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Shackling Pregnant Prisoners

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Introduction

It has been stated that 6% of all incarcerated females in U.S. facilities are pregnant, so that situations in which prisoners give birth are not uncommon. See, Bureau of Justice Statistics, Prison Inmates at Midyear 2008, March 2009, NCJ225619. Pregnant prisoners must frequently be transported to various medical facilities, including civilian medical facilities, for purposes of labor and childbirth.

A widespread and lively controversy has erupted over the use of shackles to restrain pregnant prisoners, including during their transport and in the various stages of labor. Women's rights groups, medical societies, major newspapers, state legislatures, correctional agencies, and most recently a federal appeals court, have all weighed in on the issue.

Issues confronted include striking the proper balance between safety and security concerns in correctional settings, and the medical needs of pregnant prisoners and their unborn children.

While this is still very much a disputed topic, and there is, as of yet, very limited caselaw, there seems to be a recent trend towards less use of restraints on pregnant prisoners, particularly during the final stages of labor itself.

This article will briefly examine the limited caselaw on the subject, as well as some of the legislative and administrative actions that have addressed the subject. At the end of the article, there is a brief listing of relevant resources and articles.

Shackling Pregnant Prisoners

The *New York Times*, in an October 13, 2009 editorial, stated that the "practice of keeping female prisoners in shackles while they give birth is barbaric. But it remains legal in more than 40 states, and advocates of prisoners' rights say it is all too common."

The editorial was occasioned by a divided 6-5 decision of a federal appeals court, acting en banc, denying qualified immunity to a corrections officer who placed shackles on a pregnant prisoner while she was in labor.

In that case, Nelson v. Correctional Medical Services; #07-2481, 2009 U.S. App. Lexis 21730 (8th Cir.), a female prisoner in the custody of the Arkansas Department of Correction (ADC) sued the director of the Department and an individual corrections officer. She claimed that, while giving birth to her child, she was compelled to experience the final stages of labor with both of her legs shackled to a hospital bed, and that this violated her Eighth Amendment rights against cruel and unusual punishment.

Her lawsuit argued that the director had not provided for the implementation of appropriate policies for the treatment of pregnant prisoners. She further asserted that the corrections officer, despite having seen her severe contractions, and despite the wishes expressed by medical personnel, failed to follow existing prison regulations concerning balancing security concerns against a prisoner patient's medical needs.

A reasonable corrections officer, the prisoner argued, would have known that she was in no shape to attempt to escape while her body was involved in moving her baby to birth, and that she therefore should not have been restrained by shackles at that time.

The plaintiff prisoner was a nonviolent offender, 29-years-old, and six months pregnant when she arrived at the prison. After beginning labor, she presented herself to the infirmary at 3 in the afternoon. She started to cry out with pain, and by 3:25 p.m., her contractions were only five to six minutes apart.

Nurses at the infirmary decided that she should be transferred to a civilian hospital for delivery. The corrections officer assigned to accompany her walked with her the length of a long hallway leading to the sally port where she was to be picked up for transport. Twice on the way, the prisoner had to stop because she was in too much pain to walk. The officer placed her in handcuffs as soon as they reached the sally port.

They reached the hospital by 3:50. Despite the later testimony of the corrections officer that the prisoner had not said or done anything to indicate that she posed a risk of escape or a threat to the officer, she shackled her legs to a wheelchair prior to taking her to the maternity ward.

Once in the ward, the prisoner changed into a hospital gown, and the officer shackled both of her ankles to opposite sides of a bed. The prisoner's cervix had then dilated to 7 centimeters, which meant that she was then in the final stages of labor.

The prisoner stated that having the shackles in place made it impossible for her to move her legs, stretch, or change position. The officer had to unshackle the prisoner each time a nurse wanted to measure her dilation, but she re-shackled her each time.

The prisoner was taken to a delivery room at 6:15 p.m., and her male child was born at 6:23 p.m. The shackles were removed, at a doctor's request, before entering the delivery room.

The prisoner contended that the shackling during her labor resulted in extreme mental anguish and pain, as well as a "permanent hip injury, torn stomach muscles, and an umbilical hernia requiring surgical repair." She further claimed damage to her sciatic nerve, and her orthopedist stated that the shackling injured and deformed her hips, preventing them from going "back into the place where they need to be."

Her neurosurgeon stated that her hip injury may cause her "lifelong pain," and the prisoner further asserted that her injuries have prevented her from engaging in ordinary activities such as athletic activities or playing with her children, as well as rendering her unable to bear weight or sleep on her left side, or to stand or sit for an extended period. She has also allegedly been advised not to have any additional children as a result of her injuries. (The child born during the complained of incident was her second).

