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# Patrolling Pregnant Immigrant Detainees' Bodies

Alexa Rollins<sup>†</sup>

## INTRODUCTION

E heard, “[we are] not a hospital and [we are not] doctors” as she lay for eight days bleeding out and crying as she miscarried, losing her son during the fourth month of her pregnancy.<sup>1</sup> Emma heard, “No, don’t tell me anything. You all say the same thing,” as she tried to explain that she was a pregnant as a result of rape.<sup>2</sup> Teresa heard no response as she complained on several different occasions that she was in pain, that she was bleeding profusely despite being four months pregnant, and that she needed to go to a hospital.<sup>3</sup>

What do E, Emma, and Teresa have in common? They were all pregnant immigrant detainees confined to United States detention centers who were shackled around their hands, legs, and stomach.

In December 2017, the Trump administration instituted a Department of Homeland Security policy allowing for the detention of pregnant women in their first and second trimesters.<sup>4</sup> The new Immigration

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<sup>1</sup> Ema O’Connor & Nidhi Prakash, *Pregnant Women Say They Miscarried in Immigration Detention and Didn’t Get the Care They Needed*, BUZZFEED NEWS (July 9, 2018), <https://www.buzzfeednews.com/article/emaconnor/pregnant-migrant-women-miscarriage-cpb-ice-detention-trump> [<https://perma.cc/P8BQ-H7U8>].

<sup>2</sup> American Civil Liberties Union et al., *Re: U.S. Immigration and Customs Enforcement’s Detention and Treatment of Pregnant Women*, AMERICAN IMMIGRATION COUNCIL, 7–8 (2017), [https://www.americanimmigrationcouncil.org/sites/default/files/general\\_litigation/complaint\\_increasing\\_numbers\\_of\\_pregnant\\_women\\_facing\\_harm\\_in\\_detention.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_increasing_numbers_of_pregnant_women_facing_harm_in_detention.pdf) [<https://perma.cc/W9JP-QPGM>].

<sup>3</sup> *Id.* at 8–9.

<sup>4</sup> *ICE Directive 11032.3: Identification and Monitoring of Pregnant Detainees*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 1 (Dec. 14, 2017), [https://www.ice.gov/sites/default/files/documents/Document/2018/11032\\_3\\_PregnantDetaineP.pdf](https://www.ice.gov/sites/default/files/documents/Document/2018/11032_3_PregnantDetaineP.pdf) [<https://perma.cc/RL3K-5HD4>]. See also Victoria López, *Working to Uncover How ICE Treats Pregnant Women in Detention*, ACLU: AMERICAN CIVIL LIBERTIES UNION (May 3, 2018), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/working-uncover-how-ice-treats-pregnant-women> [<https://perma.cc/ZL2E-K>].

and Customs Enforcement (ICE) directive, which failed to be announced until March despite its earlier implementation, ended the Obama administration's August 2016 policy to refrain from detaining pregnant women whose immigration cases are pending except in extreme circumstances.<sup>5</sup> The 2016 policy change was prompted by ICE's acknowledgment of the larger consensus among humanitarian and medical organizations that shackling and other forms of mistreatment are harmful to the health of expectant women and that its detention centers are not prepared to meet their unique medical needs.<sup>6</sup> Due to President Trump's executive orders on immigration,<sup>7</sup> though, this reasonable rationale has been swept aside in favor of incarcerating pregnant women who have yet to reach their third trimester.<sup>8</sup> The ICE directive has also eliminated reporting procedures that previously allowed outside agencies to monitor ICE's detention facilities and the treatment of women.<sup>9</sup>

Furthermore, despite the new policy's directions not to hold women in their third trimester and to provide appropriate medical care, pregnant detainees' testimonies prove that this portion of the directive is being ignored.<sup>10</sup> In fact, pregnant detainees often are not given proper medical care, are physically and psychologically mistreated, and are shackled around the stomach.<sup>11</sup> The treatment within detention centers is often re-traumatizing for these women, especially since many of these women's pregnancies are a result of sexual assaults.<sup>12</sup>

Part I of this Comment describes in more detail the physical and mental suffering inflicted on pregnant detainees during their time in detention centers. It further discusses the ICE detention standards and the 2017 ICE directive's contravention of them. Part II goes on to review 42 U.S.C. § 1983<sup>13</sup> claims brought forth by past prisoners, alleging vio-

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XGN]; Liz Jones, *Pregnant and Detained*, NPR: NATIONAL PUBLIC RADIO (Apr. 6, 2018), <https://www.npr.org/2018/04/05/599802820/pregnant-and-detained> [<https://perma.cc/9E84-377W>]; O'Connor, *supra* note 1.

<sup>5</sup> ICE Policy 11032.2: Identification and Monitoring of Pregnant Detainee, U.S IMMIGRATION AND CUSTOMS ENFORCEMENT, 1 (Aug. 15, 2016), [https://www.ice.gov/sites/default/files/documents/Document/2016/11032.2\\_IdentificationMoIdentificationMonitoringP.pdf](https://www.ice.gov/sites/default/files/documents/Document/2016/11032.2_IdentificationMoIdentificationMonitoringP.pdf) [<https://perma.cc/5L4B-VF58>]. See also Jones, *supra* note 4; O'Connor, *supra* note 1.

<sup>6</sup> López, *supra* note 4.

<sup>7</sup> See Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 30, 2017); Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017); Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

<sup>8</sup> O'Connor, *supra* note 1.

<sup>9</sup> López, *supra* note 4.

<sup>10</sup> O'Connor, *supra* note 1.

<sup>11</sup> See *e.g.*, *id.*

<sup>12</sup> At least three of the ten women who filed complaints testified to becoming pregnant as a result of sexual assaults, whether in their home country or on their journey into the United States. American Civil Liberties Union et al., *supra* note 2, at 6–9.

<sup>13</sup> 42 U.S.C. § 1983 (2012).

lations of their Eighth Amendment rights under the deliberate indifference standard. The Comment goes on to recognize that pretrial detainees, though they are non-convicted, have been tried by courts under this same subjective standard. It points out, though, that a recent United States Supreme Court decision, *Kingsley v. Hendrickson*,<sup>14</sup> applied an objective standard to a pretrial detainee's excessive force claims. In turn, it has led to a circuit split in which the Ninth, Second, and Seventh Circuits interpret this objective standard to extend to all Fourteenth Amendment claims while the Fifth, Eleventh, and Eighth Circuits do not. Part III then evaluates how international law, through its conventions and cases, has weighed in on the treatment of detainees and, thus, might affect courts' decision making.

Due to the broad wording of *Kingsley* and the similar injuries, both physical and constitutional, of excessive force and other Fourteenth Amendment claims, this Comment argues in Part IV that courts should interpret *Kingsley* to apply the objective standard to all Fourteenth Amendment, § 1983 claims of pretrial detainees. This reading not only is backed up by the Court's decision in *Kingsley*, but also will provide a more favorable standard for pretrial detainees. Part V further asserts that international law, especially relevant given that pregnant detainees are foreign nationals, supports this assertion and should be used by courts as persuasive authority. Finally, Part VI of this Comment responds to counterarguments by contending that current and pending domestic laws do not apply to or adequately protect pregnant pretrial detainees.

Given the increasing number of pregnant detainees within U.S. detention centers,<sup>15</sup> this inhumane treatment needs to be legally addressed as soon as possible. In fact, the #MeToo Movement demands that this treatment of pregnant women be stopped and that their rights and dignity be acknowledged. This Comment concludes, then, that the best course of action courts can take is to extend the *Kingsley* decision to Fourteenth Amendment claims other than excessive force. Especially in light of the support provided by international law, such an interpretation not only is legally correct but also would provide justice for pregnant immigrant detainees, who should have never been mistreated or shackled in the first place.

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<sup>14</sup> 135 S. Ct. 2466 (2015).

<sup>15</sup> By April 2018, 506 pregnant women had already been detained since December's policy reversal. Compare this to 292 pregnant women detained between January and May of 2017. Jones, *supra* note 4.

## I. AN OVERVIEW OF ICE DETENTION CONDITIONS, STANDARDS, AND DIRECTIVES

### A. Physical and Mental Harms to Pregnant Detainees

Pregnant detainees, who are often asylum seekers fleeing violence in their own countries, have shared similar accounts of inadequate medical attention and mistreatment. They report detention officers ignoring their requests for or delaying medical care, even when they are in severe pain, bleeding out, or miscarrying.<sup>16</sup> Detention staff also failed to refer women with high-risk pregnancies to specialists.<sup>17</sup> When women are given medical attention, their physicians often fail to inquire about their physical or mental state and to provide them with prenatal vitamins.<sup>18</sup> Due to this inadequate health care, pregnant detainees report having headaches, abdominal pain, weakness, nausea, and vomiting.<sup>19</sup>

Additionally, women attest that the detention centers are overcrowded, the food makes them nauseous, the mattresses, if any, are thin, and viruses, such those causing the flu and diarrhea, are rampant.<sup>20</sup> Emma, mentioned in the introduction, said that she could not sleep at the facility due to the crying of the detained children.<sup>21</sup>

In addition, shackling of pregnant detainees persists despite being a dangerous practice that poses unacceptable health risks to expectant mothers and children.<sup>22</sup> Restraints can leave deep gashes on expectant mothers' ankles, bruise their abdomens, and decrease their stability, which increases their likelihood of falling, harming themselves or their child, and miscarrying.<sup>23</sup> During labor, shackling prevents physicians

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<sup>16</sup> American Civil Liberties Union et al., *supra* note 2, at 5. For example, Teresa, mentioned in the Introduction, eventually miscarried due to lack of medical attention and was later denied any pain relief medication, causing her to have headaches and dramatically lose weight. *Id.* at 9.

<sup>17</sup> *Id.*

<sup>18</sup> One doctor even failed to give a twenty-four-year-old Honduran her vaccinations; instead, he gave them to her five-year-old daughter who had already received them. *Id.* at 7, 12.

<sup>19</sup> See, e.g., López, *supra* note 4. See also Jones, *supra* note 4 (recounting Jacinta Morales' similar detention conditions that eventually led to her miscarriage). It should be noted that, aside from nausea and vomiting, these are not common pregnancy symptoms. Furthermore, these women reported being nauseous and vomiting after being detained. See *What Are Some Common Signs of Pregnancy?*, NICHD: EUNICE KENNEDY SHRIVER NATIONAL INSTITUTE OF CHILD HEALTH AND HUMAN DEVELOPMENT (2018), <https://www.nichd.nih.gov/health/topics/pregnancy/condition-info/signs> [<https://perma.cc/ZGY6-FQYS>].

