The International Human Right to Safe and Humane Treatment During Pregnancy and a Theory for its Application in U.S. Courts

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Abstract

Under international human rights law, every woman has the right to safe and humane treatment during pregnancy, labor, and childbirth. This article examines the content of that human right as it exists under international law, and suggests one theory—international customary law—for its application in U.S. court cases challenging the treatment of pregnant women in custody. Using Juana Villegas v. Metropolitan Government of Davidson County as a case study, this article argues that international law should be used as binding law, not just as a tool for Eighth Amendment interpretation, and is especially relevant when non-citizen pregnant women are held in immigration detention.
I. Introduction

Cases of pregnant women shackled while in U.S. prisons have been receiving increasing national and international attention.1 In Nelson v. Correctional Medical Services, the Eighth Circuit held that shackling a prisoner during labor amounted to cruel and inhuman treatment under the Eighth Amendment.2 Advocates have called the Nelson decision “historic,”3 as it confirmed that the shackling of incarcerated women during pregnancy, labor, or the post-partum period is a “barbaric” practice that puts women’s health at risk4 and has no legitimate penological purpose.5 The shackling of women while they are in labor violates not just the Eighth Amendment but international human rights law, and as such has been unambiguously condemned by U.N. human rights mechanisms, including the Committee Against Torture, the Human Rights Committee, and the Special Rapporteur on Violence Against Women.6

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2 The U.S. Court of Appeals for the Eighth Circuit held in 2009 that Shawanna Nelson’s right not to be shackled while in the final stages of labor was “clearly established” under the Eighth Amendment, unless the state could provide clear and convincing evidence that she posed a security or flight risk. Nelson v. Correctional Medical Services, 583 F.3d 522, 534 (8th Cir. 2009).

3 Alexander, supra note 1, at 435.

4 The American Medical Association has called the practice “barbaric” and a health risk. Emily P. Walker, AMA: House of Delegates backs Ban on Shackling Inmates in Labor (June 15, 2010) http://www.medpagetoday.com/MeetingCoverage/AMA/20692. See also Sussman, supra note 1, at 477. Shackling pregnant women while in labor, at any stage, violates the World Health Organization’s standards. A woman should have “the opportunity to assume any position [she] wishes…during the course of labor. This means that she should not be restricted to bed, and certainly not to the supine position, but that she should have the freedom to adopt upright postures such as sitting, standing, or walking, without interference…especially during the first stage of labor.” WORLD HEALTH ORGANIZATION (WHO), CARE IN NORMAL BIRTH: A PRACTICAL GUIDE 14 (1996).

5 Nelson, 583 F.3d at 530.

However, pregnant women are subjected to cruel treatment in custody in ways that go beyond shackling. What the shackling cases reveal is not just the existence of a ‘barbaric practice’ *per se* but the fact that traditional U.S. notions of prisons, prisoners, and cruel-treatment norms do not seem to contemplate a prison and detainee population that increasingly includes women and pregnant women.⁷ When “cruel and inhuman treatment” norms developed, the prototypical prisoner was male.⁸ When prisoners and detainees are women and are pregnant, our understanding of what constitutes “cruel and inhuman treatment,” and what the state must do once it has lawfully deprived a person of her liberty, must change in accordance with those changing demographics.⁹

While the U.S. constitutional arguments set out in cases like *Nelson* may be adequate to persuade courts that shackling pregnant women should be prohibited, international human rights law goes further in explaining the gender-specific nature of states’ obligations to people in custody.¹⁰ International human rights law has also provided a more robust vision of pregnant women’s rights in general.¹¹ Since international human rights law can be invoked as binding law in the U.S., as the third Part of this essay will explain, international law arguments should be used in addition to domestic-law arguments in U.S. cases where incarcerated or detained pregnant women have been subjected to ill treatment by state actors. International human rights law arguments can be used to challenge shackling, but can also help explain why other, perhaps

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⁸ *The number of women in prison has increased by 700% since 1980. Sussman, supra note 1, at 484. Eighty-five percent of these women are non-violent offenders. Id., 478. Five to ten percent of incarcerated women enter prison pregnant; approximately 2,000 births occur to women in prison or jail each year. Id. 486. The existence of shackling seems indicative of prison norms that were not designed with the woman prisoner in mind. Id., 478.*
⁹ *Id., at 478.*
¹⁰ See discussion of treaty provisions *infra*, Part III (c).
¹¹ *Id.*
less visibly egregious, treatment of pregnant women should be considered human rights violations as well. International law may be of particular use when the detained person is a foreign national in the United States, as this essay’s final Part will argue.

One case from the Middle District of Tennessee, *Juana Villegas v. Metropolitan Government of Davidson County*, provides a useful context in which to explore the scope and content of pregnant women’s internationally-recognized rights to safe and humane treatment, and to identify the ways in which state actors can violate that right in ways that both include and go beyond shackling.\(^{12}\)

### II. *Juana Villegas’s Treatment While In Immigration Detention*

Juana Villegas, a woman from Mexico living in Tennessee, was nine months pregnant when she was pulled over by county police officers while driving with her three children in July of 2008.\(^{13}\) Suspected of being in the U.S. without proper immigration documents, she was separated from her children and put into county jail in Nashville.\(^{14}\) After two days in jail, she was moved to a women’s correctional center.\(^{15}\) Her water broke on her third day of imprisonment,\(^{16}\) she went into labor, and she was shackled while being transported to the hospital.\(^{17}\) Davidson County police officers remained in her hospital room during her labor. They continued to keep her in shackles, in spite of a physician’s order that she not be restrained; with the exception of one officer who removed the restraints during the childbirth itself.\(^{18}\) She was shackled again after

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\(^{13}\) Complaint, Juana Villegas v. Metro. Gov’t of Davidson County, No. 3:09-00219, (M.D. Tenn. Nov. 19, 2009), 2009 WL 5052986, at ¶ 7 *2. [hereinafter Villegas Complaint.]

\(^{14}\) Villegas, 2011 WL 1601480 at *2.

\(^{15}\) Id.

\(^{16}\) Id.

\(^{17}\) Id. at *3.

\(^{18}\) Id.
birth, and was in leg restraints even while walking and using the bathroom.\footnote{Id. at *3 - *4.} Policemen unplugged the phone in her hospital room\footnote{Villegas Complaint, supra note 13 at ¶ 46, *10; ¶ 57, *11.} and did not allow her to call her husband; thus, her family did not know where she was for three days.\footnote{Villegas, 2011 WL 1601480 at *9.} After giving birth, she was returned to the correctional facility; but her infant had been taken from her, and she did not know where he was.\footnote{Id.} The policemen refused to let her take the breast pump that the hospital had tried to give her,\footnote{Id.} which left her with no way to express her breast milk, and caused her to contract a painful, debilitating mastitis infection.\footnote{Id.} The fact that she was unable to adequately move during labor and after delivery left her with pain, cramping, and an inability to fully move her left leg, weeks later.\footnote{Villegas Complaint, supra note 13 at ¶ 67, *13.} Ms. Villegas described her overall experience as traumatic and terrifying,\footnote{Id. at ¶ 56, *11.} and a psychiatrist confirmed that shackling her during transport and labor had caused terror, immense stress, and a feeling of helplessness consistent with Post-Traumatic Stress Disorder.\footnote{Villegas, 2011 WL 1601480 at *8-9.} Davidson County officials claimed that this treatment was legal, pursuant to the 287(g) program, which authorizes state and municipal officials to enforce federal immigration law in a limited capacity.\footnote{Immigration and Nationality Act, section 287(g), codified at 8 U.S.C. §1357(g). Added by amendment, Sept. 30, 1996 pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104 – 208, 110 Stat. 3009 (codified in various sections of 8 U.S.C.).}

III. The District Court’s Decision

Since Ms. Villegas was a detainee and not a convicted prisoner, she challenged her treatment under the due process clause of the Fourteenth Amendment. Courts use Eighth
Amendment analysis on that kind of Fourteenth Amendment claim, and, after undertaking that analysis, the court entered summary judgment for Ms. Villegas. Judge William Haynes of the Middle District of Tennessee found on the pleadings alone that Ms. Villegas’s shackling and officers’ refusal to let her have a breast pump clearly constituted “deliberate indifference to a serious medical need,” thus violating the Eighth Amendment under *Estelle v. Gamble*. The court also found a free-standing Due Process violation, since Ms. Villegas been punished prior to having had any sort of adjudication.

The court’s decision followed its application of U.S. case law on the “deliberate indifference to a serious medical need” species of Eighth Amendment violations. The court explained that the “deliberate indifference” norm is concerned with preventing the “unnecessary and wanton infliction of pain;” can be violated by state actors either intentionally or negligently; and entails both objective and subjective harm. The “subjective harm” lens, under *Helling v. McKinney*, “requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwilling to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today’s society chooses to tolerate.” In other words, a *Helling* type of medical complaint is one that “is so obvious that even a lay person would recognize” it. The “subjective” lens uses the “contemporary standards of decency” analytic common to Eighth Amendment jurisprudence, which, as will be discussed below, can rely on international and comparative law considerations.

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30. Id.
31. Id. at *17, citing *Estelle* at 104-05.
32. Id.
33. Id. at *17 - *18 (citing *Helling v. McKinney*, 509 U.S. 25 (1993)).
34. Id. at *17 (quoting *Helling*, 509 U.S. at 36).
35. Id. at *18.
The court explained that restraining a laboring pregnant woman is conduct that meets all of those criteria: it is an “obvious” harm. Referring to Nelson and similar cases, the court confirmed that shackling a woman in labor is “inhumane” and “antithetical to human dignity.” The found Ms. Villegas’s shackling to be medically unnecessary, and to have caused “unnecessary physical and mental suffering,” thus constituting a “deliberate indifference” type of Eighth Amendment violation.

The court also went beyond shackling, and held that the denial of the breast pump constituted deliberate indifference and violated the Eighth and Fourteenth Amendments. The court also found that the shackling and breast pump conduct were free-standing Due Process violations under Bell v. Wolfish, since “detainees may not be punished prior to an adjudication in accordance with due process of law.”

A. International law as Eighth Amendment law

Judge Haynes’s decision is commendable for several reasons. As the next Part will demonstrate, the decision in large part comports with international law protecting pregnant women’s rights to humane treatment and adequate health care. It is noteworthy not just for conforming with international norms, but for referring to some of them explicitly.

When determining whether a denial of treatment violated “contemporary standards of decency” under Helling, Judge Haynes noted that courts will usually cite “national health
organizations. But Judge Haynes went on to refer not just to national health organizations but to international standards: the United Nations Minimum Standards for the Treatment of Prisoners, the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture (CAT). The court noted that the U.S. had ratified both the ICCPR and the CAT; and that it was not enforcing those treaties per se, but using their standards, and the U.S.’s ratification of them, as ‘persuasive’ evidence of contemporary standards. The court found this analysis especially appropriate since Ms. Villegas was a foreign national held in federal detention.

