, 102 (1976). In *Estelle,* the Court held an "inadvertent failure to provide adequate medical care" does not rise to the level of an Eighth Amendment violation. *Id.* at 105.

73. U.S. CONST. amend. XIV, §1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

Amendments to the Constitution. However, because the Constitution does not provide a mechanism for enforcing the rights that it creates,[74] prisoners must sue state agents under a "civil action for deprivation of rights" as defined by 42 U.S.C. § 1983.[75] Prisoner litigation is specifically regulated by the Prison Litigation Reform Act (PLRA), which sets up additional hurdles for inmate litigants, and presents a major challenge for inmates seeking civil damages for constitutional violations.[76]

A. The Prison Litigation Reform Act of 1996

> Prisoner suits under 42 U.S.C. § 1983 can illustrate our legal order at its best and its worst. The best is that even as to prisoners the government must obey always the Constitution. The worst is that many of these suits invoke our basic charter in support of claims which fall somewhere between the frivolous and the farcical and so foster disrespect for our laws.[77]

During the 1990s, prisoner litigation became a popular target for the media, conservative commentators, and law enforcement and elected officials hoping to cultivate a reputation for being tough on crime.[78] Politicians from around the country responded to public fears about violent crime by cracking down on prison conditions: Alabama reinstituted the chain gang,[79] then-Governor William F.

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74. Golden, *supra* note 49, at 97 n.11 ("The Constitution itself provides no mechanism for plaintiffs to enforce in court the rights it comprises. Plaintiffs must sue state actors under 42 U.S.C. § 1983 or federal actors under the theory delineated in *Bivens v. Federal Bureau of Narcotics*, 403 U.S. 388 (1971).").

75. 42 U.S.C. § 1983 (1996).

> Every person who . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

76. Prison Litigation Reform Act, 42 U.S.C. § 1997e(e) (1996). The PLRA is a subsection of the Civil Rights of Institutionalized Persons Act, 41 U.S.C. § 1997 (1994).

77. Crawford-El v. Britton, 523 U.S. 574, 601 (1998) (Kennedy, J., concurring).

78. *See, e.g.*, Barb Albert, *Attorney General Seeks to End Frivolous Suits*, INDIANAPOLIS STAR, Nov. 15, 1994, at A1; Press Release, Sandi Copes, Office of the Attorney General of Florida, Limits Sought on Frivolous Inmate Lawsuits (Aug. 1, 1995), *available at* http://myfloridalegal.com/newsrel.nsf/newsreleases/82B07319CEF98B8C85256220006C3A66 (containing a list of "Attorney General Bob Butterworth's Top 10 Frivolous Prison Inmate Lawsuits").

79. *Frugal Alabama Still Chained to the Past*, J. BLACKS HIGHER EDUC., Summer 1995, at 19. After Alabama reinstated chain gangs, the Southern Poverty Law Center,

Weld of Massachusetts opined that prison life should be like "a tour through the circles of hell,"[80] and state prison systems everywhere cut educational and recreational programs at least in part to diminish the public perception that prisons were cushy holding pens for the lazy and delinquent.[81]

Underpinning the harsh and politicized rhetoric, however, were legitimate concerns about the number of federal lawsuits brought by prisoners under § 1983.[82] During the 1960s, inmates filed only a few hundred lawsuits per year;[83] by 1995, the nearly 40,000 complaints submitted by prisoners comprised almost a fifth of the federal civil docket.[84] Although many of these complaints may have been dismissed before trial,[85] the remaining cases still accounted for fifteen percent of all federal civil trials.[86] As Margo Schlanger has commented, "[t]hese statistics highlight two qualities long associated with the inmate docket: its volume and the low rate of plaintiffs' success."[87] Lawmakers and citizens certainly had legitimate frustrations relating to the immense amount of time and money that the federal court system was dedicating to claims that, as a group, had a very low success rate.[88] However, prisoners — arguably the most unpopular and politically vulnerable bloc of American citizens — were a particularly easy

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on behalf of a group of inmates, sued the Governor under § 1983. Southern Poverty Law Center, Legal Action: Austin v. James, http://www.splcenter.org/legal/docket/files.jsp ?cdrID=2&sortID=0 (last visited Jan. 15, 2008). The case was settled in 1996 when the Department of Corrections agreed to halt the practice. *Id.*; Associated Press, *Chain Gangs Are Halted in Alabama*, N.Y. TIMES, June 21, 1996 at A14.

80. Robert Worth, *A Model Prison*, ATLANTIC MONTHLY, Nov. 1995, at 38, 39. Worth also quotes Weld as stating, "inmates should learn only 'the joys of busting rocks.'" *Id.*

81. *See, e.g., id.*

82. *See* Fred Cheesman, II, Roger A. Hanson & Brian J. Ostrom, *A Tale of Two Laws: The U.S. Congress Confronts Habeas Corpus Petitions and Section 1983 Lawsuits*, 22 LAW & POL'Y 89, 94 (2000) (citing an increase of 1,153 percent in prisoner lawsuit from 1972-1996).

83. Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES, Mar. 21, 1994, at A1.

84. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1558 (2003). "In 1995, inmates filed . . . nineteen percent of the [complaints on the] federal civil docket." Statistics for the "civil docket" exclude habeas corpus petitions and motions to vacate sentences. *Id.* at 1558 n.4.

85. *See, e.g.*, Dunn, *supra* note 83 (stating that in 1993, ninety-seven percent of prisoner suits were dismissed before trial).

86. Schlanger, *supra* note 84, at 1558. In 1993, only thirteen percent of cases initiated by prisoners resulted in pro-prisoner verdicts. Dunn, *supra* note 83.