The majority of the appeals court, in denying the corrections officer qualified immunity pointed to several existing Arkansas administrative regulations on the shackling of prisoners.

The regulations provide that shackles should be used "only when circumstances require the protection of inmates, staff, or other individuals from potential harm or to deter the possibility of escape," require that an officer charged with transporting a prisoner to the hospital "use good judgment in balancing security concerns with the wishes of treatment staff and the medical needs of the inmate" before shackles are used in the hospital, and direct officers to immediately contact their superiors for guidance if security concerns appear to conflict with prisoner medical needs.

The court found no indication that the officer balanced security concerns with the wishes of the medical treatment staff and the medical needs of the inmate, that the restraints were necessary to prevent escape or other potential harm, or that she consulted her superiors when it became clear that medical personnel were requesting that restraints be removed.

The appeals court majority found that a "reasonable factfinder could determine that there is substantial evidence of" the officer's own general awareness of the risk of harm from shackling a woman in labor, and that she was put on notice that her actions could interfere with required medical care and aggravate the prisoner's already considerable pain and suffering, including by repeated requests by medical personnel to remove the shackles.

The court stated that a factfinder could "draw the inference" that she recognized that the shackles interfered with the prisoner's medical care, could be an obstacle in the event of a medical emergency, and caused unnecessary suffering at a time when the prisoner "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."

The court also reasoned that the risks of labor and childbirth are "obvious," and "well-known," in light of the fact that each year approximately 530,000 women worldwide die during childbirth.

If the shackling of the prisoner during her labor arguably violated her Eighth Amendment rights, were such rights "clearly established," so as to deprive the officer of a qualified immunity defense? The appeals court majority said yes. It referred to the U.S. Supreme Court case of Hope v. Pelzer, #01-309, 536 U.S.740 (2002), in which the Court determined that prison officials had acted with deliberate indifference to a prisoner's health and safety in violation of the Eighth Amendment by handcuffing him to a prison hitching post, restraining him "despite the clear lack of an emergency situation" in a manner purportedly creating a risk of "particular discomfort and humiliation."

The appeals court majority could only point, however, to one prior case directly on the specific subject of use of restraints against pregnant prisoners in particular, as opposed to restraints in general. In Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 668-69 (D.D.C. 1994), modified in part on other grounds, 899 F. Supp. 659 (D.D.C. 1995), the court held that "while a woman is in labor . . . shackling is inhumane" and violates her constitutional rights. In that case, the court held defendant prison officials liable, stating that a prison official who shackles a woman in labor acts with "deliberate indifference . . . since the risk of injury to women prisoners is obvious." These aspects of the court's decision were not appealed, and therefore are not addressed in a subsequent appeals court decision in the case. See Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910 (D.C. Cir. 1996).

The court concluded that the prisoner's protections against being shackled during labor had been clearly recognized by the decisions of the Supreme Court and lower federal courts since before September 2003, and were also "reflected" in the terms of the Arkansas Department of Corrections regulations cited. As a result, a reasonable officer should have known that a prisoner "in the final stages of labor cannot be shackled absent clear evidence that she is a security or flight risk."

As for claims against the director of the Department, both the majority and minority on the appeals court agreed that there was no evidence that he had any personal involvement in the decision to keep the plaintiff prisoner restrained while in labor, that he had any personal knowledge of the medical care she was getting, or that the director created any policies or regulations that resulted in the shackling. To the contrary, some of the existing regulations were precisely pointed to as reflecting acknowledgement of the rights the appeals court majority found to be "clearly established," suggesting "administrative concern for the health and safety of pregnant inmates." The director, therefore, could not be found liable for deliberate indifference.

A strong dissent in part by five appeals court judges found that the officer had only done what she was charged to do—delivered the prisoner to a hospital and into the care of trained medical personnel. She also complied, they asserted, with all requests of medical personnel, including the removal of restraints when they needed that done to perform medical tasks. The dissenters also found that the officer did not have adequate notice of the purported rights that the majority claimed were clearly established.

> "The United States Supreme Court has not addressed the constitutionality of the use of restraints on a pregnant inmate during labor, nor have any circuit courts, nor have any district courts in our circuit. Other than a single district court opinion from outside of our circuit, later vacated on various other grounds, no other court has considered the constitutionality of such a use of restraints."

The dissent also noted that news articles have indicated that the use of restraints on pregnant prisoners, even after they go into labor, "is widely accepted throughout the United States."

