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Philadelphia Bar Association Women in the Profession Newsletter

Welcome to the inaugural issue of The Philadelphia Bar Association's Women in the Profession Newsletter. I am proud to present the first edition, which represents a compilation of empowering articles written by women who have achieved a high level of excellence in the legal profession. My goal for this first edition, and in future editions, is to present unique and relevant perspectives, advice and opinions. Additionally, we seek to explore creative solutions and provide a forum for both current and persistent issues impacting women in the profession today. Lastly, our hope is that you find value in the pragmatic presentation of the issues here and in the future.

I welcome your feedback and comments.

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Shackled and Giving Birth in Pennsylvania Prisons

By Kathleen Creamer

In July 2010, Pennsylvania Governor Edward Rendell signed into law the Healthy Birth for Incarcerated Women Act, making the Commonwealth the 10th state to outlaw the risky and inhumane practice of shackling incarcerated women during childbirth. Many were surprised to learn that such legislation was necessary, but the stories of women who experienced childbirth in shackles told us otherwise. In Philadelphia, for example, women were routinely handcuffed by an arm or a leg to their hospital bed during childbirth until Prison Commissioner Louis Giorla learned of and put a stop to the practice in 2008. Former Philadelphia inmate Tina Torres described her experience giving birth in shackles to Philadelphia Weekly: "I look at the scars on my legs, and I'm reminded of it every time...I could never have prepared myself for that. Even animals in captivity don't have to give birth in chains." "Giving Birth in PA Prisons," Philadelphia Weekly, January 19, 2010.

Indeed, it is the voices of women who have experienced this barbaric practice that have spurred the movement both in Pennsylvania and throughout the country to stop the shackling of women during childbirth. In 2004, a woman named Shawanna Nelson filed suit in federal court after suffering injuries resulting from giving birth while incarcerated with both legs in shackles. At that time, only one state in the country, Illinois, had a law prohibiting this practice, and it was not widely known that correctional facilities across the country routinely restrained women during childbirth. Ms. Nelson asserted that her experiences constituted cruel and unusual punishment and thus violated her rights under the Eighth Amendment. The Eighth Circuit Court of Appeals, while initially ordering the dismissal of Ms. Nelson's complaint, reheard the case en banc and concluded that the Eighth Amendment bars the shackling of a woman in labor absent clear evidence that she poses a security or flight risk. Nelson v. Corr. Med. Servs., 583 F.3d 522 (8th Cir. 2009)(en banc).

The Nelson case received national attention and helped to foster dialogue about state practices regarding incarcerated women in labor. The primary justification offered

for shackling by its proponents is the need to ensure security. Correctional organizations that have opposed legislation to prohibit shackling have argued that restraints guard against the possibility of pregnant women becoming violent or attempting to escape. Some have maintained that the safety of the public and of hospital and correctional staff requires that any inmate who leaves a correctional facility for medical care must be restrained at all times.

These arguments are belied, though, by the growing understanding about incarcerated women and their crimes, as well as the experiences of the states that have successfully banned shackling. The vast majority of women are incarcerated for non-violent crimes, and often the crimes they do commit arise from drug addiction and poverty. A 2008 bulletin from the Bureau of Justice Statistics found that women comprised less than 5% of sentenced violent offenders in state facilities. The very low likelihood of violence for most female inmates combined with the inherent compromise in physical strength and ability women experience during child birth make it difficult to support the argument that these women are likely to pose a security or flight risk that cannot be mitigated by the presence of the correctional officers that accompany them to the hospital. Further, what we know about incarcerated women has been borne out by the success of shackling bans in other jurisdictions. Indeed, there has been no reported increase in security incidents in Illinois or California, which have barred the practice of shackling laboring women for many years.

Indeed, there has been no reported increase in security incidents in Illinois or California, which have barred the practice of shackling laboring women for many years.

Any arguments for the necessity of shackling, moreover, must be weighed against the cost of this practice to the mother and her child. On this point, there appears to be broad consensus in the medical community that shackling cannot be justified except in the most extreme circumstances. The American College of Obstetricians and Gynecologists (ACOG) issued a strong statement against this practice in 2007, stating that shackling during childbirth puts "the health and lives of the women and unborn children at risk." Similarly, the American Medical Association (AMA) has issued a

resolution recommending that "no restraints of any kind shall be used on an inmate who is in labor, delivering her baby or recuperating from delivery" unless there is evidence of an uncontrollable flight or security risk. The medical community's objection to shackling is rooted in not only the degradation and humiliation it causes women, but also the very real medical threat posed by this practice. Shackling inhibits the physician's ability to assess the medical condition of the mother and fetus, and can exacerbate the already intense pains of labor. A woman's inability to move during labor can also increase the stress of labor and may decrease the flow of oxygen to the fetus. Particularly where any threat posed by the female can be controlled by the guards who are on staff, the medical risks to the mother and the child simply cannot be justified.

The dawning awareness of the dangers of shackling women during childbirth has led to increased action across the country. In Pennsylvania, the Healthy Birth for Incarcerated Women Act was passed with unanimous bipartisan support in the legislature, and was unopposed by the state and county corrections community. The Federal Bureau of Prisons and ten other states in the country have banned shackling in all but the most extreme circumstances, and several other states, including Nevada, Massachusetts, and Rhode Island, currently have similar legislation pending. Another federal court in Tennessee recently recognized that the shackling of an incarcerated woman during childbirth violated the woman's right to freedom from cruel and unusual punishment, noting that the Eighth Amendment standard of contemporary decency protecting women from this practice has now been established by prior judicial decisions as well as "medical publications, convention rules, social studies and standards." Villegas v. Metropolitan Government of Davidson County, 2011 WL 1601480 (M.D.Tenn. 2011).

It is encouraging to see the growing national consensus that the shackling of incarcerated women during childbirth cannot be tolerated. But while states across the country move to protect incarcerated women during childbirth, many needs of these women and their children remain unaddressed. Women in prison are a fast-growing population, but given the generally nonviolent nature of their crimes, it is not clear that incarceration is the only way to address the offenses these women com-

mit. This is particularly true for women whose crimes arise from their drug addiction; these women are much more likely to receive the treatment they need in the community than in jail.

Further, the cost to children of incarcerating women cannot be ignored. Almost two-thirds of incarcerated women are mothers, and seventy-seven percent of those mothers were the primary caregivers for their children prior to incarceration. As a result, children whose mothers are incarcerated must suffer the devastating emotional and developmental impact of losing their primary caregiver. The separation of a mother from her newborn infant can be particularly devastating, as mother-child bonding in the first months of life is critical to forming healthy attachments. Children who do not have relatives to care for them may end up in the foster care system, where, because of harsh federal and state laws requiring termination of parental rights petitions to be filed after fifteen months, they risk losing their mothers forever.

While the movement to end the shackling of incarcerated women during childbirth continues, so much more needs to be done to ensure the well-being of these women and their children. It is my hope that the dialogue that has begun with a growing awareness of the needs of incarcerated pregnant women will continue and expand to focus on the needs of all incarcerated women and their children. ■

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