87. Schlanger, *supra* note 84, at 1557.

88. *See* Cindy Chen, Note, *The Prison Litigation Reform Act of 1995: Doing Away With More Than Just Chunky Peanut Butter* 78, ST. JOHN'S L. REV. 203, 211 (2004) (citing a study by the National Association of Attorneys General that estimated the states spent a combined $81 million defending themselves against prisoner suits).

target[89] for Congressional Republicans riding the wave of the 1994 midterm elections and their proposed "Contract With America."[90]

The Prison Litigation Reform Act[91] was added to the general statute governing prisoner civil rights in 1996 in order to "unclog the federal courts from frivolous prisoner litigation."[92] Attached to the general Civil Rights of Institutionalized Persons Act, the PLRA regulates all suits brought by prisoners against public entities by attacking the problem on two fronts.[93] First, Part (d) limits the amount of attorney's fees and monetary judgments that federal judges can award inmate plaintiffs.[94]

The second set of limits, however, targeting prisoner plaintiffs themselves, is more pertinent to inmates actually submitting complaints to a federal court.[95] The PLRA functions by setting a much higher procedural bar for prisoners than the § 1983 baseline,[96] screening out inmate lawsuits that would have been allowed to go forward had the plaintiffs not been incarcerated.[97] The relevant sections, mandating that prisoners exhaust administrative relief remedies before turning to the courts and show proof of physical injury, read:

> (a) No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.
>
> . . . .

89. *See, e.g.*, Wendy Imatani Peloso, Note, *Les Miserables: Chain Gangs and the Cruel and Unusual Punishment Clause*, 70 S. CAL. L. REV. 1459, 1461 (1997) ("There's absolutely no political downside to getting tough on prisoners.") (quoting Jenni Gainsborough of the American Civil Liberties Union's National Prison Project).

90. *See* Republican Contract With America, http://www.house.gov/house/Contract/CONTRACT.html (last visited Jan. 15, 2008) (providing the legislative agenda designed by Republican members of the 104th Congress, which included a tort reform measure known as "The Common Sense Legal Reform Act").

91. Prison Litigation Reform Act, 42 U.S.C. § 1997e (1996).

92. Golden, *supra* note 49, at 97. Golden quotes Senator Spencer Abraham's remarks during floor debate: "I think virtually everybody believes that while these people are in jail they should not be tortured, but . . . their lives should . . . be describable by the old concept known as hard time." *Id.*

93. *See* Chen, *supra* note 88, at 206-07. As the Supreme Court has pointed out, "[f]or state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation . . . are boundless." Preiser v. Rodriguez, 411 U.S. 475, 492 (1973).

94. *See* 42 U.S.C. § 1997e(d).

95. *Id.* § 1997e.

96. Chen, *supra* note 88, at 207; 42 U.S.C. § 1997e(a).

97. *See* Chen, *supra* note 88, at 207.

> (c)(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune . . . the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.
>
> . . . .
>
> (e) No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.[98]

Statistics show that the impact of the PLRA was swift and dramatic;[99] forty-three percent fewer inmate-initiated complaints were filed in 2001 than in 1995, despite the fact that the actual inmate population had increased by twenty-three percent in the same time period.[100]

1. The Administrative Exhaustion Requirement

Prisoners must first prove that they have exhausted all available "administrative remedies."[101] Typically, prisons, like any large

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98. 42 U.S.C. §§ 1997e(a), (c), (e).

99. *See* Schlanger, *supra* note 84, at 1559-60.

100. *Id.* Prisoner litigation still accounts for more than twenty percent of the federal civil docket. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES tbls.4.4, 4.6 (2006), *available at* http://www.uscourts.gov/judicialfactsfigures/2006.html (last visited Jan. 11, 2008).

101. 42 U.S.C. § 1997e(a). On January 22, 2007, the Supreme Court rejected the heightened pleading requirements that the Sixth Circuit and a number of lower courts had imposed on prisoner litigants. Jones v. Bock, 127 S. Ct. 910, 921 (2007). The Court ruled that the PLRA mandates that failure to exhaust administrative remedies is an affirmative defense; however, the Sixth Circuit required inmate plaintiffs to allege and demonstrate administrative exhaustion in their complaints. *Id.* at 915, 919. Chief Justice Roberts, writing for a unanimous Court, made it clear that this decision was a victory for judicial minimalism rather than a policy-driven ruling primarily intended to benefit inmate litigants:

> There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court.
>
> . . . .
>
> We are not insensitive to the challenges faced by the lower federal courts in managing their dockets and attempting to separate, when it comes to prisoner suits, not so much wheat from chaff as needles from haystacks. . . . [However,] adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not . . . by the courts.

Id. at 918-19, 926. Nevertheless, *Jones v. Bock* has left prisoners' rights groups cautiously optimistic; according to Steven Shapiro, Legal Director of the American Civil Liberties Union: "The PLRA severely limits prisoners' access to federal courts. [The *Bock*]

institution, have extensive parallel disciplinary and grievance proceedings based on the chain of command.[102] Part (a) of the PLRA was presumably designed to strengthen the authority of prison officials with respect to grievance procedures, and prevent inmates from undercutting administrative authority with formal judicial proceedings that could be dealt with in-house.[103] While this seems reasonable on its face, the actual effectiveness of such administrative remedies varies widely from institution to institution and inmate to inmate.[104]

The actual requirements and time limitations imposed by administrative grievance processes[105] can represent a major challenge to inmates, most of whom are relatively unsophisticated and allegedly dealing with the physical and emotional aftermath of a serious breach of their civil rights.[106] While grievance proceedings differ among states,[107] the grievance procedure adopted by the BOP exemplifies the structure and types of requirements placed on inmates.[108] The Bureau of Prisons "Administrative Remedy Program" requires inmates to seek an "informal resolution" of their grievance prior to beginning the formal complaint process,[109] but still imposes a deadline of twenty calendar days on the submission of the first written complaint.[110] In other words, less than three weeks after the incident that forms the basis of the complaint, the inmate must have approached a staff member with an informal complaint, received feedback, and then gone on to file a written complaint.[111] Compared to statutes of

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decision will at least help to ensure that the courthouse door is not completely shut for prisoners . . . ." Press Release, American Civil Liberties Union, Supreme Court Decision Overturns Draconian Limitations on Prisoner Litigation Imposed by the Sixth Circuit (Jan. 22, 2007), *available at* http://www.aclu.org/scotus/2006term/jonesv.bockwilliamsv.overton/28107prs20070122.html.

102. *See, e.g.*, Administrative Remedy, 28 C.F.R. §§ 542.11-542.14 (2002). The formal grievance procedure for the Federal Bureau of Prisons requires that inmates approach staff with a verbal complaint before filing a written Administrative Remedy Request with the facility's designated "correctional counselor," who forwards the Request to the Warden. *Id.* §§ 542.13-542.14. Inmates who are unsatisfied with the Warden's response can then file appeals with the Regional Director and then the National Inmate Appeals Administrator of the Office of General Counsel. *Id.* § 542.15(a).