Using international standards as “persuasive” authority in Eighth Amendment analysis is a time-honored practice most recently and famously associated with Roper v. Simmons. It is a practice that makes sense, given the Amendment’s relativistic and evolving character, but it has also sparked backlash from conservative jurists and commentators who reject a role for international or comparative-law sources in U.S. constitutional analysis. Judges from or sympathetic to that “isolationist” school of thought may diverge from Judge Haynes’s approach and may refuse to consider international law as relevant to the Eighth Amendment; or Roper may

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41 Id. at *22, (citing Ferguson v. City of Charleston, 532 U.S. 67, 78-79 (2001))
42 Id. at *23.
43 Id.
44 Roper v. Simmons, 543 U.S. 551 (2005), determined that the juvenile death penalty no longer comported with the Eighth Amendment, and counted the vast number of treaties outlawing the punishment. Id at 576.
45 See Weems v. United States, 217 U.S. 349, 373 n. 9 (1910). “[T]ime works changes [and] brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.” See also Trop v. Dulles, 356 U.S. 86, 101, n. 8 (1958) (“evolving standards”). The Trop Court referred to the universal beliefs of “civilized people” and the “civilized nations of the world” in 1958, and surveyed the laws of other countries. Other Eighth Amendment cases, including Thompson v. Oklahoma, have referred to foreign and international law, including the law of treaties. 487 U.S. 815 at 831, n 34 (1988).
46 Some outspoken justices such as Justice Scalia insist that comparative and international law have no role to play in U.S. constitutional interpretation (See Printz v. United States, 521 U.S. 898, 921, n. 11 (1997)), but other jurists reject that view (see id. at 977 (Breyer, J., dissenting)). Many scholars argue persuasively that comparative and international law are appropriate tools for constitutional interpretation. See Vicki C. Jackson, Ambivalent Resistance and Comparative Constitutionalism: Opening up Conversation on Proportionality, 1 U. PA. J. CONST. L. 583, 638 (1999), Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 YALE L. J. 1225, 1235 (1999).
be reinterpreted by the Supreme Court to posit smaller and less-powerful roles for international law to play in Eighth Amendment decision-making.  

International standards should continue to play an important role in Eighth Amendment analysis along the lines of *Roper*; but courts disfavoring the use of international authority should at least consider international standards as part of the Eighth Amendment when faced with a case like Juana Villegas’s, in which a foreign national is in federal custody. That kind of situation has historically triggered the use of international treaties and standards, and thus may be inapposite to the anti-*Roper*-type claims against international law. But I also argue for a completely different approach, described in the next section: that international law should be applied as *binding law*, outside the context of the Eighth Amendment.

**B. Why use international law outside of the Eighth Amendment?**

Human rights groups report that shackling pregnant women and withholding or refusing breast pumps are common practices in U.S. immigration detention centers. There will be more plaintiffs like Ms. Villegas before courts that may be unlike Judge Haynes’s. An expanded approach to international human rights law is thus urgent for several reasons. First, domestic law, even in a decision like *Villegas*, does not go far enough in protecting pregnant women’s human

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47 *Graham v. Florida* emphasized the non-controlling nature of international and comparative law, likely in response to isolationist critiques of *Roper*, 130 S. Ct. 2011, 2033 (2010). *Graham* emphasized that, in rejecting life-without-parole for juvenile non-homicide offenders, the U.S. aligned with the “world” consensus, but that “this does not control our decision.” *Id.* Justice Kennedy’s majority opinion further made explicit that “the judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment” but “are not irrelevant.” *Id.* *Graham* contains a concise statement for why international treaties may not bind the U.S. on their face but are relevant to Eighth Amendment law: “the question before us is not whether international law prohibits the United States from imposing the sentence [ ]. The question is whether that punishment is cruel and unusual.” *Id.* at 2034.

48 See infra Part V.

49 *Human Rights Watch reports that pregnant women in immigration detention are routinely shackled. HUMAN RIGHTS WATCH, DETAINED AND DISMISSED: WOMEN’S STRUGGLES TO OBTAIN HEALTH CARE IN UNITED STATES IMMIGRATION DETENTION 35 (2009). HRW also found that breast pumps are routinely denied to women in immigration detention. Id. at 56. Overall, human rights reports reveal a “shocking lack of concern for pregnant women and breastfeeding mothers” in immigration detention centers. Sussman, *supra* note 1, at 479.*
rights. Judge Haynes’s decision narrowly focused on the shackling and breast-pump denial, rather than seeing Juana Villegas’s treatment holistically and interpreting it as a complex, intersectional experience of discrimination and cruel treatment. Judge Haynes did not enter summary judgment for Ms. Villegas’s other complaints: the officers’ refusal to let her call anyone in her family and let them know where she was or that she had given birth; the officers’ taking away her newborn son;50 and the officers’ refusal to give her privacy while she changed, labored, and gave birth.51 Nor did the court determine that her initial 3-day detention while nine months pregnant was, itself, a needless and cruel punishment. International human rights law goes beyond shackling and can help advocates explain why those forms of ill-treatment of pregnant women should also be prohibited.

Second, international law, when used outside the Eighth Amendment, may be less distasteful to conservative or isolationist judges – or at the very least, this approach may sidestep the Roper controversy. In his dissent from Roper, Justice Scalia expressed serious disapproval of the court’s use of international and foreign sources when interpreting the Eighth Amendment or “other provisions of our Constitution.”52 But Scalia and his ilk do not necessarily reject international law claims when brought as a separate source of subject-matter jurisdiction.53 An isolationist reading of the Constitution is a rejection of international law as persuasive authority vis-à-vis U.S. law – it may not necessarily entail a rejection of international law as law. But advocates too often think that lower courts dislike international human-rights law “as law” even more than they dislike Roper-style incorporation of international norms into Eighth Amendment

50 The facts are unclear as to if, and for how long, her baby was taken away. Judge Haynes relied on her testimony that her newborn had been with her, rather than on her pleading which stated that he had been taken away for several days. Villegas, 2011 WL 1601480 at *24.
51 Id.
53 For example, Justices like Scalia do not hesitate to apply international treaty law under treaties such as the Hague Convention on International Child Abduction (see Abbott v. Abbott 130 S.Ct. 1983 (2010)).
analysis. However, there is little evidence to support that suspicion. Instead, my review of the cases suggests that courts are very rarely asked to apply international human rights law in the first place, with the notable exception being pro se habeas litigants. It is this lack of robust advocacy on international human rights theories that leads to a scarcity of international human rights jurisprudence, not a monolithic refusal by courts to consider international human rights law.

Finally, international law may be especially necessary when foreign plaintiffs with irregular immigration status face courts who do not consider them holders of constitutional rights. While Judge Haynes saw Ms. Villegas as a holder of Eighth Amendment rights, other courts faced with a similar plaintiff might disagree. Under the “Plenary Power” doctrine, courts hold that Congress has almost absolute power to regulate in areas of immigration, and under the related “Entry Fiction” doctrine, immigrants arriving at the airport or border are not entitled to constitutional protections. Both of these doctrines, along with the *Mathews v. Díaz* line of cases, can lead courts to determine that non-citizens do not have the same cohort of constitutional or federal rights that U.S. citizens do, even once an immigrant is firmly on U.S. soil. A recent example of this kind of reasoning is *United States v. Portillo-Muñoz*, in which a divided panel of the Fifth Circuit held that “illegal aliens” are not “people” within the meaning of the Second Amendment, and that they may also lack Fourth Amendment rights. The Supreme Court has not gone as far as the Fifth Circuit in declaring “illegal aliens” not to be “people”, but

54 *See* Chae Chan Ping *v.* United States (The Chinese Exclusion Case), 130 U.S. 581, 603 (1889). Related to the Plenary Power doctrine, the Entry Fiction doctrine holds that immigrants arriving at the airport or border do not have constitutional protections, since they are not yet considered inside the United States. *See* Shaughnessy *v.* United States ex rel Mezei, 345 U.S. 206 (1953); U.S. ex rel. Knauff *v.* Shaughnessy, 338 U.S. 537, 544 (1950).
55 Related to the Plenary Power doctrine, the Entry Fiction doctrine holds that immigrants arriving at the airport or border do not have constitutional protections, since they are not yet considered inside the United States. *See* Shaughnessy *v.* United States ex rel Mezei, 345 U.S. 206 (1953); U.S. ex rel. Knauff *v.* Shaughnessy, 338 U.S. 537, 544 (1950).
in *Hoffman Plastic Compounds v. Nat’l Labor Rel. Board*, it held that undocumented migrants were not entitled to the same federally-created labor rights as other workers. 58 Courts have been divided as to what *Hoffman* means for the undocumented immigrants’ rights outside the workplace context, 59 but regardless of *Hoffman*’s scope, its denial of domestically-created rights to undocumented migrants may be countered with *Sosa v. Alvarez-Machain*’s affirmation that aliens can sue U.S. government officials for international customary law violations, so long as that customary law is very clear, and so long as the violations take place on U.S. soil. 60 The next section will argue that women like Ms. Villegas, subjected to cruel treatment while pregnant on U.S. soil, should make that kind of free-standing international customary law claim.

International human rights law both applies “as law” in the U.S. and contains a clearly-defined right to safe and humane treatment while pregnant. The next section will explain the content of this international human right, and will outline how it can be applied as law in U.S. courts under an international customary law theory.

**IV. The right to safe and humane treatment during pregnancy, labor, and childbirth is an international human right.**

The international human right to safe and humane treatment during pregnancy takes on two interrelated forms. First, women have an affirmative right to at least a basic level of pregnancy-and-childbirth related health care, which must be administered in safe conditions and must recognize their dignity. 61 Second, when a pregnant woman is in custody of the state, she has a

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61 See discussion of treaty provisions *infra*, Part III (c).
‘negative’ right to respect for her dignity, which means that the state must refrain from treating her in ways that cause cruel and inhuman treatment or constitute torture. This Part will explore how the international human rights of pregnant women could be enforceable in U.S. courts. It will focus on the second type of this human right – the rights of pregnant women in custody.

According to the Third Restatement of the Law of Foreign Relations, there are three ways by which international human rights law becomes binding in U.S. courts: treaty law, customary law, and jus cogens principles. The human right to humane treatment during pregnancy, labor, and childbirth exists and is arguably binding in the U.S. under all of those three sources of international law, but I suggest that the best method for causing U.S. courts to apply this right as “part of our law” is to use international customary law, not international treaty law. Jus cogens principles also give rise to the human right to safe and humane treatment during pregnancy, but since courts are reluctant to base holdings exclusively on jus cogens reasoning, international customary law arguments, bolstered by jus cogens arguments for “atmospheric” effect, will likely be more persuasive. Treaty terms can also be used as persuasive evidence that international consensus exists on this issue, and that the U.S. is part of this international consensus.

A. Treaty law is limited as a source of justiciable human rights law in U.S. courts
Under the Supremacy Clause of Article VI of the Constitution, international treaties duly signed and ratified become “the supreme Law of the Land.” \(^{66}\) The U.S. has signed and ratified several human rights treaties that include the right to safe and humane treatment during pregnancy, including the International Covenant on Civil and Political Rights (ICCPR), \(^{67}\) the Convention on the Elimination of All Forms of Racial Discrimination (CERD), \(^{68}\) and the Convention Against Torture (CAT). \(^{69}\) It has also signed and ratified the U.N. Charter, \(^{70}\) the Universal Declaration of Human Rights (UDHR), \(^{71}\) and the O.A.S. Charter, \(^{72}\) which makes it party to the American Declaration on the Rights and Duties of Man. \(^{73}\) All of these documents give rise to special human rights protections for pregnant women. \(^{74}\) However, notwithstanding the Supremacy Clause, courts will probably decline to apply the terms of these treaties directly, since all of these treaties have been declared to be “non-self-executing,” \(^{75}\) and since the UDHR is not a treaty but a Declaration of the General

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\(^{66}\) U.S. CONST. Art. VI.


\(^{69}\) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (entered into force for the U.S. Oct. 21, 1994) [hereinafter CAT].

\(^{70}\) U.N. Charter, Art. 110.


\(^{74}\) See discussion of treaty provisions infra, Part III (c).