<sup>20</sup> American Civil Liberties Union et al., *supra* note 2, at 6, 7, 11.

<sup>21</sup> *Id.* at 8.

<sup>22</sup> See O'Connor, *supra* note 1; Hilary Hammell, *The International Human Right to Safe and Humane Treatment During Pregnancy and a Theory for Its Application in U.S. Courts*, 33 WOMEN'S RTS. L. REP. 244, 250 n.49 (2012) (citing a Human Rights Watch report that found pregnant women in immigration detention are routinely shackled.).

<sup>23</sup> See Committee on Health Care for Underserved Women, *Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (Nov. 2011),

from safely assisting pregnant women, limits women's critical need to move during labor, and causes complications such as hemorrhaging and decreased fetal heart rate.<sup>24</sup> It may also delay a woman's caesarian section, which could cause permanent brain damage to the child.<sup>25</sup> Post-partum shackling may prevent women from healing properly and breast-feeding.<sup>26</sup>

Pregnant women's mental health is endangered in detention as well. The lack of access to health care, the physical harms suffered, the separation from their families, and the uncertainty of immigration proceedings leave pregnant detainees severely stressed. Indeed, most women have attested to feeling isolated, depressed, and anxious.<sup>27</sup> Many pregnant detainees are also survivors of abuse and are either fleeing their abuser or are pregnant due to sexual assault.<sup>28</sup> They often find the mistreatment in the detention facilities and the preparation for a credible fear interview<sup>29</sup> with an asylum officer to be re-traumatizing.<sup>30</sup> All interviewed pregnant detainees worried that this mental pressure adversely affected their pregnancies; this fear of stress thus causes pregnant detainees to be more stressed.<sup>31</sup> Acute stress during pregnancy, especially in the final trimester, could then lead to preterm births,<sup>32</sup> which often lead to higher rates of child death or disability.<sup>33</sup>

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tee-on-Health-Care-for-Underserved-Women/co511.pdf?dmc=1&ts=20181030T0057284577 [https://perma.cc/A4SK-XHYM]; The ACLU Reproductive Freedom Project and ACLU National Prison Project, *ACLU Briefing Paper: The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails & Youth Detention Centers*, ACLU: AMERICAN CIVIL LIBERTIES UNION, 3 (2018), [https://www.aclu.org/files/assets/anti-shackling\\_briefing\\_paper\\_stand\\_alone.pdf](https://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf) [https://perma.cc/9GDZ-G265].

<sup>24</sup> See Committee on Health Care for Underserved Women, *supra* note 23; United Nations Office on Drugs and Crime, *Handbook on Women and Imprisonment* 20 (2nd ed. 2014). See also The ACLU Reproductive Freedom Project and ACLU National Prison Project, *supra* note 23, at 4.

<sup>25</sup> See Committee on Health Care for Underserved Women, *supra* note 23; United Nations Office on Drugs and Crime, *Handbook on Women and Imprisonment* 20 (2nd ed. 2014); see also The ACLU Reproductive Freedom Project and ACLU National Prison Project, *supra* note 23, at 4.

<sup>26</sup> See Dana L. Sichel, *Giving Birth in Shackles: A Constitutional and Human Rights Violation*, 16 AM. U. J. GENDER SOC. POL'Y & L. 223, 225 (2007); The ACLU Reproductive Freedom Project and ACLU National Prison Project, *supra* note 23, at 3 (citing Dr. Patricia Garcia's statement to the Chicago Legal Aid to Incarcerated Mothers in December 1998).

<sup>27</sup> See American Civil Liberties Union et al., *supra* note 2, at 5–12.

<sup>28</sup> American Civil Liberties Union et al., *supra* note 2, at 2, 6–9.

<sup>29</sup> This is an interview with an asylum officer to establish a credible fear of persecution. American Civil Liberties Union et al., *supra* note 2, at 2.

<sup>30</sup> For example, a twenty-eight-year-old from Honduras attested to the traumatic preparation for her credible fear interview in which she was forced to disclose her history of domestic and sexual violence in detail. American Civil Liberties Union et al., *supra* note 2, at 6.

<sup>31</sup> *Id.* at 5.

<sup>32</sup> This is the testimony of Sera Bonds, founder and CEO of Circle of Health International, who has cared pregnant women after they have been released from detention centers. Madhuri Sathish, *Pregnant Immigrants Are Being Shackled at the Border & Lawmakers Want to End That Practice*, BUSTLE (July 26, 2018), <https://www.bustle.com/p/pregnant-immigrants-are-being-shackled-at-the-border-lawmakers-want-to-end-that-practice-9892600> [https://perma.cc/L6RB-HRDY].

<sup>33</sup> Disabilities include “breathing problems, feeding difficulties, cerebral palsy, developmental

## B. ICE Standards and Directives

To deter such harms, medical organizations<sup>34</sup> have drafted pregnancy-related care standards to guide prisons and jails. In addition to condemning the shackling of pregnant women, they recommend thoroughly documenting all pregnancies and the care provided, screening and counseling women, referring high-risk pregnancies to the appropriate physicians, and providing essential prenatal care.<sup>35</sup>

ICE adopted the medical organizations' standards in the 2011 ICE Performance Based National Detention Standard (PBNDS) on Medical Care for Women. ICE acknowledges that pregnancy constitutes a special vulnerability and may put detainees at a higher risk for victimization or assault.<sup>36</sup> Detention centers must provide prenatal care and counseling "inclusive of, but not limited to: nutrition, exercise, complications of pregnancy, prenatal vitamins, labor and delivery, postpartum care, lactation, family planning, abortion services, and parental skills education."<sup>37</sup> Detention centers must also offer pregnant detainees "temperature-appropriate" clothing and blankets, beds in their holding cells, and more food during meals.<sup>38</sup> The PBNDS also bars the shackling of women who are pregnant or recovering post-partum, "absent truly extraordinary circumstances."<sup>39</sup>

Following the PBNDS and recognizing the harms of detaining pregnant women, the Obama administration released a policy in August 2016 barring the detention of pregnant women unless the mandatory detention statute applied or "extraordinary circumstances" existed.<sup>40</sup> If

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delay, vision problems, and hearing problems." *Preterm Birth*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 24, 2018), <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pretermbirth.htm> [<https://perma.cc/5VW9-H6A7>].

<sup>34</sup> These include the National Commission on Correctional Health Care (NCCHC), American Congress of Obstetricians and Gynecologists (ACOG), and American Public Health Association (APHA).

<sup>35</sup> American Civil Liberties Union et al., *supra* note 2, at 4 (citing *Committee Opinion: Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (Nov. 2011), <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Care-for-Pregnant-and-Postpartum-Incarcerated-Women-and-Adolescent-Females?IsMobileSet=false> [<https://perma.cc/6JJK-2L9H>]).

<sup>36</sup> *ICE Performance Based Detention Standards, 2.2 Custody Classification System*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (rev. Dec. 2016) 62, 70, <https://www.ice.gov/doclib/detention-standards/2011/2-2.pdf> [<https://perma.cc/GA9K-W9Y7>].

<sup>37</sup> American Civil Liberties Union et al., *supra* note 2, at 4. See also *ICE Performance Based Detention Standards, 4.4 Medical Care (Women)*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (rev. Dec. 2016) 324–25, <https://www.ice.gov/doclib/detention-standards/2011/4-4.pdf> [<https://perma.cc/SYC8-KM6J>].

<sup>38</sup> American Civil Liberties Union et al., *supra* note 2, at 4.

<sup>39</sup> *Id.* (citation omitted).

<sup>40</sup> *ICE Policy 11032.2: Identification and Monitoring of Pregnant Detainee*, *supra* note 5. See also American Civil Liberties Union et al., *supra* note 2, at 3.

a pregnant woman was detained, ICE needed to evaluate each week whether her continued confinement was necessary.<sup>41</sup> In spite of this directive, attorneys and other advocates reported in November 2016 that detention centers and officers continued to detain and shackle pregnant immigrant women.<sup>42</sup>

A little over a year later, in December 2017, the Trump administration repealed this directive and gave ICE the power to detain pregnant women in their first and second trimesters.<sup>43</sup> Its policy also removes the mandated reporting mechanisms through which outside organizations monitored ICE's detention centers and treatment of pregnant detainees.<sup>44</sup> Given this extension of ICE's abilities and lack of supervision, hundreds—and counting—of pregnant immigrant women have continued to be detained, shackled, and subjected to inhumane conditions.<sup>45</sup>

## II. DOMESTIC LAW: THE DELIBERATE INDIFFERENCE STANDARD VS. THE OBJECTIVE STANDARD

When subjected to repeated abuses and mistreatment, pregnant immigrant detainees are afforded avenues to bring forth cases against detention officials, medical staff, detention centers, and the Department of Homeland Security. Historically, pregnant detainees, like convicted prisoners, have brought suits under 42 U.S.C. § 1983<sup>46</sup> against state actors, claiming violations of their Eighth Amendment<sup>47</sup> rights, which are extended to pretrial detainees through the Fourteenth Amendment.<sup>48</sup> But a recent Supreme Court decision, *Kingsley v. Hendrickson*,<sup>49</sup> suggests that pregnant detainees are entitled to more protection than convicted prisoners and that they should be tried under a different standard, which has led to a circuit split.

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<sup>41</sup> ICE Policy 11032.2: *Identification and Monitoring of Pregnant Detainee*, *supra* note 5.

<sup>42</sup> American Civil Liberties Union et al., *supra* note 2, at 3.

<sup>43</sup> ICE Directive 11032.3: *Identification and Monitoring of Pregnant Detainees*, *supra* note 4. See also López, *supra* note 4.

<sup>44</sup> *Id.*

<sup>45</sup> López, *supra* note 4.

<sup>46</sup> 42 U.S.C. § 1983 (2012) (providing the cause of action for a claim that “[a] person . . . under color of any statute, ordinance, regulation, custom, or usage, of any State” violated a federally protected constitutional or statutory right).

<sup>47</sup> U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

<sup>48</sup> 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.”).

<sup>49</sup> 135 S. Ct. 2466 (2015).