103. *See* McCarthy v. Madigan, 503 U.S. 140, 155 (1992); Ngo v. Woodford, 403 F.3d 620, 624 (9th Cir. 2005).

104. Elizabeth Alexander, *The Caged Canary*, 14 WM. & MARY J. WOMEN & L. 225, 263-66 (2008).

105. 28 C.F.R. § 542.

106. *See, e.g.*, Alexander, *supra* note 104, at 263-66.

107. Michael S. Hamden, *An Overview of the Law Governing the Rights of Prisoner*, XXVII FACTS & FINDINGS, May 2000, at 15, *available at* http://www.ncpls.org/prisonerrights.htm.

108. *See* 28 C.F.R. § 542.

109. *Id.* § 542.13(a).

110. *Id.* § 542.14(a).

111. *Id.* §§ 542.13-542.14.

limitations that provide non-incarcerated citizens months to many years, depending on the seriousness of the underlying allegation, to file a complaint, the PLRA's enforcement of administrative remedies severely limits the amount of time that inmates have to pursue a remedy.[112]

Further, these formal requirements, while not necessarily onerous for a non-incarcerated or more highly sophisticated complainant,[113] are clearly designed to enhance administrative efficiency rather than to facilitate a rapid response to prisoner concerns.[114] The initial written complaint, which must be submitted on a "BP-9" form provided by the facility's designated correctional counselor,[115] can address one complaint at a time; "[i]f the inmate includes on a single form multiple unrelated issues, the submission shall be rejected and returned without response, and the inmate shall be advised to use a separate form for each unrelated issue."[116] Inmates can attach a single, 8.5 x 11 inch sheet of paper if the designated form does not provide sufficient space, but must provide a copy of the additional sheet as well as a copy of any supporting exhibits.[117] "Exhibits will not be returned with the response,"[118] however, and so inmates are encouraged to make additional copies in order to preserve exhibits if they wish to keep their appeal options open.[119]

The PLRA's administrative exhaustion requirement is not a novel one, but a traditional exception to exhaustion exists when an agency has "no power to decree . . . relief."[120] Because of the specificity of Part (e) of the PLRA, however, the Supreme Court has interpreted the administrative exhaustion requirement as absolutely unwaiveable,[121] even in circumstances in which a prison's administrative remedies are clearly inadequate.[122]

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112. *Id.*

113. *See* Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L. J. 417, 441-42 (1993) (rejecting the validity of the assumption that prisoners possess average intelligence and are thus capable of arguing their claim before a court).

114. *See* Chen, *supra* note 88, at 222.

115. 28 C.F.R. §§ 542.14(a), (c).

116. *Id.* § 542.14(c)(2).

117. *Id.* § 542.14(c)(3).

118. *Id.*

119. *Id.*

120. Reiter v. Cooper, 507 U.S. 258, 269 (1993) (ruling that the doctrine of administrative exhaustion is inapplicable because the administrative body had "long interpreted its statute as giving it no power to decree reparations relief").

121. *See* Booth v. Churner, 532 U.S. 731, 741 (2001).

122. *Id.* at 741 n.6 ("Congress has provided in § 1997e(a) that an inmate must exhaust irrespective of the forms of relief sought and offered through administrative avenues.").

While this ironclad requirement has undoubtedly reduced the number of frivolous claims filed against prison officials,[123] if only because inmates with meritless claims are less likely to pursue a complicated administrative process,[124] it has also resulted in the dismissal of individual claims with real potential and merit.[125] More problematically, the case law suggests that the exhaustion requirement in the PLRA locks inmates with legitimate civil rights claims into a system where they are barred from any form of adequate relief, in violation of the well-established common law principle that a remedy exists for every wrong.[126]

In *Goebert v. Lee County*, the plaintiff, a female inmate, filed a lawsuit against the sheriff in the jurisdiction in which she was incarcerated[127] as well as against the medical personnel at the Lee County Jail.[128] Charged with DUI manslaughter, the thirty-eight-year-old Goebert informed prison officials when she was admitted that she was four months pregnant with a history of miscarrying and was considered a "high risk" pregnancy because of her age and blood type.[129] Five weeks after being admitted, Goebert became concerned that she was leaking amniotic fluid; she was examined by a nurse and doctor and an ultrasound was performed.[130] Although she was told at that time that her fetus was healthy, she continued to experience symptoms and submitted three verbal or written requests to see the doctor before she was finally admitted to the neonatal distress unit of a local hospital.[131] Her fetus died three days later.[132]

Goebert argued that administrative remedies were not truly "available" to her because she did not receive the jail's inmate

123. FRED L. CHEESMAN II, BRIAN OSTROM, & ROGER A. HANSON, NAT'L CTR. FOR STATE COURTS, A TALE OF TWO LAWS REVISITED: INVESTIGATING THE IMPACT OF THE PRISONER LITIGATION REFORM ACT AND THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY, E-8 (2004).

124. Ngo v. Woodford, 403 F.3d 620, 630 (9th Cir. 2005).

125. Schlanger, *supra* note 84, at 1587-90 (characterizing the administrative exhaustion requirement of the PLRA as risking a "babies-and-bathwater" situation).

126. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

127. Goebert v. Lee County, No. 2:04-cv-505-FtM-29DNF, 2005 U.S. Dist. LEXIS 31478, at *1 (D.Fla. Dec. 7, 2005). The grievance procedure adopted by the Florida Department of Corrections closely tracks that of the Federal Bureau of Prisons described *supra* discussion III.A.1. *See* Inmate Grievance Procedure, FLA. ADMIN. CODE ANN §§ 33-103.001-.103.019 (2006), *available at* http://www.flrules.org/gateway/ChapterHome.asp?Chapter= 33-103.

128. *Goebert*, 2005 U.S. Dist. LEXIS 31478, at *1.

129. *Id.* at *4.

130. *Id.* at *5-6.

131. *Id.* at *6-9.

