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## **Law Governing Use of Shackles on Prisoners in Hospital**

### **I. Constitutional Restraints**

“[W]hile there is no per se constitutional prohibition on the use of restraints such as shackles, chains, handcuffs and the like, courts must review with great care the circumstances surrounding their use in a particular instance to determine whether the strictures of the Eighth Amendment have been satisfied.” Ferola v. Moran, 622 F.Supp. 814, 820 (D.R.I. 1985). Thus, “as is generally true in Eighth Amendment analysis, the individual circumstances surrounding a challenged measure, including its duration and the objective sought to be served, weigh heavily.” Id. at 821 (holding that the Eighth Amendment was violated where a psychiatric prisoner in general prison population was chained spread eagled to a bed for a total of 20 hours without meaningful and frequent medical monitoring and was denied toilet access for 14 hours).

#### *A. Shackles in the Prison Context*

The Ninth Circuit has held that the use of shackles in prison showers were not unnecessary or imposed on inmates maliciously or sadistically or for the purpose of causing harm, thus upholding their use. LeMaire v. Maass, 12 F.3d 1444, 1457 (9th Cir.1993). The Court held that shackling a “dangerous inmate in a shower” does not create a sufficiently dangerous situation to warrant judicial intervention since even “slippery prison floors... do not state even an arguable claim for cruel and unusual punishment.” Id., citing Jackson v. Arizona, 885 F.2d 639, 641 (9th Cir.1989). The Court also emphasized that shackles were not used “to injure [the prisoner] or make it difficult for him to shower, but again, to protect staff. We see this practice as a security imperative.” Id. However, LeMaire relied heavily on the heightened

security concerns present in the Disciplinary Segregation Unit of the Oregon State Prison, concerns which may not be present in a hospital setting or for less dangerous, less agile prisoners. See id.

The Southern District of Ohio, however, has ruled that inmates can state a claim of an Eighth Amendment violation four-point restraints “are applied in one-man disciplinary control cells or in a single-occupancy cell of the prison infirmary” for “causing disturbances, assaulting a guard, flooding cell, attempting escape, attempting suicide and setting fires” where inmates were chained “on their backs to beds for days at a time, on occasion without timely access to toilet facilities... Certainly the practice of restraining human beings in this manner amounts to cruel and unusual punishment.” Stewart v. Rhodes, 473 F.Supp. 1185, 1193 (D.C. Ohio 1979). While the Court emphasized that prison authorities “may have good reason to temporarily restrain an inmate” following an episode of mental instability or assaultive behavior endangering others, “the use of restraints as punishment for ‘acting out’ or misbehaving is simply too extreme a response.” Id. Moreover, the Court stated that where restraints *are* necessary,

“the inmate should receive immediate medical attention and care. Any use of restraints beyond the time required to receive this attention should be under the control of medical personnel. Other than the situations noted above, the Court is unable to conceive of, nor does the evidence indicate, any other situations which would require the use of four-way restraints. Behavior which has in the past apparently been punished by the use of restraints could be controlled, for example by isolating such prisoners in cells where they would not be able to assault other persons or commit acts of destruction.”

Id.

However, the Court made sure to limit its holding to restraints in the prison context. “[C]ertain situations, as for example transporting prisoners in the prison, between prisons, or to the hospital or court may require stricter measures of restraint and control.” Id. no.9.