A. Eighth Amendment Protections Afforded Convicted Pregnant Prisoners (and Extended to Pregnant Detainees)

Given that courts have historically viewed pregnant detainees' cases under the same standard as those of pregnant prisoners, it is worthwhile to explore the history and merits of those cases. This history begins with *Estelle v. Gamble*.<sup>50</sup>

In *Estelle*, the Supreme Court acknowledged prisoners' right to receive adequate medical treatment. The Court held that prison officials' deliberate indifference to incarcerated persons' serious medical needs constitutes the "unnecessary and wanton infliction of pain" and thus violates the Eighth Amendment's protection against cruel and unusual punishment.<sup>51</sup> Indeed, denying prisoners medical care could cause them pain and suffering that does not serve a legitimate penological purpose.<sup>52</sup> Furthermore, the Court found that prison guards' intentional denial or delay of prisoners' access to medical care constitutes deliberate indifference.<sup>53</sup> Thus, the Court in *Estelle* created the deliberate indifference standard, a subjective standard requiring plaintiffs to show that the defendant intended harm and actually believed harm would likely occur.<sup>54</sup>

By 1994, the Supreme Court in *Farmer v. Brennan*<sup>55</sup> established that two elements must be satisfied to establish that defendants violated the Eighth Amendment. Plaintiffs must show that defendants: (1) exposed them to a substantial risk of serious harm<sup>56</sup> and (2) were deliberately indifferent to their constitutional rights.<sup>57</sup> The Court acknowledged that deliberate indifference was a vague phrase and attempted to clarify it as a standard of reckless disregard, though it acknowledged that this explanation was equally vague.<sup>58</sup> By this time, the Court had

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<sup>50</sup> 429 U.S. 97 (1976).

<sup>51</sup> *Id.* at 104–05 (citing to *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

<sup>52</sup> *Id.* at 103.

<sup>53</sup> *Id.* at 104.

<sup>54</sup> *See, e.g.*, *Pittman ex rel. Hamilton v. Cty. of Madison*, 746 F.3d 766, 775–76 (7th Cir. 2014).

<sup>55</sup> 511 U.S. 825 (1994).

<sup>56</sup> *Id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) and *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

<sup>57</sup> *Id.* at 834 (quoting *Wilson*, 501 U.S. at 302–03). *See also* *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239 (9th Cir. 2016) (stating the two necessary elements).

<sup>58</sup> *Id.* at 836–37 (concluding that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference).

also extended the deliberate indifference standard to other types of claims such as failure-to-protect<sup>59</sup> and conditions of confinement.<sup>60</sup>

Pretrial detainees, though, have different standing than prisoners. Detainees, unlike sentenced inmates, have yet to be tried for their crimes.<sup>61</sup> Given this lack of adjudication of guilt, courts must scrutinize pretrial detainees' claims under the Due Process Clause of the Fourteenth Amendment, not the Eighth Amendment.<sup>62</sup> Whereas the Eighth Amendment allows for the punishment of sentenced prisoners so long as it is not cruel and unusual, the Due Process Clause mandates that pretrial detainees not be punished.<sup>63</sup>

Despite this acknowledged difference, courts have usually examined the claims of pretrial detainees under the Eighth Amendment's standards. This is due to the Supreme Court's vague explanation of what deprivations the state can subject pretrial detainees to short of punishment. Indeed, the Court in *Bell v. Wolfish*<sup>64</sup> stated that, while a detainee does not have a fundamental liberty interest under the Fourteenth Amendment to be free from discomfort, a condition or restriction of pretrial detention must be "reasonably related to a legitimate governmental objective."<sup>65</sup> Given this ambiguous and broad definition, courts have relied on the Court's repeated assertion that pretrial detainees' due process rights "are at least as great as the Eighth Amendment protections available to a convicted prisoner"<sup>66</sup> to extend Eighth Amendment scrutiny to pretrial detainees' claims.

Under these Eighth Amendment standards, both pregnant prisoners and pregnant detainees have brought § 1983 claims alleging deliberate indifference to their serious medical needs. Circuits, though, have interpreted the deliberate indifference standard differently.

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<sup>59</sup> *Id.* at 837.

<sup>60</sup> *Wilson*, 501 U.S. at 303.

<sup>61</sup> *Bell v. Wolfish*, 441 U.S. 520, 536 (1979).

<sup>62</sup> *Id.* at 535, 535 n.16.

<sup>63</sup> *Id.* See also *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions."); *United States v. Lovett*, 328 U.S. 303, 317–18 (1946) ("[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.").

<sup>64</sup> 441 U.S. 520 (1979) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) and *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

<sup>65</sup> *Id.* at 539.

<sup>66</sup> *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983). See also *Bell*, 441 U.S. at 545.

1. The Second, Eighth, and Sixth Circuits have found inadequate medical care and shackling to meet the deliberate indifference standard

The Second Circuit heard the case of a pregnant prisoner who claimed that county jail officials intentionally delayed her medical care when she suffered severe pain and subsequently miscarried.<sup>67</sup> Despite disagreements on the plaintiff's health status and timing of emergency medical care, the Second Circuit stated that “[t]hese assertions, however disputed, do raise material factual issues.<sup>68</sup> After all, if the defendants did decide to delay emergency medical aid—even for ‘only’ five hours—in order to make Archer suffer, surely a claim would be stated under *Estelle*.”<sup>69</sup>

The Eighth Circuit has also found ignoring pregnant prisoners' bleeding constitutes deliberate indifference and violates their right to medical care. In *Boswell v. Sherburne*,<sup>70</sup> a pregnant pretrial detainee told the county jail upon her admittance to the county that she was pregnant and experiencing troubling symptoms.<sup>71</sup> Despite being alerted to her medical condition, jailers ignored her constant bleeding, her passage of blood clots, her cramping, and her requests for a physician.<sup>72</sup> When she was finally transferred to a hospital, she gave birth in the ambulance and lost her newborn son thirty-four minutes later.<sup>73</sup> The Eighth Circuit found that officials' denial of her requests violated her right to medical care.<sup>74</sup>

The Eighth Circuit, along with the Sixth Circuit, also found that shackling pregnant women during labor violated their Eighth Amendment rights. In 2009, the Eighth Circuit heard *Nelson v. Correctional Medical Services*,<sup>75</sup> which involved a former pregnant inmate who was shackled during labor.<sup>76</sup> As a result of the restraints, Ms. Nelson suffers

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<sup>67</sup> Archer v. Dutcher, 733 F.2d 14, 16 (2d Cir. 1984).

<sup>68</sup> *Id.* at 16.

<sup>69</sup> *Id.*

<sup>70</sup> 849 F.2d 1117 (8th Cir. 1988).

<sup>71</sup> *Id.* at 1120.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1123; *see also* Pool v. Sebastian Cty., 418 F.3d 934, 944 (8th Cir. 2005) (stating that it would have been obvious to even a layperson that a pregnant prisoner complaining of bleeding and extreme pain from cramping, which inhibited her ability to eat and shower, indicated that she needed medical attention); Coleman v. Rahija, 114 F.3d 778 (8th Cir. 1997) (stating that the nurse on duty's dismissal of the plaintiff's history of premature deliveries and failure to examine the plaintiff when she voiced her concerns showed the nurse's deliberate indifference towards and actual knowledge of the plaintiff's “serious medical need”).

<sup>75</sup> 583 F.3d 522 (8th Cir. 2009).

<sup>76</sup> *Id.* at 526.

chronic pain in her now-deformed hips, which, according to her orthopedist, refuse to go “back into the place where they need to be.”<sup>77</sup> She can no longer play with her children, do anything athletic, sleep or lean on her left side, sit or stand for more than a short period of time, or have children.<sup>78</sup> She was a non-violent offender, imprisoned for writing bad checks.<sup>79</sup> The Eighth Circuit ultimately denied summary judgment for the defendant-officer, stating that shackling a pregnant inmate during childbirth has clearly been established as a violation of the Eighth Amendment.<sup>80</sup> The Sixth Circuit in *Villegas v. Metropolitan Government of Davidson County*<sup>81</sup> also found that shackling pregnant detainees in labor substantially endangers the expectant mother’s health and “offends contemporary standards of human decency such that the practice violates the Eighth Amendment’s prohibition against the ‘unnecessary and wanton infliction of pain.’”<sup>82</sup>

2. D.C. and Ninth Circuits’ have found that inadequate medical care and shackling do not meet the deliberate indifference standard

Unlike the Second, Sixth, and Eighth Circuits, the D.C. and Ninth Circuits have concluded that inadequate medical care and shackling do not meet the deliberate indifference standard and, thus, do not violate detainees’ Eighth Amendment rights. In *Women Prisoners of D.C. v. District of Columbia*,<sup>83</sup> female prisoners sued the District of Columbia for violating their Eighth Amendment rights by providing them with inadequate medical care, shackling them, and sexually abusing them.<sup>84</sup> The trial court had ruled in favor of the female inmates, but the D.C. Circuit reversed it. It rejected the provision in the district court’s order requiring that prisons have written protocols regarding prenatal care, reasoning that the district court lacked supplemental jurisdiction.<sup>85</sup> It also rejected the district court’s order to hire a midwife to aid prisoners,

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 533. *See also* *Brawley v. State of Wash.*, 712 F. Supp. 2d 1208, 1221 (W.D. Wash. 2010) (denying summary judgment because shackling a prisoner in labor has clearly been established as an Eighth Amendment violation).

<sup>81</sup> 709 F.3d 563 (6th Cir. 2013).

<sup>82</sup> *Id.* at 574. *See also* *Villegas v. Davidson Cty.*, 789 F. Supp. 2d 895, 919 (M.D. Tenn. 2011) (holding that shackling a pregnant detainee in the final stages of labor shortly before birth and during the post-partum recovery and denying breast-pump post-partum infringes the Eighth Amendment).

<sup>83</sup> 93 F.3d 910 (D.C. Cir. 1996).

<sup>84</sup> *Id.* at 913.