132. *Id.* at *9.

handbook, was repeatedly informed that the jail was out of inmate grievance forms, and personnel wrongly informed her that she was responsible for retaining and paying for outside medical care.[133] Nonetheless, the court found that plaintiff had "failed to fully pursue her administrative remedies,"[134] because she initially complained informally and did not follow the appropriate chain of command.[135] Because "[u]nder the PLRA, [Goebert] had to file an appeal *regardless of whether the relief offered through the administrative procedures was adequate*," the District Court granted the defendants' motion for summary judgment.[136]

Goebert illustrates the fundamental injustice of the administrative exhaustion requirement of the PLRA,[137] as it was written by the legislature[138] and has been interpreted by the Supreme Court.[139] Even when courts, prison officials, and inmates all recognize that so-called administrative "remedies" are all but meaningless,[140] the prisoner plaintiff is forced to jump through time-consuming and ultimately futile hoops in order to justify a court action when the administrative process inevitably fails.[141]

This legal fiction would represent a frustrating Catch-22 for non-incarcerated civilians, but it is especially burdensome for prison plaintiffs who are typically seeking remedies for violations perpetrated by representatives of the very same power structures that formulated the grievance policy and will determine whether or not the complainant has met its requirements.[142] For this reason, the administrative exhaustion requirements present a major challenge for pregnant female inmates seeking to challenge shackling statutes.[143] Inmates who hope to use litigation to force a policy change rather than seek damages for a clear violation of prison policy will have to tackle the same administrative structure that creates and enforces the shackling policy. While an individual prisoner whose rights have been violated

133. *Id.* at *15.
134. *Id.* at *18.
135. *Id.* at *16-17.
136. *Id.* at *18 (emphasis added).
137. Prison Litigation Reform Act, 42 U.S.C. § 1997e (1996).
138. 104th Cong Rec. S14756-14759 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch).
139. *See, e.g.*, Booth v. Churner, 532 U.S. 731 (2001).
140. *See, e.g.*, Moore v. CO2 Smith, 18 F.Supp.2d 1360, 1364 (1998).
141. *Id.*
142. *See, e.g.*, Nei v. Dooley, 372 F.3d 1003, 1005 (2004) (claiming prison officials took retaliatory measures after prisoners filed a grievance against them); Celeste F. Bremer, James R. McCreight, & Michael Thompson, *"Fair and Effective" Prisoner Grievance Systems: Some Practical Suggestions*, 14 ST. LOUIS U. PUB. L. REV. 41, 45 (1994).
143. Rachel Roth, *Searching for the State: Who Governs Prisoners' Reproductive Rights?*, 11 SOC. POL. 411, 433 n.17 (2004).

may be able to find a sympathetic prison official who will approve or pass on her complaint, a blanket policy protest is more likely to be viewed as a threat to the prison order and summarily denied. This does not mean that female inmates cannot or should not attempt to use the judicial process to change shackling policies because of the administrative exhaustion requirements. Prisoners must be prepared to endure a lengthy administrative complaint and appeals process,[144] which has very little likelihood of succeeding.[145] Furthermore, they must be willing and able to study the grievance proceedings requirements carefully and follow them to the letter, lest the slightest clerical or procedural error bar the doors of the courthouse under the draconian requirements of the PLRA.[146]

2. The "Physical Injury" Requirement

In 1994, the plaintiffs in the *Women's Prisoners I* class action suit against the D.C. Department of Corrections successfully argued that shackling female inmates during the third trimester, labor, and delivery was a violation of the Eighth Amendment.[147] The court's analysis in this case was based on subjective and objective standards first set forth in *Wilson v. Seiter*.[148] To meet the objective standard, the plaintiff "must demonstrate a deprivation which amounts to a wanton and unnecessary infliction of pain,"[149] while the subjective standard requires proof that "prison officials acted with 'deliberate indifference' to inmate health or safety."[150] Other suits involving pregnancy and pre-natal living conditions have been based on the "deprivation of medical care" analysis established in *Estelle v. Gamble*.[151] This test also contains objective and subjective components; an inmate must prove that she had a sufficiently serious medical need and that the defendant knew of and was deliberately indifferent to that need.[152]

144. *See* discussion *supra* Part III.A.1.

145. *See, e.g.*, Schlanger, *supra* note 84, at 1591 ("[I]nmate plaintiffs have very, very few successes.").

146. Woodford v. Ngo, 126 S. Ct. 2378, 2402 (2006) (Stevens, J., dissenting).

147. Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 877 F.Supp. 634, 663, 668 (D.D.C. 1994), *vacated in part, modified in part*, 899 F.Supp. 659 (1995).

148. *Id.* (citing Wilson v. Seiter, 501 U.S. 294 (1991)).

149. *Id.* at 663 (citing Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

150. *Id.* at 664 (citing Farmer v. Brennan, 511 U.S. 825 (1994)).

151. Estelle v. Gamble, 492 U.S. 897 (1976); Mary Kate Kearney, DeShaney's *Legacy in Foster Care and Public School Settings*, 41 WASHBURN L.J. 275, 277 (2002).

152. *See* Johnson v. Busby, 953 F.2d 349, 351 (8th Cir. 1991). *Johnson* defines "a 'serious medical need' as 'one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a layperson would easily recognize the necessity for a doctor's attention.'" *Id.*

Clearly, the Eighth Amendment standards as they stood in the mid-1990s were fact-intensive and highly subjective, not to mention an evidentiary challenge to inmates whose medical and other records were in the hands of their courtroom opponents. The 1996 passage of the PLRA, however, altered the specific landscape of Eighth Amendment claims by imposing a second procedural requirement,[153] in addition to the administrative exhaustion section that may well have barred the plaintiffs' claim in *Women Prisoners* I and will certainly prove a challenge for future female inmates fighting the constitutionality of shackling statutes. Part (e) of the PLRA states that "[n]o Federal civil action may be brought by a prisoner . . . for mental or emotional injury . . . without a prior showing of physical injury."[154] While the administrative exhaustion requirement presents a significant procedural challenge for all prison litigants,[155] the physical injury requirement is a substantive prerequisite that could prove especially challenging to women seeking to challenge prison restraint policies.[156]

The PLRA does not define what its drafters meant by "physical injury."[157] Various Circuit Court decisions, however, have dealt with the issue on a case-by-case basis and concluded that "although a de minimis showing of physical injury does not satisfy the PLRA's physical injury requirement, an injury need not be significant to satisfy the statutory requirement."[158] Although this inexact definition leaves a great deal of room for judicial discretion based on the facts, the courts have also agreed that physical pain, on its own, does not meet the § 1997e(e) requirement,[159] but, if paired with lasting physical effects, can support a viable claim.[160] To give contrasting examples of this somewhat chilling calculus, the District Court for the Northern District of Illinois has found that "headaches, insomnia, stress, and

153. Prison Litigation Reform Act, 42 U.S.C. § 1997e(e) (1996) (showing physical injury).

154. 42 U.S.C. § 1997e(e).