\(^{75}\) The U.N. human rights treaties that the U.S. has ratified – the ICCPR, CERD, and CAT – each contain “non-self-executing” language inserted by the U.S. Senate upon ratification. ICCPR, supra note 67, Declaration I of the U.S. Senate, entered upon ratification by the United States on June 8, 1992; CERD, supra note 68, Declaration III of the U.S. Senate, entered upon ratification by the United States Oct. 21, 1994; CAT, supra note 69, Declaration III of the U.S. Senate, entered upon ratification by the United States Oct. 21, 1994. The U.N. Charter and the O.A.S. Charter were not declared to be “non-self-executing” by the U.S. Senate, but have been interpreted that way by courts. See Sei Fujii v. California, 38 Cal. 2d 718, 242 P. 2d 617 (1952) (holding the U.N. Charter not to be self-executing) and Filartiga v. Peña-Irala, 630 F. 2d 876, 882 n. 9 (2d Cir. 1980) (holding the O.A.S. Charter not to be self-executing). The Middle District of Tennessee recently held the O.A.S. Charter to be non-self-executing.
Assembly.76 The “non-self-executing” doctrine means that courts will not view the treaty’s terms as directly creating a private cause of action, and that Congress must make “implementing” legislation in order to provide positive law that courts can enforce.77 Human-rights advocates favoring international law in U.S. courts have long criticized the non-self-executing doctrine.78 While advocates for pregnant women’s rights should continue to challenge the “non-self-executing” doctrine, that argument is beyond this essay’s scope. Instead, I will explore how the international human right to safe and humane treatment during pregnancy arises under international customary law.

**B. International customary law and jus cogens are more promising sources of justiciable human rights law in U.S. courts**

International custom has traditionally been the most prevalent source of international law,79 and U.S. courts have been more willing to apply customary law than treaty law.80 According to the Restatement, “[t]he customary law of human rights is part of the law of the United States to be notwithstanding the lack of Senate ‘non-self-executing’ language. Workman v. Sundquist, 135 F. Supp. 2d 871 (M.D. Tenn. 2001).

76 The Universal Declaration is not a treaty but is a unanimous resolution adopted by the U.N. General Assembly in 1948. It is considered a statement of international customary law, and also considered the authoritative interpretation of the UN Charter. Its basic provisions are considered binding on member states of the United Nations. See Filartiga v. Peña-Irala, 630 F. 2d 876 (2d Cir. 1980) at 883; Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004).
77 See Flores v. S. Peru Copper Corp., 343 F.3d 140, 163 n.34 (2d Cir. 2003); Stefan A. Riesenfeld & Frederick M. Abbott, The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties, 67 CHI-KENT L. REV. 571 (1991).
78 See, e.g., Louis Henkin, Rights: American and Human, 79 COLUM. L. REV. 405, 424 (1979) (arguing that the non-self-executing provisions are “deeply troubling”); Riesenfeld & Abbott, supra note 77, at 608 (arguing that the Senate does not have the power to unilaterally tell Courts not to implement the terms of treaties); Nadine Strossen, Recent U.S. and International Judicial Protections of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis, 41 HASTINGS L.J. 805, 813–15 (1990) (outlining different critiques of the non-self-executing doctrine, namely that it is “incoherent” and that it should not apply to human rights treaties).
79 OPPENHEIM’S INTERNATIONAL LAW § 17 (8th Ed.) (1955).
applied as such by State as well as federal courts.”81 (emphasis added). International customary law is determined by assessing whether a certain norm is generally applied by all nations owing from a sense of legal obligation, and then binds a nation whether or not it has formally recognized it, so long as a nation has not “expressly and persistently objected to its development.”82 When determining whether a certain legal concept exists as international customary law, courts will often look to the content of treaties, whether or not they are ratified, declarations of international bodies, and the practices of states to determine whether a norm is “extensive and uniform.”83

Interestingly, the fact that customary law, rather than direct treaty law, may be used in U.S. courts means that many more treaties and documents can be relevant beyond just those that have been formally ratified by the U.S. Senate. Treaties that have merely been signed, but not ratified, by the U.S. – such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)84 and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)85 – can be used to demonstrate international consensus and the U.S.’s

agreement with basic principles. Treaties that the U.S. has not signed can be relevant in demonstrating international principles – an approach taken by the Supreme Court in its Eighth Amendment analysis in *Roper*.\(^86\) Regional treaties that the U.S. is not even eligible to sign – such as the African Protocol, or the European Social Charter – can also be relevant in showing international consensus,\(^87\) as can the domestic law of other countries.\(^88\) Documents that are not officially “treaties” and thus not enforceable under the Supremacy Clause – namely, the UDHR – can become the “authoritative statement of the international community” and thus proof of international customary law.\(^89\) Using international customary law thus widens the scope of treaties and international documents that can be cognizable to U.S. courts, and sidesteps the non-self-executing doctrine. Of course, the terms of a treaty on its face alone will not be applicable as law under this theory, but are relevant as evidence for convincing a court that a norm exists and is universal.

The right to safe and humane treatment during pregnancy is unambiguously contained in all the major international and regional human rights treaties, including those the U.S. has signed.

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\(^86\) 543 U.S. 551 (2005). The *Roper* Court considered the Convention on the Rights of the Child to be persuasive evidence of the “opinion of the world community” even though the U.S. had not ratified it. 543 U.S. at 576.

\(^87\) *Roper* referred to the prohibition on the juvenile death penalty in the African Charter on the Rights and Welfare of the Child. *Id.* at 576.

\(^88\) Evidence of comparative law and practice can be extremely persuasive to courts. The *Roper* Court noted that “the U.S. is one of only seven countries to have executed juvenile offenders since 1990.” 543 U.S. at 577. At oral argument in *Nelson*, counsel for Ms. Nelson demonstrated that the U.S. was one of the only countries in the world to shackles pregnant women. Ms. Nelson’s counsel and *amici* believe that such a showing was persuasive in ultimately succeeding on their Eighth Amendment theory. Interview with Lynn Paltrow, Executive Director of National Advocates for Pregnant Women, *amicus in Nelson*, March 8, 2011, Seattle. However, since these analyses make more sense in a fact-specific sense depending on the particular issue challenged in a given case, I will not perform this analysis here, and will merely provide the normative framework behind what I believe is international custom and universal consensus. In subsequent cases, advocates should research the exact practice they are challenging (for example, the prosecution of women for drug use during pregnancy) and examine its prevalence or nonexistence internationally. If a practice for the most part does not exist or is banned, advocates should link that empirical finding with the universal norms contained in the treaty provisions and interpretations outlined in this essay.

and ratified, those the U.S. has signed but not ratified, and those the U.S. is not eligible to sign.\textsuperscript{90} It has also been stated in a number of intergovernmental documents and decrees.\textsuperscript{91} These international documents can be considered evidence that an international customary law exists, and that, as the Sixth Circuit has explained, governments “follow [a norm] because they believe it is…law, not merely because they think it is a good idea, or politically useful, or otherwise desirable.”\textsuperscript{92} Moreover, the U.S. has not persistently and expressly objected to the norm that pregnant women enjoy an inalienable right to safe and humane treatment.\textsuperscript{93} Thus, the norm should be applicable as international customary law in U.S. courts.

The right to safe and humane treatment during pregnancy can also be interpreted as a \textit{jus cogens} norm. The notion of \textit{jus cogens} has existed for longer than the term “human rights,” but includes concepts now understood as human rights issues, such as prohibitions on slavery, genocide, piracy, torture and cruel and inhuman treatment, and forced disappearances.\textsuperscript{94} U.S. courts have held that violations of \textit{jus cogens} norms can never be considered legitimate sovereign acts by state actors,\textsuperscript{95} and that there is no “compelling” reason that can sanction such acts by a state, unlike some domestic constitutional rights deprivations.\textsuperscript{96} \textit{Jus cogens} theory can therefore be useful for advocating for the basic human rights of pregnant women in the U.S., especially in the face of federal sovereign immunity arguments\textsuperscript{97} or in the face of “legitimate

\begin{footnotesize}
\begin{enumerate}
\item See discussion of treaty provisions \textit{infra}, Part III (c).
\item \textit{Id.}
\item Buell v. Mitchell, 274 F. 3d at 372 (2001).
\item See discussion of evidence that the U.S. has adhered to these international norms \textit{infra}, Part II(c), at 10.
\item \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, §702 (1986).
\item See, e.g., Enahoro v. Abubakar, 408 F.3d 877, 893 (7th Cir. 2005); Sarai v. Rio Tinto, PLC, 487 F.3d 1193, 1209, 1221. (9th Cir. 2007).
\item See Proposed Reply Brief in Support of the United States’ Motion to Dismiss (Jun. 10, 2009), 2009 WL 5052990, Villegas v. Metro Gov’t of Davidson County, Slip Copy, 2009 WL 4015975, M.D. Tenn., 2009.
\end{enumerate}
\end{footnotesize}
penological purpose” arguments. Overall, *jus cogens* principles and the overwhelming consensus of the international community show why all states are required to provide basic respect and humane treatment to pregnant women.

**C. The sources and content of the international human right to safe and humane treatment during pregnancy**

1. **Explicit provisions for pregnant and lactating women’s rights**

Many human rights treaties and declarations explicitly declare that pregnant and nursing women have a right to special protection. One example is the American Declaration on the Rights and Duties of Man, which provides that

> [a]ll women, during pregnancy and the nursing period, and all children have the right to special protection, care, and aid. 99

Under the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights – the “Protocol of San Salvador”, States Parties must:

> “provide special care and assistance to mothers during a reasonable period before and after childbirth.” 100

Article 12(2) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), states that:

> “States Parties shall ensure to women appropriate services in connection with pregnancy, confinement, and the postnatal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.” 101

The International Covenant on Economic, Social, and Cultural Rights states that:

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101 CEDAW, *supra* note 84, art. 12(2).
“Special protection should be accorded to mothers during a reasonable period before and after childbirth.”\textsuperscript{102}

The Convention on the Rights of the Child provides that

“States parties shall…ensure appropriate pre-natal and post-natal health care for mothers…”\textsuperscript{103}

Under the African Women’s Protocol,

“States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted… States parties shall take all appropriate measures to…establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding.”\textsuperscript{104}

The Cairo Programme of Action of the International Conference on Population and Development, Principle 8, provides that:

“Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health…which includes reproductive health care…Para. 7.2. Reproductive health includes “the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and will provide couples with the best chance of having a healthy infant.”\textsuperscript{105}

The Beijing Platform for Action states that

“[women have the right to access] appropriate health-care services that will enable [them] to go safely through pregnancy and childbirth…”\textsuperscript{106}

The European Social Charter provides a broad requirement that states provide “appropriate social and economic protection” as well as “special protection” for both pregnant women and mothers.\textsuperscript{107}

\textsuperscript{102} ICESCR, supra note 85, art. 10(2).
In addition to the broad grant of special protection for pregnant women that those international documents contain, the international consensus further emphasizes that once women are deprived of liberty by the state, they retain the right to safe, humane, and appropriate treatment in connection with pregnancy and childbirth. Under the International Covenant on Civil and Political Rights,

“[P]regnant women who are deprived of their liberty should receive humane treatment and respect for their inherent dignity at all times surrounding the birth and while caring for their newly-born children.”

The U.N. Standard Minimum Rules for the Treatment of Prisoners, which has existed since 1955, prohibits shackling except for in extreme circumstances, and requires that “there be special accommodation for all necessary pre-natal and post-natal care and treatment.” This international corpus reveals that the concept that pregnant women deserve special protections is universal.

1. The U.S. has not persistently objected from, and has instead followed, the international norm that pregnant women are legally entitled to special protection.