<sup>85</sup> *Id.* at 932, 944.

to create a pre-natal clinic, and to provide for obstetrical examinations inside the detention facilities.<sup>86</sup> The D.C. Circuit also refused to declare the use of restraints on pregnant detainees unconstitutional and rejected the district court's standard.<sup>87</sup> The D.C. Circuit reasoned that courts have no experience running prisons, and, thus, they should defer to prison officials' judgments.<sup>88</sup>

As recently as 2016, the Ninth Circuit has held that lack of prenatal necessities and shackling does not violate a prisoner's Eighth Amendment rights.<sup>89</sup> Specifically, the Ninth Circuit in *Mendiola-Martinez v. Arpaio*<sup>90</sup> held that the following did not violate the Eighth Amendment: the county's use of restraints on the prisoner during labor and postpartum recovery after a caesarian section, its failure to provide her with a breast pump, and its nutrition policy for pregnant inmates, even though the prisoner reports of being repeatedly hungry and having to drink water from the sink by her toilet.<sup>91</sup>

B. *Kingsley v. Hendrickson*: A Different Standard for Pretrial Detainees?

Despite courts commonly including the Eighth Amendment's deliberate indifference requirement in cases involving pretrial detainees, the Court recently expressed disagreement with this extension of the amendment. In particular, it rejected the idea that there is one deliberate indifference standard that should be applied to all § 1983 claims regardless of whether they are brought by convicted prisoners or pretrial detainees.

In *Kingsley v. Hendrickson*,<sup>92</sup> a pretrial detainee brought an excessive force claim under the Due Process Clause of the Fourteenth Amendment. He alleged that officers, who had repeatedly asked him to remove the paper covering the light in his cell, used excessive force by handcuffing him, placing a knee in his back, slamming his head on concrete, and using a Taser on him.<sup>93</sup>

The Court found that confinement conditions of a non-convicted detainee violate the Fifth and Fourteenth Amendments if they (1) impose some harm to [her] that either significantly exceed or are independent of the inherent discomforts of confinement and (2) are not reasonably

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<sup>86</sup> *Id.* at 923.

<sup>87</sup> *Id.* at 931–32.

<sup>88</sup> *Id.*

<sup>89</sup> See generally *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239 (9th Cir. 2016).

<sup>90</sup> 836 F.3d 1239 (9th Cir. 2016).

<sup>91</sup> *Id.* at 1239, 1243.

<sup>92</sup> 135 S. Ct. 2466 (2015).

<sup>93</sup> *Id.* at 2470.

related to a legitimate government objective or are excessive in relation to the legitimate governmental objective.<sup>94</sup> Courts then must objectively assess if there is a reasonable relationship between the government's conduct and a legitimate purpose.<sup>95</sup> Thus, the Court held that the detainee only needed to prove that the defendant's conduct, used purposely or knowingly against her, was *objectively* unreasonable, not that the defendant subjectively knew that the amount of force used was unreasonable or excessive.<sup>96</sup>

The Court concluded the objective standard was the appropriate standard given its precedent. The Court has held that "pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'"<sup>97</sup> It also has held that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment,"<sup>98</sup> which can include actions "taken with an 'expressed intent to punish.'"<sup>99</sup> However, *Bell* further explained that if pretrial detainees cannot show an express intent to punish, they can still win their case by demonstrating that the defendants' acts or omissions are not "rationally related to a legitimate non-punitive governmental purpose" or that the actions "appear excessive in relation to that purpose."<sup>100</sup>

*Kingsley*, though, did not address whether its objective standard applies to only excessive-force claims or to all Fourteenth-Amendment claims made by pretrial detainees. Courts have since debated this question. Thus far, the Ninth, Second, and Seventh Circuits have expressly found that the objective standard set forth in *Kingsley* applies to pretrial detainees' other Fourteenth Amendment claims while the Eighth, Eleventh, and Fifth Circuits have declined to make such an extension.

#### 1. The Ninth, Second, and Seventh Circuits' extension of the *Kingsley* objective standard

The Ninth Circuit was the first court of appeals to review *Kingsley*. In *Castro v. County of Los Angeles*,<sup>101</sup> a pretrial detainee banged on his cell's window to alert jail officials that the inmate placed in the same

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<sup>94</sup> *Id.* at 2473–74.

<sup>95</sup> *Id.* at 2469.

<sup>96</sup> *Id.* at 2472–73.

<sup>97</sup> *Id.* at 2475 (internal citations omitted).

<sup>98</sup> *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989).

<sup>99</sup> *Bell v. Wolfish*, 441 U.S. 520, 538 (1979).

<sup>100</sup> *Id.* at 561.

<sup>101</sup> *Castro v. Cty. of L.A.*, 833 F.3d 1060 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 831 (2017).

cell was combative and would likely harm him.<sup>102</sup> Officials ignored him, though, and his cellmate ultimately beat and severely injured him.<sup>103</sup> He brought a § 1983 action, alleging violations of his Fourteenth Amendment right to be protected from the harm inflicted by other inmates.<sup>104</sup>

The Ninth Circuit held that the objective standard of *Kingsley* was not limited to excessive-force claims, extending it to pretrial detainees' Fourteenth Amendment failure-to-protect claims.<sup>105</sup> It reasoned that the federal right and injuries suffered are the same for excessive force and failure-to-protect claims.<sup>106</sup> It also recognized that both claims arise under the Due Process Clause of the Fourteenth Amendment, not the Cruel and Unusual Punishment Clause of the Eighth Amendment, especially given pretrial detainees' different status than convicted prisoners.<sup>107</sup> In addition, it observed that the Court in *Kingsley* did not confine its holding to "force" but rather stated that a pretrial detainee need only provide objective evidence that "the challenged governmental action" is unreasonably related to a legitimate government goal or is excessive in relation to its objective.<sup>108</sup> Using an objective inquiry to evaluate liability under § 1983, the Ninth Circuit affirmed the jury verdict in favor of the detainee.<sup>109</sup> It found sufficient evidence that the officers and the County knew their actions and policies posed a substantial risk of serious harm to the detainee but were deliberately indifferent to that risk.<sup>110</sup>

After the *Castro* decision, the Second Circuit also extended *Kingsley*, applying its holding to pretrial detainees' conditions of confinement complaints under the Fourteenth Amendment.<sup>111</sup> In so doing, the Second Circuit overruled its past decision in *Caiozzo v. Koreman*,<sup>112</sup> which used a subjective test when evaluating a medical-care claim, given that the Court in *Wilson*<sup>113</sup> found medical care to be a condition of confinement.<sup>114</sup> By the next year, the Second Circuit, like the Ninth Circuit,

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<sup>102</sup> *Id.* at 1064.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1060.

<sup>105</sup> *Id.* at 1070–71.

<sup>106</sup> *Id.* at 1069–70.

<sup>107</sup> *Id.* (citing to *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015)).

<sup>108</sup> *Id.* at 1070 (citing to *Kingsley*, 135 S.Ct. at 2473–74).

<sup>109</sup> *Id.* at 1060. The Ninth Circuit has since applied the *Kingsley* holding to a detainee's medical-need claim. *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1120, 1122–25 (9th Cir. 2018).

<sup>110</sup> *Id.*

<sup>111</sup> *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2nd Cir. 2017).

<sup>112</sup> 581 F.3d 63 (2nd Cir. 2009).

<sup>113</sup> *Wilson v. Seiter*, 501 U.S. 294, 303 (1991).

<sup>114</sup> *Caiozzo*, 581 F.3d at 66, 68, 70–72.

used the *Kingsley* objective standard in a case involving a claim of deliberate indifference to a serious medical need.<sup>115</sup> The Second Circuit specifically asked “whether a ‘reasonable person’ would appreciate the risk to which the detainee was subjected.”<sup>116</sup>

The Seventh Circuit most recently heard *Miranda v. County of Lake*,<sup>117</sup> concerning the death of a pretrial detainee, an Indian national, due to severe dehydration at a county jail and her Estate’s claims under the Fourteenth Amendment’s Due Process Clause for inadequate medical care.<sup>118</sup> The Seventh Circuit held that only the objective unreasonableness standard of *Kingsley* applied to pretrial detainees’ medical-care claims brought under the Fourteenth Amendment.<sup>119</sup> The Seventh Circuit first reasoned that the Supreme Court has repeatedly instructed courts to recognize pretrial detainees’ different status as compared to convicted prisoners’ status.<sup>120</sup> Second, it noted that the Court has found that the analysis under the Eighth Amendment is “not coextensive” with that of the Due Process Clause given the different language and nature of the claims.<sup>121</sup> To the Seventh Circuit, the Court’s reasoning in *Kingsley* did not indicate that its holding applied only to excessive-force claims but rather that it included other claims arising under the Fourteenth Amendment.<sup>122</sup> Thus, the district court improperly instructed the jury on intent; a jury, based on the evidence that the jail doctors knew Gomes was not eating or drinking, could have found that the defendants purposefully, knowingly, or with reckless disregard chose to observe Gomes in jail rather than take her to a hospital.<sup>123</sup>

## 2. The Fifth, Eleventh and Eighth Circuits’ refusal to extend the *Kingsley* objective standard

The Fifth, Eleventh, and Eighth Circuits, on the other hand, have held that *Kingsley* applies only to pretrial detainees’ Fourteenth Amendment claims alleging excessive-force. Thus, they have limited the case to its facts.

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<sup>115</sup> Bruno v. City of Schenectady, 727 F. App’x 717, 720 (2d Cir. 2018).

<sup>116</sup> *Id.*

<sup>117</sup> 900 F.3d 335 (7th Cir. 2018).

<sup>118</sup> *Id.* at 335, 346.

<sup>119</sup> *Id.* at 352.

<sup>120</sup> *Id.* at 350, 352–53 (citing to *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2475 (2015)).

<sup>121</sup> *Miranda*, 900 F.3d at 352 (citing *Kingsley*, 135 S.Ct. at 2475 and *Currie v. Chhabra*, 728 F.3d 626, 630 (7th Cir. 2013) (“[D]ifferent constitutional provisions, and thus different standards, govern depending on the relationship between the state and the person in the state’s custody.”)).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 354.