155. Chen, *supra* note 88, at 203.

156. Julie M. Riewe, Note, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117, 147 (1997).

157. 42 U.S.C. § 1997e(e).

158. Clifton v. Eubank, 418 F.Supp.2d 1243, 1245 (D Colo. 2006) (citing Mitchell v. Horn, 318 F.3d 523, 534 (3rd Cir. 2003) (finding that "courts of appeals have read 1997e(e) to require a less-than-significant-but-more-than-*de minimis* physical injury as a predicate to allowing the successful pleading of an emotional injury.")); Oliver v. Keller, 289 F.3d 623, 627 (9th Cir. 2002) (finding that "§ 1997e(e) requires a prior showing of physical injury that need not be significant but must be more than *de minimis*."); Harris v. Garner, 190 F.3d 1279, 1286 (11th Cir. 1999) (finding that "the physical injury must be more than de minimis, but need not be significant."); Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999) (finding that "physical injury required by § 1997e(e) must simply be more than *de minimis*").

159. *See supra* note 158.

160. *Clifton*, 418 F.Supp.2d at 1246 (suggesting that "[p]ain paired with allegations of more tangible physical effects . . . satisfy the PLRA's physical injury requirement.").

stomach anxiety are de minimis symptoms" that do not meet the PLRA requirements.[161] Several hours of pain and suffering, however, resulting from a heart attack, did meet the minimum requirements even if there was no lasting cardiac damage.[162]

The PLRA physical injury requirements will likely divide plaintiff-inmates opposing shackling policies into three groups. The first group is comprised of women who have suffered a clear injury directly related to being physically restrained during pregnancy, labor, or childbirth. These women will have a much greater chance of success via litigation than either women who sustained other types of injuries or inmates who hope to prevent future physical injury by fighting the policies themselves.

The 2005 case of Talisa Pool, an inmate at the Sebastian Detention Center in Sebastian County, Arkansas, suggests that women who can prove that they suffered injuries as a result of being shackled may be able to collect damages under § 1983 despite the heightened PLRA requirements.[163] Pool, who was serving a ten-year sentence for manslaughter, realized that she was pregnant while she was on bond pending her appeal.[164] At the time she began serving her sentence, she reported on the standard medical form used during booking that she was pregnant and, on the particular day she was being processed, had begun to "pass[ ] blood clots."[165] Officials denied Pool's requests to be transported to the emergency room and the nurse who examined her instructed her to rest with her feet elevated.[166] Over the course of the next three days, Pool began to bleed heavily, experienced painful cramping, and did not participate in recreation or attend communal meals.[167] Denied a follow-up medical examination, she was transferred by bus to a new detention facility.[168] During booking at the new facility, the booking officer noticed that Pool was bleeding through her uniform, but despite Pool's vocalized concerns that she was miscarrying and her requests to be taken to a hospital, she was simply instructed to shower and put on a new uniform.[169] Shortly after doing so, Pool was informed that she was being transferred back to the original facility and changed back into her bloody

161. *Id.* at 1246 (citing Cannon v. Burkybile, No. 99 C 4623, 2000 WL 1409852, at *6 (N.D.Ill. Sept. 21, 2000)).
162. Sealock v. Colorado, 218 F.3d 1205, 1210 (10th Cir. 2000).
163. Pool v. Sebastian County, Ark., 418 F.3d 934, 934-35 (8th Cir. 2005).
164. *Id.* at 937.
165. *Id.* at 938.
166. *Id.*
167. *Id.*
168. *Id.* at 938-39.
169. *Id.* at 939.

uniform.[170] Not until she returned to the Sebastian Detention Center was she examined again by a nurse, who placed her in an observation cell.[171] Despite being told by the nurse that a physician would be meeting with her, Pool testified at trial that she spent the next two nights in the observation cell and never met with a doctor.[172] Shortly after midnight on the second night, Pool miscarried her four-month-old fetus.[173]

In addition to her own testimony, Pool's account was bolstered by the affidavit of a female deputy that stated the deputy had been on duty the night of Pool's miscarriage.[174] According to the affidavit, the deputy had been aware that Pool had been bleeding and in pain for several days, and had discussed the situation with other prison officials.[175] Further, the deputy testified in the affidavit that she had attempted to show her supervisor one of Pool's used sanitary pads and had been sharply rebuffed.[176]

The court found that Pool's case survived the defendant's motion for summary judgment based on qualified immunity.[177] Citing *Jolly v. Knudsen* and *Johnson v. Busby*, the Eighth Circuit Court of Appeals ruled that "Pool simply must prove that she suffered from an objectively serious medical need and that Appellants knew of the need yet deliberately disregarded it. A serious medical need is 'one that is so obvious that even a layperson would easily recognize the necessity for a doctor's attention.'"[178]

The court rejected two major arguments put forth by the defendant. First, prison officials argued that Pool did not show that her

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170. *Id.*

171. *Id.*

172. *Id.*

> According to Pool, on the second day in the observation cell, "everything just started going crazy." Pool was in such pain she was balled up in a knot. . . . She was screaming, hollering and beating on the wall to try to get the deputies to come and see her.
>
> When the deputies came, she told them she had bled in her clothes and that she needed to see the doctor. According to Pool, the deputies . . . told her that there were no doctors, that they could not see any blood, and that there was nothing wrong with her and she just needed to lie down and put her feet back up. The entire time she was in the observation cell, no one actually entered the cell until after she miscarried.

Id.

173. *Id.* Pool was then transported by ambulance to a local medical center, where she underwent surgery to remove the placenta. *Id.*

174. *Id.* at 940.