The U.S. has shown its adherence to the norm that pregnant women deserve basic health care not just by signing and ratifying many of those documents, but by implementing domestic laws

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107 European Social Charter, Art. 17 (the right of mothers and children to social and economic protection), Part 1(8) (maternity protections at work), Art. 8 (right to maternity leave for nursing) E.T.S. 163 (1996).
110 It is important to point out that just because a universal principle has not been actualized by all nations does not mean that the right is not cognizable as a human right under international customary law. Sosa v. Alvarez–Machain, 542 U.S. 692, 738 n. 29 (2004).
111 The U.S. has signed and ratified ICCPR, has signed but not ratified CEDAW, ICESCR, and CRC. See supra notes 84, 85, 103. The ICPD Programme of Action was negotiated by 179 states, including the U.S. The Executive Branch of the U.S. has recently “renewed its commitment” to the ICPD. See United States Renews Full Commitment to ICPD, UNFPA DISPATCH (Jan. 8, 2010), http://www.unfpa.org/public/news/pid/4669. The Beijing Platform of Action was also drafted with the support of the U.S., see First Lady Hillary Rodham Clinton, Remarks for the United Nations Fourth World Conference on Women, Beijing China, Sept. 5, 1995 (confirming U.S.
that give everyone, regardless of income level or immigration status, the right to health care during labor and childbirth (under the Emergency Medical Treatment and Active Labor Act of 1986 (EMTALA)). Other domestic laws demonstrate U.S. compliance with the international norm that pregnancy and nursing require special treatment – the Family and Medical Leave Act (which provides maternity leave job protection); the Pregnancy Discrimination Act (which amended Title VII to define discrimination on the basis of pregnancy or childbirth as unlawful sex discrimination); the Women, Infants and Children (WIC) program (which grants food and other resources to low-income pregnant and nursing women); and many state Medicaid laws that provide prenatal care to all pregnant women, even those who are otherwise ineligible for Medicaid (such as undocumented migrants).

The right to special protection for pregnant women also means that certain state actions – and punishments, such as 287(g) detention, or being shackled – that may be appropriate for non-pregnant detainees may be inappropriate for pregnant women. The U.S. has shown its adherence to this international customary norm by means of federal prison policy and by means of court decisions such as Nelson, which have held that pregnant women who are in state custody must not be shackled and that to do so is a violation of basic dignity. Even the 287(g) program itself carves out “humanitarian exceptions,” and specifies that pregnant and nursing women are subject

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113 Nebraska is an example of a state that grants Medicaid for prenatal health care to “ineligible” mothers by technically granting the care to the “unborn” child. http://www.dhhs.ne.gov/webhelp/NFOCUS/Manuals/NAC477/nac477/medicaid_eligibility_for_the_unborn.htm

114 The Federal Bureau of Prisons issued a new policy in October 2008, generally prohibiting the shackling of inmates in labor, delivery, or the post-partum period. Federal Bureau of Prisons, Program Statement § 570.45

to those exceptions.\textsuperscript{116} The U.S. is also a leader in the promotion of safe and humane treatment for pregnant women at the global level.\textsuperscript{117} This kind of lawmaking, policymaking, and jurisprudence makes clear that the U.S. has not objected to the international norm that pregnant women – especially those deprived of liberty by state actors – should receive humane treatment in keeping with their basic dignity. Thus, the international customary law that pregnant women must be treated safely and humanely is one that the U.S. has ascribed to and is thus applicable in U.S. courts.\textsuperscript{118}

Under these principles, Juana Villegas’s treatment could be assessed insofar as it did or did not comply with her special rights as a pregnant woman, a laboring woman, and a lactating woman – all granted special protection by these international consensus documents.

The international customary law of safe and humane treatment during pregnancy does not exist, though, \textit{only} because it is explicitly stated in those documents, but because it arises from the broader human rights protections contained in \textit{all} of the human rights treaties.

2. \textit{The right to safe and humane treatment while pregnant and the principle of dignity}

The principle that all people, regardless of sex, race, nationality, or other condition, have a basic right to dignity is the foundation of human rights law, in both its treaty provisions and its customary understanding. Article 1 of the Universal Declaration of Human Rights states that, as a matter of consensus among U.N. member states, “all human beings are born free and equal in

\textsuperscript{116} See Complaint, Juana Villegas v. Metro. Gov’t of Davidson County, No. 3:09-00219, (M.D. Tenn. Nov. 19, 2009), 2009 WL 5052986 ¶ 33 - 34 **7-8, explaining that the Memorandum of Agreement between ICE and the Davidson County government “explains ICE policies, which, for example, in various contexts require officers to identify at the earliest opportunity people arrested on noncriminal immigration violations who may be sole caregivers or have other humanitarian concerns. Those who are to be evaluated for immediate humanitarian release include pregnant women and nursing mothers. These evaluations are to be made the day of an arrest.”

\textsuperscript{117} See, \textit{inter alia}, Hillary Clinton, Remarks, \textit{supra} note 111.

\textsuperscript{118} The Supreme Court in \textit{Roper v. Simmons} counted the vast number of treaties outlawing the juvenile death penalty when considering that such a norm had in fact become universal. 543 U.S. 551, 576 (2005).


The concept of dignity also underlies the ICCPR, CERD, CAT, ICESCR, CEDAW, and the international human rights consensus in general, as well as U.S. constitutional principles. The Supreme Court has emphasized that the basic principle of dignity must be considered when interpreting the Eighth Amendment -- an example of how the U.S., in its domestic jurisprudence, abides by and helps create the international customary law of human rights. As the Court said in Roper: “by protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.”

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119 UDHR, supra note 71, art. 1.
121 OAS Charter, supra note 72, Art. 45.
124 See Kenji Yoshino, The New Equal Protection, 124 Harv. L. Rev. 747, 749 (2011) arguing that the equal-protection and due-process prongs of constitutional law create an “intertwined” framework, and that “dignity” may be more accurate than “equality” or “due process” to explain what these dual strands of jurisprudence are concerned with.
126 Id.
When the Executive branch of the U.S. government reported recently to the U.N. Human Rights Council, it, like the Supreme Court in *Roper*, explained its vision of human rights in the U.S. as “protecting the dignity of all persons.”\(^{127}\) The Executive branch also stated that it was committed to applying human rights norms domestically. “[H]uman rights are universal, but their experience is local. This is why we are committed to holding everyone to the same standard, including ourselves.”\(^{128}\) Since, according to the *Restatement*, the views of the Executive should be given “great weight” when interpreting international law,\(^{129}\) courts should consider the principle of basic dignity when assessing whether a woman’s right to safe and humane treatment during pregnancy has been violated. Arising out of this background principle of inalienable dignity, the international human rights consensus contains rights to life, liberty, and security of person; rights to freedom from CIDT; and rights to freedom from non-discrimination. All of those rights provisions also give rise to the clear and unambiguous state obligation to treat pregnant, laboring, birthing, and post-partum women safely, humanely, and with respect.\(^{130}\)

1. **Dignity and the right to life, liberty, and security of person**

The rights to life, liberty, and security are international customary human rights law and are applicable to everyone, regardless of migration status.\(^{131}\) Pregnancy, labor, and childbirth are inherently dangerous to a woman’s health and life, and make women especially vulnerable to

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\(^{128}\) *Id.* at ¶ 5.

\(^{129}\) *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW*, §112 cmt. c. (1986).

\(^{130}\) There are other international human rights – such as “the right to found a family” that also give rise to pregnant women’s human rights. See Rebecca J. Cook & Charles Ngwena, *Women’s Access to Health Care: The Legal Framework*, 94 INT’L. J. GYN. & OBST. 216 (2006). However, this essay will focus only on the three elements that I believe can best give rise to the international customary-law argument for use in U.S. courts.

\(^{131}\) Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, G.A. Res. 40/144, Dec. 13, 1985. Under the Universal Declaration on Human Rights, states may not subject *anyone*, including illegal aliens, to violations of the right to life, security, to legal redress (Art. 5), and to freedom from cruel, inhuman, and degrading treatment (Art. 6).
deprivations of their liberty, security, and dignity. The right to life is violated when women cannot access medical care during pregnancy, because without sufficient medical care, pregnancy, labor, and childbirth can be deadly. The international community has overwhelmingly and unambiguously recognized the risk pregnancy poses to women’s health and lives, and has posed the issue in terms of states’ legal obligations.

A pregnant woman has a unique stake in her bodily inviolability and her personal security. Not just because she may want to protect the life she is gestating, but because her life and health are made uniquely vulnerable by pregnancy. She may go into labor; she may suffer painful bleeding, vomiting, or other complications; she may suffer from stress or anxiety about the health of the pregnancy; and psychological stress can itself cause harm to the fetus, even, data suggests, miscarriage. Thus, a woman’s right to ‘security of the person’ when she is pregnant is stronger than it may be when she is not pregnant. For these reasons, the American Declaration, CEDAW, ICESCR, CERD, ICCPR, the European Convention on Human Rights, the African Women’s Protocol, and the laws of the United States, among others, ensure women basic respect during pregnancy, labor, and childbirth, without distinction based on race, nationality, or other status.

132 “A factfinder could also determine [that officer] Turensky was aware of the risks involved [in childbirth] because they were obvious…Each year approximately 530,000 women die during childbirth (citing the World Health Organization), and the hazards associated with labor and childbirth have entered the collective consciousness…” Nelson v. Correctional Medical Services 583 F.3d 522, 530, n.5 (8th Cir. 2009).
133 See discussion of treaties supra; see also Views of the CEDAW Committee concerning Communication No. 17/2008, Alyne da Silva Pimentel v. Brazil (Aug. 10, 2011), ¶ 7.1 – 7.9, and discussion at note 216; see also Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, Supplementary Note, Mission to India (Apr. 15, 2010) 5 A/HRC/14/20/Add.2 “[Maternal mortality is a] human rights issue on a massive scale.”
134 See Nelson, 583 F.3d at 530, citing a study finding rates of miscarriage in prison to be 50 times higher than the state average, arguably due to fearsome and stress-inducing conditions of jail.
135 See also Tysiac v. Poland, No. 5410/03, ¶ 116, 2007-IV Eur. Ct. H.R. Any state restriction of women’s liberty must “be also assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be.”
136 See supra Part III(c)(i); Part III(c)(ii); and infra Part III(c)(ii); Part III(c)(ii)(2); and Part III(c)(ii)(3).
Once maternal health care is being provided, international consensus requires that the health care be adequate, appropriate, and of reasonable quality, and that a woman’s dignity be the paramount concern.\textsuperscript{137} Appropriate care “ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality, and is sensitive to her needs and perspectives.”\textsuperscript{138} In addition to the American Declaration (see \textit{supra}), the Committee on Economic, Social, and Cultural Rights has linked health and dignity: “everyone is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.”\textsuperscript{139} In the U.S. context, the affirmative right to health care in general may not be applicable as international customary law, since the U.S. has failed to join in the international consensus that every person has an inalienable right to medical care and could thus conceivably be thought of as a persistent objector.\textsuperscript{140} However, at least with regard to pregnancy, labor, and childbirth, the U.S. \textit{has} recognized an affirmative state’s obligation to provide care, in EMTALA.\textsuperscript{141} The U.S. has further protected pregnant women’s rights to receive health care by prohibiting insurers from excluding pregnancy care from coverage, through HIPAA.\textsuperscript{142} The U.S. has made federal policy aimed at providing adequate nutrition to mothers and pregnant women through WIC, explicitly


\textsuperscript{139} CESC\textemdash Tape, \textit{General Comment 14, supra} note 137, at ¶ 1.

\textsuperscript{140} That the U.S. is one of only a handful of countries not to recognize a right to health does not mean that such an international consensus could not be cognizable to U.S. courts; for example, the Court in \textit{Roper} cited the Convention on the Rights of the Child as evidence of international customary principles, notwithstanding the fact that the U.S. had not ratified that treaty at the time of the decision. \textit{Roper} v. Simmons, 543 U.S. 551, 560 (2005). \textit{DeShaney} is often held up as proof that the U.S. constitution does not contain positive guarantees, but that interpretation is open to critique, and constitutional common-law can evolve. \textit{DeShaney} v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 195–97 (1989).

\textsuperscript{141} \textit{EMTALA, supra} note 112.