Similarly, the Seventh Circuit held that a pretrial detainee's claim that he was shackled to the floor of his cell, in retaliation for detainee's blaming of a guard for injury, was sufficient to state a claim for a violation of his due process rights. Murphy v. Walker, 51 F.3d 714, 718 (7th Cir.1995). "Shackling one to the floor is an extreme measure, and several courts have stated that body restraints may not be used as punishment; they may only be used on violent inmates who pose a threat to others or suicidal inmates who pose a threat to themselves." Id., citing Ferola v. Moran, 622 F.Supp. 814 (D.R.I.1985); *see also* Stewart v. Rhodes, 473 F.Supp. 1185, 1192 (S.D. Ohio 1979), *aff'd*, 785 F.2d 310 (6th Cir.1986). Pretrial detainees should not be shackled unless the government "demonstrates a legitimate penological or medical reason" for doing so. Id. *See also* Guerrero v. Cain, 574 F.Supp. 1012, 1015 (D.C.Or.1983)(shackling of pretrial detainee to bed in hospital ward of jail was reasonably related to jail security and was not excessive in relation to those concerns, emphasizing the ward was in a minimum security area of the jail and that nurses testified that inmate-patient would have been able to attempt escape notwithstanding the bullet wound in his leg). In remanding the case to allow the government an opportunity to demonstrate a legitimate justification for the use of shackles on the appellant, the court noted that "whether using bodily restraints as punishment violates the Eighth Amendment remains an open question" in the Seventh Circuit. Id. no. 6.

Thus, it would seem that the use of shackles within prisons will be upheld as long as they are used for a penological purpose unrelated to punishment. The federal circuits, however, have not universally condemned the use of shackles for punitive reasons on sentenced prisoners within a correctional facility.

#### B. *Shackles in the Hospital Context*

Federal courts have been unwilling to entertain broadsided attacks on the use of shackles on prisoners in hospital. Cases in the DC Circuit and others, however, have rendered split decisions about the use of shackles on pregnant women. In Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia, 877 F. Supp. 634 (D.D.C.1994), the Court ruled on Eighth Amendment challenges to a panoply of prison conditions and policies, including the use of shackles on women in their third trimester and immediately after delivery:

Plaintiffs have demonstrated that the manner in which the Defendants shackle pregnant women prisoners in the third trimester of pregnancy and immediately after delivery poses a risk so serious that it violates contemporary standards of decency. The Court understands that the Defendants may need to shackle a woman prisoner who has a history of assaultive behavior or escapes. In general, however, the physical limitations of a woman in the third trimester of pregnancy and the pain involved in delivery make complete shackling redundant and unacceptable in light of the risk of injury to a woman and the baby. *The Court believes that leg shackles adequately secure women prisoners without creating an inhumane condition of confinement in the third trimester. While a woman is in labor and shortly thereafter, however, the Court holds that shackling is inhumane.*"  
Id at 668 (italics added).

Even that District Court order, however, would be trimmed back in the Court of Appeals for the D.C. Circuit, which remanded the case to the District Court to determine whether portions of its order were inconsistent with the Prison Litigation Reform Act and ruled that certain provisions of the trial court's order provided broader relief than necessary to remedy the Eighth Amendment violations. Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia, 93 F.3d 910, 913 (D.C.Cir.1996). Curiously, however, the government did not challenge the District Court's order pertaining to shackles, id at 932, so the order remained unchanged both by the Circuit Court and the District Court on remand:

The Defendants shall develop and implement a protocol concerning restraints used on pregnant and postpartum women

which provides that a pregnant prisoner shall be transported in the least restrictive way possible consistent with legitimate security reasons. Specifically, the protocol shall provide:

- A. The Defendants shall use no restraints on any woman in labor, during delivery, or in recovery immediately after delivery.
- B. During the last trimester of pregnancy until labor, the Defendants shall use only leg shackles when transporting a pregnant woman prisoner unless the woman has demonstrated a history of assaultive behavior or has escaped from a correctional facility.

Id at 936, *on remand*, 968 F.Supp. 744, 747 (D.D.C.1997).

This District Court order, however, would not have provided any more protection to pregnant women than Reynolds v. Horn, 81 Civ. 107 (PNL), as a woman inmate admitted to hospital for delivery in D.C. could be shackled before labor and in recovery, where the Reynolds Order precludes such use of shackles. *See also* N.Y.C. Dep't of Corr. Directive #4202. Worse, the provisions in Women Inmates suggest that the Reynolds Order actually supplies more than is constitutionally required to the class, as it pertains to the shackling of pregnant women.