In *Alderson v. Concordia Parish Correctional Facility*,<sup>124</sup> a pretrial detainee was stabbed and stomped by two inmates.<sup>125</sup> It took several complaints by the detainee and his family about his safety and medical condition for an officer to acknowledge his attack and take him to the hospital, where he was diagnosed with multiple broken ribs and numerous puncture wounds to his head, face, and body.<sup>126</sup> The plaintiff brought a § 1983 claim, alleging that the correctional facility provided him with “inadequate security and impermissibly delayed [his] medical care.”<sup>127</sup> The Fifth Circuit found that court precedent applied the subjective standard in cases decided after *Kingsley*; thus, the circuit’s rule of orderliness mandated that they continue to do so.<sup>128</sup> The Fifth Circuit next asserted that, at the time, only the Ninth Circuit had extended the objective standard of *Kingsley*.<sup>129</sup> Finally, it concluded that, even if *Kingsley* mandated the adoption of the objective standard for failure-to-protect claims, the plaintiff did not make such a claim.<sup>130</sup> Thus, under the subjective standard, the Fifth Circuit found that the detainee did not sufficiently demonstrate that officials acted with deliberate indifference to a substantial risk of serious harm to the detainee when they incorrectly housed him with department of correction inmates, though there was some evidence that the officer acted with deliberate indifference to his serious medical needs.<sup>131</sup>

In *Nam Dang, by & through Vina Dang v. Sheriff, Seminole County*,<sup>132</sup> the Eleventh Circuit heard a case in which a pretrial detainee developed meningitis in jail, which resulted in him having strokes that permanently injured him.<sup>133</sup> The plaintiff alleged that he received constitutionally deficient medical care due to deliberate indifference.<sup>134</sup> He further argued that he need not show deliberate indifference due to *Kingsley*.<sup>135</sup> The Eleventh Circuit, though, held there was no need to decide whether the objective standard applied.<sup>136</sup> *Kingsley*

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<sup>124</sup> 848 F.3d 415 (5th Cir. 2017).

<sup>125</sup> *Id.* at 418.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 415.

<sup>128</sup> *Id.* at 419 n.4 (citing *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996)). *See also* *Estate of Henson v. Wichita Cty.*, 795 F.3d 456 (5th Cir. 2015).

<sup>129</sup> *Alderson*, 848 F.3d at 419 n.4.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 420–21.

<sup>132</sup> 871 F.3d 1272 (11th Cir. 2017).

<sup>133</sup> *Id.* at 1276–78.

<sup>134</sup> *Id.* at 1276.

<sup>135</sup> *Id.* at 1279 n.2.

<sup>136</sup> *Id.*

only involved an excessive force claim.<sup>137</sup> Moreover, the decision would not help the detainee even if it could be applied because the Court noted that “liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process.”<sup>138</sup> And, to the Fifth Circuit, the jail nurse’s failure to treat Dang’s symptoms and her misdiagnosis was, at most, negligence.<sup>139</sup>

The Eighth Circuit in *Whitney v. City of St. Louis*<sup>140</sup> stated that *Kingsley* did not apply because the detainee brought a deliberate indifference case rather than excessive force case.<sup>141</sup> Under the subjective standard, then, the Eighth Circuit found that the father of a pretrial detainee who hanged himself in a jail cell did not sufficiently allege that the officer knew of the detainee’s suicidal thoughts or that the municipal policy was deliberately indifferent.<sup>142</sup>

Therefore, while the Fifth, Eleventh, and Eighth Circuits refuse to read *Kingsley* as applying to claims other than excessive-force, the Ninth, Second, and Seventh Circuits apply *Kingsley*’s objective standard to other Fourteenth Amendment claims. Given the Fourteenth-Amendment claims likely to be brought by pregnant detainees in light of the mistreatment and inadequate medical attention in detention centers, courts will have to decide which of the circuits to follow.

### III. INTERNATIONAL LAW: THE RIGHTS TO DIGNITY AND TO BE FREE FROM CRUEL, INHUMANE PUNISHMENT

International law has also addressed the treatment of prisoners. Most notably, international law bars cruel and inhumane punishment through various treaties and U.N. General Assembly Resolutions. Specifically, the Universal Declaration of Human Rights (“UDHR”),<sup>143</sup> the International Covenant on Civil and Political Rights (“ICCPR”), the American Convention on Human Rights (“American Convention”), and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) all state that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment.”<sup>144</sup>

The CAT defines torture as:

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* (citing to *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2472 (2015)) (emphasis in original).

<sup>139</sup> *Dang*, 871 F.3d at 1276–78, 1279 n.2.

<sup>140</sup> 887 F.3d 857 (8th Cir. 2018).

<sup>141</sup> *Id.* at 860 n.4.

<sup>142</sup> *Id.* at 857.

<sup>143</sup> The U.S. is a signatory to the UDHR.

<sup>144</sup> *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171; Organization of American States, American Convention on Human Rights, art. 5(2), Nov. 22, 1969, 1144 U.N.T.S. 143.

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>145</sup>

The CAT also bars “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>146</sup> The CAT, ratified by the United States in 1994, mandates that all State Parties “shall take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction.”<sup>147</sup>

The ICCPR, which the United States signed in 1977 and ratified in 1992, further requires that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>148</sup> The American Convention, signed by the United States, similarly mandates that “[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”<sup>149</sup>

The United Nations has also developed rules prohibiting shackling specifically.<sup>150</sup> For example, Rule 24 of the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders, otherwise known as the Bangkok Rules, expressly states that “instruments of restraint shall *never* be used on women during labour, during birth and immediately after birth.”<sup>151</sup> The United Nations Standard Minimum Rules for the Treatment of Prisoners, otherwise known as the Mandela Rules, bars the use of restraints as punishment, though it does acknowledge their use for clear, narrow exceptions.<sup>152</sup>

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<sup>145</sup> U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>146</sup> *Id.* at art. 16(1).

<sup>147</sup> *Id.* at art. 2(1).

<sup>148</sup> International Covenant on Civil and Political Rights, *supra* note 144, at art. 10.

<sup>149</sup> American Convention on Human Rights, *supra* note 144, at art. 5(2).

<sup>150</sup> These rules are included in United Nations General Assembly Resolutions. They are not signed and ratified by each individual Member State but rather are adopted by the General Assembly, which consists of one representative from each Member State. For more information, see *General Assembly of the United Nations*, UNITED NATIONS (2018), <http://www.un.org/en/ga/> [https://perma.cc/57DC-NRL8].

<sup>151</sup> G.A. Res. 65/229, ¶ 24 (Dec. 21, 2010) (emphasis added).

<sup>152</sup> G.A. Res. 70/175, U.N. Standard Minimum Rules for the Treatment of Prisoners (Dec. 17,

Since the inception of these treaties, the United Nations Human Rights Committee has clarified their meaning. For example, it found the goal of Article 7 of the ICCPR, expressing freedom from torture or inhumane treatment, was to “protect both the dignity and the physical and mental integrity of the individual.”<sup>153</sup>

The United Nations Human Rights Committee further examined Article 7 in *Mellet v. Ireland*.<sup>154</sup> The Committee found that Ireland, by prohibiting and criminalizing abortion and preventing Mellet from accessing medical care, subjected a highly vulnerable pregnant woman to severe physical and mental suffering.<sup>155</sup> The committee pointed out that her anguish could have been avoided if the state had given her proper health care.<sup>156</sup> As a result, the state violated, among other rights, her right to freedom from cruel, inhuman or degrading treatment under Article 7 of the ICCPR.<sup>157</sup> The Committee noted that the fact that an act is legal under domestic law does not stop it from violating Article 7; the article is absolute and without exception, thus leaving no room for any excuses.<sup>158</sup>

The United Nations Human Rights Committee, along with the United Nations Committee Against Torture and United Nations Special Rapporteurs on Torture and on Violence against Women, have also advocated for all States to stop using restraints on women during their pregnancy and while they are recovering thereafter.<sup>159</sup> For example, the Committee against Torture expressed concern about the United States’ treatment of female detainees, especially its shackling women detainees during labor and use of “gender-based humiliation,” and requested

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2015).

<sup>153</sup> U.N. Human Rights Comm., General Comment 20, Article 7, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, ¶ 2, U.N. Doc. HRI/Gen/1/Rev.1 (1994), <http://www1.umn.edu/humanrts/gencomm/hrcom20.htm> [<https://perma.cc/362H-PUFT>].

<sup>154</sup> Human Rights Committee, Communication No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016).

<sup>155</sup> *Id.* ¶ 7.4.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 7.6.

<sup>158</sup> *Id.* at 7.4, 7.6.

<sup>159</sup> Amnesty International, *Abuse of Women in Custody: Sexual Misconduct and the Shackling of Pregnant Women* at 2 (2001); U.N. Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 41, U.N. Doc. A/HRC/7/3 (Jan. 15, 2008); Comm. on Human Rights, *Report of the Mission to the United States of America on the Issue of Violence against Women in State and Federal Prisons*, ¶¶ 53–54, U.N. Doc. E/CN.4/1999/68/Add.2 (Jan. 4, 1999); U.N. Human Rights Council, *Report of the Special Rapporteur on Violence against Women, Its Causes, and Consequences: Ms. Rashida Manjoo: Mission to the United States of America*, ¶ C(h), U.N. Doc. A/HRC/17/26/Add.5 (Jun. 6, 2011).

that the State adopt the necessary policies to bring it back into “conformity with international standards.”<sup>160</sup>

#### IV. COURTS SHOULD FOLLOW THE NINTH, SECOND, AND SEVENTH CIRCUITS’ INTERPRETATION OF *KINGSLEY*

In light of the mistreatment of pregnant immigrant detainees, which has been exacerbated due to the new ICE directive allowing for the detainment of pregnant women in their first and second trimesters, pregnant immigrant detainees will most likely bring more § 1983 claims, alleging inadequate conditions of confinement and delayed medical care due to deliberate indifference. When faced with these claims, courts should mirror the Ninth, Second, and Seventh Circuits by applying the objective standard set forth in *Kingsley* to all Fourteenth Amendment claims brought by pretrial detainees, such as failure-to-protect and serious medical needs claims.

First, such a standard acknowledges the different protections that pretrial detainees are afforded. Indeed, the Court has held time and again that pretrial detainees have not been charged with anything and thus cannot be punished.<sup>161</sup> Immigrant detainees, such as pregnant women held in detention centers, might be held to an even higher standard than pretrial criminal detainees.<sup>162</sup> Thus, courts around the country should use a standard that does not make it harder for pretrial detainees to receive the protections that the Court has already held they are due. Rather, it should be enough that a reasonable person could find that the conditions or lack of adequate medical care non-convicted person was unreasonable.<sup>163</sup>

In addition, the objective standard might better adhere to constitutional standards given that it does not engage in the subjective deliberate indifference standard of an Eighth Amendment analysis. Indeed,

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<sup>160</sup> U.N. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, ¶ 33, U.N. Doc. CAT/C/USA/CO/2 (2006).

<sup>161</sup> See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 535–39 (1979).