\textsuperscript{142} 29 U.S.C. § 1181(d)(3) (2006) (“A group health plan, and health insurance issuer offering group health insurance coverage, may not impose any pre-existing condition exclusion relating to pregnancy as a pre-existing condition.”).
acknowledging those women’s “special” health needs. And the U.S. has ascribed to the notion that once a woman is deprived of liberty by the state, she has an affirmative right to safe, humane, reasonable-quality health care. Juana Villegas was in state custody when she underwent the treatment at issue. Thus, insofar as her treatment did not conform to medical best practices, her human right to appropriate, safe health care in connection with her pregnancy was violated. The U.S. has not objected to the existence of this right; hence, courts should not hesitate to acknowledge it and enforce it.

Since women in custody have a clear right to safe, humane pregnancy-related health care, the treatment of women in situations like Juana Villegas’s should be evaluated in light of medical standards and respect for dignity. This kind of assessment can also reveal whether or not a woman’s treatment complies with the international human right to general special protections for pregnant, birthing, and lactating women, outlined supra. Many elements of Juana Villegas’s treatment, beyond the shackling, violated medical standards and did not seem to respect her dignity. For example, the fact that she was not allowed to call anyone in her family and was not given privacy while in labor violate basic standards of maternity care according to the World Health Organization. In the interest of space, however, I will focus on only two elements of her treatment, while hoping that in other cases like this, advocates will argue that many, perhaps

143 The Women, Infants, and Children (WIC) program of the US Dep’t of Agriculture, extant since 1966, provides nutrition and health funding and services to infants and to pregnant and nursing mothers. It is a funding scheme administered by USDA pursuant to the Child Nutrition Act of 1966, codified at 42 U.S.C. 1771 note. It provides food for pregnant and postpartum women, and is also meant to encourage breastfeeding. The findings in the Child Nutrition Act reveal that Congress has long shared the international understanding that pregnant women have “special” health needs. “Congress finds that substantial numbers of pregnant, postpartum, and breastfeeding women….are at special risk with respect to their physical and mental health…” Id. at §17.
144 Compare Estelle v. Gamble, 429 U.S. 97, 103-10 (1976) (holding that inmates cannot be denied medical services) and DeShaney, 489 U.S. at 195–97 (holding that due process does not impose a duty on the state to provide adequate protective services to members of the general public).
more subtle, behaviors from state agents can violate a woman’s right to safe and humane treatment while in pregnant, in labor, or in the post-partum period.

A. Shackling violates the protection of dignity

As Judge Haynes noted, the international and U.S. medical community has overwhelmingly concluded that shackling pregnant women during labor poses major health risks to women and therefore contradicts medical standards. The practice has been opposed by the American College of Obstetricians and Gynecologists146, the National Perinatal Association, the American College of Nurse Midwives, the American Medical Women’s Association147, the American Public Health Association148, and more. The American Medical Association calls it “barbaric.”149 It is not just a practice that fails to advance a woman’s health interest – it is actively contrary to her health interests.150 Shackling during labor can cause not just “extreme mental anguish and pain,” but permanent injury, such as hip injury, hernias requiring surgery, and lifelong nerve damage.151 According to ACOG, shackling interferes with a doctor’s ability to “safely practice medicine,” and it makes “the labor and delivery process more difficult than it needs to be; thus, overall, putting the health and lives of the women and unborn children at risk.”152 The physical suffering experienced by Juana Villegas affirms the fact that shackling

146 See ACOG Letter, supra note 1.
149 Walker, supra note 4.
150 Id.
152 ACOG Letter, supra note 1.
during labor is dangerous for women. The Federal Bureau of Prisons has banned the practice since 2008, and an increasing number of U.S. states and cities are outlawing it.\textsuperscript{153}

Since the practice actively jeopardizes a woman’s health, and is clearly not in keeping with the requirement of dignity and basic respect, it is obviously contrary to the international human right to humane treatment in connection with pregnancy care. Shackling is also an instance of cruel, inhuman, and degrading treatment – described below.

\textit{B. Taking away a newborn and withholding a breast pump violate the protection of dignity}

The postpartum period is a “critical” time for mothers and newborns.\textsuperscript{154} After giving birth, a new mother’s breasts swell and fill with milk.\textsuperscript{155} If she does not have some way to express her milk, she experiences tremendous pain and can contract serious infections, inflammations, and fever.\textsuperscript{156} Breastfeeding is one of the most important things a woman can do after giving birth for her health and for infant health; in fact, the WHO refers to a failure to promote early initiation of breastfeeding as a “harmful health care practice.”\textsuperscript{157} Thus, international medical standards indicate that women must have some way to express their breast


\textsuperscript{154} WHO, \textit{TECHNICAL CONSULTATION ON POSTPARTUM AND POSTNATAL CARE} 2 (2010).

\textsuperscript{155} Id.

\textsuperscript{156} Interview with Tara Cardinal, R.N., Seattle, March 11, 2011.

\textsuperscript{157} WHO, \textit{TECHNICAL CONSULTATION} \textit{supra} note 154, at 3.
milk within one hour of delivery,\textsuperscript{158} and must have the ability to express milk for the weeks after birth.\textsuperscript{159} Often this entails breastfeeding the newborn, but in situations where that is not possible, a breast pump is necessary.\textsuperscript{160}

Juana Villegas was separated from her son after leaving the hospital, and was similarly refused a breast pump upon leaving the hospital.\textsuperscript{161} This refusal was willful and intentional.\textsuperscript{162} Since the officers also did not return her son to her, she had no way to express her breast milk, and thus, predictably, contracted a painful, debilitating infection.\textsuperscript{163} By failing to provide her with any way to express her breast milk, the officers did not uphold her right to adequate health care services in connection with pregnancy and lactation.\textsuperscript{164} This kind of treatment is also clearly prohibited by international consensus that lactating women deserve special protection and respect in general.\textsuperscript{165}

1. \textbf{Dignity and the right to be free from torture cruel, inhuman, and degrading treatment}

The international norm against cruel, inhuman, and degrading treatment (CIDT) circumscribes the behavior of state actors when they are lawfully depriving a person of liberty. This norm also

\textsuperscript{158} WHO, \textit{Mastitis: Causes and Management} 17 (2000)

\textsuperscript{159} Id. at 17 - 18.

\textsuperscript{160} Interview with Tara Cardinal, supra note 156.


\textsuperscript{162} Id.

\textsuperscript{163} Id. Being denied any way to express her breast milk caused Ms. Villegas to contract a painful and serious condition called mastitis, which involves inflammation of breast tissue, infections and abscesses, and which can be fatal if not treated. “Milk stasis [the primary cause of mastitis] occurs when milk is not removed from the breast efficiently…this may occur when the breasts are engorged soon after delivery, or at any time when the infant does not remove the milk that is produced from part or all of the breast.” WHO, \textit{Mastitis}, supra note 158 at 6. The failure to give her a breast pump was most likely the proximate cause of her mastitis. Id. at 18 - 19.

\textsuperscript{164} “In addition to facilitating breastfeeding and bonding, early skin-to-skin contact of a mother with her infant, and rooming-in, are the most natural and efficient ways to prevent the spread of infection, including the spread of organisms responsible for mastitis.” It has been known since at least 1949 that “ideally, it would appear that the baby should remain with the mother.” It is in the three to six days after childbirth that milk flows most heavily to the breasts. Thus, that is the period of time where ‘engorgement,’ inflammation, and infection are most likely if a woman has no way to express her breast milk. Id. at 10.

\textsuperscript{165} See supra notes 99 - 105 and accompanying text.
requires that pregnant inmates or detainees receive humane, adequate maternal and obstetric health care. The UDHR, ICCPR, U.S. Constitution (Am. VIII), the Geneva Conventions, and *jus cogens* norms prohibit torture and CIDT, and the entire content of the Convention Against Torture (CAT) is about the topic.\(^{166}\) The prohibition of torture and CIDT is one of the oldest international laws in the world, as customary law and *jus cogens*.\(^{167}\) The U.S. has not wavered, despite changing political climates, from its international commitment against torture and CIDT,\(^{168}\) therefore, treatment like Juana Villegas’s should be assessed in light of the international standards around that norm.

Art. 1 of CAT provides:

The term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for…any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.\(^{169}\)

The Human Rights Committee, the body that monitors compliance with the ICCPR, explained that the purpose of the prohibition on torture and CIDT is “to protect both the dignity and the physical and mental integrity of the individual.”\(^{170}\) Thus, the prohibition relates to acts that “not only cause physical pain, but also to acts that cause mental suffering to the

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\(^{167}\) RESTAMENT (THIRD) OF FOREIGN RELATIONS LAW, §702 (1986); *see also* Filartiga v. Peña-Irala, 630 F. 2d 876, 890 (2d Cir. 1980).

\(^{168}\) The principle of universality of certain rights – especially the right to freedom from torture and cruel, inhuman, and degrading treatment (which is a *jus cogens* norm and would therefore be international law in the U.S. even if the government explicitly rejected it (*see* Buell v. Mitchell, 274 F. 3d 337, 373 (2001) – has been upheld and promoted by the Executive Branch throughout differing political climate. President Reagan signed the Convention Against Torture in 1986; the United States reported to the Committee Against Torture under presidents George H.W. Bush, Bill Clinton, and George W. Bush, and the U.S. continues to report on its human rights obligations to the U.N. under President Obama. *See* U.S. UPR Report, *supra* note 123. This continuity demonstrates that the protection of certain human rights, even of aliens within our borders, is a clear and general principle of the United States.

\(^{169}\) CAT, *supra* note 69, Art. 1.

victim.”\textsuperscript{171} For those reasons, the Human Rights Committee found that a state’s failure to protect a woman’s dignity in connection with pregnancy and childbirth constituted cruel, inhuman, and degrading treatment.\textsuperscript{172} Shackling, denial of privacy, isolation from one’s family, and denial of a breast pump all constitute cruel and inhuman treatment; as does the purposeful removal of a newborn from a new mother without explanation.

These kinds of actions should be analyzed in light of both international customary norms and \textit{jus cogens} principles. \textit{Jus cogens} norms are concepts that have become so universally recognized that states cannot object to their enforcement even if they would like to.\textsuperscript{173} \textit{Jus cogens} prohibits at least slavery, piracy, torture, genocide, and forced disappearances. It seems clear that a prohibition on cruel treatment of pregnant women is also a \textit{jus cogens} norm. The right does not appear on the list of \textit{jus cogens} prohibitions in the Restatement, perhaps because women in situations of confinement were so rare that their situation was not as relevant or visible to the world community as were the international issues of slavery, piracy, and war. Nonetheless, the idea that pregnant women enjoy a right not to be harshly punished has ancient roots. In medieval times, women who were pregnant were entitled to more lenient punishment. The same is true about England dating back at least to 1710.\textsuperscript{174} Since the prohibition is so universal and ancient, it rises to the level of \textit{jus cogens}.