Prior to Women Inmates, D.C.'s District Courts handed down several pre-Wolfish decisions which struck broadly at the use of shackles, both inside and outside of the hospital environment. *See* Inmates, D.C. Jail v. Jackson, 416 F.Supp.119, 124 (D.D.C.1976)(as applied to post-trial detainees, holding, *inter alia*, that unpadded handcuffs and leg irons could never be used, that “medically appropriate restraints, padded or pliable to prevent injury to inmate” could be used “only upon the written authorization of a medical doctor”); Campbell v. McGruder, 416 F.Supp. 100, 106 (D.D.C.1975), *aff'd* 580 F.2d 521, 550-551 (D.C.Cir.1978)(as applied to pre-trial detainees, same, noting however that the policy must “allow for the temporary restraint of an inmate until a doctor, MTA or nurse can be summoned”). Even after the Wolfish decision which limited the challenges brought by pretrial detainees, see generally Bell v. Wolfish, 441

U.S. 520 (1979), the DC District Court ruled in Gawreys v. D.C. General Hospital, 480 F.Supp. 853, 855-56 (D.D.C.1979) and found:

Metal restraints are medically inferior, provide no greater security, and are more expensive than medical restraints. The only possible reason to use metal restraints is to punish the patient. Because Plaintiff was a pretrial detainee, punishment is not a legitimate government objective. The use of restraints thus violated his Fifth Amendment Due Process rights.

Id.

The District went on to order that the restraint procedures ordered in Campbell v. McGruder be followed “whenever restraints or deadlock are employed.” Id. at 856.

The Eighth Circuit, however, also directly addressed the use of shackles in hospital, but with drastically different results. That Circuit Court recently held that prison officials should be granted qualified immunity where a pregnant inmate was “shackled by, at least, one ankle to the bed railing until shortly before actually giving birth, and placed in leg restraints after giving birth,” since the record before the Court was silent about whether the officials “deliberately disregarded [the pregnant inmate]’s medical needs. Transporting and admitting [the inmate] to a hospital concretely demonstrates a deliberate concern for [her] well-being, and not an indifference.” Nelson v. Mobley, \_\_\_ F.3d \_\_\_, 2008 WL 2777423 \*3 (8th Cir.2008). The Court reasoned that the shackling of a prisoner is acceptable so long as it serves a penological goal, is “not constitutionally excessive in relation to that goal,” and is done without an intent to punish. Id. Also disturbing, the Court noted that the plaintiff in that case could not possibly state an Eighth Amendment claim, regardless of the purpose of the shackling, since “the record contains no medical evidence indicating the shackles caused injuries to [the inmate] or her son.” Id. no. 2. *See also* Valentine v. Richardson, 2008 WL 80129 \*3 (D.S.C.2008)(granting summary judgment for defendants where plaintiff-prisoner alleged a *de minimis* injury from being

shackled to hospital bed); Brightwell v. Smarkola, 1988 WL 124913\*1-2 (E.D.Pa.1988)(failure to claim a “serious injury” from two days of shackling results in dismissal of complaint as frivolous). Further, the fact that the shackles were removed upon request from the doctor prior to delivery did not appear to weigh at all in the Court’s analysis. There is no indication that the Court would decide the case differently if prison officials refused to unshackle the inmate upon request from the doctor. Id., citing Haslar v. Megerman, 104 F.3d 178, 180 (8th Cir.1997)(“[The shackling policy] serves the legitimate penological goal of preventing inmates...from escaping [] less secure confines, and is not excessive in that goal. A single armed guard often cannot prevent a determined, unrestrained, and sometimes aggressive inmate from escaping without resort to force. It is imminently reasonable to prevent escape attempts at the outset by restraining hospitalized inmates to their beds”); *See also* Lumley v. City of Dade City, Fla., (327 F.3d 1186, 1196 (11th Cir.2003)(pretrial detainee accused of armed robbery with a history of attempted flight and non-life threatening gunshot wound to the head may be “strapped” to hospital bed without depriving detainee of substantive due process); *Cf.* Dominguez v. Moore, 2005 WL 2404744 \*3 (5th Cir.2005)(holding that a hospitalized prisoner may state a case for excessive force by alleging that prison staff ordered his blackbox handcuffs to be affixed “extra tight” in retaliation for his crime and for allegedly exposing himself to hospital nurses, that officers “deliberately tightened the handcuffs back into existing wounds after the cuffs were loosened for feeding,” and that officers refused to uncuff him to allow use of the toilet or bath).