<sup>162</sup> See *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). Although they have not come to an official consensus, courts have repeatedly held that immigration detainees are afforded at least the same due process protections as pretrial criminal detainees. See *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000); *Dahlan v. Dep’t of Homeland Sec.*, 215 F. App’x 97, 100 (3d Cir. 2007). But see *Jones v. Blanas*, 393 F.3d 918, 933–34 (9th Cir. 2004). For more information, see Tom Jawetz, *Litigating Immigration Detention Conditions*, ACLU NATIONAL PRISON PROJECT (2008), [https://law.ucdavis.edu/alumni/alumni-events/files/mcle-files/jawetz\\_detention\\_conditions.pdf](https://law.ucdavis.edu/alumni/alumni-events/files/mcle-files/jawetz_detention_conditions.pdf) [https://perma.cc/VTY4-TWB2].

<sup>163</sup> See Kyla Magun, *A Changing Landscape for Pretrial Detainees? The Potential Impact of Kingsley v. Hendrickson on Jail-Suicide Litigation*, 116 COLUM. L. REV. 2059, 2085 n.169 (2016) (quoting Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 571 (2008) (“A showing of objective deliberate indifference, combined with some showing of more than de minimis injury, shocks the conscience and thus should sustain a substantive due process claim.”)).

the Court has repeatedly stated that the Eighth Amendment analysis is not the same as the Due Process Clause analysis; they differ in language and in the nature of their claims.<sup>164</sup> Thus, the objective standard could veer courts away from intertwining the analyses of the Eighth Amendment and Due Process Clause, which in some courts has proved detrimental to detainees' cases.<sup>165</sup>

The *Kingsley* decision is also broadly worded. As the Ninth Circuit pointed out, *Kingsley*'s holding is not limited to "force."<sup>166</sup> Instead, the Court asserted that pretrial detainees need only provide objective evidence that "the challenged governmental action" is unreasonably related to a legitimate government goal or is excessive in relation to its objective.<sup>167</sup> Thus, this wording indicates that the Court meant for its holding to apply to all Fourteenth Amendment claims brought by detainees. This especially makes sense in light of the fact that the injuries, both physical and constitutional, suffered in excessive force claims and other Fourteenth Amendment claims are the same.<sup>168</sup>

Furthermore, evidence exists that another circuit might join the Ninth, Second, and Seventh Circuit interpretation of *Kingsley*—the Sixth Circuit. Despite both parties' failure to raise arguments concerning *Kingsley*, the Sixth Circuit in *Richmond v. Huq*<sup>169</sup> acknowledged the change in Fourteenth Amendment deliberate indifference jurisprudence that "calls into serious doubt" whether detainees such as the plaintiff are required to demonstrate defendants' subjective awareness, and wanton disregard, of detainees' serious medical conditions.<sup>170</sup> This reading of *Kingsley* mirrors the objective, reasonable person standard set forth in the Ninth, Second, and Seventh Circuits and, thus, shows that the Sixth Circuit is inclined to follow their lead.

The Fifth Circuit might also include proponents of the *Kingsley* objective standard. Although Judge Graves in *Alderson* concurred in part, he encouraged the Fifth Circuit to reevaluate applying the subjective standard to pretrial detainees' other Fourteenth Amendment claims given the *Kingsley* holding.<sup>171</sup>

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<sup>164</sup> *Miranda*, 900 F.3d at 352 (citing to *Kingsley*, 135 S.Ct. at 2475 and to *Currie v. Chhabra*, 728 F.3d 626, 630 (7th Cir. 2013) ("[D]ifferent constitutional provisions, and thus different standards, govern depending on the relationship between the state and the person in the state's custody.")).

<sup>165</sup> See *Women Prisoners of D.C. v. District of Columbia*, 93 F.3d at 931–32; *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1243 (9th Cir. 2016).

<sup>166</sup> *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 831 (2017).

<sup>167</sup> *Id.* (citing to *Kingsley*, 135 S.Ct. at 2473–74).

<sup>168</sup> *Id.*

<sup>169</sup> 885 F.3d 928 (6th Cir. 2018).

<sup>170</sup> *Id.* at 938 n.3.

<sup>171</sup> *Alderson v. Concordia Parish Corr. Facility*, 848 F.3d 415, 424–25 (5th Cir. 2017) (Graves,

A. Counter-Arguments to Emulating the Ninth, Second, and Seventh Circuits

Critics might argue that Fourth Circuit offers support to the Eighth, Eleventh, and Fifth Circuits' interpretation of *Kingsley*. For example, the Fourth Circuit in *Duff v. Potter*<sup>172</sup> still examined a detainee's inadequate medical treatment claim under the deliberate indifference standard while analyzing his excessive-force claim under the objective reasonableness standard. But the Fourth Circuit, unlike the Sixth Circuit, did not expressly contemplate the application of *Kingsley* to other Fourteenth Amendment claims of pretrial detainees. Moreover, after *Kingsley*, the Seventh Circuit still applied the deliberate indifference standard under the Eighth Amendment to inadequate medical care claims before joining the Ninth and Second Circuits with its holding in *Miranda v. County of Lake*, which leaves it open for the Fourth Circuit to follow the same path.<sup>173</sup> Therefore, it is hard to say that the Fourth Circuit supports the Eighth, Eleventh, and Fifth Circuits' holdings.

In addition, supporters of the Eighth, Eleventh, and Fifth Circuits might contend that the application of *Kingsley* to claims other than those of excessive force is in conflict with the Court's decision in *Daniels v. Williams*.<sup>174</sup> In that case, the Court overruled *Parratt v. Taylor*<sup>175</sup> in part and concluded that negligent conduct does not offend the Due Process Clause.<sup>176</sup> Opponents of the objective-reasonableness standard might be concerned that *Kingsley*'s objective-reasonableness standard will allow negligence to be sufficient for liability and, thus, will conflict with *Daniels* by constitutionalizing medical malpractice claims.

*Kingsley*, though, does not hold that negligence suffices for liability. Rather it stated that courts must consider two separate state-of-mind questions. First, they must inquire into the defendant's state of mind concerning his physical actions—"i.e., his state of mind with respect to the bringing about of certain physical consequences in the world."<sup>177</sup> Then they must determine the defendant's state of mind "with respect to whether this use of force was 'excessive,'" using an objective standard and thus ensuring the defendant's state of mind is not a matter that a plaintiff has to prove.<sup>178</sup> Unlike the second objective inquiry, then, the

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J., specially concurring in part).

<sup>172</sup> 665 F. App'x 242, 244–45 (4th Cir. 2016).

<sup>173</sup> See, e.g., *Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 554 n.31 (7th Cir. 2016).

<sup>174</sup> 474 U.S. 327 (1986).

<sup>175</sup> 451 U.S. 527 (1981).

<sup>176</sup> *Daniels*, 474 U.S. at 330–31. See *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc), cert. denied, 137 S.Ct. 831 (2017).

<sup>177</sup> *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (2015).

<sup>178</sup> *Id.*

first question asks courts to decipher whether defendants have acted purposefully, knowingly, or recklessly when they thought about the consequences of their actions concerning the pretrial detainee.<sup>179</sup> The Ninth Circuit and other courts of appeals, upon hearing detainees' claims, have acknowledged that *Kingsley* requires a detainee to “prove more than negligence but less than subjective intent—something akin to reckless disregard.”<sup>180</sup>

#### B. The Effect of the Objective Standard on Pregnant Immigrant Detainees

In addition to adopting Ninth, Second, and Seventh Circuit precedent, courts should also interpret *Kingsley* to apply the objective standard to all Fourteenth Amendment, § 1983 claims of pretrial detainees because it will likely allow pregnant immigrant detainees to be more successful in their serious medical need, failure-to-protect, and conditions of confinement claims. Rather than show actual knowledge, pregnant immigrant detainees would only have to show that, under the circumstances, detention officials and staff should have known they needed medical attention. It seems that this standard would prove fruitful in pregnant immigrant detainees' cases given that most, if not all, claim that at least one official was alerted to their condition, their discomfort, or their bleeding and did nothing to alleviate it.<sup>181</sup>

In fact, under the *Kingsley* holding, courts could find that the inhumane treatment of pregnant detainees violates their Fifth and Fourteenth Amendments. First, these practices of endangering women's health exceeds *and* is independent of the inherent discomforts of confinement.<sup>182</sup> It does not serve a legitimate penological purpose to allow a pregnant woman to miscarry in a jail cell or to provide such poor conditions that she develops depression.<sup>183</sup> In addition, precautionary measures such as shackling might be related to an often-upheld governmental interest in ensuring safety but ultimately are excessive, especially given that a guard accompanies a detainee everywhere outside her cell, including the delivery room.<sup>184</sup>

<sup>179</sup> See *Miranda v. Cty. of Lake*, 900 F.3d 335, 353 (7th Cir. 2018).

<sup>180</sup> *Castro*, 833 F.3d at 1071. See also *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1120, 1122–25 (9th Cir. 2018); *Darnell v. Pineiro*, 849 F.3d 17, 36, 36 n.16.

<sup>181</sup> See generally *American Civil Liberties Union et al.*, *supra* note 2.

<sup>182</sup> *Kingsley*, 135 S.Ct. at 2473–74.

<sup>183</sup> See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

<sup>184</sup> The ACLU Reproductive Freedom Project and ACLU National Prison Project, *supra* note 23, at 5.

It will also likely be easier for a detainee to hold officials accountable under the objective deliberate indifference standard given the decisions of the circuit split. Whereas every circuit that heard cases using the objective standard rendered judgment in favor of detainees, the other circuit courts, i.e. the Eleventh, Eighth, and Fifth, did not despite officials knowing about detainees' injuries or illnesses and failing or delaying to give them the treatment they are afforded under the Fourteenth Amendment.<sup>185</sup>

Immigrant detainees in particular have already had some success in gaining judgments in their favor. For example, the Ninth Circuit, using the objective deliberate indifference standard, upheld a district court's order to provide clean bedding, personal hygiene accommodations, and medical screenings as well as monitor compliance and ensure implementation.<sup>186</sup>

The objective standard would not only provide a more favorable standard for pretrial detainees, but it could also change current policies concerning pregnant detainees. As will be discussed in Section VI below, Congress has left some loopholes in its current and pending legislation that allows for detention officials and medical staff to exercise their discretion when making decisions regarding pregnant detainees' medical treatment or shackling.<sup>187</sup> This discretionary standard has rendered its laws null and void because staff and officials often abuse the standard and have continued to mistreat and shackle pregnant inmates.<sup>188</sup> If courts use the objective standard when evaluating pretrial detainees' claims, they could not only discontinue the deference given to detention officials<sup>189</sup> but also signal to Congress and state legislatures that making allowances for officials' discretion is no longer viable. Detention staff also might refrain from mistreatment or act with more diligence, knowing that the court will look at their actions from the perspective of a reasonable person rather than simply looking at their version of events.