\textbf{A. Juana Villegas’ treatment as cruel, inhuman, and degrading treatment: intentionality}

\begin{footnotesize}
\begin{enumerate}
  \item \textit{Id.} at ¶ 5.
  \item \textsc{Restatement (Third) of Foreign Relations Law, §702 (1986).}
  \item \textsc{William Andrews, Punishments in the Olden Time 70 (1888).} Thus, it is at least a \textit{jus cogens} principle that states may not punish pregnant women in the same way that they punish a man or a non-pregnant person; to fail to provide any special treatment in the context of physical punishments such as confinement is simply absurd in light of the intense vulnerability concomitant with pregnancy. Such a norm would also have no historical precedent and clearly does not comport with basic principles of “civilized nations,” thus making it \textit{jus cogens}.
\end{enumerate}
\end{footnotesize}
Juana Villegas’s treatment constituted torture or cruel and inhuman treatment. The definition of torture under the CAT requires that the treatment be “intentionally” inflicted by a state official, for a reason “based on discrimination of any kind,” and lead to “severe pain or suffering,” including mental anguish.\textsuperscript{175} This is also the definition understood by U.S. courts.\textsuperscript{176} Juana Villegas was arrested by state officials with no reason given.\textsuperscript{177} Even though she was visibly nine months pregnant, and was taking care of her three children, she was separated from her family and put in a cell. That treatment evinces callousness and even animus on the part of these officials – possibly due to her being politically unpopular, as a suspected “illegal immigrant.” Discrimination is also likely due to her not just being any kind of ‘immigrant’ but due, in particular, to her race, ethnicity, and language, as a Spanish-speaking woman from Mexico.\textsuperscript{178} Further, under the 287(g) program officials were not ordered to arrest any person they believed to be without proper migration documents, and were in fact ordered to release non-violent pregnant women, but the officers intentionally did not follow that rule.\textsuperscript{179} Her treatment was thus clearly intentional and likely based on discrimination and animus.\textsuperscript{180} If a court found that she did indeed suffer “severe pain and suffering,” her treatment should be considered torture and CIDT. That finding would likely require factual analysis at trial of the “severity” of her

\textsuperscript{175} See supra note 169 and accompanying text.
\textsuperscript{176} See Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).
\textsuperscript{178} Juana Villegas’s complaint notes that she was initially pulled over for a traffic violation but was not told what its nature was, and that the police officer “ascertained that [she] appeared Hispanic, [and] could speak little English.” \textit{Id.} at *3 – 4. While Villegas was detained, the same policemen who initially stopped her also stopped a car driven by “a Caucasian male,” whom they spoke with for a few minutes and then let him drive away. \textit{Id.}
\textsuperscript{179} ICE requires officers to identify and release pregnant women. \textit{Id.} at *19.
\textsuperscript{180} State officials accused of torture, forced disappearances, or other human rights violations frequently claim that such actions were necessary to effect state policy; or that such treatment was directed at those who are “opponents of the state.” In \textit{Xuncax v. Gramajo}, Gramajo, a former Defense Minister of Guatemala, accused of torture and forced disappearances, defended his actions as against “opponents of the state.” 886 F. Supp. 162, 174 (D. Mass. 1995). The punitive dynamic in U.S. treatment of “illegal immigrants,” along with trends towards deference to political goals in the immigration context, seems to dangerously approach that idea of impunity. Thus, U.S. abuses of migrants seem especially ripe for international human rights analysis.
suffering. To successfully argue that her suffering was so severe as to constitute torture or CIDT, she might have to overcome gendered, historical biases on the part of juries or judges – namely, the ideas that the pain caused by labor is natural, and therefore cannot be interpreted as caused by state actors even when they failed to take steps to mitigate suffering – and that torture or CIDT norms only apply in the prototypical (arguably “masculine”) concepts of war and military dictatorships. The Human Rights Committee, in the *K.L. v. Peru* case, rejected that stereotype. *K.L.* found that state actors exacerbated the “pain and distress” a young woman felt in connection with pregnancy and childbirth, and that this exacerbation constituted cruel, inhuman, and degrading treatment.\(^{181}\)

But based on the facts in the briefs alone, it seems likely that her pain and suffering were extremely severe. To be detained with no reason given while parenting and while pregnant and near term caused Juana Villegas – as it would cause any reasonable person – an extreme amount of stress and fear.\(^{182}\) Labor itself is quite painful and physically and emotionally exhausting.\(^{183}\) To have to go into labor in a cell, unaware of why one is there, when one will ever be let out, and if one will see one’s family again, causes severe mental anguish.\(^{184}\) Laboring alone, in a strange climate, instead of laboring with the support of one’s husband or partner could also cause

\(^{181}\) *K.L. v. Peru*, *supra* note 172, at ¶ 6.3.

\(^{182}\) Declaration of Juana Villegas at 9, Villegas v. Metro. Gov’t of Davidson County, No. 3:09-0219 (M.D. Tenn. Nov. 15, 2010).

\(^{183}\) “… a woman going through childbirth is likely to experience excruciating pain, is largely physically incapacitated and vulnerable, and in need of care and support through this life-changing experience. Being shackled during labor, and during delivery, at this life transformative moment, amounts to a punishment totally out of proportion to any crime she may have committed.” Brief for National Perinatal Association, et al. as Amici Curiae In Support of Appellee’s Petition For Rehearing at 7, Nelson v. Correctional Medical Services, 583 F.3d 522, 2008 WL 4127217. Other kinds of cruel treatment, beyond shackling, should also be interpreted in light of the fact that a woman going through labor is already “physically incapacitated and vulnerable,” and is *already* experiencing “excruciating pain.”

\(^{184}\) Laboring in a cell, surrounded by police officers, prohibited from being with or contacted one’s family, causes stress and is contrary to health interests. According to the WHO, care for “the woman’s physical and emotional well-being” should be paramount during labor and delivery. “The establishment of good rapport between the woman and her caregiver(s) is vital.” Indeed, for optimal health care, “the quality of welcome” extended to a woman by an institution in which she goes into labor or gives birth is key for ensuring optimal outcomes. WHO, *NORMAL BIRTH*, *supra* note 4, at 8.
physical pain as well as increased stress, and can lead to worse birth outcomes.\textsuperscript{185} If advocates in cases like Ms. Villegas’s emphasize the intentional, cruel aspect of the treatment, explain the physical pain, mental suffering, humiliation, and emotional anguish suffered by the woman, and connect that suffering with the intentional behavior of defendants, this kind of intentional behavior – beyond just shackling – could be understood as torture and/or cruel, inhuman, and degrading treatment.\textsuperscript{186}

Any relationship argued by defendants about the “legitimate penological purpose” of such treatment should be rejected for its lack of proportionality to any non-violent offense, and especially when the only “offense” is being in the country without proper immigration documents.\textsuperscript{187}

A. Shackling as a specific instance of torture and cruel, inhuman, and degrading treatment

Shackling during labor is a clear instance of cruel, inhuman and degrading treatment, and has been recognized as such by the international community, the federal government of the U.S. (in the 2008 federal prison policy)\textsuperscript{188}, U.S. federal courts,\textsuperscript{189} and an increasing number of U.S. states.\textsuperscript{190} In 2006, the UN Human Rights Committee – the body that monitors compliance with

\textsuperscript{185} According to the WHO, for optimal health outcomes for both mother and infant, “...a woman should give birth in a place she feels is safe, and at the most peripheral level at which appropriate care is feasible and safe. (Id. citing International Federation of Obstetrics and Gynecology (FIGO)). For a low-risk pregnant woman this can be at home, at a small maternity clinic, or birth center...[h]owever, it must be a place where all the attention and care are focused on her needs and safety, as close to home and to her own culture as possible.” Id at 12. (emphasis added). Similarly, “[a] woman in labor should be accompanied by the people she trusts and feels comfortable with; her partner, best friend, doula, or midwife. Generally these will be the people she has become acquainted with during the course of her pregnancy ...Women’s privacy in the birthing setting should be respected.” Id. at 13.

\textsuperscript{186} K.L. v. Peru, supra note 181.

\textsuperscript{187} In this sense, the response to state arguments in favor of “penological purposes” of shackling would be different in cases like Ms. Villegas’s, which occur in immigration detention, than in cases like Ms. Nelson’s, which occur in jails, after the plaintiff has presumably had a criminal trial complying with due process requirements. Judge Haynes’s decision acknowledged that Ms. Villegas’s status as a detained immigrant rather than a convicted prisoner made her treatment even less justifiable for proportionality reasons.


\textsuperscript{189} Nelson v. Correctional Medical Services, 583 F.3d 522 (2008).

\textsuperscript{190} See supra note 153.
the International Covenant on Civil and Political Rights – expressed concern about the U.S.’s failure to completely abolish the practice of shackling pregnant women during labor.\textsuperscript{191} The HRC considered shackling to implicate Article 7 (cruel treatment) and article 10 (right to be treated with humanity and respect for dignity when deprived of liberty). The Committee Against Torture has also told the United States to abolish its practice of shackling incarcerated pregnant women.\textsuperscript{192} U.S. courts have held that the practice constitutes cruel treatment since it causes serious suffering and serves no legitimate state purpose.\textsuperscript{193} To be shackled while in labor, while in an ambulance, and directly after childbirth also, as the nurse put it in Juana Villegas’s case, constitutes “barbaric” treatment.\textsuperscript{194} It is intentional, cruel, and has no purpose other than to inflict harm. At least, in Ms. Villegas’s case, shackling seems to have been done for no purpose other than purposeful humiliation, since no reasonable person would think that a woman about to give birth, or having just given birth, would be a “flight risk” or a risk of violence to herself or others.\textsuperscript{195} It caused Juana Villegas severe pain and suffering, as she was not able to move around to the full extent that she needed to in order to most safely give birth or recover after giving birth. It caused her chronic pain, destroyed her dignity, jeopardized her safety during labor and recovery, and left her with reduced movement in her left leg. But while shackling may be the

\textsuperscript{191} Concluding Observations of the Human Rights Committee: United States of America, supra note 6, at ¶ 33.

\textsuperscript{192} Concluding Observations of the Committee Against Torture: United States of America, supra note 1, at ¶ 33.


\textsuperscript{195} “A factfinder could draw the inference that Turensky recognized that the shackles interfered with Nelson’s medical care, could be an obstacle in the event of a medical emergency, and caused unnecessary suffering at a time when Nelson would have likely been physically unable to flee because of the pain she was undergoing and the powerful contractions she was experiencing as her body worked to give birth.” Nelson, 583 F.3d at 530, citing HEIDI MURLKOFF et al., WHAT TO EXPECT WHEN YOU’RE EXPECTING 364-67 (3d ed.2002) (pain, nausea, vomiting, exhaustion, oxygen deprivation, and inability to walk are incident to final stages of labor).” The Nelson court also stated that “[a] factfinder could also determine [officer] Turensky was aware of the risks involved because they were obvious…Each year approximately 530,000 women die during childbirth (internal citation omitted), and the hazards associated with labor and childbirth have entered the collective consciousness…” 583 F.3d at 530, n 5.
prototypical example of cruel and inhuman treatment of pregnant women, the taking away of a newborn should be considered to be illegal in the same sense.

B. The abduction of a newborn from a mother immediately after childbirth constitutes torture, cruel treatment, and a forced disappearance.

To take away a woman’s child and not tell her where he or she is going or if he or she will ever be returned is a form of CIDT.\(^{196}\) It can also be considered a forced disappearance, which is independently prohibited under \textit{jus cogens} norms.\(^{197}\) Forced disappearances are kidnappings by state actors, in which a person is taken away and no information is given to his or her relatives about his or her whereabouts.\(^{198}\) They are especially used against political enemies or against those of unpopular national origin, and frequently take the form of police officers or military members kidnapping the children of politically unpopular adults.\(^{199}\) The purpose is to create ‘a state of uncertainty and terror” in the family, and possibly in the population as a whole.\(^{200}\)

The conditions in which Juana Villegas’s child was taken away match those criteria – and the result was that she was terrified and afraid, exactly the result intended by those who execute

\(^{196}\) See \textsc{Restatement (Third) of Foreign Relations Law}, §702 (1986), on forced disappearances. \textit{See also} Gonzales v. Carhart, 550 U.S. 124, 128 (2007) “Respect for human life finds an ultimate expression in the bond of love the mother has for her child.”

\(^{197}\) \textsc{Restatement (Third) of Foreign Relations Law}, §702 (1986).

\(^{198}\) \textit{See} Inter-American Convention on Forced Disappearances of Persons, Art. II.