The Nelson Court’s reasoning relied on a prior Eighth Circuit decision which validated the shackling of a partially comatose inmate, even where his legs became extremely swollen to the point the shackles were barely visible, where he complained that the shackles were too tight and that his feet hurt, and where, by the time the inmate left the hospital, he could not walk and

suffered permanent leg damage. Haslar at 179. The Court emphasized that the shackling policy was not excessive in relation to its legitimate penological goal of preventing escape and was not intended to punish. Id at 180. In making that determination, the lynchpin seems to be that the policy enumerated ways to reduce harm to the inmate as a result of the shackling (inmates' ankles to be wrapped in gauze to prevent chafing, officers to examine the tightness of the shackles upon request from the inmate and at shift changes, etc.). Id. The presence of such meager harm reduction practices in the shackling policy seemed to shield it from the allegation that it is excessive in relation to the goal of preventing escape.

In a promising development, however, the Seventh Circuit has recognized challenges to the use of shackles in hospital using constitutional swords other than the Eighth Amendment, holding that a detainee-plaintiff, in defeating defendants' claim of qualified immunity, stated valid claims for violations of equal protection, access to the courts, and substantive due process as a result of his restrictive confinement in hospital. May v. Sheahan, 226 F.3d 876, 882-885 (7th Cir.2000). There, Cook County Hospital had a policy of shackling detainees to their beds by ankle and wrist at all times and another policy which "supposedly provides that hospital detainees will not be taken to assigned court dates and will not be otherwise accommodated (by telephone or video conference, for example)." Id at 878. Further, "other policies allegedly restrict or deny hospital detainees access to their lawyers, visitors, legal materials" and the like. Id.

First, the Court recognized that plaintiff stated a valid equal protection claim on the grounds that "hospital detainees, unlike jail detainees, are not taken to court on assigned court dates and are shackled to their beds" and "hospital detainees do not have the same access as jail detainees to lawyers, legal materials, reading materials, various prison programs, and visitors."



Id at 882. Although unequal treatment is permissible if it “bears a rational relation a legitimate penal interest...[i]t is not the case, however, that any difference in the nature of a detainee’s confinement justifies different treatment.” Id (“If at the summary judgment stage, the evidence indicates that hospital detainees and jail detainees are not similarly situated with respect to the purposes the challenged policies and *that [defendant]’s security or other concerns justify different treatment*, then [defendant] will be entitled to a favorable ruling”)(italics added).

Second, the plaintiff alleged that defendant sheriff’s policies unconstitutionally impeded his access to the courts. Id at 883. “To prove a violation of this right, plaintiff must demonstrate that state action hindered his or her efforts to pursue a non-frivolous legal claim and that consequently the plaintiff suffered some actual concrete injury... A policy both preventing detainees from going to court and limiting drastically their access to attorneys has obvious problems.” Id.

Third, the Court held that plaintiff stated a substantive due process claim for depriving him freedom from bodily restraint. Id at 884.

Certainly, shackling all hospital detainees reduces the risk of a breach of security and thus furthers a legitimate non-punitive government purpose. But, it is hard to see how shackling an AIDS patient to his or her bed around the clock, despite the continuous presence of a guard, is an appropriate policy for carrying out this purpose. Such a policy is plainly excessive in the absence of any indication that the detainee poses some sort of security risk.  
Id.