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<sup>185</sup> See *Alderson v. Concordia Parish Corr. Facility*, 848 F.3d 415, 418 (5th Cir. 2017); *Dang v. Sheriff, Seminole Cty.*, 871 F.3d 1272, 1276–78 (11th Cir. 2017); *Whitney v. City of St. Louis*, 887 F.3d 857, 861 (8th Cir. 2018).

<sup>186</sup> *Doe v. Kelly*, 878 F.3d 710, 721–25 (9th Cir. 2017).

<sup>187</sup> See the discussion of the First Step Act and the Stop Shackling Act in Section VI below.

<sup>188</sup> See generally *American Civil Liberties Union et al.*, *supra* note 2.

<sup>189</sup> See *Women Prisoners of D.C. v. District of Columbia*, 93 F.3d 910, 931–32 (D.C. Cir. 1996).

V. COURTS SHOULD USE INTERNATIONAL LAW AS PERSUASIVE  
AUTHORITY TO SUPPORT THEIR ADOPTION OF THE OBJECTIVE  
STANDARD

Given the current circuit split, courts should refer to international law as persuasive authority.<sup>190</sup> Upon reviewing international law, they will find that ICE policies and practices violate pregnant detainees' rights to freedom from cruel, inhuman treatment, to dignity, and to be treated with humanity. Given this clear contravention of the ICCPR, the CAT, the American Convention, the UDHR, the Bangkok Rules, and the Mandela Rules, courts might be more persuaded to follow the examples of the Seventh, Ninth, and Second Circuits and extend the *Kingsley* decision given that they are more consistent with the international law approach.

As aforementioned, the ICCPR, the CAT, the American Convention, and the UDHR prohibit cruel, inhuman or degrading treatment or punishment.<sup>191</sup> The treatment, especially officials' inadequate attention to pregnant detainees' miscarriages, clearly violates this prohibition. Indeed, like *Mellet*, detention officials have prevented or delayed highly vulnerable pregnant women from receiving medical care and contributed to their mental and physical pain, which could have been avoided if they had chosen to pay attention to detainees' needs.<sup>192</sup> Thus, similar to Ireland, the United States has violated detainees' right to freedom from cruel, inhuman or degrading treatment.

Furthermore, the pain and suffering that pregnant detainees have reported<sup>193</sup> falls within, at the very least, the CAT definition of "cruel, inhuman or degrading treatment."<sup>194</sup> Specifically, pregnant detainees have suffered both physically, receiving gashes from shackles and enduring miscarriages due to lack of medical attention, and mentally, suffering from stress, anxiety, and depression brought on by detention centers' conditions and re-traumatization.<sup>195</sup> The anguish has also been inflicted and acquiesced by officials given their refusal to acknowledge

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<sup>190</sup> See Sichel, *supra* note 26, at 237–239 (describing in detail how international human rights law is persuasive authority and citing to federal cases that have used international law as persuasive authority).

<sup>191</sup> See *e.g.*, G.A. Res. 217 (III) A, *supra* note 144; International Covenant on Civil and Political Rights art. 7, *supra* note 144; American Convention on Human Rights, art. 5(2), *supra* note 144.

<sup>192</sup> See Human Rights Committee, *supra* note 154.

<sup>193</sup> See *generally* O'Connor, *supra* note 1; American Civil Liberties Union et al., *supra* note 2.

<sup>194</sup> U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 145, at art. 16(1).

<sup>195</sup> This also contravenes Article 7 of the ICCPR in that it does not "protect both the dignity and the physical and mental integrity of the individual." U.N. Human Rights Committee, *supra* note 153.

or their dismissal of women's cries for help, profuse bleeding, and obvious need for medical treatment.

The continued shackling of pregnant detainees also violates the international prohibitions against torture and inhuman treatment, Rule 24 of the Bangkok Rules,<sup>196</sup> and the Mandela Rules.<sup>197</sup> Indeed, the U.S. has not complied with treaties' requirements that it implement domestic mechanisms to prevent such mistreatment.<sup>198</sup> The UN Human Rights Committee, the UN Committee against Torture, and the UN Special Rapporteurs on Torture and on Violence Against Women<sup>199</sup> have repeatedly denounced this inaction, asserting that the United States has failed to uphold modern standards of decency.<sup>200</sup>

It is also apparent that detention centers have been violating pregnant detainees' rights to dignity and to be treated with humanity under the ICCPR and the American Convention.<sup>201</sup> As the Eighth Circuit insinuated, it is quite obvious that a woman bleeding out in her cell is indication that she needs medical attention.<sup>202</sup> Yet detention officers and medical staff continue to ignore women's needs, such as when they left E lying in a pool of her blood for eight days or when they fail to inquire about detainees' mental health, especially when their pregnancies are a result of rape.<sup>203</sup> Anyone can observe that such mistreatment of pregnant detainees does not afford them dignity and treats them as less than human.

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<sup>196</sup> G.A. Res. 65/229, ¶ 24 (Dec. 21, 2010).

<sup>197</sup> G.A. Res. 70/175, U.N. Standard Minimum Rules for the Treatment of Prisoners (Jan. 8, 2016).

<sup>198</sup> U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 145, at art. 2(1).

<sup>199</sup> See U.N. Human Rights Council, *supra* note 159.

<sup>200</sup> *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

<sup>201</sup> See International Covenant on Civil and Political Rights, *supra* note 144, at art. 10; American Convention on Human Rights, *supra* note 144, at art. 5(2).

<sup>202</sup> See *Pool v. Sebastian Cty.*, 418 F.3d 934, 935 (8th Cir. 2005).

<sup>203</sup> See *O'Connor*, *supra* note 1.

Some critics might be skeptical about the role of international law<sup>204</sup> in courts' interpretation of the United States Constitution.<sup>205</sup> However, the Court has acknowledged the importance of the international consensus on basic human rights and the value of foreign laws when deciding the constitutionality of certain acts.<sup>206</sup> For example, the Court determined that the Eighth Amendment "must draw its meaning from evolving standards of decency that mark the progress of a maturing society."<sup>207</sup> This interpretation of standards came from reviewing the laws and universal belief of "civilized people" and the "civilized nations of the world."<sup>208</sup> *Estelle* further elaborated on "contemporary standards" of decency by asserting that the infliction of unnecessary suffering was inconsistent with them.<sup>209</sup>

Reviewing international law, then, should sway courts to extend the objective standard to claims beyond excessive-force. Indeed, international law does not review the official actor's intent but rather has

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<sup>204</sup> Given the universal acceptance that international law exists and the extensive research set forth in other academic articles on international law, this Comment will not spend time arguing that international law exists. Rather it will remind its readers that the United States Supreme Court has acknowledge international law since the 1800s. See *The Nereide*, 13 U.S. 388, 423 (1815) (citing to the "law of nations"); *The Paquete Habana*; *The Lola*, 175 U.S. 677, 700 (1900) ("[I]nternational law is part of our law."). For more on international law, especially in the context of female prisoners and detainees, see generally Sichel, *supra* note 26; Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71 (2000); Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on Proportionality, Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 638 (1999); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1235 (1999).

<sup>205</sup> See *Roper v. Simmons*, 543 U.S. 551, 607 (2005) (Scalia, J., dissenting) (criticizing the Court's use of international sources when interpreting Constitutional provisions such as the Eighth Amendment.); *Thompson v. Oklahoma*, 487 U.S. 815, 869 n.4 (1988) (Scalia, J. dissenting) ("Where there is not first a settled consensus among our own people, the view of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans . . ."). See also Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 301, 301 (1979) (stipulating that U.N. General Assembly Resolutions are not binding); Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 877 (1983) (arguing that General Assembly Resolutions are not "independent, authoritative sources of international law").

<sup>206</sup> See e.g., *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (using comparative and international law to determine that capital punishment for the mentally ill is unconstitutional); *Lawrence v. Texas*, 539 U.S. 558, 573, 577 (2003) (relying on a European Court of Human Rights decision, *Dudgeon v. United Kingdom*, as guidance to find that a person's choice to engage in consensual homosexual activity is a protected liberty interest).

<sup>207</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>208</sup> *Id.* at 101–04.

<sup>209</sup> *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). See also *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (finding other countries' practices and opinions to be "respected and significant confirmation of [their] own conclusions" and to show the "centrality of those same rights within [the United States'] own heritage of freedom").

made blanket prohibitions on mistreatment, inadequate medical care, and shackling of detainees and prisoners. Thus, courts should be persuaded that extending the objective standard would uphold international law and modern global standards of decency.

#### VI. CURRENT AND PENDING U.S. LEGISLATION DOES NOT APPLY TO OR PROPERLY PROTECT PREGNANT DETAINEES

Critics could argue that the First Step Act,<sup>210</sup> signed into law on December 21, 2018 by President Trump, bars shackling of pregnant women in addition to other significant criminal justice reforms.<sup>211</sup> Thus, the Comment's aforementioned arguments are unnecessary.

But this prohibition on the use of restraints applies to prisoners who are pregnant or are recovering postpartum.<sup>212</sup> For the purposes of the new law, "prisoners" only include people "sentenced to a term of imprisonment pursuant to a conviction for a Federal criminal offense, or a person in the custody of the Bureau of Prisons (BOP), including a person in a Bureau of Prisons Contracted Facility."<sup>213</sup> In theory, this could extend to pregnant detainees given that ICE used five federal prisons to house approximately 1,600 immigrant detainees through temporary interagency agreements with the Bureau of Prisons.<sup>214</sup> Indeed, such June 2018 agreements, needed to accommodate the overflow of detainees in detention centers, are valid until June 2019.<sup>215</sup> In practice, however, no immigrant detainees have been put in federal prisons since November 2018.<sup>216</sup> Using federal prisons to house detainees was unprecedented and highly controversial given that most detainees were asylum seekers yet were treated like criminals.<sup>217</sup> Some attorneys have expressed doubt that federal prisons will be employed again given that using federal prisons to detain immigrants and asylum seekers violated

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<sup>210</sup> First Step Act, S. 3649, 115th Cong. (2d Sess. 2018).