\(^{199}\) \textit{See} Fighting Against Forced Disappearances in Latin America (FEDEFAM), http://www.desaparecidos.org/fedefam/eng.html, \textit{See also} Ariel Dorfman, \textit{The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?} \textsc{TORTURE: A COLLECTION} (Sanford Levinson, ed. 2004)

forced disappearances. Her status as a Hispanic woman arguably caused the Davidson County police officers to treat her with animus and hostility, in light of the increasingly anti-immigrant climate in Tennessee and at the federal level. Insofar as this kind of treatment is seen by federal or state officials as legitimate, when inflicted upon “illegal immigrants” so as to cause fear and “dissuade” immigration, it even further matches the political ambit in which forced disappearances are carried out against dissidents or unpopular groups.

Just because the conditions in which Juana Villegas’s child was forcibly disappeared were not the prototypical conditions of a military dictatorship does not mean it cannot have the same meaning, the same effect, and therefore require the same condemnation under the law. Further, when the disappearance occurs directly after childbirth, it is arguably even more terrifying and cruel, since an immediately post-partum mother is physically exhausted and emotionally vulnerable. The U.S. Supreme Court has described childbirth as something that states must respect; stating that “the bond of love the mother has for her child” is “the ultimate expression” of “respect for human life,” and has emphasized that governments must respect,  

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201 Anti-immigrant laws, policies, and activism have been “on the rise” in the U.S. in recent years. See Thomas D. Elias, Anti-immigration hate on a rapid upswing, VENTURA COUNTY STAR (July 4, 2008), http://www.vcstar.com/news/2008/jul/04/anti-immigration-hate-on-a-rapid-upswing/. This essay does not seek to connect Ms. Villegas’s treatment with this kind of increasing anti-immigrant climate, but merely to point out that further research might suggest a relationship. Cursory research suggests that in Tennessee, “the debate over illegal immigration is heated and polarizing,” Lola Alapo, Tennessee wrestles with immigration problem, KNOXVILLE NEWS SENTINEL (July 10, 2010), http://www.knoxnews.com/news/2010/jul/10/tennessee-wrestles-immigration-problem/. Tennessee also recently passed a law inspired by Arizona’s strict measure allowing any local law enforcement agent to stop someone who they suspect is “illegal.” Richard Locker, Bredesen Signs Bill Requiring Jailers to Notify U.S. of Illegal Immigrant Inmates, COMMERCIAL APPEAL (Memphis) (June 28, 2010), http://www.commercialappeal.com/news/2010/jun/28/bredesen-signs-bill-requiring-jailers-notify-us-il/ The fact that that is arguably what happened to Juana Villegas, before this law’s passage, could suggest that an anti-immigrant attitude – or at least an animus against those suspected of being from Mexico or Latin America – is or has been prevalent in Tennessee.

202 Fighting Against Forced Disappearances in Latin America (FEDEFAM), http://www.desaparecidos.org/fedefam/eng.html


and not pervert, “the process during which life is brought into the world.” It would be flagrantly inconsistent with those principles, and with international peremptory norms, to allow police officers to take away a newborn baby from a new mother for reasons of “punishment.” When a person has not even had any due process rights applied nor been convicted of any crime, the taking away of a newborn even more constitutes a gross human rights violation, and in Juana Villegas’s case seems to have been done with intentional animus to incite fear, humiliation, and cause suffering.

_Jus cogens_ norms, international human rights law, and international humanitarian law have traditionally been more concerned with the prototypical “rights violations” that occur to men, in traditionally-male-dominated arenas such as war. Similarly, the norms around the scope of ill-treatment and torture in the context of prisoners have developed in a context in which men were the majority of the incarcerated population, and standards for people in immigration detention evolved in a context in which men made up the vast majority of migrants. Now, women are incarcerated, and are migrating, in ever-increasing numbers. Thus, the cruel treatment that can be imposed on women in the context of pregnancy and childbirth, when women are incarcerated or in immigration detention, should be understood as clear violations of international human rights. The international consensus that pregnant women should not be subject to ill treatment exists and pre-exists the large-scale incarceration and detention of pregnant women, but, as was announced at the Nuremberg Tribunals, the fact that an international prohibition was previously not ‘written down’ does not mean it something is not

\[\text{205 Id. at 161.}\]
\[\text{206 See generally CATHARINE MACKINNON, ARE WOMEN HUMAN? (2008).}\]
clearly against international law. It simply means that courts, and advocates, should explain that pregnant women cannot be treated like male prisoners or detainees, and that pregnancy requires special human rights protections for women. To fail to do so will be to allow a major, gendered blind spot to acclude U.S. human rights jurisprudence and violate non-discrimination principles, outlined infra in sub-section (3) of this Part.

Other intentional infliction of cruel treatment

Juana Villegas’s treatment was “intentionally” inflicted by state actors for no apparent purpose other than to cause her shame, fear, and suffering. Other elements beyond shackling and the taking away of her son should be assessed under a CIDT analysis. For example, the purposeful unplugging of the phone meant that she could not call her husband or anyone in the family to let them know she was giving birth. This arbitrary and cruel act caused her to give birth—an intense, painful experience, that the Supreme Court has called “the ultimate expression of respect for life” in an unfamiliar room with no one she knew, with no knowledge of when and if she would ever see her family again. As she put it in her declaration, this treatment caused the birth of her son to be an experience “filled with fear and pain.”

Another example of such intentional cruel treatment is the withholding of the breast pump, which police officers did for no apparent reason, in spite of the nurse’s exhortations that it was medically necessary. This cruel treatment caused extremely severe pain and suffering. Since

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208 The Nuremberg Tribunal is a good example of international customary law/jus cogens analysis. Since “offenses against persons” had never before been “announced as part of the law of nations…the Nuremberg Tribunal’s reluctance as a standard bearer of liberalism to pass an ex post facto law came into sharp conflict with its conscientious desire to punish atrocity.” But ultimate, the Nuremberg Tribunal determined that “the Nazi atrocities had violated preexisting international norms implicit in the values actually understood and accepted by the international community…The Tribunal held that this previously unarticulated consensus of values was discoverable by courts in much the same manner that the principles of common law or other principles of international law are susceptible of discovery.” David F. Klein, Comment, A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts 13 YALE J. INT’L L. 332, 340-341 (internal citations omitted) (1988).
her son had also been taken away, she had no way to express her breast milk. Lactating women are specially protected by international treaty and customary law, as outlined in the above sections – thus, to fail to provide her with any way to express her breast milk seems to constitute both cruel and inhuman treatment and an unambiguous violation of the international law that “[a]ll women, during pregnancy and the nursing period…have the right to special protection, care, and aid.”

It also violated her right to basic health care while deprived of liberty, described supra.

Consistent with international customary law and jus cogens norms, the U.S. has consistently understood that once the state deprives a person of his or her liberty, that person’s “basic dignity” must be respected. This principle is true even for those who have committed the most “heinous” crimes. Thus, the U.S. has understood this principle to require that when women have been tried and convicted of crimes and are in jail, they are entitled to health care in connection with pregnancy, childbirth, and labor; and this care must be administered in a way that is safe and humane. Since women in immigration detention have not been tried and convicted of any crime, they deserve at least the same rights if not even more deferential treatment. The fact that they may not be U.S. citizens, and may be in the U.S. without proper documentation or without “legal” status is immaterial, since international customary law and jus cogens norms are applicable and enforceable for all people, including those outside their country of origin who may lack proper residency status.

Juana Villegas’s treatment pursuant to 287(g) may not have constituted as obvious an incidence of cruel and unusual treatment if she had been a man or even a non-pregnant woman.

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210 American Declaration of Rights and Duties of Man, supra note 99, Art. VII.
But the status of her pregnancy required the state to deal with her case in a way that recognized her rights to special protections, notwithstanding her lack of lawful migration status. Her treatment was intentional, inflicted by state actors, for reasons of animus and discrimination. It caused her severe pain and suffering. Far from providing her with “special protection, care, and aid” while she was pregnant and lactating, Davidson County officials showed her callousness or even purposeful cruel treatment. That kind of intentional behavior towards a pregnant person constitutes cruel, inhuman, and degrading treatment and is thereby prohibited under international customary law and by *jus cogens*.

**Dignity and the right to non-discrimination**

Finally, the right to safe and humane treatment during pregnancy has an element relating to the right to non-discrimination. The right to dignity is violated when one is discriminated against for reasons of sex, race, ethnicity, or for being politically unpopular. The UDHR, and the international human rights consensus in general, prohibits any discrimination on those bases in exercise of other basic rights. Because pregnancy is something that only happens to women and uniquely jeopardizes their lives, health, dignity, bodily integrity, and security, when they are taken into custody and treated no differently than a non-pregnant woman or a man would be, should such treatment cause their pregnancy, childbirth, or labor to impose more suffering upon them than it otherwise would, their right to non-discrimination may be violated.

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213 See discussion of CIDT norms, *supra*, Part III(c).


In *Alyne da Silva v. Brazil*, the CEDAW Committee held Alyne da Silva’s preventable maternal death to be a human rights violation. Ms. da Silva was a poor woman of Afro-Brazilian descent living in a slum outside of Rio de Janeiro, who died after receiving inept and badly delayed obstetric care. CEDAW held that her death constituted not just a violation of her special right to maternal health care, but an intersectional type of discrimination on bases of gender, race, class, and socio-economic status.\(^{216}\) The *Alyne* case confirms that states must take special measures to ensure that adequate maternal and obstetric care is available, especially for the most vulnerable women, in order to comply with their international human rights obligations.

Along the same lines, CERD – to which the U.S. is party – has told states to improve maternal health\(^ {217}\) with particular attention to the reproductive health of minority and marginalized women.\(^ {218}\) CERD’s interpretation of the right to safe and humane maternal health care, which is part of international customary law, therefore requires that no one be subjected to worse or more degrading maternal health care due to marginal status. The U.S.’s legal framework (including, among other laws and regulations providing special rights and protections for pregnant women, EMTALA and WIC) adheres to that international customary norm.\(^ {219}\)

International human rights law also prohibits gender stereotypes from influencing law-enforcement decisions. In the *Campo Algodonero* (“Cotton Field”) case, the Inter-American Court of Human Rights ruled that Mexican officials did not adequately investigate and prosecute murders of women and girls in Ciudad Juarez due to law enforcement officers’ negative

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\(^{219}\) See supra notes 141, 142, 143 and accompanying text.
stereotypes about rural women and girls who were the victims of the killings. If law enforcement agents in Davidson County were influenced by motives stemming from gender or ethnic stereotypes, they have also violated international human rights law. It may be the case that a gender stereotype— that women in labor do not care if they are shackled; or that being pregnant is not so burdensome as to require special care and protection – was at play; or that an ethnic or national stereotype about Mexican or Hispanic women influenced the officials’ decisions to treat Ms. Villegas the way they did. Those arguments should be considered by advocates dealing with similar cases, and the legal theories used in Alyne da Silva and Campo Algodonero should be studied.

Juana Villegas suffered discrimination when she was detained for reasons of her race, ethnicity, national origin, and language. She suffered gender-based discrimination since, because she was pregnant, she was vulnerable to serious pain and suffering that a similarly-situated man would not have faced. This principle is therefore part of the reason that pregnant women deserve special respect and treatment from states in general and especially when they are deprived of liberty. However, the disparate-impact anti-discrimination principle may be the prong of the international customary law analysis to which the U.S. may persuasively claim to have persistently objected. The U.S. has stipulated that its law of non-discrimination does not encompass disparate-impact forms of discrimination to the extent that international law does. However, the discriminatory motives (qua discriminatory intent, not disparate-impact) behind treatment of women of color and undocumented immigrant women in cases like Juana Villegas’s

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221 The U.S. in its ratification of ICCPR explained that its anti-discrimination commitment may not go as far as that of the international consensus. That is, it preserves its constitutional doctrine of allowing discrimination so long as there is a “minimum” relationship to a “legitimate governmental objective.” ICCPR, supra note 67, Understanding 1, entered by the United States upon signing on June 8, 1992.
may be so obvious\textsuperscript{222} that the discrimination element could become one reason why courts may find these situations to violate the international human right to non-discrimination in enjoyment of the right to safe and humane treatment during pregnancy.