The Court concluded: “Perhaps after some discovery [defendant] can produce evidence justifying both his shackling policy in general and his shackling of [plaintiff] in particular, but [plaintiff]’s allegations are more than adequate to survive a motion to dismiss.” Id. Cf. Walker v. Elrod, 1990 WL 186467 \*5 (N.D.Ill.1990)(hospital detainee “may well” state a § 1983 claim where corrections officers denied him dinner by refusing to unshackle his wrist when he was

already shackled by his ankle; penological interest in preventing escape could be adequately served by keeping detainee restrained by the ankle). Thus, the substantive due process claim is particularly susceptible to defeat upon evidence that the inmate is a flight risk.

Other circuits have not addressed the issue of shackling in the hospital context as squarely as the Eighth and D.C. Circuits. The Northern District of Illinois held that shackling a partially paralyzed prisoner in connection with medical treatment did not violate the Eighth Amendment where the inmate was classified a flight risk and was shackled and handcuffed during transport, where he was required to hoist himself into the transport van due to the absence of a wheelchair lift, where he was shackled to the seat in the van, and where he was shackled to his hospital bed at all times. Young v. Lane, 1987 WL 10299 \*1 (N.D.Ill.1987). Consistent with Wolfish, the Court expressed great deference to prison authorities in their decisionmaking involving security:

Although it is not clear to this court why officials found it necessary to shackle a partially paralyzed inmate to his hospital bed in spite of the presence of a guard, the court must defer to the judgment of prison officials absent some indication that these security measures were so improper that they rise to the level of a constitutional violation. In order to establish a violation of the Eighth Amendment, a plaintiff must show that prison officials intentionally inflicted excessive or grossly severe punishment on him or that officials knowingly maintained conditions so harsh as to shock the general conscience. While the restraints may have caused the Plaintiff discomfort and inconvenience, their use was not so harsh or unjustified as to make their use a constitutional violation.

Id at \*2 (internal citations omitted).

Interestingly, the Ninth Circuit has permitted what amounts to a collateral attack on restrictions tangential to post-arrest, pretrial detention in hospital by allowing a civil rights action to proceed based upon the denial of access to a telephone. Maley v. County of Orange, 2007 WL 683988 \*1 (9th Cir.2007). There, the Court held that California Penal Code § 851.5 creates a

liberty interest in a phone call after arrest, “plac[ing] a burden on police officer to ensure access to the telephone.” *Id.*; *see also* Carlo v. City of Chino, 105 F.3d 493, 499 (9th Cir.1997)(“[T]he statute substantively limits an officer’s discretion [to deny a detainee access to a phone] because it makes a telephone call mandatory unless physically impossible”). Importantly, the Maley Court held that “[n]othing about detention in a hospital makes access to a telephone ‘physically impossible’ and dismissed the defendants’ asserted security concerns. *Id.* However, Maley is in no way a bar on the use of shackles on prisoners in California hospitals. *See* Adams v. Kirby, 2007 WL 963304 \*6 (E.D.Cal.2007)(“Plaintiff’s claim is frivolous. Plaintiff is a convicted prisoner. The acts of housing plaintiff in the prison ward while at the outside hospital, and restraining plaintiff in his bed are to be expected given that plaintiff was in custody and outside prison walls.”)

### C. *Psychiatric Concerns*

As a general matter, prison officials may not use shackles on a psychiatric inmate for reasons unrelated to medical or security concerns. *See, e.g.,* Ferola v. Moran, 622 F.Supp. 814, 820 (D.R.I.1985). “While a decision to restrain a prisoner as a suicide risk is presumptively valid when it is made by a professional in accordance with professional standards, it is the duty of a court to ensure that professional judgment in fact was exercised in the decision to restrain. Due process requires that the nature and duration of physical restraint bear some reasonable relation to the purpose for which it is prescribed.” Wells v. Franzen, 777 F.2d 1258, 1261-62 (7th Cir.1985)(holding that decision whether to use four-point shackles on an allegedly suicidal patient must be made by psychiatric personnel for long-term restraint and may be made by nurses and non-psychiatric physicians for short-term restraint)(internal citations omitted); *Cf.* O’Donnell v. Thomas, 826 F.2d 788, 790-91 (8th Cir.1987)(binding inmate to hospital bed with