<sup>211</sup> *Id.*; see also Lauren Kuhlik, *Congress Just Took a Big Step Toward Ending the Shackling of Pregnant Prisoners*, ACLU (Dec. 20, 2018), <https://www.aclu.org/blog/prisoners-rights/women-prison/congress-just-took-big-step-toward-ending-shackling-pregnant> [<https://perma.cc/LV38-K8P8>].

<sup>212</sup> S. 3649, *supra* note 210.

<sup>213</sup> *Id.*

<sup>214</sup> James Doubek, *ICE to Send 1,600 Detainees to Federal Prisons*, NPR (June 8, 2018), <https://www.npr.org/2018/06/08/618182740/ice-to-send-1-600-detainees-to-federal-prisonsn> [<https://perma.cc/Q8GP-6KMQ>].

<sup>215</sup> Conrad Wilson, *ICE Appears to End Use of Federal Prisons for Immigrant Detainees*, NPR (Oct. 20, 2018), <https://www.npr.org/2018/10/20/658988420/ice-appears-to-end-use-of-federal-prisons-for-immigrant-detainees> [<https://perma.cc/76X9-HFJ9>].

<sup>216</sup> Conrad Wilson, *Final ICE Detainees Leave Federal Prison in Oregon*, OPB: OREGON PUBLIC Broadcasting (Nov. 28, 2018), <https://www.opb.org/news/article/ice-detainees-prison-oregon-release-final/> [<https://perma.cc/22XF-QQYB>].

<sup>217</sup> Conrad Wilson, *ICE Appears to End Use of Federal Prisons*, *supra* note 215.

their constitutional rights and that more facilities are now being built on the southern border.<sup>218</sup>

Critics could also contend that recent legislation specifically bars the mistreatment and shackling of detainees. The first is the twenty-ninth amendment of the Homeland Security Appropriations Bill for Fiscal Year 2019, which limits the use of restraints on detainees who are pregnant or in post-partum recuperation.<sup>219</sup> The second piece of legislation is Senator Patty Murray's Senate Bill 3225, or the Stop Shackling and Detaining Pregnant Women Act, introduced on July 17, 2018.<sup>220</sup> The Act purports to "ensure the humane treatment of pregnant women by reinstating the presumption of release and prohibiting shackling, restraining, and other inhumane treatment of pregnant detainees."<sup>221</sup> The bill, as of January 4, 2019, has made no movement within the Senate since its introduction.<sup>222</sup>

Despite the well-intentioned provisions of the amendment, the First Step Act, and the Stop Shackling Act, the legislation, if passed, will not protect pregnant women due to some very large loopholes: they allow for the detainment and shackling of women in "extraordinary circumstances."<sup>223</sup> An appropriate official may individually determine that a pregnant detainee is a "serious flight risk" or "poses an immediate and serious threat to herself or others" and "cannot be prevented by other means."<sup>224</sup> A medical or healthcare professional also has the authority to request that pregnant women be restrained in the interest of women's medical safety.<sup>225</sup> These officials are to use the least restrictive restraints possible and may not use shackles during labor.<sup>226</sup>

While it may seem that this serves a compelling governmental interest, i.e. protecting others and the detainee from herself, it ends up harming pregnant detainees in practice. Indeed, despite past and current legislation, the discretion allotted to detention officers has allowed for the continuation of mistreatment and shackling of pregnant detainees, including during labor.<sup>227</sup> The "least restrictive means" constraint

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<sup>218</sup> *Id.*

<sup>219</sup> House Appropriations Committee, *Amendments Adopted to the Homeland Security Appropriations Bill for FY 2019*, HOUSE COMMITTEE ON APPROPRIATIONS, 36–7 (2018), <https://docs.house.gov/meetings/AP/AP00/20180725/108623/HMKP-115-AP00-20180725-SD022.pdf> [<https://perma.cc/DM72-ZQNG>].

<sup>220</sup> Stop Shackling and Detaining Pregnant Women Act, S. 3225, 115th Cong. (2d Sess. 2018).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *See e.g.*, S. 3225, *supra* note 220.

<sup>224</sup> *Id.*; S. 3649, *supra* note 210; House Appropriations Committee, *supra* note 219, at 36.

<sup>225</sup> S. 3225, *supra* note 220; S. 3649, *supra* note 210; House Appropriations Committee, *supra* note 219, at 37.

<sup>226</sup> *Id.*

<sup>227</sup> *See e.g.*, Kuhlik, *supra* note 211; American Civil Liberties Union et al., *supra* note 2, at 3.

is ineffective given how easily officers circumvent, and thus abuse, the requirement; they can simply cite to their determination that the shackling was necessary.<sup>228</sup> Detention staff also often lack proper education about the law and, thus, believe their mistreatment is not illegal.<sup>229</sup> Detention officers and medical professionals' broad discretion and lack of education are compounded by the lack of oversight. The Trump administration's ICE directive disabled the reporting mechanisms that allowed outside organizations to supervise ICE's detention officers, thus ensuring that officials are not held accountable for unreasonable determinations.<sup>230</sup> Therefore, the exceptions essentially nullify the prohibition.

Furthermore, the use of the extraordinary circumstances provision is unjustified given that, thus far, lack of restraints on pregnant women has not jeopardized anyone's safety. Pregnant detainees in civil detention have not been convicted of any crimes, or most notably, any violent crimes.<sup>231</sup> Rather they are usually seeking asylum due to violence in their home countries.<sup>232</sup> None of the states where shackling pregnant inmates is barred have reported that women in labor have escaped or

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This behavior mirrors the continued shackling and mistreatment in state prisons despite state legislation banning the use of restraints and mistreatment. For example, Illinois, one of the earliest states to adopt anti-shackling laws, discovered rampant non-compliance years after legislation passed. See *generally* *Zaborowski v. Dart*, No. 08 C 6946, 2011 WL 6660999 (N.D. Ill. Dec. 20, 2011).

<sup>228</sup> See e.g., Chris DiNardo, *Pregnancy in Confinement, Anti-Shackling Laws and the Extraordinary Circumstances Loophole*, 25 DUKE J. GENDER L. & POL'Y 271, 282–83 (2018).

<sup>229</sup> See *id.*; Nina Liss-Schultz, *6 Years Ago, New York Banned the Shackling of Pregnant Inmates. So Why Are These Women Still Being Restrained?*, MOTHER JONES (Oct. 13, 2015), <http://www.motherjones.com/politics/2015/10/new-york-shackling-pregnant-inmates/#> [<https://perma.cc/DK6S-Y7FE>].

<sup>230</sup> ICE Directive 11032.3: *Identification and Monitoring of Pregnant Detainees*, *supra* note 4; see also López, *supra* note 4.

<sup>231</sup> In comparison, the majority of imprisoned women have committed non-violent offenses. *Fact Sheet on Justice Involved Women in 2016*, NATIONAL RESOURCE CENTER ON JUSTICE INVOLVED WOMEN, 2 (2016), <https://cjinvolvement.org/wp-content/uploads/2016/06/Fact-Sheet.pdf> [<https://perma.cc/NJY9-GWEJ>].

<sup>232</sup> For example, all but one of the women included in the complaint filed by the ACLU *et al* were from the Northern Triangle (namely, El Salvador, Guatemala, and Honduras) and cited violence in their home countries as the reason for fleeing to the United States. American Civil Liberties Union *et al.*, *supra* note 2, at 5–12. Indeed, studies show that the current influx of unauthorized immigrants is mainly from the Northern Triangle, with 1.85 million arriving in 2016 alone due to the rampant homicide and extortion in their home countries. Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, PEW RESEARCH CENTER (Nov. 27, 2018), <http://www.pewhispanic.org/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/> [<https://perma.cc/VF9H-92AU>]. The Northern Triangle countries are some of the most violent countries in the world; El Salvador, for example, is ranked as the world's most violent country not at war due to gang-related activities. Rocio Cara Labrador & Danielle Renwick, *Cen. Am.'s Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (June 26, 2018), <https://www.cfr.org/background/central-americas-violent-northern-triangle#chapter-title-0-3> [<https://perma.cc/52Q5-X4TF>].

harmed themselves, the public, medical staff, or correctional officers.<sup>233</sup> Armed officers also usually guard shackled women, staying in or around their delivery room, which many argue is adequate to protect all—doctors, nurses, the mother, and the newborn—involved.<sup>234</sup> Finally, women giving birth are in no condition to flee or strike out in violence.

Given the ongoing abuses, detention, and lack of education and oversight, many organizations and individuals who work with and advocate for pregnant detainees doubt that the legislation will actually change officials' behavior, finding the acts to be unsustainable.<sup>235</sup> To create long-term change, lawmakers must work on mechanisms to educate detention officers, enforce these measures, and allow for third-party supervision. Without such measures, legislation like the amendment, the First Step Act, and the Stop Shackling Act will continue to be ignored and, thus, rendered meaningless.

#### CONCLUSION

In light of the harsh policy the Trump administration had adopted, it will ultimately be up to the courts to ensure that pregnant immigrant detainees are treated humanely and with dignity. They can take a step towards ensuring this by following the example of the Ninth, Second, and Seventh Circuits and interpreting *Kingsley* to extend to Fourteenth Amendment claims other than excessive force. This determination is supported by precedent that bars the punishment of pretrial detainees and calls for scrutiny under the Fourteenth Amendment, not the Eighth Amendment. Furthermore, using international law as persuasive authority should convince courts to favor the Ninth, Second, and Seventh Circuits' interpretation of *Kingsley* given that the mistreatment of pregnant detainees is outlawed by several binding treaties, such as the ICCPR and the CAT, which view these human rights violations objectively, not subjectively.

If courts follow this interpretation of *Kingsley*, it will likely have a positive impact on pregnant detainees, making them more likely to have successful outcomes when bringing § 1983 claims and holding detention officials more accountable for their disregard for pregnant detainees' rights. Moreover, it could alter current policies and legislation by signaling to Congress that it must close the gaps that allow for deference to detention centers and its officers who abuse their discretion.

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<sup>233</sup> See e.g., Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES (Mar. 2, 2006) <http://www.nytimes.com/2006/03/02/national/02shackles.html> [<https://perma.cc/H7SL-EPBG>].

<sup>234</sup> The ACLU Reproductive Freedom Project and ACLU National Prison Project, *supra* note 23, at 5.

<sup>235</sup> *Id.*; Sathish, *supra* note 32.

With these actions, the United States will be closer to ensuring that another pregnant immigrant detainee does not say #MeToo.