In October of 2008, the Federal Bureau of Prisons and the U.S. Marshals Service reportedly ended routine shackling of pregnant prisoners and ended the use of belly shackles on them. Prior to that, pregnant prisoners they transported to medical facilities often faced being restrained at their legs, arms, and across their middles. The practice was denounced by the American College of Obstetricians and Gynecologists as putting pregnant women and unborn children "at risk." Movement Builds to Stop Shackling Pregnant Prisoners," The Crime Report, August 31, 2009.

A number of states have taken legislative action on the subject of the use of restraints on pregnant prisoners. The most recent, at the time of publication of this article, was Bill No. 3373-A, signed by New York's governor on August 26, 2009, which generally prohibits the use of restraints on pregnant prisoners during childbirth, making it the sixth state to do so. The statute does allow a pregnant prisoner to be cuffed by one wrist while being transported to a hospital if she is thought to be a danger to herself or others. Proponents of the legislation pointed to the fact that New York City jails have, since 1990, restricted the

use of restraints on pregnant inmates undergoing delivery, and that, in the almost twenty years that this policy has been in effect, there have not been incidents of escape or harm to correctional staff involving such unrestrained pregnant prisoners giving birth. The policy was adopted pursuant to a consent decree in Reynolds v. Sielaff, No.81 Civ.107 (S.D.N.Y. 1990).

Texas, Illinois, California, Vermont and New Mexico are the other states with similar prohibitions, generally barring the use of restraints during labor and childbirth, but permitting restraints on pregnant prisoners until that time.

The American Correctional Association (ACA) in ACI 4-4353-1 recommends that "Written policy, procedure and practice, in general, prohibit(ing) the use of restraints on female offenders during active labor and the delivery of a child. Any deviation from the prohibition requires approval by, and guidance on, methodology from the Medical Authority and is based on documented serious security risks. The Medical Authority provides guidance on the use of restraints on pregnant offenders prior to active labor and delivery." The following comment is added: "Comment: Restraints on pregnant offenders during active labor and the delivery of a child should only be used in extreme instances and should not be applied for more time than is absolutely necessary. Restraints used on pregnant offenders prior to active labor and delivery should not put the pregnant offender nor the fetus at risk."

The American Correctional Health Services Association on August 10, 2009, adopted a position statement on the use of shackles on pregnant inmates that supports banning the use of leg irons/shackles and restraints for pregnant women during labor and delivery, as well as immediately after birth:

> "While it is understood that security is vital in the off-site transportation of any incarcerated individual, ACHSA recommends that the pregnant inmate's individual health as well as incarceration history be considered in the decision to utilize restraints during transport and that restraints only be used on pregnant women in their third trimester when they are required as a precaution against escape or to prevent an inmate from injuring herself or other people or damaging property."
>
> "ACHSA recommends that women in their second and third trimester of pregnancy be handcuffed in the front for safety reasons if they must be restrained."

Correctional agencies should investigate and discuss the medical and legal issues involved in the use of restraints on pregnant prisoners, including during transport and during labor and delivery, and adopt clear policies that give guidance to correctional

officers involved in the custody of such prisoners, and which attempt to realistically balance security concerns with medical needs.

Resources and References

The following are a few useful resources and references related to the topic of this article.

Resources:

- State Standards for Pregnancy-Related Health Care and Abortion for Women in Prison, ACLU.

Related AELE Monthly Law Journal Article:

- Prisoner Procreation and Abortion Issues, 2007 (11) AELE Mo. L.J. 301.

References (chronological):

- American Correctional Health Services Association, Position Statement on the Use of Shackles on Pregnant Inmates, Aug. 10, 2009

- "Movement Builds to Stop Shackling Pregnant Prisoners," The Crime Report, August 31, 2009.

- Fact Sheet:" Shackling of Pregnant Women in Custody" The Rebecca Project for Human Rights (2009).

- Memo in Support of New York Anti-Shackling Bill, by The Correctional Association of New York, New York Civil Liberties Union (NYCLU), Prisoners' Rights Project of the Legal Aid Society in New York City, and Women on the Rise Telling Her Story (WORTH)

- Amnesty International USA, Excessive Use of Restraints on Women in U.S. Prisons: Shackling of Pregnant Prisoners.

- Memo on state shackling policies, The Rebecca Project for Human Rights (Aug. 20, 2008).

- "Laboring in Chains: shackling pregnant inmates, even during childbirth, still happens," Vol. 106 American Journal of Nursing, No. 10, pgs. 25-26 (October 2006).

- "Prisons Often Shackle Pregnant Inmates in Labor," by Adam Liptak, *New York Times*, March 2, 2006.

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Bernard J. Farber
Jail & Prisoner Law Editor
P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: bernfarber@aele.org
Tel. 1-800-763-2802

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