leather restraints and metal handcuffs did not constitute cruel and unusual punishment, where they were not more severe than necessary to prevent inmate from harming himself or others). Further, “the due process standard is based on norms set by the mental health professionals... At trial, plaintiff would have the burden of proving that the bodily restraint employed here constituted a substantial departure from accepted professional practice.” *Id* at 1262. “If nonprofessional prison employees arbitrarily and without good reason (such as safety) preempt the exercise of judgment by professionals, they risk violation of the due process right of prisoners.” *Id* at 1263.

## **II. State Law and Other Sources of Protection**

State law and department of corrections’ regulations fail to address the shackling of inmate-patients. Beyond Fifth Amendment due process and Eighth Amendment deliberate indifference limits on shackling, only Illinois, California, and Vermont have enacted statutes which regulate the practice, and those states limit such regulations to pregnant women. Amnesty Int’l, Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women, [http://www.amnestyusa.org/women/custody/keyfindings\\_restraints.html](http://www.amnestyusa.org/women/custody/keyfindings_restraints.html) (hereinafter “Amnesty Report”); see also Dana L. Sichel, Giving Birth in Shackles: A Constitutional and Human Rights Violation, 16 Am. U. J. Gender Soc. Pol’y & L. 223 (2007)(including an exhaustive analysis using international human rights law). Additionally, there is a bill pending in the New York legislature which would also limit the use of shackles on pregnant women. S. 2115, A. 4105, 2007-2008 Reg. Sess. (NY 2007).

The Illinois statute mandates that when a pregnant inmate is brought to hospital,

no handcuffs, shackles, or restraints of any kind may be used during her transport to a medical facility for the purpose of delivering her baby. Under no circumstances may leg irons or shackles or waist shackles be used on any pregnant female prisoner

who is in labor. Upon the pregnant female prisoner's entry to the hospital delivery room, a county correctional officer must be posted immediately outside the delivery room. The Sheriff must provide for adequate personnel to monitor the pregnant female prisoner during her transport to and from the hospital and during her stay at the hospital.  
55 ILCS 5/3-15003.6.

In one sense, the Illinois statute provides greater protection to pregnant prisoners than the Reynolds Order because it prohibits the use of restraints during transport. Likewise, it includes a categorical exemption on shackling at any time during labor. However, the statute is silent concerning the use of shackles after delivery.

Similarly, the California statute prohibits shackling “by the wrists, ankles, or both during labor, including transport to a hospital, during delivery, and while in recovery after giving birth, except as provided in Section 5007.7.” CA Penal § 3423. Section 5007.7 to the Penal Code states:

Pregnant inmates temporarily taken to a hospital outside the prison for the purposes of childbirth shall be transported in the least restrictive way possible, consistent with the legitimate security needs of each inmate. Upon arrival at the hospital, once the inmate has been declared by the attending physician to be in active labor, the inmate shall not be shackled by the wrists, ankles, or both, *unless deemed necessary for the safety and security of the inmate, the staff, and the public.*  
CA Penal § 50007.7 (italics added).

Thus, the California law would seem to allow a balancing test whereas the Reynolds Order includes a categorical exemption for pregnant women admitted for delivery.

Vermont's statute is a mixed bag. It mandates that prison officials may not routinely shackle women in prison beyond their first trimester and conducts a balancing test to determine “the least restrictive means necessary for the inmate, medical and correctional personnel, and the public” while the inmate is in transport. 28 V.S.A. § 801a(a-b). During active labor, mechanical

restraints may not be used “[u]nless the inmate presents a substantial flight risk or other extraordinary circumstances dictate otherwise.” 28 V.S.A. § 801a(c). As a general matter, women will not be restrained in recovery, again subject to a balancing of interests. Id. It also requires that if shackles are indeed employed during labor or recovery, the commissioner of corrections must make written findings justifying the action. Id. Thus, the Vermont law provides greater protection than the Reynolds Order in only one area: its prohibition on the routine use of shackles on pregnant women *in prison*. Once in the hospital, the Reynolds Order is more protective than the Vermont statute.