175. *Id.*

176. *Id.* According to the affidavit, "Deputy Griffin's supervisor told her to quit being an inmate-lover, to toughen up and to 'not let these people get to you.' The supervisor also commented: 'F[* * *] her [Pool], she's going to prison and doesn't need a baby anyway.'" *Id.*

177. *Id.* at 945.

178. *Id.* at 944 (internal citation omitted).

health, rather than the health of her fetus, had been put at sufficient risk to meet the "serious medical need" requirement.[179] Second, they argued that because Pool was not visibly pregnant, her condition was not obvious enough to meet the objective standard.[180] The court rejected both of these arguments:

> Although Pool may not have been "showing," Pool informed prison officials that she was pregnant, bleeding and passing blood clots. The record also shows that Pool was in extreme pain from the cramping, so much so that it affected her ability to perform routine daily functions such as eating and showering.[181]

The Pool decision is significant for several reasons. First, it establishes that a female inmate can survive a motion for summary judgment when her § 1983 action is based on miscarriage;[182] the defendants' argument that the injuries were suffered by Pool's fetus, rather than by Pool herself, was rejected.[183] Second, it illustrates the "deliberate indifference" standard, here exhibited by the Sebastian County officials' awareness of Pool's pregnancy from her time of entry (based on her booking forms) and worsening condition over the course of several days.[184] Undoubtedly, the affidavit submitted by a prison official served as strong corroborating evidence. And finally, it sets a high bar for "physical injury" requirements related to pregnancy. According to the testimony of Pool and Deputy Griffin, Pool suffered debilitating cramps.[185] The court was careful to note that Pool's condition prevented her from "perform[ing] routine daily functions,"[186] and also provided a detailed account of the days of blood loss that culminated in a second-trimester miscarriage, the emergency transportation to the hospital, and the surgical removal of the placenta.[187] Women who hope to use Pool as a "template" for § 1983 litigation opposing shackling regulations can do so, but likely only if they have already suffered serious injury as a result of being physically restrained during pregnancy or childbirth.[188] It underlines the

179. *Id.*
180. *Id.*
181. *Id.* at 944-45.
182. *Id.* at 937.
183. *Id.* at 944.
184. *Id.* at 945.
185. *Id.* at 938, 940.
186. *Id.* at 945.
187. *Id.* at 938-39.
188. Based on the standards outlined in *Clifton*, labor pain alone, even if enhanced by the discomfort of physical restraints, would not rise to the level of an Eighth Amendment violation. Clifton v. Eubank, 418 F.Supp.2d 1243 (D. Colo. 2006) (requiring more than a de minimis showing of physical injury). However, injuries such as those sustained by

importance of notifying prison officials of medical issues as soon as possible, to establish deliberate indifference. More broadly, complaints lodged against shackling regulations in general, even when they are not tied to medical problems or physical injuries that rise to the standard of Eighth Amendment "sufficient seriousness," could be filed in order to build a paper trail supporting an individual's physical injury claims at a later date.[189] Finally, the deference the court in Pool gave to Deputy Griffin's affidavit suggests the importance of institutional corroboration of inmate accounts.[190] This is clearly a challenge, but female guards may be more sympathetic to inmates experiencing a quintessentially female experience like pregnancy or labor.

The physical injury requirements of the PLRA will most likely bar lawsuits brought by women who cannot document "lasting" or "serious" physical injury.[191] The Women's Prison I case resulted in a court order barring shackling during labor and delivery and limiting the use of restraints during the third trimester to single leg shackles during transportation.[192] This decision was based largely on an argument that the use of physical restraints on pregnant inmates was an affront to human dignity and could potentially lead to future injuries.[193] Such reasoning would not satisfy the PLRA requirements,[194] and so female inmates hoping to pre-empt the indignity, discomfort, and possible serious injuries that might arise from experiencing pregnancy and childbirth in shackles are unlikely to find success in the courtroom.

IV. POLITICAL REMEDIES & POLICY SOLUTIONS: ALTERNATIVES TO LITIGATION

A. Anti-Shackling Statutes at the State Level

Traditionally, prisoners could depend on litigation as the primary vehicle for fighting breaches of civil rights perpetrated against them

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Shawanna Nelson, an Arkansas inmate profiled by *The New York Times*, including "lasting back pain and damage to her sciatic nerve," have a better chance of at least surviving a summary judgment motion. *See* Liptak, *supra* note 4.

189. Goebert v. Lee County, No. 2:04-cv-505-FtM-29DNF, 2005 U.S. Dist. LEXIS 31478, at *18 (D.Fl. Dec. 7, 2005).

190. *Pool*, 418 F.3d at 940-41.

191. Prison Litigation Reform Act, 42 U.S.C. § 1997e(e) (1996); *Clifton*, 418 F.Supp.2d at 1246 (suggesting pain coupled with lasting physical effects can support a viable claim).

192. Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 877 F.Supp. 634, 668 (D.D.C. 1994).

193. *Id.*

194. 42 U.S.C. § 1997e(e) (requiring physical injury).

by the state or federal government.[195] Prisoners were not guaranteed success, but like non-incarcerated citizens, prisoners could rely on § 1983 as a mechanism to enforce the Constitution through the courts.[196] However, the passage of the PLRA, with additional administrative exhaustion and physical injury proof requirements,[197] requires prisoners to meet a much higher standard than non-incarcerated plaintiffs.

For female inmates and their advocates hoping to limit or ban the use of physical restraints during pregnancy and childbirth, the physical injury requirement of the PLRA presents an especially daunting obstacle. Ultimately, anti-shackling measures are policy-driven and preventative: proponents argue shackling pregnant inmates is an affront to basic dignity,[198] an unnecessary measure against a group of inmates who are much less likely to be violent or flight risks,[199] and creates the potential for future physical injury.[200] None of these arguments overcome the inflexible physical injury requirement set forth by the PLRA;[201] in other words, prisoners must wait to be physically disabled rather than attacking shackling regulations in advance. In *Jones v. Bock*, the Roberts Court signaled its discomfort with the administrative exhaustion component of the PLRA, but also an unwillingness to supersede the wisdom of the legislature.[202]

Prisoners and advocates in three states — California, Illinois, and New York — chose to forego litigation in favor of a legislative solution.[203] In 2000, the Illinois legislature amended the state's Unified Code of Corrections to add an anti-shackling provision,[204] at least in

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195. Kristin L. Burns, Note, *Return to Hard Time: The Prison Litigation Reform Act of 1995,* 31 GA. L. REV. 879, 883 (1997).