\textbf{D. Conclusion: The right to safe and humane treatment during pregnancy exists under international customary law and jus cogens and must be applied by U.S. courts.}

The right to safe and humane treatment during pregnancy is thus a synthesis of the rights to general special protections while pregnant; the rights to life, liberty, security, and health; to freedom from torture and CIDT; and to non-discrimination. This right does not mean that women have a right to safe and healthy birth outcomes. It simply means that state actors may not treat women who are pregnant with cruelty, and that women who are pregnant, giving birth, or lactating are entitled – once they are deprived of liberty by the state – to treatment that takes into account the special health needs concomitant with pregnancy. In surveying the international framework around this right, it becomes clear this norm is indeed one that is universal, is followed for legal reasons and not just general notions of sound policy, and is ascribed to by the United States. The U.S. has signed and ratified the OAS Charter, the UN Charter, the UDHR, ICCPR, CERD, and CAT.\textsuperscript{223} 152 nations have become party to the ICCPR, 174 nations have become party to CERD, and 147 to CAT.\textsuperscript{224} Even if these treaties have been declared by U.S. entities not to be “self-executing,” their status of having been ratified should make clear to courts that the U.S. has agreed to the principles therein. Every member state of the U.N. has signed the


\textsuperscript{223} U.S. CONST. Art. VI. Any texts that the U.S. both signs and ratifies are “the supreme law of the land” and bind “the judges in every state...anything in the Constitution or laws of any State to the contrary notwithstanding.”

\textsuperscript{224} U.N.T.C., Status of Ratifications, Chap. IV.
UDHR itself, and every member of the OAS has signed the OAS Charter.\textsuperscript{225} It seems clear that adherence to the norms contained in those documents are “extensive and virtually uniform.”\textsuperscript{226} The text of those treaties, and way they have been interpreted by authoritative bodies such as international tribunals (including the CAT and HRC committees), can be useful for showing courts why the right to safe and humane treatment during pregnancy is part of the global consensus.\textsuperscript{227} Courts can also look to other international consensus documents signed by the U.S., including some of the treaties that the U.S. has signed but not ratified, such as CEDAW and ICESCR, in considering the contours of the right to safe and humane treatment during pregnancy as it exists under international customary law.\textsuperscript{228}

Since the right to safe and humane treatment during pregnancy, labor, and childbirth is a “general principle” of human rights that is employed by states from a sense of legal obligation, and since the U.S. has not persistently objected, and has adhered to the norm, this international customary law should be enforceable in the U.S.\textsuperscript{229}

\textsuperscript{225} U.N. Charter, Art. 110, OAS Charter, supra note 72, Signatories and Ratifications.

\textsuperscript{226} North Sea Continental Shelf Cases, 1969 I.C.J. 44, § 74 (Feb. 20).

\textsuperscript{227} District courts have relied on ICCPR and CAT when interpreting international law, along with the OAS Charter. \textit{See} Workman v. Sundquist, 135 F. Supp. 2d 871 (M.D. Tenn. 2001).

\textsuperscript{228} While the UDHR, ICCPR, CERD, and CAT may be held to be non-self-executing, since the U.S. has ratified, not just signed these treaties, its commitment to the international norms contained therein is much stronger than its commitment to the norms in the treaties it has only signed but not ratified. The U.S signed the International Convention on Economic and Cultural Rights (ICESCR) in 1972 and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1980, but has not yet ratified those treaties. \textit{See supra} notes 85, 84 and accompanying text. Thus, norms contained in the UDHR, ICCPR, CERD, and CAT that have risen to the status of international customary law should be imputed to have been agreed upon by the U.S. unless it has explicitly entered a reservation. Meanwhile, having only signed, but not ratified, the ICESCR and CEDAW only requires that the U.S. refrain from conduct that would defeat the “object and purpose” of the treaty. Vienna Convention on the Law of Treaties, art. 18 (May 23, 1969), 1155 U.N.T.S. 331. Thus, the principles entailed in ICESCR and CEDAW can be evidence of international customary law, but, in my view, do not set up as much of a presumption that the U.S. has ascribed to the custom.

\textsuperscript{229} This essay has mainly been concerned with international customary law as a source of law under the Supremacy Clause. It may also be worth exploring the use of international human rights law under §1983. Some have argued that treaties said to be “non-self-executing” could become cognizable as a source of law not by virtue of their being ratified but by means of §1983 or habeas. This approach may be worth investigating in the context of international customary law as well. \textit{See} 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, 122 (2000). (on using §1983 to enforce ’non-self-executing’ treaties). \textit{See}
V. **International law is especially relevant in cases of undocumented foreign nationals**

International law has always been “part of the law of the United States.” Courts must use international law if there is no treaty or controlling domestic law on point, must interpret federal and state statutes in such a way as to ensure that they do not violate international law, and should consider the foreign policy implications of applying, or not applying, international law. For those reasons, international law might be particularly useful in cases of undocumented immigrants, especially in front of courts that have not recognized undocumented immigrants’ rights to the full complement of U.S. domestic rights; or in cases involving areas traditionally within Congress’s power – such as immigration – where courts are eager to defer to Congress and thus refrain from applying rights-protecting norms to plaintiffs who may have irregular migration status.

While international law has been applied in U.S. courts since the country’s founding, it has also always been known to implicate potentially delicate issues regarding comity and international and foreign affairs, thus causing courts to ask whether the application of international law in a given case would have “collateral consequences” in terms of foreign policy and reciprocity. Courts have therefore often been reluctant to apply international law.

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230 The Paquete Habana, 175 U.S. 677 (1900) at 700.

231 “Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.” Sosa, 542 U.S. at 734 (2004), quoting The Paquete Habana, 175 U.S. 677, 700 (1900).


However, in cases like Juana Villegas’s, where the plaintiff is a foreign national, that analysis points sharply in favor of applying the international norm, since the “collateral consequences” of not finding a right to be free from unsafe and inhumane treatment during pregnancy would be significant, and would represent a “breathtaking” deviation from international standards. Such decisions would not comport with the United States’ human rights obligations, nor with the United States’ foreign policy interests. It may especially implicate relations with our important diplomatic neighbor, Mexico, which is the country of citizenship for the majority of women held in immigration detention.

Too often, international human rights arguments are not seen as realistically persuasive in U.S. litigation, and are therefore not brought by U.S. advocates, who prefer to use domestic civil rights principles. But courts’ reluctance to apply international law as law may have to do with “unfamiliarity with the substantive law.” If that is true, then advocates may prevail on international human rights law theories if they are able to comprehensively and persuasively explain the content and sources of those laws. The international human right to safe and humane treatment during pregnancy provides a uniquely promising avenue to do this, since, as this essay has sought to demonstrate, the international legal framework is overwhelmingly clear on the issue of pregnant women’s rights. The international human rights framework could therefore be an extremely useful tool for protecting and enforcing women’s rights in U.S. courts even

236 Geer, supra note 229, at 76.
237 Id.
239 Interviews with domestic practitioners of impact litigation. (Sara Ainsworth, Senior Legal Counsel, Legal Voice (Seattle, Oct. 13, 2010); Alexandra Soler Meese, Executive Director, ACLU Arizona (Mexico City, Sept. 24, 2010); Jennifer Allen, Executive Director, Borderaction (Mexico City, Sept. 24, 2010); Susan Farbstein and Tyler Giannini, Law Professors, Harvard International Human Rights Clinic (Seattle, May 5, 2010)).
240 Geer, supra note 229.
241 See generally Cook & Ngwena, supra note 130, CENTER FOR REPRODUCTIVE RIGHTS, BRINGING RIGHTS TO BEAR: SAFE MOTHERHOOD IS A HUMAN RIGHT (2007).
when those women are not U.S. citizens or permanent residents.\textsuperscript{242} Bringing and developing international law theories for the rights of immigrants and for rights to maternal health care could ultimately have wider consequences for U.S. jurisprudence, as it could embolden courts to apply international human rights law on a range of issues, including rights to education, to health, or to worker’s protections.

Energized by the comparative approach taken by the Supreme Court in \textit{Lawrence v. Texas},\textsuperscript{243} \textit{Atkins v. Virginia}\textsuperscript{244} and \textit{Roper}, advocates are rightly urging courts to consider international norms when \textit{interpreting} domestic law, namely the Eighth Amendment.\textsuperscript{245} While these increasingly frequent appeals to international norms as persuasive authority are promising, in some cases, direct application of international law may be useful or even essential in seeking justice for a person whose rights have been violated but for whom domestic law provides no remedy.\textsuperscript{246} The purpose of this essay is thus to provide an outline with which advocates may


\textsuperscript{243} 539 U.S. 558 (2003) (relying on comparative law when determining that criminalizing homosexual sex is unconstitutional).

\textsuperscript{244} 536 U.S. 304 (2002) (relying on comparative and international law when determining that capital punishment for mentally-impaired persons is unconstitutional).

\textsuperscript{245} See Brief for National Perinatal Association, et al. as Amici Curiae In Support of Appellee’s Petition For Rehearing, Nelson v. Correctional Medical Services, 583 F.3d 522, 2008 WL 4127217, citing international human rights law at 8 – 14; Proposed Brief for National Economic and Social Rights Initiative et al. as Amici Curiae Supporting Appellant, Gibbs v. Mississippi, No. 2010-M-819-SCT (S.C. Miss.), citing international and comparative norms as persuasive authority for the proposition that Mississippi should not prosecute teenager for murder on occasion of giving birth to a stillborn infant; Sichel, \textit{supra} note 242.

\textsuperscript{246} As this essay has argued, it may be increasingly useful to appeal to international law as directly binding on courts in cases involving people with irregular migration status, given the tendency of some courts to seek doctrines allowing them to avoid having to adjudicate questions of the fundamental rights of non-nationals, especially those without proper migration status. Additionally, since aliens are able to bring international human rights claims under the Alien Torts Statute – so long as the violations are “egregious” – the ATS may provide another route for non-citizen pregnant women, treated cruelly while pregnant or in labor, to seek redress in U.S. courts. \textit{See} Beth Stephens, \textit{Sosa v. Alvarez-Machain: “The Door Is Still Ajar” For Human Rights Litigation in U.S. Courts}, 70 BROOK. L. REV. 533, 535 (2004). \textit{Sosa} suggests that U.S. officials could be liable for ATS claims of human rights violations in that the FTCA would abrogate immunity if the events took place on U.S. soil. \textit{Id.} at 541.
make direct customary law arguments in addition to or instead of appealing to international norms as persuasive authority.

Using customary rather than treaty law is a type of human-rights law application that is not common in other countries, where treaties can be applied, for the most part, on the face of their text. The United States is unique in many ways, and one of them is its “exceptionalist” posture to international human rights treaty law and to international human rights tribunals.247 But its common-law and customary-law heritage – described by Justice Souter as creating “a distinctly American preoccupation with these hybrid international norms”248 gives our courts the ability to apply the customary, rather than the treaty-based, law of international human rights. Since customary international human rights law unambiguously contains a right to safe and humane treatment during pregnancy and childbirth, advocates should not hesitate to marshal those arguments on behalf of pregnant women – no matter their immigration status – who are subjected to ill treatment in on U.S. soil.

247 The term “American Exceptionalism” has been attributed to de Tocqueville, and has been called “American Exemptionalism” by Michael Ignatieff; referring to the U.S.’s tendency to “exempt itself from certain international law rules and agreements, even ones that it may have played a critical role in framing.” Harold Hongju Koh, On American Exceptionalism, Faculty Scholarship Series, Paper 1778 at 2 (2003).