The bill pending in the New York Legislature also appears to provide less protection than the Reynolds Order. That bill provides that when a woman in state or city custody is:

pregnant and about to give birth to a child, the officer in charge of such institution, a reasonable time before the anticipated birth of such child, shall cause such woman to be removed from such institution and provided with comfortable accommodations, maintenance and medical care elsewhere, under such supervision and safeguards to prevent her escape from custody as the officer may determine. No restraints of any kind shall be used during transport, except where the officer in charge of the institution has determined that such woman presents a substantial flight risk, such woman may be handcuffed. Under no circumstances shall restraints of any kind be used on any pregnant woman who is in labor. Any such personnel as may be necessary to supervise the woman to and from the hospital and during her stay at the hospital shall be provided to ensure adequate care, custody and control of the woman. The officer in charge of any institution under the control of the Department, or any penitentiary or jail shall cause such woman to be subject to return to such institution as soon after birth of her child as the state of her health will permit...”  
S. 2115, A. 4105, 2007-2008 Reg. Sess. (N.Y. 2007).

While the bill includes a categorical exemption from shackling of women actually in labor, it would permit corrections officials to engage in a balancing test which could permit shackling during transport. Further, the bill is silent about the use of shackles after delivery.

In the end, twenty-three<sup>1</sup> state departments of corrections allow the use of restraints during labor. Amnesty Report. Most state department of corrections declined to provide Amnesty with its policies regarding the frequency of shackle use and the type of shackles used.

Id. Amnesty was, however, able to report the following details:

- Alabama stated that restraints depend on the security class of the woman, but that “often two extremities are restrained.”
- Arkansas reportedly has a policy stipulating that women with “lesser disciplinary records” will at times have one arm and one leg restrained by flexible nylon “soft restraints.” Arkansas did not provide information on how women with other disciplinary records are restrained.
- Louisiana allows restraints including leg irons to be utilized.
- Nevada reported that “normally only wrist restraints” are used.
- New Hampshire stated that one foot may be shackled to the bed during labor depending on security class of the woman in labor.
- West Virginia reports that leg restraints would not be used during labor.
- Illinois, Massachusetts, Pennsylvania, Oklahoma and Wisconsin<sup>2</sup> allow restraints until the inmate is in active labor or arrives at the delivery room.

Id.

Only five departments of corrections<sup>3</sup> and the District of Columbia have written policies stipulating that no restraints are to be used on inmates during labor and birth. Id. Three states<sup>4</sup> reported that they have no official policy but that their practice is not to restrain women during

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<sup>1</sup> Alabama, Alaska, Arkansas, Arizona, Delaware, Idaho, Illinois, Indiana, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, West Virginia, and Wisconsin. Wisconsin’s Department of Corrections is considering a change in its policy following the alleged use of shackles during labor, in violation of a post order within Taycheedah Correctional Institution. Ben Jones and Wendy Harris, Binding inmates in labor was state policy breach: Rules forbade restraint of Taycheedah prisoners, Appleton Post Crescent, July 28, 2008, available at <http://www.postcrescent.com/apps/pbcs.dll/article?AID=/999999990422/APC0101/60506001>.

<sup>2</sup> See note 1.