196. *Id.* at 884-85.

197. 42 U.S.C. § 1997e(e).

198. *See* Ayelet Waldman, *Mothers in Chains: Why Keeping U.S. Women Prisoners in Shackles During Labor and Delivery is the Real Crime Against Society*, SALON, May 23, 2005, http://dir.salon.com/story/mwt/col/waldman/2005/05/23/prison/index.html.

199. *See* Liptak, *supra* note 4. Ms. Lieber, a California assemblywoman stated, "[t]hese women are mostly in for minor crimes and don't pose a flight risk . . . ." *Id.*

200. Women Prisoners of D.C. Dep't of Corr. V. District of Columbia, 877 F.Supp. 634, 668 (D.D.C. 1994).

201. 42 U.S.C. § 1997e(e).

202. Jones v. Bock, 127 S. Ct. 910, 926 (2007).

203. *See* Liptak, *supra* note 4 (stating that the New York Legislature is considering a bill similar to those enacted by California and Illinois).

204. Unified Code of Corrections, 730 ILL. COMP. STAT. 5/3-6-7 (2000):

> [W]hen a pregnant female committed person is brought to a hospital from an Illinois correctional center for the purpose of delivering her baby, no handcuffs, shackles, or restraints of any kind may be used during her transport to a medical facility for the purpose of delivering her baby. Under no circumstances may leg irons or shackles or waist shackles be used on any pregnant female committed person who is in labor. Upon the pregnant

part because of lobbying efforts by prison advocacy groups such as Chicago Legal Advocacy for Incarcerated Mothers (CLAIM).[205]

In 2005, the California Legislature followed suit by passing an anti-shackling provision.[206] Prior to the passage of the bill, the California Department of Corrections and Rehabilitation policy was to shackle women to their hospital beds during labor and throughout their hospital stay.[207] At the time, a Department spokesperson cited public safety concerns: "Basically, we don't want them to escape — that's the bottom line."[208] Citing the United Nations policy against shackling pregnant prisoners and the support of industry organizations such as the California Correctional Peace Officers Association and the American Public Health Association, the legislature chose to ban the practice.[209] A current bill pending in the New York State legislature would accomplish the same goals.[210]

The Illinois and California acts, as well as the pending New York bill, do not place the public or prison personnel at risk.[211] Nonetheless, corrections officers justify shackling pregnant inmates in two major ways: 1) physical restraints restrict prisoners' movements in a way that protects medical personnel and prison officers,[212] and 2) prisoners

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female committed person's entry to the hospital delivery room, a correctional officer must be posted immediately outside the delivery room.

205. Chicago Legal Advocacy for Incarcerated Mothers, http://claim-il.org.

206. CAL. PENAL CODE § 5007.7 (2005).

207. Medical News Today, California Legislature Considering Bill That Would Ban Shackling of Prison Inmates During Childbirth (Aug. 2005), http://www.medicalnewstoday.com/medicalnews.php?newsid=28474 (last visited Jan. 15, 2008).

208. *Id.*

209. *Id.*; CAL. PENAL CODE § 5007.7:

> Pregnant inmates temporarily taken to a hospital outside the prison for the purposes of childbirth shall be transported in the least restrictive way possible, consistent with the legitimate security needs of each inmate. Upon arrival at the hospital, once the inmate has been declared by the attending physician to be in active labor, the inmate shall not be shackled by the wrists, ankles, or both, unless deemed necessary for the safety and security of the inmate, the staff, and the public.

210. Assemb. B. 4105, 2007 Leg., 230th Sess. (N.Y. 2007). The bill pending in the New York State Assembly can be read as follows:

> Provides for the care and custody of pregnant female inmates before, during and after delivery; prohibits the use of restraints of any kind from being used during the transport of such female prisoner to a hospital for the purpose of giving birth, unless such prisoner is a flight risk whereupon handcuffs may be used; prohibits the use of any restraints during labor; requires the presence of corrections personnel during such prisoner's transport to and from the hospital and during her stay at such hospital.

Id.

211. *See, e.g.*, Press Release, Cory Jasperson, Office of Assemblywomen Sally Lieber, Governor Signs Bill to End Shackling of Women During Labor and Delivery (Oct. 7, 2005), *available at* http://democrats.assembly.ca.gov/members/a22/Press/p222005023.htm.

212. Liptak, *supra* note 4.

are prevented from escaping.[213] All three pieces of legislation contain clauses that would allow prison officials or attending physicians to mandate the use of limited physical restraints in the case of a specific health or security risk.[214] The legislators in Illinois, California, and New York, however, have recognized an important policy paradigm shift: shackling pregnant inmates should be a rare exception rather than the norm, and the decision to use physical restraints on a woman in active labor must be made carefully and for justifiable reasons.

Rather than waiting until an injury has been sustained and hoping their claims can overcome the PLRA procedural hurdles, prison inmates would be better served by legislation, or at least written state corrections policies, that ban shackling inmates during labor and delivery. Unfortunately, prisoners as a group are unpopular with the public,[215] politically powerless,[216] and legally unsophisticated.[217] Corrections policies, as a whole, are carried out, if not in secret, certainly out of public view. The passage of anti-shackling statutes, such as those in Illinois, California, and New York, along with the continued public advocacy by human rights groups and media coverage such as that which accompanied a recent Amnesty International study,[218] could go a long way to create a groundswell of support for formal bans on unnecessarily permissive restraint policies.

B. "Catch the Hope": Pre-Empting Prisoner Litigation

In 1985, in response to numerous inmate complaints, the Massachusetts Correctional Legal Services initiated litigation

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213. *Id.*

214. 730 ILL. COMP. STAT. 5/3-6-7(2000); CAL. PENAL CODE § 5007.7; Assemb. B. 4105, 2007 Leg., 230th Sess. (N.Y. 2007). It is problematic that none of the legislation specifically outlines who is responsible for making the final decision and at what point — before or during labor — the decision must be made. Kim White, Regional Director, Fed. Bureau of Prisons, Address at the William and Mary Journal of Women and the Law Symposium: Women in Prisons (Feb. 24, 2007). Corrections departments themselves might be better equipped to make these kinds of policy determinations, while legislators may be reluctant to micromanage their state prison systems in this way. *Id.* According to the Mid-Atlantic Regional Director of the Federal Bureau of Prisons, women are only shackled if the warden of their facility has previously determined that they represent a significant risk of flight or violence. *Id.* Because most of the women incarcerated in the federal prison system are serving time for drug or other minimum security offenses, she estimated that "99.9% of the time," women are not physically restrained during transportation or labor itself. *Id.*

215. Chen, *supra* note 88, at 204.

216. *Id.* at 203-04.

217. *See, e.g., id.* at 225-27 (discussing the difficulty one prisoner plaintiff encountered in determining whether there was a grievance process and how to exhaust it).

218. AMNESTY INTERNATIONAL, "NOT PART OF MY SENTENCE," *supra* note 1.

against the Massachusetts Correctional Institute at Framingham.[219] MCI-Framingham is a medium-security prison and the only all-female correctional facility in Massachusetts;[220] the complaints that made up the basis for what became *McDonald v. Fair* related to inadequate prenatal medical care and living conditions, shackling during labor and delivery, and lack of postnatal visitation time between mothers and infants.[221] While the *McDonald* case "lingered in discovery,"[222] a coalition of prisoners' rights groups joined with a community health center to found "Catch the Hope" (CTH), a program that would provide adequate prenatal and postnatal care at MCI-Framingham, within the limitations of a correctional environment.[223]

The program's goals included "provid[ing] comprehensive case services management to pregnant and postpartum inmates . . . assur[ing] identification of pregnancy [and] . . . promot[ing] optimal, healthy births."[224] After two years of operation, the final federal report before the program was transferred entirely to state control and funding, suggesting that, with almost one hundred percent participation and improved identification, monitoring, and birth rates, CTH had been a resounding success.[225]

CTH works with pregnant inmates on a number of levels, from careful medical screening, prenatal care, substance abuse counseling, and birth preparation,[226] to the Labor and Birth Support Program, which assigns professional birthing coaches to inmates during pregnancy, through childbirth, and during post-natal follow-up counseling;[227] and finally, to post-natal custody placement programs designed to prepare mothers for separation as well as reuniting at the end of their term of incarceration.[228]

Massachusetts was driven to support the CTH program largely because of fears of litigation, like the pending *McDonald* case, and methadone licensure requirements.[229] When *McDonald* was settled in 1992, the terms of the court order dealt with provisions for medical

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219. JILL L. FELDMAN, MCDONALD V. FAIR AND CATCH THE HOPE: UNDERSTANDING THE RELATIONSHIP BETWEEN INSTITUTIONAL REFORM LITIGATION AND COMMUNITY ACTIVISM 2, 3 (2002), *available at* http://clearinghouse.wustl.edu/chDocs/studies/STUDY_PC-MA-0001-Feldman.pdf.

220. *Id.*

221. *Id.* at 3.

222. *Id.*

223. *Id.* at 3-4.

224. Romeo, *supra* note 27, at 418.

225. *Id.* at 419.

226. *Id.* at 420-21.

227. *Id.* at 424.

228. *Id.* at 424-25.

229. *Id.* at 419.

screening, maternity clothes, prenatal nutrition, and access to social services, as well as limitations on the use of restraints.[230] These mirrored almost exactly those policies already in place at CTH.[231] The success of "Catch the Hope," although on a small scale, suggests that holistic programs designed to meet the needs of pregnant prison inmates not only improve the overall physical and mental health of prisoners and their children,[232] but could pre-empt the drawn-out and expensive prisoner litigation process.

CONCLUSION

> It is ugly to be punishable, but there is no glory in punishing. Hence that double system of protection that justice has set up between itself and the punishment it imposes. Those who carry out the penalty tend to become an autonomous sector; justice is relieved of responsibility for it by a bureaucratic concealment of the penalty itself.[233]

It has been remarkably easy for the American public to forget about the record number of fellow citizens incarcerated in local, state, and federal prisons.[234] Lawmakers focus on the issue of prisons and prisoners only when it is politically advantageous to cultivate a reputation for being tough on crime.[235] Aside from the occasional protest by a human rights or prisoner advocacy groups, the unspoken rule guiding the American attitude towards the incarcerated is "out of sight, out of mind."[236]

Perhaps this willful ignorance explains why a barbaric policy that allows prison officials in the vast majority of state prison systems and the Federal Bureau of Prisons to shackle female offenders during late stages of pregnancy, labor, and childbirth has remained on the books well into the 21st century.

Until the mid-1990s, prisoners seeking redress for civil rights violations, such as inhumane and senseless use of physical restraints, were most likely to turn to § 1983 litigation.[237] However, since the passage of the Prison Litigation Reform Act in 1996, prisoner plaintiff

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230. *Id.* at 420.

231. *Id.*

232. *See id.* at 425.

233. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 10 (Alan Sheridan trans., 2d ed., Vintage Books, 1995) (1978).

234. *See* Chen, *supra* note 88, at 204.

235. *See, e.g.*, Peloso, *supra* note 89, at 1461 n.8 (providing examples of political candidates criticizing inmates).

236. *Id.* at 1495 n.261.

237. *See* Riewe, *supra* note 156, at 122-23.

access to the courts has been limited by heightened procedural and evidentiary requirements that do not apply to the general public.

Women who have already been seriously physically injured as a result of the use of shackles during pregnancy and childbirth may still be able to use the court system to obtain monetary damages. However, in order to prevent future injury or to simply protest the practice as a human rights violation, female prisoners and their advocates will most likely have to turn to alternative methods of relief. In Illinois, California, and New York, state legislatures have severely limited the ability of prison officials to shackle pregnant or birthing prisoners. Meanwhile, programs like "Catch the Hope," implemented in the Massachusetts prison system, could benefit both state officials seeking to clear court dockets of prisoner litigation and female inmates whose incarceration status should neither limit their access to appropriate prenatal medical care nor force them to give birth in chains.

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