<sup>3</sup> Connecticut, Florida, Rhode Island, Washington, and Wyoming

<sup>4</sup> Hawaii, Iowa, and Kansas

labor and birth. *Id.* Ten more states<sup>5</sup> reported that they do not use restraints during labor and delivery but it is unclear whether this is based on policy or practice. *Id.* Oregon reported that it does not use restraints during labor and delivery unless requesting by the physician. *Id.*

The lack of meaningful legislation regulating the use of shackles on non-pregnant inmates is unfortunately predictable given the real and imagined public fear of prisoner escapes. *See generally, e.g., Willis v. Settle*, 162 S.W.3d 169 (Tenn.Ct.App.2004)(affirming negligence judgment against private prison company where a security guard did not shackle a prisoner to his hospital bed as mandated by company policy, and where that prisoner escaped and took a hospital employee hostage); Justin Fenton, Md. Hospitals to limit inmate patients after violent escapes, Baltimore Sun, January 5, 2008, available at <http://www.policeone.com/Prisoner-transport/articles/1646914-Md-hospitals-to-limit-inmate-patients-after-violent-escapes> (after a series of violent escapes by inmate-patients, health care groups which manage Maryland hospitals threaten to no longer admit inmate-patients unless security procedures are strengthened).

However, there is reason to believe that the public would be shocked to learn about the routine use of shackles, during pregnancy and otherwise. *See generally Report of the Fourth Grand Jury for the April/May Term of 1986 Concerning the Care and Treatment of a Patient and the Supervision of Interns and Junior Residents at a Hospital in New York County, N.Y. Co.* Sup. Ct., November 20, 1986, 49-63. (herein “Libby Zion Grand Jury Recommendations”); *see also* Christina Rouvalis, Shackling of inmates during childbirth protested: Hospital official says women handcuffed to bed, sheriff skeptical, Pittsburgh Post-Gazette, April 19, 2006, available at <http://www.post-gazette.com/pg/06109/683199-85.stm> (“about half” of pregnant inmates

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<sup>5</sup> California, Georgia, Michigan, Missouri, Montana, Nebraska, New Mexico, New York, South Dakota and Texas



admitted to Megee Women’s Hospital are shackled during delivery; reporting that, after hearing that a pregnant inmate was shackled during delivery, the Sheriff stated, “That’s crazy. It’s hard for me to believe. To tell you the truth, I don’t believe it;” also reporting that the Sheriff “said he would never shackle a woman in labor, and asked a lieutenant to look into the allegation.”)

In particular, the Grand Jury Recommendations, in stating that New York should “enact a law to prescribe when a patient in a medical hospital may be physically restrained and to standardize the care and attention necessary for a patient in restraints,” analogized to the state’s shackling limits in the Public Health Law and Mental Hygiene Law. Libby Zion Grand Jury Recommendations at 49-50. For instance, the Public Health Law mandates:

Every patient shall be free from mental and physical abuse and from physical and chemical restraints, except those restraints authorized in writing by a physician for a specified and limited period of time or as are necessitated by an emergency in which case the restraint may only be applied by a qualified licensed nurse who shall set forth in writing the circumstances requiring the use of restraint and in the case of use of a chemical restraint a physician shall be consulted within twenty-four hours. N.Y. Pub. Health § 2803-c(3)(h).

Similarly, the Mental Hygiene Law provides “that written orders be required for restraints, and that they can only be applied after the physician personally examined the patient, except in extreme emergencies. In those situations, a physician should be available to see the patient within 30 minutes. Further, a restrained patient’s condition must be assessed at least once every 30 minutes.” Libby Zion Grand Jury Recommendations at 50, citing N.Y. Ment. Health § 33.04. Relying on the Public Health Law and Mental Health Law, the Grand Jury recommended that the proposed statute to regulate shackling include provisions that shackling should only occur after an “in-person written assessment and justification by a physician,” allowing for the emergency use of restraints until a physician can be summoned, and that shackled patients should be

regularly monitored, including “the taking of vital signs at least every 30 minutes.” Id at 52.

In making its recommendations, the Libby Zion Grand Jury noted that the use of restraints can have negative medical consequences for the patient, such as “increased body temperature if the patient fights against the restraints” and the “aspirat[ion] of fluid or secretions into the lungs, which can cause pneumonia.” Id at 50-51.

### **Conclusion**

In nearly all ways, the Reynolds Order provides a higher level of protection of prisoner-patients than the federal circuits interpreting the Fifth and Eighth Amendments and even more than most all of the state law restrictions in the few states that have enacted such limits.